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Equitable Relief Under Civil RICO: Reflection on Religious Technology Center v. Wallersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?

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*[T]he great object of the maxims of interpretation is, to discover the true intention of the law; and whenever that intention can be indubitably ascertained, and it be not a violation of constitutional right, the courts are bound to obey it, whatever may be their opinion of its wisdom or policy. But it would be quite visionary to expect, in any code of statute law, such precision of thought and perspicuity of language, as to preclude all uncertainty as to the meaning, and exempt the community from the evils of vexatious doubts and litigious interpretations. Various and discordant readings, glosses and commentaries, will inevitably arise in the progress of time, and, perhaps, as often from the want of skill and talent in those who comment as in those who make the law.****

In *Religious Technology Center v. Wollersheim*,[1] the United States Court

* William J. and Dorothy O'Neill Professor of Law, Notre Dame Law School; A.B. 1957, J.D. 1960, University of Notre Dame. Professor Blakey was the Chief Counsel of the Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970 when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970), was processed. *Compare* Hilder v. Dexter [1902] App. Cas. 474, 477 (Halsbury, Lord, L.C.) ("[T]he worst person to construe [a statute] is the person who [was] responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.") *and* State v. Partlow, 91 N.C. 550, 552 (1884) (testimony before court of drafter of ambiguous statute held inadmissible) *with* Kosak v. United States, 465 U.S. 848, 856-57 & n.13 (1984) (Marshall, J.) ("[I]t is significant that the apparent draftsman of the crucial portion" of the statute so construed it and "it seems to us senseless to ignore entirely the views of its draftsman."). *See also* Banque Worms v. Luis A. Duque Pena & Hijos, Ltd, 652 F. Supp. 770, 772 n.4 (S.D.N.Y. 1986) (Goettel, J.) ("The rather broad draftsmanship of RICO has resulted in its expansive application. A professor who served as a draftsman for the bill has stated that this broad application is what *he* intended. There is no indication, however, that the Congress which passed the bill was adopting *his* intentions.") (emphasis in original). Courts have not been so reluctant to accept the writings of other professors who have been draftsmen. *See, e.g.*, Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959), cited with approval in Aaron v. Securities and Exch. Comm'n, 446 U.S. 680, 706 n.1 (1979) (Blackmun, J., concurring in part and dissenting in part); Sanders v. John Nuveen & Co., Inc., 619 F.2d 1222, 1226 (7th Cir. 1980); Woolf v. S.D. Cohn & Co., 515 F.2d 591, 605 n.6 (5th Cir. 1975); Vohs v. Dickson, 495 F.2d 607, 619 n.3 (5th Cir. 1974); Lanza v. Drexel & Co., 479 F.2d 1277, 1296 n.52 (2d Cir. 1973); Klein v. Computer Devices, Inc., 591 F. Supp. 270, 277 (S.D.N.Y. 1984) (Goettel, J.); Securities and Exch. Comm'n v. Lowe, 556 F. Supp. 1359, 1363 (E.D.N.Y. 1983); *In re* New York City Mun. Sec. Litig., 507 F. Supp. 169, 175 (S.D.N.Y. 1980). The difference may lie, not so much in the source of the opinion, but its content; it ought to rest on the character of the reasons supporting (or not) the opinion.

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*** I J. KENT, COMMENTARIES 468 (8th ed. 1854).

1 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987). Justice Douglas once suggested the adoption of an editorial policy by law reviews that would require each author to indicate his special interest in the subject matter of his article. He warned, "I fear that law journals have been more seriously corrupted by non-disclosure than we imagine." Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 229 (1965). In that spirit, we note that one of our number, Professor

of Appeals for the Ninth Circuit "decide[d] essentially as a matter of first impression for an appellate court whether injunctive relief may be granted . . . under civil RICO."[2] As the first appellate opinion squarely addressing the scope of equitable remedies available under civil RICO, *Wollersheim* will likely be given great weight by district courts and other appellate courts.[3] Accordingly, its reasoning merits careful analysis. The

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Blakey, was a counsel of record on the petition for certiorari in *Wollersheim* and on the motion for a preliminary injunction in Federal Deposit Ins. Corp. v. Antonio, 649 F. Supp. 1352 (D. Colo. 1986) (appeal pending). The views expressed in the petition to the court and on the motion in *Antonio*, however, did not differ from those previously expressed in a more scholarly context. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 330-41 (1982) [hereinafter *Civil Action*]; Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1038, 1047 (1980) [hereinafter *Basic Concepts*].

2 796 F.2d at 1082.

3 *Wollersheim* has already begun to have an impact. *Wollersheim* suggested that The Church of Scientololgy was not "one of the class for whose *especial* benefit the statute was enacted." 796 F.2d at 1088 n.14 (emphasis in original) (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)). RICO, the court suggested, was "aimed principally at protecting the public from organized crime front enterprises, not at enabling a religious organization to prevent the dissemination of doctrinal materials by a rival religious organization." *Id.* The court, however, mischaracterized at this point the record on the appeal. In fact, the district court had found that the matter was "a stolen document case." 796 F.2d at 1079 (quoting unpublished district court opinion). In addition, the district court stated that "[t]he theft appeared to be as much for economic as for doctrinal reasons." *Id.* Contrary to the court of appeals finding, the Church would, therefore, fall within the class of those for whose "especial benefit" the statute was in fact drafted: a victim of a RICO offense. Indeed, the court itself recognized that the Church had been the victim of RICO cognizable conduct. 796 F.2d at 1080. It left open only whether the Church had adequately pled RICO cognizable harm to "business or property" within 18 U.S.C. § 1964(c) (1982). 796 F.2d at 1080 n.6.

More importantly, *Wollersheim* is not an opinion limited to suits brought by religious organizations, however correct the court may have been to deny to a church the benefit of a law that it would have used to protect a commercial business. As written, *Wollersheim* denies equity type relief to *all* RICO plaintiffs. *But see* Wells v. Simonds Abrasive Co., 345 U.S. 514, 525 (1953) (Jackson, J.) (a law's application ought not depend "on whose ox it gores"); Parcell v. Summers, 145 F.2d 979, 985 (4th Cir. 1944) (law of unfair competition protects churches as well as businesses). In Federal Deposit Ins. Corp. v. Antonio, 649 F. Supp. 1352, 1354 (D. Colo. 1987) (appeal pending), the district court, in reliance on *Wollersheim*, denied the FDIC's request for injunctive relief pursuant to RICO to prevent multistate defendants from dissipating assets pending trial. The complaint alleged a fraudulent scheme by the defendants to use $3 million of the bank's assets to purchase $9 million in stolen currency. Few would contend that the FDIC is not within the class for whom RICO's protection was designed when it takes over banks that fail because of criminal activity. Nor would many suggest that, if proven, such defendant's conduct does not fall within RICO's core concern. *See* United States v. Turkette, 452 U.S. 576, 591 (1981) ("[T]he major purpose of . . . [RICO was] to address the infiltration of legitimate business by organized crime."). Nevertheless, while the FDIC's request for an injunction was granted pursuant to Colorado's little RICO statute, it was a happenstance that the bank's failure occurred in a state that had enacted such special legislation. In fact, only 27 states have such legislation, of them, only 21 expressly provide, under varying conditions, for such prejudgment relief. *See* Appendix A. Yet the problem of bank failures stemming from criminal conduct is nationwide and of epidemic proportions. N.Y. Times, Jan. 22, 1987, at 45, col. 1 (FDIC testimony: 1987 bank failures may increase 25% over 1986, which had a record 145 banks fail; $18 billion reserve fund may shrink by $1 to $3 billion). *See also* N.Y. Times, May 22, 1987, at 17, col. 6 (failure of Butcher banking dynasty inflicted $1 billion estimated harm). The assets of the 1986 moribund banks totaled $7.7 billion; it cost the FDIC $2.8 billion to pay off insured depositors and shut down the institutions. About 1,500 institutions remain on the Corporation's "sick list," 10% of which will fail each year. N.Y. Times, Jan. 5, 1987, at 20, col. 1. Similarly, the Federal Savings and Loan Insurance Corporation's funds are nearly exhausted from the failure of savings and loan associations. *See* N.Y. Times, Apr. 2, 1987, p. 30, col. 1 (General Accounting Office determines FSLIC is insolvent according to ordinary accounting principles; multibillion dollar rescue plan considered by Congress). At least one half of bank failures and one quarter of savings and loan association failures involve criminal activity by insiders. *Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Institutions*, H.R. REP. No. 1137, 98th Cong., 2d Sess. 5 (1984). One of the most

thesis of this Article is that *Wollersheim*'s reasoning is fatally flawed, since it is inconsistent with the text, legislative history, and purpose of RICO, and it cannot be easily squared with the teaching of the Supreme Court on how to read statutes in general or RICO in particular.

The Article that follows is divided into four parts. Part I sets out the facts of *Wollersheim*. Part II provides an overview of civil RICO and explains how the plaintiffs in *Wollersheim* satisfied the requirements for a civil RICO action. Part III details the opinion in *Wollersheim* and examines and critiques its reasoning. Part IV addresses the adverse consequences of *Wollersheim*, advocates that it not be followed by other courts, and suggests that Congress, if necessary, amend the statute to correct its result. Finally, the conclusion makes an effort to place *Wollersheim* in a larger economic and political context.

I. The Facts of *Religious Technology Center v. Wollersheim*[4]

The plaintiff in *Wollersheim* was the Church of Scientology ("Church"). The Church alleged that a group that had separated from it, the Church of the New Civilization ("New Church"), was disseminating to its members scriptural materials in fact stolen from the Church. Alleging federal jurisdiction under 18 U.S.C. section 1964,[5] the provisions of RICO authorizing the use of civil remedies, the Church sought a preliminary injunction in federal district court prohibiting the New Church from using the scriptural materials. In addition to the RICO claim on which federal jurisdiction was predicated, the Church's complaint contained six pendent California state law claims, including misappropriation of trade secrets.

After issuing a temporary restraining order, the district court conducted a two day evidentiary hearing. Following the hearing, the district court granted the Church's request for preliminary relief. It issued an injunction prohibiting the New Church from "using, distributing, exhib-

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common faults in failed banks is fraudulent real estate appraisals. *See* N.Y. Times, Sept. 29, 1986, at 22, col. 1 (during 1983 to 1985, more than 800 of 3,200 thrifts found to have significant appraisal deficiencies amounting to $3 billion understatement). *See also* BUS. WK., Mar. 30, 1987, at 41 (Department of Justice pursuing 300 cases involving "significant fraudulent dealing" by insiders; FBI probing another 200 cases representing $1.5 billion in losses at institution's closed by regulators). Unless the assets of defendants, whose conduct cause the bank or associations to fail, can be monitored during lengthy litigation through equity-type relief, civil suits against many of those who are involved in such scams cannot be successfully undertaken. *See* BUS. WK., May 18, 1987, at 49 (45 major bank fraud cases investigated by FBI awaiting trial for more than a year because of shortage of prosecutors). *Wollersheim*, therefore, portends ill for more than religious organizations. *See also* Republic of Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987) (RICO suit against former president of Philippines; injunction to freeze assets sought under state law; act of state doctrine precludes granting relief). Unfortunately, too, narrow and erroneous federal decisions tend to replicate themselves in state jurisprudence. *See, e.g.*, Finkelstein v. Southeast Bank, 490 So. 2d 976 (Fla. Dist. Ct. App. 1986) (Florida RICO plaintiff must meet traditional criteria for preliminary equity relief); Note, 14 FLA. ST. U.L. REV. 975 (1986) (*Finkelstein* based on mistaken reading of Florida RICO statute).

4 The facts are taken from the opinion of the court of appeals, except, as noted, where supplemented from the pleadings.

5 The Church also alleged federal jurisdiction under federal patent, copyright and trademark laws. The court of appeals, however, found that because the Church's complaint did not make "substantive allegations of patent, copyright or trademark infringement," the only basis for federal jurisdiction was under the RICO count. 796 F.2d at 1080 n.4.

iting or in any way publicly revealing"[6] the scriptural materials. A bond in the amount of one hundred thousand dollars was posted by the Church.

The New Church took an immediate appeal to the Ninth Circuit Court of Appeals. Following submission of an initial set of briefs, the Ninth Circuit requested the parties to file supplemental briefs on an issue that had not been raised in the district court or in the original briefs in the circuit court. The issue was: Did civil RICO authorize injunctive relief for private plaintiffs?

II. Background of Civil RICO and its Application to the Facts in *Religious Technology Center v. Wollersheim*

A. *The Background of Civil RICO*

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as the Racketeer Influenced and Corrupt Organizations Act (RICO).[7] RICO's "legislative history clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[8] "[T]he major purpose of Title IX [was] to address the infiltration of legitimate businesses by organized crime."[9] RICO, however, was not limited to the prohibition of the infiltration of legitimate organizations.[10] Nor does RICO apply "only to organized crime in the classic 'mobster' sense."[11] In brief, RICO was enacted as a general reform designed to sanction "enterprise criminality",[12] that is, patterns of racketeering activity committed by, through, or against an enterprise.[13]

6 796 F.2d at 1079.

7 18 U.S.C. §§ 1961-1968 (1982).

8 Russello v. United States, 464 U.S. 16, 28 (1983) (citing with approval *Civil Action*, *supra* note 1).

9 Turkette v. United States, 452 U.S. 576, 591 (1981).

10 *Id.* at 590. *See also* United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980) ("[T]he courts are all but unanimous in their refusal to read RICO as prohibiting only the infiltration of legitimate organizations . . . .").

11 United States v. Grande, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980). *See also* Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 ("not just mobsters"); Owl Constr. Co. v. Ronald Adams Contractor, Inc., 727 F.2d 540, 542 (5th Cir. 1984) ("[C]ourts and . . . commentators have persuasively and exhaustively explained why . . . RICO . . . [is not limited to] organized crime . . . .") (citing with approval *Civil Action*, *supra* note 1), *cert. denied*, 469 U.S. 831 (1984); *Basic Concepts*, *supra* note 1, at 1014.

12 *Basic Concepts*, *supra* note 1, at 1013-14.

13 One court has objected that such a reading of RICO works "a revolutionary consequence [nowhere noted] in the legislative history." Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). The facts do not support the court's statement. First, the scope of RICO, as a *general* reform *not* limited to organized crime, is noted repeatedly in its legislative history. *See Civil Action*, *supra* note 1, at 272-73 & nn.112-131, and 275-79 & n.116. Second, and more importantly, this statement ignores the structure of the entire Organized Crime Control Act. It is, after all, the statute, not the legislative history, that is voted on by Congress and signed by the President. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring). The Act is composed of 11 substantive titles, each of which (with two principal exceptions) Congress drafted in light of the *problem* of organized crime, but consciously enacted as *general* reform; other courts, too, have repeatedly rejected arguments that the 1970 Act did not work *general* reform under its various titles. *See, e.g.*, United States v. Box, 530 F.2d 1258, 1265 n.19 (5th Cir. 1976) (Title VIII (18 U.S.C. § 1955 (1976)) not limited to organized crime); United States v. Sacco, 491 F.2d 995, 1011-16 (9th Cir.

The core of RICO is found in section 1962, which sets out standards of "unlawful" conduct, which may be then enforced either criminally by the government or civilly by the government or by private parties.[14] The civil enforcement mechanisms of RICO were modeled on, but are not identical to the antitrust laws.[15] As with the comparable provisions of the antitrust laws, RICO's civil provisions create a "private enforcement mechanism . . . that . . . deter[s] violators . . . [and] provide[s] ample compensation to the victim. . . ."[16] RICO authorizes persons injured in

1974) (Ely, J., dissenting) (Title VIII unconstitutional under commerce clause, since not limited to organized crime; Title X (18 U.S.C. § 3575 (1982)) not limited to organized crime); United States v. Schwanke, 598 F.2d 575, 578 (10th Cir. 1979) (Title XI (18 U.S.C. § 844 (1982)) not limited to organized crime). Accordingly, the Organized Crime Control Act, including Title IX, conforms to a consistent pattern of federal legislation enacted over the past half century as general reform aimed at a specific target, but not restricted in its drafting to that specific target. *See, e.g.*, 18 U.S.C. § 224 (1976) (sports bribery) (held not limited to organized crime in United States v. Walsh, 544 F.2d 156, 159 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977)); 18 U.S.C. §§ 891-894 (1970) (loan sharking) (held not limited to organized crime in United States v. Keresty, 465 F.2d 36, 43 (3d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972)); 18 U.S.C. § 1510 (1976) (obstruction of criminal investigation) (held not limited to organized crime in United States v. Koehler, 544 F.2d 1326, 1330 n.6 (5th Cir. 1977)); 18 U.S.C. § 1951 (1976) (extortion) (held not limited to racketeering in United States v. Culbert, 435 U.S. 371, 373-74 (1978)); 18 U.S.C. § 1952 (1976) (Travel Act) (held not limited to organized crime bribery in Perrin v. United States, 444 U.S. 37, 46 (1979) and United States v. Wander, 601 F.2d 1251, 1257-58 (3d Cir. 1979)); 18 U.S.C. § 1953 (1964) (lottery tickets) (held not limited to organized crime in United States v. Fabrizio, 385 U.S. 263, 265-67 (1966)); 18 U.S.C. § 2113(b) (1982) (bank robbery) (held not limited to gangsters in Bell v. United States, 462 U.S. 356, 358-62 (1983)); 18 U.S.C. § 2114 (1982) (assault on custodian of property of United States) (held not limited to postal carriers in Garcia v. United States, 469 U.S. 70, 72-80 (1984)); 18 U.S.C. §§ 2421-2424 (white slave traffic) (held not limited to commercial prostitution in Caminetti v. United States, 242 U.S. 470, 485-90 (1917)). *See generally* Blakey, *Definition of Organized Crime in Statutes and Law Enforcement Administration*, in THE IMPACT: ORGANIZED CRIME TODAY: PRESIDENT'S COMMISSION ON ORGANIZED CRIME 511-80 (1986). For two independent recognitions of the fact of the pattern, albeit both with deep reservations on its wisdom, see Baker, *Nationalizing Criminal Law: Does Organized Crime Make it Necessary or Proper?*, 16 RUTGERS L.J. 495 (1985); Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 2132 (1984).

14 *See Civil Action*, *supra* note 1, at 243 n.20. Section 1962, in short, states what is "unlawful," not "criminal." As such, RICO is not, as some courts have found, "primarily a criminal statute." *See, e.g.*, *In re* Action Indus. Tender Offer, 572 F. Supp. 846, 849 (E.D. Va. 1983). Under 18 U.S.C. § 1961(3) (1982), "person" ("individual" or "entity") defines the class who may be sued civilly for violations of § 1962 under § 1964; under 1 U.S.C. § 1, "whoever" ("individual," "corporate body," but not "governmental unit") defines the class who may be indicted for violations of § 1962 under § 1963. Because the civil scope of RICO is *broader* than its criminal scope, RICO is *not* primarily criminal and punitive, but primarily civil and remedial. *See Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"); *Sedima*, 473 U.S. at 497-98; Shearson/American Express, Inc. v. McMahon, No. 81-44, slip op. at 19 (Sup. Ct. Jun. 3, 1987) ("priority of the compensatory function"). *See also* 115 CONG. REC. 6993 (1969) (remarks of Sen. Roman L. Hruska regarding S. 1623, the immediate predecessor to S. 1861, from which Title IX was drawn: "[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."). RICO's civil sanctions, imposed once a plaintiff's allegations are proven by a preponderance of the evidence, are available to the government or private parties. *See* United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (government suit); Wilcox v. First Interstate Bank of Or., 815 F.2d 522, 530-32 (9th Cir. 1986) (private suit); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1169 (5th Cir. 1984) (private suit). *See also Sedima*, 473 U.S. at 491 ("no indication . . . [to] depart from [preponderance]"); Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 560 (1985).

15 S. REP. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. REP. No. 1549, 91st Cong., 2d Sess. 56-70 (1970). Nevertheless, Congress drafted RICO outside of the antitrust laws because it wanted it to have a *broader* impact. *See Sedima*, 473 U.S. at 498-99.

16 Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982). The antitrust statutes have been aptly termed "the Magna Charta of free enterprise." United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). They "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

their "business or property" by a violation of the statute to "recover threefold the damages sustain[ed] and the cost of the suit, including reasonable attorney's fees."[17] Such compensation "provide[s] strong incen-

Id. Under the antitrust statutes, the private "treble-damages remedy [is needed] . . . precisely for the purpose of encouraging *private* challenges to antitrust violations." Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (emphasis in original). In fact, RICO and the antitrust statutes are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or the threat of it), deception, or market power." C. KAYSEN & D. TURNER, ANTITRUST POLICY 17 (1959). *See also* American C & L Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exercised through force or fraud or agreement."). RICO focuses on the first two; antitrust focuses on the third. As the antitrust laws seek to maintain economic freedom in the market place, so, too, RICO seeks to promote, among other things, integrity in the market place.

17 18 U.S.C. § 1964 (c) (1982). The idea of multiple damages for certain kinds of unlawful practices has deep roots. The earliest such provision in English law was the Statute of Gloucester, 6 EDW. 1, ch. 5 (1278) (treble damages for waste). Modern antitrust statutes have their origin in the Statute Against Monopolies, 21 JAC. 1, ch. 3, § 4 (1624) (authorizing treble damages for those injured by unlawful monopolies). Even the English Parliament, however, recognized that it was "one thing to pass statutes and . . . quite another thing to insure that [they were] actually enforced." 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 335 (3d ed. 1945). Accordingly, "it was a common expedient [in the Middle Ages and beyond] to give the public at large an interest in seeing that a statute was enforced . . . ." *Id.* The multiple damage enforcement mechanism was also present in early colonial laws. *See, e.g.*, THE LAWS AND LIBERTIES OF MASSACHUSETTS 5 & 24 (1648) (provisions providing treble damages for pilfering and theft and gaming, respectively).

The idea of multiple damages for various kinds of wrongs was a characteristic feature of Roman law. The delict of theft existed as early as the Twelve Tables (450 B.C.). *See* THE INSTITUTES OF GAIUS (PART I) 217 (F. de Zulueta trans. 1951). "[T]he penalty . . . [was] four times the value of the thing stolen" when the offender was caught in the act; otherwise, it was double. A. WATSON, THE LAW OF THE ANCIENT ROMANS 76 (1970). Extortion was remedied by four times the loss. *Id.* at 80. Possession of stolen property was remedied by three times the value of the property. *Id.* at 77. Greek law provided for double damage if stolen property was recovered; tenfold damages otherwise. 5 C. KENNEDY, THE ORATIONS OF DEMOSTHENES, APP. VI 187 (1909) (quoting a law of Solon), *quoted in*, 1 J. WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 343 (1936). Biblical law, too, reflected multiple damage recovery. *See* Exodus 21:37 (theft of ox or sheep, if killed, restoration of five for ox and four for sheep); Exodus 22:3 (double damages for trespass to property); 2 Samuel 12:1-6 (restoration of fourfold for taking of lamb).

Modern law and economic analysis support the wisdom of this history. Indeed, a number of federal statutes, particularly in the commercial area, contain treble damage provisions. *See, e.g.*, 12 U.S.C. § 1464 (1982) (Home Owners' Loan Act of 1933); 12 U.S.C. § 1975 (1982) (Bank Holding Company Act); 12 U.S.C. § 2607 (1982) (Real Estate Settlement Act of 1974); 15 U.S.C. § 15 (1982) (Clayton Act); 15 U.S.C. § 72 (1982) (Revenue Act of 1916: restraints on import trade); 15 U.S.C. § 1117 (1982) (Trademark Act of 1946); 15 U.S.C. § 1693f (1982) (Electronic Fund Transfer Act); 15 U.S.C. § 1989 (1982) (Motor Vehicle Information and Cost Savings Act); 22 U.S.C. § 4209 (1982) (penalties imposed on consular officers for exacting excessive fees); 30 U.S.C. § 689 (1982) (Lead and Zinc Stabilization Program); 35 U.S.C. § 284 (1982) (patents); 42 U.S.C. § 9607 (1982) (CERCLA); 45 U.S.C. § 83 (1982) (government aided railroads); 46 U.S.C. § 1227 (1982) (Merchant Marine Act of 1970). Professor (now Judge) Posner supports the concept of private enforcement mechanisms allowing for more than actual damages against deliberate antisocial conduct, particularly where the factor of concealment is present. R. POSNER, ECONOMIC ANALYSIS OF LAW 560 (private enforcement), 194, 346 (more than actual damages for deliberate conduct), 293 (concealment) (3d ed. 1986). Concealment, of course, is the *sine qua non* of most RICO-type behavior, particularly fraud. GENERAL ACCOUNTING OFFICE: FRAUD IN GOVERNMENT PROGRAMS—HOW EXTENSIVE IS IT?—HOW CAN IT BE CONTROLLED?, cover page (1980) ("Most fraud is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is that crime against the Government often does pay.") In brief, if society authorizes the recovery of only actual damages for deliberate antisocial conduct engaged in for profit, it allows the perpetrator know that if he is caught, he must return the misappropriated sums. If he is not caught, he may keep the money. Even if he is caught and sued, he may be able to defeat part of the damage claim or at least compromise it. The balance of economic risk under traditional single damage recovery, therefore, provides little economic disincentive to those who would engage in such conduct. *See* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 223 (1976) ("If, because of concealability, the probability of being punished for a particular . . . violation is less than unity, the prospective violator will discount (i.e., multiply) the punishment cost by that probability in determining the expected

tives to civil litigants and [is] integral to the effort of Congress to enlist the aid of civil claimants in deterring racketeering . . . ."[18] In addition, such "private . . . litigation is one of the surest weapons for effective enforcement"[19] of the law, and it "provide[s] a significant supplement to the limited resources available to the government."[20]

Congress directed that RICO be "liberally construed to effectuate its remedial purposes."[21] The directive is a "mandate."[22] "RICO is to be

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punishment cost for the violation."). *See also* Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U. S. 606 (1985):

> [It is also true that] the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

747 F.2d at 399 n.16. Similarly, studies under the antitrust statutes show that most treble damage suits are now settled at close to actual damages. STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 98th CONG. 2D SESS., STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY, SERIAL NO. 8, HOUSE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS. 14 (1984). No reason exists to believe that a similar pattern will not develop under RICO, at least in the fraud area. Empirical studies show that it is the threat of treble damages, not criminal prosecution, that is the backbone of the antitrust statutes. *See, e.g.*, Block, Nold and Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a credible threat to colluding firms . . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . ."). Ironically, it may be necessary to authorize treble damages to assure that deserving victims receive actual damages. *See generally* Shearson/American Express, Inc. v. McMahon, 107 S. Ct 2323, 2345 (1987) ("remedial role"); Genesco, Inc. v. Kakivchi & Co., Ltd., 815 F.2d 840, 851 (2d Cir. 1987) ("§ 1964(c) is primarily a compensatory and secondarily a deterrent measure"); Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 533-34 (1986):

> Treble damages have unique characteristics that can be creatively used to address the problems of sophisticated crime. Treble damages can be used to (1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.

18 Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165 (5th Cir. 1984).

19 Leh v General Petroleum Corp., 382 U.S. 54, 59 (1965) (quoting Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965)). In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, 84% were instituted by *private* plaintiffs. U.S. DEPT. OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981).

20 *Reiter*, 442 U.S. at 344. *See Sedima*, 473 U.S. at 493 ("Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps."). *See also supra* note 17 (treble damages) and *infra* note 191 (public enforcement).

21 Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. IX, 84 Stat. 941 (1970). *See also Sedima*, 473 U.S. at 491 n.10, 497-98; *Russello*, 464 U.S. at 27 ("[T]his is the only substantive federal criminal statute that contains such a directive . . . .").

The presence of a liberal construction clause is not unusual in state law. Such clauses had their origin in the codification movement of the 19th century. Edward Livingston suggested the rejection of the old common law rule of strict construction in the farsighted code he drafted for Louisiana between 1820 and 1825. 1 E. LIVINGSTON, COMPLETE WORKS ON CRIMINAL JURISPRUDENCE 231 (1873 ed.); 2 E. LIVINGSTON, *supra*, at 14 ("[A]ll penal laws whatever are to be construed according the plain import of their words . . . ."). Livingston's suggestion for Louisiana was followed by David Dudley Field in his influential draft of codes of penal law and criminal procedure for New York. THE CODE OF PENAL LAW 5 (1865 ed.) ("fair import"); THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK 470-71 (1850 ed.) (revised code to be given "liberal construction" as old rule had no support in any "principle of substantial justice, and . . . [its] highest aim, practically considered, seem[ed] to be, to render that law inconsistent with its spirit and as a consequence, absurd and ridiculous"). Ultimately, Livingston's and Field's work formed the intellectual basis for the Federal Rules of Civil and Criminal Procedure. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 104 (1969).

read broadly."[23] In addition, "[its] 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity."[24] "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime . . . . [and] it is in this spirit that all of the Act's provisions should be read."[25] Accordingly, RICO's language must be read in the same broad fashion, whatever the character of the suit.[26]

At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and hate-group prosecutions.[27] The Department of Justice has also begun to implement RICO's civil provisions.[28] Nevertheless, despite the promise of new methods to remedy old wrongs, the private bar did not begin to bring civil RICO suits until about 1975. When it did, the district courts reacted

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Judicial hostility to change through legislation was common in the 19th century. *See* J. HURST, THE GROWTH OF AMERICAN LAW 186 (1950):

> [W]here [judges] were not ready boldly to declare [it] unconstitutional, [they were ready] to interpret it so restrictively as to narrow its effect.
>
> These factors found expression in the abstract canons of statutory interpretation . . . : strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed 'drastic' burdens, or of legislation that imposed special damages. . . .
>
> The effect was to put a primarily obstructive, if not destructive connotation on the process of statutory interpretation.

Legislatures reacted. "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 174 (1974); *see* E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 421 (1953); *see also Civil Actions*, *supra* note 1, at 245 n.25 (review of the statutes and relevant decisions). In fact, a majority of states has abolished the common law rule. Judicial hostility, however, continues into the 20th century. *See, e.g.*, *Sedima*, 473 U.S. at 529 (Powell, J.) (liberal construction applies only to criminal provisions); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1305 (D. Colo. 1984) (same). Courts have recognized that strict construction is not of constitutional dimension. *See* Tarrant v. Ponte, 751 F.2d 459, 466 (1st Cir. 1985); *Civil Action*, *supra* note 1, at 288 n.150. For a different view of the relationship between "liberal" and "fair import" construction, see *Baker*, *supra* note 13, at 560-66.

22 United States v. Long, 651 F.2d 239, 241 (4th Cir.), *cert. denied*, 454 U.S. 896 (1981).

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

24 *Id.* at 498.

25 *Id.*

26 *Sedima*, 473 U.S. at 489; Plains Resources, Inc. v. Gable, 782 F.2d 883, 886 (10th Cir. 1986); *Alcorn County*, 731 F.2d at 1170-71; Slattery v. Costello, 586 F. Supp. 162, 164 (D.D.C. 1983) ("[T]his Court would be hard pressed to justify a narrower construction of RICO's civil cause of action than that afforded RICO's criminal provisions."); *see also* Northern Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.").

27 *See Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott) [hereinafter *Oversight*]. *See also* N.Y. Times, Dec. 30, 1985, at 1, col. 1 (conviction under RICO of nine men and one woman, members of the "Order," a racist and antisemitic group, accused of multiple murders, armed robberies, counterfeiting, weapons, and arson); N.Y. Times, Sep. 6, 1985, at A-17, col. 3 (conviction under RICO of leader of "Covenant, the Sword, and the Arm of the Lord," a militant white supremacist group). Federal prosecutions of various hate groups have "depleted the leadership [and] drained the resources of several organizations." N.Y. Times, Jun. 10, 1987, at 14, col. 1 (study of Anti-Defamation League of B'nai B'rith).

28 *See, e.g.*, United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986) (civil suit against organized crime controlled union); *Oversight*, *supra* note 27, at 116-17; N.Y. Times, Mar. 28, 1987, at 1, col. 1 (court trustee struggles with union "one of the most corrupt in the nation"); Wall St. J., Feb. 10, 1987, at 1, col. 6 (teamster local greets court trustee angrily).

with extreme hostility and, with few exceptions, undertook to redraft the statute in a concerted effort to dismiss civil suits in all possible ways.[29] Indeed, prior to *Sedima*, sixty-one percent of the reported decisions were dismissed on various motions of defendants.[30] The first effort to redraft civil RICO took the form of reading an "organized crime" limitation into it.[31] Because that limitation had no support in the text of the statute—it was also specifically rejected in the legislative debates—the courts of appeals for the Second, Fifth, Seventh, and Eighth Circuits rejected it out of hand.[32] The next effort involved reading a "competitive injury" limitation into the statute.[33] The Seventh and Eighth Circuits quickly turned

29 The district courts have in fact acknowledged that their rewriting of RICO was motivated by a concern about a "flood of litigation." McCarthy v. Pacific Loan, Inc., 600 F. Supp. 137, 139 (D. Haw. 1984). The district courts' concern over a flood of RICO litigation is not only misplaced factually, but also constitutionally inappropriate. Previously, separate statistics on RICO litigation were not kept by the Administrative Office of the United States Courts. *See generally* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS (1985). Approximately 275,000 civil cases, however, are filed each year. *Id.* at 11. Approximately 39,000 criminal prosecutions are brought. *Id.* at 16. Slightly more than 118,000 of the civil cases involve the United States as a plaintiff or defendant. *Id.* at 11. Private litigation embraces approximately 160,000 filings, of which 60% are federal question and 40% are diversity filings. *Id.* at 11. The principal areas of litigation concern recovery of overpayments and enforcement of judgments (47,000 filings), prisoner petitions (30,000 filings), social security (25,000 filings), civil rights (20,000 filings), and labor (11,000 filings), *id.* at A-12 & A-13. Antitrust litigation includes 959 civil filings and 47 criminal cases, *id.* at A-12 & A-47. Securities, commodities and exchange-related filings include 3,200 civil and 13 criminal cases, *id.* at A-13 & A-46. Fraud-related litigation accounts for 1,700 civil filings. *Id.* at A-12. Accordingly, if most securities and fraud-related cases were also RICO cases, RICO filings would not exceed 5,000, not more than 2% of all federal filings. How many wholly new pieces of litigation, particularly in the fraud area, RICO will draw into the federal courts cannot be reliably determined. Yet, it is doubtful that the number will be relatively high, as most significant commercial litigation is now in the federal courts under other federal statutes or diversity jurisdiction. In fact, the Department of Justice indicated that of the approximately 500 civil RICO cases brought pre-*Sedima*, 65% of them had an independent basis for federal jurisdiction. *See Oversight*, *supra* note 27, at 127. More recently, too, Administrative Office data indicate that in 1986 only 1069 civil RICO cases were filed, while 294 were terminated. *See infra* Appendix B. Of reported decisions, 58% had an independent basis for Federal jurisdiction. *Id.* As such, "the perceived problem of civil RICO case load is exaggerated . . . ." 2 CIVIL RICO REPORT No. 34, at 3 (Feb. 4, 1987) (remarks of Judge Pamela A. Rymer). In fact, the decisions have "calmed down" and "actually present no greater problems than antitrust or complicated securities cases." *Id.* In any event, "hostility to the extraordinary breadth of civil RICO is not a reason for courts to restrict its scope." Morgan v. Bank of Waukegan, 804 F.2d 970, 977 (7th Cir. 1986). Allegations of civil RICO abuse may be dealt with by the vigorous enforcement of existing remedies for general litigation abuse. *See* Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 103-04 [hereinafter *Civil RICO Abuse*] ("[U]pon review . . . RICO abuse is not a serious problem for our legal system so long as counsel and courts appreciate the utility of existing remedial procedures. Accordingly, both Congress and the courts should recognize that abuse arguments are more likely motivated by hostility to the RICO remedy."). "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly" is for the legislative branch. United States v. Rodgers, 446 U. S. 475, 484 (1984). As such, it is neither necessary nor constitutional for courts to redraft legislation. Congress, too, is being pressed both to retain and to circumscribe civil RICO. For a review of the various arguments and proposals, see generally Note, *Congress Responds to* Sedima: *Is There a Contract Out on Civil RICO?*, 19 LOY. L.A.L. REV. 851, 930 (1986) ("Though it might be conceded that RICO's private right of action has been something less than a lethal weapon in the war against organized crime, the measure may prove a hero in the war against fraud."). No evidence exists that Congress is unable or unwilling to fulfill its constitutional role.

30 *Oversight*, *supra* note 27, at 127.

31 *See, e.g.*, Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

32 For a list of courts rejecting the reading in of an organized crime limitation, see cases collected in *Alcorn County*, 731 F.2d at 1167.

33 *See, e.g.*, North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980).

aside that effort.[34] Then, the district courts hit upon the "racketeering injury" limitation.[35] Together with a criminal conviction limitation, this effort was rejected by the Supreme Court in *Sedima S.P.R.L. v. Imrex Co.*[36] When the court of appeals heard the *Wollersheim* appeal, therefore, none of the efforts by the district courts to circumscribe RICO's congressionally designed breath had been ultimately successful on appeal.[37]

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34 *See* Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983) (The organized crime limitation "revived under . . . [a new] guise"); Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir. 1982)), *aff'd*, 710 F.2d 1361 (en banc), *cert. denied sub nom.*, Prudential Ins. Co. v. Bennett, 464 U.S. 1008 (1983).

35 *See, e.g.*, Landmark Savings & Loan v. Rhoades, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

36 473 U.S. at 488, 495 ("The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. . . . [W]e perceive no distinct racketeering injury requirement. . . . A reading of the statute belies any such requirement.").

Writing for a sharply divided court of appeals, Judge Oakes had suggested that civil RICO suits against "respected and legitimate enterprises" were "extraordinary, if not outrageous." *Sedima*, 741 F.2d at 487. Included among the cited "legitimate" enterprises was E.F. Hutton. *But see White Collar Crime (E.F. Hutton): Hearings Before the Senate Judiciary Comm.*, 99th Cong., 2nd Sess. 132 (1986) (Senator Joseph R. Biden: "Where I come from that is called 'theft.' " Robert Foman, Chairman of E.F. Hutton Group, Inc.: "It is probably not different."); *Why the E.F. Hutton Scandal May Be Far From Over*, BUS. WK., Feb. 24, 1986, at 98, col. 1 (Hutton pleads guilty to 2,000 counts of mail and wirefraud in multimillion dollar bank scam). *See also* Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384, 395 n.14 (7th Cir. 1984), *aff'd*, 473 U. S. 606 (1985) ("[T]he white collar crime alleged in some RICO complaints against 'legitimate' businesses is in some ways at least as disturbing . . . ."). Those who make such remarks are apparently unaware of the substantial body of literature on white-collar crime committed by so-called respected businesses. *See, e.g.*, Ross, *How Lawless Are Big Companies*, FORTUNE, Dec. 1, 1980, at 57 (1,043 major corporations indicted between 1970-1980: 117 convictions or consent decrees for 98 antitrust violations; 18 kickbacks, briberies or illegal rebates; 21 illegal political contributions; 11 frauds; and five tax evasions). *See infra* notes 193 (white-collar crime) & 253 (same).

37 The Supreme Court's opinion in *Sedima* contained the often cited footnote number 14, stating that "the failure of Congress and the courts to develop a meaningful concept of 'pattern' . . . resulted in the extraordinary uses to which civil RICO . . . [had] been put . . . ." 473 U.S. at 500. Ignoring the general teachings of *Sedima*, and narrowly focusing on footnote 14, the district courts have, however, continued to dismiss most civil RICO cases, not seeking, as the Supreme Court suggested, to develop a "meaningful" definition of the concept of pattern, but to find an easy device to clear their dockets. *See* Appendix B (51.1% dismissed, 40% of which dismissed on "pattern" grounds). Indeed, those district courts, while acknowledging that *Sedima* eliminated the "organized crime," "competitive or racketeering injury," and "criminal conviction" requirements, have declared open-season on civil RICO. Such arguments, however, "[turn] the Supreme Court's reasoning on its head," and are "out of line with the tenor of the . . . *Sedima* opinion." Bush Dev. Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1366 (E.D. Va. 1986) ("narrow reading of . . . pattern . . . is, in principle, very similar to the criminal conviction and racketeering injury requirements that were rejected . . . in *Sedima*"). Substitute "pattern" for "organized crime" or "racketeering injury" and the decisions continue on their pre-*Sedima* course. A conflict in the circuit courts, too, has now developed. *Compare* California Architectual Bdlg. Prods. v. Francisan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987) (single episode test rejected); Roeder v. Alpha Indus., Inc., 814 F.2d 22, 31 (1st Cir. 1987) (single scheme or episode limitation rejected: multiple factors must be considered); International Data Bank Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987) (single scheme test rejected); United States v. Ianniello, 808 F.2d 184, 189-93 (2d Cir. 1986) (single scheme limitation rejected; continuity for "pattern" may be found from continuing character of enterprise and open-ended nature of scheme) *and* Morgan v. Bank of Waukegan, 804 F.2d 970, 974-77 (7th Cir. 1986) (single scheme limitation rejected; pattern may be found where series of discrete harms inflicted) *with* Superior Oil Co. v. Fulmer, 785 F.2d 252, 255-58 (8th Cir. 1986) (single scheme establishes relationship, but negates continuity for "pattern") *and* Madden v. Cluck, 815 F.2d 116 n.1 (8th Cir. 1987) (*Fulmer* "adhere[d] to" despite *Ianniello*). For an excellent analysis of "pattern" that precedes, but anticipates the holdings of *Roeder*, *International Data Bank*, *Ianniello* and *Morgan*, see Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 92 (1986). This development threatens to frustrate Congress' 1970 promise of "enhanced sanctions and new remedies" for old wrongs. *See* 84 Stat. 923 (1970).

The question of "pattern" was, of course, not before the *Sedima* court. 473 U.S. at 500. Since

"pattern" was neither briefed nor argued, "pattern" was not decided. *See* Cohen v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.). In short, little reason exists to believe that the Court, in a footnote, without briefs or arguments, cavalierly rejected wholesale a decade and one-half of well-considered intermediate appellate court jurisprudence. *See Ianniello*, 808 F.2d at 190 ("Because the *Sedima* footnote does not rise to the level of a holding, it is not controlling."); Page v. Moseley, Hallgarten, Estabrook & Weeden, 806 F.2d 291, 298 (1st Cir. 1986) ("The meaning of . . . [pattern in] a civil RICO claim has yet to be clearly established in the law."); Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 353 n.20 (3d Cir. 1986) ("*Sedima* [does] not . . . give much guidance as to how 'pattern' should be interpreted"), *aff'd on other grounds sub. nom.*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., No. 86-497 (Sup. Ct. Jun. 22, 1987). *But see* Cowan v. Corley, 814 F.2d 223, 227 (5th Cir. 1987) ("direct a narrower definition of pattern"); Smoky Greenhaw Cotton Co. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280-81 n.7 (5th Cir. 1986) ("more rigorous interpretation"). Were a court to take a fresh look at the issue of "pattern"—a course invited by the Court in *Sedima* but a course that was neither mandated in its method (ignore controlling precedent) nor dictated in its outcome (disembowel the statute)—the approach that ought to be taken is straightforward: any definition of "pattern" must be faithful to the text of the statute, its legislative history, and its purpose. It is crucial, too, for four functions:

1. The definition of criminality (when an indictment *may* be returned);
2. A statement of a claim for relief (when an action *may* be brought);
3. The principle of claim preclusion (when an action *must* be brought); and
4. The application of the statute of limitations (when, in whole or in part, it is *too late* to bring an action).

In addition, any definition of "pattern" ought to meet two tests: It ought to work equally well on the civil and criminal sides of the statute, and it must work equally well in § 1962 (a) (b) and (c). *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATION 20 (2d ed. 1953) ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language.") (emphasis in original); RICO REVISITED: AN ADVANCED SEMINAR ON THE LATEST TECHNIQUES IN CIVIL SUITS, 157 (1987) [hereinafter RICO REVISITED] ("Pattern may be used in RICO violation in at least 240 different contexts [3 (sections) x 5 (kinds of enterprises) x 4 (kinds of predicate offenses) x 4 (roles in violations) = 240].").

