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CRIMINAL LAW AND PROCEDURE

UNITED STATES v. SIMPSON: DUE PROCESS AND INFORMANTS — STRANGE BEDFELLOWS

I. INTRODUCTION

In *United States v. Simpson*,[1] the Ninth Circuit held that the FBI's recruitment and use of an informant who subsequently engaged in sexual relations with the defendant was not so "shocking to the universal sense of justice" as to amount to outrageous government conduct and, therefore, did not violate the defendant's due process rights.[2]

In overturning the district court's dismissal of the indictment, the Ninth Circuit acknowledged the existence of the "outrageous conduct doctrine," but refused to invoke it on these particular facts.[3]

II. FACTS

In 1983, Helen Miller was employed by FBI agents in their investigation of the defendant, Darrel Simpson.[4] The FBI suspected Simpson was dealing heroin.[5] Miller was also the subject of a then current FBI investigation.[6] The agents were aware that she was a prostitute, heroin user and a fugitive from Canadian

1. United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987) (per Norris, J.; the other panel members were Hug, J., and Hall, J.), *cert. denied*, 108 S. Ct. 233 (1987).
2. *Id.* at 1468.
3. *Id.* at 1465.
4. *Id.* at 1464.
5. *Id.*
6. *Id.* at 1468.

drug charges.[7] Nevertheless, the agents "manipulated" Miller into becoming an informant by promising to cease their investigation of her and to pay for her services.[8]

The FBI directed Miller to meet Simpson at the Los Angeles International Airport.[9] She was instructed to pose as a stranded traveler and entice Simpson into giving her a ride.[10] The district court found that Miller subsequently developed a close personal relationship with Simpson at the instruction of the FBI.[11] In addition, the district court found that she had become involved in a sexual relationship with him which spanned a period of over five months.[12]

The district court also found that the FBI agents had instructed Miller not to get sexually involved.[13] However, at some point the FBI became aware of the sexual relationship and probably expected Miller to continue sexual relations with Simpson.[14] After learning of the relationship, the FBI deliberately closed its eyes to Miller's ongoing conduct and did not terminate her involvement in the investigation.[15]

Sometime during the relationship, Miller introduced Simpson to FBI undercover agents posing as heroin buyers.[16] Simp-

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7. *Id.* at 1464.

8. *Id.* at 1468-69. Although the district court's findings of fact did not specifically state that Miller had been "manipulated," the Ninth Circuit inferred from the findings that she had. *Id.* at 1469 n.6.

9. *Id.* at 1464.

10. *Id.* There was conflicting testimony presented as to what Miller was actually instructed to do. Brief of Amicus Curiae, American Civil Liberties Union, at 10-11, United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987)(No. 84-5301). The agents testified that they did not give those instructions. *Id.* at 11 n.2. Miller testified that she was given no specific purpose. *Id.*

11. *Simpson*, 813 F.2d at 1465.

12. *Id.* Conflicting testimony was presented regarding the actual nature of the sexual relationship between Simpson and Miller. *Id.* The Ninth Circuit found the precise details immaterial. *Id.* at 1465 n.3. However, it appears that Miller and Simpson had sex regularly and that Miller had a key to Simpson's apartment and spent the night there on numerous occasions. Brief of Amicus Curiae, American Civil Liberties Union, at 13-14 & n.14, United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987)(No. 84-5301). There was also testimony that Miller had told Simpson that she was pregnant and that he might be the father. *Id.*

13. *Simpson*, 813 F.2d at 1467-68.

14. *Id.*

15. *Id.* at 1468.

16. *Id.* at 1464. There was a conflict in testimony regarding how Simpson became

son subsequently engaged in a heroin deal with the agents.[17] After completion of the deal Simpson was arrested and indicted.[18]

The district court dismissed the indictment against Simpson after an eight-day evidentiary hearing.[19] Judge Hatter found that the FBI violated the due process clause of the Fifth Amendment by its "offensive" conduct in recruiting and using Miller as an informant.[20] The decision was based on the finding that the goverment's conduct, *taken as a whole*, was outrageous.[21]

The goverment appealed, contending that the dismissal of the indictment was predicated upon the due process clause[22] and the Ninth Circuit reviewed the dismissal de novo.[23]

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involved in the heroin deal. Brief of Amicus Curiae, American Civil Liberties Union, at 14, United States v. Simpson, 813 F.2d. 1462 (9th Cir. 1987)(No. 84-5301). Testimony was introduced indicating that Miller had told Simpson that she needed money for her child and that Simpson was reluctant to get involved. *Id.*

17. *Simpson*, 813 F.2d at 1464.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Judge Hatter found that three factors, taken as a whole, constituted outrageous conduct by the government: 1) The FBI's "manipulation" of Miller into becoming an informant; 2) their continued use of Miller despite knowledge that she was a prostitute, heroin user and fugitive; and 3) their continued employment of Miller after learning of her sexual relationship with the defendant. *Id.* The judge held that "government cannot be permitted to stoop to these depths to investigate suspected criminal offenders." *Id.* Judge Hatter also suppressed wiretap evidence on the grounds that the affidavit submitted to authorize the wiretap contained misrepresentations and that when corrected the affidavit failed to show the necessity required by 18 U.S.C. § 2518. *Id.*

22. *Id.* Dismissal of an indictment is a final decision appealable under 28 U.S.C. § 1291.

23. *Id.* at 1465 n.2. Simpson contended that the trial court's dismissal was based upon the court's inherent supervisory powers therefore making abuse of discretion the standard of review. *Id.* The Ninth Circuit rejected this contention and held that the trial court predicated the dismissal solely upon the due process clause and thus reviewed the case de novo. *Id.* As a general rule,

> [D]e novo review is limited to determining whether particular government behavior is or is not, as a matter of law, a constitutional violation. (citations omitted) Because of the trier of fact's unique advantage in seeing and hearing the presentation of evidence, we will accept as correct his or her determination of what was the particular government behavior and what prompted that behavior, unless those factual conclusions are clearly erroneous.

United States v. Bogart, 783 F.2d 1428, 1434 (9th Cir. 1986).

Since the Ninth Circuit reviewed *Simpson* de novo, it accepted the factual conclusions of the district court and limited review to a determination of whether the conduct

III. BACKGROUND

The due process defense for outrageous government conduct is based upon a violation of the constitutional rights of the accused.[24] The defense is frequently confused with that of entrapment.[25] Although the two defenses are closely related and often raised together, they are independent theories.[26] Entrapment is a judicially created defense[27] which inquires into the defendant's predisposition to commit a crime.[28] In most jurisdictions proof of predisposition will defeat a claim of entrapment.[29] In contrast, however, it is generally understood that the due process defense is available to a predisposed defendant.[30] Generally, entrapment is a question of fact for the jury whereas due process is a question of law for the judge.[31] The due process defense is based upon "fundamental fairness" and focuses primarily on the conduct of the government.[32] Thus, the due process defense ap-

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of the government was as a *matter of law* a violation of Simpson's due process rights. *Simpson*, 813 F.2d 1462, 1465 n.2. Simpson, therefore, was not afforded the "abuse of discretion" standard of review which is used when the court invokes its supervisory power. Under this standard, the Ninth Circuit would have overruled the district court only if it could be proved that Judge Hatter's decision was an abuse of discretion.

24. Stetson, *Outrageous Conduct: A Fifth Amendment Due Process Defense*, 5 CRIM. JUST. J. 55 (1981). A historical analysis of the due process defense.

25. Abramson, Lindeman, *Entrapment and Due Process in The Federal Courts*, 8 AM. J. CRIM. L. 139 (1980). An overview of the history and application of the defense in the various circuits from it's inception through 1980.

26. United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983) *aff'd*, 723 F.2d 649 (9th Cir. 1984). For a good general discussion of due process, entrapment and their differences *see generally*, Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not to Be Enticed or Induced to Crime by Government and it's Agents*, 7 W. NEW ENG. L. REV. 1, 25-28 (1984) [hereinafter *Mascolo*]. For a discussion of entrapment and due process, *see also* Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1975-76).

27. For a good discussion of the history of the outrageous conduct defense, *see* Stetson, *Outrageous Conduct: A Fifth Amendment Due Process Defense*, 5 CRIM. JUST. J. 55 (1981).

28. *Mascolo*, *supra* note 26, at 25-28.

29. *Id.* A minority of jurisdictions observe the objective test of entrapment which purports to focus only on the inducements used by the government agents and not on the predisposition of the defendant. W. LAFAVE & R. SCOTT, CRIMINAL LAW § 5.2(c)(1986). *See also* 1 American Law Institute, *Model Penal Code & Commentaries*, Art. 2 § 2.13 (1985).

30. United States v. Bogart, 783 F.2d 1428, 1432-33 (9th Cir. 1986); *See also Mascolo*, *supra* note 26, at 25-28.

31. United States v. Stenberg, 803 F.2d 422, 428 (9th Cir. 1986); *Mascolo*, *supra* note 26, at 25-28.

32. *Mascolo*, *supra* note 26, at 25-28. *See generally* P. ROBINSON, CRIMINAL LAW DEFENSES §§ 209(b) and 210(i)(6) (1984 & Supp. 1986) and 2 J. COOK, CONSTITUTIONAL

pears to be very broad. However, in the majority of the federal courts, the degree of outrageous government conduct required for a successful due process challenge is significant[33] and more than that which is required for an entrapment defense.[34]

In *United States v. Russell*,[35] the Supreme Court first considered the theory of the outrageous government conduct defense.[36] Russell contended that his constitutional rights had been violated.[37] Government agents supplied Russell with the chemical phenyl-2-propanone, a necessary element in the manufacture of methamphetamine.[38] The ingredient supplied was difficult for the defendant to obtain.[39] Russell contended that the involvement of the government in supplying an indispensible means to commit the crime was a violation of fundamental principles of due process.[40] Russell based this argument upon the Ninth Circuit decision in *Greene v. United States*,[41] where the court reversed a conviction because government agents had become so involved in the criminal activity of the defendants that prosecution was held to be "repugnant" to the American criminal justice system.[42]

RIGHTS OF THE ACCUSED § 4:3 (2nd ed. 1986).

33. *See* United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978); and Greene v. United States, 454 F.2d 783 (9th Cir. 1971).

34. *See* United States v. Jannotti, 673 F.2d 578, 607 (3rd Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982) (ABSCAM project. An elaborate scheme was set up to "create opportunities for illicit conduct by public officials." Held not a violation of due process rights).

35. 411 U.S. 423 (1973).

36. *Id.* at 427-36.

37. *Id.* at 430. Russell contended that the same factors that led the Court to apply the exclusionary rule to illegal searches and seizures (deterring undesirable police conduct) should be applied in his case. *Id.* The Court rejected this analogy however, and held that the principal reason behind the adoption of the exclusionary rule was the government's "failure to observe its own laws." *Id.*

38. *Id.* at 425-26.

39. *Id.* at 431. Although the ingredient was difficult to obtain, it was not impossible. *Id.* The defendants had possessed it on previous occasions without the assistance of the government. *Id.*

40. *Id.* at 430-31.

41. 454 F.2d 783 (9th Cir. 1971).

42. *Id.* at 787:

> We do not believe the government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators. . . . A certain amount of stealth and strategy "are necessary weapons in the arsenal of the police officer." But, although this is not an entrapment case,

In *Greene*, a government agent posed as a "gangster,"[43] sought a location for the defendants' illegal still,[44] offered to furnish equipment and an operator for the still,[45] supplied sugar at wholesale prices,[46] and was defendants' only customer for illegal liquor for at least a two and one-half year period.[47] In overturning Greene's conviction, the court held that such direct and continuous involvement in a criminal enterprise, over an extended period of time, rises to the level of creative police activity and bars the government from prosecuting its collaborators.[48]

Russell contended that an application of *Greene* to the facts of his case would bar prosecution as a matter of law.[49] The Supreme Court, however, held the actions of the government to be less than objectionable.[50] The Court noted that the government had not supplied an indispensable means, since phenyl-2-propanone was not impossible to obtain and had in fact been obtained by the defendant elsewhere, and therefore, Russell could not fit into the very rule he proposed.[51]

However, in his frequently quoted passage of dicta, Justice Rehnquist noted:

> While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would bar the government from invoking judicial process to obtain a conviction, the instant case is distinctly not of that breed. . . . The law

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> when the government permits itself to become enmeshed in criminal activity, from begining to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances the government's conduct rises to the level of "creative activity". . . .

