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RICO's New Community of Racketeers: The Need for a Prior Criminal Conviction Requirement

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RICO'S NEW COMMUNITY OF RACKETEERS: THE NEED FOR A PRIOR CRIMINAL CONVICTION REQUIREMENT

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970[1] to curb the infiltration of legitimate businesses by organized crime.[2] Congress armed RICO with harsh criminal[3] and civil[4] penalties. Congress also included strict criminal forfeiture provisions to divest organized crime of the "fruits of its ill-gotten gains."[5] In short,

1. 18 U.S.C.A. §§ 1961-1968 (1984 & Supp. 1985).

2. Congress enacted RICO as title IX of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 941 (1970). OCCA derived predominantly from S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969). *See* S. REP. No. 617, 91st Cong., 1st Sess. 46-47 (1969). Congress was particularly concerned with the defects in the evidence-gathering process that allowed known organized crime figures to elude punishment. The first seven titles of OCCA strengthen the government's ability to gather evidence against members of organized crime. *See* 116 CONG. REC. 584-85 (1970) (S. 30 "is designed to strengthen and improve the evidence-gathering process in the field of organized crime").

A 1968 House Committee Report on organized crime identified four principal methods by which organized crime infiltrates legitimate businesses: (1) investing concealed profits acquired from gambling and other illegal activities, (2) accepting business interests in payment of the owner's gambling debts, (3) foreclosing on usurious loans, and (4) using various forms of extortion and unfair business practices. *House Comm. on Government Operations,* FEDERAL EFFORT AGAINST ORGANIZED CRIME, H.R. REP. No. 1574, 90th Cong., 2d Sess. 7 (1968). The Committee noted the reasons why organized crime infiltrates legitimate businesses: to increase profits, often through ruthless elimination of competitors; to shield illegal activities; to obtain marketing agencies for illegal or counterfeit products; and to gain social respectability. *Id.*

3. The criminal sanctions for a violation of RICO are imprisonment for up to twenty years and/or a fine of $25,000, and forfeiture of any interest in an unlawful enterprise. 18 U.S.C. § 1963 (Supp. 1985). For a discussion of these criminal sanctions, see Tarlow, *RICO Revisited,* 17 GA. L. REV. 291, 305-08 (1983); Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon,* 17 AM. CRIM. L. REV. 379, 391-92 (1980).

4. 18 U.S.C.A. § 1964(c) (1984) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

In addition, 18 U.S.C.A. § 1964(a) (1984) grants the district courts "jurisdiction to prevent and restrain violations of section 1962" and lists examples of equitable relief that courts may grant the government. Section 1964(b) authorizes the Attorney General to pursue civil remedies and § 1964(d) estops the defendant, once convicted under criminal RICO, from denying the essential allegations of a RICO violation in a subsequent civil proceeding brought by the government. For an early discussion of these government civil remedies, see Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970* - United States v. Cappetto, 25 DE PAUL L. REV. 508 (1976); Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity",* 124 U. PA. L. REV. 192 (1975).

5. United States v. Turkette, 452 U.S. 576, 585 (1981); *see also* 116 CONG. REC. 602 (1970)

Congress enacted RICO to undermine the financial foundations of organized crime.[6]

A person is subject to RICO's criminal and civil penalties if he violates a substantive provision of section 1962.[7] Section 1962 provides that an individual may not invest in, control, or participate in the conduct of the affairs of an "enterprise"[8] through a "pattern of racketeering activity."[9] Section 1961(5) provides that "a pattern of racketeering activity requires at least two acts of racketeering activity."[10] Finally, section 1961(1) enumerates the state and federal crimes that constitute "racketeering activity."[11]

A plaintiff in a civil RICO action must prove each element of the two underlying predicate acts[12] by a preponderance of the evidence.[13] If the

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(statement of Senator Hruska) (RICO is broadly aimed at "striking a mortal blow against the property interests of organized crime").

6. RICO is not a regulatory statute. It does not simply govern the manner in which organized crime carries out its activities. Rather, RICO seeks to uproot the financial foundations of organized crime. *See* Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983):

> The antitrust laws are designed to promote competition in the marketplace.
>
> . . .
>
> RICO has the opposite purpose. It is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency.

7. 18 U.S.C.A. § 1962 (1984).

8. 18 U.S.C.A. § 1961(4) (1984) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." In United States v. Turkette, 452 U.S. 576, 587 (1981), the Supreme Court held that the term "enterprise" encompasses both legitimate and illegitimate enterprises. Recently, in Hirsch v. Enright Refining Co., 751 F.2d 628, 633 (3d Cir. 1984), the Third Circuit held that the defendant must be separate from the alleged enterprise. *But see* United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982) (defendant and enterprise may be the same), *cert. denied,* 459 U.S. 1170 (1983).

9. 18 U.S.C. § 1961(5) (1982) provides: " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

10. *Id.*

11. 18 U.S.C.A. § 1961(1) (Supp. 1985) provides in pertinent part:

> "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, . . . or dealing in narcotic or other dangerous drugs, which is *chargeable* under State law and punishable by imprisonment for more than one year; (B) any act which is *indictable* under . . . [various] provisions of title 18, United States Code . . . ; (D) any *offense* involving [bankruptcy] fraud . . ., fraud in the sale of securities . . . punishable under any law of the United States. . . .