Any effort to develop a meaningful definition of "pattern" ought to begin with the language of the statute. *See Sedima*, 473 U.S. at 495 n.13; *Russello*, 464 U.S. at 20; *Turkette*, 452 U.S. at 580. The statute says "activity." 18 U.S.C. § 1961(1) (1982). It does not say "schemes," "transactions," or "episodes." *See Ianniello*, 808 F.2d at 192 n.16 ("Multiple scheme requirement is not grounded in the statutory language of RICO."); Federal Deposit Ins. Corp. v. Herr, 637 F. Supp. 828, 835 (W.D.N.C. 1986) (same). The statute "requires" that the "activity" be "patterned." 18 U.S.C. § 1961(5) ("at least two . . . within ten years," etc.). Pattern is not defined; it *is limited. Sedima*, 473 U.S. at 496 n.14 (*requires*: "while two acts are *necessary*, they may not be *sufficient*") (emphasis added). *See also* Helvering v. Morgan's, Inc., 293 U.S. 121, 125 n.1 (1934) (discussion of difference between "means" and "includes"). As such, "pattern" should be read in its ordinary or plain meaning, but it must be viewed in the context of the entire statute. *See Sedima*, 473 U.S. at 489, 495 n.13; *Russello*, 464 U.S. at 21, 22-23; *Turkette*, 452 U.S. at 580, 582, 587. One definition for *all* sections and *all* uses will not work. While their uses in each context will be different, they will reflect a "family of meanings." L. WITTGENSTEIN, *supra* at 36. "[W]e see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail." *Id.* at 32 ("family resemblances"). The requirement of a "pattern" is, therefore, like a "standard" and not a "rule." *Morgan*, 804 F.2d at 976 ("The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular use with no one factor being necessarily determinative."); *see* II R. POUND, JURISPRUDENCE 124-29 (1959). *See also* Nash v. United States, 229, U.S. 373, 376 (1913) ("restraint of trade") (Holmes, J.) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."). THE OXFORD ENGLISH DICTIONARY paraphrases "pattern" as "design" or "discernible form." *See* VII THE OXFORD ENGLISH DICTIONARY 565-66 (1933) (thirteen uses are noted; number eight refers to "design"); III THE OXFORD ENGLISH DICTIONARY 315 (1933) (definition number 8C: "An arrangement or order of things or activity in abstract senses; order or form discernible in things, actions, idea, situations, etc. Freq. with *of*, as *pattern of behavior* . . . and as second element with defining word.") (emphasis in original). The legislative history of the statute should also be examined. *See Sedima*, 473 U.S. at 486; *Turkette*, 452 U.S. at 586. The Supreme Court reviewed the legislative history materials regarding pattern. *See Sedima*, 473 U.S. at 496 n.14. The materials mention nothing about "schemes," "transactions," or "episodes." *See Ianniello*, 808 F.2d at 192 n.16 (no "clear legislative history" mandating multiple schemes). In fact, the materials specifically point only to two factors: "Relationship" and "continuity." Nothing in the text or legislative history of the statute, therefore, requires a "single

scheme" or "multiple schemes" for a showing of "pattern." *Compare* United States v. Quaod, 777 F.2d 1105, 1116 (6th Cir. 1985) (single scheme not required; acts need only be related to the enterprise), *cert. denied sub nom.*, Callanan v. United States, 106 S. Ct. 1499 (1986) *and* A.B.A., CRIMINAL JUSTICE SECTION, COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION: A REPORT OF THE RICO CASES COMMITTEE 36-37 (1985) (common scheme limitation rejected, since it would frustrate the application of RICO to conglomerates of crime) [hereinafter RICO COMMITTEE REPORT] *with Morgan*, 804 F.2d at 975 (single scheme not precluded; "otherwise . . . a single scheme would automatically escape RICO liability . . . an untenable result."). One act does not make a pattern. *See* United States v. Joseph, 781 F.2d 549, 554 (6th Cir. 1986). Nor do isolated acts. *See* S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969) ("[O]ne 'isolated racketeering' activity . . . [is] insufficient . . . . The target . . . is . . . not sporadic activity."). Moreover, nothing in the text or legislative history of the statute indicates that continuity (or its threat) may *only* be found in, or inferred from, the racketeering activity itself; it is wholly consistent with the text and legislative history of the statute to find continuity in *any aspect of a violation* that relates to the racketeering activity. *Cowan*, 814 F.2d at 227 (threat from formation and execution of illegal association); *Ianniello*, 808 F.2d at 190-91 (threat of continuity found from ongoing character of organized group); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 545 (E.D.N.Y. 1987) (continuity measured between acts not at termination); Hill v. Equitable Bank, 642 F. Supp. 1013, 1019 (D. Del. 1986) ("cover-up"); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 810 (E.D. La. 1986) (would have continued if not caught). The statute is part of Title 18, the federal criminal code. As such, "act" is best understood in the traditional sense of *actus reus* and *mens rea*. *See* United States v. Bailey, 444 U.S. 394, 415 n.11 (1980) ("Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law . . . ."). Accordingly, no reason exists, when examining the "acts" that make up an alleged "pattern," to focus on a *purely* jurisdictional "act," that is, a mailing, a use of wire communication, or interstate or foreign transportation. *Roeder*, 814 F.2d at 31 (mailing relating to single bribe not distinct for purpose of determining pattern); Elliott v. Chicago Motor Club Ins., 809 F.2d 347, 350 (7th Cir. 1987) (mailings relating to same fraud not distinct for purpose of determining pattern); *cf.* Cabbell v. United States, 636 F.2d 246, 248-49 (8th Cir. 1980) (proper prosecutorial unit under § 2314 may ignore jurisdictional elements). While "pattern" must be read consistently in criminal and civil litigation, the "acts" that constitute the "pattern" may differ. *Roeder*, 814 F.2d at 31 (single bribe not pattern simply because implemented in several steps and several acts of communications); *Elliott*, 809 F.2d at 350 (quoting Lipin Enterprises, Inc. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring) ("a multiplicity of mailings does not reasonably translate directly into a 'pattern' ")). *Compare Lipin Enters.*, 803 F.2d at 325 (Cudahy, J.) ("It is not clear that the same analysis would be appropriate in cases involving other kinds of predicate acts [such as] arson."). Instead, the focus should be on an "act"—the *actus reus*—that inflicts discrete harm. *Morgan*, 804 F.2d at 975. Using this approach, a "pattern" may be said to be present, when at least two acts occur, which are "designed," or have "discernible form," in reference to themselves or to the enterprise, and which reflect continuity (or its threat) either by looking at the acts themselves (*e.g.*, extortion), the purpose for which they were committed (*e.g.*, obstruction of justice) or the enterprise in itself (*e.g.*, a criminal gang). For parallel concepts, see Henry v. Farmer City State Bank, 808 F.2d 1228, 1237 (7th Cir. 1986) (municipal liability under 42 U.S.C. § 1983 (1982) ("[A] plaintiff must allege [under Oklahoma City v. Tuttle, 471 U.S. 808, 814 (1985)] a specific pattern or series of incidents that support the general allegations of custom or policy . . . ."); United States v. Iron Workers Local 86, 443 F.2d 544, 551-52 (9th Cir.) ("pattern or practice" prerequisite for an attorney general suit under Title VII: defined as "more than an isolated, sporadic incident, but is repeated routine of a generalized nature") (quoting 110 CONG. REC. 14270 (1970) (remarks of Sen. Hubert H. Humphrey)), *cert. denied*, 404 U.S. 984 (1971).

If such concepts as "scheme," "transaction," or "episode" are relevant to this text-based approach, they have validity solely as *tests* for the presence of congressionally-mandated elements. Normally, for example, a single "transaction" or "episode" (defined to mean several acts, so closely related in time and place that they may be fairly described as producing but a single harm) will not carry with it the reality or threat of continuity. *See, e.g.*, *Roeder*, 814 F.2d at 31 (single bribe in three installments); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987) (single contract and business opportunity); Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1112 (7th Cir. 1987) (single partnership transaction); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (sale of single piece of commercial real estate); Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1399 (9th Cir. 1986) (diversion of single shipment of product); *Lipin Enters.*, 803 F.2d at 324 (purchase of single car leasing company). As such, no pattern will be present. But the single "transaction" or "episode" tests ought not to be elevated to *judicially* imposed requirements that would be *inflexibly* applied as a substitute for congressional elements. The point is most clearly seen in the context of §§ 1962(b) and (d). In construing "pattern," most courts have concentrated on § 1962(c). *See, e.g.*, *Superior Oil*, 785 F.2d at 255; *but see id.* at 255 & n.1 (§§ 1962(a), (b), and (c)

"share in common" the "pattern" concept). Suppose, however, that the single scheme limitation were applied to § 1962(b), which deals with the takeover of an enterprise, and which, all concede, represents the principal, albeit not exclusive, purpose of RICO. *See Russello*, 464 U.S. at 28; *Turkette*, 452 U.S. at 590-91. Should no pattern be found where the racketeering activity was engaged in pursuant to a single scheme, then § 1962(b) will have been read out of the statute—or at least rewritten to prohibit *only* the acquisition of enterprises. *See Ianniello*, 808 F.2d at 192 ("requiring two schemes to establish pattern would effectively eliminate" § 1962 (b)); *see also* Paul S. Mullin & Assocs., Inc. v. Bassett, 632 F. Supp. 532, 541 (D. Del. 1986) ("[A]n attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts. . . . One could argue, however, that [no pattern was] involved because only one company was subverted. Under this view, a 'pattern' would come into existence only after the same enterprise began to infiltrate Chrysler or Ford."). *But see* A.L. Williams Corp. v. Faircloth, 652 F. Supp. 51, 55 (N.D. Ga. 1986) (single stock acquisition not pattern under § 1962(b)); Eisenberger v. Spectex Indus., Inc., 644 F. Supp. 48, 52 (E.D.N.Y. 1986) (single scheme to take over corporation not pattern under § 1962(b)). Such a result would be both "absurd" and "surprising." *Turkette*, 452 U.S. at 587. It is not what Congress intended. *See* S. REP. No. 91-617, 91st Cong., 1st Sess. 158 (1969) ("The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."). Thus, to be successful, the takeover of a legitimate business—even though accomplished in the context of a "single scheme"—would "normally" require not only the act of takeover, but also a "threat" of continuing criminal activity to maintain its objective; otherwise, the business could be reclaimed at any time. *See Morgan*, 804 F.2d at 975 ("To focus excessively on either continuity or relationship alone effectively negates the remaining prong."). Similarly, requiring multiple schemes for pattern potentially conflicts with § 1962(d) (conspiracy). A requirement of multiple schemes might defeat a single conspiracy charge; conversely, a showing of a single conspiracy might preclude a finding of multiple schemes for pattern. *See also* Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987) ("semantical game of generalizing the illegal objective"); Thompson v. Wyoming Alaska, Inc., 652 F. Supp. 1222, 1225 n.4 (D. Utah 1987) (for a thoughtful effort to distinguish between the concepts of "transaction," "episode," and "scheme"); RICO REVISITED, *supra*, at 184-85.

Ironically, the Eighth Circuit's decision in *Superior Oil* was correctly decided on its facts. Judge Wangelin's opinion rightly reflected traditional jurisprudence dealing with the single/multiple taking of oil, gas, and electricity, which requires the breaking of an otherwise continuous taking before more than one taking occurs. *See, e.g.*, Woods v. People, 222 Ill. 293, 78 N.E. 607 (1906); Reynolds v. State, 101 Ga. App. 715, 115 S.E.2d 214 (1980) (*Woods* followed). *See also* Reg. v. Firth, L.R.I.C.C. 172, 11 Cox Crim. Cases 234 (1869). But Judge Wangelin's use of the language "one continuing scheme to convert gas" and "one isolated fraudulent scheme" was unfortunate. Had he focused solely on "the underlying conversion or theft of gas," his result as well as his reasoning would have been correct. In addition, the special set of circumstances (theft of gas) in *Superior Oil* has now been ignored by the Eighth Circuit in Holmberg v. Morrisette, 800 F.2d 205, 207-10 (8th Cir. 1986) (three separate draws on letter of credit over six months not a pattern since indistinguishable from *Superior Oil*); Deviries v. Prudential-Bache Sec., 805 F.2d 326, 329 (8th Cir. 1986) (six-year course of "churning" brokerage account not a pattern); *Madden*, 815 F.2d at 1164 and Ornest v. Delaware N. Cos., Inc., 817 F.2d 651, 652 (8th Cir. 1987) (single scheme over eight years to defraud individual of commissions). Unfortunately, too, the Eighth Circuit's other "pattern" decisions are in hopeless disarray; it is likely that the court will have to sit en banc to resolve the various inconsistencies. *Compare Superior Oil with* Alexander Grant & Co. v. Tiffany Indus., Inc., 770 F.2d 717, 718 (8th Cir. 1985) (fraudulent audit pattern), *cert. denied*, 106 S. Ct. 799 (1986) *and* Barnes v. Resources Royalties, Inc., 795 F.2d 1359, 1367 (8th Cir. 1986) (three separate investments over six months a pattern). Moreover, *Superior Oil* is inconsistent with earlier, but carefully reasoned decisions of the Fifth and Eleventh Circuits. James v. Meinke, 778 F.2d 200, 207 (5th Cir. 1985) (multiple investments by investors in same failing company constituted pattern); Bank of Am. Nat'l Trust & Sav. Ass'n. v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986) (audit report: single scheme sufficient; different episodes rejected). The Fifth Circuit's unfortunate decision in R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) has been questioned by the Circuit itself. *See* Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280 n.7 (5th Cir. 1986), *on remand*, 650 F. Supp. 220 (W.D. Tex. 1986), *aff'd*, 805 F.2d 1221 (5th Cir. 1986). *Cf. Cowan*, 814 F.2d at 227 n.6 (*Smoky Greenhaw Cotton Co.* indicates "narrower" definition). *Superior Oil* has also been criticized by the Third Circuit. *See Malley-Duff & Assocs.*, 792 F.2d at 353 n.20 ("very restrictive definition of 'pattern' "); *see also* Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 123 (D. Md. 1986) ("unnecessarily restrictive"); Papai v. Cremosnik, 635 F. Supp. 1402, 1408 (N.D. Ill. 1986) ("breaking point").

The court in *Superior Oil* was also misled by Judge Shadur's opinion in Northern Trust

Bank/O'Hare v. Inryco, 615 F. Supp. 828 (N.D. Ill. 1985), which, of course, no longer states the law in the Seventh Circuit in light of *Morgan*, 804 F.2d at 974-76. *See* Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1286 (D.V.I. 1987) ("rejected" by *Morgan*); Beck v. Manufacturers Hanover Trust Co., 650 F. Supp. 48, 50 (S.D.N.Y. 1986) ("presumably overruled by *Morgan*"); Morris v. Gilbert, 649 F. Supp. 1491, 1502 (E.D.N.Y. 1986) ("repudiated in its home circuit by *Morgan*"). In *Inryco*, Judge Shadur faced under RICO a construction contract that involved a kickback scheme, "implemented through a number of payments." In all, five kickbacks were made from December 1979 through October 1980. 615 F. Supp. at 830. "Each of . . . [the] payments . . . took the form of a . . . check, [which was] made out to . . . [the perpetrator under an alias], and deposited in [his account] . . . ." *Id.* Judge Shadur recognized that precedent in the Seventh Circuit held that "acts taken in furtherance of a single criminal end . . . [may] satisfy the 'pattern' requirement [and that] the contention [had been rejected] that constituent acts do not form a pattern unless they are performed in the course of separate criminal events." *Id.* at 831 (citing United States v. Starnes, 644 F.2d 673, 677-78 (7th Cir.), *cert. denied*, 459 U. S. 826 (1981) and United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978)). Nevertheless, Judge Shadur felt that "*Sedima* . . . clearly create[d] a whole new ball game." *Id.* at 833. As such, he felt "no longer obligated to follow contrary court of appeals opinions." *Id.* So freed of legal constraints—and without the benefit of adversary briefing on the point—he reasoned:

> True enough, 'pattern' connotes similarity, hence the cases' proper emphasis on relatedness of the constituent acts. But 'pattern' also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity.

Id. at 831 (emphasis in original).

Judge Shadur's analysis in *Inryco* cannot be accepted without substantial qualification. To the degree that he focuses on jurisdictional predicates (mailings, wire communications, or interstate travels) in connection with a single criminal act (an extortion, a bribery, a fraud, etc.), he correctly focuses "pattern" on "continuity of crime." *See Elliott*, 809 F.2d at 350. But he misapplied his focus to the complaint before him, which alleged *five* kickbacks over a *thirteen* month period. Wholly apart from RICO—and independent of the peculiarities of federal jurisdiction—such conduct *may* be properly treated as five *separate* offenses. The issue turns on the factual characterization of the kickbacks as separate payments or installments of a single payment. *Compare Roeder*, 814 F.2d at 31 (one bribe, although three payments); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987) (fraud accomplished at one time, but fruits of the fraud realized over period: no pattern) *with* United States v. Addonizio, 451 F.2d 49, 59-60 (3d Cir. 1971) (single extortion scheme, but separate extortions), *cert. denied*, 405 U.S. 936 (1972); United States v. Tolub, 309 F.2d 286, 289 (2d Cir. 1962) (same); *and* United States v. Brooklier, 685 F.2d 1208, 1217 (9th Cir. 1980) (single extortion scheme, but separate extortions for RICO pattern), *cert. denied*, 459 U.S. 1206 (1983). For another of Judge Shadur's efforts—fortunately unsuccessful—to rewrite RICO, see United States v. Yonan, 623 F. Supp. 881, 883-86 (N.D. Ill. 1985) ("associated" with § 1962(c) must exist independent of "racketeering"), *aff'd in part and rev'd in part*, 800 F.2d 164, 167-68 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 930 (1987). *Inryco*, at least in its reasoning if not on its facts, has been widely and correctly followed. *See, e.g.*, Emmanouilides v. Buckthorn, Ltd., 642 F. Supp. 964, 965-66 (S.D.N.Y. 1986) (seven vessels sold simultaneously not pattern); *In re* Evening News Ass'n Tender Offer Litig., 642 F. Supp. 860, 861 (E.D. Mich. 1986) (one tender offer to one entity not pattern); Grant v. Union Bank, 629 F. Supp. 570, 577-79 (D. Utah 1986) (single bank loan to one customer not pattern); Allright Mo., Inc. v. Billeter, 631 F. Supp. 1328, 1330 (E.D. Mo. 1986) (single transfer of real estate to one limited partnership not pattern); Wright v. Everett Cash Mut. Ins. Co., 637 F. Supp. 155, 158 (W.D. Pa. 1986) (single denial of fire insurance claim to one policyholder not pattern); Ichiyasu v. Christie, Manson & Woods Int'l, Inc., 637 F. Supp. 187, 190 (N.D. Ill. 1986) (single theft of three artworks not pattern). Other decisions that purport to follow *Inryco* are more problematic on the pattern issue. *See, e.g.*, Anisfeld v. Cantor Fitzgerald & Co., Inc., 631 F. Supp. 1461, 1467 (S.D.N.Y. 1986) (offering of limited partnerships to 16 partners not a pattern); Phelps v. Wichita Eagle-Beacon, 632 F. Supp. 1164, 1172 (D. Kan. 1986) (publication of two separate articles not pattern); Frankart Distribs., Inc. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1199-1201 (S.D.N.Y. 1986) (multiple false billings for advertisements over seven month period not pattern); Small v. Goldman, 637 F. Supp. 1030, 1040 (D.N.J. 1986) (fraudulent leases not pattern). *Superior Oil*, too, has been followed with mixed results. *Compare* Rich Maid Kitchens v. Pennsylvania Lumbermens Mut. Ins. Co., 641 F. Supp. 297, 312 (E.D. Pa. 1986) (disputes as to fire coverage of single policy not pattern) *and* Wolin v. Hanley Dawson Cadillac, Inc., 636 F. Supp. 890, 891 (N.D. Ill. 1986) (single purchase of car not pattern) ("This is the kind of RICO complaint that lends fuel to the fire of those who would seek legislative emasculation of the statute. It trivializes a cause of action that Congress created for a legitimate social purpose.") *with* Eastern Corp. Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1535 (D. Mass. 1986) (audit report sent to multiple investors not pattern); Zahra v. Charles, 639 F.

B. *The Use of Civil RICO in* Religious Technology Center v. Wollersheim[38]

Section 1962[39] makes it unlawful for a "person"[40] employed or associated with an enterprise, which is engaged in or affects interstate or foreign commerce, to operate the "enterprise"[41] through a "pattern of racketeering activity."[42] Section 1961(1) defines racketeering to include

Supp. 1405, 1409 (E.D. Mich. 1986) (credit extended fraudulently five times over seven years not pattern); Madden v. Gluck, 636 F. Supp. 463, 465 (E.D. Mo. 1986) (class action of multiple parties defrauded by scheme over 18 months not pattern) *and* Frankart Distribs., Inc. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1199 (multiple false billings for advertisement over seven months not pattern).

Finally, the jurisprudence of the district courts reflecting a narrow, if not debilitating view of "pattern" is unfortunately beginning to undermine state RICO legislation. *See, e.g.*, Behunin v. Dow Chem. Co., 650 F. Supp. 1387, 1390 (D. Colo. 1986) (Colorado RICO "pattern" coincides with a federal two scheme analysis of "pattern") (citing Garbade v. Great Divide Mining and Milling Corp., 645 F. Supp. 808, 815 (D. Colo. 1986)). This development, too, is taking place despite different state statutory language and policy considerations. *See, e.g.*, State *ex rel.* Corbin v. Pickrell, 136 Ariz. 589, 667 P.2d 1304 (1983) (different interpretation adopted, since federalism not implicated). *Behunin*, for example, can hardly be squared with general federal or Colorado jurisprudence. Enacted in July, 1981, COLO. REV. STAT. §§ 18-17-101 to 109 (Supp. 1984) was, of course, "modeled after" federal RICO. *See* Benson v. People, 703 P.2d 1274, 1276 n.1 (Colo. 1985). In fact, however, it was more closely modeled on FLA. STAT. ANN. § 895.01-05 (West Supp. 1983), which was enacted in 1977. *See* Dorsey v. State, 402 So. 2d 1178, 1181 (Fla. 1981) (discussion of Florida definition of "enterprise," which is similar to the Colorado definition but which is different from the federal definition and which clarifies issues litigated under federal RICO). As such, it is presumed that similar language is to be read similarly. People v. Wahl, 716 P.2d 123, 128 (Colo. 1986). But different language is to be read differently. People v. Wheatridge Poker Club, 194 Colo. 15, 18, 569 P.2d 324, 327 (1977). Decisions under the adopted statute *prior* to the date of its adoption are also presumed to reflect legislative intent. Hoden v. District Court, 159 Colo. 451, 454, 412 P.2d 428, 431 (1966). *See also* Metropolitan R. Co. v. Moore, 121 U.S. 558, 572 (1887) (presumed). Section 18-17-103(3), unlike § 1961(5), however, says "means," not "requires." *Compare Sedima*, 473 U.S. at 496 n.14 *with* Lyman v. Town of Bow Mar, 188 Colo. 216, 533 P.2d 1129, 1133 (1975) (citing Helvering v. Morgan's, Inc., 293 U.S. 121 (1934)). Unlike Congress, the Colorado legislature, therefore, did not leave the definition of "pattern" up to the judiciary to work out using the legislative history of the statute as a guide. Prior to July 1981, too, the federal decisions had uniformly *rejected* the two scheme limitation on "pattern." *See, e.g.*, United States v. Calabrise, 645 F.2d 1379, 1389 (10th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Starnes*, 644 F.2d at 677-78; *Weatherspoon*, 581 F.2d at 602; United States v. Parness, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). As such, it was the pre-July 1981, not the post-1985, federal law, that *Behunin* should have looked to. Subsequent changes do not control. *See* Boise-Payette Lumber Co. v. Longwedel, 88 Colo. 233, 234, 295 P.2d 791, 792 (1930). *See also* Stutsman County v. Wallace, 142 U.S. 293, 312 (1882) (persuasive only). Indeed, it is hard to see how Colorado law could be identical to post-1985 federal law when that federal law is in conflict. *Compare Garbade*, 645 F. Supp. at 815 *with Roeder* 814 F.2d at 31; *Ianniello*, 808 F.2d at 192; *International Data Bank*, 812 F.2d at 155; *and Morgan*, 804 F.2d at 975. The texts of the state statutes are collected and analyzed on five major points of *distinction* in RICO REVISITED, *supra*, at 173-86 (1987).

38 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

39 18 U.S.C. § 1962 (1982), in relevant part, provides:

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

40 18 U.S.C. § 1961(3) (1982): "Person" includes any individual or entity capable of holding a legal or beneficial interest in property. *See generally Basic Concepts*, *supra* note 1, at 1022-23.

41 18 U.S.C. § 1961(4) (1982): "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *See generally Basic Concepts*, *supra* note 1, at 1023-29.

42 18 U.S.C. § 1961(5) (1982): "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

a variety of criminal activities, including the mail and wire fraud statutes.[43] Section 1964 authorizes private parties to bring suit against RICO violators.[44]

In *Wollersheim*,[45] the Church's complaint alleged that the disputed scriptural materials were trade secrets, which the New Church had misappropriated through a pattern of racketeering activity. Among the racketeering activities that the Church alleged were the theft of the scriptural materials and numerous acts of mail and wire fraud. In addition, the Church's complaint charged that the relationship between the New Church, Wollersheim and Wollersheim's counsel constituted a conspiracy within RICO. The Church's complaint also included a claim for money damages. Based on these allegations,[46] the court of appeals found that the Church satisfied the federal jurisdictional requirements for a civil RICO action.[47]

43 18 U.S.C. § 1961 (1) (1982):

> "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 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 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

See generally Civil Action, *supra* note 1, at 300-06 ("(1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials and (4) commercial and other forms of fraud").

44 18 U.S.C. § 1964 (1982). *See infra* note 63.

45 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987).

46 Concerning the theft, the court noted, but did not rule on, whether the fact that the theft did not occur in the United States meant that it was beyond the reach of RICO. Instead, the court found, despite the apparent presence of a "single scheme," that sufficient acts of mail and wire fraud were alleged to satisfy the "pattern" requirement. *Id.* at 1080 n.5. Because the Church, at the hearing on the motion for a preliminary injunction, stated that it had not suffered financial injury, but had suffered injury to its adherents, the court of appeals also indicated that should the Church proceed with its damage action in the district court, civil RICO might not afford the Church the type of nonfinancial relief it sought. *Id.* at 1080-81 n.6.

47 *Id.* at 1080.

III. The Opinion in *Religious Technology Center v. Wollersheim*

The court in *Wollersheim* began by pointing out, "[n]o appellate court has expressly determined whether civil RICO permits a private party to secure *injunctive* relief."[48] It then surveyed the circuit courts of appeal and found that the Fourth[49] and Second[50] Circuits had indicated that injunctive relief might not be available to private parties, while the Eighth[51] Circuit had indicated that such relief might be available. The court also noted that the Sixth Circuit had upheld the granting of injunc-

48 *Id.* at 1081 (emphasis in original).

49 In Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983), the Fourth Circuit considered the issue of equity-type relief in the context of a denial of injunctive relief in a corporate takeover battle. The court expressed "substantial doubt" on whether RICO included injunctive relief for private parties, although it did not "undertake to resolve the question." *Id.* The court's doubt, however, was not based on an examination of the text of the statute, its liberal construction clause, or its legislative history; rather, the court's uncertainty stemmed from the Supreme Court's restrictive view on implying claims for relief, first enunciated in Cort v. Ash, 422 U.S. 66 (1975). *Dan River*, 701 F.2d at 290. Uncharacteristically, the court did not realize the significance of Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378 (1982)—holding that the law in existence at the time of enactment of the legislation is controlling—when it considered whether a remedy should be held to be implicit in the statute. *See infra* text accompanying note 142. *See also* Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) *and* Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984) (two subsequent cases in accord with *Curran* but handed down after the Fourth Circuit reached its decision). No court need be unduly troubled, therefore, by the Fourth Circuit's concern in *Dan River*. In fact, the court's holding in *Dan River*, based on the assumption that RICO *did* afford equitable relief, was that the injunction would not issue for a different reason; the court found that it was not likely Dan River would succeed on the merits, since Carl Icahn had proceeded with advice of counsel, and, as such, it would have been difficult to demonstrate that his takeover attempt, under either a theory of mail or securities fraud, was animated by the sort of criminal state of mind required by RICO. *Dan River*, 701 F.2d at 290-91.

50 Trane Co. v. O'Connor Sec., 718 F.2d 26, 28 (2d Cir. 1983) ("We have . . . doubts as to the propriety of private party injunctive relief . . . ."); Sedima, S.P.L.R. v. Imrex Co., 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd. on other grounds*, 473 U.S. 479 (1985) ("It thus seems altogether likely that § 1964 (c) as it now stands was not intended to provide private parties injunctive relief."). The Second Circuit in *Trane* expressed its "doubts" about the availability of private party injunctive relief, but did not reach the question, since it felt that the likelihood of irreparable harm had to be shown, and it had not. 718 F.2d at 28. The court in *Trane* uncritically relied upon Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81 (W.D.N.Y. 1982), which showed no awareness of the general rule that such harm need *not* be shown where suit is upon a federal statute. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981); Johnson, *Predator Rights: Multiple Remedies For Wall Street Sharks Under the Securities Law and RICO*, 10 J. CORP. L. 3 (1984). For a critique of *Ashland*, see *Civil Action*, *supra* note 1, at 340 n.217. The *Trane* court distinguished United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974), off-handedly, as a government case. *Trane*, therefore, cannot be considered persuasive authority. The Second Circuit's decision in *Sedima*, in turn, adopted the fatally flawed reasoning of Judge Shadur's opinion in Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983). *Sedima*, 741 F.2d at 490 (*Kaushal* "endorse[d]"). *See infra* note 54. Moreover, as the *Wollersheim* court, in reviewing *Sedima*, aptly noted "the precedential value of [its] conclusion, itself somewhat equivocal, is thrown into considerable doubt by the Supreme Court's total rejection of the conclusions drawn by the Second Circuit from its historical analysis of the RICO statute." *Wollersheim*, 796 F.2d at 1081.

51 Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982) ("We note for the information of the parties and the district court such scholarship as we have discovered, without at this time endorsing or rejecting the opinions there expressed.") (citing *Basic Concepts*, *supra* note 1, at 1038 nn.132-33, as indicating that equitable relief is available to private plaintiffs under RICO), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied sub nom*, Prudential Ins. Co. v. Bennett, 464 U.S. 1008 (1983). Apparently unnoticed by the *Wollersheim* court were both Judge McMillan's statement in his concurring and dissenting opinion in the Eighth Circuit's en banc rehearing of Bennett v. Berg that he "would . . . reach the question whether equitable relief is available to private parties under RICO . . . and answer . . . affirmatively," and his lengthy citation of *Civil Action*, *supra* note 1, at 331-32, as support for his finding. *See* Bennett v. Berg, 710 F.2d 1361, 1365-66 (1983) (McMillian, J. concurring in part and dissenting in part) (dissent on enterprise-person issue).

tive relief to a private plaintiff on pendant state claims, where RICO provided federal jurisdiction.[52]

Following this survey of the circuit courts of appeal, the court turned to the district courts, where it found that a "similar disunity of views exists . . . [on] the issue."[53] Three district courts, all from the Northern District of Illinois, had held that injunctive relief was not available to a private civil RICO plaintiff.[54] Two district courts had held that injunctive relief was available to a private civil RICO plaintiff,[55] while three courts had assumed the availability of such relief.[56] In addition, a number of other courts had raised, but avoided deciding the issue.[57]

Finding the slate largely clean of controlling precedent in either the circuit or district courts, the *Wollersheim* court proceeded to "conclude that Congress did not intend to give private civil RICO plaintiffs any right to injunctive relief."[58] The court rested it decision on four bases: (1) the language of section 1964;[59] (2) the legislative history of the statute;[60] (3) the fact that civil RICO's private cause of action was modeled

52 USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97-98 (6th Cir. 1982).

53 796 F.2d at 1081.

54 Miller v. Affiliated Fin. Corp., 600 F. Supp. 987, 994 (N.D. Ill. 1984); DeMent v. Abbott Capital Corp., 589 F. Supp. 1378, 1382-83 (N.D. Ill. 1984); Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983). *But see* Johnson, *supra* note 50 (detailed treatment and rejection of *Kaushal*). Much of the basic reasoning for Judge Shadur's *Kaushal* opinion was later adopted by the court in *Wollersheim*. It is best treated, therefore, by critiquing it in the context of a full examination of *Wollersheim*.

Two additional points, however, deserve comment. Judge Shadur suggested in *Kaushal* that the analysis of one of our number, Professor Blakey, in *Basic Concepts*, *supra* note 1, was "bizarre and wholly unconvincing." 556 F. Supp. at 582. Professor Johnson in her careful analysis of RICO and her point by point rejection of the reasoning of *Kaushal* concluded that Judge Shadur's "poignant criticism . . . [of *Basic Concepts* was] totally unwarranted." Johnson, *supra* note 50, at 72. *See* Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 577 (1935) (Cardozo, J.) ("The derogatory epithet assumes the point to be decided."). She then went on to demonstrate "several flaws in [Judge Shadur's] reasoning." Johnson, *supra* note 50, at 72. It is unfortunate that the court in *Wollersheim* did not discover Professor Johnson's able piece, for its carefully reasoned analysis ought to be consulted by anyone trying to work through the difficult issues posed by *Kaushal* or *Wollersheim*.

In addition, Judge Shadur excoriated the "scholarship" of one of our number, Professor Blakey, as "entirely misleading" for citing MILLS, *RICO and Injunctions*, in III MATERIALS ON RICO 1332 (1980-81). *Kaushal*, 556 F. Supp. at 582 n.17. Shadur's point was that the Mills piece did not analyze whether or not, but assumed that, RICO contained private equitable relief. The original draft of Judge Shadur's opinion stopped there. When it was brought to his attention that the cite in *Basic Concepts* to the Mills piece was solely to illustrate how private equity relief might be used, and that, in fact, *Basic Concepts* cited different authority for a detailed discussion of whether or not such relief was available to private parties, Judge Shadur declined to modify his original criticism, and merely noted, without comparable analysis of the scope of other work, brief recognition of its existence. *See Basic Concepts*, *supra* note 1, at 1047 n.197 (citing BAILEY, *Private Action for Injunctive Relief*, in II MATERIALS ON RICO, 407-27 (1980)). As such, Judge Shadur's *Kaushal* opinion is itself misleading.

55 Aetna Casualty and Surety Co. v. Liebowitz, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984); Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984).

56 USACO Coal Co. v. Carbomin Energy, Inc., 539 F. Supp. 807, 814-16 (W.D. Ky.), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982); Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 420 (S.D.N.Y. 1982); Vietnamese Fishermen's Assoc. v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1014 (S.D. Tex. 1981).

57 McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1518-19 (D.N.J. 1985); Kaufman v. Chase Manhattan Bank, 581 F. Supp. 350, 354 (S.D.N.Y. 1984).

58 796 F.2d at 1088.

59 *Id.* at 1082-84.

60 *Id.* at 1084-86.

on analogous provisions of the antitrust laws;[61] and (4) Supreme Court doctrine that narrowly circumscribes recognition of claims for relief or particular remedies not expressly set out in a statute.[62]

A. *The Language of Section 1964*

The court in *Wollersheim* began by summarizing its reading of each of the parts of section 1964.[63] It saw subsection (a) as a "broad grant of equitable jurisdiction to federal courts,"[64] subsection (b) as "permit[ting] *the government* to bring action for equitable relief,"[65] subsection (d) as "grant[ing] collateral estoppel effect to a criminal conviction in a subsequent civil action by the government"[66] and subsection (c) as "stat[ing] that a private plaintiff may recover treble damages, costs and attorney fees."[67] It added, "[i]n contrast to part (b), there is no express authority to *private plaintiffs* to seek the equitable relief available under part (a)."[68] The court then found that this "inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiff in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs."[69]

The court's conclusion concerning the language of section 1964 is untenable for four reasons. First, it ignores the import of the plain language of subsection (c).[70] The plain language of subsection (c) reads

61 *Id.* at 1086-87.

62 *Id.* at 1087-88.

63 18 U.S.C. § 1964 (1982) states:

(a) 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 restriction 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.

(b) 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.

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

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

64 796 F.2d at 1082.

65 *Id.* (emphasis in original).

66 *Id.*

67 *Id.*

68 *Id.* (emphasis in original).

69 *Id.* at 1083 (emphasis in original).

70 The court in *Wollersheim* rejected the "sue . . . and" argument without analysis by referring to its treatment by the Second Circuit in *Sedima*, 741 F.2d at 489 n.20 ("rather remarkable argument"), Judge Shadur's opinion in *Kaushal*, 556 F. Supp. at 582 on which *Sedima* relied ("bizarre and wholly

that a person injured "may sue . . . and shall recover." The language does not read "may sue . . . to recover." Because the usual "assumption [is] that . . . legislative purpose is expressed by the ordinary meaning of the words,"[71] and the word "and" means "in addition to" or "along with",[72] the "and" proceeding "shall recover" indicates that the language following it is not to be read restrictively, as it would if "to" proceeded "may sue." Accordingly, all necessary and appropriate relief ought to be held to be included in subsection (c). Recovery of treble damages, costs and attorney fees that follow the "and" are explicitly *added* to the right to sue for all usual forms of relief. Indeed, nothing in subsection (c) says that they are the *only* relief that a person may recover. "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."[73] Hence, basic principles of statutory construction[74] in-

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unconvincing as a matter of plain English and the normal use of the language"), and by reference to the use of the word "and" in § 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982). Neither *Sedima* nor *Kaushal*, however, meaningfully addresses nor explains the significance of the use of the word "and" other than by a question-begging characterization. Professor Johnson aptly observes:

> [T]he *Kaushal* opinion does not satisfactorily counter the argument of the commentators that the use by section 1964(c) of the conjunctive language "sue and" rather than "sue to" evidences congressional intent to grant to private parties rights to seek equitable relief *in addition* to treble damages. Webster's dictionary defines the word "and" as follows: "along with or together with"; and "added to or linked to"; "in addition to." Therefore, construing this term to mean "in addition to" is not suggesting a forced interpretation of the term as claimed by Judge Shadur.

Johnson, *supra* note 50, at 72. As to the error of the court's analogy to the Clayton Act, see *infra* notes 126-41 and accompanying text.

71 *Russello*, 464 U.S. at 21 (quoting Richards v. United States, 369 U.S. 1 (1962)).

72 I THE OXFORD ENGLISH DICTIONARY 316 (1961).

73 Bennett v. Berg, 710 F.2d at 1365-66 (McMillan, J., concurring in part and dissenting in part) (quoting *Civil Action*, *supra* note 1, at 331-32).

74 Four basic assumptions are integral to any principled effort to interpret a statute:

1. legislative supremacy within the constitutional framework (U.S. Const. art. I, § 1);
2. the use of the statutory vehicle to exercise that supremacy;
3. reliance on accepted means of communication; and
4. reasonable availability of the statutory vehicle to those to be governed by it, not only its text, but any other part of its legislative context that serves to give it meaning.

R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 7-12 (1975). With respect to the third assumption, Professor Dickerson notes that "so long as the legislature uses language according to accepted standards, it is justified in assuming that the courts should read it according to the same standards. The legislature cannot adequately discharge its responsibility of shaping the future unless the integrity of the accepted communication process is maintained." *Id.*

The Supreme Court, in its decisions in *Turkette*, *Russello*, and *Sedima*, recognized and applied fifteen basic propositions of statutory construction for construing RICO: (1) read the language of the statute (*Turkette*, 452 U.S. at 580, 593; *Russello*, 464 U.S. at 20 (citing *Turkette*); *Sedima*, 473 U.S. at 495 n.13); (2) language includes its structure (*Turkette*, 452 U.S. at 582, 587; *Russello*, 464 U.S. at 22-23; *Sedima*, 473 U.S. at 490 n.8, 496 n.14); (3) language should be read in its ordinary or plain meaning, but it must be viewed in context (*Turkette*, 452 U.S. at 580, 583 n.5, 587; *Russello*, 464 U.S. at 20, 21 (citing *Turkette*), 21-23, 25; *Sedima*, 473 U.S. at 495 n.13); (4) language should not be read differently in criminal and civil proceedings (*Sedima*, 473 U.S. at 489, 492); (5) look to the legislative history of the statute (*Turkette*, 452 U.S. at 586, 589; *Sedima*, 473 U.S. at 486, 489); (6) look to the policy of the statute (*Turkette*, 452 U.S. at 590; *Russello*, 464 U.S. at 24; *Sedima*, 473 U.S. at 493); (7) the statute was aimed at the infiltration of legitimate business by organized crime (*Turkette*, 452 U.S. at 591; *Russello*, 464 U.S. at 26, 28 (citing *Turkette*)); (8) the statute was not limited to the infiltration of legitimate business by organized crime (*Turkette*, 452 U.S. at 590-91; *Russello*, 464 U.S. at 28; *Sedima*, 473 U.S. at 495, 499); (9) the statute is to be broadly read and liberally construed (*Turkette*, 452 U.S. at 588, 593; *Russello*, 464 U.S. at 21; *Sedima*, 473 U.S. at 492 n.10, 497-98); (10) the rule of lenity in statutory

dicate that subsection (c) should be read expressly to include all forms of equitable and other relief.[75]

Second, the court's analysis misconstrues the language of section 1964. Subsection (a) confers jurisdiction on the federal courts to prevent and restrain violations of section 1962 by appropriate orders. It is not limited on its face or in its legislative history to a particular kind of claim for relief—governmental or private.[76] Subsection (b) expressly authorizes the Attorney General to institute proceedings "under this section." It does not say that *only* the Attorney General may institute proceedings. Indeed, absent subsection (b), it could have been argued that the Attorney General could *not* have instituted proceedings seeking equitable relief because of the traditional rule, originating in early English jurisprudence,[77] that equity actions were only authorized where property rights were at stake, and the government was not thought to have such a right, absent unusual circumstances.[78] Subsection (b) was drafted, therefore, to assure that the government could institute proceedings free of the traditional limitations of equity jurisprudence and not as a means of denying private parties their usual equitable remedies. If the availability of equitable relief were to be determined solely by subsection (b), subsection (a) would, of course, be superfluous. Accordingly, because section 1964 was intended to provide broad remedies, does not distinguish between governmental or private claimants, and is not limited by the express powers granted the Attorney General by subsection (b), subsection

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construction does not apply when the statute is unambiguous (*Turkette*, 452 U.S. at 588; *Russello*, 464 U.S. at 29 (citing *Turkette*); *Sedima*, 473 U.S. at 492 n.10); (11) the principle of strict construction of criminal statutes does not override the clear purpose of a statute (*Turkette*, 452 U.S. at 587-88; *Sedima*, 473 U.S. at 492 n.10); (12) the rule of *ejusdem generis* does not apply when the meaning of the statute is clear (*Turkette*, 452 U.S. at 581); (13) where Congress rejects proposed limiting language in a bill, it may be presumed that the limitation was not intended (*Russello*, 464 U.S. at 23-24; *Sedima*, 473 U.S. at 498); (14) where Congress includes or omits limiting language in a bill, it is presumed that it did so intentionally (*Turkette*, 452 U.S. at 581; *Russello*, 464 U.S. at 23); and (15) the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one (*Russello*, 464 U.S. at 26). *Compare* Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.) (rules of statutory construction are but "axioms of experience").

Nevertheless, more than 100 years ago, the Supreme Court noted that "[i]t is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. . . . [By such] a construction [it is possible to] annul [the statute] and [render] it superfluous and useless." Pillow v. Roberts, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). Such an approach to statutory construction, however, carries with it a heavy price. After a lifetime of study of the law, Dean Roscoe Pound concluded that such "ingenious and astute" constructions (1) "tend[ed] to bring law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." III R. POUND, JURISPRUDENCE 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490. Its effect was seen at the polls in the last election. NAT'L L.J., Nov. 17, 1986, at 3, col. 1 (voters in three states reject chief justices); N. Y. Times, Nov. 8, 1986, at 8, col. 1 (former Chief Justice Byrd: "What is going on is a very real politicization of the judiciary.").

75 *See, e.g.*, Johnson, *supra* note 50, at 76; Wexler, *Civil RICO Comes of Age*, 35 RUTGERS L. REV. 285, 323 (1983); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest*, 19 AM. CRIM. L. REV. 455, 715 (1982); Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945, 953 (1984).

76 *See, e.g.*, H.R. REP. No. 1549, 91st Cong., 2d Sess. 57 (1970) ("Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.").

77 Gee v. Pritchard, 36 Eng. Rep. 670, 674 (1818) (equity will not enjoin a crime).

78 *See In re* Debs, 158 U.S. 564, 582-84 (1895).

(a), through subsection (c), ought to be held to be a grant of jurisdiction to allow complete equitable relief to a private party.

Third, the court's conclusion that in the absence of explicit statutory language to the contrary, private claimants under civil RICO may *only* seek money damages is inconsistent with the long-standing and well-settled Supreme Court doctrine that a congressional grant of the right to sue conveys by itself the availability of all necessary and appropriate relief. As the Supreme Court noted in *Bell v. Hood*,[79] "it is [a] well settled [rule] that where legal rights have been invaded, and a federal statute provides for a general right to sue . . . federal courts may use any available remedy to make good the wrong done."[80] Thus, the court's crabbed construction of the language of section 1964 cannot be squared with basic teaching of the Supreme Court.

