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A Trial Lawyer's Guide: Everything You Always Wanted to Know about RICO Before Your Case Was Dismissed

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A TRIAL LAWYER'S GUIDE: EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT RICO BEFORE YOUR CASE WAS DISMISSED

MARK E. DUVAL†

The Racketeer Influenced Corrupt Organizations Act (RICO) is a complicated and powerful cause of action. In addition to criminal penalties, RICO provides a civil cause of action for victims of organized criminal activities, white collar crime, and garden variety fraud. Treble damages and attorney's fees provide sufficient incentive for plaintiffs to aid the government in the fight against organized crime. This Article is a pragmatic guide to attorneys in bringing a cause of action under RICO.

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INTRODUCTION

The Racketeer Influenced Corrupt Organizations Act (RICO), instills fear in many defense-oriented civil litigators. RICO is also heralded by plaintiff's attorneys as a much needed panacea to aggrieved fraud victims.¹ Whatever the reader's perspective, RICO provokes controversy and is a fascinating tool to the civil litigator representing a wide variety of fraud victims.² This Article addresses how to litigate a RICO

1. See Nathan, *Civil RICO: A Primer on the Emerging Use and Abuse of an Elastic Treble Damage Remedy*, RICO: THE ULTIMATE WEAPON IN BUSINESS & COMMERCIAL LITIGATION Tab F-2, at 1-2 (ABA Nat'l Inst. 1985); see also, Horn, "Civil RICO Action: Weapon for Business Victims," LEGAL TIMES OF WASHINGTON 38 (Jan. 19, 1981).

2. As Professor Blakey has stated:

Congress found that "organized" criminal "activity" used "fraud" to "drain" "dollars" from the American economy and to "harm innocent investors." Congress, therefore, passed RICO to "provid[e] enhanced sanctions and new remedies." "Nothing on the face of . . . [RICO] suggests a congressional intent to limit its coverage"

Blakey, *The RICO Civil Fraud Action In Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237, 247-48 (1982) (citations omitted).

Congress, in the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970) (codified at 18 U.S.C. § 1961 (1982)) stated:

lawsuit by discussing the multiple definitions RICO has been given, suggesting pleading techniques, making discovery recommendations, and reviewing courtroom tactics used at trial.

In dissecting the words which comprise the acronym "RICO," it is evident that strong language is employed. The use of the word "racketeer" suggests that RICO's provisions are aimed at gangsters, mafioso types, loan sharks, professional arsonists, and the like.³ That proposition, although true, is also inadequate. RICO was enacted by Congress to eradicate the pernicious effects of organized and white collar crime in this country.⁴ Regardless of any individual perspective, RICO was purposefully enacted to apply to a vast array of fraudulent activity. RICO empowers civil litigants to bring "garden variety" business fraud claims that have never before been afforded a federal forum.⁵

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and wide-spread activity that annually drains billions of dollars from America's economy by unlawful conduct and illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id.

RICO potentially applies to a wealth of fraudulent activity normally not cognizable in federal court. See generally Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1103-05 (1982) (discussing judicial interpretations narrowing RICO).

3. See Blakey, *supra* note 2, at 250-52 n.41 (discussion of import and seriousness of word "racketeer").

4. See *id.* at 249; Moran, *Pleading a Civil Rico Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma*, 57 TEMP. L.Q. 731, 731 (1984).

5. See Moran, *supra* note 4, at 731.

RICO has encountered hostility from the bench and bar in the short tenure in which it has been actively used by practitioners.⁶ Judicial criticism seems predominantly motivated by the potential RICO has for significantly expanding federal jurisdiction and, hence, federal court dockets across the nation.⁷ A crafty litigator can allege a marginal RICO count and become entitled to federal jurisdiction on a traditionally state cause of action for fraud. At least one court has complained that there is now a "RICO bar" prosecuting civil RICO claims.⁸ The incentive for using federal courts will continue to exist until state legislatures enact similar treble damage legislation.

RICO is also denounced for a variety of other reasons. The most frequently cited reason is the belief that Congress did not intend it to reach such a broad array of commercial activity.⁹ Some courts have presented a convoluted and tortured exposé on the legislative history of RICO in a futile attempt to argue that it was not intended to be so broad and should be narrowly construed.¹⁰ Some commentators and courts are advocating unadulterated judicial legislation.¹¹

RICO is, despite popular belief, well-tailored and crafted. Its scope is ostensibly broad because it seeks to affect organized crime. "Organized crime" is a difficult phrase to define, and Congress did not want to shackle federal prosecutors or private attorneys general with an unworkable statute that

6. *See id.*

7. *See Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 389-90 (7th Cir. 1984), *aff'd per curiam*, 105 S. Ct. 3291 (1985).

8. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 486 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

9. *See Moran, supra* note 4, at 733-34; Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 892-93 (1980); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 293-95 (1983); Weinberg, *Mother of God, is this the End of RICO?*, 1983 A.B.A. J. 130, 130-31. *But see* Wexler, *Civil RICO Comes of Age: Some Matrimonial Problems and Proposal for Reform*, 35 RUTGERS L. REV. 285, 286-88 (1983).

For criticisms lodged against RICO as it currently exists and the debate being waged for its legislative reform, see DuVal, *RICO's Congressional History and Future*, RICO RICO EVERYWHERE!, Section I, at 11-22 (Minn. Inst. of Legal Educ. Nov. 1985). Three bills are currently pending before Congress to amend RICO. *Id.* at 13-18.

10. *See, e.g., Sedima*, 741 F.2d at 488-504; *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 851-52 (E.D. Va. 1983); *Johnsen v. Rogers*, 551 F. Supp. 281, 285 (S.D.N.Y. 1982).

11. *See Note supra* note 2, at 1103-05; Brown, *RICO Repercussions: Sedima and Haroco*, 21 CAL. W.L. REV. 282 (1985) (comparing the Second and Seventh Circuits' approach to RICO and its legislative history).

would not meaningfully enhance prosecution and civil judgments against those benefiting from the fruits of crime.¹² By enacting RICO, Congress deliberately chose to use the drag-net approach, rather than merely handing the prosecutor or civil litigator a fishing pole.

RICO's application is not disturbing when one considers that organized crime operates in many spheres and is not limited to loan sharking, gambling, and store front extortion. RICO has to be flexible and chameleon-like to apply to these situations. The criticism that RICO should not apply to "ordinary fraud" is troublesome since white collar crime does not receive enough attention in this country. As any civil litigator dealing regularly in business fraud, bankruptcy, securities, and loan transactions can report, business fraud is a serious and somewhat accepted way of life in the United States.¹³ RICO punishes only the most egregious of those fraudulent activities because to prove its elements requires more than just the presentation of a fraud case.

Many of RICO's detractors base their complaints on the over-expansive interpretation they believed RICO was being given by the Seventh Circuit Court of Appeals. Detractors sided with the interpretation given RICO's provisions by a tril-

12. Congress deliberately chose not to include a definition of "organized crime" in RICO since it would have unnecessarily narrowed the scope of the Act and would have created a violation of criminal laws based on one's status. Such a classification is constitutionally suspect. See 116 CONG. REC. H35,293 (1970) (statement of Rep. Poff); see also DuVal, *supra* note 10, at 9-10; Comment, *Civil RICO: The Resolution of the Racketeering Enterprise Injury Requirement*, 21 CAL. W.L. REV. 364, 370-71 (1985).

Senator Hruska described RICO as attacking the economic power of organized crime on two fronts; criminal and civil. He considered the civil provision the more important feature of the bill. "[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill I believe that the time has arrived for innovation in the organized crime fight." 115 CONG. REC. 6993 (statement of Sen. Hruska).

13. In 1974 the United States Chamber of Commerce conducted a comprehensive study of the direct economic cost of fraud in our society. The resulting costs are:

	<i>Types of Fraud</i>	<i>Billions of Dollars</i>
1.	Bankruptcy Fraud	.08
2.	Bribery, Kickbacks, and Payoffs	3.00
3.	Consumer Fraud	21.00
4.	Embezzlement	7.00
5.	Insurance Fraud	2.00
6.	Receiving Stolen Property	3.50
7.	Securities Theft and Fraud	4.00

UNITED STATES CHAMBER OF COMMERCE, WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS 6 (1974).

ogy of cases in the Second Circuit Court of Appeals.¹⁴ The Second Circuit's reading of RICO and its legislative history was so narrow that it essentially emasculated RICO's utility as a statute designed to combat the infiltration of legitimate businesses by organized crime.¹⁵ The Seventh Circuit's position is that RICO is necessarily broad and must reach a wide variety of conduct to effectively reach the multifarious activities into which organized crime is now involved. RICO, it is argued, essentially deputizes private attorney's general who assist the federal government in fighting organized crime by prosecuting civil RICO lawsuits.¹⁶ The civil litigant is induced to assist the government by the lure of treble damages, attorneys' fees, costs, and disbursements to the successful plaintiff.¹⁷

The debate ended recently when the United States Supreme Court decided the Second Circuit case of *Sedima, S.P.R.L. v. Imrex Co.*,¹⁸ and the Seventh Circuit case of *Haroco, Inc. v. American National Bank & Trust Co.*¹⁹ The Court basically adopted the interpretation given RICO by the Seventh Circuit. The Supreme Court rejected the Second Circuit's reading of RICO which required that a plaintiff show that the defendant had previously committed a criminal RICO offense before a civil RICO action could be prosecuted. The Court also rejected the requirement that a plaintiff establish the fact that it had suffered a competitive injury separate and apart from the injury arising from the underlying predicate acts enumerated in RICO.

14. *Sedima*, 741 F.2d 482; *Bankers Trust v. Rhoades*, 741 F.2d 511 (2d Cir. 1984); *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984). Petitions for certiorari were filed in both *Bankers Trust* and *Furman*, but the Supreme Court withheld action on the petitions pending the *Sedima* decision.

15. See *Sedima*, 741 F.2d at 488-504; Moran, *supra* note 4, at 733-34. In *Haroco*, the Seventh Circuit stated:

We do not believe we could limit RICO in the ways argued by the Second Circuit without disturbing the policy choices the Congress has made. If the safety or stability of the Republic demanded, we might be justified in pursuing an aggressive jurisprudence. But, particularly at the pleading stage, we seem to be dealing with much smaller stakes—legal fees and the sensibilities of prominent defendants alleged to be "racketeers." Those stakes do not justify our rejecting Congress's choice of a statute that sweeps broadly.

Haroco, 747 F.2d at 399.

16. See *Haroco*, 747 F.2d at 392, 398-99.

17. 18 U.S.C. § 1964(c).

18. 105 S. Ct. 3275 (1985).

19. *American Nat'l Bank Co. v. Haroco, Inc.*, 105 S. Ct. 3291 (1985).

At this point in time, RICO has survived judicial scrutiny and remains a potent weapon to the civil litigant representing victims of fraud and business torts. RICO's next challenge to its existence comes at the congressional level where many have been clamoring for Congress to legislatively restrict RICO's broad and sweeping provisions.

This Article does not purport to survey RICO's legislative history since the world of legal academia has thoroughly reviewed this area.²⁰ This Article will address the pragmatic side of pleading, proving, and litigating a RICO case. First, this Article will examine RICO definitions and their importance in bringing a RICO suit. Second, the definitions will be applied in drafting an effective complaint. Third, procedural considerations will be explored. Fourth, the problems RICO poses in discovery will be explained. Finally, certain trial tactics will be presented.

I. RICO DEFINITIONS

There are several interpretational variations in RICO which produce the most controversy among federal courts. In analyzing the statute, it is evident that it has adopted its own lexicon. The words and phrases "enterprise," "person," "racketeering activity," and "pattern of racketeering activity" are important components of RICO. Most of the debate centers around the interpretation of various definitions. Section 1964(a) sets up the statute's basic applicability:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1962] may sue therefore in any appropriate United States

20. Professor Blakey capsulizes RICO's legislative history in the following way:

(1) Congress fully intended, after specific debate, to have RICO applied *beyond* any limiting concept like "organized crime" or "racketeering";

(2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would *not* be limited by antitrust test concepts like "competitive," "commercial," or "direct or indirect" injury;

(3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;

(4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and

(5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.

Blakey, *supra* note 2, at 280 (emphasis in original).

district court and shall recover three fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.²¹

In addition to authorizing recovery of treble damages as a civil remedy, RICO also allows equitable remedies including injunctions, divestitures, and dissolutions to restrain violations of its substantive provisions.²² It is unclear at this time whether equitable relief is available to private litigants. Equitable relief, however, is available to the federal government in civil actions.²³ The Eighth Circuit has declined to answer whether private litigants are entitled to equitable relief and the Fourth Circuit has expressed doubts.²⁴ Despite the apparent ambiguity that exists, several courts have already indicated that private litigants may obtain equitable relief under the auspices of RICO.²⁵ The confusion stems from a reading of subsections (c) and (b) of section 1964.

Subsection (c) of section 1964 creates the private right of action under RICO, but lists treble damages as its only remedy.²⁶ Subsection (b) empowers the United States Attorney General's office to try civil suits and expressly permits equitable actions.²⁷ The question devolves whether Congress also intended to extend equitable remedies to private litigants.

RICO prohibits several types of activities which are actionable under its provisions. The three basic activities are: (1) investment in an enterprise engaged in or affecting interstate or foreign commerce of income obtained through a pattern of racketeering activity or through a collection of an unlawful debt;²⁸ (2) acquisition of an interest in an enterprise through a pattern of racketeering activity or through collection of an un-

21. 18 U.S.C. § 1964(c) (1982).

22. *Id.* § 1964.

23. *Id.* § 1964(b). It is unclear if RICO's equitable remedies are available to private litigants. See *supra* notes 139 and accompanying text.

24. See *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir.), *modified*, 710 F.2d 1361 (8th Cir. 1982), *cert. denied sub nom.*, *Prudential Ins. Co. v. Bennett*, 464 U.S. 1008 (1983).

25. See, e.g., *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1384 (N.D. Ill. 1984) (equitable restitution); see also *United States v. Barber*, 476 F. Supp. 182, 189 (S.D. W. Va. 1979) (dissolution and divestiture appropriate in some circumstances); *United States v. Mandel*, 415 F. Supp. 997, 1021 (D. Md. 1976) (divestiture and forfeiture available remedies under RICO).

26. See 18 U.S.C. § 1964(c).

27. *Id.* § 1964(b).