43. *Id.* at 785
44. *Id.*
45. *Id.* at 785-86.
46. *Id.* at 786.
47. *Id.*
48. *Id.* at 787.
49. United States v. Russell, 411 U.S. 423, 427-30 (1973).
50. *Id.* at 432. The Court relied on the fact that the criminal enterprise was already in progress and that the chemical was by itself a harmless substance and legal to possess. *Id.*
51. *Id.* at 431.

> enforcement conduct here stops far short of violating that "fundamental fairness shocking to the universal sense of justice," mandated by the due process clause of the Fifth Amendment.[52]

Thus, although the Supreme Court did not apply the defense to *Russell*, the possibility that it could be successfully raised in the future was left open.[53]

The outrageous conduct doctrine was clouded considerably by *Hampton v. United States*.[54] Of the three opinions in *Hampton*, none was joined by a majority of the Justices.[55] The plurality held that a defendant's predisposition would bar an outrageous conduct defense.[56] The concurring opinion, written by Justice Powell and joined by Justice Blackmun, stated that the outrageous conduct defense would be available despite the defendant's predisposition.[57] However, the Justices noted that police over-involvement in crime would have to reach a demonstrable level of outrageousness before it could bar a conviction.[58] The dissenting opinion,[59] written by Justice Brennan and joined by Justices Stewart and Marshall, also noted that *Russell* did not foreclose barring a conviction based upon supervisory power or due process principles where the conduct of law enforcement authorities is sufficiently offensive, regardless of the defendant's predisposition.[60] Thus, a majority of the members of the Court

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52. *Id.* at 431-32 (citations omitted).

53. *Id.*

54. 425 U.S. 484 (1976). Hampton was convicted of selling heroin to government agents. *Id.* at 485. Testimony was in conflict as to whether the contraband was supplied by the government's informant or defendant and whether the defendant knew it was heroin. *Id.* at 486-88. The trial court found Hampton guilty, thus rejecting his contention that the drug was supplied by the informant who said it was not heroin. *Id.* at 488. The Supreme Court found that even if the government had supplied the drug, the defendant acted in concert with the government in the sale. *Id.* at 490. The Court held that the due process clause comes into play only when the government violates a protected right of the defendant. *Id.* Since the government and Hampton were acting in concert, a protected right was not violated. *Id.* at 490-91.

55. *Id.* at 485, 491, 495.

56. *Id.* at 490.

57. *Id.* at 491-95.

58. *Id.* at 495 n.7.

59. *Id.* at 495. The dissent espoused the objective view of entrapment focusing on the conduct of the government rather than the subjective view of the majority focusing on the predisposition of the defendant. *Id.* at 496-97.

60. *Id.* at 497.

recognized the existence of the defense and its availability to the predisposed defendant.

The Ninth Circuit has since repeatedly recognized the existence of the due process outrageous conduct defense.[61] Many courts have refused to apply the outrageous conduct defense absent police brutality, where physical or psychological coercion was employed against the defendant.[62] The Ninth Circuit has not accepted the view that this discreet group of cases of police brutality defines the limits of unconstitutionally outrageous government conduct.[63] However, in only two court of appeals cases have defendants been successful in raising a due process outrageous government conduct defense.[64]

In *United States v. Twigg*,[65] the government, through an in-

61. In each of the following cases, the Ninth Circuit recognized the existence of the due process defense but refused to invoke it on the facts at hand: *See* United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986) (remanded for specific findings of fact) (fictitious business scheme was set up by government agents to trade for cocaine); United States v. Lomas, 706 F.2d 886 (9th Cir. 1983), *aff'd*, 723 F.2d 649 (9th Cir. 1984) (government agent was acting as "broker" for a drug sale); United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982) (government set up a fictitious company interested in influencing politicians); United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980) (an essential ingredient for the manufacture of drugs was supplied by a government informant); United States v. Prairie, 572 F.2d 1316 (9th Cir. 1978) (an informant/prostitute was acting as a middleman to a drug sale); United States v. Ryan, 548 F.2d 782 (9th Cir. 1976) (government informant was involved in a scheme to bribe county commissioners).

62. *See* Irvine v. California, 347 U.S. 128, 132-33 (1954) (Fundamental fairness not transgressed absent "coercion, violence or brutality to the person"); United States v. Alexandro, 675 F.2d 34 (2nd Cir. 1982) (arguably coercive interrogation of bribery suspect not a violation of due process, not actual coercion); United States v. VanMaaneny, 547 F.2d 50 (8th Cir. 1976) (no violation of due process where police falsified reports, advised witness to leave town and failed to disclose the existence of an informant); United States v. Gengler, 510 F.2d 62 (2nd Cir. 1975) (kidnapping of defendant by government not a violation of due process); United States v. Harrison, 432 F.2d 1328 (D.C. Cir. 1970) (grabbing defendant about the throat to prevent the swallowing of drug capsules not a violation of due process); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) (search of body cavity not due process violation); Belfare v. United States, 362 F.2d 870 (9th Cir. 1966) (pumping of defendant's stomach by physician at the direction of law enforcement officers not a violation of due process rights).

63. United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir. 1986) (business scheme set up by government agents to trade for cocaine).

64. Greene v. United States, 454 F.2d 783 (9th Cir. 1971) and United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). *See also* United States v. Batres-Santolino, 521 F. Supp. 744 (N.D. Cal. 1981) (government supplied contraband and made contingent promises to defendants).

65. 588 F.2d 373 (3rd Cir. 1978).

formant, suggested to defendants that a speed laboratory be established.[66] The government supplied most of the materials and the informant supplied the expertise.[67] Neither of the two defendants possessed the knowledge or the materials to commit the crime absent government involvement.[68] All actions taken by Twigg were at the direction of the government's informant.[69] The Third Circuit held that "fundamental fairness" required reversal of Twigg's conviction due to over-involvement by the government.[70]

In *Greene v. United States*,[71] an undercover government agent supplied sugar, offered equipment and an operator for a bootlegging still, and was defendants' only customer for a two and one-half year period.[72] The Ninth Circuit reversed Greene's conviction on the grounds that the government directly and continuously involved itself in the criminal operation to an extent which was "repugnant" to the American criminal justice system.[73]

In both of these cases the government supplied the subject contraband and participated substantially in its manufacture. In neither case would the defendants have had the capacity to commit the crime absent government assistance.[74] However, the Ninth Circuit has expressly stated that *Twigg* and *Greene* do not present the only situations in which the defense is appropriate.[75]

Though a clear delineation of what is and what is not outrageous government conduct has not been made, the Ninth Circuit has recognized that law enforcement conduct becomes constitutionally unacceptable when it "shocks the conscience."[76] This in-

66. *Id.* at 375. For a discussion of *Twigg*, *see* Note, *Due Process When Government Agents Instigate and Abet Crime*, 67 GEO. L. J. 1455 (1978-79).

67. *Twigg*, 588 F.2d at 375-76.

68. *Id.* at 381.

69. *Id.* at 381-82.

70. *Id.* at 382.

71. 454 F.2d 783 (9th Cir. 1971).

72. *Id.* at 786-87.

73. *Id.* at 787.

74. United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), *aff'd*, 723 F.2d 649 (9th Cir. 1984) (government agent acted as "broker" in a drug transaction).

75. *Id.*

76. Rochin v. California, 342 U.S. 165 (1952).

cludes situations where the police conduct involves unwarranted physical or perhaps mental coercion,[77] as well as where the crime is fabricated entirely by the police.[78]

Thus, the outrageous government conduct defense is still available,[79] however, it has been narrowed considerably in its application.[80] What is acceptable police conduct cannot be defined in the abstract. Every case must be resolved on its own facts.[81]

IV. THE COURT'S ANALYSIS

In *United States v. Simpson*,[82] the Ninth Circuit recognized the due process doctrine set forth in *Russell*.[83] The court relied on its decision in *United States v. Bogart*,[84] which held that the outrageous conduct doctrine bars prosecution of defendants only in that slim category of cases in which the police have been brutal, employing physical or psychological coercion against the defendant.[85] The court held Miller's treatment of Simpson lacked brutality and coercion.[86] It also noted that Simpson did not claim that he was physically or psychologically coerced into the

77. United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986) (government agents set up business scheme to trade for cocaine).

78. *Bogart*, 783 F.2d at 1438.

79. The due process outrageous conduct doctrine has been the subject of extensive commentary. *See generally* 1 W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 5.4 (1984); 1 WHARTON'S CRIMINAL LAW § 52 (14th ed. 1978 & Supp. 1987); P. ROBINSON, CRIMINAL LAW DEFENSES §§ 209(b) and 210(i)(6) (1984 & Supp. 1986); W. LA FAVE & R. SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.2(g) (1986); 2 J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:3 (2nd ed. 1986); American Law Institute, *Model Penal Code & Commentaries*, Art. 2 § 2.13, Part I (1985); 20 CAL. JUR.3D (Rev.) § 2272 (1985 & Supp. 1987).

80. United States v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976) Informant was coerced to set up scheme to bribe county commissioners in regard to zoning. *Id.* Actions by law enforcement included: 1) Telling informant he would go to jail unless he helped; 2) telling informant not to get an attorney; 3) telling him his health would suffer if he went to jail; 4) assuring informant that his friends would be kept out of the scheme; and 5) telling informant that if he did not help *he* would be indicted. *Id.* Held not a violation of defendant's due process rights. *Id.*

81. United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986) (remanded for specific findings of fact) The court found it impossible to draw a bright line between acceptable and unacceptable police conduct. *Id.*

82. 813 F.2d 1462 (9th Cir. 1987).

83. *Id.* at 1464.

84. United States v. Bogart, 783 F.2d 1428, 1435 (9th Cir. 1986) (remanded for specific findings of fact) (business scheme set up by government agents to trade for cocaine).

85. *Simpson*, 813 F.2d at 1465.

86. *Id.* at 1466.

relationship with Miller.[87]

In *Simpson*,[88] the Ninth Circuit traced the due process challenge to case law evolving from *Rochin v. California*.[89] Police officers in *Rochin* forced open the door of the defendant's bedroom, jumped on him, attempted to forcibly remove drug capsules from his throat and had his stomach pumped to retrieve the drugs.[90] The Supreme Court held that the circumstances in *Rochin* compelled their conclusion that the methods by which the conviction was obtained were far too offensive.[91] The government conduct complained of in *Rochin*, was held to "shock the conscience."[92] The Ninth Circuit noted in *Simpson* that it had previously relied on *Rochin* in holding other physical brutality a violation of due process.[93] The court, however, pointed out that cases have previously required a showing of coercion, violence or brutality to the person before due process is transgressed.[94]

The Ninth Circuit acknowledged "that Simpson may have suffered severe emotional trauma and felt stripped of his dignity upon learning that Miller's apparent affection for him was contrived."[95] The court held, however, that a suspect cannot claim government misconduct based on the use of deception alone.[96]

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87. *Id.*

88. *Id.* at 1465.

89. 342 U.S. 165 (1952).

90. *Rochin*, 342 U.S. 165, 166.

91. *Id.* at 172. Rochin was decided prior to United States v. Russell, 411 U.S. 423 (1973) and Hampton v. United States, 425 U.S. 484 (1976) therefore the defendant in *Rochin* did not allege the due process, outrageous conduct defense as such. *Rochin* was argued primarily on a privacy theory. 342 U.S. at 173. However, the *Rochin* court also focused on the conduct of law enforcement in holding that Rochin's constitutional rights had been violated. *Id.*

92. *Rochin*, 342 U.S. at 172. The Court held that the proceedings by which Rochin's conviction was obtained "do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience* . . . . They are methods too close to the rack and screw to permit of constitutional differentiation." *Id.* (Emphasis added)

93. *Simpson*, 813 F.2d at 1466. *See* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (government agents forcibly removed narcotics from defendant's rectum).