Fourth, the court began its analysis of Section 1964 with the wrong question. Justice Frankfurter put it well in *Estate of Roberts v. Commissioner*,[81] "[i]n law . . . the right answer usually depends on putting the right question."[82] The issue is not did Congress clearly *provide* for equity relief? Instead, the issue is did Congress clearly *exclude* it? The remedy, in short, is present unless it is *clearly* withheld because the rule is equally long-standing and well-settled that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."[83] The heavy burden lies on anyone who would restrict the availability of the power of a court to do justice to show that Congress has withheld it, for it is assumed that "Congress would not, without clearly expressing such a purpose, deprive . . . [a court] of its customary power . . . . [D]enial of such power is not to be inferred . . . [from silence]. Where Congress wish[es] to deprive the courts of . . . historic power, it [knows] how to use apt words."[84] Thus, the presumption, which causes close cases to be resolved *in favor* of the power, *not* against it, is that the power is present, not absent. Unfortunately, the court in *Wollersheim* turned the usual presumption upside down. Seemingly, it felt that the power should not be

79 327 U.S. 678 (1946).

80 *Id.* at 684. The teaching of *Bell*, for example, was explicitly recognized by the Second Circuit in Aetna Casualty and Surety Co. v. Liebowitz, 730 F.2d 905, 909 (2d Cir. 1984) as controlling on the availability of injunctive relief under RICO ("Once the Supreme Court handed down Bell v. Hood . . . a specific statutory provision [under RICO] authorizing preliminary injunctive relief to maintain the status quo was no longer necessary . . . .").

81 320 U.S. 410, 413 (1943).

82 *Id.* at 413.

83 Califano v. Yamasaki, 442 U.S. 682, 705 (1979) (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) which observed that "[u]nless otherwise provided by statute, all the inherent equitable powers [of the court] are . . . available").

84 Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 11 (1942). *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) ("existence of a statutory right implies the existence of all necessary and appropriate remedies"); Jones v. Mayer Co., 392 U.S. 409, 414 n.13 (1968) ("The fact that . . . [the statute] is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy."); Porter v. Warner Holding Co., 328 U.S. at 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); Texas & N.O.R. v. Brotherhood of R. & S. S. Clerks, 281 U.S. 548, 570 (1930) ("The right is created and the remedy exists.") (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-63 (1803)).

found unless it was clearly set out, and since the issue was in doubt, it had to be resolved against finding that the power existed. As such, by going in with the wrong question, the court came out with the wrong answer.[85]

B. *The Legislative History of RICO*

The court in *Wollersheim* buttressed its position on the language of the statute by finding that RICO's "legislative history mandate[d]"[86] its construction of the statute. It is doubtful, however, that the court should have even turned to the legislative history, since it is also a well-accepted tenet of statutory construction that when the statutory language is not ambiguous, it must ordinarily be regarded as conclusive.[87] Where there is no ambiguity, there is no room for construction, and no reason to resort to legislative history.[88] Thus, the *Wollersheim* court's concession that subsection (a) on its face provided a "plausible reading,"[89] which supported granting injunctive relief, was really a concession that its analysis could have and should have stopped without a further consideration of legislative history.

Assuming that the court recognized that it was only a "plausible reading"[90] of subsection (a), which indicated that equitable relief might be granted private plaintiffs, it still should not have turned to the legislative history of RICO, since RICO's express language required the "liberal" construction of the statute "to effectuate its remedial purposes."[91] In sum, RICO contains in its text a liberal construction clause, which provides the controlling rule of statutory construction to ascertain RICO's legislative intent. If RICO's language is ambiguous, the construction that would "effectuate its remedial purposes"[92] "by providing enhanced sanctions and new remedies"[93] ought to be adopted. A liberal

85 A reference to Justice Frankfurter is again appropriate. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) ("It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in.").

86 796 F.2d at 1084.

87 *Turkette*, 452 U.S. at 580 (citing Consumer Prods. Safety Comm. v. GTE Sylvania, 447 U.S. 102, 108 (1980)).

88 *See, e.g.*, Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820).

89 796 F.2d at 1084.

90 *Id.* Judge Shadur went further; he expressly conceded that the statute might be viewed as "ambiguous." *Kaushal*, 556 F.2d at 583. Unfortunately, like the *Wollersheim* court, he then largely ignored the liberal construction clause in resolving that ambiguity.

91 Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 923, 947 (1970). The court in *Wollersheim*, of course, recognized the importance of the liberal construction clause, when it observed that "as the Supreme Court has emphasized, Congress expressly admonished that RICO 'be liberally construed to effectuate its remedial purposes' and that '(t)he statute's remedial purposes are nowhere more evident than in the provision of a private action for those injured by racketeering activity . . . .' " *Wollersheim*, 796 F.2d at 1083 (quoting *Sedima*, 473 U.S. at 497). Nevertheless, it largely excluded the liberal construction clause of RICO from its analysis of whether equitable remedies are available to private parties under civil RICO. Indeed, rather than treating it as a congressional directive, which it is, the court referred to the liberal construction clause as only a "spirit." *Id.* On the proper use of the liberal construction directive, see *Civil Action*, *supra* note 1, at 288 n.150.

92 Pub. L. No. 91-452, § 904(a), 84 Stat. 923, 947 (1970).

93 *Id.*

construction of section 1964 would, of course, grant, not deny, equitable relief to effectuate RICO's remedial purposes. Accordingly, if section 1964 is ambiguous, the ambiguity should have been resolved by the liberal construction clause *in favor* of, not against, granting private parties equitable relief.[94] Legislative history should not, therefore, have been consulted.

As the *Wollersheim* opinion illustrates, often going into legislative history is a trip that does not bring a statute's meaning into focus, but a trip that surrounds it with "a fog in which little can be seen if found."[95] Indeed, RICO's legislative history is more ambiguous than the statute. The *Wollersheim* court conceded as much when it stated that RICO's "legislative history offers some support for [the Church's] thesis."[96] As such, because "absent *clear* evidence of a contrary legislative intent, a statute should be interpreted according to its plain language,"[97] the legislative history of RICO hardly provided the court with a sound basis for an interpretation of the relief available under the statute, and it should not have been used to set aside a "plausible" construction of its language.

When the court in *Wollersheim* proceeded to examine RICO's legislative history, it concluded that its "clear message"[98] was that Congress did not intend to include injunctive relief in civil RICO. The court based its conclusion on "two separate episodes"[99] from RICO's legislative history. The first episode was a House floor interchange between Congressman Richard H. Poff, the floor manager of RICO, and Congressman Sam Steiger, in which Poff requested Steiger to withdraw a comprehensive amendment, which, in turn, included a separate section authorizing private equity relief in civil RICO. Poff also referred to Steiger's amendment as offering "an additional civil remedy."[100] The court found that this exchange indicated that Congress intended not to include injunctive relief in civil RICO.[101]

As with the text of the statute, here, too, the court misread the meaning of the floor exchange between Poff and Steiger. Congressman Steiger's amendment was *not* limited to the inclusion of private equity relief; it also included language dealing with amount in controversy, intervention by the Attorney General, nonmutual estoppel, a statute of limitations, and a separate provision for an actual damage claim for relief by

94 *See* Johnson, *supra* note 50, at 66 (liberal construction clause should "resolve any language ambiguities in section 1964 in favor of providing equitable relief to the private plaintiff"); Note, *supra* note 75, at 953 ("Given the Liberal Construction Clause, the question of [whether section 1964(a) allows a private plaintiff to seek equitable remedies] . . . is largely a matter of indifference. If the text is plain, the remedy is there; if the text is ambiguous, the ambiguity should be resolved in favor of enhancing the remedial purpose of RICO.").

95 United States v. Public Utilities Comm. of California, 345 U.S. 295, 320 (1952) (Jackson, J., concurring).

96 796 F.2d at 1085.

97 United States v. Apfelbaum, 445 U.S. 115, 121 (1980) (emphasis added) (construction of Title II of the Organized Crime Control Act).

98 796 F.2d at 1086.

99 *Id.* at 1085.

100 *Id.* at 1086 (emphasis omitted) (quoting 116 CONG. REC. 35,346 (1970)).

101 *Id.* at 1085.

the government.[102] As such, it is not surprising that Congressman Poff, RICO's floor manager, asked that such a sweeping amendment be withdrawn, so that it "might properly be considered by the Judiciary Committee . . . ."[103] Moreover, as Steiger noted at the time, "the bill as it now stands . . . may have this option [of equitable relief]."[104] In addition, the amendment was not, as characterized by the *Wollersheim* court, "rejected."[105] It was withdrawn by unanimous consent.[106] As to Congressman Poff's cryptic reference that the Steiger amendment included an "additional civil remedy,"[107] it escapes understanding how the court knew that Poff was unambiguously referring to the section of the Steiger amendment dealing with private equity relief rather than the section according the government an actual damage claim for relief. Further, the technique of statutory interpretation by reliance on an isolated item of legislative history to infer that Congress consciously decided a particular issue had already been expressly rejected by the Supreme Court. In *Cannon v. University of Chicago*,[108] the Court was asked to decide whether a provision of the civil rights statutes included an implied claim for relief.[109] In determining that Title IX did contain the implied claim for relief, the Court found that an individual senator's statements in favor of expressly incorporating a private claim for relief, which were not acted upon, were "merely one senator's isolated expression of a preference,"[110] and the episode was not "indicative of a rejection of a private right of action . . . ."[111] As such, *Cannon*'s treatment of comparable legislative history ought to have been dispositive on the question of how to treat the Poff-Steiger interchange. Accordingly, neither the House floor exchange between Congressmen Poff and Steiger nor Poff's statement concerning additional civil remedies provide a "clear message"[112] as to Congress' intent concerning injunctive relief under civil RICO.[113]

The second episode was the subsequent Congressional effort to clarify the issues raised by Steiger Amendment. More specifically, the court pointed to testimony given in 1972 before the Senate Judiciary Commit-

102 *See Wollersheim,* 796 F.2d at 1085 n.9 (listing pertinent provisions of the Steiger amendment).

103 796 F.2d at 1086 (quoting 116 CONG. REC. at 35,346 (1970)). In fact, the bill was being processed under an informal agreement among Judiciary Committee members to oppose all floor amendments; withdrawal, rather than defeat, was desirable to avoid creating an unfavorable legislative history. Ironically, that legislative history was created anyway.

104 116 CONG. REC. 35,347 (1970).

105 796 F.2d at 1085.

106 116 CONG. REC. 35,347 (1970).

107 *Id.*

108 441 U.S. 677 (1979).

109 *Id.* at 688-89.

110 *Id.* at 716.

111 *Id.* at 715.

112 796 F.2d at 1086.

113 Professor Johnson aptly observes:

> [P]roponents of both sides of the private equitable relief issue cite the offer and subsequent withdrawal of this amendment in support of their position. A more objective analysis of this exchange however is that it is ambiguous and is certainly not determinative of Congressional intent.

Johnson, *supra* note 50, at 67 n.360. *See also* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., No. 86-497, slip op. at 11-12 (Sup. Ct. Jun. 22, 1987) (legislative history of statute of limitations does not indicate rejection of uniform period).

tee on Senate Bill 16,[114] which expressly provided, among other things, for private injunctive relief under civil RICO, and to remarks made by Senators John L. McClellan and Roman L. Hruska in floor discussions concerning Senate Bill 16.[115] Here, too, basic principles of statutory construction were ignored. It is "well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' "[116] Moreover, the failure of "[t]hese subsequent efforts . . . could [just as easily] reflect an interpretation by members of Congress that RICO *already* incorporated [equity relief]."[117] In short, they, too, are more ambiguous than the text of the statute. Accordingly, because subsequent efforts of Congress to amend civil RICO were less than unequivocal in their meaning, they hardly constituted a "clear message"[118] of Congress' intent concerning private injunctive relief under civil RICO. As such, they did not form a basis for the rejection of a "plausible reading"[119] of the text of the statute.

Indeed, the clearest meaning that can be mined from RICO's legislative history is that Congress, in fact, intended section 1964(c) to be a basis for private plaintiffs to seek equitable remedies. The possibility was noted, but ignored, by *Wollersheim* when it quoted statements that support the concept of private equity relief made by RICO's principal House and Senate sponsors, "statements . . . [which were] entitled to weight."[120] In describing the bill during House debate, Poff stated, "Courts are given broad powers under the title to proceed civilly, using essentially their equitable powers, to reform corrupted organizations . . . . *In addition*, . . . private persons injured by reason of a violation of the title may recover treble damages . . . ."[121] Similarly, in the Senate, while describing the value of civil RICO, RICO's principal sponsor, Senator McClellan, stated, "since enactment of the Sherman Antitrust Act in 1890, the courts have used several equitable remedies . . . . I believe, and numerous others have expressed a similar belief, that these equitable devices can prove effective in cleaning up organizations corrupted by the

114 796 F.2d at 1086 (citing S. 16, 92d Cong., 1st Sess. (1971)). The court relied on testimony of the Department of Justice in 1972 that "only the United States can institute injunctive proceedings." 796 F.2d at 1086 (citing *Victims of Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. at 3-4 (1972) [hereinafter *Victims*]). As such, the court ignored the basic principle that legislative history materials, including testimony before committees, "received without comment [or] cross examination" are of limited value in reading a statute. Piper v. Chris-Craft Indus., 430 U.S. 1, 31 (1977). Unfortunately, too, the court ignored contrary testimony by the American Bar Association, which indicated that RICO was a "codification" of basic antitrust law, which could only mean that equity relief was included in the statute, since it was at that time available under antitrust law. *Victims*, *supra*, at 490. *See also infra* note 129.

115 796 F.2d at 1086 (citing 118 CONG. REC. 29,370 (1972)).

116 *Russello*, 464 U.S. at 26 (quoting Jefferson County Pharmaceutical Ass'n. v. Abbott Laboratories, 460 U.S. 150, 165 n.27 (1983)). *See also* United States v. Wise, 370 U.S. 405, 411 (1962) ("[s]tatutes are construed by the courts with reference to the circumstances existing at the time of passage . . . [subsequent efforts at amendment are of] no persuasive significance . . . .").

117 Wexler, *supra* note 75, at 315 n.141 (emphasis added).

118 796 F.2d at 1086. *See also* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., No 86-497, slip op. at 11-12 (Sup. Ct. Jun. 22, 1987) (similar legislative history on statute of limitations does not indicate rejection of uniform period).

119 *Id.* at 1084.

120 Lewis v. United States, 445 U.S. 55, 63 (1980).

121 116 CONG. REC. 35,295 (1970) (emphasis added).

forces of organized crime."[122]

In sum, the court in *Wollersheim* did not have to undertake an analysis of civil RICO's legislative history, but, when it did, it drew the wrong conclusions from it. First, when it discovered a "plausible reading"[123] of section 1964(a), it would have been justified in adopting that reading of the statute without considering the legislative history. Second, assuming the court believed that the statute was ambiguous, it should have used the statute's liberal construction clause and resolved any ambiguities in a manner that would "effectuate its remedial purposes."[124] Third, assuming that neither the "plausible reading"[125] of section 1964(a) nor the liberal construction clause was thought to resolve the issue appropriately, the ambiguity of the legislative history itself deprived it of value as a source to resolve the supposed ambiguity on the face of the statute.

C. *The Analogy Between Civil RICO and the Antitrust Laws*

The court in *Wollersheim* also attempted to buttress its conclusion that the "clear message"[126] of civil RICO's legislative history was that private parties were not to be afforded equitable remedies by reference to the supposedly analogous provisions of the antitrust laws.[127] In brief, the court argued that since the language of the antitrust treble damages remedy was similar to language of civil RICO, and since it had been held that private equitable relief could not be obtained under the antitrust statutes, Congress did not intend to authorize equitable relief under civil RICO.[128] Moreover, the court noted that civil RICO contains provisions parallel to the antitrust statutes, which specifically grant a private right to injunctive relief.[129]

122 *Id.* at 592. When Senator McClellan made these remarks, the bill did not contain an *express* private claim for relief. Nevertheless, it is appropriate to refer to them, since it is likely that under 1970 jurisprudence, a private claim for relief would have been *implied*. *See Civil Action*, *supra* note 1, at 262 n.71. Senator McClellan added, too, that he did not intend to "[import] . . . the great complexity of antitrust law enforcement into [RICO]." *See* 115 CONG. REC. 9567 (1969). Nor did he "mean to limit the remedies available to those which have already been established." *Id.* The "great complexity" of the antitrust law enforcement to which Senator McClellan referred is, of course, the standing limitations, which are imposed on private, not public suits, and which the American Bar Association had suggested could be avoided by drafting RICO outside the antitrust statute. *Id.* at 6995. ("inappropriate and unnecessary obstacles"); *Sedima*, 473 U.S. at 498-99. It is hard, therefore, to read Senator McClellan's comments as referring to anything other than private suits. *See infra* text accompanying notes 142-50.

123 796 F.2d at 1084.

124 84 Stat. 941, 947 (1970).

125 796 F.2d at 1084.

126 *Id.* at 1086.

127 *Id.*

128 *Id.* at 1086-87.

129 *Id.* at 1087. The existence of private equity relief under § 7 of the Sherman Act, 26 Stat. 209, 210 (1890), first came before the Supreme Court in Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904), in the context of a petition for such relief by a state attorney general to vindicate public injury; it was denied under a "safe and conservative" interpretation of the Act. 194 U.S. at 70-71. Subsequently, the issue came before the Court in the context of a petition by a private party to vindicate private injury; it, too, was denied, but this time by a sharply divided Court in Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917) (4-1-4 decision). *Paine*, however, was dead law when it was handed down, largely as a result of the legislative reform efforts of President Woodrow Wilson and Justice Brandeis. *See* Clayton Act, § 16, 38 Stat. 730, 737 (1914) (private injunction); A. MASON, BRANDEIS: A FREE MAN'S LIFE 399-404 (1946). Accordingly, neither decision stood the test of time.

Here, too, the court's argument is fatally flawed. First, fundamental

See also Hart-Scott-Rodine Antitrust Improvements Act, § 301, 90 Stat. 1383, 1394 (1976) (*parens patriae* actions by state attorneys general).

RICO, too, has been held not to authorize *parens patriae* suits. *See* Illinois v. Life of Mid-America Ins. Co., 805 F.2d 763 (7th Cir. 1986) (no RICO standing for Attorney General to sue on behalf of consumers). The Seventh Circuit in *Mid-America* relied on Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) (no damages under *parens patriae* antitrust for injury to state's general economy), which was decided *after* RICO was enacted and in a context in which liberal construction was *not* statutorily mandated. *See also* People by Abrams v. Seneci, 817 F.2d 1015 (2d Cir. 1987) (no RICO standing for Attorney General to sue on behalf of individuals). *But see* Georgia v. Pennsylvania R. R. Co., 324 U.S. 439 (1945) (*parens patriae* antitrust for injunctive relief for injury to state's economy allowed without statutory text; injury to state as proprietor treated as "makeweight"). Instead, the court should have followed the general jurisprudence that upholds such suits *without express authorization* as part of the "inherent . . . power of every state." Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982) (state's discrimination suit on behalf of residents recognized without statutory text) (citing Mormon Church v. United States, 136 U.S. 1, 57 (1890)). *See generally Snapp*, 458 U.S. at 592; Maryland v. Louisiana, 451 U.S. 725 (1981) (state's suit on behalf of citizens as consumers of natural gas recognized without statutory text); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (state's suit on behalf of citizens as consumers of natural gas recognized without statutory text); United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984 (2d Cir. 1984) (state's pollution suit on behalf of citizens allowed without statutory text; environmental group denied intervention); People by Abrams v. 11 Cornwell Co., 695 F.2d 34, 39 (2d Cir. 1982) (state's housing discrimination suit on behalf of mentally retarded upheld without statutory text); Puerto Rico v. Bramkamp, 654 F.2d 212, 217 (2d Cir. 1981) (state's employment discrimination suit on behalf of migrant workers recognized without statutory test); Pennsylvania v. Porter, 659 F.2d 306, 316-17 (3d Cir. 1981) (state's police brutality suit on behalf of citizens upheld independent of statutory authorization); Maryland Dept. of Human Resources v. United States Dept. of Agric., 617 F. Supp. 408 (D. Md. 1985) (state's suit for injunctive relief on behalf of food stamp recipients upheld without reference to statutory text); Abrams v. Heckler, 582 F. Supp. 1155 (S.D.N.Y. 1984) (state's suit for declaratory and injunctive relief on behalf of medicare recipients and citizens recognized without statutory text); Kelley v. Carr, 442 F. Supp. 346 (W.D. Mich. 1977) (attorney general's Commodity Exchange Act suit on behalf of public upheld without express statutory authorization); Pennsylvania v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. 1975) (state's employment discrimination suit on behalf of citizens upheld without statutory text); Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974) (same). Unless Congress expressly prohibited such suits, the court should have recognized them. Here, too, the court set the general rule on its head. *See supra* text accompanying note 81. Narrow antitrust precedent should not have been used to circumscribe RICO. *See Sedima*, 473 U.S. at 499 ("exactly the problems Congress sought to avoid").

The historical parallels between the implementation of the antitrust statutes and the implementation of RICO are haunting. The Sherman Act was passed by the Senate by a vote of 52 to 1; it passed the House by a voice vote. *See* Act of 1890, 26 Stat. 209; J. LOURIE, LAW AND THE NATION 1865-1912 37 (1983). At first, the Act was largely frustrated in the courts. *See infra* note 181 (data collected). In United States v. E. C. Knight, Co., 156 U.S. 1 (1895), the Supreme Court, for example, narrowly read the Act's commerce element; it held that a sugar trust, which controlled 95% of the refining business in the nation, was engaged in manufacturing, not commerce. President Grover Cleveland himself told the Congress in 1896 in his last annual message: "[The Sherman Act had] thus far . . . proved ineffective . . . because . . . [of how it was] interpreted by the courts . . . ." IX RICHARDSON, MESSAGES: PAPERS OF THE PRESIDENT 745 (1900). Justice Jackson aptly summed up the impact of *Knight*: "The effect of the decision was to nullify the Sherman Act during the period when most of the great trusts were being formed, and to shelter them during their period of growth." R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 58 (Vintage ed. 1941). To be sure, the Court in United States v. Trans Mo. Freight Ass'n, 166 U.S. 290 (1897), signaled that it might read the statute to mean what it said: all combinations in restraint of trade would be found illegal. The victory, however, was relatively short-lived. An effort at legislative reform by the business community failed. *See* S. REP. No. 848, 60th Cong. 2d Sess. 11 (1909) (refusal to amend act to prohibit only unreasonable restraints). Nevertheless, while the Supreme Court, in Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911), broke up the great Rockefeller oil trust, which figured so prominently in the debates over the 1890 Act, it also announced that only "unreasonable" restraints of trade were proscribed under the Act, the so called "rule of reason." 221 U.S. at 105. It was a decision that led directly to the efforts at another kind of reform by the administration of Woodrow Wilson under the intellectual leadership of Louis D. Brandeis. *See infra* note 185. For a perceptive and detailed treatment of this overall period of history, see generally W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA (1966).

principles of statutory construction prohibit a court from making an analogy to another statute absent "ambiguity . . . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity."[130] Since a "plausible reading"[131] of RICO, *without* reference to the antitrust statutes, supported upholding the power to give equitable relief, it was not necessary to turn to the antitrust statutes. Indeed, it may be fairly said that it was the antitrust analogy, as much as any other factor, that gave rise to the ambiguity. Here, too, the court turned a rule upside down. Instead of using an analogy to resolve an ambiguity, it improperly used an analogy to create an ambiguity.

Second, the antitrust analogy is unpersuasive, since it does not take into account the significant structural and language *differences* between the antitrust statutes and civil RICO. The antitrust statutes have four sections dealing with civil relief,[132] while civil RICO contains only one.[133] Each of the antitrust statute's four civil sections expressly states a separate jurisdictional basis and sets out which parties may seek relief. In contrast, section 1964 contains one subsection, subsection (a), which makes a general grant of jurisdiction without reference to which parties may seek relief. As such, the grant of jurisdiction in subsection (a) ought to be read to provide the jurisdictional base for *both* subsections (b) and (c). Accordingly, since significant structural and language differences are present between the antitrust statutes and civil RICO, an analogy between the texts of the two acts is neither apt nor complete. As such, the antitrust analogy ought not be held to be an adequate basis to read civil RICO to limit the availability of equitable relief to private parties.[134]

Third, the antitrust analogy is particularly inappropriate since Congress drafted RICO outside of the antitrust statutes for the explicit purpose of avoiding restrictive antitrust precedent.[135] By suggesting

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RICO was, of course, consciously drafted outside of the antitrust statutes, and Congress included the liberal construction clause in an express effort to avoid a repeat of the antitrust experience. *Compare* G. HEGEL, PHILOSOPHY OF HISTORY 6 (rev. ed. 1900) ("what experience and history teaches us is this,—that peoples and governments never have learned anything from history"). Nonetheless, RICO, too, was not at first vigorously enforced by the Department of Justice. *See supra* text accompanying note 27. It is also being treated—at least civilly—with great hostility by the district courts. *See supra* text accompanying note 29. Indeed, just as it took almost 20 years to bring a successful prosecution against the Standard Oil Trust, it has taken a similar time to bring the Mafia Commission prosecution. *See* N.Y. Times, Feb. 27, 1984, at 1, col. 2 (indictment under RICO of eleven mob leaders, six of whom on Commission and heads of New York families); TIME, Dec. 1, 1986, at 32 (conviction of eight men in commission prosecution, among whom were the leaders of three of New York City's five families, for racketeering, including murder and extortion). *See also* S. REP. No. 617, 91st Cong., 1st Sess. 36-43 (1969) (six of eleven individuals indicted in 1984 had been identified in 1969 Senate Report on RICO). Finally, just as the "rule of reason" has made the judiciary the traffic cop of competition, it now appears that "pattern" will cast it in a similar role for integrity in the market place. *See supra* note 37.

130 Hamilton v. Rathbone, 175 U.S. 414, 421 (1899) (emphasis added).

131 796 F.2d at 1084.

132 *See* 15 U.S.C. §§ 15-15(a), 25, 26 (1982).

133 *See* 18 U.S.C. § 1964 (1982).

134 *See* 15 U.S.C. § 4 (1982). *See also* Johnson, *supra* note 50, at 72-74, for a parallel analysis and conclusion.

135 *See Sedima*, 473 U.S. at 498 (quoting 115 CONG. REC. 6995 (1969)) ("It is also significant that a previous proposal to add RICO-like provisions to the Sherman Act had come to grief in part precisely because it 'could create inappropriate and unnecessary obstacles in the way of . . . a private

otherwise, the *Wollersheim* court followed a discredited approach Congress expressly sought to avoid.

Fourth, a reading of civil RICO in light of the antitrust laws falls into the lawyers' fallacy, which mistakenly believes that the same words have the same meaning without regard to context of time and place.[136] Justice Holmes put it well: words are not "transparent and unchang[ing] . . . . [They] may vary greatly in color and content according to the *circumstances* and the *time* in which . . . [they are] used."[137] In sum, the relevant antitrust statutes were passed in 1890 and 1914 to deal with a free market before the merger of law and equity in 1938.[138] Law and equity were, however, merged in 1938 to "strip procedure of unnecessary forms, technicalities and distinctions . . . ."[139] RICO is a modern statute enacted after the merger of law and equity and passed, among other things, to create an honest market. To read pre-1938 distinctions into a statute enacted more than a quarter of a century later is to let the "forms of action . . . rule us from their graves."[140] In short, "the same words, in different settings, may not mean the same thing."[141]

D. *Supreme Court Doctrine Limiting Implication of Claims for Relief Not Expressly Provided by Statute*

Finally, the court in *Wollersheim* found support for its conclusion that injunctive relief is not available to private parties in the "Supreme Court doctrine that limits the implication of causes of actions or remedies not expressly provided by statute."[142] The court cited two cases decided in

litigant [who] would have to contend with a body of precedent—appropriate in a purely antitrust context . . . .' In borrowing its 'racketeering injury,' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid.") (citations omitted)). *See also* State Farm Fire and Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 679-83 (N.D. Ind. 1982) (reviews in detail RICO's legislative history and rejects use of antitrust analogy on issues of survival of a federal cause of action under RICO where RICO is silent).

136 *See* J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 428-29 (1898) ("lawyer's Paradise where all words have a fixed, precisely ascertained meaning"). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819) (Marshall, C.J.) ("Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea . . . .").

137 Towne v. Eisner, 245 U.S. 418, 425 (1918) (emphasis added).

138 Act of June 19, 1934, 48 Stat. 1064 (1934).

139 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1041, at 141 (1969) (quoting Chief Justice Hughes in an address before the American Law Institute).

140 F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (Cambridge 1st ed. 1936).

141 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 678 (1950) (Frankfurter, J.).

142 796 F.2d at 1088. Here, as elsewhere, a clear notion of what *is* being argued and what is *not* being argued is helpful. Up until this point, the analysis in the text has focused on an interpretation of the language of RICO, that is, statutory construction. It has been argued that if the language of the statute is plain, and it includes equity relief, it must be followed; it has also been argued that if the language of the statute is ambiguous, the ambiguity ought to be resolved in favor of finding equity relief by the use of the liberal construction clause of the statute and that nothing in the statute's legislative history constitutes a clear message of an intent by Congress to the contrary. At this point, the analysis in the text turns, not to "statutory construction," but to "implication analysis." In Johnson, *supra* note 50, at 63-64, Professor Johnson succinctly summarizes the different perspectives:

> The question to be addressed under the statutory construction analysis is whether section 1964(c) gives private plaintiffs the right to sue in general under section 1964 and thus utilize the provisions of section 1964(a), or alternatively whether private RICO plaintiffs can at least seek equitable relief under the court's general equitable powers. . . . Ordinarily once Congress has created a statutory right such as the express private cause of action contained

1979, *Transamerica Mortgage Advisors, Inc. v. Lewis*,[143] and *Touche Ross & Co. v. Redington*,[144] as standing for that doctrine. The court, of course, is correct that those cases do reflect that doctrine. The court errs, however, in assuming that those cases control an implication analysis of RICO. It erred, because it ignored the Supreme Court's *new* teaching in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*,[145] which directed that "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law *at the time the legislation was enacted*."[146] *Curran* then noted that the law in 1970 was that "[i]f a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members at that class. Under this approach, federal courts, following a common-law tradition, regarded the *denial of a remedy as the exception rather than the rule*."[147] Moreover, under the Supreme Court doctrine in force at the time of RICO's enactment, it was considered the "duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[148] Under this line of decisions, equitable relief should have been held to be an implied remedy in RICO, since it can hardly be questioned that implying such equitable relief would be inconsistent with the design of RICO's sponsors. As Senator McClellan, RICO's chief sponsor in the Senate noted, RICO is not "limit[ed] [to] the remedies . . . already . . . established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice."[149] Thus,

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in section 1964(c), the courts have wide discretion in fashioning appropriate relief. However, Congress can limit this discretion by specifying that certain remedies are to be exclusive. Therefore, the question becomes whether by expressly allowing private RICO plaintiffs to sue for treble damages under section 1964(c), Congress intended to exclude private litigants from utilizing other remedies specified in section 1964(a) or from seeking relief pursuant to the court's general equitable powers. Courts generally require clear evidence of legislative intent to deny a remedy which would otherwise be available to a litigant.

Under an implication analysis, however, the issue is whether the courts should imply a remedy which Congress failed to provide. The utilization of this analysis presupposes that the language of section 1964 does not by itself afford private parties the right to seek equitable relief. . . .

Thus, while legislative intent is the cornerstone of either the statutory construction or the implication analysis, there is a difference in what might be called presumptions. Under a pure statutory construction analysis, it is presumed that all necessary remedies exist for the private plaintiff; a presumption which can be rebutted by contrary legislative intent. Under an implication analysis, on the other hand, the presumption is that no private equitable remedy exists; a presumption which can only be rebutted by affirmative legislative intent that such a remedy should be implied. . . .

Recently the Supreme Court has stated that in ascertaining legislative intent the courts should pay particular attention to the contemporary legal context in which the statute was enacted.

143 444 U.S. 11, 19 (1979).

144 442 U.S. 560, 568 (1979).

145 456 U.S. 353 (1982).

146 *Id.* at 378 (emphasis added). *See also* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984) ("Our focus must be on the intent of Congress *when* it enacted the statute in question.") (emphasis added).

147 456 U.S. at 374-75 (emphasis added) (citing Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916)).

148 J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

149 115 CONG. REC. 9567 (1969). *See supra* note 122.

applying the proper standard for implication analysis under RICO, private equitable remedies should have been implied and not, as was mistakenly done by the court in *Wollersheim*, denied.[150]

IV. The Policy Consequences of Finding That Civil RICO Does Not Authorize Equitable Relief for Private Plaintiffs

The most telling criticism that may be made of the court in *Wollersheim* is that it forgot the "first" rule of statutory construction: "to make such . . . construction [of a statute] as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuation of the mischief."[151] Had the court read the "statute, not narrowly or through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for,"[152] it would not have come out as it did. It forgot, in short, that "purpose . . . is the surest guide to . . . meaning."[153] To be sure, the court in *Wollersheim* recognized that "strong policy arguments . . . support a right to injunctive relief for private RICO plaintiffs."[154] In addition, the court acknowledged that the "force[ful] . . . argument [could be made] that a private injunctive remedy would permit an injured party to put an immediate stop to racketeering behavior that threatens his or her business before the business has been brought to its knees."[155] Finally, it candidly "recognize[d] that precluding enforcing parties from employing the weapon of equitable relief partially hamstrings the statute's effect"[156] and that the "use of equitable remedies by private parties would frequently result in substantial benefits to society generally."[157] Nevertheless, the court stood behind its judgment that Congress intended to deny to victims of sophisticated crimes such relief.[158] It almost seems as if the court felt compelled to narrow the statute *because* that construction would frustrate the policy of the statute.[159]

150 *See* Johnson, *supra* note 50, at 62-74. "Certainly it cannot be seriously argued that an interpretation of RICO to include equitable relief as a remedy for a plaintiff with an express cause of action would do anything but further . . . the statutory purpose. . . . A consideration of the statutory purpose would support the availability of equitable relief for private plaintiffs under either statutory construction or the implication analysis." *Id.* at 69; Note, *supra* note 75, at 959 ("Section 1964(c) cannot fulfill its statutory purpose of providing an effective remedy for the proscribed conduct of RICO without the implication of equitable relief for private plaintiffs in all types of RICO cases.").

151 *Heydons Case*, 3 Co. 7, 76 Eng. Rep. 637, 638 (Ex. 1578). Blackstone ranked the rule in *Heydons Case*, "first." 1 W. BLACKSTONE, COMMENTARIES 87 (1765). Blackstone also suggested that "statutes against frauds are to be liberally and beneficially expounded." *Id.* at 88.

152 United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 557 (1943) (Jackson, J.).

153 Cabel v. Markham, 148 F.2d 737, 739 (2d Cir.) (Hand, J.), *aff'd*, 326 U.S. 404 (1945). *See* United States v. Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J.) ("the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."). *See also* United States v. Shirey, 359 U.S. 255, 261 (1959) ("the art of proliferating a purpose") (quoting Brooklyn Nat'l Corp. v. Comm'r, 157 F.2d 450, 451 (1946) (Hand, J.)).

154 796 F.2d at 1088.

155 *Id.* at 1088-89.

156 *Id.* at 1089.

157 *Id.*

158 *Id.*

159 *See* W. SENIOR, CONVERSATIONS WITH DISTINGUISHED PERSONS 314 (1880) (Erle, C.J.) ("I have known judges bred in the world of legal studies, who delighted in nothing so much as a strong decision. Now a strong decision is a decision opposed to common sense and to common convenience . . . . And as one strong decision is a precedent for another a little stronger. The law, at last,

Nor did the court satisfactorily explain why Congress would make such a policy judgment.[160]

Equally cogent policy considerations, not noted by the court, militate against its construction of the statute. First, RICO's private enforcement mechanism was, of course, "intended by Congress . . . to encourage private enforcement of the laws on which RICO is predicated . . . [and to] provide strong incentives to civil litigants . . . in deterring racketeering."[161] But holding that RICO does not provide equitable relief will not mean that such relief is unavailable; it will only mean that its availability will rest solely on the traditional ancillary powers of federal courts[162] or would become a matter of state law under the doctrine of pendent jurisdiction, at least over claims, if not parties. The existence of pendent party jurisdiction, however, has been termed a "subtle and complex" question by the Supreme Court,[163] and the doctrine of pendent jurisdiction is "a doctrine of discretion, not . . . right."[164] As such, no litigant will be able to know in advance whether a particular court will choose to exercise such jurisdiction. Uncertainty will be the result, and, in light of the unjustified hostility to RICO of many district courts, that uncertainty may altogether too often be resolved by throwing out the pendent claims.[165]

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on some matters becomes such a nuisance that equity intervenes or an Act of Parliament must be passed to sweep the whole away.").

160 Lamely, *Wollersheim* the court observed that by "drawing the line between private equitable relief and private damages, Congress [might have] wished to preclude federal courts from interfering with the day-to-day running of businesses at the behest of what might be only a disgruntled competitor." 796 F.2d at 1088. It then immediately added, however, that the private claim for relief was in fact especially enacted in the teeth of such objections. *Id.* (citing *Sedima*, 473 U.S. at 487-88). It might also have noted that equity relief is discretionary, while damage relief is a matter of right. *See* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("a special blend of what is necessary, what is fair, and what is workable"). How such remedies could be thought to be unwise is difficult to fathom. In fact, the court conceded that "it may well have been desirable for Congress to have extended to private parties the right to injunctive relief . . . ." 796 F.2d at 1089.

161 *Alcorn County*, 731 F.2d at 1165.

162 The All Writs Act, 28 U.S.C. § 1651(a) (1982), may be invoked to preserve the status quo. *See* FTC v. Dean Foods Co., 384 U.S. 597, 603-05 (1966) (preliminary injunction to prevent merger); ITT Community Dev. Corp. v. Barton, 457 F. Supp. 224 (M.D. Fla. 1978) (preliminary injunction issued to protect damage claim).

163 Moor v. County of Alameda, 411 U.S. 693, 715 (1973).

164 United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

165 *See* Horn, *Judicial Plague Sweeps U.S.: "Result Orientitis" Infects Civil RICO Decisions*, NAT'L L.J., May 23, 1983, at 13, col. 1. *See also infra* Appendix B. Denial of private equity relief frustrates another important purpose of RICO. In addition to the infiltration of legitimate business, Congress was deeply troubled by the takeover of legitimate unions by organized crime. *See Civil Action*, *supra* note 1, at 249-53, 257, 270. Labor racketeering remains a major challenge to the administration of justice. *See* THE EDGE: ORGANIZED CRIME BUSINESS AND LAW OR UNIONS: REPORT, PRESIDENT'S COMM. ON ORGANIZED CRIME (1984); Blakey and Goldstock, *On the Water Front: RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341 (1980). One of the more hopeful signs in this area is the decision by the Department of Justice to begin to use civil RICO to free mob dominated union locals. *See* United States v. Local 560, IBT, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986); N.Y. Times, Mar. 19, 1987, at B1, col. 1 (two construction locals in New York City placed in trusteeship) (United States Attorney Rudolph W. Giuliani: "We will be using this remedy in all appropriate circumstances. [It is] one of the most important weapons in dealing with organized crime."); *id.*, Nov. 22, 1987, at 1, col. 1 (Department of Justice to focus on relation between mob and Teamsters, Longshoremen, Hotel Workers, and Laborers; use of criminal and civil RICO foreseen). Court appointed trustees, acting independently of the government, will, of course, seek relief for the victimized union locals. But will they be limited to *only* seeking damage relief? In addition, will union members themselves have standing to seek, through RICO, to free

Second, assuming that a district court chooses to exercise pendent jurisdiction or that diversity jurisdiction exists, that jurisdiction will be exercised under a body of law that Congress has already found to be inadequate in the context of RICO-type claims.[166] More specifically, if civil RICO provides for injunctive relief for private parties, then it is not necessary for private parties to show irreparable injury or the inadequacy of the remedy at law.[167] But if civil RICO does not expressly provide equitable relief, then traditional equitable criteria, including irreparable injury and inadequacy of the remedy at law, must be shown under the All Writs Act,[168] Federal Rule of Civil Procedure 65 or state law in order to obtain injunctive relief.[169] Hence, if civil RICO is read not to provide equitable relief to private parties, then the obtaining of injunctive relief by such parties becomes more difficult if not, at times, impossible.[170]

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mob dominated unions on their own? *Compare* Carter v. Berger, 777 F.2d 1173, 1178 (7th Cir. 1985) ("indirectly injured parties could recover under RICO when they show that the directly injured party was under the continuing control or influence of the defendant or his henchman") *with* Bass v. Campagnone, 655 F. Supp. 1390, 1393 (D.R.I. 1987) (union, not members, has standing to sue for injury to union). *But see* 116 CONG. REC. 35,204 (1970) (remarks of Rep. Richard H. Poff) ("workers are victims of sweetheart contracts"). Even without personal standing, derivative suits may be brought. *See* 29 U.S.C. § 501 (1982); Morrissey v. Curran, 650 F.2d 1267, 1271 n.1 (2d Cir. 1981). In either case, will their relief be limited to damages? Obviously, without the power to seek complete relief, neither trustees nor members will be able to achieve Congress' 1970 objective: unions free of the mob. As such, the court forgot Justice Cardozo's comment in *In Re* Rouss, 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917): "Consequences cannot alter statutes, but may help to fix their meaning."

166 *See* Organized Crime Control Act of 1970, Pub. L. No 91-452, 84 Stat. 923 (1970) ("sanctions and remedies . . . unnecessarily limited in scope and impact"); *Turkette*, 452 U.S. at 586 (because "state and federal [law] was not adequate" Congress enacted RICO). For a powerful critique of the traditional approach from a historical, comparative, and functional perspective that calls for reform, see Hummond, *Interlocutory Injunctions: Time For a New Model*, 30 U. TORONTO L.J. 240 (1980) (traditional limitations, slavishly adopted in the United States from English jurisprudence where they were rooted in a jurisdictional relation between law and equity court, anachronistic in light of their merger and modern crowded court dockets).

Ironically, too, English law has moved away from the older view. Traditionally, injunctions against persons to restrain the removal of assets were not permitted in English law under Lister & Co. v. Stubbs, [1890] 45 Ch. D. 1. The historical materials are reviewed in Rasu Maritime v. Pertambangan, [1977] 3 All.E.R. 324, 331 (Denning, J.). Mareva v. International Bulkcarriers, [1975] 2 Lloyds Rep. 509, marked a dramatic turn, for it upheld the issuance of injunctions to freeze assets. A new test was formulated in Chandris Shipping v. Unimarine, S.A., [1979] 2 All.E.R. 972, 984-85 (Denning, J.). While at first the new test seemed to be applicable only to international litigation, in Barclay-Johnson v. Yuill, [1980] 3 All.E.R. 190, 194, it was made to rest solely on the "risk of removal of assets." *See also* Prince Abdul v. Abu-Taha, [1908] 3 All.E.R. 409, 412. The present state of English law, in which such injunctions are fairly easily obtained, is reflected in Bayer A.G. v. Winter, [1986] 1 All.E.R. 733, 737. *See generally* PROFITS OF CRIME AND THEIR RECOVERY: REPORT OF HOWARD LEAGUE FOR PENAL REFORM 104-111 (1984) (discussion of *Mareva* injunctions).

167 *See, e.g.*, United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974) (government injunction) ("plainly the intention of Congress . . . to provide [in RICO] for injunctive relief . . . without any requirement of a showing of irreparable injury . . . [or] inadequacy of the remedy at law"), *cert. denied*, 420 U.S. 925 (1975); Atchison, Topeka and Sante Fe Ry. v. Lennen, 640 F.2d 255, 259-60 (10th Cir. 1981) (private suit not on RICO) (survey of statutes and cases: where a federal statute authorizes injunctive relief, irreparable harm or the inadequacy of the remedy at law need not be shown).

168 28 U.S.C. § 1651 (1982).

169 *Civil Action*, *supra* note 1, at 334 n.217. *See also* Republic of Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987); FDIC v. Antonio, 649 F. Supp. 1352, 1354 (D. Colo. 1987) (appeal pending).