28. *Id.* § 1962(a).

lawful debt;²⁹ and (3) conducting the affairs of such an enterprise through a pattern of racketeering or through collection of an unlawful debt.³⁰ A conspiracy to commit any of the above three offenses is the fourth actionable provision found in the statute.³¹ Since the first and second activities require proof of tracing laundered money to legitimate businesses, it is a difficult and onerous task to prove at trial. Many litigators, therefore, have chosen to proceed under section 1962(c), seeking to prove that the defendant has conducted the affairs of an enterprise through a pattern of racketeering or through collection of an unlawful debt.

Laying out section 1962 into its constituent parts, the following elements are found:

1. A person (as defined in section 1961(3));
2. Employed or associated with;
3. An enterprise (section 1961(4));
4. Which enterprise is engaged in, or the activities of which enterprise affect, interstate or foreign commerce; and
5. A person employed by or associated with the enterprise conducts or participates in the enterprise's affairs;
6. Through a pattern (section 1961(5));
7. Of racketeering activity (section 1961(1)).³²

Distilling RICO to its core, one must prove that a person has invested in, acquired, or conducted an enterprise by means of a pattern of racketeering activity or through collection of an unlawful debt. Each of these terms present interesting interpretational problems.

A. Enterprise

Section 1961(4) defines enterprise to include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact. Courts have interpreted enterprise to include almost any combination of individuals or organizations. Enterprises may include labor unions,³³ partnerships,³⁴ foreign corporations,³⁵ groups of

29. *Id.* § 1962(b).

30. *Id.* § 1962(c).

31. *Id.* § 1962(d). For a discussion of conspiracy under RICO, see Nathan, *supra* note 1, at 14-15.

32. 18 U.S.C. § 1962; see Nathan, *supra* note 1, at 6-14.

33. See, e.g., *United States v. Boffa*, 688 F.2d 919, 937 (3d Cir. 1982), *cert. denied*.

corporations,³⁶ and units of government.³⁷ This interpretation has ostensibly broadened RICO's application.

One of the first milestones RICO achieved in being interpreted was to shed the idea that it applied only to illegitimate enterprises.³⁸ Some courts reasoned that an association of individuals for illicit purposes could be deemed an "enterprise" under the statute.³⁹ The Supreme Court, in *United States v. Turkette*,⁴⁰ resolved the dispute by holding that an enterprise embraces both legitimate and illegitimate associations.⁴¹ The Court in *Turkette* followed RICO's mandate that "provisions of this Title shall be liberally construed to effectuate its remedial purposes."⁴²

Turkette clarified an additional problem associated with the definition of "enterprise." The Seventh Circuit, construing RICO too liberally, interpreted "enterprise" by suggesting that an enterprise could be the pattern of offenses.⁴³ The

460 U.S. 1022 (1983); *United States v. Scotto*, 641 F.2d 47, 52 (2d Cir. 1980), *cert. denied*, 453 U.S. 961 (1981); *United States v. Campanale*, 518 F.2d 352, 355 (9th Cir. 1975), *cert. denied sub nom.*, 423 U.S. 1050 (1976); *United States v. Gibson*, 486 F. Supp. 1230, 1244 (S.D. Ohio 1980).

34. 18 U.S.C. 1961(4); Nathan, *supra* note 1, at 7.

35. See Liman, *Civil RICO: An Overview*, RICO: THE ULTIMATE WEAPON IN BUSINESS & COMMERCIAL LITIGATION, Tab F-3, at 13 (ABA Nat'l Inst. 1985)

36. *Id.*

37. See, e.g., *United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981) (state civil court), *cert. denied sub nom.*, *Ribotsky v. United States*, 455 U.S. 910 (1982); *United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir. 1977) (local regulatory board), *cert. denied sub nom.*, *Sills v. United States*, 434 U.S. 1072 (1978); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977) (local police department), *cert. denied*, 435 U.S. 904 (1978). *But see* *United States v. Thompson*, 669 F.2d 1143, 1145 (6th Cir. 1982) (office of governor not an "enterprise").

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

39. See, e.g., *United States v. Rone*, 598 F.2d 564, 569-70 (9th Cir. 1979) (burglary ring); *United States v. Clemones*, 577 F.2d 1247 (5th Cir. 1978) (prostitution ring); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied sub nom.*, *Napoli v. United States*, 429 U.S. 1039 (1977) (band of gamblers).

40. 452 U.S. 576 (1981).

41. *Id.* at 585.

42. See *id.* at 587, quoting, 84 Stat. 947.

43. See *United States v. Cappetto*, 502 F.2d 1351, 1354 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). The Sixth Circuit interpreted *Cappetto* as allowing "the prosecution of illegal gamblers for conducting illegal gambling through a pattern of illegal gambling . . ." *United States v. Sutton*, 605 F.2d 260, 269 (6th Cir. 1979). The *Sutton* court pointed out why the enterprise must be separate from the pattern offenses.

Surely their draftsman would not have opted for so complex a formulation if the legislative purpose had been merely to proscribe racketeering, without more. A straightforward prohibition against engaging in "patterns of racketeering"

Supreme Court rejected this reasoning in *Turkette* and held that an enterprise must have an existence independent of the predicate offenses.⁴⁴

B. Person

Courts have not only confused enterprise with the underlying pattern offenses,⁴⁵ they have also failed to distinguish the “enterprise” from the “person” who commits the RICO offense. Section 1961(3) defines a “person” as any individual or entity capable of holding a legal or beneficial interest in property.⁴⁶ RICO’s language suggests that the enterprise is separate and distinct from the person or persons who utilize the enterprise in a forbidden manner. A RICO defendant is one who “controls or participates” in the affairs of the enterprise, or who “invests” or “acquires an interest in an enterprise through a pattern of racketeering activity.”⁴⁷ The definition of “person” does not only dictate who can be named as a RICO defendant, but it also defines who qualifies as a RICO plaintiff. Section 1964(c) operates as a proximate cause requirement in RICO since a person can only recover if he is injured “in his business or property.” This proximate cause requirement is discussed later in the article.⁴⁸

One of the problems frequently encountered by courts is whether a corporation can be considered both a “person” and an “enterprise” in a RICO suit.⁴⁹ Courts are split on this is-

teering activity” would have sufficed, and there would have been no need for a reference to “enterprises” of any sort.

Id. at 266.

44. See *Turkette*, 452 U.S. at 582-83.

45. Liman, *supra* note 35, at 14.

46. 18 U.S.C. § 1961(3).

47. See *id.* § 1962.

48. See *infra* notes 130-37 and accompanying text.

49. Arthur Liman stated that a RICO enterprise must be separate from a person:

The better argument is that for the same reasons that the enterprise cannot be the underlying pattern offenses, the enterprise cannot be the person. For example, section 1962(c) prohibits “any person employed by or associated with any enterprise” from conducting the enterprise’s affairs through a pattern of racketeering activity. Because an enterprise can be an individual or any other association, a person accused of a RICO violation could always be identified as the enterprise, since he is always “associated with” himself. If the defendant is both the person and the enterprise, section 1962(4) states merely that a person who participates in a pattern of racketeering activities violates RICO.

Liman, *supra* note 35, at 15 (citations omitted). Professor Blakey disagrees that the “person” and “enterprise” must be separate. Professor Blakey states:

sue.⁵⁰ For example, the Fourth Circuit has held that a corporation simultaneously cannot be both the enterprise and the defendant in a RICO action.⁵¹ The Eleventh Circuit disagrees, adopting the broad reading given "enterprise" by the United States Supreme Court in *Turkette*.⁵² Following the parity of reasoning used to hold that an enterprise cannot also be part of the pattern offenses, it seems clearly analogous that an enterprise cannot also be the person. The language of RICO supports this rationale.⁵³

To be sure, the text of RICO requires the showing of two separate elements: "person" and "enterprise." But nothing in this statute compels the conclusion that the elements are mutually exclusive. Nothing on the face of the statute, on the other hand, compels a conclusion that they are *not* mutually exclusive. Either reading of the statute would be consistent with its unadorned text. The resolution of the issue, however, ought to turn on which statutory construction is most consistent with Congress' expressed purpose to provide "enhanced sanctions and new remedies." Obviously, too, Congress' characterization of RICO as "remedial" and is directive that RICO be "liberally construed" to implement that characterization ought to be brought into play. Following that approach, the proper result should depend on the particular relationship between the "person," "enterprise," and "pattern of racketeering activity" that is involved in the violation of each of RICO's basic standards. In some situations, no objection ought to be raised to attributing to the "enterprise" civil liability or criminal responsibility for the conduct of the "person." In other situations, such an attribution would be perverse.

Blakey, *supra* note 2, at 287-90 (citations omitted).

50. See, e.g., *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (a corporation cannot simultaneously be the "enterprise" and the defendant in a substantive RICO charge), *cert. denied*, 459 U.S. 1105 (1983); *Fields v. National Republic Bank*, 546 F. Supp. 123, 124 (N.D. Ill. 1982) (if the bank is considered the enterprise then plaintiff did not identify a person); *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982) (corporation may be simultaneously both the defendant and the enterprise), *cert. denied*, 459 U.S. 1170 (1983).

51. See *Computer Sciences Corp.*, 689 F.2d at 1190.

52. See *Hartley*, 678 F.2d at 988. One commentator makes the following remarks to suggest that the language in RICO supports the idea that the enterprise must be separate and distinct from the person.

The language of the statute suggests that the "enterprise" must also be separate and distinct from the person or persons who are manipulating the "enterprise" in the forbidden manner. The defendant under RICO is the person who "conducts or participates" in the affairs of the enterprise or who "invests" or "acquires" an interest in the enterprise through a pattern of racketeering. The statute defines person as including "any individual or entity capable of holding a legal or beneficial interest in property." The definition covers not only the person who can be named as a defendant in either a criminal or civil suit, but also the person who, "having been injured in his business or property," may initiate a civil action.

Nathan, *supra* note 1, at 10-11.

53. The language of RICO does not give an obvious indication that a civil action can proceed only after a criminal conviction. The word "conviction" does not appear in any relevant portion of the statute. See 18 U.S.C. §§ 1961, 1962, 1964(c). To the contrary, the predicate acts involve conduct that is "chargeable" or "indictable" and

C. Racketeering Activity

Racketeering activity is defined in Section 1961 as conduct traditionally considered criminal which is "chargeable" or "indictable" under state or federal law, including murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs.⁵⁴ Racketeering activity also involves more commonly pled conduct such as bankruptcy fraud, fraud in the sale of securities, and mail and wire fraud, all of which are punishable under any law of the United States.⁵⁵

"offense[s]" that are "punishable" under various criminal statutes. *Id.* § 1961(1). As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be convicted. *See also* S. Rep. No. 91-617, p. 518 (1969) "a racketeering activity . . . must be an act in itself *subject* to criminal sanction." (emphasis added.) Thus, a prior conviction requirement cannot be found in the definition of "racketeering activity," nor can it be found in section 1962, which sets out the statute's substantive provision. Indeed, if either section 1961 or section 1962 contained such a requirement, a prior conviction would also be a prerequisite, for a criminal prosecution, or for a civil action by the government to enjoin violations that had not yet occurred.

54. 18 U.S.C. § 1961. Offenses of racketeering activity include:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, 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 any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 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 the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic); (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); or (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

Id.

55. 18 U.S.C. § 1961.

The reference to the words "chargeable," "indictable," and "punishable" in section 1961(1) has prompted the question of whether a person must have been convicted of the predicate offense to be liable. This question fueled a major controversy between the Second and Seventh Circuits. The Second Circuit required a showing that the defendant was convicted of a predicate RICO act before the plaintiff had standing to sue.⁵⁶ The Seventh Circuit rejected the Second Circuit's view and found that it was an unnecessary and tortured view of the statute.⁵⁷ The United States Supreme Court recently settled this question in *Sedima*,⁵⁸ in which it held that a prior criminal conviction requirement is not found in the definition of racketeering activity.

The final category of RICO offenses is a conspiracy to commit the offenses proscribed by the statute.⁵⁹ The case law developing in the area of conspiracy must, of necessity, be borrowed from criminal RICO cases. The Fifth Circuit, in *United States v. Elliot*,⁶⁰ held that in criminal RICO cases, "[t]o be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through commission of two or more predicate crimes*."⁶¹ This means that the RICO conspirator must have agreed to commit at least two predicate acts.⁶²

56. *Id.*; *Sedima*, 741 F.2d at 496.

57. *See Haroco*, 747 F.2d at 393-94. Other courts also jumped into the fray. Several courts have allowed a civil RICO suit to be maintained without requiring that the defendant be charged or indicted by the government for committing a crime. *See, e.g.*, *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982); *Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1981); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

58. 105 S. Ct. 3275 (1985). The Supreme Court in *Sedima* held:

In sum, we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under § 1964(c) can proceed only against a defendant who has already been convicted. To the contrary, every indication is that no such requirement exists.

Id. at 3284.

59. 18 U.S.C. § 1962(d).

60. 571 F.2d 880 (5th Cir.), *cert. denied sub nom.*, *Delph v. United States*, 439 U.S. 953 (1978).

61. *Id.* at 903 (emphasis in original).

62. *See United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983).

One commentator suggests that an action based upon a conspiracy to violate

Out of the categories of predicate offenses elucidated above, it is clear that those with the most potential for federalizing traditionally state causes of action, or significantly expanding federal jurisdiction, are mail fraud, wire fraud, fraud in the sale of securities, and bankruptcy fraud.⁶³ Courts have historically been reluctant to create a private right of action under the mail and wire fraud statutes.⁶⁴ RICO obviates this reluctance and provides plaintiffs with a cause of action if only two acts of wire or mail fraud are shown, thereby establishing a pattern.⁶⁵

As a result, RICO makes federal courts available to several

RICO should be the same as the tort of civil conspiracy. Its elements are: "(1) an agreement between or among the defendants to do an unlawful thing or to do a lawful thing in an unlawful manner and (2) an overt act that results in damages to the plaintiff." Nathan, *supra* note 1, at 15; see Mizokami Bros., Inc. v. Mobay Chemical Corp., 660 F.2d 712, 718 n.8 (8th Cir. 1981); Fenslage v. Dawkins, 629 F.2d 1107, 1110 (5th Cir. 1980); Arlinghaus v. Ritenour, 622 F.2d 629, 639 (2d Cir.), *cert. denied*, 449 U.S. 1013 (1980).