Id. (emphasis added). The acts of racketeering activity are commonly referred to as the "predicate acts."

12. Kaufman v. Chase Manhattan Bank, 581 F. Supp. 350, 357 (S.D.N.Y. 1984).

13. For a discussion of the appropriate burden of proof in civil RICO actions, see Matz, *Deter-*

plaintiff is successful, the defendant is subject to treble damage liability under section 1964(c).[14]

Although prosecutors have invoked criminal RICO regularly since 1975, private civil RICO[15] has developed into a significant source of commercial litigation only within the last three years.[16] Private civil RICO, however, has failed to address the criminal element that threatens to undermine the nation's economy.[17] Rather, civil RICO has created a new community of racketeers. The Supreme Court recently recognized that RICO has been applied against "respected businesses . . . rather than against the archetypal, intimidating mobster."[18] In addition, private civil RICO has interfered with the objectives of other federal statutes.[19] As a result, Congress should reevaluate the role of private citizens in the enforcement of RICO against organized crime and should amend RICO accordingly.

Part I of this Note discusses the misuse of RICO by civil litigants, particularly in securities litigation. Part II examines judicially imposed limitations on RICO's broad scope. In part III, this Note suggests

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mining the Standard of Proof in Lawsuits Brought Under RICO, Nat'l L. J., Oct. 10, 1983, at 21, col. 1.

14. *See supra* note 4.

15. One commentator notes that "RICO did not gain popularity among prosecutors until after a Justice Department strike force toured the country in 1975 educating them and FBI agents on the law's benefits." Tybor, *Racketeering Law Facing Key Test,* Nat'l L. J., Dec. 29, 1980, at 18, col. 1.

16. By 1982 courts had published about fifteen decisions on § 1964(c). Today, there are well over two hundred reported decisions. One commentator attributes the dearth of civil RICO cases prior to 1982 to early judicial attempts to restrict the scope of RICO. Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action,* 85 DICK. L. REV. 201, 209-10 (1981). A more plausable explanation of civil RICO's slow start is that even the most imaginative commercial lawyers believed that RICO was aimed only at organized crime. Moreover, prior to 1980, no pressing need existed for securities lawyers to find alternative remedies to the federal securities laws. *See infra* notes 23-47 and accompanying text.

Several factors fueled the recent explosion of private RICO actions. First, judicial trends restricting the availability of private remedies for federal securities laws violations spurred the search for new methods to recover damages for securities fraud. *See infra* notes 23-47 and accompanying text. Second, Congress commanded that RICO be liberally construed. *See* OCCA, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes."). Third, the criminal nature, mob-influenced connotations, and broad discovery provisions of RICO made it a useful tactical weapon for harassment or other improper purposes. *See infra* notes 44-47 and accompanying text. Finally, RICO offered plaintiffs the prospect of treble damages and attorney's fees. *See supra* note 4 and accompanying text.

17. *See, e.g.,* Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3286 (1985).

18. *Id.* at 3287.

19. *See infra* notes 23-30 and accompanying text.

amending RICO to create a private cause of action only after the government has obtained a criminal RICO conviction of the defendant. Finally, part IV of this Note evaluates the operation of the proposed amendment.

I. THE MISUSE OF RICO IN SECURITIES LITIGATION

The use of private civil RICO in securities litigation provides a useful paradigm of RICO's abuse. First, private litigants employ RICO to accomplish goals wholly unrelated to the purpose of the statute. Second, private litigants employ RICO in a manner that undermines the structure of express and implied remedies under the federal securities laws.

Congress intended RICO to combat the ability of organized crime to infiltrate and corrupt legitimate businesses.[20] Congress did not intend RICO to serve as a regulatory alternative to the federal securities laws.[21] Although RICO may apply to securities litigation because securities fraud is a section 1961 predicate act, Congress intended RICO to remedy the theft and fraudulent resale of securities, rather than nondisclosure violations.[22] Therefore, the use of private civil RICO in securities litigation accomplishes goals wholly unrelated to the purpose of the statute.

In the last decade, the Supreme Court has narrowly construed the federal securities laws,[23] allowing only limited private securities fraud remedies.[24] For example, by refusing to imply a private cause of action under

20. *See supra* note 2 and accompanying text.

21. The federal securities laws were not intended "to provide a comprehensive remedy for all fraud." Landreth Timber Co. v. Landreth, 105 S.Ct. 2297, 2303 (1985) (rejecting the sale of business doctrine). Thus, the use of RICO would frustrate the broad but carefully defined scope of the federal securities laws.

22. 18 U.S.C.A. § 1961(1)(D) (Supp. 1985). In addition to relying on securities fraud, a RICO plaintiff may rely on mail and wire fraud as predicate acts to establish a RICO violation.

23. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 736 (1979) (Powell, J., dissenting). Refusing to imply a private cause of action under title IX of the Education Amendments of 1972, Justice Powell criticized the implication of private remedies under the federal securities laws:

> A break in this pattern occurred in J.I. Case Co. v. Borak. There the Court held that a private party could maintain a cause of action under § 14(a) of the Securities Exchange Act of 1934, in spite of Congress' express creation of an administrative mechanism for enforcing that statute. I find this decision both unprecedented and incomprehensible as a matter of public policy. The decision's rationale, which lies ultimately in the judgment that '[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action', ignores the fact that Congress, in determining the degree of regulation to be imposed on companies covered by the Securities Exchange Act, already decided that private enforcement was unnecessary.

Id. at 735-36 (citations omitted).

24. In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), the Burger Court limited

section 14(e) of the Williams Act for takeover bidders,[25] the Court attempted to assure "neutrality" in contests for corporate control and thereby to further shareholder protection.[26] The Court's reluctance to imply private causes of action has forced lawyers to search for alternative avenues of relief. As a result, many lawyers have turned to RICO.[27]

The general application of RICO to securities fraud, however, conflicts with the Supreme Court's narrow interpretation of the federal securities laws.[28] For example, the use of RICO in struggles for corporate control undermines the delicate balance of power between management, shareholders, and bidders established by the Williams Act and reaffirmed by the Court in *Piper v. Chris-Craft Industries, Inc.*[29] RICO is especially useful as a weapon against takeover bids because a target corporation can

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the availability of a private remedy under § 10(b) of the Securities and Exchange Act of 1934 and rule 10b-5 to purchasers and sellers of securities. Since J.I. Case Co. v. Borak, 377 U.S. 426 (1964), the Supreme Court has consistently declined to create new private remedies or expand existing private remedies under the securities laws. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 (1977) (private cause of action should not be implied when it is "unnecessary to ensure the fulfillment of Congress' purposes" in adopting the Act).

The Court in *Blue Chip Stamps* pointed to the abuse of the implied private remedy under rule 10b-5 as a means: (1) to obtain increased settlement pressure, (2) to obtain liberal discovery under the Federal Rules of Civil Procedure, (3) to frustrate or delay normal business activity of the defendants, and (4) to survive summary judgment and prolong litigation with a concommitant increase in settlement value. 421 U.S. at 740-41. With respect to litigants whose legitimate claims might be barred by a court's restrictive approach, the Court noted that "this disadvantage is attenuated to the extent that remedies are available . . . under state law." *Id.* at 721 n.9.

Additionally, in Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977), Justice White argued that unchecked private use of the federal securities laws would improperly intrude on state law. In particular, the Court noted that some states have supplied minority shareholders with carefully structured remedies to recover the fair value of shares allegedly undervalued in a short-form merger. The Court feared that minority shareholders might undermine these remedies by invoking rule 10b-5. *Id.*

25. The Williams Act regulates stock acquisitions and tender offers. The Williams Act added §§ 13(d), 13(e), 14(d), 14(e), and 14(f) to the Securities and Exchange Act of 1934.

26. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 29-30 (1977). The Supreme Court recognized that Congress adopted a policy of "neutrality" in contests for corporate control and refused to imply a private cause of action under § 14(e) of the Williams Act. The Court added that this "express policy of neutrality scarcely suggests an intent to confer highly important, new rights upon the class of participants whose activities prompted the legislation in the first instance." *Id.*

27. *See supra* note 16.

28. RICO is an attractive alternative remedy for securities fraud because, unlike any of the federal securities laws, RICO contains an express private treble damage remedy. *See supra* note 4.

29. 430 U.S. 1 (1977). In Edgar v. MITE Corp., 457 U.S. 624 (1981), the Supreme Court struck down the Illinois Business Takeover Act as violative of the commerce clause. The Court stated that the Illinois Act frustrated the congressional purpose of the Williams Act by introducing extended delay into the tender offer process. *Id.* at 637. The use of RICO as a defense against unfriendly tender offers results in exactly the same kind of delay.

employ it defensively as a means of harassment and delay.[30]

Plaintiffs have also used civil RICO in a number of other securities contexts to avoid narrow federal and state securities laws. Management and shareholders have employed RICO as a defensive tactic in takeover battles,[31] proxy contests,[32] contested mergers,[33] and minority squeeze-outs.[34] Plaintiffs have also used RICO to allege violations regarding insider trading,[35] self-dealing,[36] "churning,"[37] market manipulation,[38] and nondisclosure.[39]

The use of RICO in this manner could stigmatize an otherwise law-abiding corporate officer or director.[40] Although individuals familiar

30. One commentator accurately predicted the prolific application of RICO to securities litigation, noting that "RICO may well prove to be to the 1980's what Rule 10b-5 was in its day." Morrison, *Old Bottle - Not So New Wine: Treble Damages in Actions Under the Federal Securities Laws,* 10 SEC. REG. L.J. 67, 83 (1982). Another commentator has strongly urged the securities bar to use RICO as an alternative remedy to the federal securities laws. *See* Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action,* 85 DICK. L. R. 201, 205 (1981).

31. *See, e.g.,* Hanna Mining Co. v. Norcen Energy Resources, Ltd., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742 (N.D. OHIO 1983) (RICO claim based on allegations that offeror filed false and misleading schedules in connection with purchase of Hanna stock).

32. *See, e.g.,* Bayly Corp. v. Marantette, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,834 (D.D.C. 1982).