94. *Simpson*, 813 F.2d at 1466 [quoting Irvine v. California, 347 U.S. 128, 133 (1954), and United States v. Kelly, 707 F.2d 1460, 1476 (D.C. Cir. 1983)].

95. *Simpson*, 813 F.2d at 1466.

96. *Id.* The court specifically stated that "[t]he betrayed suspect might feel foolish or insulted but cannot complain of government impropriety based on the use of deception alone." *Id.*

According to the Ninth Circuit, deceptive creation and exploitation of an intimate relationship is a permissible law enforcement tactic.[97] The court held that Miller's treatment of Simpson was short of the brutality and coercion underlying previous successful outrageous conduct challenges.[98] The Ninth Circuit noted further that Simpson did not claim that he was physically or psychologically coerced into developing a close relationship with Miller.[99] Therefore, the court held that the due process clause did not protect Simpson from voluntarily trusting someone who turns out to be unworthy of that trust.[100]

Simpson also argued that Miller's use of sex was outrageous as a matter of law.[101] The Ninth Circuit did not agree and held that an informant must be given substantial leeway in deciding how to establish a relationship with a suspect.[102] The court refused to draw any line or identify any fixed point beyond which a relationship between a suspect and informant would become shocking.[103] The Ninth Circuit felt an attempt to distinguish that point would require the court to draw upon social mores and notions of human sexuality, and that such subjective application of the outrageous conduct doctrine on the part of judges had been specifically limited by the Supreme Court.[104]

Additionally, Simpson contended that Miller's illusory cultivation of emotional intimacy, combined with her deceptive use of sex, magnified the invasion such that prosecution should have

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97. *Id.* "We have recognized that the government may use artifice and strategem to ferret out criminal activity, . . . and to that end informants must be permitted to use deceit by assuming identities that will be convincing to the criminal elements they have to deal with." *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* The court held that "[t]o win a suspect's confidence, an informant must make overtures of friendship and trust and must enjoy a great deal of freedom in deciding how best to establish a rapport with the suspect. In a particular case the informant might perceive a need to establish a physical as well as an emotional bond with the suspect." *Id.*

103. *Id.* The Ninth Circuit felt that "any attempt to distinguish between holding hands, hugging, kissing, engaging in sexual foreplay, and having sex on a regular basis in order to decide when an informant has gone to far would require [them] to draw upon [their] peculiarly personal notions of human sexuality and social mores." *Id.*

104. *Id.* at 1466-67 [citing Rochin v. California, 342 U.S. 165, 170 (1952)].

been barred.[105] The Ninth Circuit rejected this contention and refused to draw fine lines based on the level of emotional intimacy in a particular informant/suspect relationship.[106] The court based this decision on its holding in *United States v. Penn*.[107] In *Penn*, the court held that government agents may recruit family members as informants without violating due process.[108] The court in *Simpson* drew a parallel between family members and lovers and stated that exploiting an emotionally intimate relationship between lovers seems no more egregious than exploiting an emotionally intimate relationship between family members.[109] The Ninth Circuit noted further that courts are not well equipped to assess degrees of intimacy and any attempt to bar prosecutions based on those degrees would lack the universality required by the due process clause.[110] Thus, the court rejected Simpson's argument that the *totality* of Miller's actions in this case was a violation of his due process rights.[111]

The Ninth Circuit also focused on the fact that Miller's conduct could not be *directly* attributed to the government.[112] The court relied on its decision in *United States v. Prairie*.[113] In *Prairie*, the court held there was no due process violation when a paid informant had sex with a suspect without the government's knowledge.[114] The informant was not asked by the agents to establish any particular relationship with Prairie.[115] The *Prairie* court held that her official role was limited to introducing a willing seller of narcotics to a willing purchaser.[116] Thus, the Ninth Circuit held that, since the trial court found that Miller had been instructed "not to get involved," Miller's decision to establish the relationship could not be attributed to the govern-

105. *Simpson*, 813 F.2d at 1467.

106. *Id.*

107. 647 F.2d 876 (9th Cir. 1980).

108. *Id.* at 883-84. (government agent offered the defendant's 5-year old son five dollars to show where his mother had buried heroin, held not a violation of the defendant's due process rights).

109. *Simpson*, 813 F.2d at 1467.

110. *Id.*

111. *Id.*

112. *Id.*

113. 572 F.2d 1316 (9th Cir. 1978).

114. *Id.* at 1319.

115. *Id.*

116. *Id.*

ment.[117] However, the court admitted that the government's "hands were not entirely clean."[118] Once the FBI became aware of the relationship, they expected Miller to continue and closed their eyes to her ongoing conduct.[119] The court, however, found the government's passive tolerance of Miller's conduct to be less egregious than the conduct of government agents which is typically present in outrageous conduct challenges.[120] They felt to decide otherwise would undermine the FBI's ability to sustain investigations merely because an informant, on her own initiative, engaged in sexual activity with a suspect.[121]

The Ninth Circuit held that Miller's deceptive use of sex was not so outrageous as to bar Simpson's prosecution.[122] In doing so the court relied both on the fact that Miller's conduct was not *directly* attributable to the government[123] and on its refusal to draw a line at which a sexual relationship between an informant and suspect becomes shocking.[124] Although the Ninth Circuit recognized that society may find the use of sex offensive, it held that the government may use methods that are neither appealing nor moral when judged by abstract norms of decency.[125] The Ninth Circuit held that it is the function of the political branches of government to regulate police conduct that offends but which is not violative of due process.[126]

The Ninth Circuit also found that the government's "manipulation" of Miller into becoming an informant and the continued use of Miller despite the fact that she continued to engage in unrelated criminal activity was not violative of Simpson's due process rights.[127]

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117. *Simpson*, 813 F.2d at 1467.

118. *Id.* at 1467-68.

119. *Id.* at 1468.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* The court reserved judgment on the issue of whether the use of sex by an informant would "shock the conscience" in a case where it was directly attributable to the government. *Id.* at 1468 n.4.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1468-70. On the issue of "manipulation" the Ninth Circuit held that even if Miller had been manipulated by the government, there was no basis for dismissing Simpson's indictment on those grounds. *Id.* at 1469. The court reasoned that the use of

V. CRITIQUE

The Ninth Circuit's opinion in *United States v. Simpson*[128], is the latest in a long line of cases in which the courts of appeal have considered the outrageous conduct doctrine. The opinions are all similar in that they recognize the existence of the defense, but hold that the government's conduct is reasonable based on the facts at hand.[129] Thus, it has yet to be clearly de-

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informants is common and inarguably permissible and that Miller could not be rejected as an informant just because she was poor and vulnerable. *Id.* The court also held that since it is common practice to reduce or drop charges against persons who cooperate with law enforcement at the prosecution stage, it should be equally permissible to do so at the investigation stage. *Id.* Therefore, Miller could not be rejected as an informant merely because the government agreed to ease off their investigation of her. *Id.*

The court rejected the government's contention that Simpson did not have standing to complain about the government's treatment of Miller. *Id.* at 1469 n.7. It held that as a *direct target* of the F.B.I.'s investigation, Simpson had standing to complain about *any* outrageous conduct on the part of the government during the investigation. *Id.* However, the court held that since the use of informants is permissible and since it is common to reduce or drop charges against them, there was no due process violation. *Id.* at 1469.

On the issue of unrelated criminal activity, the Ninth Circuit stated that they found no authority in support of defendant's contention that the use of an informant who engages in unrelated criminal activity raises due process concerns. *Id.* at 1470.

The court, however, did affirm the trial court's finding that evidence obtained through a wiretap of Simpson's home should be suppressed due to an inadequate showing of necessity. *Id.* at 1471-73.

128. 813 F.2d 1462 (9th Cir. 1987).

129. United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986) (remanded for specific findings of fact) (business scheme set up by government agents to trade for cocaine); United States v. Stenberg, 803 F.2d 442 (9th Cir. 1986) (government agents purchased illegal protected wildlife from defendants, held not a violation of due process); United States v. Smith, 802 F.2d 1119 (9th Cir. 1986) (brother of defendant used as informant to solicit drug transaction. This activity was held to come close but not quite reach outrageous conduct); United States v. Williams, 791 F.2d 1383 (9th Cir. 1986) (no violation of due process where government officials knew of defendants' planned prison break and took no steps to stop it); United States v. Fortna, 796 F.2d 724 (5th Cir. 1986) (government's use of mother of the defendant's child as informant not violation of due process); United States v. Scott, 789 F.2d 795 (9th Cir. 1986) (no violation of due process where government agents gave beer to defendant who had an alcohol problem); United States v. Cole, 807 F.2d 262 (1st Cir. 1986) (no violation of due process where agent engaged in sexual relationship with defendant's roommate); United States v. So, 755 F.2d 1350 (9th Cir. 1985) (government informant involved in "money laundering" operation, provided the funds to the defendant. Held not a violation of defendant's due process rights); United States v. Yater, 756 F.2d 1058 (5th Cir. 1985) (held no violation of due process where paid informant arranged drug deal, agreed to give defendant money and agreed to care for the defendant's 18-month old child when defendant, who had cancer, died); United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985) (government informant used as middleman in bribery scheme, held not outrageous); United States v. Puett, 735 F.2d 1331 (11th Cir. 1984) (government agents set up scheme to purchase fraudulent securities from defendant, held not a violation of due process); United States v. O'Connor, 737

fined what conduct on the part of government *would* constitute a violation of a defendant's due process rights.

Although the opinion in *Simpson* appears to be in accord with decisions in both this circuit and others,[130] it does raise some serious questions about the application of the due process outrageous conduct doctrine. The language used in the opinion seems to state that the Ninth Circuit intends to limit the defense to cases involving brutality and coercion.[131] The court stated that "the outrageous conduct doctrine bars prosecution of defendants in that slim category of cases in which the police have been brutal, employing physical or psychological coercion against the defendant."[132] As examples of this conduct, the court cited *Rochin v. California*[133] and *Huguez v. United States*.[134] In both cases the conduct of law enforcement officers involved a physical violation of the defendant's body. The court attempted to distinguish these cases from physical violations not involving brutality.[135] The court cited *Belfare v. United States*,[136] where

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F.2d 814 (9th Cir. 1984) (government agent offered cocaine as payment of debt, held not violation of due process where cocaine was the intended form of payment); United States v. Lomas, 706 F.2d 886 (9th Cir. 1983), *aff'd*, 723 F.2d 649 (9th Cir. 1984) (government agent offered to provide cocaine and acted as a broker for sale, held not outrageous conduct); United States v. Beverly, 723 F.2d 11 (3rd Cir. 1983) (not violation of due process where paid informant introduced defendant to agent posing as someone who wanted to burn a building); United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983) (ABSCAM: bribery of congressional members, involvment in extensive "set up" not violation of due process); United States v. Ramirez, 710 F.2d 535 (9th Cir. 1983) (not a violation of due process where government agents bribed and coerced informer. Note also that defendant argued invocation of supervisory power); United States v. Bagnariol, 655 F.2d 877 (9th Cir. 1981) (government set up a fictitious company interested in influencing politicians); United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980) (no violation where an essential ingredient for drug manufacture supplied by government informant); United States v. Penn, 647 F.2d 876 (9th Cir. 1980) (five year old son of defendant offered five dollars to show where his mother had buried heroin, held no violation); United States v. Prairie, 572 F.2d 1316 (9th Cir. 1978) (no violation where informant/prostitute acting as middleman for a drug sale); United States v. Ryan, 548 F.2d 782 (9th Cir. 1976) (no violation where informant coerced to set up scheme to bribe county commissioners). For a good overall review of decisions prior to 1980 in the various circuits, *see generally*, Abramson & Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139 (1980).

130. *See* cases cited *supra* note 129.

131. *Simpson*, 813 F.2d at 1465.

132. *Id.* at 1465 (quoting *Bogart*, 783 F.2d at 1435).

133. 342 U.S. 165 (1952); *see* text accompanying note 90.

134. 406 F.2d 366 (9th Cir. 1968) *see supra* note 93.

135. *Simpson*, 813 F.2d at 1466.