170 *See, e.g.*, USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 99 (6th Cir. 1982) (adequate remedy at law might preclude "injunction sought to secure a potential damages award or even if sought only to preserve defendants' assets pending a final determination of rights"). *But see* Lynch Corp. v. Omaha Nat'l Bank, 666 F.2d 1208, 1211-12 (8th Cir. 1981) (injunction granted to prevent

Third, the effect of denying private parties equitable relief under civil RICO is not ameliorated by the option of obtaining prejudgment attachment under Federal Rule of Civil Procedure 64 because where no federal statute is applicable, the matter is governed by state law, which varies from state to state depending "upon each state's attitude toward the debtor-creditor relationship."[171]

More than a little irony accompanies these consequences of the *Wollersheim* decision. RICO's core concern is, of course, with organized crime activities, even though it constitutes general reform that applies across the board.[172] The government's experience with efforts to forfeit assets in organized crime prosecutions is, therefore, illuminating. Even with the enactment by Congress of special laws providing for preverdict seizures,[173] the government's success in forfeiting assets has been limited.[174] Reading out of civil RICO a provision for preliminary equitable remedies for injured private parties means that such parties will be assuredly doomed to a similar abysmal fate. Note, too, the specter of inconsistent results from case to case that the holding of *Wollersheim* may well create. RICO's requirement of a pattern of racketeering activity, which may well extend across state lines, makes it that "unusual case", where a claim may arise in more than one district.[175] Under RICO's nationwide service of process and venue provision,[176] ample room will exist for forum shopping by the skillful litigator to avoid the unfavorable state law of a particular forum. Only skillful forum shopping, not the merits of a

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dissipation of assets); Producto Carnic, S.A. v. Central Am. Bee and Sea Food Trading Corp., 621 F.2d 683, 686 (5th Cir. 1980) (same); International Controls Corp. v. Vesco, 490 F.2d 1334, 1347 (2d Cir.) (same), *cert. denied*, 417 U.S. 932 (1974).

171 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 64.04[3], at 64-13 (2d ed. 1985). Here, one additional comment may be appropriate on Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81 (W.D.N.Y. 1982), in which the court declined to grant an injunction to preserve assets as requested by a RICO victim. The *Ashland* court made its analysis under Fed. R. Civ. P. 64, which provides that absent a federal statute to the contrary, federal courts are to use state standards in determining the appropriateness of an attachment. The *Ashland* court made a fatal mistake, however, when it determined, without substantial comment, that the injunction requested by the plaintiff was in fact a mislabeled request for attachment. *See Civil Action*, *supra* note 1, at 339 n.217. *Ashland* may be summed up on this point by simply saying that it was wrongly decided. *See In re* DeLorean Motor Co., 755 F.2d 1223, 1227 (6th Cir. 1985) ("At least one commentator has suggested that Rule 64 does not require that an injunction otherwise proper under Rule 65 must also conform to state law merely because it is a provisional remedy.") (citing 7 MOORE'S FEDERAL PRACTICE ¶ 64-04[3], at 64-19 to 64-21 (2d ed. 1948)). Little that is charitable may be said of the rest of the opinion.

172 *See supra* notes 7-13 and accompanying text.

173 18 U.S.C. § 1963(b); 21 U.S.C. § 848(d) (1982).

174 *See, e.g., Forfeiture of Narcotics Proceeds: Hearings Before the Senate Subcomm. on Criminal Justice, Comm. on the Judiciary*, 96th Cong., 2d Sess. 96-97, 114 (1980) (testimony of Justice Department as to the existence of three problems in the preverdict seizure of assets: (1) ascertaining what the assets are, (2) reaching assets that are in the hands of third parties, and (3) preventing the dissipation of assets before trials; problems compounded since "sophisticated criminals . . . have access to the best lawyers and accountants money can buy"). *See also Civil Action*, *supra* note 1, at 258-60 n.59.

175 *Compare* Leroy v. Great W. United Corp., 443 U.S. 173, 185 (1979) ("unusual case") *with* Butchers Union Local No. 498 v. S.D.C Inv., Inc., 788 F.2d 535, 538-39 (9th Cir. 1986) (analysis of nation-wide service of process under RICO). *See also* United States v. Standard Oil Co., 152 F. 290, 292-97 (E.D. Mo. 1907) (analysis of comparable provision under antitrust statutes), *aff'd*, 221 U.S. 1, 47 (1911). Similar considerations led the Supreme Court to apply an uniform federal statute of limitations to RICO. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., No. 86-497 (Sup. Ct. Jun. 22, 1987).

176 18 U.S.C. § 1965 (1982).

claim, will offer hope of success. Accordingly, it is doubtful that a private party, who may be forced to wait until a verdict is rendered to execute his money damage award, will collect anything or, for that matter, even bother to sue in the organized crime area. That means, too, that RICO, as a practical matter, will generally offer realistic damage relief only against the white-collar offender who has assets in the community available for execution. Those who are concerned with the breadth of RICO, that is, its application beyond organized crime, hardly do well to advocate, therefore, its narrow construction on the question of equitable relief. The result that they will achieve cannot only be described as absurd, but perverse. No one ought lightly conclude that Congress intended such a result. "If this was Congress' intent one would expect it to have said so in clear and understandable terms."[177] Nothing that the *Wollersheim* court marshals in behalf of its decision can be fairly described as "clear" or "understandable."

V. Conclusion

A struggle is being waged today for the soul of the nation—between the haves and have-nots, not in the classic Marxist sense of a class struggle, but in the older American sense of a struggle between the less privileged and the more privileged. It is a struggle for basic human justice in a free society. The struggle is as old as Thomas Jefferson's fight against Alexander Hamilton over the proper role of the federal government in according special privilege to finance, business and industry in the years after the Revolution[178]—of Andrew Jackson against Nicholas Biddle over a centralized eastern money power, which disadvantaged western farmers[179]—of Abraham Lincoln against Chief Justice Roger Brooke Taney over the *Dred Scott*[180] decision, which froze Congress' power to deal with

177 *Russello*, 464 U.S. at 25 (narrow reading of "interest").

178 Appointed as the first Secretary of the Treasury in 1783, Alexander Hamilton implemented a broad based economic plan; he set up a national bank, arranged for the federal government to assume state debts incurred during the revolution, imposed a tariff duty, and instituted an excise tax on distilled liquors. These measures not only encouraged industry and commerce, but created a strong attachment to the federal government among the propertied class. Thomas Jefferson, on the other hand, opposed Hamilton's plan, arguing that the American farmer, artisan, or small merchant would be forced to bear the principal burden of the taxation; he also believed that manufacturing would eventually prove to be an oppressive force, and thus it should not be encouraged over agricultural and related interests. *See generally* J. MILLER, THE GROWTH OF THE NEW NATION 296-322 (1959).

179 In the fall of 1833, Jackson, who preferred local banks to the national bank, ordered the removal of federal deposits from the Second Bank of the United States, located in Philadelphia. Its president was Nicholas Biddle. The bank was to Jackson the embodiment of evil, since it dealt so alluringly with paper money. Biddle counteracted with a tight money policy that resulted in business distress, which continued through 1834. Biddle's actions caused Pennsylvania Governor George Wolf, among others, much financial embarrassment. The bank's charter expired in 1836, and because of its policy of contracting its credits after the removal of the deposits, the Democratic administration of Governor Wolf refused to support Mr. Biddle's request for renewal. Without Democratic support, the fate of the bank's national charter was sealed; the charter was not renewed. *See generally* F. TURNER, THE UNITED STATES: 1830-1850, at 106-09 (1958).

180 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, the question involved the status of a slave taken into a territory made free by the Missouri Compromise. Chief Justice Taney read the due process clause of the Fifth Amendment to deprive Congress of the power to liberate property. Lincoln objected to the decision in his debates with Stephen Douglas. *See* POLITICAL DEBATES BETWEEN LINCOLN AND DOUGLAS 29, 268 (1860). He also spoke against *Dred Scott* in his first

the slavery issue in a 1789 mold and hastened a disastrous civil war—and of Theodore Roosevelt against J. P. Morgan and his colleagues over the enforcement of the Sherman Antitrust Act against the great railroad, meatpacker, tobacco, and oil trusts.[181] It was at issue when Woodrow Wilson wanted to put Louis D. Brandeis on the Supreme Court over the protests of seven past presidents of the American Bar Association,[182] and it was at issue when Franklin D. Roosevelt sought during the Great Depression to secure and protect stock-market regulation at the federal level against prominent voices in the securities, investment, and banking industries, who asserted that full-disclosure and financial-integrity legislation at the federal level would inhibit capital formation and make "grass grow" on Wall Street.[183] That struggle for the soul of the nation

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inaugural address. VI J. RICHARDSON, MESSAGES & PAPERS OF THE PRESIDENTS 9-10 (1897). *See generally* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 28-33 (1941).

181 Roosevelt's antitrust activities earned him the name of "trust buster." He launched an attack against monopolies in 1902, and he kept at it intermittently during the rest of his administration. At the time, Congress was dominated by economic conservatives, who would not pass legislation that could form an effective control measure to contain the manifest economic abuses of the times. With the path to effective regulation blocked by a stubborn Congress, Roosevelt made an effort to control the great aggregates of capital through the use of antitrust laws. Roosevelt brought suits under the Sherman Act against such corporations as the Northern Pacific Railroad, the Great Northern Railroad, the Standard Oil Company, the American Tobacco Company, the New Haven Railroad, and the DuPont Corporation. *See generally* G. MOWREY, THE ERA OF ROOSEVELT, 1900-1912, at 130-33 (1958). Nevertheless, it is a melancholy truth that judicial hostility to the Sherman Act largely frustrated its early administration in the judicial arena. *See* Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17, 19 (1983). The statistical data is collected in Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 371 (1970). *See* 16 J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAW AND TRADE REGULATIONS § 203[1] (1983) ("The federal judiciary in 1890 was so instilled with the laissez-faire or social Darwinist theories then prevalent that they failed to see that the Sherman Act . . . could encourage a business climate closer to the model they desired."). Even later, many judges considered the Act's treble damage and attorneys' fee provisions an invitation to "racketeering." *See, e.g.*, Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 570 (7th Cir. 1951) (attorney fees), *cert. denied*, 342 U.S. 909 (1952). Advances were made in the 1940s and 1950s, but it was not until the Warren Court era that key decisions of the Supreme Court brought the private enforcement mechanism of the antitrust statutes into its own. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-11 (1959) (no "public injury" limitation).

182 Wilson's nomination of Brandeis for the Supreme Court in 1916 was one of the most controversial in the Court's history. Although Brandeis was Jewish, the confrontation was primarily one of interests and ideologies rather than prejudice. Brandeis had exposed the inequities of men in high places in the financial system; his clients were not exclusively of the commercial class, and he did not stand in awe of the majesty of wealth. Support for him was, however, equally as strong. Nine of eleven Harvard Law School professors supported Brandeis, along with people like Newton D. Baker, Frances Perkins, Henry Moskowitz, Norman Hapgood, Charles Crane, Paul Kellog, Rabbi Stephen Wise, Amos Pichot, and Walter Lippmann. *See generally* P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 291-299 (1984).

183 *See* D. RATNER, SECURITIES REGLUATION 80 (1982). Fifty years ago, following the brilliant exposé of Ferdinand Pecora, chief counsel of the Senate Banking and Currency Committee, Congress passed the Securities Act of 1933 to deal with abuses, frauds and deceits in certain limited areas of the marketplace. *See generally* F. PECORA, WALL STREET UNDER OATH (1939); Landis, *supra* note 1, at 30:

> The act naturally had its beginnings in the high financing of the Twenties that was followed by the market crash of 1929. Even before the inauguration of Franklin D. Roosevelt as President of the United States, a spectacularly illuminating investigation of the nature of this financing was being undertaken by the Senate Banking and Currency Committee under the direction of its able counsel, Ferdinand D. Pecora. That Committee spread on the record more than the peccadillos of groups of men involved in the issuance and marketing of securities. It indicted a system as a whole that had failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other

is today being fought anew in the business community, bar associations,

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people's money. Investment bankers, brokers and dealers, corporate directors, accountants, all found themselves the object of criticism so severe that the American public lost much of its faith in professions that had theretofore been regarded with respect that had approached awe.

The Act, however, encountered both open and undercover resistance from brokers and investment bankers. *See* J. SELIGMAN, THE TRANSFORMATION OF WALL STREET 79 (1983) (quoting then Prof. Felix Frankfurter: "The leading financial law firms who have been systematically carrying on a campaign against [the Securities Act of 1933] have been seeking—now that they and their financial clients have come out of their storm cellar of fear—not to improve but to chloroform the Act. They evidently assume that the public is unaware of the sources of the issues that represent the boldest abuses of fiduciary responsibility."). The 1933 Act was, for example, thought to be so "draconian" that it would "dry up the nation's underwriting business and that 'grass would grow in Wall Street.' " D. RATNER, *supra*, at 80. Richard Whitney, president of the New York Stock Exchange, led the well-supported fight against securities regulation by the federal government; he viewed such legislation as indirectly constituting a nationalization of business, which might result in a freezing of the stock exchange. In addition, George O. May, of Price Waterhouse & Co., "was . . . opposed to . . . requirements for independent accountants." Landis, *supra* note 1, at 35 n.12. Businessmen and wire houses across the country rallied to Whitney's leadership. The Investment Bankers Association issued a statement decrying the Act and asserting that its "practical result . . . [would] be to suspend the underwriting or distribution of many capital issues . . . ." *Id.* at 40. According to one of its drafters, the 1933 Act was subject to "misinterpretations, deliberate to a great degree, by the widely publicized utterances of persons prominent in the financial world together with their lawyers." *Id.* at 40 n.18. In the end, Congress passed the President's legislation, not only the Securities Act of 1933, but also the Securities Exchange Act of 1934 which entrusted much authority over the market to the Securities and Exchange Commission. *See generally* A. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 456-57 (1958). Early decisions by the pre-New Deal Supreme Court, however, reflected a similar hostility. *See, e.g.*, Jones v. SEC, 298 U.S. 1 (1935); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 147-53 (Vintage ed. 1941) ("[T]he majority used the occasion to write an opinion which did all that a court's opinion could do to discredit the Commission . . . . Every tricky knave in the investment business hailed the opinion . . . .").

Apparently, too, an impression is widespread in the securities industry today that RICO simply "overlaps" all securities fraud. Justice Marshall's dissent in *Sedima* expressed a similar concern. *Sedima*, 473 U.S. at 505 ("virtually eliminates decades of legislative and judicial developments of private civil remedies under the federal securities laws"). Nothing could be further from the truth. RICO says any offense involving "fraud in the sale of securities . . . punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (1982). "Offense" means criminal offense. *See* Trane v. O'Connor Sec., 718 F.2d 26, 29 (2d Cir. 1983) ("obviously refers to criminal punishment"); Dan River, Inc. v. Icahn, 701 F.2d 278, 291 (4th Cir. 1983) ("criminal intent is . . . necessary in either mail fraud or securities fraud [under RICO]"); Levine v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 639 F. Supp. 1391, 1395-06 (S.D.N.Y. 1986) (RICO securities violations must be criminal); Frota v. Prudential-Bache Sec., Inc., 639 F. Supp. 1186, 1192 (S.D.N.Y. 1986) (RICO securities violations must be criminal); Kronfeld v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1471 (D.N.J. 1986) (RICO securities violations must be willful); *In Re* Nat'l Mortgage Equity Corp. Mortgage Pool, 636 F. Supp. 1138, 1157 (C.D. Cal. 1986) (recklessness suffices for criminal violation); Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1434 (N.D. Ill. 1986) (RICO securities violations must be willful). Accordingly, only the *criminal* fraud provisions of the securities acts fall within RICO. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77x (1982) ("willfully"); Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a) (1982) ("willfully"). Mere negligent conduct or a transaction that only operates as a fraud does not fall within the statute. *See* Aaron v. SEC, 446 U.S. 680, 701-02 (1980) (intent to defraud rather than negligence in § 10(b) of the 1934 Act or § 17a(1) of the 1933 Act, but not untrue statements or admissions or transactions that operate as a fraud in § 17(a)(2) or (3) of the 1933 Act). Such an overlap between statutes is neither "unusual nor unfortunate." SEC v. National Sec., Inc., 393 U.S. 453, 468 (1969). Indeed, the securities acts themselves envision it. *See, e.g.*, § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1982) ("rights and remedies . . . in addition" to "all other" that might exist). RICO, too, recognizes the overlap. *See* 84 Stat. 947 (1970) ("Nothing in this title shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.").

Unfortunately, the courts of appeal are failing to give full recognition to the fact that civil RICO enforces the *criminal* (*e.g.*, § 78ff), not the *civil* (*e.g.*, § 10b(5)) aspects of the securities acts. *See, e.g.*, International Data Bank, Ltd. v Zepkin, 812 F.2d 149, 152-54 (4th Cir. 1987) (purchaser-seller rule enforced under § 10b(5); fraud under RICO); Brannan v. Eisenstein, 804 F.2d 1041, 1046-47 (8th Cir. 1986) (purchaser-seller rules enforced under §§ 10b(5), 1341 under RICO). Civilly, standing

Congress, and the courts. It has many names: it is called "strict constructionism";[184] it is called "antitrust reform";[185] it is called "tort re-

rules, of course, limit § 10b(5). Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (purchaser-seller). But no similar standing rules limit the *criminal* scope of § 78ff or, for that matter, § 1341. *See, e.g.*, United States v. Newman, 664 F.2d 12, 17 (2d Cir. 1981) ("[C]ourt's concern must be with scope of the Rule, not plaintiff's standing to sue"), *aff'd after remand*, 722 F.2d 729 (2d Cir.), *cert. denied*, 464 U.S. 863 (1983). An effort to read such private law standing limitations into the *criminal* securities statutes—or mail or wire fraud—as they are enforced through RICO is, therefore, fundamentally misguided. By themselves, the civil provisions of the securities statutes seek only private redress; RICO, however, seeks to make effective the *criminal* law standards of the statutes through a *private* enforcement mechanism. Plaintiffs under RICO act, not only for themselves, but also as private attorneys general in the enforcement of the law. *See Sedima*, 473 U.S. at 493 ("to fill prosecutorial gaps"). Moreover, Congress carefully drafted the private enforcement mechanism of RICO, as it did, precisely to avoid such standing limitations. *Id.* at 3287. ("exactly the problem . . . Congress sought to avoid"). *But see International Data Bank Ltd.*, 812 F.2d at 153-54. Congress, too, was well-aware of the overlap between RICO and the securities statutes, as the point was specifically drawn to its attention. *See Civil Action*, *supra* note 1, at 272-73. Because civil RICO enforces criminal standards—and requires a showing of a pattern of such "offenses," which may well require a plaintiff to prove multiple injuries, not only to himself, but also to others—civil RICO—and the private plaintiff—serves an important public as well as private function. As such, forcing civil RICO into a purely private law model misconceives its important public law functions; it is bad policy and bad law. *See generally* Chayes, *Forward: Public Law Litigation and The Burger Court*, 96 HARV. L. REV. 4 (1982) (classic model of private dispute resolution contrasted with contemporary model of public grievance against aggregates); 8-26 (inappropriate private law standing limitations analyzed); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Since the judiciary implied a private claim for relief in § 105(b), circumscribing it by private standing rule is appropriate. Civil RICO, however, is an express claim for relief. As such, the "[j]udiciary may not circumscribe [it] . . . because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability." *Blue Chips Stamps*, 421 U.S. at 748.

184 *Compare* Meese, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22 (1985) *with* Brennan, *Construing the Constitution* 19 U.C. DAVIS L. REV. 2 (1985). Ostensibly, the struggle over strict constructionism concerns which philosophy of interpretation will animate the judiciary in its construction of the Constitution. Shall it be a dry literalism or a vital organic faith in a living constitution? Should the original intent of the founders, duly imprisoned in 18th century thought, govern our concepts of government and human dignity, or should we, in Justice Holmes' words, view the Constitution as a "constitute act . . . [which] called into life a being, the development of which could not have been foreseen completely by the most gifted of its begetters." Missouri v. Holland, 252 U.S. 416, 433 (1920). At one level, the debate is over a seemingly unresolvable bedrock issue of jurisprudence. At another, it is apparently a mask behind which a determined few hide an economic and social agenda that would, if achieved, restore an older and long-ago discredited polity.

185 Justice Brandeis saw American democracy as having a backbone of small tradespeople, merchants and manufacturers with a sprinkling of professionals. He realized that the last decades of the 19th century had brought about concentrations of wealth, which did not fit into this scheme. Groups like the Morgan-backed syndicate, which controlled the elevated railroad, had access to huge amounts of capital, with which they could buy out or force out competition and bribe state legislators. If the good of individuals, organized through government, could be negated by concentration of capital, then such concentration and their consequence had to be opposed. *See* P. STRUM, *supra* note 102, at 62. Ostensibly, the struggle over antitrust reform today is over bringing the free-market legislation of the 19th and early 20th centuries into necessary conformity with modern economic analysis and the realities of a highly competitive world economy. Shall we retain Brandeis' ideal of using law not only to promote free enterprise, but also to circumscribe the power of great aggregates of capital—for economic, yes, but also political reasons? Rightly or wrongly, here, too, the tenets of strict constructionism are strangely forgotten in a rush to refashion the law in the mold of the neoclassical Chicago School of Economics. For example, the Department of Justice merger guidelines repeal duly enacted legislation and undisturbed court decisions. *Merger Guidelines of the Department of Justice: 1982*, 1 TRADE REG. REP. (CCH) ¶ 4500. Guidelines that permit the union of Seven-Up and Pepsico, Inc., giving Pepsico and Coca-Cola 74% of the soft-drink market, in short, do not guide, but sanction unrestrained mergers. *See* Wash. Post, Feb. 14, 1986, at A-20, col. 1 (facts of merger). Fortunately, the Federal Trade Commission, at least, has moved to attack this merger. *Id.* Jun. 25, 1986, at G-1, col 3. Without the benefit of hearings, congressional action, or the president's signature, antitrust policy, is, in short, made by announcing that the law will not be enforced. Ironically, the new guidelines are also being proposed as legislation, reversing the normal order of reform; implementation first, enactment later. *See Proposed Legislation: Administrations Antitrust Law Package*,

form";[186] and it is also called "civil RICO reform."

Civil RICO reform is being widely urged in the business com-

TRADE REG. REP. (CCH) No. 744 (Feb. 24, 1986). In addition, wittingly or unwittingly, antitrust enforcement programs are starved by the executive of needed resources. In 1985, for example, the Antitrust Division was allocated $143,119,000 of the annual budget; in 1980, the division had been allocated over $4 million more, $147,544,000. *Compare* OFFICE OF MANAGEMENT and Budget, Budget of the United States Government: Fiscal Year 1987, at I-06 (1986) *with* H.R. Doc. No. 97-1, 97th Cong., 1st Sess. 468 (1981). Similarly, in 1985, a total of 1,508 cases passed through the Antitrust Division: 729 antitrust cases were instituted, and 779 cases were terminated; five years earlier 3,488 cases passed through the Antitrust Division; 1,808 cases were instituted and 1,680 cases were terminated. *Compare* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1987, at I-06 (1986) *with id.* FISCAL YEAR 1983, at I-N6 (1982). Private suits are increasingly limited by the courts with more stringent requirements. *See, e.g.*, Cargill, Inc. v. Monfort of Colo., Inc., 107 S. Ct. 484 (1987) (merger cannot be enjoined without showing of antitrust injury). As a result, antitrust filings have fallen sharply. *Compare* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 104 (1983) (1,200 civil; 74 criminal) *with id.* A-12, A-47 (1985) (959 civil; 47 criminal). Proposals, too, would alter common law rules about joint-and-several liability and narrow the class of cases in which treble damages may be awarded. *See, e.g.*, S. 1300, 99th Cong., 2d Sess. (1986) (proposed amendment to Clayton Act). N.Y. Times, Mar. 30, 1983, at 27, col. 5 (Administration proposals reviewed). The unseen hand of the free market will soon be largely freed of having to account to the law for the abuse of economic power.

186 No one seriously doubts the reality of our pressing liability-insurance crisis. Nor can it be doubted that the insurance industry under the flag of the liability crisis has secured legislative reform of the tort system. *But see* Wall St. J., Aug. 1, 1986, at 10 (state law changes summarized) ("While 31 states have made changes in the way lawsuits are tried and damages awarded, the moves aren't expected to yield broad benefits for insurers or their customers.") Yet its cause or cure is another matter. Surely, here, too, the first requirement of a serious reform proposal is, not only the identification of a problem, but also a showing that the remedy is related to the wrong. Should we better manage insurance companies or reform the tort law system? What is the principal cause of the crisis: the expansion of legal liability or the insurance industry's profit cycle? *See* Hunter, *Taming the Lastest Insurance 'CRISIS'*, N.Y. Times, Apr. 13, 1986, at F-3, col. 1 (argument advanced that profit cycle is principal factor). Or some prudent combination of both? Depending on whose accountant you listen to, the insurance industry last year lost $5.5 billion or made $1.7 billion. N.Y. Times, Mar. 2, 1986, at 20, col. 5. *See also*, N.Y. Times, Dec. 27, 1986, at 12, col. 1 (industry claims to have lost $500 million on medical malpractice during last decade, while GAO finds $2 billion profit). The Willard Commission, set up by the Justice Department to study tort reform, pointed to a 758% rise in federal products liability litigation in the past decade. *See* EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY, I TORT POLICY WORKING GROUP 42 (1986). But the Commission ignored other data, which shows that a substantial portion of the number is attributed to only one product, asbestos (*see, e.g.*, KNOWLTON, *Asbestos Litigation: Which Way Out?*, A.B.A. SEC. TORT & INSURANCE PRACTICE, August, 1983, at 4 ("of 60,000 claims presented to the Traveler's Companies, 20,000 represent persons claiming some type of injury due to asbestos exposure")); that the vast majority of tort litigation is tried in state, not federal courts (*see* BUS. WK., Apr. 21, 1986, at 24); and, that such suits have not significantly outpaced population growth (only 2 percentage points). *Id.* Indeed, civil cases generally have declined 10% since 1981 in state court systems, according to the National Center for State Courts. *Id.* In fact, "hyperlexis" may be a word without the substantial reality behind it that many people suppose to exist. Only one in ten people who start out with a grievance ever make it to a lawyer; half of those who see a lawyer never file suit; and 92% of those settle without a trial. The stakes, too, are small—half involve less than $10,000—just 12% involve $50,000 or more. *See* NEWSWEEK, Nov. 12, 1983, at 98 (study directed by Wisconsin law professor dealing with cases in 1978). Much is also made of over 400 multimillion dollar jury awards per year. *See* Wermiel, *The Cost of Lawsuits Growing Ever Larger*, Wall St. J., May 16, 1986, at 8, col. 1; *In Awarding Damages, Panels Have Reasons For Thinking Big*, *id.*, May 29, 1986, at 1, col. 1. That figure pales compared with the nation's population (240 million). *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 5 (106th ed. 1986); nor is it significant in light of the fact that two-thirds of such awards involve permanent paralysis, brain damage, amputation or deaths. *See* BUS. WK., Apr. 21, 1986, at 25. In fact, if medical liability awards, for example, are adjusted for inflation, they have remained constant for 25 years. *See* N.Y. Times, May 25, 1986, at 18E, col. 4. Indeed, the median liability award during this period has hovered around $20,000 in constant dollars. *Id.*, Apr. 13, 1986, at F-3, col. 2. *See also* GENERAL ACCOUNTING OFFICE: MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984 (Apr. 1987) (57% closed without indemnity; median payment $18,000 with average of $80,741; average cost for insurance investigation: $10,985; 50% closed after suit, but before trial). Moreover, little empirical evidence supports the theory that "tort re-

munity, principally by segments of the accounting[187] and securi-

form" in the medical malpractice area in fact affects insurance costs. *See generally* GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATES CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (Dec., 1986). In addition, the much-maligned punitive damage award is made in less than 13% of all verdicts, *id.* Many of those are cut down or reversed on appeal. *See* BUS. WK., Apr. 21, 1986, at 25. It ought not be forgotten, too, that, "[i]t's the jury—not the government, not business, not judges—that is responsible for putting safety improvements in cars, for getting Dalkon shields off the market, for having health hazards removed." Wall St. J., May 29, 1986, at 18, col. 6 (quoting Herbert Hafif, plaintiff's counsel). Nevertheless, no objective observer can seriously argue that our tort system is efficient, effective, or fair. While more people are seriously injured than ever before by defective products or negligent conduct, it costs too much to get adequate compensation to those who need it. *See, e.g.*, Anderson and Kahn, *A Ten-Point Proposal for Asbestos Superfund*, FORUM, Spring 1983. But what are the legislative remedies proposed in the name of "reform"? Strangely, those who are federalist on other issues ignore the tenets of federalism here. Tort reform is seen as a national problem requiring a national solution. The remedy: curtail by national legislation the fees of plaintiffs' lawyers by circumscribing the contingent-fee system (a method whereby victims as a class, in effect, insure themselves against legal costs), and cap noneconomic damage awards (which are, in fact, another way of awarding legal fees). *See* FORTUNE, Jul. 7, 1986, at 35-36 (Reagan administration backs tort reform). On the role of contingent fees in the tort system, see generally G. CALABRESI, IDEAL, BELIEFS, ATTITUDES AND THE LAW 79-81 (1985) ("Pain and suffering awards plus contingent fees function as mutual insurance system among accident victims."). If victims have less access to lawyers, society will, of course, have less litigation, yet not because fewer wrongs are done, but because less access to the courts is available. Little is said, too, about reforming insurance company inefficiency, curtailing the medical fees of health-care professionals, who maintain a wasteful system of "socialized" accounts receivables through government and private insurance programs, and who are largely able to maintain marketplace freedom in price setting; or of weeding out from the profession the incompetent doctors, whose conduct gives rise to the suits. *Compare* Stein, *Medical Negligence Needs a Study*, N.Y. Times, May 30, 1987, at 15, col. 2 (estimates of 260,000 to 300,000 injuries and deaths in hospitals each year from negligence) *with* NEWSWEEK, Jan. 26, 1987, at 62-63 (small percentage of physicians account for disproportionate number of malpractice claims, but nationwide only 406 medical licenses revoked in 1985); N.Y. Times, Feb. 4, 1986, at 9, col. 4 (20,000 to 45,000 of 400,000 physicians not fully competent, but only 1,400 disciplinary actions each year). Neither is attention paid to the fees of defense counsel for whom, in light of insurance-company reimbursement of the insured, there is little economic disincentive to run the meter in major litigation before trying to achieve a realistic settlement, even where liability and amount of damage are not seriously in dispute. Nor are responsible proposals being seriously considered that would create a substitute for the tort system which might be a more efficient, effective, or fair system of social insurance for the medical and other injuries, which are an inevitable incident of life in modern society. Here, the trial lawyers of both camps join hands with the insurance industry in conspiring against the rights of society. G. SHAW, THE DOCTOR'S DILEMMA Act I 32 (Brentano's ed. 1909) ("all professions are conspiracies against the laity"). Instead, "tort law reform" is a euphemism for choosing to enhance the power of one side in an adversary system, which would move the clock, not forward to a better system for the 21st century, but backward to restore a discredited 19th-century system, where only the well-to-do would have lawyers. O. GOLDSMITH, *The Traveller*, in GOLDSMITH: SELECTED WORKS 600 (Rupert Hand-Davis ed. 1950) ("Laws grind the poor, and rich men rule the law."); N.Y. Times, Mar. 27, 1987, at E-20, col. 1 (fewer law graduates going into public or public interest legal work, as starting annual salaries in major firms approach $80,000).

187 *See, e.g.*, *Oversight*, *supra* note 27, at 243 (testimony of American Institute of Certified Public Accountants). After a "spectacular string of corporate failures and financial scam deals," the accounting industry, which is "supposed to audit company books and sniff out chicanery" is itself coming under close scrutiny. TIME, Sep. 21, 1986, at 61. "Fraudulent financial reporting is . . . a serious problem." REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING 1 (Exposure Draft Apr. 1987) [hereinafter FINANCIAL REPORTING]; *see also* FORBES, May 4, 1987, at 57 (accounting firms engage in "cascading," which involves enlisting clients for accounting services and then persuading them to buy other management services that compromise firms independence); *Auditors Face U.S. Scrutiny*, N.Y. Times, Feb. 18, 1985, at Y-14, col. 6 (statement of Eli Mason, Chairman of National Conference of C.P.A. Practitioners) ("there has been a marked deterioration in professional behavior due to unscrupulous marketing practices," that is, cutting prices to obtain a client); *id.*, Mar. 10, 1985, at Y-8, col. 1 ("Not only is the auditor paid by the client whose financial statements the auditor must examine on behalf of the public, but accounting firms have been expanding into sidelines such as management consulting, which require being advocates for the client."). Since 1980, major accounting firms have had to pay more that $180 million to settle liability

ties[188] industries. The arguments being advanced against civil RICO vary, but usually one or more of eight points are made. First, RICO was designed to cripple organized crime, not legitimate business.[189] Second,

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suits. TIME, Sep. 21, 1986, at 61. *See also Uneasy Period for Andersen*, N.Y. Times, Nov. 23, 1984, at Y-29, col. 3 (within two months Arthur Andersen & Co. agreed to $65 million in out-of-court settlements). "[W]hen fraudulent financial reporting occurs, serious consequences ensue. The damage that results in widespread, with a sometimes devastating ripple effect." FINANCIAL REPORTING, *supra*, at 4. The spectacular failures include, for example, the collapse in 1985 of E.S.M. Government Securities, Inc., of Fort Lauderdale, Florida, which fell after falsified books that concealed millions of dollars of losses from investors were made possible by a bribed accounting firm auditor. *See generally In Re* Alexander Grant & Co. Litig., 110 F.R.D. 528, 530-31, 539-43 (S.D. Fla. 1986) (text of indictment). Investors with accounts at the firm, including as many as a dozen municipalities, lost as much as $315 million. The collapse of E.S.M. also led to the insolvency of Home State Savings Bank in Ohio, which lost almost $150 million, and the shutdown of 71 privately insured thrift institutions in Ohio. *See generally* Barrons, Mar. 9, 1987, at 71, col. 1. Recently, the accounting firm of Grant, Thornton, a/k/a Alexander Grant & Company, reached a $22.5 million settlement with the American Savings and Loan Association, which lost $55.3 million; it also reached a $50 million settlement with 17 municipal governments, which had sued under RICO. *See* N.Y. Times, Sep. 17, 1986, at 48, col. 6. Without RICO, it is doubtful that a favorable settlement could have been obtained by the victims. *See supra* note 17 (treble damages). No wonder that the accounting industry is a major contributor to the political campaigns of those in the forefront of the effort to disembowel the RICO statute. *See* Nat'l L.J., Sep. 6, 1986, p. 2114-15. *But see* FINANCIAL REPORTING, *supra*, at 9 ("strong and effective deterrence is essential in reducing the incidence of fraudulent financial reporting.").

188 *See, e.g., Oversight, supra* note 27, at 629 (testimony of Securities Industry Association). In 1981, various writers knowledgeable about Wall Street began to suggest that the recent rise in corporate takeovers was accompanied by insider trading so pervasive that nothing could be done to prevent it. *See, e.g.*, Louis, *The Unwinnable War on Insider Trading*, FORTUNE, Jul. 1981, at 72. John Shad, Chairman of the SEC, dismissed the significance of these allegations, claiming that such articles unfairly impugned the integrity of the securities markets and shook investor confidence. *See Hearings on SEC Oversight Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 53-120, 217-68 (1986). He also argued that no new legislation was needed and that the Commission had sufficient resources to combat it. *See* N.Y. Times, Jun. 19, 1986, at 34, col. 3. Most now concede that "the abuse of inside information in the takeover game is endemic and has grown systematic over the past half-decade." Wall St. J., Feb. 17, 1987, at 27, col. 1 (3,000 takeover transactions involving $175 billion in 1986). *See generally* BUS. WK., Mar. 3, 1987, at 28; NEWSWEEK, May 26, 1986, at 44. It is "probably a safe bet that [the unfolding federal probe will] vastly understate the total losses incurred by stock market investors, as well as many target companies that no longer exist and their acquirer who doubtless paid too dearly for them." Wall St. J., Feb. 17, 1987, at 27, col. 1. It is no wonder, too, that the attack on RICO by the securities industry is vigorous. It is harder to justify that Shad has spoken out against RICO. *See* FORTUNE, Mar. 3, 1986, at 109. It is even harder to justify that Shad, until recently, had suggested that SEC resources were adequate to police insider trading. N.Y. Times, Mar. 21, 1987, at 18, col. 3. *See infra* note 191 (private enforcement). Indeed, the SEC, as understaffed and resourced as it is, actually earns a profit for the government. N.Y. Times, Dec. 12, 1986, at 23, col. 1 (spent $106 million, but took in $215 million in fees). For a comprehensive survey and critique of the law and economic literature on insider trading, see Cox, *Insider Trading and Contracting: A Critical Response to the 'Chicago School,'* 1986 DUKE L.J. 628. Statistical examinations of premerger stock performance arrive at conflicting results on the extent of insider trading. *Compare* BUS. WK., Apr. 29, 1985, at 79 (evidence of insider trading persuasive) *with* Wall St. J., Mar. 11, 1987, at 4, col. 4 (SEC study: variety of factors consistent with legitimate market for information) *and* N.Y. Times, Mar. 11, 1987, at 1, col. 1 (story on SEC study: variety of factors, including illegal behavior, explanatory of sharp rise in takeover stock price). A number of civil RICO suits are on file seeking treble damages in connection with the various scams. *See, e.g.*, Wall St. J., Mar. 5, 1987, at 25, col. 3 (David Berger, counsel for several plaintiffs, "[t]his was a tremendous racket.").

189 *See, e.g., Oversight, supra* note 27, at 241 (testimony of American Institute of Certified Public Accountants) ("the legislative history of civil RICO confirms that Congress intended to create a weapon in the war against organized crime, but at no time did Congress envision that it was creating a powerful new weapon to be used against legitimate business people in ordinary commercial disputes having nothing whatsoever to do with organized crime"). *But see supra* text accompanying notes 7-13.

A quick review of history would have informed the Institute that the application of RICO beyond organized crime was the way most statutes had been implemented over the years. For exam-

RICO applies in the typical business transaction that uses the mails or phones.[190] Third, since law enforcement agencies can be depended upon to prosecute the real malefactors, private enforcement mechanisms are not needed.[191] Fourth, multiple damage suits are unnecessary.[192]

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ple, 42 U.S.C. § 1983 (1982), which provides a civil action for deprivation of constitutional rights, was "originally called the Ku Klux Klan Act of 1871." It "was enacted to provide a measure of Federal control over state and territorial officials who were reluctant to enforce state laws against persons who violated the rights of newly freed slaves and union sympathizers." H.R. REP. No. 548, 96th Cong., 1st Sess. (1979). Nevertheless in Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court held that "although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates." *Id.* at 183. As such, § 1983 has been used, not only to remedy discrimination against Blacks under color of state law, but to vindicate, for example, a pregnant school teacher's right not to be subject to arbitrary maternity leave policies. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). Similarly, senators during the debates over the Sherman Act, commented that its purpose was to break up the large monopoly trusts then existing and subject them to competition. *See generally* W. THORNTON, A TREATISE ON COMBINATIONS IN RESTRAINT OF TRADE 1-31 (1928). Since then, however, the Sherman Act's broad language has been applied to invalidate tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947), sue the National Football League for conspiring to blacklist a player, Radovich v. National Football League, 352 U.S. 445 (1957), and enjoin the National Collegiate Athletic Association from restricting football game television contracts of member schools, National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984). The breadth of legislation, in short, is a function, not of the specific state of mind of the legislators who vote on it, but also the scope of the language they use in writing the statute. Diamond v. Chakrabarty, 447 U.S. 303, 315-16 (1980) ("a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.' "); United States v. Maze, 414 U.S. 395, 399 n.4 (1974) (mail fraud) ("while obviously not directed at credit card frauds as such [its language] is sufficiently general . . . to include them if the requirements of the statute are otherwise met.").

190 *See, e.g., Oversight, supra* note 27, at 278 (testimony of American Institute of Certified Public Accountants) ("Claims based on 'mail fraud' and 'wire fraud' predicate offense are easy to plead in many commercial disputes."). *But see supra* note 37 (pattern), note 183 (criminal securities fraud), *and infra* note 238 (current fraud litigation); *Civil Action, supra* note 1, at 244 n.23 (good faith defense to mail fraud).

191 *See, e.g., Oversight, supra* note 27, at 310 (testimony of American Institute of Certified Public Accountants) ("It is baseless to assert that the targets of the private Civil RICO cases that private lawyers have brought in the absence of prior convictions would have been prosecuted if only federal and state prosecutors had more resources.").

With its principal reliance on the criminal law, public enforcement cannot be relied upon to do the whole job of policing fraud. As Justice Jackson observed, "the criminal law has long proved futile to reach the subtler kinds of fraud at all, and able to reach grosser fraud, only rarely." R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 152 (Vintage ed. 1941). It is necessary, in short, to be candid about the limitations of the criminal justice system in the white-collar crime area. Resources available for investigation and prosecution are scarce. The common law criminal trial is ponderous. The cases are complex. Offenders will be most often treated as "first offenders" even if they had actually engaged in a pattern of behavior over a substantial period of time. Indeed, while the proceeding is in form criminal, it is in substance civil, for a fine, not imprisonment, is the norm for white-collar offenders. *See* U.S. NEWS & WORLD REPORT, Jul. 1, 1985, at 43 (in federal courts, probation granted in 40% of antitrust, 61% of fraud, and 70% of embezzlement cases). Unfortunately, too, the government is less than effective in its enforcement of fines. *See* N.Y. Times, Aug. 4, 1983, at 8, col. 3 (in federal courts, only 55% of all criminal fines collected over past 16 years; only 34% over past 18 months; most of the 22,532 cases of unpaid federal fines totaling $185.6 million involved white collar crime). A few convictions will yield only a minimal deterrent effect. *See* J. CONKLIN, ILLEGAL BUT NOT CRIMINAL: BUSINESS CRIME IN AMERICA 129 (1977) (citations omitted):

> [T]he criminal justice system treats business offenders with leniency. Prosecution is uncommon, conviction is rare, and harsh sentences almost nonexistent. At most, a businessman or corporation is fined; few individuals are imprisoned and those who are serve very short sentences. Many reasons exist for this leniency. The wealth and prestige of businessmen, their influence over the media, the trend towards more lenient punishment for all offenders, the complexity and invisibility of many business crimes, the existence of regulatory agencies and inspectors who seek compliance with the law rather than punishment of violators all help explain why the criminal justice system rarely deals harshly with businessmen.

Fifth, RICO's "racketeer" label leads legitimate businesses to settle garden variety fraud claims for extortionate amounts.[193] Sixth, existing

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This failure to punish business offenders may encourage feelings of mistrust toward community morality, and general social disorganization in the general population. Discriminatory justice may also provide lower-class and working-class individuals with justifications for their own violation of the law, and it may provide political radicals with a desire to replace a corrupt system in which equal justice is little more than a spoken ideal.

Public agencies, moreover, will never be funded at adequate levels. The funding of the Securities and Exchange Commission, for example, has increased since 1979, but its staffing has decreased, and its pending investigations are down. Yet the number of shares traded on the New York Stock Exchange has shot up 300% since 1977; the number of first time registrants has increased by 260%. *See generally* GENERAL ACCOUNTING OFFICE, STATISTICS ON SEC'S ENFORCEMENT PROGRAM, March 25, 1985. *See also* Fedders & Perry, *Policing Financial Disclosure Fraud: The SEC's Top Priority*, 1984 J. OF ACCT. 58, 60 ("Because certain conduct violates the federal securities laws does not mean that the commission must file charges and seek to impose sanctions on the malefactor."); *supra* note 188 (SEC Chairman Shad, until recently, contended that additional resources to police insider trading were not necessary). Similarly, the futures industry in the United States has grown tremendously in recent years. The 139.9 million futures contracts traded in 1983 represents a level of trading activity 15 times greater than that reached in 1968. The value of contracts traded exceeds $5 trillion a year. *See* S. REP. No. 97-495, 97th Cong., 2d Sess. 10 (1983). Nevertheless, the resources of the Commodities Futures Trading Commission have remained relatively constant. Some would suggest that the industry is a scandal waiting to happen, for the Commission "is thoroughly out-gunned in the ongoing battle against commodity fraud." *Id.*

As such, private enforcement mechanisms have an essential role today. Assistant Attorney General Steven S. Trott put it well:

> [I]n gauging the overall deterrent value of auxiliary enforcement by private plaintiffs, the deterrence provided by the mere threat of private suits must be added to the deterrence supplied by the suits that are actually filed. Furthermore, as the federal government's enforcement efforts continue to weaken organized crime and dispel the myth of invulnerability that has long surrounded and protected its members, private plaintiffs may become more willing to pursue RICO's attractive civil remedies in organized crime contexts. It should be remembered, too, that civil RICO has significant deterrent potential when used by institutional plaintiffs, such as units of state and local governments, which are not likely to be intimidated at the prospect of suing organized crime members. Finally, civil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in areas of the organized criminality may have had a greater deterrent impact than is commonly recognized, and that both the threat and the actuality of private enforcement might be expected to produce even greater deterrence in the future.

Oversight, *supra* note 27, at 140-41.

192 *See, e.g.*, *Oversight*, *supra* note 27, at 177-78 (testimony of Charles L. Marinaccio, Securities and Exchange Commissioner) ("[The Securities Acts private claims for relief] have served well [with only actual damages] as supplements to other enforcement mechanisms . . . ."). *But see supra* note 17 (treble damages).

