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# An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: Mother of God - Is this the End of RICO?

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# An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God—Is This the End of RICO?”

*G. Robert Blakey\* and Thomas A. Perry\*\**

I.	INTRODUCTION .....	853
II.	MYTHS THAT BOLSTER EFFORTS TO REWRITE RICO .....	860
	A. <i>The Organized Crime Myth</i> .....	860
	B. <i>The Legitimate Business Myth</i> .....	868
	C. <i>The Litigation Floodgate Myth</i> .....	869
	D. <i>The Two Letters Myth</i> .....	874
	E. <i>The Contract Dispute Myth</i> .....	875
	F. <i>The Racketeer Label Myth</i> .....	875
	G. <i>The Litigation Abuse Myth</i> .....	877
	H. <i>The Litigation Abuse Remedies Myth</i> .....	879
	I. <i>The Garden Variety Fraud Myth</i> .....	881
	J. <i>The Adequacy of State Law Myth</i> .....	909
	K. <i>The Adequacy of Law Enforcement Myth</i> .....	912
	L. <i>The Multiple Damages Myth</i> .....	916
	M. <i>The Federalism Myth</i> .....	920
III.	PROPOSALS FOR REFORM .....	924
	A. <i>Title</i> .....	926
	B. <i>Predicate Offenses</i> .....	926
	C. <i>Burden of Proof</i> .....	928
	D. <i>Government Suits</i> .....	928
	1. <i>Exclusion of Key Governmental Entities</i> . . . .	929
	2. <i>Exclusion of Key Kinds of Governmental Damages</i> .....	931
	E. <i>General Private Suits for Multiple Damages</i> .....	932

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1.	Who Can Sue .....	933
2.	Conduct for Which Suit May Be Brought ..	934
	<i>a. Insider Trading</i> .....	934
	<i>b. Consumer Fraud</i> .....	937
	<i>c. Against Whom Suit May Be Brought</i>	940
	<i>d. Remedy Authorized</i> .....	942
F.	<i>Personal Injury Private Suits for Multiple Dam-</i>	
	<i>ages</i> .....	945
1.	Limitation to Immediate Serious Bodily In-	
	jury .....	946
2.	Limitation to Crime of Violence Narrowly	
	Defined .....	947
3.	Limitation to Elements of Violation .....	947
4.	Limitation to Damage Excluding Pain and	
	Suffering Allowable Under Applicable State	
	Law .....	949
5.	Limitation of Punitive Damages by a Special	
	Standard and Burden of Proof .....	949
G.	<i>Limitation on Order of Proof</i> .....	950
H.	<i>Treble Damages for Injury to Business or Property</i>	
	<i>After Criminal Conviction</i> .....	951
I.	<i>Statute of Limitations</i> .....	952
J.	<i>Affirmative Defense for Good Faith and Limitation</i>	
	<i>on Discovery</i> .....	953
K.	<i>Pleading with Particularity</i> .....	954
L.	<i>Abatement and Survival</i> .....	955
M.	<i>Racketeer Label</i> .....	955
N.	<i>Definitions</i> .....	956
O.	<i>International Service of Process</i> .....	957
P.	<i>Exclusive Jurisdiction</i> .....	957
Q.	<i>Stylistic Amendment</i> .....	959
R.	<i>Retroactivity</i> .....	959
S.	<i>Pattern</i> .....	961
T.	<i>Parens Patriae</i> .....	968
U.	<i>Prejudgment Interest</i> .....	968
V.	<i>Resolution or Clarification of Issues in Conflict</i> ..	968
W.	<i>Discovery and Findings in Arbitration</i> .....	974
X.	<i>Demonstration Related Litigation Abuse</i> .....	975
Y.	<i>Necessities and Forfeiture</i> .....	977
Z.	<i>Labor Disputes</i> .....	978
IV.	CONCLUSION .....	979

"Myth: a belief given uncritical acceptance . . . ."†

"When liberty is mentioned, we must always be careful to observe whether it is not really the assertion of private interests which is thereby designated."††

## I. INTRODUCTION

In 1970 Congress enacted the Organized Crime Control Act, Title IX of which is known as the Racketeer Influenced and Corrupt Organizations Act, or RICO.<sup>1</sup> Congress enacted the 1970 Act to "strengthen[] the legal tools in the evidence-gathering process, [to] establish[] new penal prohibitions, and [to] provid[e] enhanced sanctions and new rem-

† WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1497 (1981).

†† G. HEGEL, *THE PHILOSOPHY OF HISTORY* pt. 4, § 3, ch. 2, at 430 (1900).

1. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (1970) [hereinafter RICO] (codified at 18 U.S.C. §§ 1961-1968 (1988)). The law review and related commentary on RICO is extensive. The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 n.2 (1985) termed the bibliography in Milner, *A Civil RICO Bibliography*, 21 CAL. W.L. REV. 409 (1985), "thorough." For the best general treatments of the statute from a variety of perspectives, see generally CRIMINAL DIV., U.S. DEP'T OF JUSTICE, *RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS* (2d rev. ed. 1988); CRIMINAL DIV., U.S. DEP'T OF JUSTICE, *CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS* (1988); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982); Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526 (1987); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); Blakey & Goldstock, *On the Waterfront: RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341 (1980); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983); see also Lynch, *RICO: The Crime of Being a Criminal* (pts. 1-4), 87 COLUM. L. REV. 661 (1987); Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988); Lynch, *A Reply to Michael Goldsmith*, 88 COLUM. L. REV. 802 (1988). For the most consistently thoughtful student works, see Note, *"Mother of Mercy—Is This the End of RICO?"—Justice Scalia Invites Constitutional Void for Vagueness Challenge to RICO Pattern*, 65 NOTRE DAME L. REV. (forthcoming 1990); Note, *Who Should Pay When Federally Insured Pension Funds Go Broke?—A Strategy for Recovering from Wrongdoers*, 65 NOTRE DAME L. REV. 310 (1990) [hereinafter Note, *Who Should Pay*]; Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989) [hereinafter Note, *Functions*]; Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179 (1988) [hereinafter Note, *Innocence by Association*]; Note, *Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It*, 63 NOTRE DAME L. REV. 535 (1988); Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83 (1986) [hereinafter Note, *Reconsideration of Pattern*]; Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526 (1986) [hereinafter Note, *Treble Damages*]; Note, *A Uniform Limitations Period for Civil RICO*, 61 NOTRE DAME L. REV. 495 (1986); Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566 (1985) [hereinafter Note, *Burden of Proof*]; Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945 (1984); Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382 (1982); Note, *Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law*, 58 NOTRE DAME L. REV. 587 (1983).

edies . . . ."<sup>2</sup> RICO covers violence, the provision of illegal goods and services, corruption in labor or management relations, corruption in government, and commercial fraud.<sup>3</sup> Congress found in 1970 that the sanctions and remedies available to combat these crimes under the law then in force were unnecessarily limited in scope and impact.<sup>4</sup> Consequently, it provided a wide range of new criminal and civil sanctions to control these offenses, including imprisonment, forfeiture, injunctions, and treble damage relief for persons injured in their business or property by violations of the statute.<sup>5</sup> At the time, the President,<sup>6</sup> the Presi-

2. RICO, *supra* note 1, 84 Stat. at 923.

3. See generally Blakey, *supra* note 1, at 300-06.

4. RICO, *supra* note 1, 84 Stat. at 923.

5. See 18 U.S.C. §§ 1963, 1964 (1988).

6. See *Message from the President of the United States Relative to the Fight Against Organized Crime* [hereinafter *President's Message*], reprinted in *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 444 (1969) [hereinafter *Senate Hearings*]. That support, at least for private civil RICO sanctions, no longer exists. The change in position of the Department of Justice, reflecting the views of the Administration, is traced and criticized in 133 CONG. REC. H9050-57 (daily ed. Oct. 27, 1987) (statement of Rep. John Conyers). Rep. Conyers remarked that "[t]he best explanation lies in a change of personalities—the substitution at the position of the Deputy Attorney General in the Department [of Justice] for J.D. Lowell Jensen, a widely experienced Federal and State prosecutor, of Arnold I. Burns, a prominent New York corporations and securities lawyer." *Id.* at 9051; see also *Hearings on S. 438 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *S. 438 Hearings*] (hearings not officially printed as of current date) (testimony of John C. Keeny, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice) (stating that "S.438 . . . represents the general approach to RICO reform that we have come to prefer . . .").

The Judicial Conference of the United States also supported RICO in 1970. That support, too, no longer exists. In 1986 the Judicial Conference changed its position on RICO. Noting a "veritable 'explosion' of civil RICO suits," the Conference indicated that federal jurisdiction was granted under RICO for "every case in which two or more instances of mail or wire fraud are alleged. . . ." JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1986). As such, it recommended that "Congress . . . seriously consider narrowing the reach of [the] statute." *Id.* at 12. In 1987 the Conference further justified its support for RICO reform by rejecting testimony before the House Judiciary Subcommittee on Criminal Justice that the number of civil RICO cases was not as large as thought and indicating its belief that the number was "substantially larger than [could] be statistically documented given the judiciary's statistical practices and . . . require[d] a disproportionately large amount of time to resolve." JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 76 (1987). The Conference reaffirmed its position in 1988. See JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (1988) (stating that curtailing RICO would have a "positive impact on the federal civil RICO caseload").

Chief Justice William Rehnquist is also in favor of RICO reform. See Rehnquist, *Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 11-13 (1989) (originally presented at the Brookings Institution's Eleventh Seminar on the Administration of Justice, Apr. 7, 1989). Noting that most of the civil RICO filings are "garden-variety civil fraud cases of the type traditionally litigated in state courts," *id.* at 9, the Chief Justice faulted RICO's inclusion of a civil counterpart to criminal mail and wire fraud prosecutions, suggesting that the criminal side of these two offenses is kept in check by prosecutorial discretion. "[T]here is no such thing as prosecutorial dis-

dent's Commission on Crime and Administration of Justice,<sup>7</sup> and the American Bar Association<sup>8</sup> called for the private civil remedies of RICO. In response, the Senate passed the Bill seventy-three to one.<sup>9</sup> The House passed an amended Bill three hundred forty-one to twenty-six.<sup>10</sup> The Senate passed the amended House Bill without objection, and the President signed the legislation on October 14, 1970.<sup>11</sup>

At first, the Department of Justice moved slowly to use RICO in criminal prosecutions. Today, RICO is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and neo-Nazi and anti-Semitic hate group prosecutions.<sup>12</sup> The Department

cretion," he noted, "to limit the use of civil RICO by plaintiffs' attorneys." *Id.* at 10. Nevertheless, he acknowledged that RICO specifically avoided mentioning "organized crime." He noted that "the statute was intentionally written in general terms so as to permit flexible application." *Id.* at 11; see also W. Rehnquist, Remarks of the Chief Justice at the American Bar Association Mid-Year Meeting in Denver, Colo. 11-12 (Feb. 6, 1989) (source on file with Author) (stating that "[a] sharp curtailment of the basis for civil RICO actions . . . would . . . help to cut down on the work of the federal courts").

7. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 208 (1967) [hereinafter COMM'N REPORT] (recommending "[c]ivil proceedings . . . to stop unfair trade practices . . . by organized crime businesses").

8. See *Senate Hearings*, *supra* note 6, at 259-72 (testimony of Rufus King, Chair, Special Committee on Organized Crime, Criminal Law Section, American Bar Association); *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 537-94 (1970) [hereinafter *House Hearings*] (testimony of Edward L. Wright, President-Elect, American Bar Association). American Bar Association support no longer exists. See generally Blakey & Cessar, *supra* note 1, at 572-77 (stating that "[t]he turn around of the Association's official policy . . . 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").

9. 116 CONG. REC. 972 (1970).

10. *Id.* at 35,363.

11. *Id.* at 36,296, 37,264. Since 1970, 29 states enacted similar state legislation. For a chart analyzing the statutes of the various states, see App. A, *infra* p. 988. See generally STATE CIVIL RICO: DRUG ENFORCEMENT NEWSLETTER, Dec. 1989 (describing the implementation of state RICO legislation in Arizona, Oregon, Washington, Colorado, and Tennessee); Strasser, *State Racketeering Laws Are Giving Prosecutors a New Weapon Against Crime*, GOVERNING, Apr. 1988, at 42, 44 (describing state RICO efforts in Florida, Washington, Arizona, and New Jersey). Fred Strasser states:

With a growing number of exceptions, states have let little RICOs sit on the books like well-sheathed swords.

. . . [O]bserves John G. McKenzie, who tracked state RICO developments for the National Association of Attorneys General in 1985 . . . "[t]he reason is that for the most part, you just don't have a strong prosecutorial body in the states."

. . . "It's like brain surgery, [says G. Robert Blakey]. The legislature has authorized it, but until you get brain surgeons, there's no one around to do the operation."

*Id.*

12. See *Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 109-11 (1985) [hereinafter *Oversight Hearings*] (statement of Assistant Attorney General Stephen S. Trott); see also *United States v. Yarbrough*, 852 F.2d 1522, 1526-28, 1540, 1546 (9th Cir. 1988) (RICO prosecution of the Bruders Schweigh, a white-hate group, for robbery, murder, and other crimes, including the murder of Alan Berg), *cert. denied*, 109 S. Ct. 171

(1989); *United States v. Angiulo*, 847 F.2d 956 (1st Cir. 1988) (RICO prosecution of a Boston organized crime family); *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980) (RICO prosecution of a Japanese corporation for mail fraud and bribery); *United States v. Mandel*, 431 F. Supp. 90 (D. Md. 1977) (conviction of the Governor of Maryland for RICO mail fraud and bribery), *aff'd in part and vacated and remanded in part*, 591 F.2d 1347 (4th Cir.) (en banc), *aff'd per curiam by equally divided court en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 461 (1986), *conviction vacated*, 862 F.2d 1067 (4th Cir. 1988) (vacating the conviction in light of 18 U.S.C. § 1346 (1988), which set aside *United States v. McNally*, 483 U.S. 350 (1987)). See generally B. JACOBS, THIMBLE RIGGERS: THE LAW V. GOVERNOR MARVIN MANDEL (1984) (recounting the story of the Mandel investigation and prosecution); G. O'NEILL & D. LEHR, THE UNDERBOSS: THE RISE AND FALL OF A MAFIA FAMILY (1989) (recounting the story of the Angiulo investigation and prosecution); S. SINGULAR, TALKED TO DEATH: THE MURDER OF ALAN BERG AND THE RISE OF THE NEO-NAZIS (1987) (recounting the story of the investigation and prosecution of the Bruders Schweigh).

Following *McNally*, Mandel was readmitted to the Maryland Bar. Barringer, *When Good Standing Has Different Meanings*, N.Y. Times, July 28, 1989, at B10, col. 3. He is now a lobbyist in the state capitol. NCNB's *Legal Staff in Texas Mushrooms*, Wall St. J., Dec. 12, 1989, at B6, col. 4.

Independent studies also conclude that RICO is effective against sophisticated forms of crime. The President's Commission on Organized Crime praised RICO highly and recommended that states adopt similar legislation. President's Comm'n on Organized Crime, *The Edge: Organized Crime, Business, and Labor Unions: Report to the President and the Attorney General* 251 (1986) (describing the statute as "effective"). The General Accounting Office, in its study of federal organized crime prosecutions, concluded:

Prior to the passage of [RICO], attacking an organized criminal group was an awkward affair. RICO facilitated the prosecution of a criminal group involved in superficially unrelated criminal ventures and enterprises connected only at the usually well-insulated upper levels of the organization's bureaucracy.

.....

Before the Act, the government's efforts were necessarily piecemeal, attacking isolated segments of the organization as they engaged in single criminal acts. The leaders, when caught, were only penalized for what seemed to be unimportant crimes. The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal prosecution. With the passage of RICO, the entire picture of the organization's criminal behavior and the involvement of its leaders in directing that behavior could be captured and presented.

*Organized Crime: 25 Years After Valachi: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 100th Cong., 2d Sess. 505 (1988) (statement of David C. Williams, Director, Office of Special Investigations, General Accounting Office); see also McFadden, *The Mafia of 1980's: Divided and Under Siege*, N.Y. Times, Mar. 11, 1987, at 1, col. 1; *Busting the Mob*, U.S. NEWS & WORLD REP., Feb. 3, 1986, at 24; *The Mob on Trial*, NEWSDAY, Sept. 7, 1986, at 4.

Significant prosecutions continue. See Butterfield, *21 Indicted in New England As Core of Organized Crime*, N.Y. Times, Mar. 27, 1990, at A8, col. 1. The *New York Times* article reported a racketeering indictment quoting tapes of an organized crime initiation ceremony that included the following oath: "I want to enter into this organization to protect my family and to protect all my friends. I swear not to divulge this secret and to obey, with love and omerta." *Id.* The indictment also quoted instructions to new members: "concerning the rules of the La Cosa Nostra and agreed to kill any individual who posed a threat to the organization and its members." *Id.*

Forfeitures under RICO and similar drug statutes increasingly are having a significant impact on criminal enterprises. Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. Times, Jan. 7, 1990, § 1, at 18, col. 1 (reporting that the Department of Justice seized \$580 million in 1989, \$207 million in 1988, and \$94 million in 1986).

of Justice also is implementing the civil provisions of the Act.<sup>13</sup> The private bar did not begin to bring civil RICO suits until about 1975. When it did, a firestorm of controversy broke out, and today RICO is endangered from a variety of quarters.<sup>14</sup> The arguments against RICO

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13. See *Oversight Hearings*, *supra* note 12, at 116-17 (reviewing litigation against mob-controlled unions); see also Tumulty, *U.S. Files Suit to Oust Mob from N.Y. Waterfront*, L.A. Times, Feb. 15, 1990, at A1, col. 1 (reporting a civil RICO suit by the Justice Department against the International Longshoremen's Association, alleging extortion, embezzlement, bribes, mail fraud, assault, and murder, concluding that a "hidden tax of payments to organized crime" was imposed that cost consumers millions of dollars, and noting the opposition by more than 250 members of Congress as well as former presidential candidate Gov. Michael S. Dukakis to the use of civil RICO against unions); Hagedorn, *U.S. Is Said to Plan RICO Suit Against Longshoremen's Union*, Wall St. J., July 19, 1989, at B10, col. 1 (stating that the Justice Department is planning a civil RICO suit against the International Longshoremen's Association, one of four unions identified as corrupt by the President's Commission on Organized Crime). See generally *Federal Government's Use of Trusteeships Under the RICO Statute: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. (1989). Compare *Teamster Denies Fighting U.S. Through His Union*, N.Y. Times, Dec. 17, 1989, § 1, at 37, col. 1 (reporting litigation brought to challenge settlement of civil RICO suit between the Government and the Teamsters Union in which the Government charged that the Union was under the influence of organized crime) with *U.S. and Teamsters Reach Accord That Avoids a Racketeering Trial*, N.Y. Times, Mar. 14, 1989, at A1, col. 4 (reporting that the Justice Department and the International Brotherhood of Teamsters reached a tentative settlement of a civil RICO suit in which the Government originally accused the Teamsters of having made a "devil's pact with La Cosa Nostra") and *Teamster Accord: Each Side Finds Some Different Meanings*, N.Y. Times, Mar. 16, 1989, at A27, col. 1 (reporting that the Teamsters and the Government continue to work on the settlement of a civil RICO suit over criminal influence in the Union demonstrated by 340 convictions over 20 years in more than 200 separate prosecutions and lawsuits).

14. Compare Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. Rev. 55 and Note, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO?*, 19 Loy. L.A.L. Rev. 851 (1986) with Lacovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-1986). The principal players supporting RICO include Public Citizen, a consumer group; the United States Public Interest Research Group, a state consumer group; the National Conference of State Legislatures; the National Association of Insurance Commissioners; the National Association of Attorney Generals; and the National Association of Securities and Commercial Law Attorneys, a plaintiff's lawyers group. Those seeking reform include the National Association of Manufacturers; the AFL-CIO; the American Civil Liberties Union; the American Institute of Certified Public Accountants; the American Bar Association; the American Bankers Association; the Securities Industry Association; the Future Industries Association; and the American Life League, an antiabortion group. See *Advocates of RICO Revision Gird for Third Try*, CONG. Q., Feb. 18, 1989, at 322 (describing the groups involved and the history of unsuccessful efforts since 1985 to secure reform); Abramson, *High-Powered Bid to Gut RICO Law Is Derailed by Unrelated Scandals, Backers' Seeming Greed*, Wall St. J., Nov. 9, 1989, at A18, col.1.