136. 362 F.2d 870 (9th Cir. 1966).

insertion of a tube into the defendant's stomach to force him to vomit was held not outrageous since it was performed by a physician and imposed a limited amount of pain on the defendant.[137] The court then held that the "requisite level of outrageousness . . . is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; [due process] is not transgressed absent 'coercion, violence or brutality to the person.' "[138] Though the Ninth Circuit recognized that Simpson may have suffered emotional trauma,[139] it held that Miller's treatment of him fell short of the brutality and coercion underlying previous successful outrageous conduct challenges.[140]

It appears, therefore, that the court is limiting the defense to situations of physical violence, coercion and brutality. However, the Ninth Circuit has previously held that these situations are not the only instances where the defense is appropriate.[141] The defense was also successfully raised in both *Greene*[142] and *Twigg*.[143] These cases did not involve situations of violence, brutality or coercion. These were situations where the defendants would not have had the capacity to commit the crime absent government involvement. The *Simpson* court made no reference to these cases. Thus, although the Ninth Circuit has specifically stated that the defense is appropriate in circumstances other than physical violence, the court in *Simpson* appears to be saying that the defense *is* limited to just those situations. If this is the case, the Ninth Circuit should make clear to the district courts its intent to so limit the outrageous conduct defense.

In holding Miller's treatment of Simpson short of the brutality and coercion needed, the Ninth Circuit relied on the fact that Simpson was not *coerced* to enter into the relationship with

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137. *Id.* at 876.

138. *Simpson*, 813 F.2d at 1466 (quoting *Irvine*, 347 U.S. at 133).

139. United States v. Simpson, 813 F.2d 1462, 1466 (9th Cir. 1987).

140. *Id.*

141. United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983), *aff'd*, 723 F.2d 649 (9th Cir. 1984). *See* text accompanying note 129.

142. Greene v. United States, 454 F.2d 783 (9th Cir. 1971). *See* text accompanying note 42.

143. United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). *See* text accompanying note 65.

Miller.[144] However, the court failed to address whether Simpson was coerced into the *drug deal* by Miller rather than into the sexual relationship with her. There was evidence presented to the court that when the drug deal was being discussed, Miller indicated to Simpson that she needed money for her child.[145] It appears that the court did not recognize that the intimate relationship with Miller, a known heroin user, who had set up an emotional bond with Simpson, may have been a factor that *coerced* Simpson into engaging in the drug deal.

The Ninth Circuit noted that to win a suspect's confidence, an informant must be given substantial leeway in establishing a rapport with the suspect.[146] The court stated that "in a particular case the informant might perceive a need to establish a physical as well as emotional bond with the suspect."[147] The court then reasoned that it saw no principled way to identify a fixed point where a physical relationship becomes "shocking" without drawing on personal notions of human sexuality and social mores, and therefore, it would not do so.[148] Thus, the court did not determine what type of a physical or psychological relationship between an informant and a suspect would cross due process lines. If the standard is that law enforcement conduct becomes unacceptable when it "shocks the conscience"[149] and the Ninth Circuit refuses to decide at what point a relationship "shocks," it has provided little or no guidance to the district courts as to what type of conduct involving an informant and a suspect would cross due process lines. The opinion in *Simpson*, therefore, seems to afford the government unlimited leeway to manipulate a suspect through an informant. Further, it seems that all decisions of this nature to some extent must be a "value type" judgment. What is considered to be "outrageous" or "shocking"

144. United States v. Simpson, 813 F.2d 1462, 1466 (9th Cir. 1987).

145. There was evidence presented to the district court that Miller had told Simpson she needed money for her child when the drug deal was being discussed. Brief of Amicus Curiae, American Civil Liberties Union at 14. United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987)(No. 84-5301).

146. *Simpson*, 813 F.2d at 1466.

147. *Id.*

148. *Id.* The court stated: "[W]e see no principled way to identify a fixed point along the continuum from casual physical contact to intense physical bonding beyond which the relationship becomes 'shocking' when entertained by an informant." *Id.*

149. *See* United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986) (remanded for specific findings of fact).

will always involve the personal feelings of the individuals judging that action. Thus, an attempt to remove the human factor of personal mores and notions of human sexuality on the part of the Ninth Circuit is not totally possible.

Additionally, the Ninth Circuit relied heavily on its decision in *United States v. Penn*,[150] in holding that Miller's cultivation of emotional intimacy did not violate Simpson's due process rights.[151] The *Simpson* court drew a parallel between exploiting the relationship of lovers and exploiting that of parent and child, which was held acceptable in *Penn*.[152] The court in *Penn* held that Penn was not entitled to a constitutional remedy for law enforcement's intrusion into the family circle,[153] in part because Penn's case did not involve the special intimacy characteristic of areas of sexual relation and reproduction.[154] Thus, the court in *Simpson* failed to recognize that *Penn* itself precludes the parallel they drew. The Ninth Circuit also failed to note the difference between an existing relationship and one created for the purpose of the investigation. *Penn* may be distinguished by the fact that the relationship in *Penn* was already in existence and the relationship in *Simpson* was created in order to be betrayed.

The Ninth Circuit also relied on its decision in *United States v. Prairie*,[155] in holding that since Miller's conduct was not directly attributable to the government, there was no due process violation.[156] *Prairie*, however, is distinguishable on its facts. The government in *Prairie* never knew of the sexual relationship between defendant and the informant.[157] In *Simpson*, the government agents not only knew of Miller's sexual relation-

150. 647 F.2d 876 (9th Cir 1980). *See supra* note 108 for facts.

151. United States v. Simpson, 813 F.2d 1462, 1467 (9th Cir. 1987).

152. *Id.*

153. United States v. Penn, 647 F.2d 876, 883-84 (9th Cir. 1980). *See supra* note 108 for facts.

154. *Id.*

155. 572 F.2d 1316 (9th Cir. 1978).

156. *Simpson*, 813 F.2d at 1467.

157. *Prairie*, 572 F.2d at 1319. The opinion in *Prairie* itself does not specifically state that the government did not know of the relationship. *Id.* However, it does state that the informant was neither paid nor asked to develop a relationship with Prairie. *Id.* The *Simpson* court drew the conclusion that the informant's conduct was unknown to the government in *Prairie*. *Simpson*, 813 F.2d at 1467.

ship with the defendant, they expected it to continue.[158] The Ninth Circuit addressed this point but noted that the initial decision to establish a sexual relationship was Miller's.[159] The court considered the passive tolerance of Miller's conduct to be less egregious than the conscious direction of government agents typically present in outrageous conduct challenges.[160] However, the court failed to cite *any* cases where conscious direction of an informant was present. The Ninth Circuit should have addressed itself to the actions of the government in this case. The government created at least some sort of a relationship between Miller and Simpson and then "closed its eyes" to the sexual nature of the relationship.[161] The government's "passive tolerance"[162] of the relationship was tantamount to encouragement. Instead of denouncing the actions of the government, the opinion seems to state that so long as the government does not *specifically direct* an informant, they may engage in any activity without violating the defendant's due process rights. This becomes an open invitation for law enforcement to employ an informant, suggest to the informant that she "do whatever is necessary" and then successfully disclaim any responsibility for the informant's conduct.[163]

It is apparent from the decisions handed down by the Ninth Circuit, that the court is seeking to narrow the due process, outrageous conduct defense. However, since the defense has been specifically recognized by the Supreme Court,[164] the Ninth Circuit is either unwilling or feels unable to eliminate it. Perhaps the court should examine more closely the possibility of invoking its supervisory power as an independent means for the judiciary to deal with "outrageous" police activity. This view was expressed by the dissent in *Hampton*[165] and perhaps should be reexamined by the federal courts as an effective way to limit inap-

158. *Simpson*, 813 F.2d at 1468.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. The court reserved judgment on whether the use of sex by a police officer would be a violation of due process. *Id.* at 1468 n.4.

164. United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976).

165. *Hampton*, 425 U.S. 484, 500 n.4. *See supra* note 54 for facts.

propriate police activity in cases involving informants.[166]

Thus, although *Simpson is* in accord with decisions in both this circuit and others, it leaves the meaning and application of the due process defense undefined, and provides an open invitation for law enforcement officers to use informants in order to escape a due process challenge.

VI. CONCLUSION

The Ninth Circuit's opinion in *United States v. Simpson*[167] does nothing to aid the district courts in the application of the due process outrageous conduct defense. Thus, the future of the defense is still unclear. However, it is unlikely that the Supreme Court will hear a due process outrageous conduct challenge at any point in the near future since the court of appeals decisions all appear to be in accord with one another.

The Ninth Circuit appears to be subtly attempting to limit the due process defense to situations involving physical violence and coercion. If that is the intent of the court it should make that point sufficiently clear to the district courts to discourage the relatively large number of these cases which are heard on appeal.

Unfortunately, due to the broad language used by the court, the opinion in *Simpson* could be construed to mean that law enforcement officers will rarely be held accountable for the actions of informants. As such, the *Simpson* opinion will likely be seen cited in many government briefs in cases where the government has used an informant in a questionable manner.

*Veronica A. Franz Gundred**

166. For a discussion of the invocation of the court's supervisory powers, *see* United States v. Ramirez, 710 F.2d 535 (9th Cir. 1983); R. ALLEN AND R. KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE p. 792 (1985); and Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

167. 813 F.2d 1462 (9th Cir. 1987).

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WILCOX v. FIRST INTERSTATE BANK: CONTINUING TO EXPAND CIVIL RICO

I. INTRODUCTION

In *Wilcox v. First Interstate Bank*,[1] the Ninth Circuit held that commercial borrowers could maintain an action against their banks based on a claim of mail fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO),[2] even though the banks had defeated borrowers' claim of fraud in a related state action.[3]

The Ninth Circuit also held that commercial borrowers did not present sufficient evidence of an illegal trade agreement between banks to fix their prime interest rates in violation of section 1 of the Sherman Act.[4]

In reversing the district court's grant of summary judgment on the RICO claim, the Ninth Circuit established that a preponderance of evidence is required for proof of predicate acts in civil RICO litigation.[5] Thus, the burden of proof for fraud in RICO cases is less than the clear and convincing standard which is frequently required in proving common law fraud.[6]

The court also followed the Supreme Court rule of *Sedima, S.P.R.L. v. Imrex Co.*,[7] and held that a RICO claim need not allege an injury separate from the predicate act itself.[8] In addition, the Ninth Circuit clarified its interpretation of the terms

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1. 815 F.2d 522 (9th Cir. 1987) (per Skopil, J.; the other panel members were Nelson, J., and Boochever, J., dissenting in part).

2. 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986). *See infra* text accompanying notes 41-85.

3. *Wilcox*, 815 F.2d at 530-32.

4. *Id.* at 528, discussing the Sherman Act, 15 U.S.C. § 1 (1982). *See infra* text accompanying notes 23-40.

5. *Id.* at 528, 531.

6. *Id.* at 531 & n.7. *See infra* note 138 and accompanying text.

7. 473 U.S. 479 (1985). *See* discussion *infra* note 57.

8. *Wilcox*, 815 F.2d at 529.

"person" and "enterprise" as required for pleading a RICO claim.[9]

Civil RICO litigation has experienced explosive growth in the 1980's primarily because RICO has been used as a weapon against ordinary business fraud, rather than against organized crime as was originally intended.[10] This note will examine some of the issues raised in *Wilcox* which have caused problems for the courts interpreting civil RICO, and which have led to its broad application.

II. FACTS

Wilcox[11] involved commercial borrowers (plaintiffs) who

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9. *Id.* at 529-30.

10. For a good discussion of the early development of civil RICO, see *The Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP. BANKING & BUS. LAW 1, 55 [hereinafter *Ad Hoc Report*], which reported only nine civil RICO cases in federal district courts between 1970 (RICO's enactment) and 1980, and approximately 260 between 1980 and 1985 (publication of the *Ad Hoc Report*).