63. The mail fraud statute is found in 18 U.S.C. § 1341 and the wire fraud statute is found in 18 U.S.C. § 1343. The securities fraud statute is found at 15 U.S.C. § 78(ff) and the bankruptcy fraud statute is found at 11 U.S.C. §§ 107, 403(c).

RICO's unanticipated potential to federalize common law fraud arises from the statute's inclusion of federal mail and wire fraud as possible predicate offenses. To establish a criminal violation of the mail and wire fraud statutes, only a scheme to defraud and the use of mails or wires for the purpose of executing the scheme need be proved. Courts uniformly have refused, however, to create a private cause of action under these statutes. Thus, the defrauded plaintiff has been relegated to a common law action in state court. However, because RICO requires only two acts of mail or wire fraud to establish a violation, and because each mailing or wire use in furtherance of a fraudulent scheme, whether or not pursuant to the same scheme, constitutes a separate offense, a private right of action for treble damages is available for violation of section 1962 in virtually every case of commercial mail and wire fraud. Section 1962(c) prohibits an employee or associate of an enterprise from "conduct[ing] . . . such enterprise's affairs through" any two acts of mail or wire fraud. Similarly, section 1962(b) makes it unlawful to fraudulently "acquire . . . any interest in or control of any enterprise" through any two such acts. Given the prevalence of mail and wire use in commercial transactions, RICO's provisions for a private cause of action predicated on violations of the mail and wire fraud statutes virtually federalizes common law fraud.

See Note, *supra* note 2, at 1104-05 (citations omitted).

The United States Supreme Court in *Sedima* took judicial notice of an ABA task force report that found "of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% 'allegations of criminal activity of a type generally associated with professional criminals.'" *Sedima*, 105 S. Ct. at 3287 (citing Report, *Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP. BANKING & BUSINESS LAW 55-56).

64. See, e.g., Ryan v. Ohio Edison Co., 611 F.2d 1170, 1177-79 (6th Cir. 1979); Bell v. Health-Mor, Inc., 549 F.2d 342, 346 (5th Cir. 1977). For discussion of the use of mail and wire fraud in RICO cases, see Liman, *supra* note 35, at 16-20; Nathan, *supra* note 1, at 16-20.

65. The Act requires "at least two acts of racketeering activity" within a 10 year

new classes of fraud victims who were traditionally relegated to state court and state law formulations for damages, which are generally out-of-pocket losses.⁶⁶ The statute also provides fraud victims with an enhanced reason to choose to prosecute an action in federal court because of its treble damage provision.⁶⁷

D. Pattern of Racketeering Activity

The definition of racketeering activity was analyzed in the previous section. This portion of the Article focuses on the "pattern" necessary to be established in a RICO action. A "pattern of racketeering activity" is defined in section 1961(5) as "at least two acts of racketeering, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."⁶⁸

The effective date of the RICO legislation was October 15, 1970, so that any two racketeering acts occurring within a ten-year period after 1970 is cognizable as a pattern of racketeering activity under federal law.⁶⁹ In most cases, if the isolated act of fraud is truly an integral part of any fraudulent scheme, it will have occurred within a relatively short time frame and certainly shorter than ten years. Such a pattern is usually not difficult to establish under this standard.

While RICO ostensibly erects the "pattern" barrier to weed out civil litigants, a pattern is quite easy to construct in three basic scenarios. First, a pattern develops when one act is indictable, chargeable, or punishable under both state and federal law. It is conceivable that a single criminal act prosecutable under state and federal law provides a civil litigant with the two necessary predicate acts for a RICO action. For example, if a RICO defendant violated state gambling laws

period. 18 U.S.C. § 1961(5). Mail and wire fraud are two predicate acts of racketeering activity.

66. See, e.g., *Strouth v. Wilkinson*, 302 Minn. 297, 300, 224 N.W.2d 511, 514 (1974).

67. 18 U.S.C. § 1964(c).

68. *Id.* § 1961(5).

69. The date of passage of RICO was October 15, 1970. See Pub. L. No. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, as amended by Pub. L. No. 95-575 § 3(c) Nov. 2, 1978, 92 Stat. 2465; Pub. L. No. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677.

punishable by a year's imprisonment, a racketeering act would have also been committed. Furthermore, by committing the state gambling offense, the defendant would also have violated 18 U.S.C. § 1955, a federal act prohibiting certain operations which violate the state gambling laws. This act is also denominated as a racketeering activity in section 1961(1)(B) of RICO. It follows, that *two* predicate acts were committed for RICO's definitional purposes. This single violation could result in a pattern of racketeering activity and RICO liability.⁷⁰

The second scenario in which a RICO action is easily constructed is when a single criminal episode constitutes a pattern of racketeering activity.⁷¹ For instance, in *United States v. Moeller*,⁷² the defendant was criminally charged with burning a factory and kidnapping three employees. These acts were all committed within the course of one afternoon. The question arose whether these acts strung together in a short time frame could be interpreted as a pattern of racketeering activity. The court held that they could, and did not dismiss the RICO indictment.⁷³

The final scenario in which RICO elements are satisfied is when there are two acts of mail or wire fraud pursuant to a single fraudulent scheme. Under federal criminal law, each mailing or wire communication translates into a separate violation of the federal mail and wire fraud statutes.⁷⁴ If two mailings or wire communications occurred in furtherance of the

70. See Liman, *supra* note 35, at 11. As pointed out by Mr. Liman, the two offenses may be considered separate crimes for double jeopardy purposes. *Id.*; see also Moran, *supra* note 4, at 779-82.

71. See 18 U.S.C. § 1961(5).

72. 402 F. Supp. 49 (D. Conn. 1975) (relying on *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974)).

73. *Moeller*, 402 F. Supp. at 57-58; see *United States v. Licavoli*, 725 F.2d 1040 (6th Cir. 1984) (conspiracy to commit murder and conspiracy to murder may constitute separate predicate acts for a RICO conviction); see also *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061, 1066 (S.D.N.Y. 1983) (mail and wire fraud where confidential information was sold to attorney for use in soliciting client); *United States v. Chovanec*, 467 F. Supp. 41 (S.D.N.Y. 1979) (six incidents of wire fraud in defrauding the victim over a few weeks period); *United States v. Salvitti*, 451 F. Supp. 195, 200 (E.D. Pa. 1978) (each mailing, although it may be related to a single scheme, is a separate act for purposes of meeting the "pattern" requirement), *aff'd*, 588 F.2d 822 (3d Cir. 1977).

74. See *United States v. Weatherspoon*, 581 F.2d 595, 602 (7th Cir. 1978); *Hulse v. Hale Farms Dev. Corp.*, 586 F. Supp. 120, 122 (D. Conn. 1984) (two or more mailings incident to a scheme to defraud in violation of the mail fraud statute sufficient to allege a substantive RICO violation).

scheme within a ten year period, a pattern of racketeering activity is created.⁷⁵ While the above scenario suggests the apparent latitude in which courts have interpreted RICO in finding a pattern of racketeering, some courts have even held that the two predicate acts need not be related to each other.⁷⁶ This single interpretation defeats whatever definitional limitation Congress chose to impose by inserting the requirement that a pattern be established.

A few courts, including the United States Supreme Court, have addressed the issue of whether the requirement of demonstrating a "pattern" is becoming a superfluous or nonexistent requirement in light of recent decisions.⁷⁷ In an apparent

75. 18 U.S.C. § 1961(5).

76. See *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir. 1978); see also *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983); *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); Moran, *supra* note 4, at 783. The above cases should be compared with the holding in *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), in which the court held there must be a relationship among each of the predicate acts of racketeering. *Id.* at 613-14. With respect to both the *Elliott* and *Stofsky* decisions, Mr. Moran has commented:

Though neither rule is specifically required by the statute, the *Elliott* approach is fundamentally sound and should be followed. Because it is the operation of an enterprise through a pattern of racketeering activity that Section 1962(c) prohibits, the *Elliott* requirement that a plaintiff show that the predicate acts are related to the affairs of the enterprise is firmly based on a plain reading of the statute. If, as previously suggested, the enterprise is alleged as the association in fact of the person or persons who engaged in the predicate acts, the *Elliott* standard should not be difficult to meet. Moreover, adherence to *Stofsky* in certain cases is likely to provoke judicial hostility because *Stofsky* would permit plaintiffs to establish a pattern of racketeering activity on the basis of predicate acts that have nothing to do with the enterprise. For example, in a typical business or commercial fraud action, a plaintiff could, under *Stofsky*, establish the necessary pattern by alleging predicate acts that are totally unrelated to the fraudulent conduct that is the basis for the plaintiff's action. Such a result would encourage misuse of RICO, and should be rejected in favor of the *Elliott* rule.

Moran, *supra* note 4, at 783.

77. See *Sedima*, 105 S. Ct. at 3285 n.14. In *Sedima*, the United States Supreme Court intimated that two underlying predicate acts may not be sufficient to establish a pattern. This underscores the importance of establishing not simply a "technical" pattern but also a "practical" pattern. See also *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6, 12 (W.D. Pa. 1981) (multiple bribes at a single fund-raising event not sufficient for a pattern); *Moeller*, 402 F. Supp. at 57-58 (D. Conn. 1975) (court held the common sense interpretation required finding pattern from different criminal episodes); Anthony, *Exploring RICO: Civil Remedies for Violation of the Organized Crime Control Act of 1970*, HENNEPIN LAW. July-Aug. 1983, at 35-36.

Moran has provided some pragmatic insight to why a pattern should consist not only of two underlying predicate acts, but rather, an actual pattern.

To convince a skeptical district judge, the practitioner should consider whether the defendant's conduct can be characterized, not only legally but also practically, as constituting a pattern of racketeering activity. These

attempt to revitalize the pattern requirement, some courts have held that it may take more than two underlying predicate acts to make a pattern. This interpretation is drawn from the language of section 1961(5) which states that a pattern requires "two or more acts of racketeering." These courts have not felt constrained by previous decisions and have capitalized on the "or more" language to suggest that only two acts of mail fraud for example, may not suffice to make a pattern. This type of analysis implicitly denounces reasoning like that in *Elliott*, that the two predicate acts need not be related.⁷⁸ As a result, this rationale actually resurrects the requirement that a RICO plaintiff establish a nexus between each of the racketeering acts.⁷⁹ This interpretation should be applauded since it may present the only legitimate barrier to spurious fraud actions which are not intended to be true subjects of RICO actions.

Other courts are simply insisting that the racketeering acts must be connected with each other by some common scheme, plan, or motive that constitutes a pattern and not simply a series of disconnected acts.⁸⁰ This requires that a federal court

practical or extra-legislative factors that lend credence to the existence of a pattern or scheme include the relationship among the predicate acts, the relationship of the predicate acts to the enterprise, and the nature and frequency of the predicate acts.

* * *

To minimize the likelihood of judicial resistance, the practitioner should not consider a RICO action unless the two predicate offenses arise from distinct and separate acts that are themselves related to the operation of the enterprise. These acts should be separate in time and place not only from each other, but also from any underlying contract or agreement. In this way, there will be no "bootstrapping" of predicate offenses whereby a pattern is alleged on the basis of a single act or occurrence.

Moran, *supra* note 4, at 781-82, 786 (citations omitted).

78. *Elliott*, 571 F.2d at 899 n.23.

79. See Moran, *supra* note 4, at 782-83.

80. In *Sedima*, 105 S. Ct. at 3285 n.14, the Court stated:

As many commentators have pointed out, the 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," 18 U.S.C. § 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 activity 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 '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

must be convinced that the independent racketeering acts are not disjointed from each other, but are interrelated and designed to promote the enterprise.⁸¹ Courts will probably require a litigant to show more than a "technical" pattern; a "practical" pattern will have to be proved.⁸²

The Supreme Court recently addressed this issue in a footnote in *Sedima*.⁸³ The Court stated, "in common parlance two of anything do not generally form a 'pattern'" and "two isolated acts of racketeering activity do not constitute a pattern."⁸⁴ The Court clarified the issue that two independent

Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'patterns' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." *Id.*

81. *See Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y.), *aff'd*, 527 F.2d 237 (2d Cir. 1975) (must be a relationship among each of the predicate acts of racketeering). Interrelated acts designed to promote the enterprise are likely to be considered part of a pattern. *United States v. Scotto*, 641 F.2d 47, 52 (2d Cir. 1980); *Elliott*, 571 F.2d at 889 (5th Cir. 1978); *United States v. Kaye*, 556 F.2d 855, 860 (7th Cir. 1977).

82. *See Moran*, *supra* note 4, at 787-88 where he states:

Consideration of the nature and frequency of the predicate acts, and the relationship to the enterprise, will allow the practitioner to go beyond a mere determination that the legal elements of a RICO action have technically been met, and will enable him or her to analyze the propriety of a RICO claim in terms of its practical impact on a district judge. Having ascertained that the minimum statutory requirements for a RICO claim can be alleged, the practitioner can then assess whether such a bare-bones assertion, given the entire factual context of the case, is likely to withstand a motion to dismiss. If it will not, the factors discussed above may be used to buttress the minimal assertion of the RICO claim.

If the RICO action cannot be strengthened in this matter, the practitioner must take a closer look at the RICO claim and decide whether the benefits of asserting a minimal RICO action in a garden-variety commercial fraud case are commensurate with the risks. The former include the significant bargaining leverage that comes with the prospect of treble damages in attorneys' fees, while the latter include stiffening opposition, loss of credibility with the district judge, dismissal, and sanctions. Only if there are no other grounds upon which recovery may be predicated, does the assertion of a skeletal RICO action appear to justify its risks. Thus, by focusing on the entire factual context from which a RICO claim must be drawn, the practitioner will be able to temper any immediate inclination to assert a RICO action whenever the letter of the statute can be satisfied.

RICO is a powerful remedy that cannot be ignored in business and commercial litigation. Yet, the practitioner must be mindful of judicial hostility to the use of RICO in such cases, and carefully tailor their complaint to minimize the likelihood that this hostility will manifest itself in a dismissal of the action. This can be done by undertaking a principled analysis of the facts to determine the existence of an enterprise through which statutorily defined "persons" conducted or participated in a statutorily defined "pattern" of racketeering activity.

Id.

83. 105 S. Ct. at 3285 n.14.

84. *Id.*

and unrelated acts of racketeering activity may not be sufficient to constitute a pattern.