RICO stimulates wide-ranging commentary. Several papers and magazines wrote basically favorable editorials. See, e.g., *Refine RICO, Don't "Reform" It* (editorial), N.Y. Times, Aug. 27, 1989, § 4, at 18, col. 1. The editorial stated, "Industry groups . . . haven't proved that [RICO] needs more than fine-tuning . . . [The reform legislation] would selectively spare particular groups . . . for proven fraud. Worse, it would apply the relief retroactively . . . [T]he law doesn't deserve to be overthrown by a mislabeled [reform] bill." *Id.*; see also "Fixing" RICO: *Beware of Solutions to Nonexistent Problems* (editorial), Philadelphia Inquirer, Sept. 1, 1989, at 18-A, col. 1. This editorial stated that "[t]his is an odd time to be weakening a law that lets victims of white-collar crime fight for compensation. . . . By gutting the civil provisions of [RICO], lawmakers



are fueled by a series of myths that are not supported by a careful anal-

would be pulling their biggest con job in years." *Id.*; see also *Don't Dull This Sword* (editorial), Miami Herald, Aug. 29, 1989, at 15A, col. 1. "Sadly, as the Justice Department begins to wield . . . [the] sword [of RICO] on Wall Street, Chicago's commodities pits and the savings-and-loan industry, Congress seems ready to yield [to reform requests]. . . It must not happen. [The] alleged danger to legitimate business . . . appears vastly overstated. . . RICO . . . must be wielded with discretion. It does not need to be reforged." *Id.*; see also *The Wrong Way to Reform RICO* (editorial), Bus. Wk., Aug. 28, 1989, at 102. "RICO's function as an adjunct of law enforcement is valuable and deserves to be preserved. Congress should think twice before undermining this critical device for policing the business community." *Id.*; see also *Which Room for RICO?* (editorial), Phoenix Gazette, Jan. 22, 1990, at A8, col. 1. "RICO is in pretty good shape . . . . But over in [the] [o]perating [r]oom . . . Sen. Dennis DeConcini, D-Ariz., and Rep. Frederick Boucher, D-Va. . . . [are] twirling a meat ax . . . and firing up a chain saw. Their surgical procedure is clearly designed to eviscerate RICO". *Id.* Other papers wrote basically unfavorable editorials. See, e.g., *RICO Overkill* (editorial), Wash. Post, Oct. 25, 1989, at A26, col. 1 (arguing that "[t]he explosion of RICO suits is an abuse that must be addressed by Congress"); *Wounding the RICO Beast* (editorial), Wash. Times, Nov. 27, 1989, at F2, col. 1. "The RICO . . . monster lives . . . . This guarantees that businesses, protesters and other non-mobsters will continue to get Edward G. Robinson treatment from political foes and ambitious prosecutors. That's a disgrace." *Id.*; see also *Hold RICO up to the Light* . . . (editorial), Chicago Tribune, Feb. 5, 1988, at C2, col. 1. "If we think the RICO treatment for mob and drug suspects is OK, but are worried that the threat of assets seizure or triple damages . . . could unfairly destroy a legitimate business . . . , we should press for more specific legislation . . . . The unintended effects of RICO can be as dangerous as a trip-mine." *Id.*; see also *RICO: Only Repeal Will Do* (editorial), L.A. Times, Oct. 25, 1989, at B6, col. 1 ("believ[ing] that the statute's flaws are so fundamental that nothing less than Congressional repeal will suffice"). One paper, the Wall Street Journal, makes advocating the rewriting of RICO a major project. As one commentator noted, "The Wall Street Journal's editorial page has been preoccupied with RICO reform, putting more passion and more column inches into the issue than almost any other in the past two years." Vise, *The Time Is Ripe to Rewrite RICO*, WASH. POST NAT'L WEEKLY ED., Nov. 20, 1989, at 31 (describing more than 40 Wall Street Journal editorials). See, e.g., *RICO, First Blood?* (editorial), Wall St. J., Nov. 15, 1989, at A26, col. 1. "RICO is a horror. . . Repealing RICO is a key test of Congressional seriousness about public policy. . . . RICO has become Frankenstein's monster." *Id.*; see also *Changing of the Prosecutors* (editorial), Wall St. J., Sept. 11, 1989, at A18, col. 1 (reporting that Drexel "decided to plead guilty . . . because prosecutors . . . threatened to RICO Drexel out of business before any trial"); *RICO v. RICO* (editorial), Wall St. J., Dec. 14, 1989, at A22, col. 1 (reporting that "[t]he sole intent of the statute [was] getting the Mafia"); *Ham-Sandwich RICO* (editorial), Wall St. J., Aug. 11, 1989, at A12, col. 1. "We have . . . been long complaining about . . . apply[ing] RICO to non-Mafia individuals and businesses [, because] . . . juries have little choice but to convict if prosecutors simply yell racketeers! . . . How . . . [long] before someone finally drives a stake through the heart of the most abusive legal invention since the Alien and Sedition Laws?" *Id.* Most of the editorials are unsigned, but occasionally their principal draftsman, L. Gordon Crovitz, writes under his own name. See, e.g., Crovitz, *RICO Needs No Stinkin' Badges*, Wall St. J., Oct. 4, 1989, at A30, col. 3. Crovitz and his legal vision occasionally attract the attention of the press. See generally Taylor, *Daily Diatribe of the American Right*, Am. Law., Jan./Feb. 1989, at 170. Stuart Taylor stated:

L. Gordon Crovitz [is] a mild-spoken law graduate of both Oxford (on a Rhodes Scholarship) and Yale of alternately brooding and cherubic appearance, who has become at the age of 30 the voice of the editorial page [of the Wall Street Journal] on legal issues . . . . He . . . [is] . . . [one of] the most conspicuous polemicist[s] for [a] hard-edged neoconservative approach to law . . . . He is an articulate and vitriolic scourge of liberals, "judicial activists," Congress, "vigilante" special prosecutors, plaintiffs lawyers, the American Civil Liberties Union, the Securities and Exchange Commission, and others. His causes include a quasi-monarchical vision of presidential power, getting the judiciary out of the constables' hair and into the deregulation of business, . . . turning back the clock of the common law about 30 years [, and RICO].

ysis of the statute, its legislative history, or the facts. The myths, however, have a debilitating impact on the interpretation and application of the statute. Chiefly, these myths undermine RICO's basic legitimacy. When the statute's legitimacy is undermined, efforts are facilitated to get the judiciary<sup>15</sup> or Congress<sup>16</sup> to rewrite the statute. If these efforts succeed, victims of sophisticated forms of crime everywhere will be harmed. Accordingly, these myths need to be thoroughly examined before any RICO reform goes forward.

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*Id.* at 171

15. When the private bar began to bring RICO suits, the district courts reacted with hostility and undertook judicially to redraft the statute in an effort to dismiss civil suits in all possible ways. See Jost, *The Fraudulent Case Against RICO*, CAL. LAW., May 1989, at 49. "In addition to the accustomed difficulties of complex litigation, plaintiffs' lawyers who allege RICO violations expect one additional roadblock: a hostile judge. . . . The point is acknowledged by lawyers on both sides of the issue and by judges themselves." *Id.* at 51; see also Horn, *Judicial Plague Sweeps U.S.*, NAT'L L.J., May 23, 1983, at 13, col. 1. Indeed, between 1975 and 1984, 61% of the reported decisions dismissed the plaintiff's complaint on various motions of the defendants. *Oversight Hearings*, *supra* note 12, at 126-27 (statement of Assistant Attorney General Stephen S. Trott). Since *Sedima* the dismissal rate is 58.6%. Blakey & Cessar, *supra* note 1, app. B, at 619.

16. For a comparison of reform proposals and current law, see App. B, *infra* p. 1012.

Until the recent investigation and indictment of Michael Milken, former head of Drexel Burnham Lambert Inc.'s junk bond operation, on 98 counts of RICO and criminal securities fraud for cheating his clients, the public controversy over RICO largely focused on its private civil enforcement mechanism. The furor now, however, includes RICO's criminal sanctions.

The Milken indictment seeks \$1.8 billion in forfeitures from Milken and his codefendants. "Junk Bond" Leader Is Indicted by U.S. in Criminal Action, N.Y. Times, Mar. 30, 1989, at A1, col. 6. If found guilty, Milken's illegal earnings will be exceeded only by those of Al Capone. Swartz, *Why Mike Milken Stands to Qualify for Guinness Book*, Wall St. J., Mar. 31, 1989, at 1, col. 4. Milken agreed to post a bond to secure his portion of the forfeiture of \$700 million in cash and other assets and to post as bail a \$1 million bond and his Encino, California residence. *Milken Will Put up \$700 Million Guarantee*, N.Y. Times, Apr. 15, 1989, at 35, col. 4. Drexel itself agreed to plead guilty to securities fraud and pay \$650 million in fines and sanctions. Cohen, *With Signed Checks, Formal Guilty Plea, Drexel Ends Ordeal*, Wall St. J., Sept. 12, 1989, at A3, col. 4. While Drexel publicly protests that it was unfairly forced to plead guilty because it feared that pretrial restraints would put it out of business, the company privately told its employees that, if indicted under RICO, it would "have the opportunity to post a bond to forestall any pretrial restraints, [which] will permit us to continue operations." Adler, *Heated Argument: Are RICO Seizures a Violation of Rights, As Critics Contend?*, Wall St. J., Feb. 15, 1989, at A1, col. 1. Drexel also informed the United States District Court that its plea would be "voluntary." Cohen, *Drexel's Supportive Words on Milken Raise Federal Ire*, Wall St. J., Mar. 31, 1989, at A6, col. 3 (stating that the plea agreement was made "voluntarily and without coercion").

Newspaper columnists decry RICO's pretrial restraints as an unconstitutional interference with the presumption of innocence. See, e.g., Adler, *supra*, at A1, col. 1 (analyzing the commentary of William Safire and others). In fact, defendants, on a proper showing, may be detained in jail before trial consistent with the Constitution. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987). It is doubtful that greater pretrial rights ought to be afforded to property than liberty. Nevertheless, those who seek to reform RICO are not moving to alter its criminal provisions. See *Criminal RICO Unlikely to Change*, CONG. Q., Feb. 18, 1989, at 324 (statement of Rep. Rick Boucher) (stating that "I don't think there is a lot of 'poor Drexel' sentiment"); Boucher, *Trying to Fix a Statute Run Amok*, N.Y. Times, Mar. 12, 1989, § 3, at 2, col. 3 (stating that "there is no sentiment to limit RICO on the criminal side").

## II. MYTHS THAT BOLSTER EFFORTS TO REWRITE RICO

### A. *The Organized Crime Myth*<sup>17</sup>

1.1 Myth: RICO Was Designed to Deal Only with Organized Crime.

1.2 Fact: RICO Was Designed Not Only to Deal with Organized Crime, but Also with Other Forms of Enterprise Criminality.

Many myths about RICO bolster the various arguments for its judicial or legislative reform. But the first and the most powerful myth—and the underlying basis of many of the other charges against the statute—is that RICO was designed to deal *only* with organized crime.<sup>18</sup> Accordingly, any application of the statute beyond organized

17. "It would be time-saving," Judge Jerome Frank once observed, "if [courts] had a descriptive catalogue of recurrent types of fallacies encountered in arguments addressed to [them]." *United Shipyards v. Hoey*, 131 F.2d 525, 526 (2d Cir. 1942), *cert. denied*, 318 U.S. 791 (1943). Judge Frank echoed Arthur Schopenhauer, who said, "It would be a very good thing if every trick could receive some short and obviously appropriate name, so that when a man used this or that particular trick, he could be at once reproached for it." C. OGDEN & I. RICHARDS, *THE MEANING OF MEANING* 132 (1956) (quoting Arthur Schopenhauer). This effort to catalogue and name the RICO myths follows these valuable suggestions.

18. See *Oversight Hearings*, *supra* note 12, at 241 (testimony of a panel, including Ray J. Groves, Chair, American Institute of Certified Public Accountants). Groves stated:

[T]he 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.

*Id.* On the contrary, although the "legislative history [of RICO] clearly demonstrates that [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots," *Russello v. United States*, 464 U.S. 16, 26 (1983), and "the major purpose of [RICO was] to address the infiltration of legitimate business by organized crime," *United States v. Turkette*, 452 U.S. 576, 591 (1981), Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *Turkette*, 452 U.S. at 590. Additionally, the "notion [that RICO] applies only to organized crime in the classic 'mobster' sense" also is rejected. See, e.g., *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.) (citation omitted), *cert. denied*, 449 U.S. 830 (1980). As the Supreme Court observed in *H.J. Inc. v. Northwestern Bell Tel. Co.*, the notion that RICO is limited to organized crime "finds no support in the Act's text, and is at odds with the tenor of its legislative history." 109 S. Ct. 2893, 2903 (1989). "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *Id.* at 2905; see also *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1984) (holding that RICO applies to all persons, "not just mobsters"); *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir.) (noting that "courts and . . . commentators have persuasively and exhaustively explained why . . . RICO . . . [is not limited to] organized crime . . ." (citing Blakey, *supra* note 1)), *cert. denied*, 469 U.S. 831 (1984).