193 *See, e.g.*, *Oversight*, *supra* note 27, at 311 (testimony of American Institute of Certified Public Accountants) ("The private claimant's power to brand a businessman or firm a 'racketeer' may cause almost as much irreversible injury to the legitimate businessman as may an unwarranted criminal charge." As Justice Marshall noted in the *Sedima* decision: "[T]he defendant, facing a tremendous financial exposure in addition to the threat of being labelled a 'racketeer,' will have a strong interest in settling the dispute.") *See also* 132 CONG. REC. E 3531 (Oct. 10, 1986 daily ed.) (remarks of Rep. Frederick C. Boucher) ("[RICO] allows plaintiffs to raise the stakes significantly in . . . [commercial disputes] because a civil RICO claim carries with it the threat of treble damages, attorney's fees, and the opprobrium of being labeled a 'racketeer.' As Justice Marshall concluded in examining the current situation created by civil RICO: 'Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.' ").

Mr. Philip A. Feign, Assistant Securities Commissioner, Colorado Division of Securities, and spokesman for the North American Securities Administrators Association before the Senate Judiciary Committee, aptly commented:

> Euphemisms like "commercial disputes," "commercial frauds," "garden variety frauds" and "technical violations" . . . are sanitized phrases often used by "legitimate businesses and individuals" to distinguish their frauds from the "real" frauds perpetrated by the "real" crooks. Yet all willful fraudulent conduct has in common the elements of premeditation,

planning, motivation, execution over time and injury to victims and commerce. And it is all crime.

Oversight, *supra* note 27 at 535.

On the role of euphemisms in encouraging public and official reluctance to enforce the law and providing rationalizations for the violators themselves in the white-collar crime area, see PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, CRIME AND ITS IMPACT—AN ASSESSMENT 104-08 (1976) ("most white collar crime is not at all morally neutral"); D. CRESSEY, OTHER PEOPLES MONEY 102 (1952) (fact that embezzlers rationalize their conduct as different from theft is an important fact in behavior pattern). It is simply not true, moreover, that the "racketeer" label results in extortionate settlements. As quoted by Rep. Boucher, Justice Marshall suggests that "a prudent defendant, facing ruinous exposure [under RICO] will decide to settle even a case with no merit." *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting). Accordingly, civil RICO lends itself, he argued, to the very extortive purpose "it was designed to combat." Justice Marshall cites as authority for this extraordinary proposition the REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION ON CORPORATION, BANKING AND BUSINESS LAW 69 (1985). The Ad Hoc Task Force, in turn, conducted a survey of 3,200 corporate litigation lawyers, of whom only 350 responded. Two factors, however, undermine the scientific credibility of the general results of the survey: (1) the population questioned was unrepresentative of the bar, and (2) the response rate was insufficient to warrant broad generalizations. *See* D. HUFF, HOW TO LIE WITH STATISTICS 11-26 (sample with built-in bias), 37-52 (sample of insufficient number) (1982). More to the point here, the survey did *not* ask each of the respondents a carefully phrased question calling for their opinion or experience with RICO as a settlement weapon. Instead, the opinion relied upon by Justice Marshall was *volunteered* by only *two* of the 350 respondents as grounds for repealing RICO. In fact, it is the experience of a majority of seasoned litigators in the RICO area that adding a RICO claim to a suit does *not* facilitate settlement; it inhibits it, particularly when a legitimate business is involved. *See* RICO COMMITTEE REPORT, supra note 37, at 121-23.

Generally, businesses wrongfully accused of "racketeering" will not settle suits—even those that should be compromised—as long as the racketeer label is in the litigation. Indeed, it is difficult to understand how Justice Marshall or Representative Boucher could believe that a suit with "no merit" faces a defendant with "ruinous exposure." If the plaintiff's suit has *no* merit, his chance of success is zero, and zero multiplied by three (or any other number) is still zero. Before anyone accepts the Task Force's, Justice Marshall's, or Representative Boucher's claim, he ought to ask for the names of the defendants and the cases allegedly so settled; he should then inquire of the plaintiffs what their evidence was. It is doubtful that it will be found that the litigation was meritless. It is doubtful, in short, that responsible corporate or other defendants are paying off strike suits in the RICO area—or any other—at more than their settlement value, no matter what the theory of the complaint is. Neither the racketeer label nor the threat of treble damages will convince prudent managers to surrender lightly scarce resources, merely because another files a suit. No matter how colorfully it is phrased, the claim that such managers act against their own economic best interest is not credible.

Finally, white-collar crime, principally fraud, is no "garden variety" problem in the United States today. Current estimates put it in the $200 billion range. *See* ATT'Y GEN. ANN. REP. 42 (1985); *see generally*, *White Collar Crime: Hearing before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. Parts I-III (1985). That figure is similar in dimension to drugs. *Drug Enforcement: Hearings on H.R. 526 before Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) (remarks of Rep. William J. Hughes) ($110 billion spent annually; lost productivity, etc., $60 billion). Ultimately, many of these costs of fraud are passed on to the rest of society. Insurance fraud, for example, costs $11 billion annually, and since the typical insurance company must generate $1.25 in premiums for every dollar it pays out, the bill that the nation must meet amounts to $13.75 billion. N.Y. Times, Jul. 6, 1980, at 27, col. 1. Indeed, the "insurance crisis" that has led legislatures to rewrite our liability laws to curtail personal injury litigation might be better dealt with by enforcing vigorously our laws against fraud, for the industry loses more than twice as much each year from fraud as it says it lost overall last year because of the crisis in personal injury litigation. *See* N.Y. Times, Mar. 2, 1986, at 20, col. 1 (industry spokesmen say it lost $5.5 billion; consumer spokesmen say it made $1.7 billion). *But see* N.Y. Times, Feb. 9, 1987, at 1, col. 1 (insurance crisis ended with insurance generally available, although at higher rate, and the industry is profitable again). *See also* INSURANCE ADJUSTER, Dec. 1983, at 3 (survey by American Society of Industrial Security: 42% of insurance companies surveyed had no formal policy of prosecuting criminally or suing civilly those who submit fraudulent claims). While the cost of vexatious litigation is generally spread throughout society by directors and officers liability insurance, too often the cost of fraud is not shared through various kinds of insurance, and it rests on the shoulders of the victim, who can ill-afford to carry or sustain it. No one ought seriously to contend, therefore, that such fraud is a "garden variety" problem, which may be "weeded out" with business-as-usual legal techniques.

state jurisprudence is adequate to deal with fraud.[194] Seventh, the federal courts are being unjustifiably inundated with the new litigation under civil RICO.[195] Eighth, current remedies against litigation abuse are not adequate to remedy the misuse of RICO.[196]

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194 *See Oversight, supra* note 27, at 634-35 (remarks of Edward I. O'Brien, Securities Industry Association) ("[H]undreds of years of common law interpretation of state law fraud is completely subverted to RICO. . . . [The] nation [ought not] abandon well over 200 years of common law development by the states of what fraudulent practices are . . . ."); *id.* at 590-91 (remarks of Richard P. Swanson, New York State Bar Association) ("There are, and there have always been, remedies for common law fraud and securities fraud. There is no evidence whatsoever that those remedies are inadequate. There is no evidence of an epidemic of fraud in the last 20 years that would necessitate the broad, new remedies which RICO provides."). *But see supra* notes 187 (accounting) and 188 (securities).

In the 18th and 19th century, state fraud jurisprudence was developed in the context of the then prevailing philosophies of *laissez-faire* and *caveat emptor*, which were aptly summed up by Mr. Justice Dennison in Queen v. Jones, [1794] Salk 397, 91 Eng. Rep. 330: "[W]e are not to indict one man for making a fool of another." *See generally* W. PROSSER & W. KEETON, LAW OF TORTS 105-10 (9th ed. 1984); Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). *But see* M. RADIN, THE LAWFUL PURSUIT OF GAIN 54 (1931) ("[C]aveat emptor . . . is bad Latin, and from the Roman point of view, worse law."). Congress found the jurisprudence of the 18th and 19th centuries inadequate in 1970, when it enacted RICO. 84 Stat. 923 ("sanctions and remedies . . . unnecessarily limited in scope and impact"); *Turkette*, 452 U.S. at 586 ("not adequate"). Writing in 1967, the President's Crime Commission, whose studies led to RICO, noted the following in THE CHALLENGE OF CRIME IN A FREE SOCIETY 47-48 (1967):

> During the last few centuries economic life has become vastly more complex. Individual families or groups of families are not self-sufficient; they rely for the basic necessities of life on thousands or even millions of different people, each with a specialized function, many of whom live hundreds or thousands of miles away.

The Commission also observed:

> Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizable in gross but are also significant and possibly devastating for individual victims.

Id. at 33-34.

Since 1970, 27 states have enacted RICO-type legislation, 22 of which include the private multiple damage suit. *See infra* Appendix A. Similar legislation is under active consideration in other states. *But see* ORGANIZED CRIME IN AMERICA: CONCEPTS AND CONTROVERSIES 91 (T. Bynum ed. 1987) (Illinois RICO bill defeated by "large corporations and accounting firms in Chicago"). Congress, too, enacted legislation in the 1930s to deal with securities fraud, precisely because state fraud law in that area *was* inadequate to deal with "racketeering" on Wall Street. *See, e.g.*, 77 CONG. REC. 3801 (1933) (remarks of Sen. Duncan Fletcher, leading sponsor of Securities Act of 1933) ("[Securities Act is] designed to protect the public from financial racketeering of . . . investment bankers . . . ."). As such, the law of the 18th or 19th century, or the federal securities statutes alone, can hardly be characterized—simply—as not "inadequate." *See generally* M. RADIN, *supra*, at 47-56; *"Blue Sky Laws,"* II ENCYCLOPEDIA OF THE SOCIAL SCIENCES 602-05 (1937); *"Consumer Protection,"* IV ENCYCLOPEDIA OF THE SOCIAL SCIENCES 282; *"Fraud,"* VI ENCYCLOPEDIA OF THE SOCIAL SCIENCES 427-29.

195 *See, e.g., Oversight, supra* note 27, at 631 (testimony of Securities Industry Association) ("*Sedima* . . . cleared the way for an unlimited number of . . . cases. . . . [T]hese are but the first trickles of an onrushing flood created by the bursting of the dam . . . ."). *But see supra* note 29 and *infra* Appendix B.

196 *Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 99th Cong., 1st Sess. (1985) (testimony of N. Minow) (hearings not printed as of current date). *But see* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SEPTEMBER 21-22, 1983, at 56 ("Judge Hunter stated that the Subcommittee on Judicial Improvements . . . had explored ways and means to reduce frivolous or meritless litigation in the courts and had canvassed the various courts for ideas and suggestions. After consideration of the suggestions received, the Subcommittee concluded, as did many judges, that the existing tools are sufficient, but perhaps not fully understood or utilized."). *See also* Farguson v. M. Bank Huston, 808 F.2d 358, 360 (5th Cir. 1986) (Rule 11: monetary sanctions imposed and injunction granted against further frivolous litigation under RICO); Spiegel v. Continental Ill. Nat'l Bank, 790 F.2d 638, 650-51 (7th Cir. 1986) (Rule 38: sanctions applied to RICO); Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983) (bad faith counsel fees awarded in RICO

The American Bar Association has heard the call in the business community for civil RICO reform. The turn around of the Association's official policy in support of civil RICO is a classic study in special interest pleading, in which lawyers move from a broad-based public policy analysis to a narrow-focused position reflecting the views of their clients. The participation of the Association in the process that ultimately resulted in the Organized Crime Control Act of 1970 began with the establishment of the American Bar Association Commission on Organized Crime in September 1950.[197] The Commission was established to assist and carry forward the work of the Special Senate Committee to Investigate Organized Crime in Interstate Commerce (Kefauver Committee), which considered the impact of organized crime in a number of areas, including syndicated gambling, narcotics, the infiltration of legitimate businesses, and public corruption.[198] The Bar Association Commission studied and

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suit: inherent power, Rule 11, and 28 U.S.C. § 1927); Bush v. Rewald, 619 F. Supp. 585, 604-06 (D. Haw. 1985) (Rule 11: counsel fee award for failure to investigate RICO facts); WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate System, 103 F.R.D. 417 (N.D. Cal. 1984) (RICO not applicable to labor dispute: Rule 11 sanctions applied); Financial Fed'n, Inc. v. Ashkanazzy [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,489 (C.D. Cal. 1983) (Rule 11: award of $150,000 in legal fees in frivolous RICO claim), *vacated and remanded*, 742 F.2d 1461 (9th Cir. 1984), *reinstated in unpublished opinion*, King v. Lasher, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983) (Rule ll: dispute over will—frivolous RICO claim and counsel fee awarded). *Compare* Hoover v. Ronwin, 104 S. Ct. 1989, 2012 (1984) (Steven, J., dissenting) ("Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfound claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law."); *see also* Meyers v. Bethlehem Ship Bldg. Corp., 303 U.S. 41, 51-52 (1938) (Brandeis, J.) ("Lawsuits . . . often prove to . . . [be] groundless; but no way has been discovered for relieving a defendant from the necessity of a trial to establish the fact.").

197 COMMISSION ON ORGANIZED CRIME: ABA, REPORT TO THE AMERICAN BAR ASSOCIATION ix (1951).

198 S. REP. No. 2370, 81st Cong., 2d Sess. (1950); S. REP. No. 141, 82d Cong., 1st Sess. (1951); S. REP. No. 307, 82d, 1st Sess. (1951). *See generally* E. KEFAUVER, CRIME IN AMERICA (1951). The Kefauver committee's origins lay in work done in California by then-Governor Earl Warren, who created the California Crime Commission, which conducted a comprehensive review of organized crime in California. *See* L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 243-47 (1967). At the time, the work of the committee was not well received. *See, e.g.*, Wilson, "The Kefauver Committee 1950", in 5 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 3439 (A. Schlesinger & R. Burns eds. 1975). Significantly, at the beginning of the probe, "Attorney General McGrath [said] that the Justice Department had no persuasive evidence that a 'national crime syndicate' did exist." *Id.* at 3450. Kefauver made an effort to offer the evidence, but did not persuade scholars. *See, e.g.*, W. MOORE, THE KEFAUVER COMMITTEE AND THE POLITICS OF CRIME 1950-1952, at 241 (1974) (referring to the committee's "debatable judgments on the structure of organized crime."). Senator Kefauver's investigation into organized crime was continued by Senator John L. McClellan. The McClellan Committee's efforts focused on the infamous Appalachian organized crime gathering in upstate New York in 1957 and the testimony of Mafia informant Joseph Valachi. That work also had its academic critics. *See* A. SCHLESINGER, A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 696 (1965) ("criminologists . . . were . . . skeptical of . . . the notion of a centrally organized . . . Mafia"); A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES 303 (1978) (skeptic's position is "more persuasive"). Evidence obtained more recently by the Department of Justice and presented in court supports the investigations of Senators Kefauver and McClellan. *Compare* United States v. Bufalino, 285 F.2d 408, 419 (2d Cir. 1960) (Clark, J., concurring) ("not a shred of legal evidence that the Appalachian gathering was illegal") *with* United States v. Licavoli, 725 F.2d 1040, 1043 (6th Cir. 1984) (prosecution of "crime family" of Cleveland); United States v. Riccobene, 709 F.2d 214, 216 (3d Cir.) (prosecution of "crime family" of Philadelphia), *cert. denied*, 464 U.S. 849 (1983); United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982) (prosecution of "crime family" of Los Angeles) ("Appellants are members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking"), *cert. denied*, 459 U.S. 1206 (1983); United States v. Bufalino, 683 F.2d 639, 647 (2d Cir. 1982) (Bufalino, who was at Appalach-

supported federal legislation formulated in light of the Kefauver Committee's hearings and findings, although much of it did not become law until 1962 and 1970.[199] In addition, the Association drafted or endorsed model state legislation in the area of witness immunity,[200] perjury,[201] and syndicated gambling.[202] Continuing those reform efforts, the President-Elect of the Association, Edward L. Wright, appeared in 1970 before a Subcommittee of the House Judiciary Committee to present the views of the Association on the Organized Crime Control Act, which was then pending before the Committee.[203] The Organized Crime Control Act was, of course, comprehensive reform legislation containing titles dealing with grand jury proceedings, witness immunity, recalcitrant witnesses, false declarations, witness protection, depositions, the suppression of evidence, syndicated gambling, racketeer influenced and corrupt organizations, and dangerous special offender sentencing.[204] The views of the Association on these issues were formulated by the Board of Governors in response to a request by the President of the United States[205] to review the Senate-passed bills.[206] Those views, too, had matured over

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ian, was a member of "La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy"), *cert. denied*, 459 U.S. 1104 (1983); McFadden, *The Mafia of the 1980's: Divided and Under Seige*, N.Y. Times, Mar. 11, 1987, at 1, col. 1; *Busting The Mob*, U.S. NEWS & WORLD REPT., Feb. 3, 1986, at 24; *The Mob on Trial*, Newsday, Sep. 7, 1986, at 4, col. 1 (background of recent Mafia trials, including Commission prosecution in New York City).

199 *See generally* Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 958-87 (1978) (reviewing 15 U.S.C. §§ 1171-1178; 18 U.S.C. §§ 1084-1151, 1952, 1953, 1955, 1961-1968).

200 FINAL REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON ORGANIZED CRIME 157-86 (1952) (text of model legislation) [hereinafter FINAL REPORT].

201 *See Organized Crime Control, Hearings Before House Subcomm. No. 5, of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 579-85 (1970) (text of model legislation) [hereinafter *House Hearings*].

202 FINAL REPORT, *supra* note 200, at 57-91 (text of model legislation). The Model Gambling Act began with a statement of findings and purpose and a mandate that its provisions be "liberally construed." *Id.* at 62. The legislation, including its liberal construction clause, was enacted in a number of states. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 28-1.1(a) (Smith-Hurd 1977 & 1984 Supp.). The concept that legislation should have a statement of findings and purpose to cast light on its text goes back to Plato; it was also supported by English writers as diverse as Coke and Bentham. *See* H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 48-52 (1967). It was widely used in colonial legislation. *See, e.g.*, THE LAWS AND LIBERTIES OF MASSACHUSETTS 1 (1648). Additionally, it is an important aid in construing legislation. *See e.g.*, Block v. Hirsh, 256 U.S. 135, 154 (1921) (Holmes, J.) ("entitled at least to great respect"). Nevertheless, a restricted preamble may not be used to limit a clear text. United States v. Briggs, 9 U.S. (9 How.) 351, 355 (1850); Roush v. State, 413 So. 2d 15, 19-20 (Fla. 1982) ("narrow title" does not limit "broad" text); Dorsey v. State, 402 So. 2d 1178, 1180 (Fla. 1981) ("'prefatory' language cannot expand or restrict") (citing Yazzo & Mississippi Valley R. R. Co. v. Thomas, 132 U.S. 174, 188 (1889)). *See also supra* note 21 (liberal construction clause).

203 *House Hearings*, *supra* note 201, at 537.

204 Pub. L. No. 91-452, 84 Stat. 941 (1970). *See supra* note 13; *see generally* McClellan, *The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties*, 46 NOTRE DAME LAW. 57 (1970).

205 *House Hearings, supra* note 201, at 539. The President had earlier called for such legislation, including treble damage provisions, in his "Message on Organized Crime." *Measures Relating to Organized Crime: Hearings before the Subcomm. on Crim. Laws and Procedures, of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 449-50 (1969) [hereinafter *Senate Hearings*].

206 The Senate had first considered and passed the legislation by a vote of 73 to 1. *See* 116 CONG. REC. 972 (1970). Subsequently, it reconsidered it, with the House amendments, including the treble damage provisions, and passed it without objection. *Id.* at 36,280-96 (1970). The Association's voice had been heard in the Senate Hearings through testimony of Rufus King. *See Senate Hearings*, *supra* note 205, at 259, 268 (support expressed for legislation with public and private sanctions, including treble damages).

a period of years.[207] While President Wright informed the Subcommittee that the Association gave its "unqualified . . . support" to the 1970 Act,[208] he recommended to the Subcommittee restoration in the Senate bill of language, as part of the bill's private enforcement mechanism, which would authorize the recovery of treble damages for violations of the Act.[209] The Subcommittee accepted the Association's suggestion, and a duly amended bill became law.[210]

The Department of Justice did not, of course, begin to implement the criminal provisions of RICO until about 1975.[211] The criminal defense bar then reacted with extreme outrage,[212] and it counterattacked through the Bar Association. In August 1982, criminal defense lawyers succeeded in getting the House of Delegates of the Association to reconsider the Association's position on the criminal provisions of RICO to "insure . . . [their] effective execution . . . with proper regard for due process and fundamental fairness."[213] Twelve amendments each of which would have circumscribed the scope of RICO, were suggested.[214]

207 The report filed by the PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN., THE CHALLENGE OF CRIME IN A FREE SOCIETY 208 (1967) recommended that a comprehensive set of reforms be adopted to control organized criminal activities. They included the use of civil antitrust type remedies because of the easier standard of proof. Legislation to accomplish this objective was introduced in 1967. The legislation, which included private equity and treble damage relief, was studied by the Association and endorsed by the House of Delegates. Those recommendations were given to Congress in 1969 and 1970. *See Senate Hearings*, *supra* note 205, at 556-58; *House Hearings*, *supra* note 201, at 147-49. It is simply not true, therefore, to suggest that while RICO "for the most part originated in the Senate," the civil provisions permitting suit by private parties "originated in the House." *Sedima*, 741 F.2d at 488 (Oakes, J.).

Nevertheless, Judge Oakes' view of RICO's legislative history has misled other courts, including *Haroco*, 747 F.2d at 398 (*Sedima*'s analysis of the legislative history of RICO termed "persuasive"). *See also* McCarthy v. Pacific Loan, Inc., 600 F. Supp. 137, 139-40 (D. Haw. 1984); White v. Fosco, 599 F. Supp. 710, 715-16 (D.D.C. 1984); Gardner v. Surnamer, 599 F. Supp. 477, 479-80 (E.D. Pa. 1984). On Judge Oakes' view, see *Wollersheim*, 796 F.2d at 1081 ("precedential value . . . [in] doubt by the Supreme Court's total rejection of the . . . historical analysis of RICO").

208 *Senate Hearings*, *supra* note 205, at 538. While the Association's support was "unqualified," it urged "prompt consideration of seven specific amendments to the bill. *Id.* at 547-48. Acceptance of the amendments, however, was not made a condition of the Association's support. *Id.* at 551 (If the amendments were not adopted the Association's position "would not be changed. It would support [the bill].").

209 *Id.* at 543-44.

210 The vote was 431 to 26. *See* 116 CONG. REC. 35,363 (1970). It was signed into legislation on Oct. 15, 1970 by the President following Senate reconsideration of the House amended bill.

211 *See supra* text accompanying note 27.

212 William G. Hundley, a prominent Washington defense counsel (his clients have included former Attorney General John Mitchell), was quoted: "But they're using this [RICO] against all kinds of defendants. You know as well as I do that Congress never would have passed it if they ever thought they were going to use it against governors and people like that." *Are Prosecutors Going Wild Over RICO*, Legal Times of Wash., Oct. 8, 1979, at 32, col. 1. Defense attorney Stanley S. Arken of New York called RICO "cruel." George Collins of Chicago called its draftsmen "brilliant," but the statute "totalitarian." *In Pursuit of the Mob*, Nat'l L.J., Nov. 26, 1979, at 12, col. 2. Sherman Magidson of Chicago said, "RICO can reach out and castrate people." *RICO the Enforcer*, NEWSWEEK, Aug. 20, 1970, at 83. "It's like the death sentence," according to Harvey M. Silets of Chicago. "If a RICO count is in the indictment, unless you work a [plea bargaining] deal, you are really courting the danger of losing not only your liberty but your business as well." *Racketeering Law Facing Key Test*, Nat'l L.J., Dec. 29, 1980, at 18, col. 1. The potential for abuse "is not fanciful. It's there," added Stephen Horn of Washington. *Id.* at 18, col. 2. "It's like using a cannon to go hunting for squirrels," said Barry Tarlow of Los Angeles. "The way it has been applied and the threats to apply it involve a gross violation of individual rights and liberties." *Id.* at 18, col. 3.

213 AMERICAN BAR ASSOCIATION, Report on RICO 2 (1982) [hereinafter 1982 ABA REPORT].

214 The twelve recommendations were:

None of them has been adopted by Congress.[215]

The private civil bar did not, of course, begin to implement the civil

1. Replace the term "racketeering activity" by the less pejorative phrase "criminal activity."
2. Provide that a criminal activity may be charged only if it occurs within five years of the date of the indictment.
3. Provide that the criminal activities must occur in different criminal episodes which are separate in time and place yet sufficiently related by purpose to demonstrate a continuity of activity.
4. Provide that the criminal activities must be related by common scheme or plan.
5. Require that a pattern of criminal activity include at least one offense other than a violation of section 1341 (mail fraud), section 1343 (wire fraud), section 2314 (interstate transportation of stolen goods), and section 2315 (sale or receipt of stolen goods).
6. Apply section 1962(a) only to those who are involved as principals in a pattern of criminal activity or collection of an unlawful debt.
7. Provide that sections 1962 (b) and (c) include a mens rea element requiring that the accused knowingly commit the proscribed activities.
8. Repeal section 1962 (d).
9. Repeal the liberal construction clause, Pub. L. No. 91-452, section 904(a), 84 Stat. 947.
10. Provide that section 1962(a), relative to forfeiture read, "may have forfeited" rather than "shall forfeit."
11. Require that parties not charged with RICO offenses be granted a jury hearing, to be held immediately after the verdict in the initial prosecution and prior to any final judgment of forfeiture, regarding their claim to ownership in any property sought to be forfeited.
12. Add this language to section 1963(b): "A hearing shall be held in accordance with Rule 65 of the Federal Rules of Civil Procedure."

1982 ABA REPORT, *supra* note 213, at 1-2. The report's recommendations were vigorously contested, and they provoked a sharp dissent. Bar Association policy does not require the circulation of such dissenting views. The majority report and the dissent, however, are reprinted in RICO COMMITTEE REPORT, *supra* note 37, at Appendix A. The majority did not explicitly call for a reconsideration of criminal RICO; it termed its recommendations only "fine-tuning." 1982 ABA REPORT, *supra* note 213, at 2-3. Nevertheless, a careful examination of the recommendations demonstrates that collectively they constituted nothing less than a major effort, not to fine-tune the statute, but to return, insofar as practicable, to pre-RICO law, which the Congress had described in 1970 as "unnecessarily limited in scope and impact." 84 Stat. 923; *Turkette*, 452 U.S. at 586 ("The view was that existing law, state and federal, was not adequate to address the problem [of sophisticated forms of crime], which was of national dimensions.").

The principal moving force behind the ABA's position on criminal RICO was Barry Tarlow, a Los Angeles criminal defense lawyer. *See* Burke, *Did Jurors Hear About "Mafia Ties"?*, Nat'l L.J., Mar. 28, 1981, at 3, col. 1; Seigel, *Arizona Hits Racketeers in Wallet*, L.A. Times, May 3, 1983, at 17, col. 1. Tarlow has written urging a narrow construction of RICO. *See, e.g.*, Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980); Tarlow, *Using the RICO Statute in Civil Litigation*, Nat'l L.J., May 24, 1982, at 1, col. 3. He also filed an amicus curiae brief for the California Attorneys for Criminal Justice in *Turkette*, 452 U.S. at 577, which advocated that RICO be held not to apply to illicit associations, a position that the Supreme Court rejected eight to one. Had Tarlow's views obtained in *Turkette*, the recent series of successful organized crime prosecutions in major cities throughout the nation, which is beginning to cripple the mob, could not have been undertaken. *See* McFadden, *The Mafia of the 1980's: Divided and Under Seige*, N.Y. Times, Mar 11, 1987, at 1, col. 1; *The Mob on Trial*, Newsday, Sep. 7, 1986, at 4, col. 1, (background of recent Mafia trials, including Commission prosecution in New York City).

215 Congress returned to RICO in the passage of the "Comprehensive Crime Control Act of 1984," Pub. L. No. 98-473, 98 Stat. 1837 (1984). The 1984 Act set aside several court decisions that had given the criminal forfeiture provisions of RICO a narrow reading. *See, e.g.*, United States v. McManigal, 708 F.2d 276 (7th Cir. 1983) (imposing restrictions on forfeiture of proceeds and the time of forfeiture), *vacated*, 404 U. S. 979, *aff'd as modified*, 723 F.2d 580 (7th Cir. 1983); United States v. Spilotro, 680 F.2d 612 (9th Cir. 1982) (imposing restrictions on pre-trial freeze orders). The Association's recommendations in these areas were generally not followed. *See Comprehensive Drugs Penalty Act: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 40 (1983) for the testimony of the Section of Criminal Justice on the various forfeiture proposals then under consideration. Congress also returned to RICO in the passage of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). The 1986 Act adopted the substitution of assets concept, which had failed to pass in the 1984 Act. *Compare* § 2301 (no substituted assets) *with* § 1153 (substituted assets) (codified at 18 U.S.C. § 1963(n)).

provisions of RICO on anything more than an isolated basis until about 1980.[216] Here, too, civil defense lawyers reacted with extreme outrage,[217] and they, too, counterattacked through the Bar Association and succeeded in getting the House of Delegates of the Association to reconsider its position on the civil provisions of RICO. Reflecting the complaints voiced in the business community, the opponents of civil RICO protested that it was not being used "against 'mob' enterprises," but in a wide range of claims in commercial civil litigation—'garden variety' fraud cases involving legitimate businesses."[218] Civil RICO was "inappropriately federaliz[ing] many areas of state common laws and displacing existing, effective federal remedies."[219] In addition, curtailment of "civil Rico would save the federal courts from a virtual flood of unwarranted litigation."[220] In August 1986, the House of Delegates passed two resolutions aimed at circumscribing civil RICO , one of which included a recommendation to set up a RICO Coordinating Committee to study

216 *See supra* text accompanying note 29.

217 "I see it as a strong-arm abuse," said Jane E. Durgon, counsel to Nissan Motor Acceptance Corporation. *See* CALIFORNIA LAWYER, Apr. 1985, at 46. "It's inconceivable to me that Congress intended to federalize every state cause of action involving mail or wire fraud," added Spencer Hosie of San Francisco, California. *Id.* at 45. "RICO was passed as an effort to deal with organized crime. It was never debated as a method to deal with garden-varieties fraud," complained Philip A. Lacovara of Washington, D.C. *See* N.Y. Times, Oct. 15, 1985, at 30, col. 1. "The mere use of RICO may be so prejudicial that it has undue force," noted Arthur Mathews of Washington, D.C. *See* N.Y. Times, Jun. 27, 1983, at 23, col. 2. "It is sort of lawful libel," said Michael Klein of Washington, D.C. *See* Wash. Post, Feb. 28, 1983, at 16. "Bankers, accountants and securities brokers out there are confounded at the prospect that the racketeer statute is being applied to them!", noted Andrew Weisman of Washington, D.C. *See* TWA AMBASSADOR, Jul. 1984, at 92. Their clients agreed. "It doesn't sit very well in the board room of some of your largest corporations to be labeled racketeers," commented William Fitzpatrick of the Securities Industry Association. *See* Wall St. J., Jun. 17, 1985, at 1, col. 1. Unlike the criminal defense counsel, the civil defense bar also commanded impressive editorial support. *See* Wall St. J., Jan. 24, 1986, at 20, col. 1; Wash. Post, Dec. 6, 1985, at A-26, col. 1. *But see* N.Y. Times, Oct. 27, 1985, at E-22, col. 1 ("The best way for worried corporations to avoid the stigma and penalties of RICO is to prove they did not commit mail or wire fraud."). *Compare* Wash. Post, Feb. 28, 1983, at 16, col. 1 (Carl Icahn, Wall Street raider: It is "an abomination that a company management should resort to these gutter and smear tactics [under RICO]") *with* N.Y. Times, Mar. 17, 1987, at 25, col. 3 (Icahn confirms SEC investigation into his takeover activity for possible securities fraud action). *See also* Dan River, Inc. v. Icahn, 701 F.2d 278, 291 (4th Cir. 1983) (Murnaghan, J., for the majority) ("Congress was out to attack the problem of organized crime, not the problem of corporate control and risk arbitrage."). *But see id.* at 293 (Butzner, J., dissenting) ("I cannot subscribe to the notion that it is the function of the courts to exclude white-collar, corporate crime from [RICO]"). Those involved in the enactment of RICO joined in the public discussion. *See* L.A. Times, Feb. 15, 1984, at 20, col. 1 (Prof. G. Robert Blakey) ("We knew we weren't limiting . . . [RICO] to organized crime. If this was the appropriate way to handle the mobster, then it also was the right way to handle the businessman who does the same things . . . ."); *id.* (Abner J. Mikva, former congressman, who fought RICO, and now D.C. Circuit Court of Appeals judge) ("I absolutely, flatly deny what Blakey says. Blakey is just plain wrong."). Even organized crime figures, inadvertently, joined in the debate. *See* N.Y. Times, Jul. 8, 1985, at 11, col. 2 (Gennaro J. Angiulo, leader of Boston organized crime family: "I wouldn't be in a legitimate business for all the money in the world."). *See generally*, B. Seigel, *RICO's Running Amok in Board Rooms*, L.A. Times, Feb. 15, 1984, at 1, col. 1; K. Sylverster, *Civil RICO's New Punch*, Nat'l L.J., Feb. 7, 1983, at 1, col. 1; Lewin, *Targets of Racketeering Law*, N.Y. Times, Jun. 27, 1983, at 19, col. 2. Civil RICO is not totally without supporters. *See, e.g.*, Mokhiber, *Why We Picketed the Corporate Law Firm of Wilmer, Cutler & Pickering Chanting "Hands Off RICO"*, 31 N.Y.L. SCH. L. REV. 147 (1986).

218 AMERICAN BAR ASSOCIATION, RICO COORDINATING COMMITTEE REPORT 3 (1987) [hereinafter 1987 ABA REPORT]. *But see supra* note 193 (role of euphemisms).

219 1987 ABA REPORT, *supra* note 218, at 5-6. *But see supra* note 194 (adequacy of state law) and text accompanying notes 7-13.

220 1987 ABA REPORT, *supra* note 218, at 6. *But see supra* note 29 and *infra* Appendix B.

pending reform legislation.[221] In February 1987, the House of Delegates endorsed the reform legislation that had been considered in the 99th Congress but suggested that it be made even more stringent.[222] As such, the Association has made an almost complete turnaround on both the criminal and the civil provision of RICO.

Following the rejection in the Supreme Court[223] of the Second Cir-

221 1987 ABA REPORT, *supra* note 218, at 3.

222 *Id.* at 1-2. The proposed legislation endorsed by the Association was H.R. 5445, as passed by the House of Representatives. *Id.* The endorsement suggested that the bill also include:

1. *Additional Damages*. (a) Substitute the term "additional damages" for the term "punitive damages", (b) provide that the judge, rather than the jury, shall determine whether additional damages are appropriate and in what amount, and (c) delete the "equitable factor" from the list of factors that are to be considered in determining the amount of additional damages.
2. *Attorneys' Fees*. Provide that, in business versus business suits, that reasonable attorneys' fees be awarded to a defendant prevailing on the merits of a civil RICO claim if plaintiff's RICO claims are not "substantially justified."
3. *Pleading*. Delete language amending the Federal Rules of Civil Procedure relating to particularity of pleading. If a requirement for particularity of pleading is deemed necessary, it should be incorporated in the RICO statute itself.
4. *Statute of Limitations*. Provide that a civil RICO action cannot be brought after the latest of (1) three years after the date of the cause of action accrues or (2) one year after the date of conviction of the defendant of a predicate act or of a RICO criminal prosecution.
5. *"Person" and "Enterprise" Amendments*. Amend 18 U.S.C., Section 1962 (c) to:

a. Provide that "person" (1) be a different entity than the "enterprise" under that section, and (2) not be part of an affiliated group whose membership also includes the "enterprise."

b. Remove the "enterprise" from liability for treble damages or injunctive relief under the civil provisions of RICO either directly or through the application of principles of agency, *respondeat superior*, or similar doctrines.

6. *"Conduct" Amendment*. Amend 18 U.S.C. 1962 (c) to provide that a person may be found to have "conducted" an enterprise's affairs only when such person has actively participated in the operation or management of the enterprise itself.

The perspective brought to the reform of civil RICO by the RICO Coordinating Committee was reflected in the rationales offered for the various amendments. "Additional" damages would be less "pejorative and inflammatory" than "punitive." *Id.* at 8. Courts, rather than juries, would make the award of "additional" damages. "[L]oopholes" that let injured persons recover from entities under "agency or respondeat superior doctrines" should be closed. *Id.* at 9. *But see infra* note 235. As such, "banks . . . [and] securities brokers . . . would be insulated from the application of RICO . . . ." 1987 ABA REPORT, *supra* note 218, at 9. Narrowing the concept of "conduct" would be the "better view." *Id. But see infra* note 236. As such, it "would . . . insulate accountants and bankers." 1987 ABA REPORT, *supra* note 218, at 9. *But see* THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS AND MONEY LAUNDERING: INTERIM REPORT, PRESIDENT COMM'N ON ORGANIZED CRIME 11, 26 (1984) (Illegal money laundry schemes run by "accountants, money brokers, money couriers, bankers and banks;" not limited to organized crime families, but involve motorcycle groups and legitimate businesses, including Gulf Oil Corp., Lockheed Aircraft Corp., McDonnell Douglas Corp., Bethlehem Steel Corp. and Southland Corp.). The recent work of the Bar Association calls to mind the remarks of Justice Brandeis in 1905, then in private practice, before the Harvard Ethical Society: "We hear much of the 'corporation lawyer' and far too little of the 'people's lawyer'. The great opportunity of the American bar is and will be to stand again, as it has in the past, ready to protect also the interests of the people." A. MASON, BRANDEIS AND THE MODERN STATE 30 (1933).

223 Sedima S.P.R.L. v. Imrex Co., 741 F.2d 842 (2d Cir. 1984), *rev'd.*, 473 U.S. 479 (1985). Judge Oakes in *Sedima* suggested that civil RICO suits against "respected and legitimate 'enterprises' [were] . . . extraordinary if not outrageous." 741 F.2d at 487. He was not moved to make a similar comment, when a prominent labor leader was accused of "racketeering." United States v. Scotto, 641 F.2d 47 (2d Cir. 1980) (Oakes, J.), *cert. denied*, 452 U.S. 961 (1981). In fact, Scotto was a *capodecina* in the organized crime family of Carlo Gambino. *See generally Waterfront Corruption: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. (1981); Note, United States v. Scotto: *Progression of a Waterfront Corruption Prosecution from Investigation Through Appeal*, 57 NOTRE DAME L. REV. 364 (1981). Indeed, Scotto was named as such in the Senate report on RICO. *See* S. REP. No. 91-617, 91st Cong., 1st Sess. 39 (1969). Nevertheless, this data was not part of the government's trial proof. Questions on appeal are limited to those

cuit's effort to rewrite civil RICO, attention in the struggle over civil RICO reform shifted, as the Court rightly suggested,[224] to Congress, where hearings were held in the Senate[225] and House.[226] A concerted drive was made to amend RICO to include the rejected criminal conviction limitation.[227] Broadly, representatives of segments of the business community found themselves pitted against consumer groups and state attorneys general.[228] At first, the Department of Justice presented able testimony against the criminal conviction limitation; it also supported the provision of a private enforcement mechanism and expressed considerably less alarm than the opponents of civil RICO with the various allegations of RICO abuse.[229] The Department of Justice's love affair with the concept of private civil enforcement, however, turned out to be a September to July romance.[230] Nevertheless, at about the time that the De-

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properly raised. *See* Irvine v. California, 347 U.S. 128, 129-30 (1954). Scotto, not having been heard on the issue, ought not have had his appeal decided on the basis of extra judicial factors, for it has long been the rule that facts not a part of the record cannot be made part of a decision. *See* Knapp v. Western Vt. R. R. Co., 87 U.S. (20 Wall.) 117, 121 (1874) ("[facts] form no part of record and cannot be considered"); Caritativo v. California, 357 U.S. 549, 558 (1950) (Frankfurter, J., dissenting) ("*Audi alteran partem*—hear the other side! [A] demand . . . spoken with the voice of . . . Due Process . . . ."). Similarly, how could Judge Oakes have known that a "respected" enterprise was "legitimate" in a particular transaction unless evidence was heard on the issue. Indeed, even in a RICO litigation, with nothing other than the complaint before him, the rule was that the judge was to take the plaintiff's allegations as true. *See, e.g.*, Bennett v. Berg, 685 F.2d 1053, 1056 n.4, 1058, 1062 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983). The Oakes' decision moved Judge Pratt in Furman v. Cirrito, 741 F.2d 524, 528-29 (2d Cir. 1984) to observe:

> Despite the clarity of Congress' language [in drafting RICO] defendants argue that since RICO's primary purpose is to eradicate organized crime, it is [not] directed . . . against businessmen engaged in 'garden variety fraud' . . . . While RICO's primary focus may have been on organized crime, when considering the statute Congress also recognized that fraud is a pervasive problem throughout our society . . . which causes billions of dollars in loss each year. . . . Congress further acknowledged that existing state and federal law was not capable of dealing with this problem.
>
> . . . .
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> When Congress provided severe sanctions, both civil and criminal, for conducting the affairs of an 'enterprise' through a 'pattern of racketeering activity,' it provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as 'garden variety fraud,' we can only conclude that by the RICO statute Congress has provided an additional means to weed that 'garden' of its fraud.

224 *Sedima*, 473 U.S. at 499 ("It is true that private civil actions under the statute are being brought almost solely against . . . [respected businesses] rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.").

225 *See generally Oversight*, *supra* note 27.

226 *Subcommittee on Criminal Justice of the House Committee on Judiciary*, 99th Cong., 1st Sess. (1985) (hearing not printed as of current date); 113 CONG. REC. H3643 (daily ed. May 13, 1987) (insertion in record of testimony of Prof. G. Robert Blakey).

227 *See generally* Corrigan, *Rolling Back RICO*, NAT'L L.J., Sep. 6, 1986, at 2114.

228 *Id.*

229 *See, e.g.*, *Oversight*, *supra* note 27, at 141 ("Analysis of the available evidence seems to suggest that the collective weight of [the burden that private civil RICO action have imposed on legitimate businessmen, on the federal courts, and on the federal civil justice system] may not be as great as is claimed, and that the burden in individual cases may be balanced by the social value of the remedy's availability against large-scale, systematic illegality.").

230 *Compare* Letter from Assistant Attorney General John R. Bolton to Vice President George Bush (Jul. 22, 1986) ("The Department of Justice believes . . . [that the criminal conviction limitation] would best respond to the increasingly troublesome issues that civil RICO" raises) *with* Letter from Acting Assistant Attorney General Philip D. Brady to Congressman John Conyers (Sep. 30,

partment of Justice changed its position, the principal spokesman for business groups in Congress, Congressman Frederick C. Boucher, offered a multifaceted reform package, which passed the House of Representatives,[231] but failed by two votes to pass in the Senate in the closing

1985) ("[W]e do not believe that . . . [the criminal conviction limitation] is the best approach to limiting the scope of civil RICO." Brady added, "the Department also believes that the preferable course would not include the elimination of treble damages and attorneys' fees for successful private litigants in civil RICO cases."). Theodore C. Barreaux, Vice President of the American Institute of Certified Public Accountants, attributes the Department of Justice's switch from opposition to support of a criminal conviction limitation for civil RICO to a series of meetings between accounting institute lawyers and Department officials. Nat'l L.J., Sep. 6, 1986, at 2115. Significant, too, was a change in personnel—the substitution at the position of the Deputy Attorney General in the Department of Justice for D. Lowell Jensen, a widely respected and experienced federal and state prosecutor, Arnold I. Burns, a prominent New York corporation and securities lawyer, who is outspoken in his opposition to civil RICO. *See, e.g.*, 19 THE THIRD BRANCH: BULLETIN OF FEDERAL COURTS 3 (Mar. 1987) (interview of Arnold I. Burns) ("[B]ankers, merchants, insurance company agents are sued under the civil RICO statute . . . and that is a terrible thing."). The Administration's proposal is embodied in Title IV of S.635, 100th Cong., 1st Sess. (1987). For a detailed refutation of the current position of the Department of Justice, see Goldsmith & Maynes, *The Undermining of Civil RICO*, 2 CRIM. JUST. 6 (1987). *See also Sedima*, 473 U.S. at 490 n.9 (1985). What the federal criminal prosecutors appreciate, but the federal civil policy makers undervalue, is the devastating impact on criminal prosecutions if most complaining witnesses in criminal RICO cases can be cross-examined about their hopes to recover treble damages, if, but only if, the criminal prosecution results in a conviction.