II. PLEADING A RICO CASE

A. *Encountering Judicial and Defense Hostility*

From the outset, the practitioner must bear in mind that RICO allegations are met with hostility from both defendants and judges.⁸⁵ The implication that another person or entity is a "racketeer," together with the possibility of being held liable for treble damages, is undoubtedly the origin of this hostility. A RICO complaint must be carefully crafted and well-tailored to the facts of each case. Sloppy and ill-conceived pleading will subject the plaintiff to swift retribution in the form of a motion to dismiss from defense counsel. Plaintiffs should expect that motions to dismiss will be made expeditiously and vigorously, since defendants generally consider being labeled a racketeer repugnant to their integrity and seriously damaging to their reputation.

Pleading a RICO case should not be treated as a perfunctory exercise adopted from a form book.⁸⁶ RICO allegations are serious in tenor and subject defendants to an extremely broad scope of discovery. Accordingly, many courts have utilized Rule 9 of the Federal Rules of Civil Procedure, requiring fraud to be pled with particularity, to bludgeon RICO cases to death at an infantile stage.⁸⁷

RICO cases engender hostility because they expand federal court jurisdiction and complicate commercial litigation. RICO

85. See Anthony, *Is RICO In Your Future?*, HENNEPIN LAW, Jan.-Feb. 1985, at 25-26. See generally Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982).

86. See Blakey, *supra* note 2, at 326-27 & n.193; Moran, *supra* note 4, at 768 n.205. The Fourth Circuit in *Computer Sciences*, makes an excellent point that should be thoughtfully considered by potential RICO plaintiffs:

Resourceful lawyers representing criminal defendants often desire to be thorough and to overlook nothing in their commendable zeal to afford first-class representation. Consequently, in many cases they tend to excess as they inundate us with a plethora of arguments, some good and some not so good. Sometimes one wonders whether such lack of selectivity is not counterproductive, for a party raising a point of little merit exposes himself to the risk of excessive discount for a better point because of the company it keeps.

Computer Sciences, 689 F.2d at 1183; *United States v. Hart*, 693 F.2d 286, 287 n.1 (3d Cir. 1982).

87. *Bennett*, 685 F.2d at 1062.

also breeds work for the federal courts and compounds the judicial supervision of discovery. RICO cases are received and defended with much acrimony and tenacity. Motions to stay the proceedings,⁸⁸ the assertion of the fifth amendment privilege, protective orders, nondestruct orders, Rule 6(e) motions to release grand jury records, Rule 37 motions to impose sanctions, and dispositive motions are all endemic to RICO litigation. This potential paucity of additional motion work in a RICO case nudges even reluctant judges into seriously considering motions to dismiss.

Many courts have been receptive to motions to dismiss complaints under Rule 9 for technically insufficient complaints. A paradigm case is *Moss v. Morgan Stanley, Inc.*⁸⁹ In *Moss*, the trial court dismissed the plaintiff's complaint because it lacked a factual basis for establishing the defendant's nexus to organized crime and other definitional RICO elements.⁹⁰ The trial court also dismissed the plaintiff's RICO claim in *Mauriber v. Shearson/American Express, Inc.*,⁹¹ since the plaintiff failed to plead fraud with the requisite particularity.⁹²

Motions to dismiss were also granted in *Rae v. Union Bank*,⁹³ and *Harper v. New Japan Securities International, Inc.*⁹⁴ In both

88. One court curiously upheld RICO allegations in the context of a corporate takeover, but stayed RICO discovery:

Even though the RICO count survives the motion to dismiss, the very breadth and vagueness of the RICO statute suggests that the courts assume some control of such counts in civil actions. It is not too difficult to allege sufficient facts to add a RICO count to many kinds of civil cases, thus greatly expanding the scope of litigation. Among other things, a defendant may be exposed to pretrial discovery of every aspect of its business for a ten-year period. I doubt that this was the result contemplated or intended by Congress when the civil provisions were added to RICO.

It seems to me that prudent and economical case management requires that courts insist that the plaintiff show that the defendant has caused it legally compensable injury before it be allowed to expand the case to secure the triple damages and attorneys' fees that RICO provides.

Spencer Companies, Inc. v. Agency Rent-A-Car, Inc., [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,217 (D. Mass. 1981).

89. 553 F. Supp. 1347 (S.D.N.Y. 1983), *aff'd*, 719 F.2d 5 (2d Cir. 1983).

90. *Moss*, 553 F. Supp. at 1361-62.

91. *Mauriber*, 546 F. Supp. 391 (S.D.N.Y. 1982). The trial court dismissed for failure to allege the underlying fraud with particularity. *Id.* at 397.

The plaintiff filed an amended complaint which adequately stated the allegation of fraud and the RICO claim. *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231 (S.D.N.Y. 1983).

92. *Mauriber*, 546 F. Supp. at 397.

93. 725 F.2d 478, 480-81 (9th Cir. 1984).

94. 545 F. Supp. 1002, 1008 (C.D. Cal. 1982); *see also* Landmark Sav. & Loan v.

cases, the plaintiffs had inadequately pleaded substantive violations of the statute. In *Rae*, the plaintiffs did not even attempt to amend the complaint. In *Harper*, the plaintiff was granted leave to amend the complaint and the defendants again moved to dismiss after the amended complaint was filed. The trial court granted the motion to dismiss since the plaintiffs had once again failed to allege any racketeering-type injury.⁹⁵

It is a testimony to this judicial hostility that the development of civil RICO law has occurred primarily at the pretrial stage through the motion work of parties. Practitioners pleading RICO cases should not complacently rely on the liberal pleading policy of the Federal Rules of Civil Procedure to salvage a deficient complaint since many of the previously discussed factors militate in favor of dismissing improperly pleaded complaints. In fact, it might be stated that the developing body of RICO cases has created a judicial inertia supporting dismissals.

B. Elements of a RICO Action

1. Person Distinct from Enterprise

The initial hurdle to overcome in pleading is to identify both the "person" and the "enterprise" as identities distinct from each other. This is imperative since a complaint may be dismissed for failure to plead the requisite separateness of the two.⁹⁶ A person is one who conducts the affairs of the enter-

Rhoades, 527 F. Supp. 206, 209 (E.D. Mich. 1981) (plaintiff failed to allege a "racketeering enterprise injury").

95. *Harper*, 545 F. Supp. at 1008. *But see* United States v. Huber, 603 F.2d 387 (2d Cir. 1979) (setting forth elements of "pattern of racketeering activity"), *cert. denied*, 445 U.S. 927 (1980).

96. *See* Anthony, *supra* note 77, at 35; Blakey, *supra* note 2, at 286-325 (examination of the substantive requirements of pleading that the "person" is distinct from the "enterprise"); *see also* *Rae*, 725 F.2d at 480-81 (if bank is the enterprise, it cannot also be the RICO defendant); *Computer Science Corp.*, 689 F.2d at 1190 (enterprise meant to refer to something different from person whose behavior the act was designed to prohibit or punish); *Bennett*, 685 F.2d at 1061-62 (plaintiff failed to state claim where complaint placed corporation in role of "person" responsible for conducting affairs of enterprise through pattern of racketeering activity, but did not clearly allege that community was "enterprise" acted upon by such person); United States v. Hartley, 678 F.2d 961, 988-89 (11th Cir. 1982) (in criminal RICO violation corporation may simultaneously be both defendant and enterprise), *cert. denied*, 459 U.S. 1170 (1983); *Action Indus. Tender Offer*, 578 F. Supp. at 849 (possible to allege that action is the enterprise and that the inside and outside directors are the persons associated with the enterprise in conducting racketeering activity); *B.F. Hirsch, Inc. v. Enright Refining Co.*, 577 F. Supp. 339, 346-47 (D.N.J. 1983); United States v. Ben-

prise through a pattern of racketeering activity. A person can be any entity capable of acquiring or holding a beneficial interest in property such as a labor union, corporation, or partnership. Nevertheless, a person must still have an existence distinct from the enterprise for purposes of RICO.⁹⁷

This issue was encountered by the Eighth Circuit Court of Appeals in *Bennett v. Berg*.⁹⁸ *Bennett* involved an alleged scheme in which John Knox Village, a corporate, nonprofit retirement community; Kenneth Berg, the founder of the Village; Prudential Insurance Company, the mortgage lender; and the Village's accountants, lawyers, officers, and directors were named defendants. For an "entrance endowment," the plaintiffs were entitled to lifetime residency at the Village with housing, food, laundry, and medical assistance provided. The plaintiffs alleged that the Village was virtually bankrupt, that services had deteriorated, and life care was in jeopardy. The plaintiffs alleged fraud in promoting the retirement community.⁹⁹

The first count of the plaintiffs' complaint in *Bennett* sought treble damages from all defendants, except the Village, which was named as the enterprise operated by the other defendants. The second count unfortunately caused some confusion by casting the Village in the role of "person" for purposes of seeking equitable relief.¹⁰⁰ The district court surmised from the pleading that the retirement community, as an association in fact, was the enterprise.¹⁰¹ Prudential argued that no enterprise had been alleged apart from the person who "associated with" an enterprise for the purpose of engaging in racketeering activity.¹⁰²

The court rectified this error by allowing the dismissal of Count II, since the Village was considered both the person and

ney, 559 F. Supp. 264, 268-69 (N.D. Cal. 1983); *Parnes*, 548 F. Supp. at 23-24 (enterprise cannot simultaneously be the defendant and the person).

97. See *Bennett*, 685 F.2d at 1061-62; *Alexander Grant & Co. v. Tiffany*, 742 F.2d 408, 413 (8th Cir. 1984), *vacated*, 105 S. Ct. 3551 (1985). *But see* Blakey, *supra* note 2, at 286-325. One way to avoid this dilemma is to plead the RICO enterprise as an association in fact which of necessity may consist of persons not distinct from the enterprise.

98. 685 F.2d 1053 (8th Cir. 1982).

99. *Id.* at 1057.

100. *Id.* at 1061.

101. *Id.* at 1060.

102. *Id.* at 1061.

the enterprise.¹⁰³ The court, however, suggested that on remand, the plaintiffs should be permitted to amend their complaint to effectuate justice and did not reach a decision on the pleadings.¹⁰⁴

Practitioners can avoid the mistake made in *Bennett* by simply pleading the person as distinct from the enterprise through which the person has acted. For example, if the complaint alleged that a corporate defendant and its officers and directors acted in a pervasively fraudulent manner to induce the plaintiffs to make an investment in the corporate defendant, the allegations would be technically insufficient, since the culpable "persons" were not distinct from the enterprise. On the other hand, if the plaintiff alleged that the officers and directors operated the "enterprise" through a pattern of racketeering activity which included fraudulent representations that induced the plaintiff to invest in the corporate defendant, there would be an enterprise distinct from the culpable persons.¹⁰⁵

The anomaly encountered by not characterizing an enterprise as a defendant is that the plaintiff may recognize that the enterprise is the only entity capable of satisfying a civil judgment.¹⁰⁶ Yet if the enterprise must be distinct from the offending person, the plaintiff cannot name the enterprise as the defendant and collect a judgment from that party. It has been suggested that enterprises occupy several different roles in RICO actions of "prize," "instrument," "victim," or "perpetrator."¹⁰⁷ These roles are not mutually exclusive.¹⁰⁸

If the enterprise is also an unknowing victim or prize of the perpetrator, then it would be senseless to name the victim as a defendant since it would not serve the remedial purposes contemplated by the statute.¹⁰⁹ If, however, the enterprise is controlled by the perpetrators, or the perpetrators can bind the enterprise under the doctrines of respondeat superior, then it

103. *Id.* at 1062.

104. *Id.*

105. See Anthony, *supra* note 77, at 35.

106. Nathan, *supra* note 1, at 12.

107. See Blakey, *supra* note 2, at 307-25.

108. *Id.* at 307.

109. See *United States v. Melton*, 689 F.2d 679, 683 (7th Cir. 1982) (individual owner of a business used his enterprise to defraud property insurance carriers through a pattern of arson, mail fraud, and extortion); *United States v. Weisman*, 624 F.2d 1118, 1123 (2d Cir.) (theater violated RICO by skimming ticket sales and concessions), *cert. denied*, 449 U.S. 891 (1980); Blakey, *supra* note 2, at 323-25.

may prove fruitful to also name the enterprise as a person.¹¹⁰

If the enterprise plays the role of perpetrator, liability of the enterprise should follow and the enterprise should be named as a person in the complaint. Where the enterprise is a person, courts should impose vicarious and entity civil liability under well-established principles of federal law.¹¹¹ This imputation of liability is also consistent with RICO's broad remedial purposes.

As Professor Blakey stated following the *Bennett*¹¹² decision, "A more difficult issue, however, is presented by the role of

110. Professor Blakey would impose civil liability in the case where an enterprise is the perpetrator and has some level of culpability in the fraud or scheme alleged by the RICO plaintiff. See Blakey, *supra* note 2, at 307-25. A tougher issue is reached where the enterprise is a "prize" or "victim." Professor Blakey advises that "no salutary remedial purpose would be served by attributing the conduct of an individual involved in the pattern of racketeering activity to the individual or entity playing the role of the enterprise, whether for civil liability or criminal responsibility." *Id.* at 323. The most difficult issue, however, is when the enterprise plays the role of "instrument." For a discussion of the issue, see *infra* notes 115-20 and accompanying text.

The court in *Parnes*, found that the enterprise was a "victim," and stated that in that event:

[t]hat sort of respondeat superior application, perhaps permissible to establish ordinary civil liability, would be bizarre indeed as a means to warp the facts alleged in this case into the RICO mold. Under that theory, malefactors at a low corporate level could thrust treble damage liability on a wholly unwitting corporate management and shareholders.

Parnes, 548 F. Supp. at 24 n.9. *But see* *Bernstein v. IDT Corp.*, 582 F. Supp. 1079, 1083-84 (D. Del. 1984) (usual agency principles apply in imposing RICO liability).

If the entity participates in or directly benefits from the racketeering activity, it should be named as a defendant under vicarious liability or respondeat superior principles. See Moran, *supra* note 4, at 775-76 & n.251. Where the entity has acted or participated in or benefitted from the pattern of racketeering activities, it may be permissible to allege it as both enterprise and defendant. See, e.g., *Alcorn County v. United States Interstate Supplies, Inc.*, 731 F.2d 1160, 1168 (5th Cir. 1984) (fraudulent sales of office supplies); *Hartley*, 678 F.2d at 988 (government inspector paid by corporation to falsify inspection reports); *B.F. Hirsch Inc.*, 577 F. Supp. at 343 (fraudulent misrepresentation and illegal retainage fee). *But see*, *Rae*, 725 F.2d at 481; *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 97 (E.D. Pa. 1983); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 243 (E.D. Pa. 1983) (cable television companies could not simultaneously constitute both RICO enterprise and persons associated with enterprise). For an extended discussion comparing the *Hartley* and *Computer Sciences* decisions, see Blakey, *supra* note 2, at 324 nn.181-85; see also *United States v. Thompson*, 685 F.2d 993, 1000 (6th Cir. 1982) (discussing legislative intent in defining "enterprise"), *cert. denied*, 459 U.S. 1072 (1982); Moran, *supra* note 4, at 777 & n.255; Comment, *RICO: The Corporation as an "Enterprise" and Defendant*, 52 U. CIN. L. Rev. 503 (1983) (comparing the *Computer Sciences* and *Hartley* interpretations of "enterprise").