The legislative history of the 1970 statute is replete with statements by the Bill's sponsors that fully demonstrate that they intended it to apply beyond organized crime. See, e.g., 116 CONG. REC. 35,204 (1970) (remarks of Rep. Robert McClory, a House floor manager of RICO) (stating that "every effort was made [in drafting RICO] to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with all who might be affected by this legislation—whether part of the crime syndicate or not"). Legitimate businesses, in short, "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Sedima*, 473 U.S. at 499.

It is suggested forcefully that the modern definition of organized crime ought to include fi-

crime is illegitimate and abusive. Implicitly, the point is made that it would not be improper, despite the limitations of separation of powers, for a court to return the statute to its original design.<sup>19</sup> This myth gave

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nance. See Stein, *The New Organized Crime*, N.Y. Times, Jan. 21, 1990, § 3, at 13, col. 2. Benjamin J. Stein wrote:

John Gotti, you poor, obsolete loser. You've missed the boat. You forgot Willie Sutton's lesson — go where the money is.

. . . .  
 . . . The real organized crime, the riskless kind that pays off in the hundreds of millions and billions, is . . . in lower Manhattan, on Broad Street, on Wall Street. It's across the continent, in a gleaming marble cube on Rodeo Drive.

The only truly meaningful kind of taking of other people's property, the kind that adds up to enough to support an army—of lawyers—is being done by the American financial establishment, at least the tawdriest part of it . . . . It's so big, so perfectly safe, that it has redefined "organization" and "crime" in the Western world.

Example: the sale of fraudulent bonds. This has been done in a small way in the whole history of the Republic. But in the last decade, it has been lifted to unheard-of levels.

What, after all, were the bonds of Campeau, issued for hundreds of millions of dollars within the last two years, with many of them now close to worthless? What were the hundreds of millions of Merv Griffin and Resorts International bonds that were issued within the last 12 months and are already in default? Or the bonds for Seaman Furniture or SCI Television or Gillett Holdings?

. . . .  
 John Gotti, you poor devil, those savings and loan guys . . . know the score. . . .  
 Why bother to sell numbers or drugs or prostitution? . . .

. . . .  
 . . . The old-style organized criminal had at least to deliver gin or prostitution. But the new way, the Wall Street way, means you don't deliver a thing. . . . You sell a worthless bond, and nobody lays a hand on you.

It is a lesson for you, John Gotti. If you have young relatives, don't teach them the fish wholesaling business, and forget linen supply. If you want to do someone a favor, try corporate finance at a big-name school. Try calling in some favors in Vegas to get them started in mergers and acquisitions at a big firm in Beverly Hills or New York. The world has changed. Be in finance. . . . They learned from you and now you can learn from them.

*Id.*  
 As a statute aimed at the specific goal of eliminating organized crime that also allows a more general application, RICO fits easily into a consistent pattern of federal legislation enacted over the past half century or more aimed at a specific target, but drafted without limiting it to the specific target. See, e.g., 18 U.S.C. § 1951 (1988) (extortion) (held not limited to racketeering in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978)); *id.* § 1952 (Travel Act) (held not limited to organized crime bribery of public officials but included organized crime bribery of private individuals in *Perrin v. United States*, 444 U.S. 37, 41-45 (1979)); *id.* § 1953 (lottery tickets) (held not limited to organized crime in *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966)); *id.* § 2113(b) (bank robbery) (held not limited to gangsters in *Bell v. United States*, 462 U.S. 356, 361-62 (1983)); *id.* § 2421 (white slave traffic) (held not limited to commercial prostitution in *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917)). See generally *Blakey & Cessar, supra* note 1, at 529 n.13 (collecting similar cases); *Greenhouse, 1871 Rights Law Now Used for Many Causes*, N.Y. Times, Aug. 26, 1988, at B6, col. 3 (stating that the Civil Rights Act of 1871, passed to protect former slaves but not so limited, was a "powerful tool for challenging a widening array of official actions that have nothing to do with race" and that constitute "by far the biggest category of civil cases").

19. But see *H.J. Inc.*, 109 S. Ct. at 2905 (holding that "rewriting [RICO] is a job for Congress, if it is so inclined, and not for [a] [c]ourt"); *Sedima*, 473 U.S. at 500 (finding that "it is a form of statutory amendment [in]appropriately undertaken by the courts"); *United States v. Ian-*

rise to several judicial attempts to read limitations into the statute's plain language.

In their first effort to redraft civil RICO, the federal district courts read an organized crime limitation into the statute.<sup>20</sup> Because the limitation had no support in the text of the statute, and it was specifically rejected in the legislative debates, the Second, Fifth, Seventh, and Eighth Circuits quickly rejected it.<sup>21</sup> The next judicial effort involved reading an antitrust-like competitive injury limitation into the statute.<sup>22</sup> The Seventh and Eighth Circuits quickly turned this effort aside.<sup>23</sup> Then, the district courts hit upon the racketeering injury<sup>24</sup> and the criminal conviction<sup>25</sup> limitations. Both limitations, which were shamefully adopted by a sharply divided Second Circuit, were squarely repudiated by the Supreme Court in its *Sedima* decision.<sup>26</sup> It also was necessary for the Supreme Court to repeat its *Sedima* teaching that RICO is not limited to "mobsters" in its *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>27</sup> decision.<sup>28</sup> After *H.J. Inc.*, this myth should be dead. It is doubtful, however, that the myth will ever die as long as media cover-

niello, 808 F.2d 184, 192 n.15 (2d Cir. 1986) (stating that "any 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) (noting that "[t]he sweep of RICO is admittedly broad, and our function is to apply the language of the statute as drafted by Congress, not to rewrite the statute as we might prefer it to be"); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982).

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

21. For a list of cases rejecting this limitation, see *Alcorn County v. United States Interstate Supplies, Inc.*, 731 F.2d 1160, 1167 n.10 (5th Cir. 1984).

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

23. See *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir.), cert. denied, 464 U.S. 1002 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982), aff'd on rehearing en banc, 710 F.2d 1361 (8th Cir.), cert. denied, 464 U.S. 1008 (1983).

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

25. See, e.g., *McCarthy v. Pacific Loan, Inc.*, 600 F. Supp. 137, 140 (D. Haw. 1984).

26. *Sedima*, 473 U.S. at 479. The Second Circuit suggested that civil RICO suits against "respected and legitimate enterprises" were "extraordinary, if not outrageous." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985). E.F. Hutton & Co. was included among the cited legitimate enterprises. But see M. STEVENS, *SUDDEN DEATH: THE RISE AND FALL OF E.F. HUTTON* (1989); Welles, *Case Not Closed*, BUS. WK., Feb. 24, 1986, at 98 (reporting that E.F. Hutton pleaded guilty to 2000 counts of mail fraud in a multimillion dollar bank scam); see also *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 395 n.14 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985) (stating that "the white collar crime alleged in some RICO complaints against 'legitimate' businesses is in some ways at least as disturbing . . ."). Those who oppose the application of RICO to legitimate business are apparently unaware of the substantial body of literature on white-collar crime by so-called respected businesses. See, e.g., Ross, *How Lawless Are Big Companies*, FORTUNE, Dec. 1, 1980, at 57 (noting that among 1043 major corporations between 1970-1980, there were 188 citations for 163 separate offenses: 98 antitrust violations; 28 kickbacks, bribes, or illegal rebates; 21 illegal political contributions; 11 frauds; and 5 tax evasions).

27. 109 S. Ct. 2893 (1989).

28. See *H.J. Inc.*, 109 S. Ct. at 2902-05; see also *Sedima*, 473 U.S. at 495.

age of RICO continues to reflect the myth in virtually every piece written on the statute.<sup>29</sup>

29. The typical newspaper editorial or article on RICO will contain parenthetical background language that purports to describe the statute. See, e.g., *RICO Still Drives a Hard Bargain*, CRAIN'S CHICAGO BUS., Feb. 26, 1990, at 8 (describing RICO as "passed by Congress in 1970 to fight organized crime"); *Regulating the Financiers* (editorial), Financial Times, Mar. 13, 1990, at 18, col. 1 (describing RICO as "designed to fight organised crime"); Mansnerus, *As Racketeering Law Expands, So Does Pressure to Rein It in*, N.Y. Times, Mar. 12, 1989, at E4, col. 1 (describing RICO as a "federal racketeering law, passed in 1970 as a weapon against mobsters"). The editorial or article then will go on to deal with whatever aspect of the statute on which it wishes to focus. This kind of world-wide coverage makes the Organized Crime Myth a part of the common understanding of most literate people.

Judges, too, continue to develop theories, which are sometimes superficially appealing, that threaten to eviscerate the statute, particularly as it applies to white-collar crime. The handiwork of United States District Court Judge Milton I. Shadur is illustrative. He was one of the first to adopt the rule that an "enterprise" could not be a "person," that is, also a defendant under 18 U.S.C. § 1962(c) (1938). Compare *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20 (N.D. Ill. 1982) with *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982). His reasoning helped convince his court of appeals, the Seventh Circuit. See *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). The Seventh Circuit, however, carefully qualified its adoption of the rule by promising recovery under § 1962(a). *Haroco*, 747 F.2d at 401-02. Judge Shadur promptly broke this promise in *P.M.F. Servs., Inc. v. Grady*, 681 F. Supp. 549, 555-56 (N.D. Ill. 1988). But see *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 647 F. Supp. 1026 (N.D. Ill. 1986) (on remand). The court stated that "[t]he Seventh Circuit's interpretation of Section 1962(a) in *Haroco* . . . supports plaintiffs' [right to recovery]." So as not to "shield deep corporate pockets from RICO liability . . . when the fruits of racketeering come to rest in a corporate-enterprise, that enterprise is within RICO's intended reach. Section 1962(a) is designed to recover these proceeds." *Id.* at 1033. Judge Shadur's analysis, nevertheless, helped persuade two circuit courts to his view. See *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert. denied*, 110 S. Ct. 76 (1989); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989). It did not persuade the Fourth Circuit. *Busby v. Crown Supply, Inc.*, 896 F.2d 836-40 (4th Cir. 1990) (citing *Blakey & Cessar*, *supra* note 1). Judge Shadur's reading of the text and legislative history of the statute was considered persuasive. See *Rose*, 871 F.2d at 358 (holding that "requiring the allegation of income use or investment injury 'is consistent with . . . the literal language [of section 1692(a)]'" (quoting *P.M.F. Servs.*, 681 F. Supp. at 555)); *Grider*, 868 F.2d at 1150 (restricting its interpretation to RICO's "own language" (citing *P.M.F. Servs.*, 681 F. Supp. at 555)). In fact, it is woefully inadequate.