33. *See, e.g.,* Berg v. First Am. Bankshares, Inc., 599 F. Supp. 500 (D.D.C. 1984) (minority shareholders sue to recover fair value of stock).

34. *See, e.g.,* Friedlander v. Nims, 571 F. Supp. 1188, 1191 (N.D. Ga. 1983) (conspiracy to freeze out minority shareholders by means of misleading written and oral communications).

35. *See, e.g.,* Moss v. Morgan Stanley Inc., 553 F. Supp. 1347, 1358 (S.D.N.Y.) (plaintiffs sold their stock below subsequently announced tender offer price), *rev'd on other grounds,* 719 F.2d 5 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1280 (1984); Johnsen v. Rogers, 551 F. Supp. 281, 283 (C.D. Cal. 1982) (plaintiffs bought interests in oil and gas leases based on material misrepresentation of value). *See also* Wang, *Recent Developments in the Federal Law Regulating Stock Market Insider Trading,* 6 CORP. L. REV. 291, 315 (1983) (formulating theories of liability under RICO for insider trading violations).

36. *See, e.g.,* Swanson v. Wabash, Inc., 577 F. Supp. 1308, 1312 (N.D. Ill. 1983) (plaintiffs based RICO claim on fraud and self-dealing in connection with a tender offer).

37. *See, e.g.,* Lopez v. Dean Witter Reynolds, Inc., 591 F. Supp. 581, 583 (N.D. Cal. 1984) (plaintiffs based RICO claim on excessive trading of commodities futures trading); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1237 (S.D.N.Y. 1983).

38. *See, e.g.,* Maryville Academy v. Loeb Rhoades & Co., 530 F. Supp. 1061, 1063 (N.D. Ill. 1981) (plaintiffs alleged that broker manipulated the market to artificially depress the price of certain securities).

39. *See* Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities",* 18 GA. L. REV. 43, 54-55 (1983).

40. Corporate executives often express shock and disbelief when sued under RICO. *See* Markus, *Racketeering Law Increasingly Invoked to Thwart Takeovers,* Wash. Post, Feb. 28, 1983, at 1, col. 4 (one renowned takeover specialist proclaimed: "I consider it an abomination that a company's management should resort to these gutter and smear tactics.").

with the use of RICO in securities litigation would understand the limited import of the allegation,[41] uninformed third parties, including shareholders, may be alarmed.[42] Publicity of a racketeering charge against a tender offeror, for example, may prejudice the target company's shareholders against the offeror.[43]

Finally, litigants employ civil RICO as a tool for harassing the opposing side through unwarranted discovery.[44] The Federal Rules of Civil Procedure allow discovery of matters relevant to the subject matter of the litigation.[45] Because the subject matter of a securities-RICO action is broader than that of a securities action alone, the Federal Rules authorize inquiry into matters beyond the scope of an inquiry brought under the securities laws.[46] This authorization of broad discovery poses potential for serious abuse.[47]

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41. Because of RICO's blatant abuse, few securities lawyers associate RICO with organized crime. In fact, one securities practitioner suggested that failure to bring a RICO action in a securities case might constitute malpractice. 16 SEC. REG. & L. REP. (BNA) No. 15, 754 (Apr. 10, 1984).

42. *See, e.g.*, Bradley, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities"*, 18 GA. L. REV. 43 (1983).

43. *Id.* at 55. ("A RICO allegation can inflict serious harm in a takeover bid or proxy contest when voters cannot understand the importance of the alleged predicate offenses but do think they understand what organized crime and 'racketeering' are").

44. The Supreme Court's decision in *Blue Chip Stamps*, 421 U.S. at 741, criticized the use of the federal securities laws to obtain broad discovery opportunities. The Court emphasized that extensive discovery is a common occurence in securities litigation.

Justice Rehnquist's opinion expanded:

> [T]o the extent that [liberal discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Id.

RICO, however, exposes defendant to more extensive discovery than an ordinary securities fraud action.

45. FED. R. CIV. P. 26(b)(1).

46. RICO authorizes inquiry into matters beyond the immediate scope of the predicate securities violations. A plaintiff, for example, may inquire into the use of funds obtained from the alleged pattern of racketeering activity, into the general business affairs of the defendant, and into the business affairs of those with whom he associates.

47. Several sanctions may be available to curb the use of broad discovery as a harassment device in RICO actions. In Spencer Cos. v. Agency Rent-A-Car, Inc., [1981 Transfer Binder] FED. SEC. L. REP. (CCH)] ¶ 98,361 at 92,2217 (D. Mass. 1981), the court asserted that "prudent and economical case management" required a stay of all discovery until the plaintiff demonstrated a legally compensable injury. In addition, a 1983 amendment to rule 26(b) gives the trial court discretion to limit discovery if it determines that further discovery would be "unreasonably cumulative or duplicative" or "unduly burdensome or expensive." FED. R. CIV. P. 26(b). Finally, a few courts have imposed sanctions on RICO plaintiffs for bringing RICO actions in bad faith pursuant to Federal Rule of Civil Procedure 11. *See, e.g.*, King v. Lasher, 572 F. Supp. 1377 (S.D.N.Y. 1983).