111. See *supra* note 110.

112. 685 F.2d 1053 (8th Cir. 1982).

'instrument.'"¹¹³ When the enterprise assumes this role, it is used in the unlawful conduct, but does not originate the scheme as an entity as does a "perpetrator." Such an enterprise is not "wholly innocent, as when it plays the role of a pure 'prize' or 'victim.'"¹¹⁴ Professor Blakey believes that in the case of an "instrument" enterprise, the risk of civil liability, but not criminal responsibility, should shift to the enterprise.¹¹⁵

An example of an "instrument" enterprise is drawn from the unreported case of *Holmberg v. Morrissette and Mintex Corp.*¹¹⁶ In *Holmberg*, the defendant Morrissette acted through the enterprise, Mintex Corporation, to submit false, forged and altered documents to three separate banks to draw down on letters of credit. The documents submitted by Morrissette represented that Mintex Corporation was entitled to proceeds from the letters of credit since he had manufactured and shipped goods overseas and had not been paid for them.¹¹⁷

Morrissette was the principal shareholder, a director, and president of Mintex Corporation. Morrissette acted fraudulently under the auspices of Mintex to receive the proceeds to pay for goods manufactured by Mintex Corporation. The district court found Morrissette liable under RICO and both Morrissette and Mintex liable under common law counts of fraud and conversion of the proceeds from the letters of credit.¹¹⁸ The *Holmberg* case is instructive because it demonstrates the passive role an enterprise may play and yet benefit from the racketeering activity of a controlling person. Civil liability is correctly transmitted to the enterprise in such a case.

From a pleading perspective, when dealing with corporations, partnerships, associations, or other legal entities, a plaintiff should aver that the enterprise is both distinct from the person, but derivatively liable for the acts of its employee, officer, director, or agent under the familiar doctrines of respondeat superior or vicarious liability. This allows a plaintiff to comply with the technical requirements of RICO by separating the person from the enterprise. It also enables the plaintiff

113. Blakey, *supra* note 2, at 323.

114. *Id.*

115. *Id.* at 324.

116. No. 3-83-1383 (D. Minn. Feb. 1, 1985).

117. *Id.* at 23.

118. *Id.* at 22-23.

to allege the financial responsibility of the enterprise for any judgment rendered against its employee or agent.¹¹⁹

Another tactical approach used by some plaintiffs and approved by certain courts is to plead the enterprise as an association in fact of the individual and the corporate entity. This avoids the necessity of pleading the separateness of the individual from the entity since the individual is an integral part of the associated relationship.¹²⁰

2. *Pleading the Enterprise Distinct from the Pattern of Racketeering Activity*

To properly plead the acts of racketeering activity, each element of the underlying offense must be pled in the complaint and must be proved at trial. If the individual violation consists of two acts of mail fraud, the complaint must state with specificity, to the extent it is known or ascertainable, the time, date, and place of the communications, including who created the mailed document, who mailed it, who received it, and its relationship to the overall scheme. A plaintiff who can provide this much information in a RICO complaint, should survive, or even evade, a motion to dismiss under Rule 9 of the Federal Rules of Civil Procedure.

In *Turkette*, the Supreme Court addressed the relationship between the enterprise and the pattern of racketeering activity.¹²¹ In *Turkette*, the Court held that the enterprise must be an entity separate from the pattern for purposes of pleading and proof.¹²² If the complaint alleges an "association in fact" under RICO, the association is pled and proved by events of an ongoing organization, formal or informal, and by showing that the associates functioned in concert with each other.¹²³

Turkette also makes it clear that the statutory language of RICO encompasses both legitimate and illegitimate associations.¹²⁴ Where the enterprise is comprised of individuals associated for illegal activity, the plaintiff must plead and prove

119. See *Bernstein*, 582 F. Supp. at 1082-83; see also Dwyer & Kiely, *Vicarious Liability Under the Racketeer Influenced and Corrupt Organizations Act*, 21 CAL. W. L. REV. 324, 342-45 (1985).

120. Moran, *supra* note 4, at 772-74, 777-79.

121. *Turkette*, 452 U.S. 576.

122. *Id.* at 583.

123. See *id.* at 582-83.

124. *Id.* at 585.

an entity or unit distinct from the acts of racketeering.¹²⁵ As the *Bennett* court stated, "Discrete existence, rather than the legality or illegality of enterprise's activities or goals, is the test."¹²⁶ This may result in an overlap of proof of both the enterprise and pattern.¹²⁷

Where the enterprise is a separate legal entity, such as a corporation, partnership, joint venture, nonprofit association or another organization recognized under state law, the enterprise is separate from the pattern of racketeering activity.¹²⁸ This rule implies that the practitioner should clearly distinguish the enterprise as a legal entity separate from the pattern of racketeering activity.¹²⁹ The practitioner should also plead the facts in a way that will demonstrate a relationship among the individual acts of racketeering activity so that a pattern emerges. It would be wise to allege that the racketeering acts are intertwined as an integral and necessary incident to the underlying scheme, and therefore constitute a pattern under the purview of section 1961(5).

3. *Pleading the Injury was Proximately Caused by the RICO Acts*

At least two reported cases suggest that courts may require the plaintiff's injury to be proximately caused by the RICO violation.¹³⁰ Courts capitalize on the language in RICO which states that treble damages are available only to the plaintiff who has suffered injury in his business or property "by reason of" a violation of section 1962.¹³¹ The Seventh Circuit case of *Cenco Inc. v. Seidman & Seidman*,¹³² seems to require that the plaintiff's injury must be direct and proximately caused before

125. *Id.* at 583.

126. *Bennett*, 685 F.2d at 1060.

127. *Turkette*, 452 U.S. at 583.

128. *See Bennett*, 685 F.2d at 1060. *Cf. United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.) (requiring "proof of some structure separate from the racketeering activity"), *cert. denied*, 459 U.S. 1040 (1982); *United States v. Mazzei*, 700 F.2d 85, 89-90 (2d Cir.) (common or shared purpose among the individuals and evidence of their functioning as a continuing unit sufficient to establish an enterprise), *cert. denied*, 461 U.S. 945 (1983).

129. Although both the "enterprise" and the "pattern" must be proven, separate proof need not be presented for each. *See Mazzei*, 700 F.2d at 89.

130. *See Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Maryville Academy v. Loeb Rhoades & Co.*, 530 F. Supp. 1061, 1069 (N.D. Ill. 1981).

131. The "by reason of" language is contained in 18 U.S.C. § 1964(c).

132. 686 F.2d 449 (7th Cir. 1982).

plaintiff may sue for treble damages.¹³³

In *Cenco*, the Seventh Circuit upheld the dismissal of the RICO count brought by a company's independent auditors against the company and its former officers and directors.¹³⁴ The auditors had been named as co-defendants in an action brought by the purchasers of the company's securities against the issuer, its officers and directors, and independent auditors for negligence in auditing the company's financial statements.¹³⁵ The purchasers alleged these parties violated the securities laws by inflating the company's stock prices.¹³⁶

The auditors settled these claims with the plaintiff and then sought to sue the company for three times the settlement under RICO. The auditors argued that if the company had not engaged in securities fraud, which misled them in conducting their audit, they would not have had to pay a settlement to the stock purchasers. The Seventh Circuit Court of Appeals held that, under these circumstances, the auditors lacked standing to maintain a civil RICO action.¹³⁷

The *Cenco* holding suggests that the auditors were indirect victims of the predicate acts of securities fraud, which constituted the RICO violation. The direct victims were the purchasers of the company's stock. The auditors, as indirect victims, were not entitled to relief because their injuries were not proximately caused by the RICO violation. This decision seems ap-

133. *See id.* The Seventh Circuit in *Haroco* stated, "A defendant who violates Section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who had not been injured." *Haroco*, 747 F.2d at 398. The United States Supreme Court in *Sedima* also added "in addition, plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting a violation." *Sedima*, 105 S. Ct. at 3285-86.

134. *Cenco*, 686 F.2d at 457.

135. *Id.* at 451.

136. *Id.*

137. *Id.* at 457. The *Cenco* court stated:

It is presumably on behalf of the owners, perhaps also the customers and competitors, of such businesses that the civil damage remedy was created, and not on behalf of the people who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO. It is unlikely that Congress if it had adverted to the issue would have chosen to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation, especially when many of these would inevitably be, as here, the witting or unwitting tools of the violator.

Id.

propriate to preclude an inundation of claims by those remotely injured by the alleged RICO violator.

4. *Requesting the Appropriate Relief*

Section 1964(a) of the statute expressly provides equitable relief and empowers federal courts to restrain violations of section 1962 by issuing appropriate orders. Some confusion has arisen whether private litigants are authorized to utilize section 1964(a), since section 1964(b) authorizes the attorney general to bring civil suits.¹³⁸ It is uncertain whether section 1964(a) was to be limited to use by the federal government or whether it is only a general grant of equitable power to federal courts in both government and private suits.¹³⁹

138. The district courts of the United States have jurisdiction to prevent and restrain violations of section 1962 by issuing appropriate order. 18 U.S.C. § 1964(a).

139. 18 U.S.C. § 1964(a) reads:

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

Id. Section 1964(b) provides:

The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

Id. § 1964(b).

One court has stated that § 1964(a) gives courts power to issue injunctions and other equitable relief in RICO civil actions brought by plaintiffs. *See USACO Coal*, 689 F.2d at 95 n.1.

The following cases have not allowed a court to grant injunctive or other equitable relief to a private plaintiff in a civil RICO action. *See, e.g., Dan River*, 701 F.2d at 290 (injunctive and other equitable relief probably not authorized in light of recent Supreme Court decisions); *Ashland Oil, Inc. v. Gleave*, 540 F. Supp. 81, 84-85 (W.D.N.Y. 1982).

Professor Blakey believes that equitable relief to private parties is authorized by § 1964(a). Professor Blakey writes:

It is difficult to see how a court could conclude that RICO does not provide equitable relief for private parties. Section 1964(a) is a general grant of equitable power. It is not limited on its face or in its legislative history. Section 1964(b) grants the government authority to seek relief, an authority that it was necessary to set out lest old learning be used to circumscribe the new governmental power to seek equitable relief. Nothing in Section 1964(b) speaks in negative terms about an authorization for private parties to seek similar relief. Indeed, the governmental suits are to be brought on

The provisional relief offered by RICO enables federal courts to utilize a broad array of equitable tools historically employed by courts to safeguard the interests of an aggrieved plaintiff. Among these equitable tools used by federal courts are temporary restraining orders, preliminary injunctions, divestitures, voluntary dissolutions, receiverships, reorganizations, attachments, protective trusts, or equitable liens to prevent defendants from secreting or dissipating assets during the pendency of litigation.

It is well settled that in all cases in federal court, state law is incorporated to determine the availability of prejudgment remedies for seizure of personal property.¹⁴⁰ Rule 64 of the Federal Rules of Civil Procedure provides that "all remedies providing for the seizure of personal property for the purpose of securing satisfaction of the judgement . . . are available under the circumstances and in the manner provided by the law of the state in which the district court is held."¹⁴¹

Since RICO relies on the law of the forum state to determine if equitable remedies are available to a plaintiff, certain equitable remedies could be available in one state under a lenient standard and unavailable in another state under a more stringent standard. This could produce forum shopping under RICO's jurisdiction, venue, and process serving provisions.¹⁴² The end result could be "a wholly unjustifiable lack of uniformity in the practical impact of a major federal statute on

behalf of private parties. No satisfactory explanation can be offered as to why Congress would have precluded victims from seeking help themselves. Section 1964(c), moreover, says "sue and" and not "sue to." The contrary argument would have to suggest that by adding the right to secure treble damage relief to the general right to sue Congress somehow manifested an intention to subtract the right to obtain other forms of relief. How addition might be converted into subtraction in a remedial statute that must be liberally construed strains even the legal imagination. Section 1964 ought to be read as authorizing both governmental and private suits to obtain equitable relief. To the degree that any ambiguity might be thought to exist in the choice of language, the liberal construction clause and the remedial purpose of the statute come down on the side of finding private suits to be authorized and that full relief can be granted. No satisfactory rationale can be offered, in short, to explain why a court ought to feel itself circumscribed in doing full justice for a victim under RICO.

Blakey, *supra* note 2, at 331-32 (footnotes omitted).

140. See Nathan, *supra* note 1, at 52; Blakey, *supra* note 2, at 334-40 & n.217; see also *Granny Goose Foods, Inc. v. Local 170 Int'l Bhd. of Teamsters*, 415 U.S. 423, 436-37 n.10 (1974).

141. FED. R. CIV. P. 64.

142. See Blakey, *supra* note 2, at 331-41.

both plaintiffs and defendants.”¹⁴³ Congress should solve this problem by amending RICO to provide express equitable remedies with the definable standards for their use under RICO.¹⁴⁴

Equitable relief was granted a private litigant in *USACO Coal Co. v. Carbomin Energy, Inc.*,¹⁴⁵ upon a complaint by the plaintiff that the defendants had defrauded it of approximately \$8,300,000 in connection with certain coal leases. The plaintiff sought treble damages under RICO and also alleged a breach of fiduciary duty, fraud, and breach of contract. The plaintiff sought and secured a preliminary injunction restraining the defendants from dissipating specific assets *pendente lite*. The defendants appealed the order.¹⁴⁶

The defendants argued that the district court had no authority to sequester their assets under section 1964(a) to secure a potential treble damage judgment under section 1964(c). The Sixth Circuit Court of Appeals rejected the defendants' arguments that the district court had improperly issued the injunction. The district court issued the injunction under its general equitable power stemming from its *pendent* jurisdiction under common law claims, rather than to secure the RICO damage award.¹⁴⁷

One of the most interesting aspects of *USACO* is that the decision discussed the availability of injunctive relief under traditional principles for granting injunctive relief under Rule 65 of the Federal Rules of Civil Procedure. The court in *USACO* found that the plaintiffs had demonstrated a “substantial likelihood” of success on the merits and had a “high probability” that the defendants would transfer assets out of the country if not enjoined.¹⁴⁸

143. *Id.* at 341.