11. *Wilcox*, 815 F.2d at 522. *Wilcox* consisted of three consolidated actions. *Id.* at 523-24 & n.1. The three actions were:

(1) Wilcox v. First Interstate Bank, CA No. 85-3640, DC No. 81-1127-RE. *Id.* at 524 n.1. Plaintiffs were a husband and wife, their real estate development company, and a limited partnership of which the husband was the general partner. Wilcox Dev. Co. v. First Interstate Bank, 590 F. Supp. 445, 447 (D. Or. 1984). They executed a $2.5 million promissory note in early 1978 on a loan to build a residential development in Wilsonville, Oregon. *Id.* The agreed interest rate was two percent above the prime rate. *Id.* A mortgage on the property and a personal note were given as security. *Id.* Plaintiff defaulted on the note, whereupon defendant foreclosed and bought the property at a sheriff's sale. *Id.*;

(2) Kunkle & Stone, Inc. v. First Interstate Bank, CA No. 85-3644, DC No. 83-1766-RE. Wilcox v. First Interstate Bank, 815 F.2d 522, 524 n.1 (9th Cir. 1987). Plaintiff was a dissolved Oregon corporation. Brief for Appellant at 6, Wilcox v. First Interstate Bank, 815 F.2d 522 (9th Cir. 1987) (Nos. 85-3640, 85-3642, 85-3644). The corporation had executed an $8 million note in August 1978 to finance construction of the Shenandoah Hotel in Las Vegas, Nevada. *Id.* The agreed interest rate was three percent above the prime rate. *Id.* at 6-7. In July 1979, plaintiff executed a second note for an additional $4.5 million with the same terms. *Id.* at 7. In July 1980, plaintiff sold the hotel, paid all accrued interest, and had the buyer assume the note. *Id.*;

(3) Montgomery v. First Interstate Bank, CA No. 85-3643, DC No. 83-1909-RE. *Wilcox*, 815 F.2d at 524 n.1. Plaintiffs were husband and wife. Brief for Appellant at 6, Wilcox v. First Interstate Bank, 815 F.2d 522 (9th Cir. 1987) (Nos. 85-3640, 85-3643, 85-3644). They executed a $300,000 note in December 1979 for development of a residential subdivision in Lebanon, Oregon. *Id.* The agreed interest rate was two percent above the prime rate. *Id.* Plaintiff defaulted and defendant filed foreclosure proceedings. *Id.* Final judgment had not been entered upon submittal of plaintiffs' appellate brief to the Ninth Circuit. *Id.*;

had arranged loans with banks (defendants).[12] The plaintiffs' promissory notes provided for interest on the loans to accrue at a variable rate of one to three percent above the defendants' prime rate.[13] Before the 1970's, all commercial loans were based on the defendants' published prime rate.[14] In the 1970's, however, major borrowers were able to obtain loans at sub-prime rates,[15] while plaintiffs and other so-called "middle market" borrowers were still required to negotiate based on the prime rate.[16] Plaintiffs alleged that defendants misrepresented their prime rate as the best available rate as part of their scheme to defraud plaintiffs.[17] Plaintiffs claimed that defendants committed mail fraud[18] in violation of RICO by using the mail to assess and collect excessive interest charges based on defendants' misrepresentations.[19] Plaintiffs further claimed that the defendants conspired with one or more other banks to set the prime rate at a uniform, non-competitive level in violation of the Sherman Act.[20]

A jury found in favor of the plaintiffs on the antitrust claim, but the district court overturned the verdict by entering judgment notwithstanding the verdict (JNOV).[21] The district court also granted defendants' motion for summary judgment on the RICO claims.[22]

A fourth action, Kunkle v. First Interstate Bank, CA No. 85-3641, DC No. 82-754-RE, was dismissed upon a settlement order. *Wilcox*, 815 F.2d at 524 n.1.

12. *Wilcox*, 815 F.2d at 523-24 & n.2. The defendant/appellee in all the cases was First Interstate Bank of Oregon (FIOR). FIOR's corporate parent, First Interstate Bancorp, was an additional defendant in *Wilcox* only. *Id.*

13. *Id.* at 524.

14. *Id.* at 527-28.

15. *Id.* at 528.

16. *Id.* at 524.

17. *Id.* at 528. *See also* Wilcox Dev. Co. v. First Interstate Bank, 590 F. Supp. 445, 447-48 (D. Or. 1984).

18. Mail fraud is a federal crime which is codified at 18 U.S.C. § 1343 (1982). *See* discussion *infra* note 51.

19. Wilcox v. First Interstate Bank, 815 F.2d 522, 524 (9th Cir. 1987).

20. *Id.* at 524. Plaintiffs claimed that defendants conspired with one or more of six other banks: First Interstate Bank of California, First Interstate Bank of Arizona, First Interstate Bank of Nevada, First Interstate Bank of Washington, Bank of America, and/or United States National Bank of Oregon. Brief for Appellant at 7, Wilcox v. First Interstate Bank, 815 F.2d 522 (9th Cir. 1987) (Nos. 85-3640, 85-3643, 85-3644).

21. Wilcox v. First Interstate Bank, 815 F.2d 522, 524 (9th Cir. 1987). *See also* Wilcox Dev. Co. v. First Interstate Bank, 605 F. Supp. 592 (D. Or. 1985) (grant of judgment notwithstanding the verdict (JNOV), or alternatively, new trial on antitrust claims).

22. Wilcox v. First Interstate Bank, 815 F.2d 522, 523 (9th Cir. 1987). *See also* Wil-

III. BACKGROUND

A. ANTITRUST

The Sherman Act[23] was passed in 1890 to safeguard the role of competition in the economy.[24] Section 1 of the Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ."[25] In the landmark case of *Standard Oil Co. v. United States*,[26] the Supreme Court stated that all trade agreements restrain trade to some degree, and that only agreements which unreasonably restrain trade are illegal.[27] Therefore, to succeed in a section 1 claim a plaintiff must establish: (1) an agreement; (2) which is intended to unreasonably restrain trade; and (3) which actually harms competition.[28]

The courts have employed two methods for determining whether an act or agreement is unreasonable, the "per se rule"

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cox Dev. Co. v. First Interstate Bank, 590 F. Supp. 445 (D. Or. 1984) (summary judgment on RICO claim).

23. The Sherman Act, 15 U.S.C. §§ 1-? (1982).

24. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-77 (1984). *See also* United States v. Topco Assocs., 405 U.S. 596, 610 (1972): "Antitrust laws in general and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 5-11 (1977); 7 P. AREEDA, ANTITRUST LAW §§ 1500-11 (1986); 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (E. Kintner ed. 1978).

25. 15 U.S.C. § 1 (1982) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

26. 221 U.S. 1 (1911). Standard Oil had acquired the stock of many other oil companies in order to gain control of petroleum commerce. *Id.* at 75-77. This action was found to be unreasonable because it was a concerted effort to gain a monopoly. *Id. Accord* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-90 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50 (1977). *But cf.* Board of Trade v. United States, 246 U.S. 231, 238 (1918) (it was not unreasonable for the Board of Trade to limit the time when trading could take place).

27. *Standard Oil*, 221 U.S. at 60.

28. Wilcox Dev. Co. v. First Interstate Bank, 605 F. Supp. 592 (D. Or. 1985).

and the "rule of reason."[29] Under the per se rule, some agreements are so blatantly anticompetitive as to be deemed illegal per se.[30] The leading example is an agreement to fix prices.[31] Other agreements, such as mergers and joint ventures, have some potential for increasing competition and must be more closely examined for their impact on the market.[32] Using the rule of reason, the court will examine evidence of the agreement's actual effect on competition, then weigh the agreement's tendency to enhance competition against its tendency to injure competition.[33]

Plaintiffs need not prove the agreement by direct evidence.[34] Circumstantial evidence may suffice if it supports a reasonable inference of a conscious agreement to attain an illegal objective.[35] But, the evidence must also tend to exclude the pos-

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29. *See generally* L. SULLIVAN, *supra* note 24, at §§ 63-67; 7 P. AREEDA, *supra* note 24, at §§ 1500-11.

30. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-23 (1940), where the Court held that a concerted effort by major oil producers to control the oil market was illegal per se. In *Socony*, the major oil producers engaged in spot buying of gasoline at distressed prices from independent producers. *Id.* at 155. The independents had insufficient capacity to hold inventories, thus the major producers, by controlling inventories, were able to hold market prices at levels the majors found desirable. *Id.* The Court found this practice offensive, stating that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal per se." *Id.* at 221-23. Earlier cases had developed the concept of inherently non-competitive activity without using the "per se" label. *See, e.g.*, United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). *See generally* L. SULLIVAN, *supra* note 24, at §§ 67, 70-75: "[T]he per se rule against price fixing applies to any agreement among competitors which, in purpose or effect, directly or indirectly inhibits price competition." *Id.* at 198.

31. *See* cases cited *supra* note 30.

32. *Copperweld*, 467 U.S. at 768.

33. *Id. See also* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (the classic rule of reason case), discussed *supra* at note 26. *See generally* L. SULLIVAN, *supra* note 24, at §§ 68-69, 72: "[C]ompetition [is] the rule of trade which cannot be put aside, however reasonable doing so may seem in particular instances." *Id.* at § 65, at 172.

34. Wilcox v. First Interstate Bank, 815 F.2d 522, 525 (1987). *See also* Wilcox Dev. Co. v. First Interstate Bank, 605 F. Supp. 592, 594 (D. Or. 1985), *quoting* American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946) (An agreement may be inferred from the "course of dealing or other circumstances as well as the exchange of words."); Matsushita Elec. Indus. Co. v. Zenith, 475 U.S. 574 (1986); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968); Weit v. Continental Illinois Nat'l Bank & Trust Co., 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

35. *Wilcox*, 815 F.2d at 525, *quoting* T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 632 (9th Cir. 1987). *See also* cases cited *supra* note 34.

sibility of independent action.[36]

The Ninth Circuit has employed a series of "plus factors" to determine whether an agreement may be inferred from circumstantial evidence.[37] The test was announced in *C-O-Two Fire Equipment Co. v. United States*.[38] Under this test, the totality of the factors, such as parallel conduct (price and product uniformity), exchanges of price information, and meetings which could provide an opportunity to form industry-wide policies, are examined to see if they reasonably support an inference of conspiracy.[39] The inference of agreement must be "reasonable in light of the competing inference of independent action . . . ."[40]

B. RICO

RICO was passed as part of the Organized Crime Control Act of 1970.[41] Congress intended that RICO be used to fight organized crime and its influence on legitimate businesses by providing new remedies, including potential treble damages and attorney's fees for successful civil claims.[42] However, RICO has

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36. *Wilcox*, 815 F.2d at 525. *See also Matsushita*, 475 U. S. at 574; *Monsanto*, 465 U.S. at 764; Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 680-81 (9th Cir. 1985); *Sweeney*, 637 F.2d at 111.

37. *Wilcox*, 815 F.2d at 525-26.

38. 197 F.2d 489 (9th Cir. 1952), *cert. denied*, 344 U.S. 892 (1952). Defendants were convicted of conspiring to fix prices and terms and conditions for sale of fire extinguishers. *Id.* at 490. The government introduced evidence that defendants had: (1) regularly maintained virtually identical price lists; (2) instructed dealers to adhere to price lists; (3) policed dealers to assure adherence; (4) submitted identical bids which conformed to price lists. *Id.* at 491-92.

39. *Id.* at 493:

> [T]he trial court, sitting as the trier of the facts, regarded this evidence as being one in a series of "plus factors" which, when standing alone and examined separately, could not be said to point directly to the conclusion that the charges of the indictment were true beyond a reasonable doubt, but which, when viewed as a whole, in their proper setting, spelled out that irresistable conclusion.

40. *Wilcox*, 815 F.2d at 526, *quoting* Matsushita Elec. Indus. Co. v. Zenith, 475 U.S. 574, 577 (1986). *See generally* L. SULLIVAN, *supra* note 24, §§ 63-67.

41. The Organized Crime Control Act of 1970, tit. IX, Pub. L. No. 91-452 §§ 901-02, 84 Stat. 922, 941-48 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986)). For a good discussion of legislative history, see Blakey & Gettings, *Racketeer Influenced Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMPLE L. Q. 1009 (1980) and *Ad Hoc Report*, *supra* note 10.