II. THE HISTORY OF JUDICIAL RESTRICTIONS

Troubled by the inconsistency between RICO's purpose and its use, courts have limited RICO's application by imposing three requirements: (1) the organized crime "nexus" requirement, (2) the racketeering injury requirement, and (3) the prior criminal conviction requirement. These judicial limitations provide a starting point in determining how Congress should amend RICO.

A. The Organized Crime "Nexus" Requirement

The earliest attempt to limit the broad scope of RICO required the plaintiff to allege a "nexus" between the defendant and an organized criminal association.[48] In *Barr v. WUI/TAS, Inc.*,[49] the plaintiff alleged that the defendant had violated section 1 of the Sherman Act. The court refused to allow the plaintiff to add a RICO count, reasoning that Congress aimed RICO at a "society of criminals." In addition, the court held that it would be unfair to give an organized crime stigma to the defendant.[50] Most courts, however, have rejected the nexus requirement.[51] Predicating a RICO violation on membership in a criminal organization also raises the constitutional problem of creating an offense based on status.[52]

Focusing on the idea that RICO prohibits conduct rather than status, some courts have developed a refined version of the organized crime nexus requirement, looking to RICO's purpose to determine the conduct

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Other courts, however, have declined to impose sanctions under rule 11 because of the confusion surrounding civil RICO. *See* Hudson v. Larouche, 579 F. Supp. 623, 626 (S.D.N.Y. 1983).

48. The most influential of the many organized criminal groups in America in 1969 was La Cosa Nostra with an estimated membership of 3,000 to 5,000. Combined into 26 core groups, each known as a "family," La Cosa Nostra constituted the heart of organized crime in America. SENATE REPORT, *supra* note 2, at 36.

49. 66 F.R.D. 109 (S.D.N.Y. 1975).

50. *Id.* at 113 (RICO is not aimed at legitimate business, but rather at "a society of criminals operating outside of the control of the American people and their governments").

One commentator argues that RICO claims can stigmatize defendants only if courts restrict the applicability of the statute to those allegedly tied to organized crime. *See* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction,* 95 HARV. L. REV. 1101, 1107 (1982).

51. *See, e.g.,* Moss v. Morgan Stanley Inc., 719 F.2d 5, 21 (2d Cir. 1983) (statutory language does not premise a RICO violation on allegations of any connection with organized crime), *cert. denied,* 104 S.Ct. 1280 (1984). In the context of criminal RICO actions, courts have also consistently rejected an organized crime "nexus" requirement.

52. *See* Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982) (RICO should not be interpreted as creating a status offense), *cert. denied,* 464 U.S. 1008 (1983).

within its reach. In *Hokama v. E.F. Hutton & Co.*,[53] a civil RICO action based on securities fraud, the court required that the defendant's activities somehow relate to the evils that Congress sought to prevent.[54]

In *United States v. Ivic*,[55] a criminal RICO action, the Second Circuit Court of Appeals expressed dissatisfaction with the application of RICO to situations far removed from its purpose. The court reversed the conviction of four Croation activists, holding that RICO should be applied only to economically motivated activities.[56] The defendants' conduct in this case was motivated solely by political belief and did not pose a threat similar to that posed by organized crime.[57]

B. The Racketeering Injury Requirement

Some courts have also limited the application of RICO to situations in which the plaintiff sustains a certain type of injury. In *North Barrington Development, Inc. v. Fanslow*,[58] the court required an injury to competition caused by the RICO violation. The court reasoned that Congress intended section 1964(c) to prevent interference with free competition.[59] In *Schact v. Brown*, however, the Seventh Circuit Court of Appeals re-

53. 566 F. Supp. 636 (C.D. Cal. 1983).

54. *Id.* at 643-44. In Adair v. Hunt Int'l. Resources Corp., 526 F. Supp. 736, 746 (N.D. Ill. 1981), the court refused to extend RICO to ordinary securities fraud. The court noted that it "is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* (citing United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979), quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)). *But see* Eisenberg v. Gagnon, 564 F. Supp. 1347, 1351 (E.D. Pa. 1983) (rejecting argument that RICO should be limited to activities that fall within the "penumbra" of activities engaged in by organized crime).

55. 700 F.2d 51 (2d Cir. 1983).

56. *Id.* at 59 n.5. The court's conclusion that a criminal indictment must allege that the defendant's activities have a financial purpose rests in part on the common understanding of the word "racketeer" as one "who extorts money or advantages by threats of violence or by blackmail." *Id.* at 61. Additionally, the politically motivated conduct of the four Croation activists was unrelated to the type of activities that "annually drain billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption." *Id.* at 62.

57. *Id.* at 64-65.

58. 547 F. Supp. 207, 211 (N.D. Ill. 1980).