144. *Id.*

145. 689 F.2d 94 (6th Cir. 1982).

146. *Id.* at 96. The appeal was taken pursuant to 28 U.S.C. § 1292 (1982).

147. 689 F.2d at 96-97.

148. *Id.* It is also interesting to note that the district court was held to have properly dismissed the bond normally required under Rule 65(c) since the injunction did not interfere with the defendant's daily business activities. *Id.* at 100. This case should be contrasted with *Ashland Oil*, 540 F. Supp. at 81, in which the district court rejected the plaintiffs' request for a similar injunction, where the plaintiffs alleged that the defendant stole 375,000 gallons of gasoline through a scheme to defraud under RICO. Unfortunately, in *Ashland Oil*, the court treated the defendant's request as one for an attachment. The court thought that it was a harsh remedy that ought not to be read into § 1964 in cases brought by private parties. *Id.* at 85-86. The court found that the plaintiff had established a probability of success on the merits.

One can glean from *USACO* that a private plaintiff will have to establish two factors under Rule 65 to be entitled to injunctive relief. A plaintiff will have to establish a substantial likelihood of success on the merits at trial, and a high probability that the assets in which the moving party seeks to have protected by the injunctive relief will be endangered, secreted, concealed, or dissipated. It is also likely the courts will require a third factor to be established in conjunction with the second factor articulated above. Plaintiffs may have to show that there is a high probability that the assets will be needed to satisfy any resulting damage award.¹⁴⁹ These standards parallel conventional injunctive standards but are tailored to meet the peculiar substantive requirements of RICO.¹⁵⁰

III. PROCEDURAL CONSIDERATIONS

A. Statutes of Limitations

As in initiating any litigation, the practitioner must first be concerned with the statute of limitations in a RICO action. Unfortunately, that question is not readily answerable under existing federal decisions. RICO itself has no statute of limitations for civil actions. Federal courts, therefore, turn to the most analogous state law.¹⁵¹ Federal courts choose between several categories of limitations periods to determine the most

Id. at 82; see also *Marshall Field & Co.*, 537 F. Supp. 420 (injunction not sufficient under RICO because showing of likelihood of success, balance of equities and irreparable harm were insufficient).

149. See Nathan, *supra* note 1, at 54. Cf. *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982), in which these requirements were used in a criminal context.

150. Nathan, *supra* note 1, at 54; see FED. R. CIV. P. 65.

151. See *Alexander v. Perkin-Elmer Corp.*, 729 F.2d 576, 577 (8th Cir. 1984); *Burns v. Ersek*, 591 F. Supp. 837, 843 (D. Minn. 1984); *Creamer v. General Teamsters Local Union 326*, 579 F. Supp. 1284, 1287 (D. Del. 1984); *Estee Lauder, Inc. v. Harco Graphics*, No. 82 Civ. 8188 (CBM) (S.D.N.Y. Mar. 21, 1984); *Kirschner*, 576 F. Supp. at 238; *Seawell v. Miller Brewing Co.*, 576 F. Supp. 424 (M.D.N.C. 1983); *D'Iorio v. Adonizio*, 554 F. Supp. 222, 231 (M.D. Pa. 1982); *State Farm Fire & Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 683-84 (N.D. Ind. 1982); *Ingram Corp. v. J. Ray McDermott & Co.*, 495 F. Supp. 1321, 1324 & n.4 (E.D. La. 1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983); see also *Board of Regents v. Tomasio*, 446 U.S. 478, 483-84 (1980); Nathan, *supra* note 1, at 46-48.

The conditions under which an injunction will be issued pursuant to Section 1964 determinable from the principles that govern the granting of equitable relief . . . whether equitable relief is appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence underlying shows a likelihood that the defendants will commit wrongful acts in the future

Id.

appropriate. For those states that have adopted a RICO-type statute with a limitations period, the decision is simplistic. In the absence of a state RICO statute to adopt, courts must choose between state statutes prescribing periods for actions based on: (1) federal statutes; (2) penalty or forfeiture statutes; or (3) fraud.¹⁵²

Since RICO is most often referred to as a remedial statute,¹⁵³ penalty or forfeiture statutes are generally considered inapplicable. In civil RICO cases, the statute of limitations for fraud is most commonly applied.¹⁵⁴ A court could consider the character of the underlying predicate acts pled in a RICO action to determine if the appropriate statute of limitation relates to those acts. If murder, kidnapping, extortion, or conspiracy were pled, a court could look to an analogous limitations period to adopt in a RICO case. This type of decision could lead to a tremendous lack of uniformity in the applicable limitations period in RICO cases and could promote forum shopping.¹⁵⁵

The practitioner must also consider that a court examining the proper statute of limitations period will first determine whether the forum state's choice of law provisions dictate that another state's law applies. If so, the applicable statute of limitations period would not be that of the forum state.¹⁵⁶ The period of the statute of limitations would appear to be applied to the last predicate act which occurred.¹⁵⁷ A RICO plaintiff could then go back ten years to find another predicate act that could be alleged as part of the pattern. The issue of which statute of limitations period applies is a difficult and unsettled one which will undoubtedly present the litigator with some problems.

B. Venue

Venue in RICO actions is set forth in section 1965(a) which provides that an action will lie in any district in which the defendant "resides, is found, has an agent, or transacts his af-

152. See Nathan, *supra* note 1, at 47.

153. *Id.*

154. *Id.*

155. See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Concepts-Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1047 (1980) (federal statute of limitations should be applied).

156. *State Farm Fire & Cas. Co.*, 540 F. Supp. at 683.

157. See *id.* at 685.

fairs."¹⁵⁸ RICO's venue provision is more liberal than the general federal venue statute which states the appropriate venue in a civil action is any place where all defendants reside or in which the claim arose.¹⁵⁹

Interpretations of RICO venue provisions are often borrowed from the antitrust laws since the venue provision was adopted from the antitrust venue rules.¹⁶⁰ An action may be brought in any district where the claim arose as to some defendants if there is no other district where there is venue over the defendants.¹⁶¹ This allows a plaintiff to exercise venue over distant RICO defendants, even if venue as to them was not originally appropriate.

RICO also provides for nationwide service of process which greatly enhances and facilitates the prosecution of a civil action. Service of a summons and complaint is permitted if the standard provided in section 1965(b) is met. Nationwide service of process is allowed where it is shown that the ends of justice require that other parties residing in any other district be brought before the court.¹⁶² The service of subpoenas to compel the attendance of witnesses is also allowed nationwide upon a showing of good cause.¹⁶³

C. *Burden of Proof*

A major unanswered question in civil RICO litigation is the proper standard of proof to impose on a party prosecuting a RICO claim.¹⁶⁴ Three potential standards apply to RICO cases. The first is the typical preponderance of the evidence standard used in most civil litigation. Many federal district

158. 18 U.S.C. § 1965(a).

159. 28 U.S.C. § 1391(b). *See also* *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

160. *See, e.g.*, *Martin-Trigona v. Pearson, Ball & Dowd*, No. 82-Civ. 592 (S.D.N.Y. Oct. 20, 1982); *see also* *King v. Vesco*, 342 F. Supp. 120, 122 (N.D. Cal. 1972).

161. *See* *Schering v. Tech America*, Dkt. No. 83-C-1820 (N.D. Ill. Jan. 20, 1984); *Farmers Bank*, 452 F. Supp. at 1280; *King*, 342 F. Supp. at 122; *see also* *Securities Investor Protection Corp. v. Executive Sec. Corp.*, [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,164 (S.D.N.Y. 1977). *But see* *Eacho v. N.D. Resources, Inc.*, [1983-84 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,690 (D.D.C. 1984) (the interests of justice do not require the RICO claim to be transferred to a court with proper venue over it).

162. 18 U.S.C. § 1965(b).

163. *Id.* § 1965(c).

164. *See* *Matz, Determining the Standard of Proof in Lawsuits Brought Under RICO*, Nat'l L.J. Oct. 10, 1983, at 21, col. 1.

courts have also advocated this standard.¹⁶⁵

The second standard is the clear and convincing standard, which is applied in many state fraud cases.¹⁶⁶ A few commentators suggest that this is the proper burden of proof in RICO actions since pleading is a serious matter compelling a heightened standard of proof which could also serve to prevent spurious claims.¹⁶⁷

The third standard that is arguably applicable is the criminal "beyond a reasonable doubt" standard which is certainly applicable in criminal RICO actions. There has been much debate and concern that a lower burden of proof in civil cases could jeopardize a defendant's rights if that defendant was later subjected to criminal prosecution. The civil plaintiff would obviously have access to more sensitive discoverable information to which the fifth amendment privilege may apply.¹⁶⁸

The United States Supreme Court in *Sedima* recently intimated that it was not convinced that the reasonable doubt standard applied to civil RICO cases.¹⁶⁹ The *Sedima* court was responding to an argument by the Second Circuit that a nar-

165. See, e.g., *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983); *State Farm Fire & Cas. Co.*, 540 F. Supp. at 677; *Parnes*, 487 F. Supp. at 647.

Some courts have expressly held that the preponderance of the evidence standard applies as opposed to simply the appropriate civil burden of proof endorsed by those courts listed above. See *Eaby*, 561 F. Supp. at 133-34; *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979); *Farmers Bank*, 452 F. Supp. at 1280.

166. E.g., *Addington v. Texas*, 441 U.S. 418, 423-24 (1979). For example, in Minnesota, the standard in fraud cases is the clear and convincing standard. E.g., *Weise v. Red Owl Stores, Inc.*, 286 Minn. 199, 203, 175 N.W.2d 184, 187 (1970).

167. See *Strafer*, *Massumi & Skolnick*, *supra* note 85, at 715-18.

168. For a discussion of the fifth amendment and discovery in RICO actions, see *Flynn*, *Civil RICO: A Primer on the Emerging Use and Abuse of an Elastic Treble Damage Remedy*, RICO THE ULTIMATE WEAPON IN BUSINESS & COMMERCIAL LITIGATION Tab F-5, at 6-11 (ABA Nat'l Inst. 1983); *Pollack*, *Civil RICO: A Primer on the Emerging Use and Abuse of an Elastic Treble Damage Remedy*, RICO: THE ULTIMATE WEAPON IN BUSINESS & COMMERCIAL LITIGATION Tab F-6, at 2-28 (ABA Nat'l Inst. 1983).

169. See *Sedima*, 105 S. Ct. at 3282. The Court specifically stated:

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 preponderance standard. There is no indication that Congress sought to depart from this general principle here. That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established with criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction. But we need not decide the standard of proof issue today.

If there is a problem with thus stigmatizing a garden variety defrauder by

row construction of the statute was essential to "avoid intolerable consequences."¹⁷⁰ As interpreted by the Supreme Court, the Second Circuit believed that without a prior criminal conviction to rely on, the plaintiff would have to prove commission of the predicate acts beyond a reasonable doubt.¹⁷¹ The Second Circuit further believed that this would require instructing the jury as to different standards of proof for different aspects of the case. The Second Circuit concluded that this incongruous result could only be avoided if the criminality of the defendant had already been established before a civil RICO action could be maintained.¹⁷²

The Supreme Court's response to the Second Circuit in *Sedima* seems to foreclose the use of the reasonable doubt standard, but gives no clue whether the more stringent clear and convincing standard might be applied. The Court has, in the context of a securities fraud damage action, rejected the clear and convincing standard or anything elevated above the preponderance of the evidence standard.¹⁷³ This is true, the Court stated, even though the civil action is based upon fraud which is prosecutable as a criminal offense.¹⁷⁴

IV. DISCOVERY TATICS

A. *The Expansive Scope of Discovery Under Rule 26*

The scope of discovery in civil RICO cases can seem frighteningly broad to defendants. Rule 26(b)(1) provides that the "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the

means of a civil action, it is not reduced by making certain that the defendant is guilty of *fraud* beyond a reasonable doubt.

Id. at 3282-83 (emphasis in original). See also Kaplan, *Damages, Injunctive Relief, Burden of Proof, and State Court RICO*, CIVIL LITIGATION AFTER *SEDIMA* 215, 227-28 (RICO Law Rptr. 1985) (courts uniformly apply civil standard).

170. *Sedima*, 105 S. Ct. at 3282.

171. *Id.*

172. *Id.*

173. In *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), a securities fraud damage action, the Court rejected a "clear and convincing" standard or any standard more stringent than the preponderance of the evidence standard. *Id.* at 390.

174. In the only two civil RICO cases that are known to have been tried to completion, *B.F. Hirsh Inc. v. Enright Refining Co.*, 577 F. Supp. 339 (D.N.J. 1983), *aff'd in part vacated in part*, 751 F.2d 628 (3d Cir. 1984), and *Holmberg v. Morrisette & Mintex Corp.*, No. 3-83-1383 (D. Minn. Feb. 1, 1985) the preponderance of the evidence standard was used and more courts are likely to accept this as the prevailing standard.

pending action”¹⁷⁵ RICO discovery exposes the activities of the defendant for a ten-year period in which the pattern is alleged to have unfolded.¹⁷⁶ Moreover, the plaintiff is entitled to discover any of the litany of offenses listed as predicate acts under section 1961(1). This makes “relevant” discovery unusually broad.¹⁷⁷

Rules 26 and 37 play a primary role in RICO discovery as they do in all normal discovery, although Rule 37 sanctions for noncompliance can play a dominant role in RICO cases. A plaintiff pursuing a RICO claim can expect to meet formidable, swift, and creative opposition to discovery in RICO cases. RICO allegations often cause defense counsel to bristle and respond ferociously and stubbornly to discovery requests. This often necessitates court intervention, subsequent sanctions, protective orders, and resulting procedural jockeying.