Analytically, injury in § 1962(a) litigation may flow from the racketeering acts or the investment (or use of the income or its proceeds) in an enterprise, or both. It is, of course, possible to be injured by a racketeering act that does not produce income (unsuccessful fraud) that is part of a pattern of racketeering acts that, as a whole, does produce income (successful frauds). Nothing in the statute, however, says injury by the first kind of act is not injury within the statute. See *Sedima*, 473 U.S. at 495-99 (finding that damage is not limited to racketeering or competitive injury). The investment only rule, however, would preclude recovery for such acts.

When racketeering acts produce income and that income (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 disadvantage, and (3) to the entity or individual from whom it was obtained by the racketeering acts, or all three. Little doubt exists, although the decisions have not discussed the concept in detail, that direct investment or competitive injury is within the statute. See *Sedima*, 473 U.S. at 497 n.15 (stating that direct or competitive injury is included). Nevertheless, the decisions adopting the use or invest rule assume, largely without detailed analysis, that the victim of a racketeering act is not separately injured by the use or investment of the income or its proceeds. This view is mistaken. Property, including money, taken by theft or fraud is converted. The victim may sue for fraud or

To assert that an offender's treatment should be determined by the

conversion. *See, e.g.,* Harley-Davidson Motor Co. v. Custom Cycle Delight, Inc., 664 F.2d 1371, 1372 (9th Cir. 1982) (applying California law). Any distinct act of dominion over the property, however, is a separate conversion. *See, e.g.,* Gowin v. Heider, 237 Or. 266, 319, 391 P.2d 630, 636 (1964) (holding that "the plaintiff [has] his election to make either the original conversion or the later one the basis of [his] action . . ."). Unauthorized use of money may be a distinct act of dominion under this reasoning. *See, e.g.,* Borrello v. Perera Co., 381 F. Supp. 1226, 1232 (S.D.N.Y. 1974), *aff'd per curiam*, 512 F.2d 1380 (2d Cir. 1975) (applying New York law). Accordingly, even the investment only rule ought not to prevent a victim of a racketeering act that produces income from bringing suit for its investment or use in the enterprise. *See, e.g.,* Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 398 (6th Cir. 1989) (holding that it is "[not] impossible for the plaintiffs to show that they had been injured"); Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co., 883 F.2d 48, 51 (7th Cir. 1989) (stating that multiple use "go[es] to the issue of damages").

*Grider v. Texas Oil & Gas Corp.* suggests that a distinction must be made under § 1962(a) between "received" and "receive." *Grider*, 868 F.2d at 1149. The court, however, confuses surface syntax with deep structure semantics. *See generally* G. LEECH, SEMANTICS 178-201 (1974) (discussing semantics and syntax); *id.* at 263-90 (discussing semantic equivalence and "deep semantics"). No difference in meaning, in short, is represented by these three syntactically alternative ways of expressing the same semantic idea: (1) If he receives and uses money, then . . . ; (2) If he received and used money, then . . . ; (3) If he has received money and then uses it . . . . The court's contrary construction of RICO is bad semantics and worse law.

Just as importantly, the court ignores other crucial aspects of the text. Section 1962(a) not only requires "use or invest," but also requires that the person be a principal in the racketeering activity. *See* 18 U.S.C. § 1962(a) (1988) (referring to activity "in which such person has participated as a principal"). As such, it requires both "racketeering activity" and "use or invest." Injury by either would, therefore, be injury "by reason of a violation of section 1962. . . ." *Id.* § 1964(c).

If text were not enough, the use or invest rule is inconsistent with *Sedima* and *Haroco*. *See Sedima*, 473 U.S. at 495, 497-98; *Haroco*, 473 U.S. at 608-09; *see also* Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 742-48 (5th Cir. 1989). The issue is not settled in the Seventh Circuit. *See* Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1340 n.1 (7th Cir. 1989) (Ripple, J., concurring) (pointing out that use injury was not decided).

Judge Shadur's analysis of the legislative history of RICO stands on no better footing. *See P.M.F. Servs.*, 681 F. Supp. at 555 (stating that § 1964 was a "late edition, spot-welded to an already fully-structured criminal statute"). His views, first expressed in *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983), were followed by the Second Circuit in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 488-90 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). Their precedential value, however, is now in considerable doubt because of the Supreme Court's total rejection in *Sedima* of the conclusions drawn from Judge Shadur's historical analysis of RICO. *See* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1081 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). They are also plainly wrong. *See generally* Blakey, *supra* note 1, at 249-80.

In 1968 the Presidential Commission on Law Enforcement and Administration of Justice recommended the adoption of antitrust type remedies to control sophisticated forms of crime. COMM'N REPORT, *supra* note 7, at 483. Bills were introduced in the Senate and House that included private enforcement provisions. *See, e.g.,* S. 2048, 90th Cong., 1st Sess. (1967), 113 CONG. REC. 17,999 (1967). The American Bar Association testified before the Senate in favor of the treble damages remedy. *See Senate Hearings, supra* note 6, at 259 (testimony of Rufus King, Chair, Special Committee on Organized Crime, Criminal Law Section, American Bar Association); *id.* at 556 (report of the antitrust section of the American Bar Association). The President, at that time, also favored the treble damages remedy. *President's Message, supra* note 6, reprinted in *Senate Hearings, supra* note 6, at 449. The Senate passed the bill, of course, with only express government criminal and civil relief and without any private enforcement mechanism, but a private claim for relief for actual damages was implied in the statute, at least based on 1970 jurisprudence. *Compare* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (implying private remedy under § 27 of

color of a collar is contrary not only to the text and legislative history of the statute, but also to the most basic premise of our jurisprudence: equal justice under law.<sup>30</sup> The victim of a RICO violation needs redress,

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the Securities Exchange Act of 1934) with *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982) (holding that the jurisprudence at the time of the legislation, not later, governs implications). Nevertheless, when the Bar Association testified before the House that the private enforcement mechanism should be reinserted, it was restored to the Bill. The Senate then accepted the Bill and the President signed it. See *House Hearings, supra* note 8, at 543-44 (testimony of Edward L. Wright, President-Elect, American Bar Association). Contrary to Judge Shadur's conclusion in *P.M.F. Servs.*, RICO is not, in short, a criminal statute with an ill-designed treble damages afterthought. See *Iannelli v. United States*, 420 U.S. 770, 786-89 (1975) (describing RICO as "a carefully crafted piece of legislation"); 116 CONG. REC. 35,204 (1970) (statement of Rep. Robert McClory) (noting that "no single measure has received more thorough consideration . . ."). From the beginning, Senator Roman Hruska, one of RICO's principal sponsors, recognized that RICO's "criminal provision . . . [was] intended primarily as an adjunct to the civil provision," which he "consider[ed] . . . [one of] the more important features" of the Bill. 115 *id.* at 6993-94; see also *id.* at 602 (statement of Sen. Roman Hruska) (arguing that "the principal value of this legislation may well be found to exist in its civil provisions . . ."). See generally *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987) (stating that "'private attorneys general' [are for] a serious national problem for which public prosecutorial resources are deemed inadequate"); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987) (finding that the drafters viewed private attorneys general as "vigorous incentives for plaintiffs to pursue RICO claims"); *Sedima*, 473 U.S. at 493 (holding that "private attorney general provisions . . . are in part designed to fill prosecutorial gaps").

Judge Shadur's views on other aspects of RICO often are reversed or rejected by the Seventh Circuit. See, e.g., *United States v. Yonan*, 623 F. Supp. 881, 883-86 (N.D. Ill. 1985) (providing a construction of "associated with"), *rev'd*, 800 F.2d 164, 167-68 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987); *Northern Trust Banks/O'Hare v. Inryco, Inc.*, 615 F. Supp. 828, 831 (N.D. Ill. 1985) (holding that a single scheme did not constitute a "pattern"), *rev'd by Morgan v. Bank of Waukegan*, 804 F.2d 970, 973-77 (7th Cir. 1986). Judge Shadur's single scheme decision on "pattern" was rejected unanimously by the Supreme Court in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989).

The policy objections to the invest or use rule are equally strong. Only the Supreme Court's decision in *Sedima* prevented § 1962(c) from being confined to indirect or competitive injury as a result of 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 limitation, however, might be the effect of the adoption of the person-enterprise rule under § 1962(c) and a narrowly defined use or invest rule 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. See *Sedima*, 473 U.S. at 497-98.

More than 100 years ago, the Supreme Court noted, "It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed . . . Such a construction [makes it possible to] annul[] [it] and render[] it superfluous and useless." *Pillow v. Roberts*, 54 U.S. (13 How.) 472, 476 (1851). 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 construction: (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." 3 R. POUND, *JURISPRUDENCE* 488 (1959). Spurious judicial construction threatened, he found, to make "laws . . . worth little" and to "break down" the law. *Id.* at 490.

30. Few would doubt that the Magna Carta is "rightly revered as . . . the symbol of . . . supremacy of law . . . which [is] the proudest possession of Englishmen and their descendants everywhere." R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 22 (1957). Among other things, it called for "one measure of wine throughout . . . [the] Kingdom." R.



and he should be able to obtain it regardless of the social status of the offender. In fact, RICO was designed to deal with organized crime. As such, the organized crime myth is particularly powerful because it is a half truth, and its refutation requires conceding the correctness of the myth maker's basic proposition, but then explaining why it is false, because it is not the whole truth. Too often, the listener never gets beyond the concession.

RICO was designed to deal with organized crime, but it also was crafted more broadly to deal with all forms of "enterprise criminality."<sup>31</sup> Indeed, in 1968 the President's Commission on Law Enforcement and Administration of Justice, whose studies led to RICO, addressed not only organized crime, but also white-collar crime.<sup>32</sup> The text and

STRINGHAM, MAGNA CARTA: FOUNTAINHEAD OF FREEDOM 235 (1966) (text of Magna Carta cl. 35). Equality, in short, is one of the key "watchwords" of a "matured legal system." R. POUND, THE SPIRIT OF THE COMMON LAW 142 (1921).

31. RICO's purpose is "the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior, that is, enterprise criminality—from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors." Blakey & Gettings, *supra* note 1, at 1013-14, cited in *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

Properly, state RICO legislation also is not limited to organized crime or its infiltration of legitimate business. *See, e.g., State v. Thompson*, 751 P.2d 805, 815 (Ct. App.), *cert. granted*, 765 P.2d 1277 (Utah 1988) (holding that a "nexus to organized crime" is not required for a Utah RICO action); *Banderas v. Banco Central del Ecuador*, 461 So. 2d 265, 269-70 (Fla. Dist. Ct. App. 1985) (stating that a Florida RICO action is not limited to organized crime and that no "garden variety" fraud exclusion exists); *Commonwealth v. Yacoubian*, 339 Pa. Super. 413, 420, 489 A.2d 228, 231 (1985) (holding that a Pennsylvania RICO action is not limited by the preamble to infiltration of legitimate business).