59. *Id.* at 210. The early legislative history of RICO provides some support for the competitive injury requirement. Senator Hruska introduced a bill, S. 1623, as an amendment to the antitrust laws. The language of S. 1623 was similar to § 1964(c) and was aimed at organized crime. Senator Hruska commented that S. 1623 "also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman." 115 CONG. REC. 6993 (1969). The Senate, however, rejected the idea of attacking organized crime through the antitrust laws.

jected a competitive injury requirement,[60] reasoning that Congress was concerned with harm to investors and to the general public welfare.[61]

Many courts have analogized RICO to the antitrust laws, requiring a "racketeering injury."[62] Because section 1964(c) requires an injury "by reason of a violation of section 1962,"[63] these courts have reasoned that injuries caused directly by the predicate acts alone are not compensable.[64]

In *Landmark Savings & Loan v. Rhoades*,[65] the court dismissed a civil RICO count in a complaint alleging securities fraud because the plaintiff failed to show an injury "by reason of" a RICO violation. The court explained that section 1964(c) requires something more than injury from

60. 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

61. 711 F.2d at 1357. *See* Haroco, Inc. v. American Nat'l. Bank & Trust Co., 747 F.2d 384, 391 (7th Cir. 1984), *aff'd*, 105 S.Ct. 3291 (1985) (Congress' concerns in exacting RICO extend much farther than injury to free competition); Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516-17 n.6 (2d Cir. 1984) (the objectives of RICO go beyond the objective of the antitrust laws).

Congress explicitly rejected an amendment to the antitrust laws that would have provided remedies for competitive harm caused by organized crime infiltration. 115 CONG. REC. 6993 (1969). As noted in a report by the Antitrust Section of the American Bar Association:

> [Some] activities of organized crime in legitimate business may or may not be subject to the antitrust laws. Thus, some extortion tactics and business takeovers by organized crime might not be reached under the antitrust laws, particularly if they affected only the victimized business rather than resulted in a lessening of competition in an entire line of commerce.

Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 91st Cong., 1st Sess. 556-557 (1969); *see also* Note, *supra* note 50, at 1111 (competitive injury requirement would "arbitrarily undermine RICO's potency").

62. Courts have variously referred to this requirement as a "racketeering injury," "racketeering enterprise injury," or "RICO injury." These terms refer to a standing requirement based on the type of injury to the plaintiff, and are generally interchangeable.

63. Both § 1964(c) of RICO and 15 U.S.C. § 15(a) of the Clayton Act require an injury "by reason of" a RICO or antitrust violation. In Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977), the Supreme Court construed 15 U.S.C. § 15(a), the Clayton Act's civil remedy provision, to require an injury of the type the statute was intended to prevent—an "antitrust injury." Drawing upon the analysis of *Pueblo Bowl-O-Mat*, several courts have imposed a similar standing requirement in RICO cases, predicating civil RICO liability on a "racketeering injury." *See, e.g.*, Harper v. New Japan Sec. Int'l., 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982) ("plaintiff must allege not only injury from the predicate offenses, but injury of the type the RICO statute was intended to prevent").

64. *But see* Haroco, Inc. v. American Nat'l. Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 105 S.Ct. 3291 (1985) ("by reason of" language imposes proximate cause requirement; therefore, direct injury from predicate acts is sufficient); Mauriber v. Shearson/American Express, 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983) (plaintiff need only allege injury caused by the predicate acts).

65. 527 F. Supp. 206 (E.D. Mich. 1981).

the predicate acts.[66] The court observed that a RICO injury might occur, for example, if the infusion of money into an enterprise from a pattern of racketeering activity enhanced the defendant's ability to harm the plaintiff.[67]

The Supreme Court, however, rejected any requirement of special injury in *Sedima, S.P.R.L. v. Imrex Co.*,[68] holding that injury caused directly by the predicate acts are compensable under RICO.[69] The Court stated that the competitive injury and racketeering injury requirements are inconsistent with RICO's purpose. By imposing a special injury requirement, courts fail to focus on the defendant's conduct and ignore RICO's remedial purpose.[70] In addition, a standing requirement that limits the class of plaintiffs who can recover under RICO also ignores RICO's remedial purpose.[71]

C. *The Prior Criminal Conviction Requirement*

In *Sedima, S.P.R.L. v. Imrex Co.*,[72] the Supreme Court also reversed the Second Circuit's requirement that a private action proceed only against a defendant already convicted of a RICO violation or of a predicate act.[73] The Second Circuit intended its prior criminal conviction re-

66. *Id.* at 208.

67. *Id.* at 209. In Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), the court required an injury flowing from the pattern of racketeering activity. *Id.* at 516. The court gave the following example of a distinct RICO injury: The defendant committed multiple acts of arson against the plaintiff. As a result of the arson, the plaintiff's insurance company canceled his policy. Subsequently, the plaintiff suffered an innocent, uninsured fire loss. This loss, the court concluded, flowed from the pattern of arson rather than any particular act of arson and, therefore, would be compensable under § 1964(c). *Id.* at 517.

68. 105 S. Ct. 3275 (1985).

69. *Id.* at 3284-87.

70. *Id.*

71. *Id. See also* Swanson v. Wabash, Inc., 577 F. Supp. 1308, 1320 (N.D. Ill. 1983) (racketeering injury requirement undermines purpose of RICO); Crocker Nat'l Bank v. Rockwell Int'l, 555 F. Supp. 47, 50 (N.D. Cal. 1982) ("Such a rule wold leave money derived from actions prohibited by RICO precisely where Congress did not intend it to remain, in the hands of RICO violators.").