231 132 CONG. REC. H. 9377 (daily ed. Oct. 7, 1986). The 1987 ABA REPORT, *supra* note 218, at 6-7 summarized H.R. 5445, which it termed a "compromise":

> [The Boucher bill] divides civil RICO into three basic categories:
>
> 1. Treble damage suits would be retained for the U.S. Department of Justice and state attorneys general and in cases where the defendant has been convicted of criminal offenses, or predicate acts.
>
> 2. In cases where individual consumers have been harmed in connection with the purchase of a consumer product or service, the remedy would be actual damages, attorneys fees and "punitive" damages up to twice the amount of actual damages.
>
> 3. In cases where businesses are harmed, the remedy would be actual damages plus attorneys' fees.
>
> It then noted other "key provisions":
>
> 1. *Illicit activity*. To remove the stigma of a defendant being labeled a "racketeer," the compromise renames the Act the "Pattern of Illicit Activity Act," and replaces "racketeering" and variants of that term with the phrase "illicit activity" or "criminal."
>
> 2. *Definition of Pattern*. The compromise reduces from ten to five years the number of years in which at least two acts of illicit activity must have occurred to constitute a "pattern" of illicit activity.
>
> 3. *Attorneys Fees*. The compromise retains existing law regarding attorney fees. Thus, attorneys fees may be awarded as a part of costs to successful plaintiffs.
>
> 4. *Pleadings*. The compromise amends Rule 9(b) of the Federal Rules of Civil Procedure to require that in a section 1964(c) action, the plaintiff must, as to each defendant, plead with particularity the facts supporting the plaintiff's cause of action.
>
> 5. *Statute of Limitations*. The Compromise provides that a civil RICO action cannot be brought after the latest of (1) three years after the date when the cause of action accrued; (2) three years after the date when the conduct causing injury to the plaintiff terminated; or (3) two years after the date of conviction of the defendant of an offense under section 1962 or of an illicit activity, if such conviction was for the conduct in violation of section 1962 upon which the claim of the plaintiff is based.
>
> 6. *Effective Date*. The compromise basically makes the various procedural changes applicable only to cases commenced after the date of enactment. The detrebling of damages, however, would be effective upon enactment and would thus apply to most pending cases.

The heart of the "compromise" Boucher bill lay in its effective date provision. Philip A. Lacovara of Washington, D.C., who represents the American Institute of Certified Public Accountants in the Congress, put it well: "We're talking very big numbers. There are probably billions of dollars in claims where you treble the damages." Nat'l L.J., Sep. 6, 1986, at 2114. Charles B. Curtis of Washington, D.C., who is also representing the accountants, agreed: "[There is] easily over $2 billion of outstanding liability in pending litigation right now." *Id. See also id.* (Prof. G. Robert Blakey: "The

hours of the 99th Congress.[232]

The struggle over civil RICO continues in the judicial forum. While the Supreme Court rejected the effort of the Second Circuit to rewrite civil RICO, it did not change the basic attitude of the lower courts, which remains hostile to civil RICO.[233] Judicial efforts to narrow the scope of the statute continue largely unabated. The most significant efforts—apart from "pattern"[234]—focus on various techniques for an "enterprise," as opposed to individuals, to avoid responsibility or liability

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people seeking 'reform' are pirates. They're no longer flying the stars and stripes. They're flying the Jolly Roger.").

Congress has, of course, wide latitude in making civil, as opposed to criminal, statutes retroactive. *See, e.g.*, Jefferson Disposal Co. v. Parish of Jefferson, 603 F. Supp. 1125, 1135-38 (E.D. La. 1985) (Local Government Antitrust Act held constitutional: elimination of treble damage suits against local governments). The Constitution only prohibits, without qualification, ex post facto criminal legislation. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). Nevertheless, not everything that is constitutional is wise. Justice Frankfurter—then a professor of law—put it well in 1925: "[P]reoccupation with the constitutionality of legislation rather than its wisdom . . . [is] a false value." P. KURLAND, FELIX FRANKFURTER ON THE SUPREME COURT 177 (1970). Making legislation retroactive—whatever its naked constitutionality—is, in the words of Justice Doe, one of the giants of early American jurisprudence, in Kent v. Gray, 53 N.H. 576, 580 (1873), "wholly irreconcilable with the spirit of our institutions." Justice Doe elaborated:

> [I]t is most manifestly injurious, oppressive, and unjust, that, after an individual has, upon the faith of existing laws, brought his action . . . [that] the legislature should step in, and, without any examination of the circumstances of the cause, arbitrarily repeal the law upon which the action . . . had been rested. [S]uch an exercise of power is irreconcilable . . . with the great principles of freedom upon which [our institutions] are founded . . . .

Id.

RICO, in short, did not make anything unlawful that was not already unlawful before its passage under its predicate offenses. *See* United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir. 1986) ("RICO is a remedial statute, as opposed to a substantive statute. . . . The provisions of section 1963 do not create 'new crimes' but serve as the prerequisites for the invocation of increased sanctions for conduct which is proscribed elsewhere in both federal and state criminal codes."); *Basic Concepts*, *supra* note 1, at 1031-33. No question is presented by RICO's civil provisions of a sudden or unexpected new liability. *See, e.g.*, J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 386-87 (1986) (discussion of Anderson v. Mount Clemen Pottery Co., 328 U.S. 680 (1946)) (broad and unexpected construction of Fair Labor Standards Act, which led to the Portal-to-Portal Pay Act of 1947). When Congress passed RICO, it held out to victims of sophisticated forms of crime the promise of treble damages to encourage the private enforcement of the law. *See supra* text accompanying notes 14-20. Litigation has now been instituted in a trusting reliance on that promise. *See infra* Appendix B. It is a promise, therefore, that Congress ought not lightly break, particularly when it is recognized that making the amendments retroactive will insulate from their just desert the conduct of the perpetrators of the recent insider trading frauds. *See supra* note 188. To be sure, the amendments contain a treble damage suit applicable to those convicted of RICO or one of its predicate offenses. Careful plea bargaining, however, can obviate those provisions. *See, e.g.*, N.Y. Times, Jun. 5, 1987, at 1, col. 2 (Kidder, Peabody & Co. pays $25.3 million to settle insider trading allegations without criminal charge); *id.*, Apr. 24, 1987, at 29, col. 6 (Ivan F. Boesky guilty plea) ("Lawyers said the felony charge was so finely drawn that his vulnerability to lawsuits from stockholders was considerably lessened."). Nor can much be expected quickly from disgorgement programs like the $50 million fund set up by Boesky. *See* BARRONS, Mar. 9, 1987, at 70, col. 2 (Although several funds have been set up in recent years, defrauded investors have yet to collect a cent.).

232 132 CONG. REC. S16,704 (daily ed. Oct. 16, 1986). For a general analysis of the reform proposals, see Goldsmith, *RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 4 (1987).

233 Before *Sedima*, 61% of the reported decisions were dismissed on various motions of defendants. *See Oversight*, *supra* note 27, at 127. Since *Sedima*, through 1986, 55.9% of the reported decisions have been, in whole or in part, dismissed on various motions of the defendants. *See* Appendix B *infra*. The principal ground (40.4%) has been the lack of a proper allegation of "pattern." *Id.* *See* Moran, *The Meaning of Pattern*, 62 CHI[-]KENT L. REV. 139 (1985) ("hostile judges free to fashion new limitations on civil RICO").

234 *See supra* note 37.

for those associated with it[235] or for those who might be secondarily

235 One route taken to reach this result is the rule that an entity cannot be under § 1962(c) an "enterprise" and a "person" charged as a defendant in the same count of the complaint or indictment. The rule originated in Van Schaick v. Church of Scientology of Cal., Inc. 535 F. Supp. 1125 (D. Mass 1982), in which the district court, expressing reservations about recognizing a federal claim for relief in a matter traditionally left to the states, reached a series of decisions reflecting a basically hostile view toward the plaintiff and RICO. In addition to the enterprise-defendant rule, for example, the court imposed a "commercial" injury limitation on the statute (*id.* at 1137), a result contrary to the Supreme Court's reasoning in Reiter v. Sonotone Corp., 442 U.S. 330, 337-45 (1979), under the comparable language of § 4 of the Clayton Act. Judge Shadur soon joined in the result. *See* Parnes v. Heinhold Commodities, Inc., 548 F. Supp. 20 (N.D. Ill. 1982). In *Parnes*, he dismissed a complaint filed under § 1962(c) against a commodities brokerage firm for the allegedly fraudulent conduct of two of its employee brokers concededly "conducting themselves within the scope of their authority for common-law purposes." *Id.* at 23. Noting that his "text analysis owe[d] nothing to the litigants" and reflected "intuitive unease" at the "unanticipated" application of RICO to a "garden-variety fraud," he held that "the civil plaintiff can sue [under § 1962(c)] only the 'person' and not the 'enterprise' for damages suffered from . . . 'racketeering activity.' " *Id.* at 24. A majority of the courts of appeal has adopted these holdings. *See* Bishop v. Corbitt Marine Ways, 802 F.2d 122, 122-23 (5th Cir. 1986) (collecting decisions under § 1962(c) from the 2d, 3d, 4th, 5th, 7th, 8th, 9th and 11th circuits); *see also* Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 29-34 (1st Cir. 1986). Only the Eleventh Circuit takes a contrary position. *See* United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). Apparently, the Ninth Circuit is unknowingly on both sides of the issue. *Compare* United States v. Washington, 782 F.2d 807, 822 n.21 (9th Cir.) (enterprise may be a defendant), *reh'g. granted*, 797 F.2d 1461 (9th Cir. 1986) *with* Rae v. Union Bank, 725 F.2d 478, 480-81 (9th Cir. 1984) (enterprise may not be a defendant). A different result, however, has usually been reached at the court of appeals level under § 1962(a), where the leading decision is Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984) (dictum), *aff'd. on other grounds*, 473 U.S. 606 (1985), *on remand*, 647 F. Supp. 1026, 1033 (N.D. Ill. 1986) (injury under § 1962(a) not limited to investment). The dictum of *Haroco* became a holding or was otherwise approved in Wilcox v. First Interstate Bank of Or., 815 F.2d 522, 529 (9th Cir. 1987); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1396-98 (9th Cir. 1986); *Schofield*, 793 F.2d at 29-34; Masi v. Ford City Bank & Trust Co., 779 F.2d 397, 401-02 (7th Cir. 1985); B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633-34 (3d Cir. 1984), *judgment reentered on remand*, 617 F. Supp. 49 (D.N.J. 1985). Nevertheless, a number of district courts would still extend the immunity of entities under § 1962(c) to § 1962(a). *See, e.g.*, H. J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419, 428 (D. Minn. 1986); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1197 (S.D.N.Y. 1986).

Ostensibly, the rule that an enterprise may not be a defendant in a claim under § 1962(c) stems from two considerations, neither of which supports the rule. First, the rule is said to be rooted in a belief that an enterprise cannot be "employed by or associated" with itself as a matter of simple language usage. *See, e.g.*, *Schofield*, 793 F.2d at 31. To be "self-associated" seems, of course, a strain on the normal use of words, but to be "self-employed" hardly departs from standard usage. *See* IX THE OXFORD ENGLISH DICTIONARY 31 (Supp. 1985). Second, the rule is said to reflect an unease at the prospect of holding an enterprise liable where it is the "victim" of the pattern of racketeering activity. *See, e.g.*, *B.F. Hirsch*, 751 F.2d at 634. That an enterprise may play different roles—perpetrator, victim, instrument, or prize—in RICO violations, depending on the nature of the enterprise and the type of racketeering activity, was first suggested in *Civil Action*, *supra* note 1, at 306-25; the article was then cited with approval in *Haroco*, 747 F.2d at 401 ("helpful"). The approach reflects little more than basic linguistic theory. *See generally* G. DILLON, INTRODUCTION TO CONTEMPORARY LINGUISTIC SEMANTICS 68-82 (1977) (reviews the relevant literature on "Semantic Roles"). The Third Circuit's unease at holding a "victim" enterprise liable as a basis for a rule that *no* enterprise may be liable, however, moved the ABA's Civil RICO Task Force to comment: "[T]his hardly seems a reason to fashion a general rule that applies even when the enterprise is *not* the victim, but is instead the perpetrator." AD HOC CIVIL RICO TASK FORCE, A.B.A. SEC. OF CORPORATION, BANKING AND BUSINESS LAW 374 n.607 (1985) (emphasis in original). In fact, the Task Force, generally no friend to civil RICO, recommended that the enterprise be treated as a defendant under appropriate circumstances. The Task Force offered the following rationale for its position:

> [S]uppose the Board of Directors of a corporation commits multiple mail frauds in its operation of the company. Surely each participating member of the Board faces possible RICO liability. The only policy reason not to hold the company liable as well is to protect corporate assets owned by innocent shareholders. But this interest may well be outweighed by (1) the preference of allocating risk of loss to persons who have exercised some choice in corporate governance or who can otherwise potentially exercise some control over corpo-

rather than primarily liable to disassociate themselves from the enter-

rate affairs; (2) the desire to encourage private enforcement actions when a legitimate enterprise is being turned to corruption; (3) the need to encourage shareholders to insist upon internal audit procedures to protect against such corporate activities; (4) the aim of ensuring full compensation of losses suffered by victims; (5) the availability of actions on behalf of the corporation or shareholders against the Board members; and (6) the appropriateness of holding the corporate entity liable as a separate person just as many of the advantages of "personhood" inure to its benefit. Accordingly, under circumstances like these, the policies underlying RICO would appear to argue in favor of liability of an "enterprise" which also is a "person" pursuing its affairs through racketeering activities.

Id. at 374-76.

Those courts holding that an enterprise may be a defendant under § 1962(a) recognize that no textual language stands in the way of the rule, and if it were not adopted, the rule might "insulate corporations from *all* liability" under RICO; if an enterprise that acted as a perpetrator could not be sued under §§ 1962(c) or (a), it could not, in short, be sued under RICO at all. *Schofield*, 793 F.2d at 31 n.2 (emphasis in original).

Since neither of the ostensible justifications supports the rule, it ought to be reconsidered. "In law . . . the right answer usually depends on putting the right question." Estate of Rogers v. Commissioner, 320 U.S. 410, 413 (1943) (Frankfurter, J.). The issue is *not* whether the enterprise may be "employed by or associated" with itself, but whether the conduct of a person who *is* employed by or associated with the enterprise may be attributed to the enterprise itself. That question, in turn, is not answered by the text of RICO, but by the general doctrines of criminal agency or criminal *respondeat superior*. Ironically, the First Circuit used the enterprise-defendant rule to justify the rejection of *respondeat superior* under RICO rather than *respondeat superior* to justify rejection of the enterprise-defendant rule. *See Schofield*, 793 F.2d at 32-34; *accord* Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987) ("where . . . principal . . . was a victim"). Most importantly, these doctrines, as well as the victim exclusion rule, also answer the second concern. When the enterprise is the victim, the conduct of a person employed by or associated with it will not be attributed to it, for under the law of criminal agency or criminal *respondeat superior*, the person must, not only act within the scope of his agency or employment, but also *with intent to benefit* his principal or employer, the enterprise. *See, e.g.*, United States v. Local 560, 581 F. Supp. 279, 332 n.30, 337 (D.N.J. 1984) (rules for criminal *respondeat superior* under RICO are those of criminal, not civil law), *aff'd*, 780 F.2d 267, 284 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986). Similarly, under the victim exclusion rule, which is read into federal criminal statutes, such individuals or entities cannot be found criminally responsible. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.8 (2d ed. 1986) (victim not within class liable). ("The businessmen who yields to the extortion of a racketeer . . . may be unwise . . .; to view [him] . . . as involved in the commission of the crime confounds the policy embodied in the prohibition") (quoting Model Penal Code § 2.06 comment, at 323-24 (1985)). *But see* NATIONAL COM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 158 (1970). The approach that uses § 1962(a) as the *exclusive* vehicle to reach the enterprise as perpetrator, moreover, suffers from underinclusion. Unfortunately, it fails to reach an enterprise that is *not* run for profit (a social club) or a pattern of racketeering activity that does *not* produce income (murder), where it *might* be appropriate under the *express* text of § 1963(a) to order "dissolution or reorganization of any enterprise." Indeed, § 1963(a)'s express reference to a remedy directly applicable to an "enterprise" sharply undercuts the textual support for the supposed intent of Congress *not* to hold enterprises responsible for the conduct of their agents or employees. *See also* §§ 1961(3) ("person" includes "entity") and (4) ("enterprise" includes "entity"); § 1963(a) ("whoever" defined in 1 U.S.C. § 1 (1982) to include "corporations, etc."). Entity responsibility, moreover, is the norm, not the exception, in federal criminal jurisprudence, since at least the turn of the century. *See, e.g.*, New York Cent. & Hudson River R. R. v. United States, 212 U.S. 481, 495 (1909) ("no valid objection in law and every reason in public policy" why an entity should be liable); *Civil Action*, *supra* note 1, at 290 n.151 (cases collected and analyzed). *See generally* Commissioner v. Beneficial Finance Co., 390 Mass. 188, 275 N.E.2d 33 (1971); Note, *Developments in the Law, Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1246-51 (1979). Accordingly, corporations have regularly been indicted and convicted since 1909. *See, e.g.*, United States v. Cincotta, 689 F.2d 238, 241-43 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982). Similar rules are also applicable to partnerships, United States v. A & P Trucking Co., 358 U.S. 121, 125-27 (1958), and voluntary associations, United States v. Adams Express Co., 229 U.S. 381, 389-90 (1913). Both the individual and the entity are responsible. *See* United States v. Wise, 370 U.S. 405, 408-11 (1962). That this result should obtain under RICO ought not strike a discordant note, for a *broader* standard of civil liability is in fact the rule in other areas. In American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982), a manufacturer of fuel cutoffs sought treble damages against a non-profit trade association. The Supreme Court held that the association could be held liable for the conduct of an agent acting with

apparent authority *even though he did not act for the benefit of the principal. Id.* at 567. *Compare* Philadelphia and Reading R.R. v. Derby, 55 U.S. (14 How.) 468, 486 (1852) ("The rule of 'respondeat superior,' or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment.") *with* Continental Data Sys., Inc. v. Exxon Corp., 638 F. Supp. 432, 438-40 (E.D. Pa. 1986) (*respondeat superior* rejected under RICO). Unless such an enterprise is made a defendant, it is difficult to see how it could be dissolved or reorganized, that is, at least unless it is made a defendant solely for the purposes of relief. *See* FED. R. CIV. P. 19(a); International Bhd. of Teamsters v. United States, 431 U.S. 324, 356 n.4 (1977); United States v. Local 560, 581 F. Supp. 279, 337 (D.N.J. 1984) (union not liable for unlawful conduct not undertaken with intent to benefit it, but retained as nominal defendant for purposes of relief), *aff'd*, 780 F.2d 267, 284, 295-96 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986). But even then, "dissolution" would seem to be a harsh remedy without some showing of "enterprise responsibility." *Schofield*, on the other hand, suggests that RICO *is* aimed at individual, not entity responsibility. 793 F.2d at 33. This suggestion, however, mistakenly gives insufficient weight to the definitions of "person," at 18 U.S.C. § 1961(3) ("individual or entity"), and "whoever," at 1 U.S.C. § 1 (includes "corporation [etc.]" as well as individuals). *See, e.g.*, Schacht v. Brown, 711 F.2d 1343, 1361 (7th Cir.) (liability not limited to human beings), *cert. denied*, 464 U.S. 1002 (1983). *See also supra* note 14. In addition, *Schofield* recognizes the incongruity of limiting § 1962(a) to "income-related" conduct, but blames the statute, not its own construction of it. 793 F.2d at 31 n.2. The blame lies instead on *Schofield's* analysis.

Finally, the rule, if applied to group enterprise theories, threatens to undercut the central, but not exclusive, purpose of RICO: an attack on organized crime itself as comprised of associations-in-fact. *Compare* United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1292-94 (E.D.N.Y. 1985) (corporations cannot be defendant and one of a group constituting an enterprise) *with* Fustok v. Conticommodity Servs., Inc., 618 F. Supp. 1074, 1075-76 (S.D.N.Y. 1985) (contra). Fortunately, *Haroco*, while adopting the enterprise defendant rule under § 1962(c), expressly recognizes it ought not be held applicable when the enterprise is an association in fact. *Haroco*, 747 F.2d at 401. *See also* Cullen v. Margiotta, 811 F.2d 698, 730 (2d Cir. 1987) ("[T]here is neither a conceptual nor a doctrinal difficulty in positing an entity associated with a group of which it is but a part.") In its ill-considered rush to insulate legitimate businesses from RICO liability, the American Bar Association disagreed. *See supra* note 222. The effect of rejecting this aspect of *Haroco* and adopting the Bar Association recommendation would be to overrule *Turkette*, 452 U.S. at 580, and to make legally impossible the direct prosecution of organized crime families, for *illegitimate* businesses. As such, many prosecutions could not have been brought, and RICO's central purpose would be thoughtlessly frustrated. *See, e.g.*, United States v. Langella, 804 F.2d 185, 186 (2d Cir. 1986) (mob commission as enterprise; head of families and members as defendants); United States v. Licavoli, 725 F.2d 1040, 1043 (6th Cir. 1984) (mob family as enterprise; head and members as defendants); United States v. Riccobene, 709 F.2d 214, 221-24 (3d Cir.) (mob family as enterprise; members as defendants), *cert. denied*, 464 U.S. 849 (1983). Accordingly, the Association has come full circle—from support to opposition against an organized crime statute.

It is difficult to evaluate the development and wide-spread acceptance of the enterprise-defendant rule under § 1962(c) in the absence of any defensible rationale for it. To attribute its development judicially to the same economic based motivation that lies behind its advocacy by the Bar Association would be too facile. The simultaneous development of the contrary rule under § 1962(a), opposed by the Association, undermines that inference. Dean Roscoe Pound in his ECONOMIC INTERPRETATION OF LEGAL HISTORY 100-05, 109-115 (1923) rightly offers powerful alternative explanations of the development and growth of legal concepts, although he concedes that "it would be grievous error to reject the economic interpretation wholly because of the extravagance of its advocates [and that] it has an element of truth which we may not ignore . . . ." *But see* M. COHEN, LAW AND SOCIAL ORDER 329-30 (1933) ("[Pound] seems to argue as if the presence of ethical notions and logical reason proves that economic forces were not influential. This is clearly an inadequate view, since logical, ethical and economic considerations are not mutually exclusive. There is a large mass of evidence to show that our honest convictions are largely molded by the interest of the class to which we belong."); M. COHEN, AMERICAN THOUGHT 201 (Collier ed. 1962) ("It is clearly a case of what James and Dewey have called vicious intellectualism to argue as if the presence of a good logical reason for a rule excludes a social or economic motive for it."). Instead, the explanation seems to lie in the force of shallow logic and snowballing precedent. Once the rule was adopted by district courts—for the wrong reasons—it seemed to acquire a life of its own, and it swept through the courts of appeal largely without careful or independent analysis of its rationale or perverse consequences. Accordingly, it is to be fondly hoped—but not expected—that the remaining circuits will

prise.[236] Efforts, too, have been made to read the concept of cognizable

decline to adopt it, that the Eleventh Circuit will remain firm in its opposition, and that eventually the Supreme Court will resolve the split by rejecting the rule, or that Congress, despite the American Bar Association, will itself overturn it.

236 Attacks have, for example, been made on the application of *respondeat superior* or agency principles to RICO. *See supra* note 235. In addition, the route of attack sometimes taken has been a restrictive reading of the concept of "conduct" in § 1962(c). Two variations of this reading have been made. One seeks to exclude from "conduct" matters that are not "essential or integral" to the affairs of the organization. Compare *Oversight*, *supra* note 27, at 660-61 (testimony of Donald E. Egan, counsel for American National Bank & Trust Co. in *Haroco*) *with* Official Transcript of Proceeding Before the Supreme Court of the United States, BKT Case No. 84-822, American Nat'l Bank and Trust Co. of Chicago v. Haroco, Washington, D.C., Apr. 17, 1985, at 116-24 (bank's affairs not "conducted" by making unlawful loans). The second seeks to insulate from liability persons, principally outside accountants, lawyers, insurance companies, who are not personally involved in the "management" of the organization. Both variations owe their origin to arguments both accepted and rejected in the prosecution of Marvin Mandel, the governor of Maryland. *See* United States v. Mandel, 408 F. Supp. 679 (D. Md), *supplemented by*, 415 F. Supp. 997 (D. Md.), *supplemented by*, 415 F. Supp. 1025 (D. Md.), *supplemented by*, 415 F. Supp. 1033 (D. Md.), *supplemented by*, 415 F. Supp. 1079 (D. Md.), *supplemented by*, 415 F. Supp. 90 (D. Md. 1977), *rev'd*, 591 F.2d 1347 (4th Cir.), *aff'd by equally divided court*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980). Mandel was convicted of a § 1962(b) violation; he was also charged with a § 1962(c) violation. Codefendants were convicted of a § 1962(c) violation. Mandel was convicted (count 21) of acquiring an interest in Security Investment Company "through" a pattern of racketeering activity. In addition, he was charged (count 22) with conducting business with the State of Maryland "through" a pattern of racketeering activity. Count 22 was dismissed by the district court. Codefendants were convicted (count 23) of operating the Security Investment Company "through" a pattern of racketeering activity; they were also convicted (count 24) of operating Marlboro Race Track "through" a pattern of racketeering activity. The racketeering activity alleged in each count consisted of mail fraud and bribery. The basic allegation was that Mandel had received approximately $350,000 in "gifts" from his codefendants during his six years in office in return for which he strengthened their financial position. Mandel argued to the district court that "through" in § 1962(b) should be read to mean "only those 'racketeering acts' which proximately resulted in the acquisition or maintenance of the interest in the enterprise could be alleged to be part of the 'prohibited pattern.' " 415 F. Supp. at 1020. The district court rejected the contention, holding that such a "narrow . . . meaning of the word 'through' would . . . reward subtle and sophisticated patterns . . . in which it would be difficult, if not impossible, to identify the 'proximate cause' of an acquisition . . . ." *Id.* It would "unnecessarily frustrate Congress' intention to rid the influence of racketeering activities from legitimate businesses." *Id.* Similarly, Mandel's codefendants argued that "conduct or participate" in § 1962(c) required "involvement in the operation or management" of the enterprise. *Mandel*, 591 F.2d at 1375. As such, the mere transfer of a partnership interest in Security Investment Company from one of the codefendants to Mandel did not violate § 1963(c). The district court agreed, and set aside the jury verdict on count 23, which was appealed by the government. The court of appeals upheld the district court's interpretation, and added: "We find additional support for [the district court's] view in the use of the word 'through' . . . . We do not believe Congress meant to sweep so broadly, especially in light of the mandatory forfeiture penalties . . . ." *Id.* at 1375. The transfer of the interest was "the antithesis of operating it." *Id.* at 1376. "Mandel's interest was purely passive[;] . . . he was not entitled to any management role . . . ." *Id.* It was not "the situation where the . . . enterprise [was] . . . a front for racketeering activity." *Id.*

The panel's holding in *Mandel* may not be the law of the Fourth Circuit today, not only because the panel decision was set aside, but also because of the *Webster* decisions. United States v. Webster, 639 F.2d 174 (4th Cir. 1981), *modified on rehearing*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 915 (1982); *see also* Note, United States v. Mandel: *The Mail Fraud and En Banc Procedural Issues*, 40 MD. L. REV. 550, 582 n.178 (1981) (cases collected on effect of vacating and affirming by equally divided en banc decision). The *Webster* panel opinion, relying on *Mandel*, held that the "operating through" requirement meant that the affairs of the enterprise had to be "advanced or benefited." *Webster*, 639 F.2d at 185-86. On rehearing by the panel, however, the court abandoned any effort to define "conduct through" in so simple a fashion. The court observed that:

> It would have been far preferable had the earlier panel opinion adhered strictly to the language of 18 U.S.C. § 1962(c) . . . . Unfortunately, we introduced 'promoted,' 'improved,' 'advanced' and 'benefited' . . . for 'conducted' . . . .

Webster, 639 F.2d at 186. The court then noted that the required nexus would vary with the character of the enterprise and the alleged pattern, giving as an example a non-profit enterprise, whose affairs could not be "benefitted." *Id.* at 186-87. *See also* United States v. Welch, 656 F.2d 1039, 1060-61

claims in an artificially narrow fashion,[237] and to introduce

(5th Cir. 1981) (unmodified *Webster* rejected as "unduly restrictive"), *cert. denied*, 456 U.S. 915 (1982). Nevertheless, the language of *Mandel* was picked up in dictum by the Eighth Circuit's en banc rehearing in Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1983) ("ordinarily will require management or operation"), *cert. denied*, 464 U.S. 1008 (1983), and has been the basis for district court holdings. *See, e.g.*, John Peterson Motors, Inc. v. General Motors Corp., 613 F. Supp. 887, 900 (D. Minn. 1985) ("managerial role" required). No other court of appeals, however, has squarely adopted the rule, and those to which it has been argued have rejected it. *See, e.g.*, Bank of Am. Nat'l Trust and Savings Ass'n v. Touche Ross & Co., 782 F.2d 966, 970 (11th Cir. 1986) (not necessary for outside auditor to participate in management; "conduct" means performance of activity necessary or helpful to enterprise); United States v. DePeri, 778 F.2d 963, 983 (3d Cir. 1985) ("[RICO] draws no distinction between the foot soldier and the general . . . ."), *cert denied*, 106 S. Ct. 1518 (1986); United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984) (policeman protecting drug dealer), *cert. denied*, 472 U.S. 1017 (1985); Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir.) ("[Defendants] argue that § 1962(c) in essence requires that a defendant must be an 'insider' or 'manager' of the damage-causing enterprise in order to suffer liability. We do not believe the language and purpose of § 1962(c) support such an interpretation."), *cert. denied*, 464 U.S. 1002 (1983); United States v. Martino, 648 F.2d 367, 382 (5th Cir. 1981) (low echelon participants in arson ring), *cert. denied*, 456 U.S. 943 (1982). The Bar Association would like to convert this minority perspective into the general rule to protect "accountants and banks." *See supra* note 222. Not only does this recommendation reflect profoundly unwise policy, it would not even be effective to achieve its stated objective. Apparently, the lawyers who prepared the Association's report are unaware of the basic principles of criminal jurisprudence. A focus on "conduct" as a means of limiting RICO is misconceived; it ignores the distinction between principals in the first degree and principals in the second degree and conspiracy. If one principal in the first degree or a co-conspirator commits an offense, other persons can be principals in the second degree or co-conspirators, even if they could not be guilty as principals in the first degree of the offense. *See, e.g.*, Gebardi v. United States, 287 U.S. 112, 117, 120-21 n.5 (1932) (women, who cannot violate Mann Act, may, if conduct goes beyond mere acquiescence, be aiders and abettors or co-conspirators); W. LaFave & A. Scott, Criminal Law § 6.5(g)(2) (2d ed. 1986). Outsiders would only be insulated, therefore, if *no* insider with whom they were associated fell into the management category, an unlikely event in most white-collar scams.

237 Here, the attack on responsibility under RICO seeks to frustrate the use of § 1962(a) as a means of holding an entity responsible, where it cannot be an enterprise under § 1962(c). Under § 1962(c), the injury to the victim, of course, flows from the commission of the racketeering acts. Even so, *Sedima* struck down a concerted effort to narrow liability under § 1962(c). 473 U.S. at 495. ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement.") (citations omitted). An effort is now being made, however, to give § 1962(a) a similarly artifical and narrow twist by arguing that for the injury to be cognizable under RICO, it must flow from the gravamen of the offense, that is, the "investment or use" under § 1962(a), and not *any* aspect of the violation, including the racketeering activity. The decisions at the district court level are split. *Compare* Gilbert v. Prudential-Bache Sec., Inc., 643 F. Supp. 107, 109 (E.D. Pa. 1986) (injury must be from investment, not racketeering acts) *and* Heritage Ins. Co. v. First Nat'l Bank of Chicago, 629 F. Supp. 1412, 1417 (N.D. Ill 1986) (same) *with* Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 647 F. Supp. 1026, 1033 (N.D. Ill. 1986) ("[To so rule] would effectively shield deep corporate pockets") *and* Louisiana Power and Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 805-07 (S.D. La. 1986) (contra) ("To [so] rule . . . would emasculate the statute with regard to corporate defendants."). *Gilbert* is illustrative of these decisions that adopt the "investment or use" only rule: it was on remand after Gilbert v. Prudential-Bache Sec., 769 F.2d 940, 941 (3d Cir. 1985), in which the Third Circuit reversed the district court's attempt to impose an organized crime limitation on civil, but not criminal RICO. Undaunted in its effort to circumscribe the statute, it then read the concept of injury narrowly.

The decisions such as *Gilbert* that have adopted the "investment or use" only rule have been singularly free of careful analysis. As such, they are subject to severe criticism on analytical and policy grounds. Analytically, injury under § 1962(a) may flow from—

1. Racketeering activity,
2. The investment (or use) of the income (or its proceeds) in an enterprise, or
3. both.

It is, of course, possible to be injured by "racketeering activity" that does not produce income (unsuccessful fraud) that is part of a pattern of racketeering acts that does produce income (successful frauds). Nothing in the statute, however, says injury by the first kind of activity is not injury within the statute. *See Sedima,* 473 U.S. at 495-99 (damage not limited to racketeering or competitive in-

jury); Marshall & Isley Trust Co. v. Pate, 819 F.2d 806, 809 (7th Cir. 1987) (sufficient to show injury from "some or all of the activities comprising the violation"). The investment only rule, however, would preclude recovery for such acts. Where "racketeering activity" produces income and it (or its proceeds) is invested (or used) in an enterprise, injury may be of at least three types—

1. to the enterprise into which it is invested (or in which it is used),
2. to another entity or individual, who suffers competitive or other disadvantage, or
3. to the entity or individual from whom it was obtained by the racketeering acts.

Little doubt exists—although the decisions have not discussed the concept in detail—that direct investment or competitive injury is within the statute. *See, e.g.*, *Sedima*, 473 U.S. at 497 n.15 (direct or competitive). Nevertheless, the decisions adopting the "investment or use" only rule seem to assume, but largely without careful analysis, that the victim of "racketeering activity" is not *separately* injured by the investment (or use) of the income (or its proceeds). This view is fundamentally mistaken. Property, including money, taken by theft or fraud is converted. The victim may sue for fraud or conversion. *See, e.g.*, Harley-Davidson Motor Co., Inc. v. Custom Cycle Delight, Inc., 664 F.2d 1371, 1372 (9th Cir. 1982) (California law). Any *distinct* act of dominion over the property, however, is a *separate* conversion. *See, e.g.*, Gowin v. Heider, 237 Or. 266, 272 391 P.2d 630, 626 (1964) ("[T]he plaintiff . . . [has] his election to make either the original conversion of the later one the basis of [his action]."). Unauthorized use of money may be a distinct act of dominion. *See, e.g.*, Bonello v. Perera Co., Inc., 381 F. Supp. 1226, 1232 (S.D.N.Y. 1974), *aff'd*, 512 F.2d 1380 (2d Cir. 1975) (per curiam) (New York law). Accordingly, even the "investment or use" only rule ought not prevent a victim of a "racketeering activity" that does produce income from bringing suit under § 1962(a) for its *separate* investment or use in an enterprise.

The policy objections to the "investment or use" only rule are equally strong. It took the Supreme Court's decision in *Sedima* to prevent § 1962(c) from being confined to indirect or competitive injury in a misguided effort to secure legal immunity for "legitimate" enterprises. Congress did not intend to confine RICO to organized crime or to preclude its application to white-collar crime. That, however, might well be the effect of the adoption of no enterprise-defendant rule under § 1962(c) and a narrowly defined "investment or use" only rule under § 1962(a). It would, in short, largely frustrate the textual and policy considerations that have led circuit courts of appeal to adopt the rule that the "person" who plays the role of "enterprise" may also be a "defendant" under § 1962(a). *See, e.g.*, *Schreiber Distrib.*, 806 F.2d at 1398 ("we hold that where a corporation is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise'). *Masi*, 779 F.2d at 397, 401 ("a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator. . . . This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering . . . .") (citing *Haroco,* 747 F.2d at 402, *aff'd*, 479 U.S. 606 (1985); Schofield v. First Commodity Corp., 793 F.2d 28, 31 (1st Cir. 1986) ("we agree with . . . . *Haroco* . . . which found that a culpable enterprise may be held under . . . § 1962(a)"). The courts would have in two steps adopted a policy that Congress specifically declined to adopt when RICO was enacted in 1970. The no-person-enterprise rule under § 1962(c) coupled with the investment-only rule under § 1962(a) would accomplish in two steps what the organized-crime-only-no-legitimate-business rule sought to achieve. As such, the two rules, taken together, constitute an effort to reverse *Sedima*, 473 U.S. at 499 ("Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises.") (citing *Turkette*, 452 U.S. at 590). Other variations on the theme have been advanced. May a victim include among the pattern of racketeering acts he alleges those that are only injurious to others? *Compare* Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1433 (N.D. Ill. 1986) (yes) *with* Bender v. Continental Tower Ltd., 632 F. Supp. 497, 502 (S.D.N.Y. 1986) (no). This rule was too much for even Judge Shadur. *See* S.J. Advanced Technology & Mfg. Corp. v. Junkunc, 627 F. Supp. 572, 576 (N.D. Ill. 1986) (may include acts injurious to others); Papagiannis v. Pontikis, 108 F.R.D. 177, 179 (N.D. Ill. 1985) ("[E]ach victim can sue the RICO violator adducing evidence of the offense against the other victim to meet the statute's proof requirements as to a 'pattern.' "). It has now been authoritively rejected by the Seventh Circuit. *See Marshall & Isley Trust*, 819 F.2d at 809 ("[*Sedima* placed] on the courts [the onus] to develop a sensible description of what can constitute a 'pattern' . . . . By stiffening the requirements for showing a pattern, courts can narrow the application of RICO in accordance with a presumed congressional intent. Given such a definition of 'pattern,' however, it is wrong to require a plaintiff to show injury resulting from every act comprising the pattern."). *See also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979) (civil rights) ("[A]s long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973) (civil rights) ("general pattern of discrimination"); Denny v. Hutchins, 649 F.2d 816, 822 (10th Cir. 1981) (civil rights) (other discrimination to show intent). Is it necessary for the victim himself to be injured by a complete, as opposed to partial, pattern which may also be injurious to others? *Compare* Town of Kearny v. Hudson Meadows Urban Renewal Corp., 648 F. Supp. 1412, 1418-19 (D.N.J. 1986) (yes) *with*

common law limitations on the underlying predicate offenses.[238] In

Virden v. Graphics One, 623 F. Supp. 1417, 1425 (D.C. Cal. 1985) (no). *See also Marshall & Isley Trust Co.*, 819 F.2d at 809 ("Imposing such a requirement . . . would conflate . . . two separate inquiries: First, was there a pattern . . . ., and second, was the plaintiff injured by the . . . violation? . . . [P]laintiff [need not] allege an injury . . . caused by at least two predicate acts, or caused by all the acts adding up to a pattern."). Each of these issues ought to be resolved by a reading of the plain language of the statute; it says "injured in his business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(c) (1982). It does not say "gravamen" or "complete violation"; it says "violation." If it is argued that the provision is open to more than one construction, the liberal construction clause requires that the construction that enhances, not retards, the remedy be adopted. *Sedima*, 473 U.S. at 491 n.10 ("[I]f Congress' liberal construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident."). That the narrow view is being taken reflects judicial hostility, not a careful analysis of the text, legislative history, or policy of RICO. *See also* N.L. Indus., Inc. v. Gulf & Western Indus., 650 F. Supp. 1115, 1127-28 (D. Kan. 1986) (recovery under § 1962(a) and (b) limited to injury from investment or acquisition).

238 The bulk of the civil RICO claims for relief now being pressed in the courts are for fraud. *See infra* Appendix B. The principal predicate fraud offenses relied upon are mail and wire fraud. 18 U.S.C. §§ 1341, 1343 (1982). Should, for example, common law concepts of reliance be read into the elements of the claim for relief either as part of "fraud" or "by reason of"? An answer to that question requires a review of the development and scope of the two statutes. *See generally* Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771 (1980) (best general treatment of the development of mail fraud). The scope of the statutes may be quickly summarized. The mail fraud and wire fraud statutes are *in pari materia*; decisions under each are regularly used to interpret similar language in the other. *See, e.g.*, United States v. Soteras, 770 F.2d 641, 645 n.5 (7th Cir. 1985) ("equally applicable"); United States v. Westbo, 746 F.2d 1022, 1026 (5th Cir. 1984) ("[t]hese mail fraud rules are equally applicable to wire fraud"); United States v. Tarnopol, 561 F.2d 466, 475 (3d Cir. 1977) (mail fraud cases used to interpret wire fraud). The purpose of the two statutes, taken together, is to prohibit schemes to defraud that utilize, in varying circumstances, the mails or interstate communication facilities. Parr v. United States, 363 U.S. 370, 389 (1960); Durland v. United States, 161 U.S. 306, 314 (1896). Mail or wire fraud may be found where two elements come together: a scheme to defraud and the use of the mails or wires to execute the scheme. *See* Pereira v. United States, 347 U.S. 1, 8-9 (1954) (two elements); United States v. Gordon, 780 F.2d 1165, 1170-71 (5th Cir. 1986). The boundaries of "scheme to defraud" are, however, not limited to common law concepts of fraud or false pretenses. *Durland*, 161 U.S. 306, 313-14. *See generally* Dennis v. United States, 384 U.S. 855, 860-61 (1966); Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); Haas v. Henkel, 216 U.S. 462, 479-80 (1910). *See* United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987) (§ 1344: " 'scheme to defraud' . . . measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community"). The extension of the concept by the "intangible rights" doctrine and breach of fiduciary relations rule, two matters of great controversy, was recently and is now before the Supreme Court, not only under mail fraud, but securities fraud. *See* United States v. Carpenter, 791 F.2d 1024 (2d Cir.) (Winans), *cert. granted*, 107 S. Ct. 666 (1986); United States v. Gray, 790 F.2d 1290 (6th Cir.), *rev'd sub. nom.*, McMalley v. United States, No. 86-234 (Sup. Ct. Jun. 22, 1987) (rejection of intangible rights doctrine under § 1341, but not § 371). *See generally* Coffee, *The Metastasis of Mail Fraud*, 21 AM. L. REV. (1983); Coffee, *From Tort to Crime*, 19 AM. CRIM. L. REV. 117 (1981); United States v. Silvano, 812 F.2d 754, 758-60 (1st Cir. 1987) (cases collected on public or private fiduciary's failure to disclose material information). The phrase has been "broadly interpreted" by the courts. United States v. Pisani, 773 F.2d 397, 409 (2d Cir. 1985). "Congress . . . decided not to define [it] . . . because the range of potential schemes is as broad as the criminal imagination." United States v. Bonansinga, 773 F.2d 166, 173 (7th Cir. 1985), *cert denied*, 106 S. Ct. 2281 (1986). *See also* Weiss v. United States, 122 F.2d 675, 681 (5th Cir.) ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity."), *cert. denied*, 314 U.S. 687 (1941). Where a false statement is made, knowledge or reckless disregard of its truth or falsity is required. *See, e.g.*, United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984); United States v. Cusino, 694 F.2d 185, 188 (9th Cir. 1982), *cert. denied*, 461 U.S. 932 (1983); United States v. Benjamin, 328 F.2d 854, 862 (2d Cir) (mail fraud and securities fraud), *cert denied*, 377 U.S. 953 (1964). Future promises may be false. *Durland*, 161 U.S. at 313; United States v. Pritchard, 773 F.2d 873, 877-78 (7th Cir. 1985) (intent to pay), *cert. denied*, 106 S. Ct. 860 (1986); United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). Direct evidence of intent to defraud is not required; it may be inferred from circumstantial evidence. *See* United States v. Kimmel, 777 F.2d 290, 292 (5th Cir. 1985) ("may infer" instruction upheld), *cert. denied*, 106 S. Ct 1947 (1986); United States v. Alexander, 743 F.2d 472, 475 (7th Cir. 1984) ("The evidence established a pattern of conduct by defendant from which the jury could infer a scheme to

addition, an effort has been made—improperly and properly—to impose

defraud."); United States v. Brown, 739 F.2d 1136, 1149 (7th Cir.), *cert. denied*, 105 S. Ct. 331 (1984); United States v. Alson, 609 F.2d 531, 538 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918 (1980). But a false promise to perform may not be inferred from mere nonperformance. *See* Soper v. Simmons Int'l Ltd., 632 F. Supp. 244, 249 (S.D.N.Y. 1986). Otherwise, it is a jury question. United States v. Stephens, 779 F.2d 232, 236 (5th Cir. 1985); United States v. Gaspard, 744 F.2d 438, 440 (5th Cir. 1984), *cert. denied*, 469 U. S. 1217 (1985); *Alexander*, 743 F.2d at 475. The use of the mails or wires need not have been essential to the scheme, only an "incident to an essential part." *Pereira*, 347 U.S. at 8. *See also* United States v. Maze, 414 U.S. 395, 399 (1974) (mailing after obtaining property not in execution) ("sufficiently closely related"); United States v. Caldwell, 776 F.2d 989, 1004-06 (11th Cir. 1985) (pattern instruction upheld). The defendant himself need not have mailed the letter or made the phone call. *See Pereira*, 347 U.S. at 8-9; *Bonansinga*, 773 F.2d at 169-73 (mailings between victims sufficient, but not where merely adjusting accounts); United States v. Soteras, 770 F.2d 641, 645 (7th Cir. 1985) (reasonably foreseeable); United States v. Westbo, 746 F.2d 1022, 1025 (5th Cir. 1984) ("Once membership in a scheme to defraud is established, a knowing participant is liable for any wire communication which subsequently takes place or which previously took place in connection with the scheme."); United States v. Blankenship, 746 F.2d 233, 236, 240-42 (5th Cir. 1984) (others may mail; mailing not "essential," but "integral"). It is only required that it be shown that the defendant "caused" the mailing or the communications "with knowledge that the use of the mails [would] follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . . ." *Pereira*, 347 U.S. at 8-9. Mailings subsequent to the execution of the scheme will not support a conviction. *See* Kann v. United States, 323 U.S. 88, 94 (1944). But attempts to "lull" the victim, even after property has been obtained, may be included. *See* United States v. Brewer, 807 F.2d 895, 897-98 (11th Cir.), *cert. denied*, 107 S. Ct. 1909 (1987); United States v. Otto, 742 F.2d 104, 108 (3d Cir. 1984) ("an attempt to buy time in order to avoid or at least postpone detection"), *cert. denied*, 469 U.S. 1196 (1985); United States v. Adkins, 741 F.2d 744, 750 (5th Cir. 1984) ("Mailings 'designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect' are mailings in furtherance of the fraudulent scheme.") (quoting United States v. Ashdown, 509 F.2d 793, 800 (5th Cir.), *cert. denied*, 423 U.S. 829 (1975)), *cert. denied*, 105 S. Ct. 2113-14 (1985); United States v. Martin, 694 F.2d 885, 890 (1st Cir. 1982) ("deliberate attempt to lull detection"). The question of furtherance, including lulling, is for the jury. *See* United States v. Lane, 735 F.2d 799, 806-08 (5th Cir.), *cert. denied*, 469 U.S. 1206 (1985). The mailing or use of the wire need not itself involve a false representation; it may merely be the means by which the property was obtained by the scheme to defraud. *See* United States v. Contenti, 735 F.2d 628, 631 (1st Cir. 1984) (insurance checks) ("Each separate use of the mails in furtherance of the scheme constitutes a separate offense . . . . The mailed letter need not itself disclose any intent to defraud."). *See also* United States v. Stull, 743 F.2d 439, 445 (6th Cir. 1984) (each transportation, like each mailing or telephone call, constitutes a separate offense), *cert denied*, 470 U.S. 1062 (1985). Each participant in a scheme is "responsible for the use of the mails [by others] in the execution of the scheme." United States v. Peters, 732 F.2d 1004, 1007 n.2 (1st Cir. 1984). Mail and wire fraud require intent to defraud. *Pereira*, 347 U.S. at 8-9. Intent to defraud is negated by its converse: good faith. *See Kimmel*, 777 F.2d at 293; United States v. Casperson, 773 F.2d 216, 221-24 (8th Cir. 1985). But it is not necessary that there be a false representation. *See* McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1506-10 (D.N.J. 1985) (RICO scheme to defraud: cases collected).