B. Limitations on Discovery

1. Rule 26 as a Limitation to its Own Broad Grant

Subdivision (c) of Rule 26 grants a court the potential power to take away whatever Rule 26(b) allows a party to obtain in discovery. Pursuant to Rule 26(c), the party can delimit the scope and extent of discovery by seeking a protective order directing, among other things, that discovery not be had, that it be had only under specified terms and conditions, or that it be limited to certain matters.¹⁷⁸ Rule 37 is the enforcement mechanism through which discovery is modulated and regulated. The recent amendment to Rule 26(b) has had particular import in RICO actions since it instructs that discovery “shall be limited by the court” if the court should find that the discovery sought is “unreasonably cumulative or duplicative,” or “unduly burdensome or expensive.” The most interesting aspect of the new language is that it allows a court to act on its own to protect against such abuses. The Advisory Committee note to the 1983 Amendment to Rule 26 states that the purpose of the amendment is “to encourage judges to be more aggressive in identifying and discouraging discovery

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

176. See 18 U.S.C. § 1961(5) (imposing a ten-year requirement).

177. See Flynn, *supra* note 168, at 2.

178. FED. R. CIV. P. 26(c).

overuse."¹⁷⁹ The recent amendment to Rule 26(b) is certain to play a prominent role in RICO cases particularly as they proliferate.

2. Sanctions Under Rule 37

As previously stated, Rule 37 operates as an enforcement tool for courts monitoring discovery between parties. Rule 37(a) allows courts to issue orders compelling discovery, while subdivision (b) allows it to fashion and impose appropriate sanctions in response to a party's failure to comply with an order that discovery be had.¹⁸⁰ A number of sanctions exist in a federal court's arsenal, each having a varying degree of severity. A common sanction is an order to stay the proceedings, which has been tried in at least one RICO case.¹⁸¹

Another potential sanction is found in Rule 37(b)(2)(B) which provides for "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."¹⁸² A court could conceivably prohibit a defendant from testifying at trial on matters objected to or to which the fifth amendment privilege was raised.¹⁸³

The most draconian of all Rule 37 sanctions is the entry of default or dismissal against a noncomplying party. Courts, for obvious reasons, have reservations about exercising such a remedy. The compunction to grant such an order is even greater when the reason for noncompliance is the assertion of the fifth amendment privilege. A default judgment was entered by one district court where the court found the assertion

179. See FED. R. CIV. P. 23(b) advisory committee comment to the 1983 amendment.

180. FED. R. CIV. P. 37 (a), (b).

181. *Spencer Companies*, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, 92,214 (D. Mass. 1982). In *Spencer Companies*, which involved RICO allegations in the context of a corporate takeover, the court restricted the discovery process until the plaintiff could demonstrate that the defendant had caused it a legally "compensable injury." *Id.* at 92,217. The court in *Spencer Companies* was arguably well outside the parameters of its discretion in staying the proceedings. Its decision may have been supportable before *Sedima*, but certainly is not sustainable after *Sedima* since many of the cloudy and inconsistent RICO interpretations relied upon by the *Spencer Companies* court are now settled.

182. FED. R. CIV. P. 37.

183. Pollack, *supra* note 168, at 18.

of the fifth amendment privilege was improper.¹⁸⁴ It cannot be emphasized enough that litigators must be prepared to face resistance to discovery and the concomitant need to request sanctions in such cases.

C. Invocation of the Fifth Amendment

The potential invocation of the fifth amendment in RICO litigation becomes an extremely important matter since the defendant in civil RICO action may also be the defendant of a subsequent or concurrent criminal RICO action.¹⁸⁵ The civil discovery process seeks to illicit information that, if proven, could also establish a criminal action.¹⁸⁶ For this reason, defense counsel is wise to carefully consider whether the client might need to assert the privilege despite the obvious stigma attached to its exercise. Third-party witnesses might also have occasion to invoke the fifth amendment during discovery. Plaintiff's counsel must analyze whether discovery will be frustrated by a defendant's or third-party's assertion of the fifth amendment.

Rule 26 excepts from its broad threshold for discovery matters which are privileged.¹⁸⁷ The fifth amendment has long been held to apply to both civil and criminal proceedings "wherever the answer might tend to subject to criminal responsibility him who gives it."¹⁸⁸ Defendants may properly refuse to comply with discovery requests where the responses may tend to incriminate¹⁸⁹ or furnish a line in a chain of evidence that could incriminate.¹⁹⁰ As a corollary to the assertion, the civil RICO plaintiff has no right to receive the privileged information under Rule 26(b)(1).¹⁹¹

To be entitled to assert the privilege, the defendant must show that a "possibility" of prosecution is presented.¹⁹² A de-

184. *Davis v. Fendler*, 650 F.2d 1154, 1159-60 (9th Cir. 1981); *Baker v. Limber*, 647 F.2d 912, 917 (9th Cir. 1981).

185. Pollack, *supra* note 168, at 5-6; *see also In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974) (right to assert privilege depends on possibility, not likelihood of criminal prosecution).

186. Pollack, *supra* note 168, at 6.

187. FED. R. CIV. P. 26(b).

188. *McCarthy v. Arndtsrein*, 266 U.S. 34, 40 (1924).

189. *See Gitterman*, 564 F. Supp. at 50.

190. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

191. Pollack, *supra* note 168, at 3.

192. *Master Key Litig.*, 507 F.2d at 293.

defendant cannot simply declare that the answer will incriminate.¹⁹³ A proper assertion requires the defendant to provide a trial judge with sufficient information from which the judge can make an intelligent evaluation of the claim.¹⁹⁴ If the trial court concludes that no threat of incrimination is present, then the defendant must respond by demonstrating the danger of incrimination.¹⁹⁵ Defendants are not simply protected from discovery by making a blanket assertion of the privilege.¹⁹⁶ Objections to discovery must be specific.¹⁹⁷

193. *Hoffman*, 341 U.S. at 486; *Brunswick Corp. v. Doff*, 638 F.2d 108, 110 (9th Cir.), *cert. denied*, 454 U.S. 862 (1981); *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7th Cir.), *cert. denied*, 449 U.S. 1025 (1980).

194. *See Davis*, 650 F.2d at 1160.

195. *See Baker*, 647 F.2d at 917; *United States v. Neff*, 615 F.2d 1235, 1240 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).

196. *See General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Capitol Prods. Corp. v. Hernon*, 457 F.2d 541, 542-43 (8th Cir. 1972); *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213, 223 (D. Kan. 1979); *Guy v. Abdulla*, 58 F.R.D. 1, 2 (N.D. Ohio 1973); *Gitterman*, 564 F. Supp. at 49.

The *Sedima* court settled the issue that a prior criminal conviction is not necessary to make a RICO action. *Sedima*, 105 S. Ct. at 3284. It also settled the issue that a competitive or indirect injury is not required to maintain standing in prosecuting a civil RICO action. *Id.* The Supreme Court has also alluded that the "beyond a reasonable doubt" standard is not applicable in civil RICO actions. *Id.* at 3282; *see supra* notes 173-74 and accompanying text.

The Supreme Court has probably eliminated the requirement that there be a nexus between organized crime and the RICO defendant in a civil RICO action. These postulates were all presumed by the court in *Spencer Companies* when it rendered its decision during the discovery in that case. Now that those postulates have been dismantled by the Supreme Court in *Sedima*, the basis for the *Spencer Companies* decision probably no longer exists. The *Spencer Companies* court was reacting negatively to the broad reach of RICO instead of simply applying its provisions as written.

197. *See* FED. R. CIV. P. 37(b)(2)(B).

In *United States v. Capetto*, 502 F.2d 1351, 1359 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), a civil RICO action brought by the government, the defendant insisted that plaintiffs had no right to take discovery following the invocation of the fifth amendment and refused to appear at a deposition. The Seventh Circuit disagreed holding that the defendants had no right to refuse to submit to questioning, but stated that a defendant "has a right under the Fifth Amendment to refuse to answer specific questions on the ground that the answer may tend to incriminate him." *Capetto*, 502 F.2d at 1359. In *Gitterman*, the court held that defendants are free to object to discovery demands or to seek a protective order to preserve their fifth amendment rights, but must make a specific demand or objection. *Gitterman*, 564 F. Supp. at 50.

An attorney who believes his client could be indicted during or following a civil lawsuit, should advise his client of his rights as one accused of a crime, the least of which is the fifth amendment privilege against self incrimination. *See Pollack, supra* note 168, at 11-13.

It is also interesting to note that in *Capetto*, the Seventh Circuit rejected the

The fifth amendment privilege is obviously not available to a defendant who has been convicted,¹⁹⁸ unless other related charges could be filed.¹⁹⁹ If the court makes a formal grant of immunity, the privilege may not be asserted.²⁰⁰ If the statute of limitations on the criminal action has run, a defendant may not assert the privilege either.²⁰¹ Waiver of the privilege may be important in civil RICO litigation.²⁰² Since the fifth amendment is not self-executing, it must be affirmatively asserted or waived.²⁰³

Rule 37 sanctions may apply to a defendant's refusal to answer questions based upon the fifth amendment, but the imposition of sanctions cannot make the assertion of the privilege costly.²⁰⁴ As a result, a default or dismissal of the defendant's case under RICO is unlikely when an apparently bona fide claim of privilege is made under the fifth amendment.²⁰⁵

Courts have shown a proclivity to stay the proceedings in

argument that a RICO civil action is essentially a criminal proceeding giving rise to rights guaranteed in a criminal case. The court noted that § 1964 of RICO is remedial and punitive in nature and is of the type traditionally granted by courts of equity. *Cappetto*, 502 F.2d at 1357.

198. See *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973); *United States v. Romero*, 249 F.2d 371, 375 (2d Cir. 1957) (convicted defendant can no longer claim the fifth amendment privilege). One should bear in mind, however, the different standards of proof between a criminal and civil action.

199. See *In re Folding Carton Antitrust Litig.*, 619 F.2d 867, 871-72 (7th Cir. 1979).

200. See *McCarthy*, 266 U.S. at 42; *Ryan v. Commissioner*, 568 F.2d 531, 539 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978).

201. See *United States v. Stewart*, 445 F.2d 897, 900-01 (8th Cir. 1971).

202. See, e.g., *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472 (1972) (discussion of what testimony can be compelled under grant of immunity); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link . . . to prosecute"); *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958) (likelihood of prosecution does not affect right to invoke privilege).

203. See *Davis*, 650 F.2d at 1160. Rule 26 of the Federal Rules of Civil Procedure provides that "privileged" matter is not discoverable by parties to a civil proceeding. See FED. R. CIV. P. 26.

204. See FED. R. CIV. P. 37; see also *Hoffman*, 341 U.S. at 486 (1951); *Brunswick Corp. v. Doff*, 638 F.2d 108, 110 (9th Cir.), cert. denied, 454 U.S. 862 (1981); *Martin-Trigona*, 634 F.2d at 360 (pendency of criminal investigation not enough unless nexus shown between information sought and criminal investigation). The Supreme Court, in *Hoffman*, stated: "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486-87.

205. See *Flynn*, *supra* note 168, at 11-13.

RICO cases as an alternative to default²⁰⁶ or dismissal.²⁰⁷ The parties requesting the stay have the burden of demonstrating a possibility that criminal proceedings are imminent. Further, there is a burden to show the interrelationship between the evidence sought in discovery with the evidence which could be presented to prosecute a criminal RICO case.²⁰⁸ If it is likely that the relationship between the evidence in the civil and criminal cases would damage the defendants, a stay is probably appropriate.²⁰⁹

In the context of non-RICO cases, federal courts have allowed a civil case to proceed and have instead precluded the defendant from introducing the testimony or document sought to be discovered.²¹⁰ This result is certainly a dubious approach since it makes the assertion of the privilege costly.²¹¹

1. Protective Orders and the Fifth Amendment Privilege

A litigant subjected to questions, the answers to which may tend to incriminate, can bring a motion for a protective order under Rule 26. The order can prevent discovery on certain issues or questions or require discovery pursuant to specified conditions.²¹²

To accommodate both parties, courts often order discovery. The court may dictate who may be present at depositions or document productions and may order records and transcripts sealed.²¹³ In addition, a court may order that certain matters not be discussed with nonparties or witnesses under the threat of contempt of court. Parties may also bring motions to deter-

206. See FED. R. CIV. P. 26.

207. See *In re Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d 671 (D.C. Cir. 1981); *Chemical & Indus. Corp. v. Druffel*, 301 F.2d 126, 129 (6th Cir. 1962).

208. See *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1086 (5th Cir. 1979).

209. One commentator suggests that a partial stay of the proceedings may be a desirable alternative to completely halting the discovery process. See Flynn, *supra* note 168, at 14.

210. See *Backos v. United States*, 82 F.R.D. 743 (E.D. Mich. 1978).

211. Cf. *Spevack v. Klein*, 385 U.S. 511, 515 (1967); *Wehling*, 608 F.2d at 1087 (court found no provision in Federal Discovery Rules to allow a court to impose sanctions on a party making a valid claim of privilege); *Backos*, 82 F.R.D. at 745 (plaintiffs hurt own claim because unable to introduce helpful evidence); *Securities & Exch. Comm'n v. American Beryllium & Oil Corp.*, 303 F. Supp. 912 (S.D.N.Y. 1969).

212. FED. R. CIV. P. 26(c).

213. See Flynn, *supra* note 168, at 16. It is questionable whether a court has this authority in the face of a fifth amendment privilege.

mine whether such material is discoverable so that information does not have to be introduced in open court.²¹⁴

Rule 26 orders, of the variety discussed above, may be of little value to the defendant asserting a fifth amendment privilege since any disclosure of the information has the probability of being leaked. Moreover, in a subsequent criminal proceeding, the federal government may gain access to such information. The defendant may lose the benefits of civil nondisclosure.²¹⁵ One commentator remarked on the potential danger of such disclosure pursuant to a Rule 26 order, "[a]nother apparent weakness in such an order is that it relies on the good faith and watchfulness of the parties to insure that its purpose is met. Absent such care by the parties, the order may well be of little value."²¹⁶ Practitioners whose clients must assert the fifth amendment would be well-advised not to acquiesce in or accede to such arrangements and appeal such orders should they be rendered by a court.

2. Use of Adverse Inferences Following a Fifth Amendment Assertion

If a defendant interposes the fifth amendment privilege to refuse to answer questions in discovery or in testifying, it is permissible for the plaintiff to argue to the jury and ask for jury instructions that an adverse inference may be drawn from the refusal.²¹⁷ The most oft-cited case for this proposition is *Baxter v. Palmigiano*,²¹⁸ a non-RICO case, in which the United States

214. See *United States v. American Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 204-05 (3d Cir. 1967).

215. *Id.*

216. See Flynn, *supra* note 168, at 16-17. Flynn states:

For instance, if incriminating information from allegedly closed proceedings or sealed papers is leaked intentionally or negligently to outsiders, particularly law enforcement officers, the defendant may be left exposed and without a remedy adequate to protect him. Who is to be punished for the leak? Should it be the client, the lawyer, a secretary, any one of whom may be responsible? How will a contempt citation levied upon any of these individuals help the defendant who now may face criminal charges? What can the court do to help the defendant when the police in another jurisdiction, over whom he has no control, have obtained the information in good faith with no understanding that its release violated the court's order? It seems that there is very little the court can do to provide a real substitute—not just an arguable alternative to the exercise of the privilege under these circumstances. *The so-called protective order may be no protection at all.*

Id. at 17 (emphasis added).