72. 105 S. Ct. 3275 (1985), *rev'g,* 741 F.2d 482 (2d Cir. 1984).

73. *Sedima* was the first of a trilogy of cases handed down on successive days by the Second Circuit. The second of these cases, Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (Kearse, J.), held that a plaintiff must allege a distinct "racketeering injury." *See supra* note 67. Both *Sedima* and *Rhoades* represent a concerted effort by the Second Circuit to end the abuse of civil RICO. *See* Eason, *New 2d Circuit Curbs Point Up Civil RICO Chaos,* Legal Times, Aug. 6, 1984, at 2, col. 2. In the third decision, Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984) (Pratt, J.), the Second Circuit panel sharply criticized the holdings in *Sedmia* and *Rhoades* but decided the case on their authority.

quirement to curb the abuse of private civil RICO.[74]

The legislative history offers little indication of the intended scope of section 1964(c). At the time of the Senate Report and the House Judiciary Committee hearings, RICO did not contain a private treble damages provision.[75] Because Congress added section 1964(c)[76] to the Senate bill as an afterthought, the treble damage provision received only limited discussion prior to RICO's passage.[77] The silence of the legislative history

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74. *Sedima, S.P.R.L. v. Imrex,* 741 F.2d at 487. Judge Oakes observed:

> Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized business people. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch, to name a few defendants labeled as "racketeers" in civil RICO claims resulting in published decisions.

Id. (footnote omitted).

75. S. 30, title IX, derives predominately from S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-71 (1969). Neither S. 1861 nor S.30 contained a private cause of action. An earlier version of S. 1861, S. 1623, did contain a private cause of action patterned closely after a provision contained in the Clayton Act. S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969). The legislative history provides no explanation why S. 1861 did not contain a private cause of action. *But see* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies,* 53 TEMP. L.Q. 1009, 1017-18 (1980) (private cause of action dropped "in an effort to streamline [the OCCA] and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a variety of both public and private remedies").

The Senate initially passed S. 30 on January 23, 1970 by a vote of 73-1. At that date, S. 30 did not contain a private cause of action. 116 CONG. REC. 972 (1970).

76. The House Judiciary Committee added § 1964(c) to S. 30 on October 6, 1970. H.R. 19586, 91st Cong., 2d Sess., 116 CONG. REC. 35,242 (1970).

77. The day after § 1964(c) was added, Congressman Poff discussed each provision of S. 30 and made the following brief remark about the addition of a private remedy:

> [A]t the suggestion of the gentleman from Arizona (Mr. Steiger) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts - another example of the antitrust remedy being adapted for use against organized criminality.

116 CONG. REC. 35,295 (1970). Subsequently, Congress discussed the addition of a private cause of action on only one occasion.

In Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 390 (7th Cir. 1984), *aff'd,* 105 S.Ct. 3291 (1985), the Seventh Circuit conceded that "the legislative history includes relatively little material on RICO's private civil remedy." 747 F.2d at 390. Nevertheless, the court concluded that Congress "deliberately chose the very broad language of RICO's provisions." *Id.* The Seventh Circuit reasoned that Congress chose to provide "civil remedies" by balancing the need for broad remedial measures against the virtues of "tight, but possibly overly astringent, legislative draftsmanship." *Id.* In support of a broad construction of § 1964(c), the court pointed to the civil liberties groups who unsuccessfully argued that RICO's provisions were overbroad and would have a chilling effect on civil rights. *Id.*

Reliance on this legislative history, however, is unjustified. On June 9, 1970, Senator McClellan urged the Senate for the last time to reject the "specious" arguments of "overbreadth" asserted by the ACLU. 116 CONG. REC. 18,913 (1970). The version of the OCCA presented to the Senate on

indicates that Congress was unaware of the potential impact of a private treble damage remedy.

III. Requiring a RICO Conviction: A Proposal for Reform

A broad construction of RICO has proved ineffective in combatting organized crime.[78] Although some courts have imposed limitations on this broad construction, the Supreme Court in *Sedima* effectively removed these limitations from future use. Congress should respond to *Sedima* by amending section 1964(c) to require a prior RICO conviction. A prior RICO conviction requirement would prevent abuse of civil RICO by restricting its application to previously determined criminal conduct.

Current private civil RICO does not effectively attack organized crime because fear and participation in the enterprise often prevent victims of organized crime from complaining to federal authorities or bringing suit under RICO.[79] Because the Organized Crime Control Act offers protection to private informants in a criminal, but not a civil, RICO action,[80] a private plaintiff would be more likely to bring a RICO action against a

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that day, however, contained no private civil remedy. Section 1964(c) was not added to the OCCA until October 6, 1970. *See supra* note 76. Thus, Congress did not engage in a balancing test with respect to privity civil RICO.

Other courts have also relied on Congress' recognition that criminal RICO would have a broad reach to support a broad construction of § 1964(c). *See, e.g.*, Shacht v. Brown, 711 F.2d 1343, 1354 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983) (Congress provided civil remedies for an "enormous variety" of activities, citing pre-§ 1964(c) legislative history).

78. *See infra* notes 79-81 and accompanying text.