A number of conceptual difficulties arise, however, under civil RICO when the parties or the courts "confus[e] mail fraud with common law fraud." Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481 (5th Cir. 1986). A civil claim for relief under a common law tort action in deceit requires, *inter alia*, a showing of the following elements: Justifiable reliance upon a false misrepresentation on the part of the plaintiff in taking action or refraining from it. *See* W. PROSSER & W. KEATON, THE LAW OF TORTS § 105 (5th ed. 1984); *see also* Contractor Utility Sales Co. v. Certain-Teed Corp., 748 F.2d 1151, 1154 (7th Cir. 2984) (law of Pa.), *cert. denied*, 105 S. Ct. 1397 (1985).

Efforts by different courts to read these common law principles into the RICO predicate acts of mail and wire fraud have created varying opinions. In Flowers v. Continental Grain Co., 775 F.2d 1051 (8th Cir. 1985), the plaintiff brought a civil RICO action against the owners of a rendering plant. Plaintiff, the former manager of the plant, sued the owners alleging extortion and mail fraud as predicate acts. The *Flowers* court found the RICO count insufficient, partly because mail fraud was not charged. 775 F.2d at 1054. At the same time, the *Flowers* court confused the elements of mail fraud with those of common law fraudulent misrepresentation. *See also* Horn, 776 F.2d at 780-82 (common law fraud, including reliance, read into § 1343). In *Flowers*, the Eighth Circuit also found that "[t]he complaint does not charge that defendants made any representations to plaintiff known at the time to be false." 775 F.2d at 1054. A material misrepresentation of fact, however, is an element of common law fraudulent misrepresentation, but it is not an element of mail fraud. 18 U.S.C.

§ 1341 prohibits "having devised . . . any scheme . . . to defraud, *or* for obtaining money or property by means of false or fraudulent . . . representation . . . ." (Emphasis added). *See McLendon*, 602 F. Supp. at 1506-10. The *Flowers* court, moreover, found the complaint insufficient for a lack of a "clear allegation that plaintiff has parted with property because of his reliance on representations made by defendants that they knew were false." 775 F.2d at 1054. *See also* Blount Financial Servs. v. Heller, No. 86-5342 (6th Cir. May 27, 1987) (false statement and reliance required for RICO mail fraud). While reasonable reliance is an element of common law fraudulent misrepresentation, it is not an element of mail fraud. All that is required is a scheme to defraud and the use of the mails to execute the scheme. *See Pereira*, 347 U.S. at 8-9. It is not necessary that the victim detrimentally relied on the mailing. *See, e.g.*, United States v. Goldberg, 455 F.2d 479, 481 (9th Cir.), *cert. denied*, 406 U.S. 967 (1972). For a violation of the mail fraud statute, the intended victim need not even have actually been defrauded. *See* United States v. Buchanan, 633 F.2d 423, 427 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). In *McLendon*, on the other hand, the court properly dealt with the first common law fraud element wrongly required by *Flowers*—a misrepresentation or omission. In holding that a material misrepresentation or omission was not an element of mail fraud, the *McLendon* court said:

> A course of conduct may comprise a scheme or artifice to defraud, even absent particular fraudulent statements or omissions. Indeed, the statute discusses two separate types of mail/wire fraud offenses: one may act pursuant to a "scheme or artifice to defraud," *or* one may act "by means of false or fraudulent pretenses, representations of promises." . . . [O]ther courts . . . have given the statute such a disjunctive meaning.

602 F. Supp. at 1507 (emphasis in original). Thus, *McLendon*, unlike *Flowers*, but in accord with general mail fraud jurisprudence, did not require a showing of material misrepresentation or omission for the predicate act of mail fraud in a civil RICO complaint.

Flowers second imposition of a common law deceit element upon mail fraud involved the court's requirement of a showing of reasonable reliance to the victim's detriment. The *Armco* court correctly held that "[t]o find a violation of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentation." 782 F.2d at 482. The court noted that "the intended victim need not even have been defrauded for liability to attach under the mail fraud statute." *Id.* Simply, "justifiable reliance is not an element that need be proven to establish a mail fraud violation." *Id.*

Analytically, the reliance issue turns on whether or not such reliance is an element of the wrong or an element of the nexus between the wrong and the injury. Traditionally, reliance was an element of deceit; the nexus between deceit and the injury was independently conceptualized in proximate cause terms. *See, e.g.*, Smith v. Bolles, 132 U.S. 125, 130 (1889). Since the concept of a "scheme to defraud" requires neither a representation nor reliance, it is difficult to see how the element of reliance can be introduced into RICO, except as part of causation, a result that would be indefensible as a matter of general jurisprudence; it would give to RICO a more narrow definition of cause than that which is followed in other federal statutes.

Congress' use of "by reason of" to indicate casual connection is a feature found in a number of other federal statutes. *See, e.g.*, 12 U.S.C. § 1975 (1982) (3x damage; by reason of); 15 U.S.C. § 72 (same); 19 U.S.C. § 1671(b)(1) (by reason of); 22 U.S.C. § 2399(b) (2x damage; by reason of); 29 U.S.C. § 187 (actual damage; by reason of); 46 U.S.C. § 1227 (3x damage; by reason of).

Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, is illustrative. In Mead v. Retail Clerks Int'l Ass'n, 523 F.2d 1371, 1376 (9th Cir. 1975), for example, the court found, that for purposes of § 187, an "injury occurred 'by reason of' particular unlawful conduct if such conduct 'materially contributed' to the injury . . . or was a 'substantial factor' in bringing it about . . . 'not withstanding other factors contributed also . . . .' As the words 'by reason of' make clear, section 303(b) requires . . . a casual nexus between the . . . activity and the injury suffered by the plaintiff." *See also* Feather v. United Mine Workers of Am., 711 F.2d 530, 537 (3d Cir. 1983). "By requiring the [plaintiff] to show that the . . . violation . . . was a substantial factor in causing the injury, the court preserve[s] the [plaintiff's] right to compensation for losses proximately caused by the [violation] . . . ." *Id.* at 538. For recovery under the Labor Management Relations Act, "[i]t is sufficient if the evidence 'support[ed] a just and reasonable inference' " of damage through the violation. *Mead*, 523 F.2d at 1377 (quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266 (1946)). Accordingly, in actions under the Labor Management Relations Act, the court may "infer from . . . circumstantial evidence that the necessary causal relation between the . . . conduct and the claimed damage existed." *Mead*, 523 F.2d at 1378.

A comparison of § 303 of the Labor Management Relations Act, 29 U.S.C. § 187(b), with RICO is significant for several reasons. Not only is the "by reason of" language identical, but § 303, like RICO, "was drawn directly from the treble damage provision of the Clayton Act . . . ." *Id.* at 1376. In addition, even though the "by reason of" language was used, both acts were enacted separately from the antitrust acts. RICO was drafted separately from the antitrust laws "because [placing RICO within the antitrust laws] . . . 'could create inappropriate and unnecessary obstacles in the way of . . .

special pleading requirements on RICO plaintiffs.[239]

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a private litigant . . . [including restrictive antitrust] 'proximate cause' [rules]." *Sedima*, 473 U.S. at 498 (quoting 115 CONG. REC. 6994-95 (1969)). Similarly, § 303 of the Labor Management Relations Act "was enacted as an alternative to subjecting unions to antitrust liability for secondary activities." *Mead*, 523 F.2d at 1376. Thus, while both statutes borrowed the Clayton Act's "by reason of" language, both acts were enacted outside of the antitrust laws, so that they might develop their own jurisprudence, freed of restrictive antitrust precedent. *See also* Costner v. Blount Nat'l Bank of Maryville, 578 F.2d 1192 (6th Cir. 1978) ("cause" for 12 U.S.C. § 1975 "by reason of" in unrevised 31 U.S.C. § 231) ("But for" alone rejected; nexus required between fraud and loss); Commerce Tankers Corp. v. National Maritime Union of Am., 553 F.2d 793, 800-01 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977) (§ 4 of Clayton Act proximate cause); Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 701-03 (D. Md. 1981) ("by reason of" violation of 15 U.S.C. § 2072 met though fraud on Commission, not consumer, based on concept of agency). *But see* United States v. Dinerstein, 362 F.2d 852, 856 n.5 (2d Cir. 1966) ("by reason of" fraud under 41 U.S.C. § 119 requires reliance). For antitrust proximate causation, see generally Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 529-46 (1983) (proximate cause and standing factors in antitrust); J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 561-63 (1981) (actual injury); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) (not susceptible to concrete proof); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 697-701 (1962) (inferred from circumstantial evidence); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946) (need not be measured with exactness); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (uncertainty of extent distinguished from uncertainty of fact); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927) (need not be calculated with absolute exactness). As such, it is improper to read common law limitation into the "defraud" predicate offenses in RICO.

239 Under FED. R. CIV. P. 8, the general concept of notice pleading should have been held to be applicable to RICO. Nevertheless, early efforts were made by the district courts to impose special "probable cause" pleading requirements on the statute, which, fortunately, were rejected by the courts of appeal. *Compare* Banco de Desarrollo Agropecuario v. Gibbs, 640 F. Supp. 1168, 1175 (S.D. Fla. 1986) (probable cause); Schnitzer v. Oppenheimer & Co., 633 F. Supp. 92, 97 (D. Or. 1985) (not probable cause, but higher than notice since, like fraud, involves an injury to reputation); Grant v. Union Bank, 629 F. Supp. 570, 575-76 (D. Utah 1986) (strict and liberal pleading compared); Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 682-83 (N.D. Ga. 1983) (plead elements to probability) *and* Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1045-47 (D. Utah 1983) (same) *with* Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 403-04 (7th Cir. 1984) (notice pleading applies to RICO and *Bache Halsey* and *Taylor* rejected), *aff'd on other grounds*, 473 U.S. 606 (1985) and Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 790-92 (3d Cir. 1984) (notice pleading applies to RICO; particularity shown; complaint reinstated), *cert. denied*, 469 U.S. 1211 (1985); Tryco Trucking Co., Inc. v. Belk Store Servs., Inc., 608 F. Supp. 812, 815-16 (W.D.N.C. 1985) (*Bache Halsey* and *Taylor* rejected). *See also* Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29 (1st Cir. 1987) (complaint should not be read "inflexibly"); Howell Petroleum Corp. v. Weaver, 776 F.2d 1302 (5th Cir. 1985), *on panel rehearing*, 780 F.2d 1198, 1199 (5th Cir. 1986) ("It is indeed necessary to plead all of the elements of a RICO violation but it suffices to do so in accordance with the liberal notice-pleading procedure of the Federal Rules of Civil Procedure.").

On the other hand, under FED. R. CIV. P. 9(b), fraud must be pled with particularity. *Compare* Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982) (fraud requires person, time, place and representation under Rule 9(b)), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1008 (1983) *and* Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 405 (7th Cir. 1984) (same), *aff'd on other grounds*, 473 U.S. 606 (1985) *with Seville*, 742 F.2d at 792 n.7 (pleading fraud with particularity "does not require that every element of an offense that includes fraud also be pleaded particularity"), *cert. denied*, 105 S. Ct. 1179 (1985). The basic rules may be easily stated; they should be more widely learned. *See infra* Appendix B (21.1% reported decision found failure to plead fraud with particularity).

Pleading fraud with particularity is rightly required to protect reputations and to avoid baseless strike suits that give rise to negotiating points. *See* Bresson v. Thomson McKinnon Sec., Inc., 641 F. Supp. 338, 346 n.6 (S.D.N.Y. 1986) (2d Cir. stricter); Kronfeld v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1463 (D.N.J. 1986) (3d Cir. distinguished from 2d Cir.); Equitable Life Assurance Soc'y v. Alexander Grant & Co., 627 F. Supp. 1023, 1028-31 (S.D.N.Y. 1985); Saine v. AIA, Inc., 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984); D & G Enters. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago, 574 F. Supp. 263, 266-67 (N.D. Ill. 1983); Somerville v. Major Exploration, 576 F. Supp. 902, 909 (S.D.N.Y. 1983). RICO charges are in fact subject to abuse. *Saine*, 582 F. Supp. at 1306 n.5; Friedlander v. Nims, 571 F. Supp. 1188, 1194 (N.D. Ga. 1983), *aff'd on other grounds*, 755 F.2d

A comprehensive evaluation of the Ninth Circuit's opinion in *Woller-*

810 (11th Cir. 1985). But no difference exists in the basic elements between criminal and civil RICO charges. Gregoris Motors v. Nissan Motor Corp., 630 F. Supp. 902, 913 (E.D.N.Y. 1986). *Haroco*, 747 F.2d at 402 n.20; Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1170-71 (5th Cir. 1984); Hudson v. Larouche, 579 F. Supp. 623, 626 n.2 (S.D.N.Y. 1983); Ralston v. Capper, 569 F. Supp. 1575, 1579 (E.D. Mich. 1983); Kimmel v. Peterson, 565 F. Supp. 476, 491 n.17 (E.D. Pa. 1983); Eaby v. Richmond, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983). The predicate offenses must be strictly construed. *See* I.S. Joseph Co. v. Lauritzen, 751 F.2d 265, 267 (8th Cir. 1984). It is improper to file and then seek to prove. *See* Bush v. Rewald, 619 F. Supp. 585, 604 (D. Haw. 1985); Beck v. Cantor, Fitzgerald and Co., 621 F. Supp. 1547, 1552-53 (N.D. Ill. 1985); McKee v. Pope Ballard Shepard & Fowle, Ltd., 604 F. Supp. 927, 930-32 (N.D. Ill. 1985); *D & G Enters.*, 574 F. Supp. at 266. Rule 8 and Rule 9(b) must be reconciled. *See* Corwin v. Marney, Orton Invs., 788 F.2d 1063, 1068 n.4 (5th Cir. 1986); Friedlander v. Nims, 755 F.2d 810, 813 n.3 (11th Cir. 1985); McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228-29 (1st Cir. 1980); Mitchell Energy Corp. v. Martin, 616 F. Supp. 924, 927 (S.D. Tex. 1985); *Kimmel*, 565 F. Supp. at 481. A basic outline of the scheme, not evidence, must be set out. Banowitz v. State Exchange Bank, 600 F. Supp. 1466, 1469 (N.D. Ill. 1985); Caliber Partners, Ltd. v. Affeld, 583 F. Supp. 1308, 1311 (N.D. Ill. 1984). Conspiracy charges, too, require particularity. *Kronfeld*, 638 F. Supp. at 1468-69; Kravetz v. Brukenfeld, 591 F. Supp. 1383, 1387-88 (S.D.N.Y. 1984); Rich-Taubman Assocs. v. Stamford Restaurant Operating Co., 587 F. Supp. 875, 879 (S.D.N.Y. 1984) (attribution permissible); *Saine*, 582 F. Supp. at 1307; Bernstein v. IDT Corp., 582 F. Supp. 1079, 1084-85 (D. Del. 1984); Kirschner v. Cable/Tel Corp., 576 F. Supp. 234, 244 (E.D. Pa. 1983); Eisenberg v. Gagnon, 564 F. Supp. 1347, 1352 (E.D. Pa. 1983); *Eaby*, 561 F. Supp. at 137. Where multiple parties are involved, the roles of each must be carefully delineated. *See In re* National Mortgage Equity Corp. Mortgage Pool, 636 F. Supp. 1138, 1158-59 (C.D. Cal. 1986); Lumbard v. Maglia, Inc., 621 F. Supp. 1529, 1538-39 (S.D.N.Y. 1985); Otto v. Variable Annuity Life Co., 611 F. Supp. 83, 89-90 (N.D. Ill. 1985); Harris Trust & Savings Bank v. Ellis, 609 F. Supp. 1118, 1123 (N.D. Ill. 1985); *McKee*, 604 F. Supp. at 931; Arndt v. Prudential Bache Sec., Inc., 603 F. Supp. 674, 676 (S.D. Cal. 1984); *Banowitz*, 600 F. Supp. at 1469; *Saine*, 582 F. Supp. at 1303; *Hudson*, 579 F. Supp. at 629; *Somerville*, 576 F. Supp. at 912-13; *D & G Enterprises*, 574 F. Supp. at 267; *Friedlander*, 571 F. Supp. at 1194; *Kimmel*, 565 F. Supp. at 481; *Eisenberg*, 564 F. Supp. at 1352; *Eaby*, 561 F. Supp. at 135. But collective allegations may be appropriate in dealing with corporate officers or partners. *Banowitz*, 600 F. Supp. at 1469 (corporate); *Somerville*, 576 F. Supp. at 911 (corporate); *Kravetz*, 591 F. Supp. at 1387 (partner). State of mind must be alleged, and a basis for the inference set out. *Compare* Blount Fin. Servs., Inc. v. Walter E. Heller & Co., 632 F. Supp. 240, 244 (E.D. Tenn. 1986) (alleged); Soper v. Simmons Int'l Ltd., 632 F. Supp. 244, 249 (S.D.N.Y. 1986) (yes) (proof of fraud must be more than failure to perform); *McKee*, 604 F. Supp. at 931 (yes), *and D & G Enterprises*, 574 F. Supp. at 266-68 (yes) *with Kronfeld*, 638 F. Supp. at 1465-66 (yes) (conspiracy and aiding and abetting); *and Caliber Partners, Ltd.*, 583 F. Supp. at 1311 (no). Representations must be detailed. *See Kronfeld*, 638 F. Supp. at 1464 (omissions need not be related to documents); *Kravetz*, 591 F. Supp. at 1386; *Kimmel*, 565 F. Supp. at 482. Mailings must be set out. *See* Levine v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 639 F. Supp. 1391, 1396 (S.D.N.Y. 1986); Frota v. Prudential-Bache Sec., Inc., 639 F. Supp. 1186, 1192 (S.D.N.Y. 1986); Folsom v. Continental Ill. Nat'l Bank & Trust Co. of Chicago, 633 F. Supp. 178, 187-88 (N.D. Ill. 1986); Sellers v. General Motors Corp., 590 F. Supp. 502, 505 (E.D. Pa. 1984); *Caliber Partners, Ltd.*, 583 F. Supp. at 1313; Serig v. South Cook County Serv. Corp., 581 F. Supp. 575, (N.D. Ill. 1984); *Eisenberg*, 564 F. Supp. at 1347. *But see Seville*, 942 F.2d at 791 (other detail may suffice); *In re* National Mortgage Equity Corp. Mortgage Pool, 636 F. Supp. 1138, 1159 (C.D. Cal. 1986) (same). Less detail is required where multiple transactions are alleged. *See Kronfeld*, 638 F. Supp. at 1464 (class of plaintiffs); Ambrosino v. Rodman & Renshaw, Inc., 635 F. Supp. 968, 971 (N.D. Ill. 1986); Onesti v. Thomson McKinnon Sec., Inc., 619 F. Supp. 1262, 1265 (N.D. Ill. 1985); *Kimmel*, 565 F. Supp. at 481. Where the information is peculiarly within the knowledge of the other party, less detail is required. *See Rich-Taubman Assocs.*, 587 F. Supp. at 880; *Somerville*, 565 F. Supp. at 482. Pleading fraud based on information and belief is proper, but a basis must be set out. *See* Mechigian v. Art Capital Corp., 639 F. Supp. 702, 704 (S.D.N.Y. 1986) (basis may be inferred); *Serig*, 581 F. Supp. at 579 n.2; *Somerville*, 576 F. Supp. at 909; *D & G Enterprises*, 574 F. Supp. at 267; *Kimmel*, 565 F. Supp. at 482. *But see* Banco de Desarrollo Agropecuario v. Gibbs, 640 F. Supp. 1168, 1176 (S.D. Fla. 1986) (information and belief not acceptable); *Schnitzer*, 633 F. Supp. at 97 (same); *Equitable Life*, 627 F. Supp. at 1029 (cannot be based on information and belief). An opportunity to discover is appropriate to flesh out a charge. *See Bernstein*, 582 F. Supp. at 1084-85; *Eaby*, 561 F. Supp. at 136-37. Leave to amend is usually granted. *See* Mullen v. Sweetwater Dev. Corp., 619 F. Supp. 809, 819 (D. Colo. 1985); *Beck*, 621 F. Supp. at 1567; *Eaby*, 561 F. Supp. at 137. *But see* Emmanouilides v. Buckthorn, Ltd., 642 F. Supp. 964, 966 (S.D.N.Y. 1986) (second amended complaint rejected). Leave to amend is subject to Rule 11. *See Beck*, 621 F. Supp. at 1567; *Friedlander*, 571 F. Supp. at 1194; *Saine*, 582 F. Supp. at 1306 n.5.

sheim ought, of course, to begin by attempting to place the opinion in this larger economic and political context. The difficulty, however, is that the opinion does not fit comfortably on one side or the other of this traditional struggle. To the degree that its reasoning, like that of the Second Circuit's in *Sedima*[240] is the child of the reasoning of *Kaushal*,[241] it suffers all the flaws of its sibling and its parent. As such, it could be placed easily into the general line of decisions that seek, for whatever reason, to narrow RICO in contradiction of its plain language, particularly the liberal construction clause, and its broad remedial purposes. Accordingly, no court properly seeking to be faithful to the text of the statute, its legislative history, its express purposes, or the relevant teaching of the Supreme Court ought to feel any hesitancy about disagreeing with the *Wollersheim* opinion and inviting a resolution of the conflict by the Supreme Court. Candor, however, requires the frank acknowledgement that the opinion in *Wollersheim* resists such an easy classification. Too much in it honestly recognizes the ambivalence of the relevant legal materials and the substantial policy reasons reflecting the purpose of the statute that might legitimately lead a court to decide the basic issue the other way. *Kaushal* should, of course, be rejected as a willful effort to impose, for whatever reason, a particular result on RICO. *Wollersheim* cannot be so easily characterized. In fact, the *Wollersheim* opinion is well-written and carefully crafted. Its analysis of the language of the statute openly recognizes that alternative readings of RICO are "plausible."[242] Its marshalling of the relevant legal materials from the legislative history is comprehensive. Its analysis of the remedial purpose of RICO and the adverse consequences of its own decision is perceptive, even if it did not lead the court to reach the correct decision. Nevertheless, the impact of *Wollersheim* will be the same—whether it is an example of result-oriented jurisprudence that willfully seeks to narrow the statute judicially, or the honest, but mistaken, effort of a court trying to do its best with a difficult question. Like *Kaushal*, *Wollersheim* must be classified as wrongly decided. While the *Wollersheim* opinion deserves respect, no other court ought to feel compelled to adopt its reasoning or follow its result, and, if necessary, the statute should be quickly amended by Congress to assure that the right of victims of sophisticated forms of crime may be fully vindicated in the judicial forum.

An honest evaluation of the *Wollersheim* opinion and any effort to place it in a larger economic or political context, however, must also conclude with another recognition. It may be that the core of the analysis here is wrong. The separate reform movements, which this analysis posits as parts of a whole, and integral to the traditional American strug-

Dismissal is inappropriate unless no set of facts could be proved that would warrant relief. *See* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246 (1980) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Pleadings are to be taken as true and construed to do substantial justice. *See* Bennett v. Berg, 685 F.2d 1053, 1056 n.4, 1058, 1062 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).

240 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

241 556 F. Supp. 576 (N.D. Ill. 1983).

242 796 F.2d at 1084.

gle between the less privileged and the more privileged, may be independent. In fact, the struggle over civil RICO itself—at least for some of its participants—may not be part of larger economic and political issues in the nation. It may be, too, that much of the hostility among members of the judiciary to civil RICO reflects little more than their traditional resistance to change[243] and a justifiable, but unjustified, concern with RICO as an uncontrollable source of new litigation, which apparently threatens their ability to do justice under law in the matters already entrusted to their care, rather than a particular economic or political philosophy. If so, then other comments addressed to the judiciary are in order. The "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for"[244] the legislative branch. "[H]ostility to the extraordinary breadth of civil RICO is not a reason for courts to restrict its scope."[245] The possibility that litigation might be a burden on courts is "not sufficient to justify a judicial decision to alter [a] congressionally [drafted remedial scheme]."[246] If RICO should be rewritten, in short, it should be rewritten by another branch of government.[247]

The history of legal institutions and laws in the 20th century has been the adaptation of the nation's 19th century institutions and laws to 20th century problems. If those who would reform our basic laws truly believed that those adaptations are misguided—and they are not merely Bourbons, forgetting nothing and learning nothing, who long for the restorations of lost privileges—they should be asked what is their new design for our basic institutions and laws that will deal with 20th century problems. Is your only solution to restore 19th century institutions and laws? A nation may be captivated for a while by economic and political rhetoric of various kinds of crisis, but a Latin proverb says it well: *Magna est veritas et praevalebit.*[248] The issues here, too, are not merely legal. Behind the struggle for the attention of judges and lawmakers, the harsh facts of life remain. Our legal institutions cannot long close their doors to a cry for human justice. Anyone who drives an American car knows that the economic woe of such basic industries as autos is not caused by a lack of bigness, but the lack of quality workmanship and management imagination.[249] Rewriting the law of torts will not make the stark facts of

243 *See* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 313-14 (Vintage ed. 1941) ("The entire philosophy interest, and training of the legal profession tend toward conservatism. . . . This trend to conservatism in the profession of the law is intensified in the case of judges by the weight of the official tradition of social and intellectual isolation."). *See also* F. MAITLAND, ENGLISH LAW AND THE RENAISSANCE 25 (1901) ("Taught law is tough law.")

244 United States v. Rodgers, 466 U.S. 475, 484 (1984).

245 Morgan v. Bank of Waukegan, 804 F.2d 970, 977 (7th Cir. 1986).

246 Patsy v. Florida Bd. of Regents, 457 U.S. 496, 512 n.13 (1982).

247 United States v. Ianniello, 808 F.2d 184, 192 n.15 (2d Cir. 1986) ("[A]ny further narrowing of RICO, however appropriate that may be, is a job for Congress, not the courts."); Morgan v. Bank of Waukegan, 804 F.2d 970, 974 (7th Cir. 1986) ("The sweep of RICO is admittedly broad, and our function is to apply the language of the statute as drafted in Congress, not to rewrite the statute as we might prefer it to be.")

248 Great is truth and it shall prevail.

249 *See generally* N.Y. Times, Jun. 1, 1987, at 21, col. 4 (independent surveys of car-buyers show less satisfaction with American than foreign-made cars); *GM: What Went Wrong*, BUS. WK., Mar. 16, 1987, at 102. General Motors has had its run in with civil RICO. *See, e.g.*, Allison on behalf of

medical malpractice disappear or cure the cancers caused by asbestos or make fertile the wombs of women injured or sterilized by defective birth control devices. Civil RICO could, of course, be directly repealed, not indirectly gutted, judicially or legislatively. But the problem of lack of integrity in an increasingly interdependent society, for which trust is essential, will not go away.[250]

On January 28, 1986, Senator Joseph R. Biden gave a talk at the New York University School of Law Center for Research in Crime and Justice.[251] In it, he reflected on the administration of justice in recent and past white-collar crime investigations and prosecutions involving such major corporations as General Electric, E. F. Hutton, and General Dynamics for price fixing, bank fraud, and defense procurement fraud. Thoughtfully, he suggested that, as a nation, we must do more than seek to hold accountable those who head our political institutions.[252] An effort must also be made to hold accountable those who exercise power in our other great institutions. In 1970, Congress made such an effort in the Organized Crime Control Act, not only to deal with those who run

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General Motors Corp. v. General Motors Corp, 604 F. Supp. 1106, 1120 (D. Del. 1985) (termination of derivative fraud suit against management upheld under business judgment rule), *aff'd*, 782 F.2d 1026 (3d Cir. 1985) (mem.). Roger Smith, GM's Chairman, has also recommended in a letter of Jan. 12, 1987, to Vice President George Bush, the Head of the Presidential Task Force on Regulation Relief, on behalf of the Business Round Table, that civil RICO be circumscribed by a criminal conviction limitation. *But see* Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566 (1985) (an excellent analysis of the policy objections to the criminal conviction limitation).

250 Those reformers, particularly attorneys, who would reinterpret our constitution or rewrite our antitrust, tort liability, or federal fraud laws must also face fundamental questions. Just as generals are morally responsible for unnecessary civilian deaths in battle, so, too, are attorneys responsible for overkill, which deprives victims of needed redress in meritorious litigation as a price of protecting from appropriate legal accountability those who have money and power. Here, too, it is more than ironic that the attack on the most effective fraud statute on the books itself takes the form of a scam fostered by people and institutions that depend most on trust: the government itself, attorneys, accountants, and securities dealers.

251 Biden, *The Challenge of Institutional Responsibility*, 23 AM. CRIM. L. REV. 243 (1986).

252 He observed:

> Our society is increasingly characterized, in both its public and its private life, by large and impersonal organizations which have the power to do great good or great evil. We have learned how to create them, but we have not yet learned how to control them. From our earliest days as a nation, much of our political energy and creativity has been expended, rightly, on devising and implementing systems of accountability for those who exercise political power. Today, we must develop equally sophisticated techniques for holding responsible those organizations and individuals who wield great economic power for private purposes, but with significant public consequences. We accord great wealth and prestige to those who lead our corporations and, by and large, we have prospered as a nation by doing so. Now we must find new ways to call to account those who abuse that trust.

Id. at 247-48. On the size of the wealth afforded to corporate executives, see *Executive Pay*, BUS. WK., May 4, 1987, at 50. ("While most managers and run-of-the-mill executives had to settle for raises of less than 6%, the average chief executive's salary and bonus jumped 17.9% to $829,887 in 1986. . . . Of the 25 highest-paid executives, a number hail from well-paying Wall Street firms . . . ."). *But see* L. BRANDEIS, OTHER PEOPLE'S MONEY 17-18 (1914) ("The goose that lays golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by somebody else's goose.")

Biden then asked:

> [H]ow long [can] a democratic society that depends upon the confidence of its people . . . afford to tolerate legal and corporate standards of accountability . . . that deviate so significantly from the traditional American demand for honesty and integrity among those who exercise great power[?]

23 AM. CRIM. L. REV. at 247-48.

underworld syndicates, but also those who engage in patterns of criminal activity by, through, or against the other organizations in our society.[253] The struggle over civil RICO ought to be seen in Senator Biden's terms; it is about accountability in the administration of justice in a free society. The outcome is yet in doubt.[254]

253 *See also* Papai v. Cremosnik, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986) ("[T]o the extent RICO is used as a weapon against 'white collar crime,' this purpose is not contrary to the intent of Congress but is in fact one of the 'benefits' Congress saw the Act as providing.") Writing in 1967, the President's Commission on Crime and the Administration of Justice, whose studies led to RICO, observed:

> [W]hite-collar crime [is] — [a term] now commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute [that] . . . are only rarely dealt with through the full force of criminal sanctions.
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> . . . .
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> Serious erosion of morals accompanies [the white collar offender's] violation. [Those who so] flout the law set an example for other business and influence individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get.

CHALLENGE OF CRIME IN A FREE SOCIETY 47-48 (1967). *See generally White Collar Crime: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

254 This Article began by quoting from one of the principal spokesmen for 19th century jurisprudence. It may be appropriate to end by quoting from the remarks of Congressman Steiger, whose participation in the floor debates on RICO played so central a role in the *Wollersheim* opinion:

> [I]n this country today, if a poor man's son commits a crime and a rich man's son commits the same crime, the chances are that the poor man's son will receive the full weight of justice and the rich man's son will either get off or receive a much lighter sentence. It is unfortunate, but this is a fact of life. . . .
>
> I will submit to all of you distinguished members of the bar that is exactly what happened with organized crime. It is a fact of life. Because of the sophistication, because of the wealth, and because of the ability of organized crime to keep the best counsel, they have been able to abrogate the law.

116 CONG. REC. 35,355 (1970). Congressman Steiger was not prophetic about organized crime. *See supra* note 198. He may yet be wrong in the broader struggle between the privileged and the less privileged.

Appendix A

COMPARATIVE ANALYSIS STATE RICO LEGISLATION***

		Federal	Hawaii	Pennsylvania	Florida	Arizona
ENACTED		Oct. 15, 1970	1972	June 6, 1973 June 27, 1978	Oct. 1, 1977 June 23, 1979	Oct. 1, 1978 April 27, 1980
AMENDED		Oct. 1, 1979		Dec. 4, 1980		1982, 1985, 1986
CRIMINAL ACTION	1. Proceeding allowed	Yes 1961	Yes 842	Yes 911	Yes 895	Yes 2301
	2. Brought by					
	AG	NP	NP	Yes 911e(2)	NP	NP
	DA	NP	NP	Yes 911e(2)	NP	NP
	3. Court	NP	NP	NP	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1962(a)	Yes 842-2(1)	Yes 911b(1)	Yes 895.03(1)	Yes 2312A
	-investment or control through pattern or debt	Yes 1962(b)	Yes 842-2(2)	Yes 911b(2)	Yes 895.03(2)	Yes 2312A
	-participation through pattern or debt	Yes 1962(c)	Yes 842-2(3)	Yes 911b(3)	Yes 895.03(3)	Yes 2312B
	-conspiracy to do the above	Yes 1962(d)	NP	Yes 911b(4)	Yes 895.03(4)	NP
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excluding imprisonment 1961(5)	NP	2 rel., 1 after eff. date 911h(4)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 895.02(4)	NP
	6. Predicate offenses	Yes 1961(1)	Yes 842-1	Yes 911h(1)	Yes 895.02(1)	Yes 2301D(4)
	7. Person	Yes 1961(3)	Yes 842-1	Yes 911h(2)	NP	NP
	8. Enterprise	Yes 1961(4)	Yes 842-1	Yes 911h(3)	Yes 895.02(3)	Yes 2301D(2)
	9. State of mind	NP	NP	NP	NP	Knowing 2312C

***ARIZ. REV. STAT. ANN. §§ 13-2301-2316 (1978 & Supp. 1984-85); CAL. PENAL CODE §§ 186-186.8 (West Supp. 1985); COLO. REV. STAT. §§ 18-17-101-109 (Supp. 1984); CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West Supp. 1984); DEL. CODE ANN. tit. 11 § 1501-11 (1986); FLA. STAT. ANN. §§ 895.01-.05 (West Supp. 1983); GA. CODE ANN. §§ 26-3401-3414 (1983); HAWAII REV. STAT. §§ 842-1 to -12 (1976); IDAHO CODE §§ 18-7801-7805 (Supp. 1984); ILL. REV. STAT. ch. 56-1/2 §§ 1651-1661 (Smith-Hurd Supp. 1984-85) (limited to narcotics); IND. CODE ANN. §§ 35-45-6-1-2, 34-4-30.5-1-6 (Burns Supp. 1982); LA. REV. STAT. §§ 15:1351-1356 (West. 1985) (limited to narcotics); MISS. CODE ANN. §§ 97-43-1 to -11 (Lawyers Co-op 1984); NEV. REV. STAT. §§ 207.350-.520 (1983); N.J. STAT. ANN. § 2C:41 6.2 (West Supp. 1982); N.M. STAT. ANN. §§ 30-42-1 to -6 (Michie Supp. 1980); N.Y. PENAL LAW § 460.00-80 (1986); N.C. GEN. STAT. § 75-D-1-14 (1986); N.D. CENT. CODE §§ 12.1-06.1 to -08 (Smith Supp. 1983); OHIO REV. CODE ANN. §§ 2923.31-.36 (Page 1985); OR. REV. STAT. §§ 166-715-735 (1981); 18 PA. CONS. STAT. § 911 (Purdon 1983); R.I. GEN. LAWS §§ 7-15-1 to -11 (Michie Supp. 1983); TENN. CODE ANN. § 39-1-1001-12 (1986); UTAH CODE ANN. §§ 76-10-1601-1608 (Smith Supp. 1983); WASH. REV. CODE ANN. §§ 9A.82010-901 (West Supp. 1985); WIS. STAT. ANN. § 946-80-87 (West Supp. 1984-85).