While RICO was aimed at organized crime, its use "as a weapon against 'white collar crime' . . . is not contrary to the intent of Congress but is in fact one of the 'benefits' Congress saw the Act as providing." *Papai v. Cremosnik*, 635 F. Supp. 1402, 1411 (N.D. Ill. 1986). Judge George Pratt in *Furman v. Cirrito* put it well:

[Congress] 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.

It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm. 741 F.2d 524, 529 (2d Cir. 1984).

32. *See* COMM'N REPORT, *supra* note 7, at 155-58. The Commission found that "white-collar crime" is "now commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute." *Id.* at 155. These crimes "are only rarely dealt with through the full force of criminal sanctions." *Id.* at 156. The Commission concluded:

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.

*Id.* The Commission further noted that "[s]erious erosion of morals accompanies [the white-collar offender's violation]. [Those who so] flout the law set an example for other businesses and influence individuals, particularly young people, to commit other kinds of crime on the ground that everyone is taking what he can get." *Id.* at 158.

legislative history of the statute, therefore, demonstrate beyond serious doubt that RICO is properly applied to white-collar crime.<sup>33</sup> If the Supreme Court's decision in *Sedima* left any doubt, the Court's *H.J. Inc.* decision eliminated it, when it squarely refused to read an organized crime limitation into the statute.<sup>34</sup> First, the Court recognized that an organized crime limitation would imply that only those acts committed by a group, instead of any individual, would fall within RICO's scope.<sup>35</sup> The Court observed, however, that "RICO's language supplies no grounds to believe that Congress meant to impose such a limit on the Act's scope."<sup>36</sup> Second, "no such restriction is explicitly stated."<sup>37</sup> Third, Congress specifically limited other titles of the Organized Crime Control Act to organized crime, which demonstrates that if Congress wanted such a limitation in title IX, Congress knew how to create it.<sup>38</sup> The legislative history, too, demonstrates that RICO's principal sponsors expressly rejected the limitation.<sup>39</sup> Thus, based on the wording of

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33. See Blakey, *supra* note 1, at 280. In the article, this Author stated:

[A] review of the legislative history of S. 30 [the Organized Crime Control Act] in general, and Title IX [RICO] in particular, establishes the following points beyond serious question:

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

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

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

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

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

*Id.* (emphasis in original). The article's review of the legislative history of RICO was cited with approval in *Russello v. United States*, 464 U.S. 16, 28 (1983).

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

35. *Id.* at 2903.

36. *Id.*

37. *Id.*

38. *Id.* The Court recognized that the title of the Act, its stated purpose, and its legislative history might lend themselves to a narrow view of the Act, but it recognized that the text was not so limited. *Id.* The general rule is that a restrictive title or preamble may not be used to restrict a clear text. See, e.g., *United States v. Briggs*, 50 U.S. (9 How.) 351, 355 (1850); *People v. Burns*, 197 Colo. 284, 288, 593 P.2d 351, 354 (1979); *Roush v. State*, 413 So. 2d 15, 18-19 (Fla. 1982); *Dorsey v. State*, 402 So. 2d 1178, 1180-81 (Fla. 1981) (citing *Yazzo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889)); see also *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (holding that "the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words").

39. See, e.g., S. REP. NO. 617, 91st Cong., 1st Sess. 215 (1969) (individual views of Sen. Philip Hart and Sen. Edward Kennedy) (complaining that the Organized Crime Control bill "goes beyond organized criminal activity"); 116 CONG. REC. 18,913-14 (1970) (statement of Sen. John L. McClellan). Senator McClellan stated:

The danger posed by organized crime-type offenses to our society has, of course, provided the

the statute and its legislative history, the Supreme Court unequivocally rejected the organized crime limitation. Legally, at least, the Organized Crime Myth ought to be left in its coffin with a stake driven through its heart.

### B. *The Legitimate Business Myth*

2.1 Myth: RICO Was Designed to Deal Only with the Infiltration of Legitimate Business.

2.2 Fact: RICO Was Designed Not Only to Deal with the Infiltration of Legitimate Business, but Also Other Forms of Enterprise Criminality.

While legitimate businesses attempted to confine RICO to organized crime, illegitimate businesses tried to confine RICO to legitimate

occasion for our examination of the working of our system of criminal justice. But should it follow . . . that any proposals for action stemming from that examination be limited to organized crime?

. . . [T]his line of analysis . . . is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination. . . .

. . . .

In addition, the objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.

The objection, moreover, has practical as well as theoretical defects. Even as to titles of [the Organized Crime Control bill] needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases . . . . On the other hand, each title . . . which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible, while preserving the ability to administer the act and its effectiveness as a law enforcement tool.

*Id.*; see also *id.* at 35,204 (statement of Rep. Richard Poff). Rep. Poff argued:

It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?

*Id.*; see also *H.J. Inc.*, 109 S. Ct. at 2904-05. The Supreme Court noted that “[o]pponents [of RICO] criticized [the Organized Crime Control Act] precisely because it failed to limit the statute’s reach to organized crime. In response, the statute’s sponsors made evident that the omission of this limit was no accident, but a reflection of OCCA’s intended breadth.” *Id.* at 2904 (citations omitted). The Court concluded:

The thrust of these explanations seems to us reasonably clear. The occasion for Congress’ action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.

*Id.* at 2905.

business.<sup>40</sup> This myth, too, is a half truth. In fact, RICO was designed to deal with organized crime's infiltration of legitimate business,<sup>41</sup> but it was also designed to deal with organized crime itself.<sup>42</sup> In short, RICO was designed to deal with a variety of forms of enterprise criminality in the upperworld and the underworld. The Supreme Court rejected the Legitimate Business Myth in *Turkette*.<sup>43</sup> This myth also should be confined to its crypt.

### C. The Litigation Floodgate Myth

3.1 Myth: The Courts Are Being Inundated with New Litigation Under Civil RICO.

3.2 Fact: Civil RICO Litigation Is Neither Wholly New nor of Floodgate Proportions.

Along with the attacks on the application of RICO beyond organized crime and its infiltration of legitimate business, RICO's opponents underscore their efforts to confine its scope by asserting that including other types of cases within the statute would inundate federal courts with new litigation, particularly under RICO's civil provisions.<sup>44</sup> In fact, civil RICO litigation is neither wholly new nor of floodgate proportions.

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40. The issue was first raised in a panel opinion of the Sixth Circuit. See *United States v. Sutton*, 605 F.2d 260, 262-63 (6th Cir. 1979), *rev'd*, 642 F.2d 1001 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981). The First Circuit followed suit in *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981). While *Turkette* was *sub judice* before the Supreme Court, a Mafia chieftain and his lieutenant conversed:

Mr. Angiulo: "Our argument is we're illegitimate business."

Mr. Zannino: "We're a shylock."

Mr. Angiulo: "We are a bookmaker. We're selling marijuana. We are illegal here, illegal there. Arsonists. We are everything."

Mr. Zannino: "Pimps."

Mr. Angiulo: "So what?"

Mr. Zannino: "Prostitutes."

Mr. Angiulo: "The law does not cover us, is that right?"

Mr. Zannino: "That's the argument."

Note, *Functions*, *supra* note 1, at 662 n.64. See generally G. O'NEILL & D. LEHR, *supra* note 12, at 233; Butterfield, *Jury Hears Tape on Gang Wars in Boston Trial*, N.Y. Times, Sept. 8, 1985, § 1, at 26, col. 1. Angiulo also commented, "[I]f they don't prove that a legitimate business was infiltrated we're off the hook. . . . We can do anything we want. They can stick RICO. . . . I wouldn't be in a legitimate business for all the fuckin' money in the world to begin with." G. O'NEILL & D. LEHR, *supra* note 12, at 233.

41. The Supreme Court observed that "the major purpose of Title IX [was] to address the infiltration of legitimate business by organized crime." *Turkette*, 452 U.S. at 591.

42. The Court concluded that it was "unpersuaded[, however,] that Congress . . . confined [RICO] to . . . only the infiltration of legitimate business." *Id.* at 590 (emphasis in original).

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

44. See 132 CONG. REC. H9371 (daily ed. Oct. 8, 1986) (remarks of Rep. Rick Boucher) (stating that "the federalization of thousands of mere commercial disputes, irrespective of the amount in controversy or the diversity of citizenship of the parties threatens to swamp a Federal judiciary that was never designed to handle this kind of case").

For the twelve-month period ending June 30, 1988, 239,634 civil cases were filed in the United States district courts.<sup>45</sup> RICO litigation is, of course, included in that number. Data of the Administrative Office of the United States District Court indicate, however, that RICO civil filings occur only at the rate of approximately 82 out of 20,000 general filings each month.<sup>46</sup> Nonetheless, it is argued that these data understate the actual number of filings because litigants are required only to designate one "box," or claim for relief, when filling out filing cards. As such, the real number of civil RICO filings is hidden in other categories.<sup>47</sup> Estimates of the real RICO figure vary according to who is estimating and what evidence is being cited. The worst-case scenario suggested by Representative Rick Boucher, an advocate of reform, is that up to one-sixth, or seventeen percent, of the cases in the district courts deal with RICO.<sup>48</sup> Accordingly, the real number would be, not around 1000, but around 40,000. This number is simply incredible because it may be tested and rejected in light of other known figures.

Of the total number of civil cases filed in 1986, 3059 involved securities violations.<sup>49</sup> That same year, 28.8 percent of the reported RICO cases dealt with securities violations.<sup>50</sup> From these data, an estimate

45. DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table S-8, at 114 (1988) [hereinafter 1988 ANNUAL REPORT].

46. For data on RICO filings, see App. C, *infra* p. 1018.

47. See, e.g., S. 438 Hearings, *supra* note 6, (statement of Philip A. Lacovara, Senior Counsel for Litigation and Legal Policy, General Electric Co., and Chair, Business/Labor Coalition for Civil RICO Reform) [hereinafter Lacovara Statement]. Mr. Lacovara stated:

[T]he opponents of civil RICO reform claim that civil RICO lawsuits make up only a small fraction of the civil suits actually . . . filed . . . [The data reported], in fact, vastly underestimates the true number of private civil RICO claims filed in the federal district courts.

. . . .

. . . [T]he Civil Cover Sheet specifically states that the party filling out the form should "place an X in one box only," when categorizing the nature of the action. In addition, the instructions on the reverse side of the Civil Cover Sheet state that "if the cause fits more than one nature of suit, select the most definitive." . . .

. . . [T]here is every reason to believe that many, many cases that include RICO claims are counted in some other category in the Administrative Office's statistics. . . .

. . . .

. . . Perhaps as many as ten times the number of civil cases than the Administrative Office statistics reflect include a civil RICO claim as part of the complaint.

*Id.* One of the biggest beneficiaries of the RICO reform legislation, if it is made retroactive, would be General Electric Co., which has been sued under RICO for \$1 billion by the Washington Public Power Supply System over the construction of a nuclear containment unit. See Dwyer, *Business May Have Found a Way to Defang RICO*, Bus. Wk., Aug. 28, 1989, at 26.

48. Hearings on H.R. 1046 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) (hearings not officially printed as of current date) [hereinafter H.R. 1046 Hearings] (comment of Rep. Rick Boucher).