79. The realization that victims of organized crime are typically uncooperative highlighted the need for a comprehensive federal effort against organized crime. The Senate Hearings observed:

> The organized crime investigation, however, does not generally begin with a complaint because the "victim" of organized crime is often a participant in the racketeer's unlawful acts or illegal conduct. . . . Another deterrent to reporting the crime is the large number of unsolved gangland murders and the resulting fear to be an "informant." Protection of organized crime witnesses and members of their families against threats, intimidation, and bodily harm is absolutely essential.

Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Committee on the Judiciary, 91st Cong., 1st Sess. 112 (1969) (statement of Attorney General Mitchell).

80. *See supra* note 2. Prior to the inclusion of a private remedy in RICO, Congress recognized the limited role of private citizens in the effort against organized crime. Congress noted the value of distributing pamphlets to businessmen to educate them about the warning signs of incipient organized crime infiltration. *See Subcomm. No. 5 of the House Comm. on the Judiciary, Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 409-10 (1970) (citizen awareness and involvement is essential).

defendant who had already been convicted under criminal RICO.[81] After the government obtained a criminal conviction of the defendant with the victim's help, the victim could then impose additional sanctions on the defendant in the form of treble damages.

The following suggested amendment to section 1964(c) of RICO incorporates a prior RICO conviction requirement:[82]

§ 1964 Civil Remedies

(c) Any person injured *by an act of racketeering activity that results in a violation of section 1962 of this chapter, for which the government has obtained a conviction under section 1962 of this chapter,* may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

IV. IMPACT OF A PRIOR RICO CONVICTION REQUIREMENT

The proposed amendment would allow private recovery for injuries caused by a single act of racketeering activity. In a situation in which a defendant committed three separate acts of arson against the properties of three different persons, most courts today would deny a section 1964(c) cause of action against the defendant because each plaintiff's injury failed to result from a pattern of racketeering activity with regard to him.[83] Under the amendment, however, once the government proved that the three acts of arson established a pattern of racketeering activity by which the defendant maintained an enterprise in violation of section 1962, each victim could sue the defendant for treble damages. The amendment, therefore, would better fulfill RICO's purpose of eliminating organized crime by means of financial divestment. If a jury determined that a defendant's activities were within the scope of RICO, the defend-

81. One commentator has noted:

> It is not clear whether treble damages really offer a significant incentive for a private plaintiff to take on organized crime syndicates. If one is not willing to lose one's house, or one's family, for single damages, one is not likely to find trebel damages to be a much better bargain. On the other hand, treble damages are likely to be sought by private plaintiffs who have no fear of reprisal from a defendant, perhaps because the defendant is not the sort of criminal the statute meant to attack.

Bradley, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities"*, 18 GA. L. REV. 43, 53 n. 65 (1983).

82. This amendment requires the addition of a provision establishing that the criminal action would toll the limitation period for the § 1964(c) action. For example, the limitation period on the § 1964(c) claim might run for one year from the date of judgment in the criminal action.

83. *See supra* notes 3-14 and accompanying text.

ant would be subject to civil liability.[84]

The proposed amendment would also promote a more efficient use of RICO. Victims would have an incentive to aid the prosecution of violators because they would have a financial interest in the outcome. Also, the amendment would prevent plaintiffs from bringing section 1964(c) actions in bad faith, thereby conserving considerable judicial resources.

The amendment would also make the use of collateral estoppel available, increasing the effectiveness of private civil RICO. A prior criminal RICO conviction would estop a defendant from denying the essential allegations of a RICO offense in a subsequent civil proceeding.[85] In order to prevail, a private plaintiff would only be required to prove that the defendant's activities caused him injury.

V. CONCLUSION

The adoption of the proposed amendment would halt the abuse of private civil RICO. In particular, the proposed amendment would halt the use of RICO as an alternative and cumulative remedy to the federal securities laws. By injecting prosecutorial discretion into civil RICO, the proposed amendment would unite the government and private citizens in a single front against organized crime. The adoption of a prior criminal conviction requirement is a necessary and practical solution to the apparent failure of section 1964(c).

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84. In *Sedima,* the Supreme Court noted potential problems associated with a prior criminal conviction requirement. 105 S.Ct. at 3282 n.9. The Court reasoned that such a requirement would restrict the availability of private actions and would create incentives for plea bargaining. In addition, the requirement might create problems with self-serving trial testimony and with the statute of limitations. *Id.* While these claims may well arise in unique cases, the documented abuse of civil RICO absent a prior conviction requirement outweighs the risk. Also, the statute of limitations problems are not insurmountable. *See supra* note 82.

85. 18 U.S.C.A. § 1964(d) (1984) currently estops a defendant convicted under criminal RICO from denying the essential allegations of the RICO violation in a subsequent civil proceeding brought by the government. In County of Cook v. Lynch, 560 F. Supp. 136, 137 (N.D. Ill. 1982), for example, the government had obtained criminal convictions of the defendants under § 1962(d) for their participation in a conspiracy to obtain fraudulent real estate tax assessment reductions by bribing county officials. Noting that federal law no longer required mutuality for the "offensive" use of collateral estoppel, the court granted plaintiff's motion for summary judgment on the issue of defendants' liability under § 1962(d).