42. United States v. Turkette, 452 U.S. 576 (1981): "[L]egislative history forcefully supports the view that the major purpose of [RICO] is to address the infiltration of

been used primarily against ordinary commercial fraud.[43] This has led to considerable controversy over the scope of the RICO statute.[44]

RICO makes it unlawful for any person to: (1) invest the profits of a racketeering activity in an enterprise (section 1962(a));[45] (2) acquire or maintain any interest in an enterprise through a pattern of racketeering activity (section 1962(b));[46] or (3) conduct the business of an enterprise through a pattern of

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legitimate business by organized crime." *Id.* at 591. Congress expressed their intent when they enacted The Organized Crime Control Act of 1970, Pub. L. No. 91-452 §§ 901-02, 84 Stat. 922-23: "It is the purpose of this act to seek the eradication of organized crime . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *See also Ad Hoc Report, supra* note 10, at 55; Blakey & Gettings, *supra* note 41, at 1014-22; Kennedy, *Civil RICO in the Antitrust Context*, 55 ANTITRUST L. J. 463 (1987).

43. *Ad Hoc Report, supra* note 10, at 2.

44. *See generally Ad Hoc Report, supra* note 10; Kennedy, *supra* note 42, at 465; Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 840-48 (1987); Note, *Clarifying Civil RICO: Sedima v. Imrex Co., Inc.*, 7 U. BRIDGEPORT L. REV. 189 (1986); Boucher, *Closing the RICO Floodgates in the Aftermath of Sedima*, 31 N.Y.L. SCH. L. REV. 133 (1986); Black, *Racketeering Influenced and Corrupt Organizations (RICO) - Securities and Commercial Fraud as Racketeering Fraud after Sedima: What is a "Pattern of Racketeering Activity"?*, 6 PACE L. REV. 365 (1985-86); Smith & Metzloff, *RICO and the Professionals*, 37 MERCER L. REV. 627 (1985-86); Moran, *The Meaning of Pattern in RICO*, 62 CHI.-KENT L. REV. 139 (1985); Abrams, *The Place of Procedural Control in Determining who may sue or be sued: Lessons in Statutory Interpretation from Civil RICO and Sedima*, 38 VAND. L. REV. 1477 (1985); Wood, *Civil RICO - Limitations in Limbo*, 21 WILLAMETTE L. REV. 683 (1985); Note, *Civil RICO and the Prior Criminal Conviction Requirement: Has the Second Circuit Drawn the Net Too Tightly?*, 60 WASH. L. REV. 461 (1984-85); Hirschberg, Arnold & Towers, *The Racketeer Influenced Corrupt Organizations Act: A Peek into Pandora's Box*, 57 WIS. BAR BULL. 11 (1984).

45. 18 U.S.C. § 1962(a) (1982) provides in part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

46. 18 U.S.C. § 1962(b) (1982) 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.

racketeering activity (section 1962(c)).[47] A conspiracy to violate any of these sections is also unlawful (section 1962(d)).[48]

The statute focuses on "racketeering activity", which is defined as any of a long list of state and federal crimes, including mail and wire fraud.[49] These prohibited acts are commonly

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47. 18 U.S.C. § 1962(c) (1982) 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 activity or collection of an unlawful debt.

Thus, the elements of a RICO claim are: (1) a person; (2) a pattern of racketeering activity; (3) an enterprise in interstate commerce; (4) a relationship between the person and the enterprise which violates section 1962; and (5) an injury to business or property.

48. 18 U.S.C. § 1962(d) (1982) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

49. 18 U.S.C. § 1961 (1982 & Supp. IV 1986) defines the terms of the statute, providing in section 1961(1):

> "[R]acketeering activity" means (A) 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; (B) any act which is indictable under any of the following provisions of title 18, United States Code: sections 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 1084 (relating to 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 obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to 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), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections

called "predicate acts" because they form the basis for a RICO claim. Mail and wire fraud are the predicate acts which are most frequently the basis for a RICO claim.[50] They are two of the broadest federal criminal statutes, requiring only (1) a scheme to defraud, and (2) foreseeable use of the mail or wire in furtherance of the scheme.[51] Prior to RICO, no federal statute provided a private damage remedy for victims of mail or wire fraud.[52]

The statute defines a "pattern" as at least two predicate acts committed within ten years of each other.[53] An "enterprise"

> 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (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.

50. *Ad Hoc Report*, *supra* note 10, at 18, 57, 243; U.S. DEP'T OF JUSTICE, A MANUAL FOR FEDERAL PROSECUTORS, RICO, at 12 (1985).

51. 18 U.S.C. § 1341 (1982) prohibits mail fraud, providing in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository . . . or takes or receives therefrom . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (1982) prohibits wire fraud, providing in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television . . . 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.

See also Pereira v. United States, 347 U.S. 1, 8 (1954): "It is not necessary that the scheme contemplate the use of the mails as an essential element."

52. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 501 (1985) (Marshall, J., dissenting). *See also* Ryan v. Ohio Edison Co., 611 F.2d 1170, 1177-79 (6th Cir. 1979) (mail fraud); Bell v. Health-Mor Inc., 549 F.2d 342 (5th Cir. 1977); Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir. 1974) (wire fraud), *cert. denied*, 423 U.S. 837 (1975); *See generally Ad Hoc Report*, *supra* note 10, at 239.

53. 18 U.S.C. § 1961(5) (1982) provides that a pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective

is broadly defined to include almost any person or group.[54] A "person" includes any individual capable of holding a legal or beneficial interest in property.[55]

Congress expressly directed that "RICO should be liberally construed to effectuate its remedial purposes."[56] In the landmark case of *Sedima, S.P.R.L. v. Imrex Co.*,[57] the Supreme Court stated that "RICO is to be read broadly."[58] However, the Court also acknowledged that RICO is evolving into something quite different from what Congress envisioned.[59]

The Ninth Circuit first considered civil RICO in *Rae v. Union Bank*,[60] where a RICO claim under section 1964(c) was dismissed by the district court due to a failure of the pleadings to adequately state the claim.[61] Specifically, the plaintiff contended that the person who committed the predicate act was also the affected enterprise.[62] The Ninth Circuit, however, imposed the limitation that the enterprise could not be the RICO defendant.[63] This limitation has been consistently imposed by most courts for section 1962(c) claims.[64]

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date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

54. 18 U.S.C. § 1961(4) (1982) provides that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

55. 18 U.S.C. § 1961(3) (1982) provides that a person "includes any individual or entity capable of holding a legal or beneficial interest in property."

56. The Organized Crime Control Act of 1970, § 904(a), Pub. L. No. 91-452, 84 Stat. 941, 947 (1970) (liberal construction clause).

57. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). A Belgian company, Sedima, contracted with a domestic firm, Imrex, to ship electronic parts to Europe with both firms sharing in the profits. *Id.* at 483-84. Sedima claimed that Imrex was committing mail fraud by sending inflated bills. *Id.* at 484. Thus, mail fraud was the predicate act for a RICO claim under 18 U.S.C. § 1962(c) (1982). *Id.* While the case was remanded to allow amendment of pleadings, the Court rejected the need to allege a racketeering enterprise injury, or to show a prior criminal conviction of the predicate act. *Id.* at 500.

58. *Id.* at 497.

59. *Id.* at 500.

60. 725 F.2d 478 (9th Cir. 1984). A series of loans, extensions, and modifications finally resulted in default by the plaintiff and foreclosure by the defendant on plaintiff's real property. *Id.* at 497. The court found that plaintiff's complaint: (1) failed to allege that defendants were associated with an enterprise; (2) failed to identify the enterprise; (3) failed to allege a predicate act. *Id.* at 480-81.

61. *Id.* at 479. *See supra* note 60.

62. *Id.* at 481.

63. *Id.*

64. *See* Bennett v. United States Trust Co., 770 F.2d 308, 315 (2d Cir. 1985), *cert.*

Claims under sections 1962(a) and (b) were considered by the Ninth Circuit in *Schreiber Distributing Co. v. Serv-Well Furniture Co.*[65] The court held that under these sections the person and the enterprise could be the same.[66] The court relied on the reasoning of the Seventh Circuit in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*[67] In *Haroco*, the court looked to the language of the statute[68] and the underlying policies of RICO in determining that a person and an enterprise must be separate entities in a section 1962(c) claim, even though a corporation could fit both statutory definitions.[69] The Seventh Circuit reasoned that section 1962(c) requires the liable person be employed by or associated with an enterprise, which implies that the person must be distinct from the enterprise.[70] Sections 1962(a) and (b), however, provide no such close relation between the person and the enterprise.[71] Thus, under section 1962(a) the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations.[72] Similarly, under section 1962(b) the liable person may be a corporation that engages in racketeering activity to obtain or further its controlling

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denied, 474 U.S. 1058 (1986); B. F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633-34 (3d Cir. 1984); Haroco Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); Bennet v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in part, rev'd in part in reh'g en banc*, 710 F.2d 1361 (1983), *cert. denied*, 464 U.S. 1008 (1983). *Contra* United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1183 (1983) (A corporation may simultaneously be both a defendant and the enterprise under section 1962(c)).

65. 806 F.2d 1393 (9th Cir. 1986). Plaintiff was the exclusive distributor for defendant's appliances in Southern California. *Id.* at 1395. He claimed that defendant diverted appliances intended for sale in other areas into plaintiff's exclusive area. *Id.* The court held that a claim under section 1962(a) or (b) allows the enterprise to be named as a defendant. *Id.* at 1398.

66. *Id.*

67. 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). This case was decided on the same day as Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

68. *See supra* note 47.

69. *Haroco*, 747 F.2d at 400.

70. *Id.* at 400-02.

71. Compare the language of 18 U.S.C. § 1962(a) (1982), *supra* note 45, with that of 18 U.S.C. § 1962(b) (1982), *supra* note 46, and that of 18 U.S.C. § 1962(c) (1982), *supra* note 47. Section 1962(c) prohibits activity by a RICO person who is somehow affiliated with the RICO enterprise, whereas sections 1962 (a) and (b) prohibit certain types of activity by a RICO person, regardless of their relation to the RICO enterprise. "Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be different." *Haroco*, 747 F.2d at 402.

72. *Id.*

interest in its own enterprise.[73] In both instances, however, it is important to note that the corporation is the beneficiary of the pattern of racketeering activity.[74] The court found this to be a reasonable result because RICO is intended to reach those who benefit from racketeering, not those who are victimized by it.[75]

Other courts have sought to impose additional limitations on RICO claims.[76] The Second Circuit had required that plaintiffs show that there was an injury other than that caused by the predicate act, a so-called "racketeering enterprise injury."[77] This requirement was analogized to the antitrust requirement that a competitive injury be shown.[78] This notion was clearly rejected in *Sedima*, where the Court held that the predicate act by itself constituted the compensable injury.[79]

Another limitation rejected in *Sedima* was a requirement

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73. Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986), *quoting* Pennsylvania v. Derry Construction Co., 617 F. Supp. 940, 943 (W.D. Pa. 1985): "Logic dictates that a corporation, receiving income from a pattern of racketeering activity in which it has participated as a principal, can invest that income in its own operations."

74. *Haroco*, 747 F.2d at 402: "This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering."

75. *Id.*

76. The First Circuit was overruled when it tried to limit the application of RICO to legitimate businesses. *See* United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981) (Neither the language nor structure of RICO limits its application to legitimate enterprises). *Cf.* United States v. Elliot, 571 F.2d 880, 898 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978) (No distinction between a corporation that elects its officers and holds annual meetings, and a similar structure that controls secret criminal networks). For a good discussion of how the federal courts of appeal have tried to limit RICO, see *Ad Hoc Report*, *supra* note 9. *See generally* Tarlow, *RICO Revisted*, 17 GA. L. REV. 291 (1983).

77. Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (Defendant attempted to conceal assets subject to distribution in a bankruptcy action). *Contra* Terre du Lac Ass'n., Inc. v. Terre du Lac, Inc., 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

78. The requirement for a competitive injury is patterned after section 4 of the Clayton Act, codified as amended at 15 U.S.C. § 15(a) (1982). *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). The Supreme Court has held that antitrust claims could only be brought by plaintiffs who were *directly* injured in their business or property by an anticompetitive agreement. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). An antitrust injury is "more than [an] injury causally linked to an illegal presence in the market." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

79. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985).

that the person must have been convicted of a predicate act in order be liable under civil RICO.[80] The Court pointed to the language of the statute requiring that the predicate acts be indictable, chargeable, or punishable under the laws enumerated in section 1961.[81] The Court stated that this language clearly shows Congress' intent that a predicate act be one which is subject to criminal sanction, not one which has already been prosecuted.[82]

However, the Court in *Sedima* did point to a limitation regarding the definition of a pattern.[83] The Court suggests that two isolated predicate acts do not form a "pattern" thus will not

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80. *Id.* at 493.

81. *Id.* at 481-82.

82. *Id.* at 481-82, 488-89. In support of this position, the Court notes that Congress expressly required a conviction prior to seizure of forfeited property in an adjacent section of RICO. 18 U.S.C. § 1963(f) (Supp. IV 1986).

83. *Sedima*, 473 U.S. at 496 n.14, where Justice White wrote:

> [T]he definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "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." 18 U.S.C. § 3375(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789 (1975).

support a RICO claim.[84] There must be a relationship between the acts which provides a threat of continued wrongdoing.[85]

IV. THE COURT'S ANALYSIS

A. Antitrust Claim

In *Wilcox*,[86] the Ninth Circuit upheld the district court's grant of defendants' motion for JNOV on the antitrust claim.[87] Using the rule of reason[88] and the "plus factors" test,[89] the court evaluated each of four factors offered by the plaintiffs and the defendants' explanations to determine whether an inference of conspiracy was reasonable in light of the competing inferences of independent action.[90]

First, the plaintiffs relied on parallel movement of defendants' prime rate with other banks.[91] The defendants did not deny parallel movement.[92] The Ninth Circuit has consistently held that parallel conduct without more is insufficient to establish an inference of conspiracy.[93] Further, the Supreme Court has held that it is not unlawful for a firm to independently fol-

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84. *Id.*

85. *Id.*

86. 815 F.2d 522 (9th Cir. 1987).

87. *Id.* at 524, 527. In reviewing the grant of JNOV, the Ninth Circuit applied the same standard as the district court. *Id.* at 524, *citing* Peterson v. Kennedy, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 106 U.S. 1642 (1986). The decision was affirmed because the evidence could support only one reasonable conclusion. *Wilcox*, 815 F.2d at 525, *citing* William Inglis & Sons v. ITT Continental Baking Co., 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). However, "the court is not free to reach a result it finds more reasonable . . . if the jury verdict is supported by substantial evidence." *Wilcox*, 815 F.2d at 525, *citing* Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1013-14 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986).

88. *See supra* notes 29-33 and accompanying text.

89. *See supra* notes 37-39 and accompanying text.

90. *Wilcox*, 815 F.2d at 525-28.

91. *Id.* at 526.

92. *Id.*

93. *Id. See also* Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co., 794 F.2d 1359 (9th Cir. 1986). In *Wilson*, a television station (KICU in San Jose, California) alleged that networks and other independent stations conspired to deny KICU rights to broadcast programs under certain exclusive licensing agreements. *Id.* at 1365. KICU suggested that since all defendants exercised exclusivity against KICU, such parallel action inferred a conspiracy. *Id.* However, the court acknowledged that similar businesses are generally conducted alike. *Id.* It also required that there be more circumstances which suggest a joint agreement. *Id. See also* Granddad Bread, Inc. v. Continental Baking Co., 612 F.2d 1105, 1112 (9th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

low the prices of an industry leader.[94] In *Wilcox*, the Ninth Circuit pointed to defendants' "count-to-four" method of adjusting its prime rate.[95] Under this method, when four of seven specific banks changed their prime rates, the defendants would too.[96] The court found this to be a unilateral action which was a convenient and reliable way to remain competitive in the lending market.[97]

Plaintiffs also contended that the defendants' parallel movement was not motivated by good faith business judgement, but by a desire to stabilize profits.[98] However, the court found that defendants had presented evidence which showed that prime-based and sub-prime loans were offered to different classes of borrowers, and that both markets were highly competitive.[99]

The Ninth Circuit dismissed the second factor, exchange of prime rate information, by distinguishing *United States v. Container Corp. of America*,[100] in which the conspirators exchanged confidential information as to prices charged to individual customers, rather than a statistical report on the average cost to all customers.[101] In *Wilcox*, however, the prime rate information was publically available over the wire services.[102] Such disclosure did not support an inference that the defendants conspired to fix their prime rate.[103]

The third factor, in-house meetings of defendants, was sum-

94. United States v. International Harvester Co., 274 U.S. 693, 708-09 (1927), *quoting* United States v. Steel Corporation, 251 U.S. 417, 448 (1920): "[T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

95. Wilcox v. First Interstate Bank, 815 F.2d 522, 526 (9th Cir. 1987).

96. Wilcox Dev. Co. v. First Interstate Bank, 605 F. Supp. 592, 595 (D. Or. 1985).

97. Wilcox v. First Interstate Bank, 815 F.2d 522, 526 (9th Cir. 1987).

98. *Id.* at 527-28.

99. *Id.* at 528.

100. 393 U.S. 333 (1969). Container Corporation shipped about ninety percent of the corrugated containers in the Southeastern United States. *Id.* at 336. They exchanged information with competitors as to the most recent prices charged to customer groups. *Id.* at 334-36. The Court held that this practice had the effect of stabilizing prices, and price controls are illegal. *Id.* at 337-38.

101. *Id.* at 334.

102. Wilcox v. First Interstate Bank, 815 F.2d 522, 526 (9th Cir. 1987).

103. *Id.* at 527.

marily dismissed by the court because plaintiffs offered no evidence of any agreement to set prime rates at the meetings.[104]

The fourth factor was outside meetings of industry officials.[105] The Ninth Circuit found analogous the facts of *Weit v. Continental Illinois Nat'l Bank & Trust Co.*[106] In *Weit*, bank credit card holders claimed that five banks conspired to fix interest rates on credit card purchases.[107] The cardholders presented evidence of industry meetings to support their claim, but the Seventh Circuit held that the meetings provided an effective means of cooperation in establishing a compatible credit card system.[108] In *Wilcox*, there was a similar need for officials to meet to agree on terms for participation loans.[109]

Thus, the Ninth Circuit found that defendants' explanations showed a reasonable possibility of independent action, and therefore, no illegal agreement could be inferred.[110]

B. RICO

1. *Majority*

The district court granted defendants' motion for summary judgment on the RICO claim, finding that plaintiffs had not alleged a racketeering enterprise injury, and also that the plaintiffs had sued the enterprise and not the persons who conducted the affairs of the enterprise.[111]

The Ninth Circuit began its review with a discussion of *Sedima, S.P.R.L. v. Imrex Co.*,[112] in which the Supreme Court expressly rejected the requirement that a RICO plaintiff allege a racketeering enterprise injury.[113] The Ninth Circuit had previ-

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104. *Id.*
105. *Id.*
106. 641 F.2d 457 (7th Cir. 1981).
107. *Weit*, 641 F.2d at 458.
108. *Id.* at 462.
109. *Wilcox*, 815 F.2d at 527.
110. *Id.* at 527-28.
111. *Id.* at 528-29. The district court denied motions to amend because plaintiffs alternative theories still alleged that the person and the enterprise were the same entity. *Id.* at 529. These two limitations are discussed *supra* notes 62-75 and accompanying text.
112. 473 U.S. 479 (1985). *See supra* note 57.
113. *Id.* at 495. *See supra* text accompanying notes 77-79.

ously adopted this rule in *Simon Oil Co. v. Norman*,[114] but the district court's opinions in *Wilcox*[115] were rendered prior to either of these cases.

The court also discussed the person/enterprise distinction in civil RICO claims.[116] Plaintiffs had alleged violations of sections 1962(a), (c) and (d).[117] The Ninth Circuit established in *Rae v. Union Bank*,[118] that a corporate defendant could not be both the RICO person and the RICO enterprise in a claim under section 1962(c).[119] However, in *Schreiber Distributing Co. v. Serv-Well Furniture Co.*,[120] the Ninth Circuit reasoned that no such distinction was required under sections 1962(a) or (b) as long as the corporation was the beneficiary of the pattern of racketeering activity.[121] In *Wilcox*, the court did not decide this question, rather they gave plaintiffs the opportunity to amend their pleadings on remand to conform with the requirements of *Rae* and *Schreiber*.[122]

Lastly, and most significantly, the Ninth Circuit rejected defendants' argument that collateral estoppel precluded plaintiffs from asserting a mail fraud claim.[123] In a related state action, a jury had found against the plaintiffs on a common law claim that the defendants' prime rate was fraudulent.[124] Defendants contended, therefore, that some elements of the mail fraud claim were disproved.[125] The court did not discuss the elements

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114. 789 F.2d 780 (9th Cir. 1986). Defendants promoted and sold interests in oil and gas development. *Id.* at 780-81. The RICO claim had been dismissed by the district court, but the Ninth Circuit reversed to follow *Sedima*. *Id.* at 781.

115. Wilcox Dev. Co. v. First Interstate Bank, 590 F.Supp 445 (D. Or. 1984).

116. Wilcox v. First Interstate Bank, 815 F.2d 522, 529 (9th Cir. 1987). *See supra* text accompanying notes 62-75.

117. *Id.* at 528.

118. 725 F.2d 478 (9th Cir. 1984). *See supra* note 62.

119. *Id.* at 481.

120. 806 F.2d 1393 (9th Cir. 1986). *See supra* note 67.

121. *Id.* at 1398.

122. Wilcox v. First Interstate Bank, 815 F.2d 522, 530 (9th Cir. 1987).

123. *Id.* at 532.

124. *Id.* at 530-31.

125. *Id.* at 530. The court relied on Oregon law to define the elements of the fraud claim, citing Rice v. McAlister, 268 Or. 125, 128, 519 P.2d 1263, 1265 (1974), which held that fraud claims in Oregon are shown by: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) an intent that it be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) reliance on its truth; (8) the right to rely thereon; (9) consequent and proximate injury.

of the different fraud claims, but focused instead on the burden of proof which was required for each claim.[126]

Civil claims generally must be proved by a preponderance of the evidence.[127] But some claims, including fraud, may require plaintiffs to meet the increased burden of proving their claims by clear and convincing evidence.[128] The plaintiffs in *Wilcox* were required by Oregon law to prove their common law fraud claim by clear and convincing evidence.[129] However, relying on dicta in *Sedima*, the Ninth Circuit held that plaintiffs must prove RICO predicate acts by a proponderance of the evidence.[130] In fact, the court stated "[w]e have found no civil RICO cases applying the clear and convincing standard of proof for predicate acts."[131] Having adopted a preponderance standard, collateral estoppel could not apply because the burden of proof was less in the RICO action than in the common law fraud action.[132]

2. *Dissent*

Judge Boochever, dissenting in part, believed that the court should adopt the standard which applied in the corresponding state cause of action for fraud.[133] He claimed that the dicta in *Sedima* was unclear as to whether a preponderance standard is appropriate in all RICO claims:

> We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a prepon-

126. *Wilcox*, 815 F.2d at 531.

127. McCORMICK ON EVIDENCE, § 339 (3d ed. 1984) [hereinafter McCORMICK]; 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5122 (1977 & Supp. 1987).

128. McCORMICK, *supra* note 127, at § 339; 21 C. WRIGHT & K. GRAHAM, *supra* note 127, at § 5122.

129. *Wilcox*, 815 F.2d at 531.

130. *Id.* at 531-32. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985). *Accord* Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987); Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475 (5th Cir. 1986); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986).

131. *Wilcox*, 815 F.2d at 531.

132. *Id.*

133. *Id.* at 532 (Boochever, J., dissenting in part).