49. 1988 ANNUAL REPORT, *supra* note 45, table C-2A, at 186. This figure also includes commodities litigation.

50. Blakey & Cessar, *supra* note 1, app. B, at 621.

that defines the outer limits of how many RICO cases were filed may be reached with a fairly high degree of confidence. While a significant proportion of RICO filings may involve securities violations, not all securities cases filed involve RICO violations. Nevertheless, it is possible to calculate how many RICO cases would be in the system if all securities cases did involve RICO. Thus, if 3059 securities cases comprise 28.8 percent of all RICO cases filed in 1986, then the total would have been, in fact, 10,622 RICO filings. This estimate amounts to 4.2 percent of all civil cases in the federal district courts in 1986, a considerable difference from the seventeen percent alleged by those fearful of RICO's scope and who promote the Floodgate Myth.

It is also enlightening to contrast the number of civil RICO cases in the federal courts pre- and post-*Sedima*. If, as alleged, many RICO cases are not categorized as RICO cases but are classified as securities cases, concealing the actual number of civil RICO filings during any given year, then a huge increase in the number of securities cases between 1985 and 1988 would be expected to correspond to the "opening of the floodgates" by the Supreme Court's 1985 *Sedima* decision that RICO should be read to mean what it says. The data contradict this allegation. In 1985, 3266 securities cases were filed in the federal district courts.<sup>51</sup> In 1988 the number actually dropped to 2638 or nineteen percent.<sup>52</sup> This statistic hardly indicates an increase of federal cases due to civil RICO litigation disguised as securities cases.<sup>53</sup>

It also is enlightening to estimate the real number of RICO filings based on subject matter jurisdiction. Because the cases involving securities violations have grounds for federal jurisdiction independent of the RICO claims, they cannot be said to be clogging up the federal courts; they would be in a federal forum even without the RICO claim. As for RICO claims as a whole, 62.4 percent of the reported decisions in 1986

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51. 1988 ANNUAL REPORT, *supra* note 45, table C-2A, at 186.

52. *Id.*

53. The Business/Labor Coalition for Civil RICO Reform argued:

Every survey of civil RICO cases . . . indicate [sic] that somewhere around forty percent of all the civil RICO cases arise from securities transactions. This is not surprising, since the plaintiffs' securities bar is among the most sophisticated, and therefore was both one of the first to recognize the value of appending a RICO count to its cases and also among the most adept at meeting whatever pleading requirements the law and judicial interpretation established. In addition, given the nature of securities transactions, the number of documents usually involved, and the wide dissemination they receive, it is an easy task to plead the typical securities case, which already usually includes an allegation of fraud, as a civil RICO case.

Lacovara Statement, *supra* note 47. Even if the higher percentage (40%) is used to calculate the outside figure, the number of civil RICO filings would not exceed 6595, which would, at worst, make that category 2.7%, not 17%, of the total civil filings in 1988. An undercount of "as many as ten times," *id.*, is absurd. The Administrative Office's data, therefore, hardly "vastly underestimate[] the true number." *Id.*

had grounds for federal subject matter jurisdiction independent of the RICO claim.<sup>54</sup> As such, the outside figure for civil RICO cases for 1986, assuming that none of the reported filings had an independent basis for jurisdiction, would be 2660 or 1.04 percent, not seventeen percent of the district court docket.

More recently, data from the Administrative Office indicate that in the calendar year 1989, the latest complete period for which full information is available, only 989 civil RICO cases were filed, not thousands.<sup>55</sup> Docket congestion also is not a problem everywhere.<sup>56</sup> While the absolute number of general filings increased by roughly half, the average number of cases per federal judge from 1960 to 1980 stayed about the same.<sup>57</sup> Indeed, from 1900 to 1980, the length of civil cases fell by over one-half.<sup>58</sup> The literature complaining about the litigation explosion, in short, shows "a strong admixture of naive speculation and undocumented assertion."<sup>59</sup> In fact, of all the major categories of civil

54. Blakey & Cessar, *supra* note 1, app. B, at 619.

55. See App. C, *infra* p. 1018. As such, "the perceived problem of civil RICO case load is exaggerated . . ." The RICO caseload is now "calmed down" and "actually presents no greater problems than antitrust or complicated securities cases." *Problems "Exaggerated," but Suits Must Be Limited*, CIV. RICO REP., Feb. 4, 1987, at 23 (remarks of Judge Pamela A. Rymer).

56. See, e.g., *Penwest Dev. Corp. v. Dow Chem. Co.*, 667 F. Supp. 436, 441 (E.D. Mich. 1987) (finding that the courts are "not tremendously overburdened"); see also Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983) (stating that "[t]he number of disputes actually litigated . . . does not appear to be rising much faster than the population" (emphasis in original)).

57. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 81-85 (1981).

58. *Id.*

59. Galanter, *Reading the Legal Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 62 (1983). Compare TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) (finding that product liability cases in federal courts present a crisis and that the causes of this crisis include the movement toward no fault liability, the imposition of liability on others than who caused injury, the large size of jury awards, and excessive litigation costs) with GEN. ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED (1988). The GAO publication found that the causes of the explosion are not legal. One product, asbestos, accounts for 60% of the growth from 1976-1986 and 75% of the growth since 1981. The growth unrelated to asbestos is neither accelerating nor explosive. Determining whether society is excessively litigious is complex and requires more information than the number of suits filed. The number of filings alone does not speak to equitable outcomes, deterring wrongdoing, or the effect of reforms on the current system. *Id.* at 1-3; see also Labaton, *Business and the Law: Product Liability's "Quiet Revolution,"* N.Y. Times, Nov. 27, 1989, at D2, col. 1 (reporting that a General Accounting Office study concludes damage awards are "neither erratic nor excessive, but in general are consistent with the kind of injury suffered").

Additionally, more may be involved in the "litigation explosion crisis" than facts. For a disturbing, but enlightening analysis of the crisis, see Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989). Professor Nancy Levit stated:

[T]he combination of judicial overload and injudicious federalism is operating to shunt cer-

litigation, RICO would outrank only one of the thirteen categories.<sup>60</sup> Finally, dire predictions of an explosion of new federal litigation need to be put into perspective. Litigation itself, as the Supreme Court recognized in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,<sup>61</sup> is not an evil.<sup>62</sup> Accordingly, the mere fact of RICO suits is not a matter to be decried or deplored.<sup>63</sup>

tain classes of litigants away from federal courts. . . . Federal courts are increasingly using the doctrines of preclusion, preemption, abstention and remand to shuttle cases or decision-making authority back to state courts. Complementing this procedural routing of cases is an expansion of summary procedures and a dramatic reduction in the scope of substantive constitutional rights.

Federal docket-clearing practices are eliminating the possibility of substantive relief and the protection of a federal forum for a spectrum of politically underrepresented and powerless classes. Equally important, this manipulation of jurisdiction is unprincipled and inconsistent. While conservative judges urge judicial restraint, they often practice selective activism. At times caseload concerns seem paramount to federal courts, while at other times courts ignore the access-expansive effects of their decisions. Indeed, the malleability of the overload issue suggests it is being used as an instrument to further other goals. The selective use of caseload as a justification for restricting Article III jurisdiction leads to a decrease in the uniformity and predictability of decisions, and it blurs the boundaries of already ill-defined theories of federal jurisdiction.

. . . While court efficiency appears to be a deserving goal, the current method of its implementation is through a reduction of court access to particular classes of litigants. . . . [T]he concept of administrability and . . . administrative efficiency is actually a value-laden argument for selecting which litigants should be permitted access to federal courts.

. . . [T]he adjustment of jurisdictional theories by the judiciary is neither an effective docket-clearing mechanism nor a desirable institutional practice. Analysis of the political and ideological assumptions underlying jurisdictional manipulation and the implications of judicial molding of Article III jurisdiction raises serious separation of powers and fairness concerns regarding the quest for administrative efficiency.

. . . Federal courts should adopt jurisdictional rules that offer the greatest chance of merits determinations.

*Id.* at 321-22 (footnote omitted).

60. These categories are: contracts, 62,811; real property, 12,209; personal injury, 41,148; other personal injury, 24,982; personal property damage, 3813; antitrust, 682; bankruptcy, 5558; civil rights, 19,323; prisoner petitions, 38,839; forfeitures, 3873; labor law, 12,688; protected property rights, 6059; social security, 15,152. 1988 ANNUAL REPORT, *supra* note 45, table C-2, at 180-83.

61. 471 U.S. 626, 643 (1985).

62. The Court noted:

Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. . . .

That our citizens have access to their civil courts, is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought take pride.

*Zauderer*, 471 U.S. at 643.

63. Any examination of the dockets of federal and state courts, however, should include a consideration of the present and future impact of the drug traffic. Drug prosecutions increasingly are crowding out all civil litigation in federal and state courts in a number of areas of the United States. See generally *Chief Justice Makes Plea for More Federal Judgeships to Help in Fight Against Drugs*, N.Y. Times, Jan. 1, 1990, at 10, col. 1 (remarks of Chief Justice William Rehnquist) (stating that "the war on drugs will fail if the judiciary is not given the judgeships necessary to do the job"); Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice Off Balance*, N.Y. Times, Dec. 29, 1989, at A1, col. 1 (providing a detailed statement of facts of the increased re-



#### D. *The Two Letters Myth*

4.1 Myth: RICO Applies to Every Business Transaction That Uses the Mails or Phones.

4.2 Fact: RICO Applies Only to Patterns of Unlawful Behavior, Not to the Mere Multiple Use of the Mails or Phones.

A variation of the Litigation Floodgate Myth is the parade of horrors that claims that even if no increase in litigation has occurred (a point not conceded by RICO's opponents), the increase is coming because RICO potentially applies to every business transaction that uses the mails or phones.<sup>64</sup> How, reform supporters cry, could anyone con-

sources for federal and state investigation and prosecution of drug offenses, the rising number of drug prosecutions, the falling number of civil filings, and the increasing delay in civil cases, but the relatively stable judicial resources).