217. See *Campbell v. Gerrans*, 592 F.2d 1054, 1058 (9th Cir. 1979); *Securities & Exch. Comm'n v. Vesco*, 16 FED. R. SERV. 2d 1237, 1239 (S.D.N.Y. 1973).

218. 425 U.S. 308 (1976).

Supreme Court held that it is "the prevailing rule that the fifth amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them" ²¹⁹ It is clear, following *Baxter* and its progeny, that an adverse inference may be drawn against a defendant. This can be a powerful tool to use against a defendant in a RICO action.

Defense attorneys, however, are wise to argue that under the unique facts of their case, the use of the inference takes a heavy toll and deprives the defendant of his fifth amendment due process rights. At least one court has held that it would be unconstitutionally coercive to condition the exercise of the privilege against self-incrimination on the loss of substantial economic interests. ²²⁰

Defense counsel representing a legal entity like a corporation or partnership must also ensure that the adverse inference made is against the culpable individual and not the innocent legal entity. Jury instructions may be necessary to clarify and segregate against whom the jury is permitted to draw the adverse inference. ²²¹ From a plaintiff's perspective, the threat of the adverse inference should lend sobriety to and enhance settlement negotiations.

D. *Obtaining Discovery from Corporate Defendants and the Government*

1. *Discovery from the Corporate or Similar Entity*

Rule 30(b) of the Federal Rules of Civil Procedure allows discovery from organizations, corporations, partnerships, unions, associations, and other like entities. Attendance at depositions of an officer, director, managing agent, or other persons who consent to testify is required. These persons must be designated by the organization to testify. ²²² Since the organization can only act through these individuals, their fail-

219. *Id.* at 318. See generally Daskal, *Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies*, 64 MARQ. L. REV. 243 (1980) (discussion of ramifications of self-incrimination privilege in federal civil proceedings).

220. See *Securities & Exch. Comm'n v. Gilbert*, 79 F.R.D. 683, 685-86 (S.D.N.Y. 1978) (allowing an adverse inference would substantially prejudice defendant's ability to defend).

221. See Flynn, *supra* note 168, at 18.

222. FED. R. CIV. P. 30(b).

ure to comply with discovery requests can result in sanctions being imposed upon the organization under Rule 37.²²³ When an officer, director, or managing agent does not appear at a deposition, it is considered that the corporation has failed to appear and the corporation will be sanctioned.

A corporation, as an entity, has no right to invoke the fifth amendment privilege afforded individuals. When a corporation must appoint an agent to respond to discovery requests, it must appoint a person who can answer without fear of self-incrimination so that the discovery process is not frustrated.²²⁴ The corporation must turn over all information notwithstanding the existence of the privilege for the individual officer, director, or agent.²²⁵ The United States Supreme Court, in *United States v. Kordel*,²²⁶ has suggested that if the organization cannot find an agent who can answer without self-incrimination, then the appropriate remedy is a protective order postponing civil discovery until the termination of the criminal action.²²⁷ If that argument is used by a corporation and its officer, director, or agent, the plaintiff's attorney's rejoinder is that the corporate attorney must examine and furnish all requested information and sign the interrogatories on behalf of the corporation.²²⁸

The size, organization, and structure of an organization may dictate whether the fifth amendment privilege can functionally protect the organization. In *United States v. Bellis*,²²⁹ the United States Supreme Court essentially held that when an organization is small, loosely knit, and unorganized, it may be allowed to assert the fifth amendment privilege and thwart discovery since producing records and testimony may lead directly to those individuals.²³⁰ To the extent a corporation is also small,

223. *Cleveland v. Palmby*, 75 F.R.D. 654, 656 (W.D. Okla. 1977).

224. See *United States v. Kordel*, 397 U.S. 1, 8 (1970). See also *General Dynamics Corp.*, 481 F.2d at 1204, 1210 (8th Cir. 1973) (designated agent must furnish to the court all information known by its officers and employees which is imputed to the corporation).

225. See *In re Anthracite Coal Antitrust Litig.*, 82 F.R.D. 364, 368-69 (M.D. Pa. 1979); see also *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 205 (1946).

226. 397 U.S. 1 (1970).

227. *Id.* at 8-9.

228. See *Pollack*, *supra* note 168, at 15.

229. 417 U.S. 885 (1974).

230. *Id.* at 892. The court in *Bellis* extended the rule to cover any organization which "must be relatively well organized and structured and not merely a loose, in-

loosely knit, and unorganized, the corporation may be the benefactor of the fifth amendment asserted by an officer or director.

The Court in *Bellis* differentiated between the officer forced to provide information that might incriminate him and a mere custodian who simply holds organization records. A custodian has no right to refuse to produce documents of an organization despite an assertion of the fifth amendment that those records might incriminate him.²³¹ A custodian, however, may not be compelled to reveal the location of the records which may tend to incriminate him.²³²

The real problem is encountered when an officer is requested to testify and possesses information derived from his capacity as an officer, but invokes the fifth amendment privilege. This is problematic since the officer may be the only practical source of information which could implicate both himself and the corporation in a RICO case.²³³

2. *Discovery from the Government*

a. *The Freedom of Information Act*

A plaintiff may seek to obtain information under the Freedom of Information Act ("FOIA") in which a federal government agency must turn over documents in its possession subject to FOIA's exceptions on confidentiality, investigative records, or revealing sources of informants and other similar exceptions.²³⁴ FOIA information requests may prove a fruitful source of information for plaintiffs.

A government agency or agent may also be subpoenaed to testify at trial, but each request is scrutinized by the United States District Attorney in the district in which the testimony is requested. FOIA criteria provide the guidelines for determining whether an exception applies or testimony will be allowed.

formal association of individuals. It must maintain a distinct set of organizational records and recognize rights in its numbers of control and access to them." *Id.*

231. *See Curcio v. United States*, 354 U.S. 118, 128 (1957).

232. *Id.* at 128.

233. One court has responded to this situation by imposing sanctions on the corporation itself since a failure to do so would be tantamount to allowing the corporation to benefit from the fifth amendment privilege. *See Anthracite Coal*, 82 F.R.D. at 368 (M.D. Pa. 1979).

234. 5 U.S.C. § 552(b) (7).

One author correctly suggests that a good relationship with the local agency in the United States District Attorney's office is important when requesting permission to allow an agency and its agent to testify.²³⁵ The concern of the agency or the United States District Attorney's office is generally not with the testimony sought by the plaintiff on direct examination at trial. The concern is that the process of investigation, identity of informants, or other sensitive information could be inquired into by the defendant on cross-examination, thereby unnecessarily exposing the government to the risk of releasing such information.

b. Discovery of Grand Jury Records Under Rule 6(e)

Rule 6(e) of the Federal Rules of Criminal Procedure govern the disclosure and release of federal grand jury records. The presumption is against release of the records, and this policy is in recognition of the secrecy afforded grand jury records.²³⁶ To seek release of the records, a litigant must make a motion before a federal district court judge itemizing the type of information and, if possible, the specific documents sought.

As a preliminary and practical matter, the custodian of records and the United States District Attorney who sought the original indictment must be assured that the release of documents will not jeopardize the secrecy of the grand jury process and its deliberations. Federal judges often closely follow, if not adopt, the United States District Attorney's recommendations for release of grand jury documents. In a case where the government has seized the business records of a corporation for a criminal proceeding, a Rule 6(e) motion will be impera-

235. See Flynn, *supra* note 168, at 20. Flynn suggests:

As to testimony at depositions and at trial, the Department of Justice guidelines admit a degree of flexibility to the government's response. A subpoena to testify is normally served upon the agency and the U.S. Attorney in the district where the testimony is desired. Both then forward the request to Washington through their own administrative channels. Each case is judged on its merits though the criteria listed in the FOIA are still considered. The recommendation of the local agency and the U.S. Attorney carry great weight in the Justice Department's decision-making process.

Id. at 20-21.

236. The United States Supreme Court has permitted disclosure only if the parties seeking it can show that the particular need for the disclosure outweighs the public interest in continued secrecy. See *United States v. Sells Eng'g Inc.*, 463 U.S. 418, 424 (1983); *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222-23 (1979); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958).

tive to procure basic documents needed for trial. The United States District Attorney and the federal judge must be convinced that the request will be circumscribed and will not reveal the grand jury process.²³⁷

V. TRIAL STRATEGY

A practitioner must first decide between a bench or jury trial. Many factors militate both for and against a jury trial. To the extent plaintiff's counsel believes a RICO count will not survive pre-trial or post-trial legal scrutiny, a jury would be important where punitive damages for common law fraud are alternatively pled. A jury is not only adept at finding fraud, but depending upon the seriousness of the conduct, can be generous in punitive damage awards. If a RICO count fails legally, a punitive damage claim based upon common law fraud will still be submitted to the jury.

A RICO count has the desirable effect for a plaintiff of somewhat tainting the jury before trial. A RICO case involves a nomenclature full of criminal-type language and accusations and the unsophisticated juror may be imbued with a feeling that a normal commercial dispute which involves "technical" predicate act violations, is indeed a criminal-type proceeding. This may affect the jurors' outlook on the case from beginning to end and unfairly burden the civil defendant. Federal judges may, for precisely this reason, take great pains to counteract that effect during *voir dire*, before trial instructions, and after trial jury instructions.

A federal district court judge may have to wrestle with whether to apply a preponderance of the evidence standard, a beyond a reasonable doubt standard, some combination of the two, or a clear and convincing standard. A federal judge's concern for the proper standard increases when a party wants to impanel a jury. A judge may decide that portions of the case will be under one standard and other portions will be under another standard. Since it may be difficult to explain different standards to a jury, a bench trial may be preferable.

RICO cases often involve complex schemes that are difficult for a jury to understand. This may make a practitioner in-

237. One commentator suggests that a party may have easier access to business records than testimonial documents presented to the grand jury. See Flynn, *supra* note 168, at 23.

clined to rely on a bench trial. The complicated nature of RICO civil jury instructions also suggests that a bench trial is best in a given case.²³⁸ RICO civil jury instructions elongate and complicate the court's jury instruction since RICO has so many elements and sub-elements. These jury instructions are in addition to instructions normally submitted in fraud, conversion, or similar cases.

A bench trial is certainly shorter since a trial judge is not reluctant to hear borderline or otherwise inadmissible evidence. A trial judge feels the admissibility of evidence can be sorted out later in deliberations. A trial judge will act differently when a jury is sitting. The judge will take the time to determine questions of admissibility when they arise at trial, since the jury is not as well-equipped to sort out and disregard potentially inadmissible evidence. This results in frequent interruptions, side-bar conferences, recesses for in-chamber arguments, and, in short, additional time and expense. After trial and before the jury is instructed, attorneys will argue over requested jury instructions, special verdict forms, and permissible statements in closing arguments. A practitioner must consider these factors before deciding to impanel a jury.

One final consideration is that not all civil fraud cases should carry the imprimatur of a RICO allegation. A litigator should be concerned that a RICO count may be met with hostility from all sides and can lessen credibility with a court, thereby affecting fully bona fide fraud claims. The treble damages, attorneys' fees, interest, costs, and disbursements attendant to a claim are significant incentives to pleading a RICO case. Those advantages, however, must be compared and realistically analyzed with the disadvantages.

A practitioner, in considering whether or not to allege a RICO count, must also believe that there is truly a "pattern" of racketeering activity. A "technical" pattern of two predicate acts may not convince a trial court judge that a RICO claim is justified. A litigator must establish a "practical" pattern that satisfies both judge and jury that there truly has been a course of wrongful and actionable conduct.

238. For sample civil RICO jury instructions, see Buffone, *Model Civil RICO Instructions*, RICO: THE ULTIMATE WEAPON IN BUSINESS AND COMMERCIAL LITIGATION, Tab F-8, at 1-10 (ABA Nat'l Inst. 1983). Please note that these model jury instructions are affected by the Supreme Court's decision in *Sedima*.

All of the above factors should go into the practitioner's formula for addressing the viability and need for a jury or a bench trial. The decision does not fit into a neat, schematic pattern, but relies, for the most part, on the facts of each case and the strength and character of the trial judge.²³⁹

CONCLUSION

Congress enacted RICO to launch a full-scale attack on organized crime in the United States. Congress specifically sought to enlist the aid of private citizens in that effort by offering private litigants treble damages if they were successful in proving the underlying fraudulent acts necessary to establish a RICO cause of action. In addition, the aggrieved party injured by fraudulent conduct is also able to recover interest, costs, and attorneys' fees. RICO had its genesis in 1970 and is, therefore, only fifteen years old. RICO's contours are not yet finally defined since the statute has been utilized primarily as a criminal statute by federal prosecutors in the first fifteen years of its existence. It has only been roughly in the last five years that private litigants have discovered RICO's utility in civil actions.

The United States Supreme Court has recently clarified some of the key areas of RICO, primarily through the Court's decisions in *Turkette* and *Sedima*. *Sedima* eliminated the requirement that the defendant have previously committed a criminal RICO offense as a prerequisite to initiating a civil RICO suit. The plaintiff also does not have to show that he has suffered a compensable injury separate from the injury caused by the commission of the predicate acts.

Despite the liberal reading given RICO by the Supreme Court, not all fraud actions can or should form the basis for a RICO count. RICO is a powerful weapon in terms of both monetary and reputational damage. Courts remain hostile to RICO, and only cases with the strongest fact patterns will survive attack from both the defendant and the bench.

One way to strengthen a RICO claim is through proper pleading. Litigators should always be mindful of Rule 9 motions to dismiss for failure to state a claim with particularity and Rule 12 motions to dismiss for failure to state a claim upon

239. Moran, *supra* note 4, at 779-89.

which relief can be granted. Litigants must also be prepared for the rush of motions, discovery protective orders, and hostility that will be generated by pleading a RICO claim. If one can anticipate this hostility in advance, RICO can be a potent weapon for aggrieved fraud victims. It is a statute that is long overdue.