STATE RICO SURVEY (continued)

		Federal	Hawaii	Pennsylvania	Florida	Arizona
SANCTIONS	10. Sanctions					
	-imprisonment	Up to 20 yrs. 1963(a)	Yes 842-3	Felony 1° 911c	Yes 895.04(1)	Class 3 fel. 2312C
	-fine	Up to $25,000 1963(a)	Yes 842-3	Felony 1° 911c	Yes, up to 3x gain or harm 895.04(2)	Class 3 fel. 2312C
	-forfeiture	Yes 1963(a)	Yes 842-3	NP	NP	NP
	-costs	NP	NP	NP	Yes 895.04(2)	NP
	11. Injunctive relief					
	-restraining order	Yes 1963(b)	NP	NP	NP	Yes 2313
	-racketeering lien	NP	NP	NP	Yes 895.07	Yes 2313, 2314-02
CIVIL SUIT	12. Proceeding allowed	Yes 1964	Yes 842-5, 3	Yes 911d	Yes 895.05	Yes 2314
	13. Brought by					
	-AG	Yes 1964(b)	Yes 842-5	Yes 911e(1)	Yes 895.05(5)	Yes 2314A
	-DA	NP	NP	NP	Yes 895.05(5)	Yes 2314 A,K
	-Private Party	Yes 1964(c)	Yes 842-3(c)	NP	Yes 895.05(6)	Yes 2314A
	14. Court	U.S. Dist. 1964(a)	Circuit 842-5	Courts of Common Pleas, Commonwealth Ct. 911d(1)	Circuit 895.05(1)	Superior 2314
	15. Burden of Proof					
	-Law	NP	NP	NP	NP	Preponderance 2314I
	-Equity	NP	NP	NP	NP	Preponderance 2314I
	16. Provision for innocent parties	Yes 1964(a)	Yes 842-8(a)	Yes 911dlii	Yes 895.05(2)(c)	Yes 2314B
	17. Preliminary relief	Yes 1964(b)	Yes 842-6	Yes 911d2	Yes 895.05(5)(6)	Yes 2314C
	-harm requirement	NP	NP	NP	Yes 895.05(6)	NP
	-bond is an option	Yes 1964(b)	Yes 842-8(b)	Yes 911d2	Yes 895.05(5)(6)	Yes 2314C
	18. Showing for relief					
	-general	NP	NP	NP	Yes 895.05(6)	NP
	-no special	NP	NP	NP	Yes 895.05(6)	NP
	19. Scope of equitable relief					
	-divest	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(i)	Yes 895.05(1)(a)	Yes 2314D(1)
	-restrict	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(i)	Yes 895.05(1)(b)	Yes 2314D(2)
	-dissolve	Yes 1964(a)	Yes 842-8(a)	Yes 911d(1)(ii)	Yes 895.05(1)(c)	Yes 2314D(3)
	-reorganize	Yes 1964(a)	Yes 842-8(a)	NP	Yes 895.05(1)(c)	Yes 2314D(3)
	-revoke permits	NP	Yes 842-5	Yes 911d(1)(ii)	Yes 895.05(1)(d)	NP
	-forfeit charter	NP	Yes 842-5	Yes 911d(1)(ii)	Yes 895.05(1)(e)	NP

STATE RICO SURVEY (continued)

		Federal	Hawaii	Pennsylvania	Florida	Arizona
	20. Scope of legal relief					
	-amount	3x 1964(c)	Damages 842-8(c)	NP	3x + punitive 895.05(7)	3x 2314A
	-costs	Yes 1964(c)	Yes 842-8(c)	NP	Yes 895.05(7)	Yes 2314A
	-attorney fees	Yes 1964(c)	Yes 842-8(c)	NP	Yes 895.05(7)	Yes 2314A
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(a),(b)
	-personal property	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(c)
	-money	NP	NP	NP	Yes 895.05(2)(a)	Yes 2314D(6)(c)
	-may substitute other property if forfeited property is not available	NP	NP	NP	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	Yes 1968	Yes 842-10	Yes 911f	Yes 895.06	Yes 2315
	23. Seizure without process in certain instances	NP	NP	NP	Yes 895.05(3)	NP
	24. Relation back	NP	NP	NP	Yes 895.05(2)b	2314-02I(1),(2)
	25. Jury trial	NP	NP	NP	Yes 895.05(7)a	NP
	26. Estoppel	Yes 1964(d)	Yes as to action by the State 842-8(d)	Yes 911d(3)	Yes 895.05(8)	Yes 2314F
	27. Intervention by State	NP	NP	NP	Yes 895.05(9)	Yes, but not in action by D.A. 2314K
	28. Civil suit not precluded by criminal action	NP	NP	NP	Yes 895.05(11)	Yes 2314M
	29. Priority of individual over State to compensation	NP	NP	NP	Yes 895.05(7)b	NP

STATE RICO SURVEY (continued)

	Federal	Hawaii	Pennsylvania	Florida	Arizona
30. Fund for investigation and prosecution	NP	NP	NP	NP	NP
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statute of limitation	NP	NP	NP	5 yrs. suspended 895.05(10)	Yes 2314G
33. Construction	Liberal PL 91-452 § 904	Fair Import 701-104	Fair Import 105	Strict 775.021	Fair Meaning 13-104
34. Severability	NP	NP	NP	NP	NP
35. Findings and Intent	Yes PL 91-452 § 1	NP	Yes 911a	NP	NP

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY

		Rhode Island	New Mexico	Georgia	Indiana	New Jersey
ENACTED AMENDED		1979	Feb. 28, 1980	July 1, 1980 April 16, 1982 1983	1980, 1984, 1985	June 15, 1981
CRIMINAL ACTION	1. Proceeding allowed	Yes 7-15	Yes 30-42	Yes 26-3401	Yes 35-45-6-1	Yes 2C:41-1
	2. Brought by					
	AG	NP	Yes 30-42-5	NP	NP	Yes 41-3(c)
	DA	NP	Yes 30-42-5	NP	NP	Pros.Atty. 41-1(g) when authorized
	3. Court	Superior 7-15-8	NP	NP	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 7-15-2(a)	Yes 30-42-4(a)	Yes 3403(a)	Yes -6-2(a)(1)	Yes 41-2(a)
	-investment or control through pattern or debt	Yes 7-15-2(b)	Yes 30-42-4B	Yes 3403(a)	Yes -6-2(a)(2)	Yes 41-2(b)
	-participation through pattern or debt	Yes 7-15-2(c)	Yes 30-42-4C	Yes 3403(b)	Yes -6-2(a)(3)	Yes 41-2(c)
	-conspiracy to do the above	NP	Yes 30-42-4D	Yes 3403(c)	NP	Yes 41-2(d)
	5. Pattern	NP	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 30-42-3D	2 rel., 1 after eff. date,1 w/in 4 yrs. of prior excl. imprisonment 3402(d)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior -6-1(c)	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment 41-1d(1),(2)
	6. Predicate offenses	Yes 7-15-1(a)	Yes 30-42-3A	Yes 3402(a),(b)	Yes -6-1(d)	Yes 41-1(a)
	7. Person	Yes 7-15-1(b)	Yes 30-42-3B	NP	NP	Yes 41-1(b)
	8. Enterprise	Yes 7-15-1(c)	Yes 30-42-3C	Yes 3402(c)	Yes -6-1(b)	Yes 41-1(c)
	9. State of mind	NP	NP	NP	Knowledge or Intent -6-2	NP

STATE RICO SURVEY (continued)

		Rhode Island	New Mexico	Georgia	Indiana	New Jersey
SANCTIONS	10. Sanctions					
	-imprisonment	Yes 7-15-3	Fel. 2° or 3° 30-42-3	Yes 3404(a)	Class C Felony -6-2	1° w/gun 2° w/out 41-3(a)
	-fine	Yes 7-15-3	Fel. 2° or 3° 30-42-4A-D	Up to $25,000 or 3x gain to $25,000 3404(a),(b)	Class C Felony -6-2	1° with gun/ 41-3(a) 2° w/out gun 41-3(a)
	-forfeiture	Yes 7-15-3	Yes 30-42-4E	Yes via Civil Proc. 3405(a)	NP	Yes 41-3(b)
	-costs	NP	NP	NP	NP	NP
	11. Injunctive relief					
	-restraining order	NP	Yes 30-42-4F	NP	NP	Yes 41-3(c)
	-racketeering lien	NP	Yes 30-42-4F	NP	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 7-15-4	Yes 30-42-6A	Yes 3405(a)	Yes 34-4-30.5	Yes 41-4
	13. Brought by					
	-AG	Yes 7-15-4(b)	Yes 30-42-6B	Yes 3405(f)(1)	NP	Yes 41-4(b)
	-DA	NP	Yes 30-42-6B	Yes 3405(f)(1)	ProsAtty -30.5-2	NP
	-Private Party	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3405(f)(1)	Yes -30.5-5	Yes 41-4(c)
	14. Court	Superior 7-15-4(a)	District 30-42-6A	Superior 3406(a)	Circuit or Superior -30.5-2	Superior 41-1(a)
	15. Burden of Proof					
	-Law	NP	NP	NP	Preponder.-30.5-2	NP
	-Equity	NP	NP	NP	Preponder.-30.5-2	NP
	16. Provision for innocent parties	Yes 7-15-4(a)	Yes 30-42-6C	Yes 3405(h)	Yes -30.5-2	Yes 41-4(a)
	17. Preliminary relief	Yes 7-15-4(b)	Yes 30-42-6C	Yes 3406(b)	Yes -30.5-5(a)	Yes 41-4(b)
	-harm requirement	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
	-bond is an option	Yes 7-15-4(b)	Yes 30-42-6C	Yes 3406(b)	Yes -30.5-5(a)	Yes 41-4(b)
	18. Showing for relief					
	-general	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP
	-no special	NP	NP	Yes 3406(b)	Yes -30.5-5(a)	NP

STATE RICO SURVEY (continued)

		Rhode Island	New Mexico	Georgia	Indiana	New Jersey
	19. Scope of equitable relief					
	-divest	Yes 7-15-4(a)	Yes 30-42-6D1	Yes 3406(a)(1)	Yes -30.5-2(1)	Yes 41-4(a)(1)
	-restrict	Yes 7-15-4(a)	Yes 30-42-6D2	Yes 3406(a)(2)	Yes -30.5-2(2)	Yes 41-4(a)(2)
	-dissolve	Yes 7-15-4(a)	Yes 30-42-6D3	Yes 3406(a)(3)	Yes -30.5-2(3)	Yes 41-4(a)(3)
	-reorganize	Yes 7-15-4(a)	Yes 30-42-6D3	Yes 3406(a)(3)	Yes -30.5-2(3)	Yes 41-4(a)(3)
	-revoke permits	NP	NP	Yes 3406(a)(4)	Yes -30.5-2(4)	Yes 41-4(a)(5)
	-forfeit charter	NP	NP	Yes 3406(a)(5)	Yes -30.5-2(5)	Yes 41-4(a)(4)
	20. Scope of legal relief					
	-amount	3x 7-15-4(c)	3x 30-42-6A	3x + punitive 3406(c)	3x + punitive 30.5-5(b)(1),(4)	3x 41-4(c)
	-costs	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3406(c)	Yes -30.5-5(b)(2)	Yes 41-4(c)
	-attorney fees	Yes 7-15-4(c)	Yes 30-42-6A	Yes 3406(c)	Yes -30.5-5(b)(3)	Yes 41-4(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	NP	NP	Yes 3405(a)	Yes -30.5-3	Yes 41-3(b)(2)
	-personal property	NP	NP	Yes 3405(a)	Yes -30.5-3	Yes 41-3(b)(1)
	-money	NP	NP	Yes 3405(a)	NP	Yes 41-3(b)(1)
	-may substitute other property if forfeited property is not available	NP	NP	NP	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	Yes 7-15-7	NP	NP	NP	Yes 41-5
	23. Seizure without process in certain instances	NP	NP	Yes 3405(d)(2)	Yes -30.5-4	NP
	24. Relation back	NP	NP	Yes 3405(e)(11)(A)	NP	NP
	25. Jury trial	NP	NP	Yes 3406(c)(1)	Yes -30.5-5(c)	NP
	26. Estoppel	Yes 7-15-4(d)	NP	Yes 3406(d)	Yes -30.5-6	Yes 41-4(d)
	27. Intervention by State	NP	NP	NP	NP	NP
	28. Civil suit not precluded by criminal action	NP	NP	Yes 3408	NP	Yes 41-6.1
	29. Priority of individual over State to compensation	NP	NP	Yes 3406(c)(2)	Yes -30.5-5(d)	NP
	30. Fund for investigation and prosecution	NP	NP	NP	NP	Yes 41-3(b)

STATE RICO SURVEY (continued)

	Rhode Island	New Mexico	Georgia	Indiana	New Jersey
31. Reciprocity of enforcement	NP	NP	Yes 3409	NP	NP
32. Statute of limitation	NP	NP	5 yrs. suspended 3407	NP	NP
33. Construction	Liberal 7-15-10	Approved Usage 12-2-2	Fair Warning 26-102-b	Plain, ordinary usual sense 1-1-4-1	Liberal 41-6
34. Severability	Yes 7-15-11	NP	NP	NP	Yes 41-6.2
35. Findings and Intent	NP	Yes 30-42-2	Yes 3401	NP	Yes 41-1.1

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY

		Utah	Colorado	Idaho	Oregon	Wisconsin
ENACTED		July 1, 1981	July 1, 1981 1981, 1982, 1983, 1984	1981	1981, 1983	April 27, 1982
AMENDED						
CRIMINAL ACTION	1. Proceeding allowed	Yes 76-10-1601	Yes 18-17-101	Yes 18-7801	Yes 166.715	Yes 946.80
	2. Brought by					
	AG	NP	NP	NP	NP	Yes 946.87(3)
	DA	NP	NP	NP	NP	Yes 946.87(3)
	3. Court	NP	NP	NP	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1603(1)	Yes -104(1)	Yes 7804(a)	Yes .720(1)	Yes 946.83(1)
	-investment or control through pattern or debt	Yes 1603(2)	Yes -104(2)	Yes 7804(b)	Yes .720(2)	Yes 946.83(2)
	-participation through pattern or debt	Yes 1603(3)	Yes -104(3)	Yes 7804(c)	Yes .720(3)	Yes 946.83(3)
	-conspiracy to do the above	Yes 1604(4)	Yes -104(4)	Yes 7804(d)	Yes .720(4)	NP
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 1602(4)	2 rel., 1 after eff. date,1 w/in 10 yrs. of prior excl. imprisonment -103(3)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 7803(d)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior .715(4)	3 rel., 1 after eff. date, last within 7 yrs. of prior. Mult. acts at same time & place count as 1 act 946.82(3)
	6. Predicate offenses	Yes 1602(1)	Yes -103(5)	Yes 7803(a)	Yes .715(6)	Yes 946.82(4)
	7. Person	Yes 1602(2)	Yes -103(4)	Yes 7803(b)	Yes .715(5)	NP
	8. Enterprise	Yes 1602(3)	Yes -103(2)	Yes 7803(c)	Yes .715(2)	Yes 946.82(2)
	9. State of mind	NP	NP	NP	NP	NP

STATE RICO SURVEY (continued)

		Utah	Colorado	Idaho	Oregon	Wisconsin
SANCTIONS	10. Sanctions					
	-imprisonment	2° Felony 1603(5)	Class 2 Fel. -105(1)	Up To 14 yrs. 7804(e)	Class A Fel. .720(5)(a)	Class C fel. 946.84(1)
	-fine	2° Felony 1603(5)	up to $25,000 -105(1)(a) up to 3x gain or harm -105(2)	Up to $25,000 7804(e)	Yes Or Up .730(5)(a) To 3x gain or harm .720(5)(b)	Up to 2x gain or loss 946.84(2)
	-forfeiture	Yes 1603(5)	Yes -105(1)(b)	Yes 7804(f)	Yes .725	Yes 946.84(2)
	-costs	NP	Yes with 3x fine or forfeiture -105(2) -105(6)(d)(II)	NP	Yes .720(5)(b)	Yes 946.84(2) greater penalties for "Continuing Criminal Enterprise" 946.85
	11. Injunctive relief					
	-restraining order	Yes 1603(6)	Yes -105(5)	Yes 7804(g)	Yes .725	NP
	-racketeering lien	NP	NP	NP	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 1605(1)	Yes -106(5)	Yes 7805	Yes .725	Yes 946.86
	13. Brought by					
	-AG	Yes 1605(1)	Yes -106(5)	Yes 7805(b)	Yes .725(5)	Yes 946.86(3)
	-DA	Yes 1605(1)	Yes -106(5)	Yes 7805(b)	Yes .725(5)	Yes 946.86(3)
	-Private Party	Yes 1605(1)	Yes -106(6)	Yes 7805(a)	Yes .725(6)	Yes 946.86(4)
	14. Court	District 1605(1)	District -106(1)	District 7805(c)	Circuit .725(1)	Circuit 946.86
	15. Burden of Proof					
	-Law	Preponder. 1605(2)	NP	NP	NP	Reasonable Certainty 946.86(5)
	-Equity	Preponder. 1605(2)	NP	NP	NP	Reas. Cert. 946.86(5)
	16. Provision for innocent parties	Yes 1605(2)	Yes -106(1)	Yes 7805(c)	Yes .725(1),(2)	Yes 946.86(1)
	17. Preliminary relief	Yes 1605(3)	Yes -106(6)	Yes 7805(c)	Yes .725(5)	Yes 946.86(3)
	-harm requirement	NP	Yes -106(6)	NP	NP	NP
	-bond is an option	Yes 1605(3)	Yes -106(6)	Yes 7805(c)	Yes .725(5),(6)	Yes 946.86(3)
	18. Showing for relief					
	-general	NP	Yes -106(6)	NP	NP	NP
	-no special	NP	Yes -106(6)	NP	Yes .725(6)	NP

STATE RICO SURVEY (continued)

		Utah	Colorado	Idaho	Oregon	Wisconsin
	19. Scope of equitable relief					
	-divest	Yes 1605(4)(a)	Yes -106(1)(a)	Yes 7805(d)(1)	Yes .725(1)(a)	Yes 946.86(1)(a)
	-restrict	Yes 1605(4)(b)	Yes -106(1)(b)	Yes 7805(d)(2)	Yes .725(1)(b)	Yes 946.86(1)(b)
	-dissolve	Yes 1605(4)(c)	Yes -106(1)(c)	Yes 7805(d)(3)	Yes .725(1)(c)	Yes 946.86(1)(c)
	-reorganize	Yes 1605(4)(c)	Yes -106(1)(c)	Yes 7805(d)(3)	Yes .725(1)(c)	Yes 946.86(1)(c)
	-revoke permits	NP	Yes -106(1)(d)	Yes 7805(d)(5)	Yes .725(1)(d)	Yes 946.86(1)(d)
	-forfeit charter	NP	Yes -106(1)(e)	Yes 7805(d)(6)	Yes .725(1)(e)	Yes 946.86(1)(e)
	20. Scope of legal relief					
	-amount	3x + punitive 1605(1)	3x -106(7)	3x 7805(a)	3x + punitive .725(7)(a)	2x + punitive 946.86(4)
	-costs	Yes 1605(1)	Yes -106(7)	Yes 7805(a)	Yes .725(7)(a)	Yes 946.86(4)
	-attorney fees	Yes 1605(1)	Yes -106(7)	Yes 7805(a)	Yes .725(7)(a)	Yes 946.86(4)
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	Yes 1606(2)	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
	-personal property	Yes 1606(2)	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
	-money	NP	Yes -106(2)	NP	Yes .725(2)	Yes 946.86(2)(a)
	-may substitute other property if forfeited property is not available	Yes 1606(3)	NP	NP	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	NP	Yes -107	NP	Yes .730	NP
	23. Seizure without process in certain instances	NP	Yes -106(3)	NP	Yes .725(3)	NP
	24. Relation back	NP	NP	NP	NP	NP
	25. Jury trial	NP	Yes -106(7)(a)	NP	Yes .725(7)(b)	Yes 946.86(4)
	26. Estoppel	Yes 1607	Yes -106(8)	NP	Yes .725(9)	Yes 946.86(6)
	27. Intervention by State	NP	NP	NP	Yes .725(8)	NP
	28. Civil suit not precluded by criminal action	NP	Yes -106(9)	NP	Yes .725(12)	Yes 946.87(2)
	29. Priority of individual over State to compensation	NP	Yes -106(7)(b)	NP	Yes .725(7)(c)	Yes 946.86(2)(b)
	30. Fund for investigation and prosecution	NP	NP	NP	NP	

STATE RICO SURVEY (continued)

	Utah	Colorado	Idaho	Oregon	Wisconsin
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statute of limitation	NP	NP	NP	5 yrs. suspended .725(11)	6 yrs. suspended 946.87(1)
33. Construction	Fair Import 76-1-106	Liberal -108	Liberal 73-102(1)	Liberal .735(2)	Reasonable Intendment 990.001
34. Severability	NP	Yes -109	NP	NP	
35. Findings and Intent	NP	Yes -102	Yes 7802	NP	Yes 946.81

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY

		Illinois**	California	Connecticut	North Dakota	Nevada
ENACTED		August 18, 1982 1986	1982, 1985, 1986	1982	1983	July 1, 1983
AMENDED						
CRIMINAL ACTION	1. Proceeding allowed	Yes 56 1/2 § 1651	Yes Penal 186	Yes 53-393	Yes 12.1-06.1	Yes 207.350
	2. Brought by					
	AG	Yes 1655 § 5(d)	Yes 186.2(c)	Yes -394(f)	NP	NP
	DA	Yes 1655 § 5(d)	Yes 186.2(c)	Yes -394(f)	NP	Pros. Atty. 207.430
	3. Court	NP	Superior 186.5(c)(1)	Superior -398(a)	NP	NP
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1654 § 4(b)	NP	Yes -395(a)	NP	Yes 207.400(a)
	-investment or control through pattern or debt	Yes 1654 § 4(c)	NP	Yes -395(b)	Yes -06.1-03(1)	Yes 207.400(b)
	-participation through pattern or debt	Yes 1654 § 4(d)	NP	Yes -395(c)	Yes -06.1-03(2)	Yes 207.400(c)
	-conspiracy to do the above	NP	NP	NP	NP	207.400(h)
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior. At least 1 must be Class X, 1 or 2 Felony 1653 § 3(b)	2 rel., 1 after eff. date,1 w/in 10 yrs. of prior excluding imprisonment 186.2(b)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior -394(e)	NP	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 207.390
	6. Predicate offenses	Yes 1653 § 3(a)(1),(2)	Yes 186.2(a)	Yes -394(a)	Yes -06.1-01(2)(d)	Yes 207.360
	7. Person	Yes 1653 § 3(c)	NP	Yes -394(d)	NP	NP
	8. Enterprise	Yes 1653 § 3(d)	NP	Yes -394(c)	Yes -06.1-01(2)(b)	Yes 207.370
	9. State of mind	NP	NP	NP	Knowing -06.1-03(3)	NP

STATE RICO SURVEY (continued)

		Illinois**	California	Connecticut	North Dakota	Nevada
SANCTIONS	10. Sanctions					
	-imprisonment	Class I Fel. 1655 § 5a1	NP	1-20 yrs. -397(a)	Class B Fel. -06.1-03(3)	5-20 yrs. 207.400(2)
	-fine	Up to $250,000 1655 § 5(a)(2)	NP	or Up to $25,000 -397(a)	Class B Felony -06.1-03(3)	Up to $25,000 or 3x 207.400(2) gain/loss 207.410
	-forfeiture	Yes 1655 § 5(a)(3)	Yes 186.3, 186.7(a)	Yes -397(a)	NP	Yes 207.420
	-costs	NP	NP	NP	NP	Yes 207.410(2)
	11. Injunctive relief					
	-restraining order	Yes 1655 § 5(c)	Yes 186.6(a)	Yes -398(a)	Yes -06.1-04	Yes 207.430
	-racketeering lien	NP	NP	Yes -399(a), 402(c)	Yes -06.1-06	NP
CIVIL SUIT	12. Proceeding allowed	Yes 1657 § 7	NP	NP	Yes -06.1-05(1)	Yes 207.470
	13. Brought by					
	-AG	Yes 1656 § 6(b)	NP	NP	Yes -06.1-05(1)	Yes 207.490(4)
	-DA	Yes 1656 § 6(b)	NP	NP	NP	Yes 207.490(4)
	-Private Party	Yes 1657 § 7	NP	NP	Yes -06.1-05(1)	Yes 207.470(1)
	14. Court	Circuit 1657 § 7	NP	NP	District -06.1-05(2)	District 297.470(3)
	15. Burden of Proof					
	-Law	NP	NP	NP	Preponder. -06.1-05	NP
	-Equity	NP	NP	NP	Preponder. -06.1-05	NP
	16. Provision for innocent parties	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(2)	Yes 207.500(2)
	17. Preliminary relief	Yes 1656 § 6(b)	NP	NP	Yes 06.1-05(3)	Yes 207.490(5)
	-harm requirement	NP	NP	NP	NP	NP
	-bond is an option	Yes 1656 § 6(b)	NP	NP	Yes 06.1-05(3)	Yes 207.490(5)
	18. Showing for relief					
	-general	NP	NP	NP	NP	NP
	-no special	NP	NP	NP	NP	NP

STATE RICO SURVEY (continued)

		Illinois**	California	Connecticut	North Dakota	Nevada
	19. Scope of equitable relief					
	-divest	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(a)	NP
	-restrict	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(b)	NP
	-dissolve	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(c)	NP
	-reorganize	Yes 1656 § 6(a)	NP	NP	Yes 06.1-05(4)(c)	NP
	-revoke permits	NP	NP	NP	NP	NP
	-forfeit charter	NP	NP	NP	NP	NP
	20. Scope of legal relief					
	-amount	3x 1656 § 6(c)	NP	NP	3x 06.1-05(1)	3x 207.470(1)
	-costs	Yes 1656 § 6(c)	NP	NP	Yes 06.1-05(1)	Yes 207.470(1)
	-attorney fees	Yes 1656 § 6(c)	NP	NP	Yes 06.1-05(1)	Yes 207.470(1)
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	Yes 1655 § 5(a)(3)	Yes 186.3(b),(c)	NP	Yes 06.1-05(4)(f)(1)	Yes 207.460(a)
	-personal property	Yes 1655 § 5(a)(3)	Yes 186.3(b),(c)	NP	Yes 06.1-05(4)(f)(2)	Yes 207.460(a)
	-money	Yes 1655 § 5(a)(3)	NP	NP	Yes 06.1-05(4)(f)(3)	Yes 207.460(a)
	-may substitute other property if forfeited property is not available	NP	NP	NP	Yes 06.1-05(4)(g)	Yes 207.420(3)
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	NP	NP	NP	Yes 06.1-07	NP
	23. Seizure without process in certain instances	NP	NP	NP	NP	Yes 207.490(1)
	24. Relation back	NP	NP	NP	Yes 06.1-06	NP
	25. Jury trial	NP	NP	NP	NP	Yes 207.470(1)
	26. Estoppel	Yes 1656 § 6(d)	NP	NP	Yes 06.1-05(6)	Yes 207.470(2)
	27. Intervention by State	NP	NP	NP	Yes 06.1-05(10)	Yes 207.490(4)
	28. Civil suit not precluded by criminal action	NP	NP	NP	Yes 06.1-05(13)	Yes 207.470(4)
	29. Priority of individual over State to compensation	NP	NP	NP	NP	Yes 207.470(1)

STATE RICO SURVEY (continued)

	Illinois**	California	Connecticut	North Dakota	Nevada
30. Fund for investigation and prosecution	Yes 1655 § 5(g)	NP	NP	NP	NP
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statute of limitation	NP	NP	NP	7 yrs. 06.1-05(7)	5 yrs. suspended 207.520
33. Construction	Liberal 1658 § 8	NP	NP	Liberal 1-02-01	Fair Import 193.030
34. Severability	Yes 1659 § 9	NP	Yes -403(b)	NP	NP
35. Findings and Intent	Yes 1652 § 2	Yes 186.1	NP	NP	NP

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY

		Louisiana**	Mississippi	Washington	Ohio	
ENACTED		July 22, 1983	July 1, 1984	January 1, 1985	October 9, 1985	
AMENDED			1985, 1986			
CRIMINAL ACTION	1. Proceeding allowed	Yes 15:1351	Yes § 3	Yes .100(1)(b)	Yes 2923.32(B)(1)	
	2. Brought by					
	AG	NP	NP	Yes .100(1)(b)	NP	
	DA	NP	NP	Yes .100(1)(b)	NP	
	3. Court	NP	Circuit 9	Superior .100(1)(a)	NP	
ACTS	4. Prohibited Activities					
	-investment of $ from pattern or debt	Yes 1353(A)	Yes 5(1)	Yes .080(1)	Yes 2923.32(A)(3)	
	-investment or control through pattern or debt	Yes 1353 (B)	Yes 5(2)	Yes .080(2)	Yes 2923.32(A)(2)	
	-participation through pattern or debt	Yes 1353(C)	Yes 5(3)	NP	Yes 2923.32(A)(1)	
	-conspiracy to do the above	Yes 1353(D)	Yes 5(4)	Yes .080(3)	NP	
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 1352(C)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 3(d)	3 rel., 1 after eff. date, 1 w/in 5 yrs. of prior excl. imprisonment .010(15)	2 rel., 1 after eff. date, last w/in 6 yrs. 2923.31(E)	
	6. Predicate offenses	Yes 1352(A)	Yes 3(a)	Yes .010(14)	Yes 2923.31(I)	
	7. Person	NP	Yes (general) 1-3-39	NP	Yes 2923.31(G)	
	8. Enterprise	Yes 1352(B)	Yes 3(c)	Yes .010(12)	Yes 2923.31(C)	
	9. State of mind	Knowing 1353(A)	Intent 5(1)	Knowing .080(1)	NP	

STATE RICO SURVEY (continued)

		Louisiana**	Mississippi	Washington	Ohio	
SANCTIONS	10. Sanctions					
	-imprisonment	Up to 50 yrs 1354(A)	Up to 20 yrs 7(1)	Class B Fel. .080(4)	Felony, 1st°	
	-fine	Up to $1,000,000 or 3x loss 1354(A) or gain 1354(B)	Up to $25,000 7(1) or 3x loss 7(2) or gain		Alternative fine 2923.32(b)(1)(2)(a)	
	-forfeiture	Yes 1354(D)	Yes 7(4)	Yes .100(3)	Yes 2923.32(B)(3)	
	-costs	Yes 1354(B)	Yes 7(2)	Yes .100(4)(e)	Yes 2923.32(B)(2)(b)(c)	
	11. Injunctive relief					
	-restraining order	Yes 1356(D)	NP	Yes .090	Yes 2923.33	
	-racketeering lien	NP	NP	Yes .120	Yes 2923.36	
CIVIL SUIT	12. Proceeding allowed	Yes 1356	Yes 9	Yes .100	Yes 2923.34	
	13. Brought by					
	-AG	NP	Yes 9(4)	Yes .100(1)(b)	NP	
	-DA	Yes 1356(D)	Yes 9(4)	Yes .100(1)(b)	Yes 2923.34(A)	
	-Private Party	Yes 1356(E)	Yes 9(5)	Yes .100(1)(a)	Yes 2923.34(B)	
	14. Court	District 1356(D)	Circuit 9(1)	Superior .100(1)(a)	NP	
	15. Burden of Proof					
	-Law	NP	NP	Preponderance .100(9)	Clear/Convinc. 34(F)	
	-Equity	NP	NP	Preponderance .100(9)	Preponderance 34(C)	
	16. Provision for innocent parties	Yes 1356(A)(2)	Yes 9(1)	Yes .100(3)	Yes 2923.34(C)	
	17. Preliminary relief		Yes 9(4)	Yes .100(3)	Yes 2923.34(E)	
	-harm requirement	NP	NP	NP	Yes 2923.34(E)	
	-bond is an option	Yes 1356(D)	Yes 9(4)	NP	Yes 2923.34(E)	
	18. Showing for relief					
	-general	NP	Yes 9(5)	NP	NP	
	-no special	NP	Yes 9(5)	NP	NP	

STATE RICO SURVEY (continued)

		Louisiana**	Mississippi	Washington	Ohio	
	19. Scope of equitable relief					
	-divest	NP	Yes 9(1)(a)	Yes .100(4)(a)	Yes 2923.34(C)(1)	
	-restrict	NP	Yes 9(1)(b)	Yes .100(4)(b)	Yes 2932.34(C)(2)	
	-dissolve	NP	Yes 9(1)(c)	Yes .100(4)(c)	Yes 2932.34(C)(3)	
	-reorganize	NP	Yes 9(1)(c)	Yes .100(4)(c)	Yes 2932.34(C)(4)	
	-revoke permits	NP	Yes 9(1)(d)	NP	Yes 2932.34(C)(5)	
	-forfeit charter	NP	Yes 9(1)(e)	NP		
	20. Scope of legal relief					
	-amount	3x or $10,000 1356(E)	3x + punitive 9(6)	3x or actual damage .100(4)(e)	3x 2923.34(F)	
	-costs	Yes 1356(E)	Yes 9(6)	Yes .100(c)	Yes 2923.34(G)	
	-attorney fees	Yes 1356(E)	Yes 9(6)	Yes .100(c)	Yes 2923.34(G)	
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	Yes 1356(A)(1)	Yes 9(2)	Yes .100(4)(f)	Yes 2923.32(B)(3)	
	-personal property	Yes 1356(A)(1)	Yes 9(2)	Yes .100(4)(f)	Yes 2923.32(B)(3)	
	-money	Yes 1356(A)(1)	Yes 9(2)	Yes .100(4)(f)	Yes 2923.32(B)(3)	
	-may substitute other property if forfeited property is not available	NP	NP	NP	Yes 2923.32(B)(5)	
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	NP	NP	NP	NP	
	23. Seizure without process in certain instances	Yes 1356(B)	Yes 9(3)	NP	Yes 2923.36(G)	
	24. Relation back	NP	NP	NP	(time of notice)	
	25. Jury trial	NP	Yes 9(6)(a)	NP	NP	

STATE RICO SURVEY (continued)

	Louisiana**	Mississippi	Washington	Ohio	
26. Estoppel	Yes 1356(F)	NP	Yes .100(6)	Yes 2923.34(J)	
27. Intervention by State	Yes 1356(G)	Yes 9(7)	Yes, w/certification by AG .100(11)(12)	Yes 2923.34(D)	
28. Civil suit not precluded by criminal action	Yes 1356(I)	Yes 9(9)	Yes .100(13)	Yes 2923.32(D)	
29. Priority of individual over State to compensation	Yes 1356(A)(1)	Yes 9(6)(b)	NP	Yes 2923.35(B)(1)	
30. Fund for investigation and prosecution	Yes 1356(A)(3)	NP	Yes .110	Yes 2923.35(D)	
31. Reciprocity of enforcement	NP	NP	NP	NP	
32. Statute of limitation	5 years suspended 1356(H)	5 yrs. 9(8)	3 yrs. .100(7)	5 yrs. 2923.34(K)	
33. Construction	Fair Import 14:3	Common Meaning 1-3-65	Fair Import 9A.04.020(2)	NP	
34. Severability	NP	Yes (general) 1-3-77	Yes .900	NP	
35. Findings and Intent	NP	NP	NP	NP	

*NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY

			Tennessee**	New York	Delaware	North Carolina	
ENACTED			July 1, 1986	July 2, 1986 (effective date November 3, 1986)	July 9, 1986	July 12, 1986 (effective date Oct 1, 1986 expiration Oct 1, 1989)	
AMENDED							
CRIMINAL ACTION	1.	Proceeding allowed	Yes 39-1-1005	Yes 460.40	Yes 1504(a)	NP	
	2.	Brought by					
		AG	NP	Yes 460.50(1)(c)	NP	NP	
		DA	NP	Yes 460.50(1)(a)	NP	NP	
	3.	Court	NP	NP	NP	NP	
ACTS	4.	Prohibited Activities					
		-investment of $ from pattern or debt	Yes 39-1-1004(a)	Yes 460.20(1)(c)	Yes 1503(c)	Yes 75D-4(a)(1)	
		-investment or control through pattern or debt	Yes 39-1-1004(b)	Yes 460.20(1)(b)	Yes 1503(b)	Yes 75D-4(a)(1)	
		-participation through pattern or debt	Yes 39-1-1004(c)	Yes 460.20(1)(a)	Yes 1503(a)	Yes 75D-4(a)(2)	
		-conspiracy to do the above	Yes 39-1-1004(d)	NP	Yes 1503(d)	Yes 75D-4(a)(3)	
	5.	Pattern	2 rel., 1 after eff. date, last w/i 2 yrs. prior 39-1-1003(6)	3 rel., 1 after eff. date, w/in 10 yrs. 460.10(4)	2 rel., 1 after last w/in 10 yrs. 1501(2)	2 rel., 1 after eff. date, 1 w/in 4 yrs. of prior	
	6.	Predicate offenses	Yes 39-1-1003(9)	Yes 460.10(1)	Yes 1502(i)	Yes 75D-3(I)	
	7.	Person	NP	NP	NP	NP	
	8.	Enterprise	Yes 39-1-1003(3)	Yes 460.10(2)	Yes 1502(c)	Yes 75D-3(a)	
	9.	State of mind	Yes, intent, knowing	Yes intent, knwldg	NP	No 75D-4(b)	
SANCTIONS	10.	Sanctions					
		-imprisonment	Felony, range II	B Felony	Felony, 20 yrs.	NP	
		-fine	$25,000 alternative fine 3x loss/gain	Alternative fine 460.30(5) 3x	alternative fine 3x loss or gain § 1504(e)	NP	
		-forfeiture	Yes 39-1-1006(b)	Yes 460.30	Yes 1504(b)	Yes 75D-5(a)	
		-costs	NP	NP	NP	NP	
	11.	Injunctive relief					
		-restraining order	Yes 39-1-1006(f)	Yes 460.70	Yes 1505(b)	Yes 75D-5(e)	
		-racketeering lien	Yes 39-1-1007(a)	NP	Yes 1507		

STATE RICO SURVEY (continued)

		Tennessee**	New York	Delaware	North Carolina	
CIVIL SUIT	12. Proceeding allowed	Yes 39-1-1006(a)	Yes 1353	Yes 1505	Yes 75D-13	
	13. Brought by					
	-AG	Yes 39-1-1006(e)	Yes 1353(2)	Yes 1505(b)	Yes 75D-5(d)	
	-DA	NP	Yes 1353(2)	NP	Yes 75D-3(f)	
	-Private Party	NP	NP	NP	Yes 75D-8(c)	
	14. Court	Circuit or Chancery 39-1-1006	Court 1353	Superior 1505(a)	Superior 75D-8(g)	
	15. Burden of Proof					
	-Law	NP	NP	NP	NP	
	-Equity	NP	NP	NP	NP	
	16. Provision for innocent parties	Yes 39-1-1006(a)	Yes 1353	Yes 1505(a)	Yes 75D-5(i)	
	17. Preliminary relief	Yes 39-1-1006(f)	Yes 460.70	Yes 1505(a)	Yes 75D-8(a)(7)	
	-harm requirement	Yes	NP	NP	No 75D-8(b)	
	-bond is an option	Yes	NP	NP	No 75D-8(b)	
	18. Showing for relief			NP	NP	
	-general	Yes	NP	NP	NP	
	-no special	Yes	NP	Yes 1505(a)	Yes 75D-8(a)(1)	
	19. Scope of equitable relief					
	-divest	Yes 39-1-1006(a)(1)	Yes 1353(1)(a)	Yes 1505(a)	Yes 75D-8(a)(1)	
	-restrict	Yes 39-1-1006(a)(2)	Yes 1353(1)(b)	Yes 1505(a)	Yes 75D-8(a)(2)	
	-dissolve	Yes 39-1-1006(a)(3)	Yes 1353(1)(c)	Yes 1505(a)	Yes 75D-8(a)(3)	
	-reorganize	Yes 39-1-1006(a)(3)	Yes 1353(1)(d)	Yes 1505(a)	Yes 75D-8(a)(3)	
	-revoke permits	Yes 39-1-1006(a)(4)	Yes 1353(1)(d)	NP	Yes 75D-8(a)(4)	
	-forfeit charter	Yes 39-1-1006(a)(5)	Yes 1353(1)(e)	NP	Yes 75D-8(a)(5)	
	20. Scope of legal relief					
	-amount	NP	NP	3x + punitive on conviction 1505(c)	3x 75D-8(c)	
	-costs	NP	NP	Yes 1505(c)	NP	
	-attorney fees	NP	NP	Yes 1505(c)	Yes 75D-8(c)	

STATE RICO SURVEY (continued)

		Tennessee**	New York	Delaware	North Carolina	
PROPERTY SUBJECT	21. Type of property subject to forfeiture					
	-real property	Yes 39-1-1006(b)	Yes 460.30	Yes 1504(b)	Yes 75D-5(a)	
	-personal property	Yes 39-1-1006(b)	Yes 460.30	Yes 1504(b)	Yes 75D-5(a)	
	-money	Yes 39-1-1006(b)	Yes 460.30	Yes 1506(b)	Yes 75D-5(a)	
	-may substitute other property if forfeited property is not available	NP	NP			
PROCEDURE AND PRIORITY	22. Civil Investigative Demand (subpoena and/or interrogatory)	Yes 39-1-1009(a)	NP	NP	Yes 75D-6	
	23. Seizure without process in certain instances	Yes 39-1-1006(c)	NP	NP	Yes 75D-5(f)	
	24. Relation back	Yes 39-1-1007(k) (time of notice)		Yes 1507(j) (time of notice)	Yes 75D-5(l) (time of notice)	
	25. Jury trial		Yes 460.30(2)	NP		
	26. Estoppel	Yes 39-1-1006(g)	NP	Yes 1505(e)	Yes 75D-8(e)	
	27. Intervention by State	NP	NP	NP	Yes 75D-8(c)	
	28. Civil suit not precluded by criminal action	Yes 39-1-1006(i)	NP	NP	Yes 75D-10	
	29. Priority of individual over State to compensation	Yes 39-1-1010(a)	NP	Yes 1505(d)	Yes 75D-(d)	
	30. Fund for investigation and prosecution	NP	Yes 460.30(4)	Yes 1506(f)	NP	
	31. Reciprocity of enforcement	NP	NP	NP	Yes 75D-11	
	32. Statute of limitation	5 years 39-1-1006(h)	NP	5 yrs. 1505(f)	5 yrs. 75D-9	
	33. Construction	Liberal 39-6-1706	Fair Import 5	Fair Import 203	NP	
	34. Severability	Yes 12	Yes 14	NP	Yes 2	
	35. Findings and Intent	Yes 3	Yes 460.00	Yes 1501	Yes 75D-2	

*NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

Appendix B

RICO CASE STUDY*

	1985		1986		Total	
RICO Provision Alleged to be Violated						
§ 1962(a) solely	4	(4.5%)	3	(2.3%)	7	(3.2%)
§ 1962(b) solely	1	(1.1%)	1	(0.8%)	2	(0.9%)
§ 1962(c) solely	35	(39.3%)	51	(38.3%)	86	(38.7%)
§ 1962(d) solely	1	(1.1%)	2	(1.5%)	3	(1.4%)
Multiple provisions	24	(27.0%)	37	(27.8%)	61	(27.5%)
Not expressly stated	24	(27.0%)	39	(29.3%)	63	(28.4%)
Cases citing § 1962(c) (omitting cases wherein no one provision was expressly stated)	59	(90.7%)	88	(93.6%)	147	(92.5%)
Cases with Independent Grounds for Federal Jurisdiction						
No independent grounds	42	(47.2%)	50	(37.6%)	92	(41.4%)
Other grounds for jurisdiction	47	(52.8%)	83	(62.4%)	130	(58.6%)
Cases Making Specific Reference to the ABA Task Force Report	1	(1.1%)	8	(6.0%)	9	(4.1%)
Cases with Final Judgment Awarded						
Final judgment	15	(16.9%)	27	(20.3%)	42	(18.9%)
No final judgment	74	(83.1%)	106	(79.7%)	180	(81.1%)
Cases with Motion to Dismiss						
No motion made	16	(18.0%)	13	(9.8%)	29	(13.1%)
Motion made and denied	37	(41.6%)	31	(23.3%)	68	(30.6%)
Motion made and granted	33	(37.1%)	78	(58.6%)	111	(50.0%)
Motion made and partially granted/partially denied	2	(2.2%)	11	(8.3%)	13	(5.9%)
Cases Where Racketeering Activity was Limited to One Episode						
Episode (1 place, 1 time)	15	(16.9%)	39	(29.3%)	54	(24.3%)
Nonepisode (pattern)	74	(83.1%)	94	(70.7%)	168	(75.7%)
Parties' Allegations of "Professional Criminal Type" Activity						
None alleged	83	(93.3%)	121	(91.0%)	204	(91.9%)
Alleged: bribery	2	(2.2%)	4	(3.0%)	6	(2.7%)
commercial bribery	0	(0.0%)	1	(0.8%)	1	(0.5%)
embezzlement	0	(0.0%)	2	(1.5%)	2	(0.9%)
extortion	1	(1.1%)	2	(1.5%)	3	(1.4%)
theft	1	(1.1%)	2	(1.5%)	3	(1.4%)
political corruption	2	(2.2%)	0	(0.0%)	2	(0.9%)
other	0	(0.0%)	1	(0.8%)	1	(0.5%)

	Pre-Sedima	Post-Sedima
CASES WITH FINAL JUDGMENT		
Final judgment ordered	4 (10.5%)	38 (20.7%)
No damages awarded	2 (50.0%)	27 (71.1%)
Damages awarded	2 (50.0%)	11 (28.9%)
AMONG CASES WHERE FINAL JUDGMENT WAS AWARDED		
Held RICO violation	4 (100.0%)	28 (73.7%)
Held no RICO violation	0 (0.0%)	10 (26.3%)
Arbitration sought by defendant	2 (50.0%)	11 (28.9%)
No arbitration sought	2 (50.0%)	27 (71.1%)
Arbitration ordered	1 (25.0%)	4 (10.5%)
Arbitration refused	1 (25.0%)	6 (15.8%)
CASES WITH MOTION TO DISMISS		
Motion granted	17 (44.7%)	94 (51.1%)
Reason: lack of pattern	0 (0.0%)	38 (40.4%)
lack of adequate particularity in complaint	5 (29.4%)	12 (12.8%)
insufficient allegations of predicate offenses	5 (29.4%)	21 (22.3%)
failure to allege injury required by statute	7 (41.2%)	20 (21.3%)
failure to name required enterprise as defendant	1 (5.9%)	11 (11.7%)
failure to allege prior criminal conviction	2 (11.8%)	0 (0.0%)
other	6 (35.3%)	27 (28.7%)
Motion partially granted/denied	1 (2.6%)	12 (6.5%)
Reason: lack of pattern	0 (0.0%)	1 (8.3%)
lack of adequate particularity in complaint	1 (100.0%)	1 (8.3%)
failure to name required enterprise as defendant	0 (0.0%)	2 (16.7%)
other	0 (0.0%)	5 (41.7%)
PREDICATE OFFENSES ALLEGED VIOLATED		
Mail fraud	24 (63.2%)	108 (58.7%)
Wire fraud	13 (34.2%)	93 (50.5%)
Security fraud	16 (42.1%)	36 (19.6%)
Criminal prosecution	1 (2.6%)	6 (3.3%)
None expressly stated	1 (2.6%)	27 (14.7%)

NATURE OF THE CASES

Security fraud	18	(47.4%)	53	(28.8%)	71	(32.0%)
Bribery	3	(7.9%)	12	(6.5%)	15	(6.8%)
Common law fraud	16	(42.1%)	101	(54.9%)	117	(52.7%)
Antitrust/unfair competition	3	(7.9%)	12	(6.5%)	15	(6.8%)
Nonsecurities fraud	2	(5.3%)	18	(9.8%)	20	(9.0%)
Labor-related	1	(2.6%)	9	(4.9%)	10	(4.5%)
Theft or conversion	0	(0.0%)	15	(8.2%)	15	(6.8%)
Not expressly stated	16	(42.1%)	49	(26.6%)	65	(29.3%)

TOTAL NUMBER OF CASES IN SURVEY: 222
Total number of pre-Sedima cases: 38 (17.1%)
Total number of post-Sedima cases: 184 (82.9%)
Total number of 1985 cases: 89
Total number of 1986 cases: 133
Among the total number of 1985 cases:
pre-Sedima cases: 38 (42.7%)
post-Sedima cases: 51 (57.3%)
Among the total number of 1986 cases:
pre-Sedima cases: 0 (0.0%)
post-Sedima cases: 133 (100.0%)

PLAINTIFFS INVOLVED IN SUIT, OF TOTAL CASES SURVEYED**

Business	95
Natural person	112
Class action	10
Non-profit organization	3
Government	10
Other	9

DEFENDANTS INVOLVED IN SUIT, OF TOTAL CASES SURVEYED**

Business	171
Natural person	107
Non-profit organization	2
Other	11

CASES WITH A RULE 11 MOTION

No motion made	87	(97.8%)	126	(94.7%)	213	(95.9%)
Motion made and denied	1	(1.1%)	5	(3.5%)	6	(2.7%)
Motion made and granted	1	(1.1%)	1	(0.8%)	2	(0.9%)
Motion made/denied/warned	0	(0.0%)	1	(0.8%)	1	(0.5%)

* Study covers all reported cases (222) decided from January 1, 1985 through December 31, 1986 wherein RICO (18 U.S.C. §§ 1961-1968 (1982)) was at issue. Statistics reflect the total number of applicable cases for each year, the corresponding percentages for each year, the aggregate number of applicable cases, and the aggregate percentages. This data is subject to two caveats. It is not known if reported decisions, which are fewer in number than filings, are representative of filings; the number of decisions in many of the subcategories are also so small that percentages may be misleading. *See supra* note 193 (discussion of ABA Task Force study).

** One suit may involve more than one type of plaintiff. Where that is true, more than one category of plaintiff is noted.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS 1986 DATA ON CIVIL RICO FILINGS***

Month	Civil RICO Filings	Caseload Terminated
January	78	4
February	56	7
March	83	11
April	99	17
May	84	25
June	96	17
July	79	16
August	93	26
September	96	35
October	106	45
November	90	47
December	109	44
Total	1069	294

As of December 31, 1986, 894 Civil RICO cases were pending.

*** Letter of Pamela D. Crawford, Civil Program Analyst, Administrative Office of the United States Courts, dated March 24, 1987 to Professor G. Robert Blakey.

SELECTED INDEX