> derance standard. . . . There is no indication that Congress sought to depart from this general principle here. . . . But we need not decide the standard of proof issue today.[134]

The Second Circuit recently proposed in *Cullen v. Margiotta*,[135] that the appropriate statute of limitations in a civil RICO claim was the limitation period for the corresponding state cause of action.[136] The *Wilcox* dissent proposed that the same method was appropriate for establishing the burden of proof for RICO predicate acts.[137] In most civil cases, a preponderance of the evidence standard would thus be required, but in some special cases, such as fraud, clear and convincing evidence might be required.[138]

The dissent also claimed that it would be inconsistent to allow a fraud claim as the basis of both state and federal actions, based on the same set of facts, yet having different burdens of proof.[139] In *Wilcox*, however, the plaintiffs were allowed to do just that. They failed to prove their common law fraud claim under state law, but on remand they would be allowed to try the same set of facts at a lesser burden of proof for a potential treble damage award in a federal RICO action.[140]

Lastly, the *Wilcox* dissent cites approvingly Judge Kennedy's concurring opinion in *Schreiber Distributing Co. v. Serv-*

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134. *Sedima*, 473 U.S. at 491.

135. 811 F.2d 698 (2d Cir. 1987) (Coercive solicitation of political contributions).

136. *Id.* at 717-27. However, the Supreme Court recently decided in Agency Holding Corp. v. Malley-Duff & Assocs., 107 S. Ct. 2759 (1987), that the appropriate statute of limitations was four years by analogy to the Clayton Act.

137. Wilcox v. First Interstate Bank, 815 F.2d 522, 533 (9th Cir. 1987). In fact, the Ninth Circuit has looked to the law of the forum state in determining the appropriate limitations period. *See* Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984).

138. In most states, civil actions require a preponderance of the evidence to succeed. Fraud is the major exception, usually requiring clear and convincing evidence. *See, e.g*, 21 C. WRIGHT & K. GRAHAM, *supra* note 127, at 557-58; MCCORMICK, *supra* note 127, at § 339.

139. *Wilcox*, 815 F.2d at 534. *See also* Herman & McLean v. Huddleston, 459 U.S. 375 (1983) (Action for fraud in the sale of securities). "Concerned that claims would be fabricated, the chancery courts imposed a more demanding standard of proof. The higher standard subsequently received wide acceptance in equity proceedings to set aside presumptively valid written instruments on account of fraud." *Id.* at 388 n.27.

140. *Wilcox*, 815 F.2d at 534.

Well Furniture Co.[141] Judge Kennedy stated that the vast scope of mail fraud as a criminal act can be checked by the existence of prosecutorial discretion in criminal cases.[142] No such check exists in private actions under RICO.[143] Before RICO, there were no damages available as a civil remedy for an act of mail fraud.[144] However, private entities now have an unchecked potential to strike a blow to their competition, a weapon unforeseen by Congress when they enacted RICO.[145]

V. CRITIQUE

The Ninth Circuit's opinion in *Wilcox*[146] shows a stark contrast in the court's handling of the antitrust claim and the RICO claim. In dealing with the antitrust claim, the court applied sound logic and moderation in using the rule of reason. However, in light of considerable judicial disagreement as to the scope of RICO and the many calls for reform,[147] the court failed to take advantage of an opportunity to place a rational limitation on a statute that has grown beyond what was intended.[148]

The Ninth Circuit was bound to follow the holdings of *Sedima, S.P.R.L. v. Imrex Co.*[149] As applied to *Wilcox*, this meant that there was no requirement that plaintiffs plead and prove a racketeering enterprise injury, a holding which the Ninth Circuit had already followed in *Simon Oil Co. v. Norman.*[150]

However, the distinction drawn between the statutory language of sections 1962(a), (b) and (c) needs closer examination. The Ninth Circuit focused on the fact that the language of section 1962(c) spells out a closer relationship between a person

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141. 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring).

142. *Wilcox*, 815 F.2d at 534, *quoting Schreiber*, 806 F.2d at 1402 (Kennedy, J., concurring). *See also* U.S. DEP'T OF JUSTICE, A MAUAL FOR FEDERAL PROSECUTORS, RICO, 12 (1985).

143. *Wilcox*, 815 F.2d at 534.

144. *See* cases cited *supra* note 52.

145. *Wilcox*, 815 F.2d at 534-35.

146. 815 F.2d 522 (9th Cir. 1987).

147. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985).

148. *See Sedima*, 473 U.S. at 500; *Ad Hoc Report*, *supra* note 10, at 56-70.

149. *Sedima*, 473 U.S. at 479.

150. 789 F.2d 780 (9th Cir. 1986).

and the enterprise than sections 1962(a) and (b).[151] The court stated that the enterprise may be sued as the beneficiary of a pattern of racketeering activity under sections (a) and (b), but not under section (c).[152] However, all three sections begin with the phrase, "It shall be unlawful for any *person* . . . ." [153] It may well be that RICO should be a valuable tool against commercial fraud, but it was intended to eradicate the influence of organized crime, and this means criminals and their organizations.[154] It should be obvious that RICO as currently interpreted will continue to be used against legitimate businesses, not against organized crime.

The most startling holding in *Wilcox* was that a preponderance of the evidence standard must always apply to proof of predicate acts in civil RICO claims.[155] The Ninth Circuit relied on dicta in *Sedima*, but the reliance was misplaced. The Supreme Court did not *strongly* suggest a preponderance standard, as the *Wilcox* court would have us believe.[156] Instead, the Supreme Court pointed out only that there are many other types of activity which are punished as criminal, yet support civil sanctions under a preponderance standard, and Congress made no indication that under RICO it should be otherwise.[157] Therefore, a preponderance standard will *usually* be appropriate as that is the standard most states apply.[158] However, the Court also clearly stated that the burden of proof issue was not decided.[159]

The *Wilcox* dissent is a logical approach to the proof problem. The primary reason for requiring clear and convincing evidence for fraud is to discourage fabrication of claims.[160] The rule

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151. *See supra* text accompanying note 71.

152. Wilcox v. First Interstate Bank, 815 F.2d 522, 529 (9th Cir. 1987). *See also* Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986); Schofield v. First Commodity Corp., 793 F.2d 28, 31 (1st Cir. 1986) (Section 1962(a) does not require separate entities, but section 1962(c) does). *Accord* Masi v. Ford City Bank & Trust Co., 779 F.2d 397, 402 (7th Cir. 1985).

153. *Compare* statutes cited *supra* notes 45-47 (emphasis added).

154. *See generally* Blakey & Gettings, *supra* note 41, at 1014-21.

155. *Wilcox*, 815 F.2d at 531-32.

156. *Id.* at 531.

157. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985). *See supra* text accompanying note 134.

158. *Id.*

159. *Id.*

160. *See, e.g.*, Herman & McLean v. Huddleston, 459 U.S. 375, 388 n.27 (1983).

was such in the Ninth Circuit in the days of federal common law.[161] But under the broad collection of state and federal crimes which comprise RICO, fraud is treated differently. Thus, the same set of facts could be the basis of a criminal charge if proved beyond a reasonable doubt, a common law action if proved by clear and convincing evidence, and a RICO claim (for treble damages) if proved by a preponderance of the evidence.

It makes sense to look to the law of the forum state to determine the proper burden of proof for a RICO predicate act, especially when based on a state crime. Yet the *Wilcox* majority made no analysis of this issue. The court settled on the the findings of other district courts, most of which have relied heavily on the dicta from *Sedima*.[162]

VI. CONCLUSION

It is clear that the courts are struggling to rationally interpret civil RICO claims. The Supreme Court has recognized that civil RICO claims are being brought almost solely against legitimate commercial enterprises.[163] However, the Court also stresses that any reform must come from Congress.[164]

Reform measures were introduced in the 99th Congress,[165]

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161. United States v. California Midway Oil Co., 259 F. 343, 352-53 (S.D. Cal. 1919), *aff'd*, 279 F. 516 (9th Cir. 1922), *aff'd*, 263 U.S. 682 (1923) (clear and convincing evidence required for fraud).

162. A number of decisions have established a preponderance standard. *See* Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir. 1987); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 279-80 & n.12 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986).

163. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985): "It is true that private civil actions under the statute are being brought solely against such defendants [legitimate businesses], rather than against the archetypal, intimidating mobster."

164. *Id.* at 499-500: "[T]his defect - if defect it is - is inherent in the statute as written, and its correction must lie with Congress. . . . sharing the doubts of the Court of Appeals about this increasing divergence [growth in scope], we cannot agree with either its diagnosis or its remedy."

165. The bills introduced in the 99th Congress were: H.R. 5445, 99th Cong., 2nd Sess. (1985) (Would change the term racketeering to illicit activity, provide treble damages only to government entities or private litigants who showed a prior criminal conviction, provide double punitive damages in certain specified situations, and provide a four year limitations period on all civil RICO claims); H.R. 5391, 99th Cong., 2nd Sess. (1986); H.R. 5290, 99th Cong., 2nd Sess. (1986); H.R. 4892, 99th Cong., 2nd Sess. (1985); H.R. 3985, 99th Cong., 1st Sess. (1985); H.R. 2943, 99th Cong., 1st Sess. (1985); H.R. 2517, 99th Cong., 1st Sess. (1985); S. 1521, 99th Cong., 1st Sess. (1985) (Would require a com-

and again in the 100th Congress.[166] The reforms offered have varied, but it seems clear that the two most troublesome aspects of RICO, notwithstanding the definition of its terms, are the inclusion of mail and wire fraud as predicate acts, and the availability of treble damages. Any reform must address these issues.

The post-*Sedima* decisions continue to reflect the broad application of RICO to business fraud.[167] Commercial enterprises, such as the banks in *Wilcox*, are highly likely to use the mail or phone in conducting their businesses. They are now confronted by an awesome sword in the hands of private attorney generals: potential liability for treble damages under RICO. It is true that fraud is a major problem in commercial transactions.[168] But RICO was not initially aimed at business fraud.[169] If that is where the focus must stay then we must reshape the law with that in mind.

There is, however, one area where the Supreme Court in *Sedima* did provide leeway for the lower courts to apply rational limitations. The Court suggested that a pattern must be more

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petitive injury be shown).

166. Bills have been introduced into the 100th Congress: H. 2983, 100th Cong., 1st Sess. (1987) (virtually the same as H.R. 5445, passed by the House in the 99th Congress); S. 1523, 100th Cong., 1st Sess. (1987) (Proposes to change the term racketeering to illicit activity).

167. *See* Sun Savings & Loan v. Dierdorff, 825 F.2d 187 (9th Cir. 1987); California Architectural Bldg. Prods. v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987); TeleVideo Sys. v. Heidenthal, 826 F.2d 915 (9th Cir. 1987); Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349 (3d Cir. 1987); Blount v. Heller & Co., 819 F.2d 151 (5th Cir. 1987); Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438 (5th Cir. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986); Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986) (a commodities firm may not be the RICO person in a claim under § 1962(c)); Agency Holding Corp. v. Malley-Duff & Assocs., 792 F.2d 341 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2759 (1987) (by analogy to the Clayton Act, a four year statute of limitations is appropriate in RICO claims); Superior Oil v. Fulmer, 785 F.2d 252 (8th Cir. 1986); Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986); Masi v. Ford City Bank & Trust Co., 779 F.2d 397 (7th Cir. 1985) (claim under § 1962(a) that a bank used depositor's funds to conduct its business); Miller v. Glen & Helen Aircraft, 777 F.2d 496 (9th Cir. 1985); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) (multiple acts of mail fraud as part of a single scheme constitute a RICO pattern).

168. Commercial business fraud is a large national problem. A 1984 study estimated that fraud accounts for losses in excess of $200 billion annually. *See* U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL 42 (1984). *See generally* Goldsmith, *supra* note 44, at 832-38.

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

than the commission of two isolated predicate acts.[170] There must be continuity plus a relationship between the acts, such that there is a threat of continuing criminal activity.[171]

The courts should also recognize other rational limitations, such as an increased burden of proof for fraud as a predicate act. It is doubtful that Congress intended to federalize fraud actions through the passage of RICO.

It is unfortunate, but our experience tells us that Congressional reform is likely to be slow in coming. Thus, the courts must address the issues arising in civil RICO litigation with reasoned analysis, not blind adherence.

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170. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 n.14 (1985).
171. *Id.*
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