More, however, is required than merely authorizing additional judicial resources. Careful attention must be given to the entire caseload of the federal courts and to its management. Modifications of RICO that targeted the Act more narrowly on a more limited class of organized crime, white-collar crime, and other serious offenders rather than eviscerated it would be justifiable if reform were occasioned by other systemic caseload and management reforms. *See generally* Wiehl, *Drastic Moves Urged to Ease U.S. Courts' Load*, N.Y. Times, Mar. 23, 1990, at B10, col. 3 (reporting on recommendations of a committee appointed by Chief Justice William H. Rehnquist to review the court system to transfer to state courts and federal administrative agencies many commercial cases, state law disputes, social security appeals, federal tax appeals, and labor quarrels that would result in an 37% reduction in district courts and a 17% reduction in circuit courts of appeals); Wermiel, *Panel Studying Federal Courts Proposes Broad Changes in Operation of System*, Wall St. J., Dec. 13, 1989, at A16, col. 1 (discussing the draft report of the Federal Courts Study Committee, which recommends various reforms, including the elimination of diversity jurisdiction); BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* 6, 10, 22, 35, 37 (1989) [hereinafter *JUSTICE FOR ALL*] (stating that the causes of delay, which give unfair advantage to "large interests," include "horse-and-buggy" practices of the judiciary, failure to rule on fully briefed motions that might in fact streamline litigation, as well as discovery practices of litigants that could be curtailed by better judicial supervision). While the American Bar Association opposes RICO on a variety of grounds, a principal objection is that it "inappropriately federalized many areas of state common law" claims. A.B.A. RICO COORDINATING COMMITTEE, *REPORT TO THE HOUSE OF DELEGATES* 5 (1987) [hereinafter *COORDINATING COMMITTEE REPORT*]. At the same time, the Bar Association remains adamant about retaining diversity jurisdiction. Labaton, *Business and the Law: Panel Urges End of Diversity Rule*, N.Y. Times, Jan. 8, 1990, at D2, col. 1 (reporting that "[t]he American Bar Association . . . prefers the [diversity] rule because of the flexibility it affords strategists in choosing courts . . ."); Greenhouse, *Burger Declares Congress Ignores Burden of Courts*, N.Y. Times, Jan. 3, 1983, at A1, col. 5 (stating that the Bar Association is one of the "strongest lobbies against eliminating . . . diversity jurisdiction"); see A.B.A., *ABA Policy and Procedures Handbook: 1989-1990*, at 157 (stating that the Association "[o]ppose[s] legislation that would either abolish diversity jurisdiction . . . or curtail it . . ."). The Bar Association's positions are difficult to square with any general conception of the public interest.

64. See 132 CONG. REC. H9371 (daily ed. Oct. 8, 1986) (remarks of Rep. Rick Boucher). Rep. Boucher stated:

[F]raud allegations are commonly made in contract situations, and all that is needed under the current law to convert a simple contract dispute into a civil RICO case is the allegation that there was a contract and the additional allegation that either the mails or the telephones were used more than once in either forming or breaching the contract.

*Id.*

duct business without the threat of a RICO suit: all business transactions make multiple use of the mails or phones. In fact, RICO applies only to a pattern of unlawful behavior, not multiple uses of the mails or phones. Indeed, before *H.J. Inc.*, the courts of appeals, with two exceptions, made it abundantly clear that RICO did not apply to the mere multiple use of the mails.<sup>65</sup> The Supreme Court confirmed these holdings in its *H.J. Inc.* decision and specifically rejected the exceptions.<sup>66</sup>

### E. The Contract Dispute Myth

5.1 Myth: RICO Applies to Mere Contract Disputes.

5.2 Fact: RICO Requires a Showing of Bad Faith; a Good Faith Dispute Is Not Within the Scope of RICO.

Another variation of the Two Letters Myth is the Mere Contracts Dispute Myth. Critics suggest that RICO applies to mere contract disputes.<sup>67</sup> In fact, RICO requires a showing of bad faith. Good faith disputes are not within the scope of RICO.<sup>68</sup> None of RICO's predicate offenses apply on a showing of strict liability. Each requires a showing of *mens rea* or criminal state of mind.<sup>69</sup> As such, RICO does not apply to mere contract disputes.

### F. The Racketeer Label Myth

6.1 Myth: The Racketeer Label Leads Legitimate Business People to Settle Garden Variety Fraud Claims for Extortionate Amounts.

6.2 Fact: The Racketeer Label Inhibits, Not Facilitates, Settlement.

Those hostile to RICO allege that the statute's racketeer label leads legitimate business people to settle garden variety fraud claims for ex-

65. See, e.g., *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22 (1st Cir. 1987) (holding that a single bribe in three installments is not a "pattern" despite several communications); see also *H.J. Inc.*, 109 S. Ct. at 2898 n.2 (collecting the various court of appeals decisions). The Fifth and Sixth Circuits are the exceptions. See *United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988); *R.A.G.S. Couture, Inc. v. Hyatt*, 744 F.2d 1350, 1355 (5th Cir. 1985).

66. See *H.J. Inc.*, 109 S. Ct. at 2899 (expressly rejecting *Jennings*, 842 F.2d at 159).

67. See 132 CONG. REC. H9371 (daily ed. Oct. 8, 1986) (remarks of Rep. Rick Boucher). Rep. Boucher stated that "RICO is so broad-based that virtually any party that has become embroiled in a commercial dispute becomes a candidate for a civil RICO case. . . . [V]irtually every type of contract dispute has been turned into a RICO case." *Id.*

68. See, e.g., *Union Nat'l Bank v. Federal Nat'l Mortgage Ass'n*, 860 F.2d 847, 856-57 (8th Cir. 1988) (holding that good faith exercise of contract claims is not RICO extortion).

69. See, e.g., *Durland v. United States*, 161 U.S. 306, 314 (1896) (mail fraud) (holding that if the evidence had shown that the defendant acted in good faith, "no conviction could be sustained"); *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984) (finding that RICO mail fraud requires intent to defraud); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983) (holding that "[c]riminal intent is . . . necessary in either mail fraud or securities fraud [under RICO]").

tortionate amounts.<sup>70</sup> Suits with no merit, which may force a legitimate business to face ruin, are settled unjustly for large sums. In fact, the racketeer label inhibits, rather than facilitates, settlement. 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 one could believe that a suit with no merit faces a defendant with ruinous exposure. If the plaintiff's suit has no merit, the chance of success is zero, and zero multiplied by three (or any other number) is still zero. Before anyone uncritically accepts this claim, he ought to ask for the name of the case and then find out what the plaintiff's evidence was. It is doubtful that the litigation will be meritless. Responsible corporate or other defendants generally do not pay off strike suits in the RICO—or any other—area at more than their settlement value, no matter what the theory of the complaint. 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 phrased, the claim that such managers act against their own economic interest is not credible.

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70. See 132 CONG. REC. E3531 (daily ed. Oct. 10, 1986) (remarks of Rep. Rick Boucher). Rep. Boucher stated:

[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."

*Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1984) (Marshall, J., dissenting)). Justice Thurgood Marshall cites as authority for his extraordinary proposition A.B.A. SECTION OF CORP., BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 69 (1985) [hereinafter ABA RICO REPORT]; see *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting). The Ad Hoc Task Force, in turn, conducted a survey of 3200 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. 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, but inhibits settlement, particularly when a legitimate business is involved. See A.B.A. CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION: A REPORT OF THE RICO CASES COMMITTEE 121-23 (1985) [hereinafter RICO CASES COMMITTEE REPORT].

### G. The Litigation Abuse Myth

7.1 Myth: Private Plaintiffs Are Bringing a Substantial Number of Abusive Civil Suits.

7.2 Fact: No Evidence Has Been Produced That Civil RICO Suits Are Being Abused in a Fashion Peculiar to RICO That Warrants Its Substantial Rewriting.

The charge that the right to file civil RICO suits is being abused was, until recently, just that: a charge. Now, however, the coalition of those seeking to undermine RICO, the Business/Labor Coalition for Civil RICO Reform, has produced a list of cases that it terms "abusive."<sup>71</sup> Because the coalition has been in existence for almost four years and is richly financed, it is fair to assume that these cases represent the most egregious examples of litigation abuse under RICO that time and money could find. The coalition's overall position against civil RICO fairly may be said to stand or fall on the basis of this list. Nevertheless, when carefully analyzed and researched, the list does not warrant the substantial rewriting of RICO. In fact, the list indicates that little rela-

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71. For a detailed description of each of the cases, including the Business/Labor Coalition for Civil RICO Reform's comment and an analysis of each case, see App. D, *infra* p. 1021. The coalition's definition of "abusive" is artful. It extends not only to frivolous suits but also to any claim for relief that is broader than its limited understanding of the purpose of RICO. Lacovara Statement, *supra* note 47. Lacovara stated:

The RICO Reform Coalition . . . often refer[s] to the type of case we hope this legislation will discourage as an "abusive" civil RICO case. The Members of the Committee should not think that the term "abusive" is the equivalent of "frivolous" as lawyers generally use that term. Rather, any civil RICO suit that uses the statute's broad language to litigate in federal courts claims long-established under well-recognized state law causes of action, or to evade more directly applicable existing federal statutory regimes is "abusive" because it uses the statute in inappropriate ways[, for example, securities fraud].

*Id.*

*But see* RICO, *supra* note 1, § 902, 84 Stat. at 947 (stating that "[n]othing in [RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 392 (7th Cir. 1984) (noting that "Congress enacted RICO in order to supplement, not supplant, the available remedies since it thought those remedies offered too little protection for the victims"), *aff'd*, 473 U.S. 606 (1985). Some 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.*, Securities Exchange Act of 1934, ch. 404, § 28(a), 48 Stat. 881, 903 (codified at 15 U.S.C. 78bb(a) (1988)) (stating that the "rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist . . ."). Such cumulative remedies further remedial purposes. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983). Federal statutes typically overlap, but Congress generally preserves multiple remedies. *See, e.g.*, Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 514, 88 Stat. 829, 897 (codified at 29 U.S.C. § 1144(d) (1982)) (stating that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . ."); Consumer Product Safety Act of 1972, Pub. L. No. 92-573, § 23, 86 Stat. 1207, 1226 (codified at 15 U.S.C. 2072(c) (1988)) (stating that "[t]he remedies provided for in this section shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law").

tionship exists between the allegations of abuse and suggested reforms of the statute. The allegations of abuse are merely a smoke screen behind which special interests are seeking to enact laws for their private benefit.

The coalition has produced a list of fifty-three cases it terms "abusive." The first case was filed in December 1979. The last case was filed in January 1988. Between December 1979 and January 1988, approximately 2,151,640 criminal and civil matters were filed in the federal district courts. Of these actions, 1,861,788 were civil. Of that number, approximately 2902 cases involved civil RICO filings.<sup>72</sup> The RICO fil-

72. The number of matters filed in federal district courts in the years 1980-1988 is listed in: 1988 ANNUAL REPORT, *supra* note 45, table C, at 172; *id.* table D, at 237; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C, at 169 (1987); *id.* table D, at 234; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C, at 169 (1986); *id.* table D, at 230; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C-1, at 276 (1985); *id.* table D-1, at 336; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C-1, at 249 (1984); *id.* table D-1, at 310; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C-1, at 241 (1983); *id.* table D-1, at 302; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C-1, at 211 (1982); *id.* table D-1, at 272; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C-1, at 363 (1981); *id.* table D-1, at 410; DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT table C-1, at 370 (1980); *id.* table D-1, at 415.

*Civil and Criminal Matters 1980-1988*

	Total Civil Matters filed	Total Criminal Matters filed	Total Matters filed
1988	239,634 (119,817)	43,503	283,137 (141,569)
1987	238,982	42,156	281,138
1986	254,828	40,427	295,255
1985	273,670	38,546	312,216
1984	261,485	35,911	297,396
1983	241,842	34,927	276,769
1982	206,193	31,765	237,958
1981	180,576	30,413	210,989
1980	<u>168,789</u> (84,395)	<u>27,910</u>	<u>196,699</u> (98,350)
Total	2,065,999 (1,861,788)	325,588	2,391,557 (23,9919)

Because the Administrative Office keeps its figures on a fiscal year basis, appropriate adjustments were applied to estimate annual figures for the relevant periods.

The civil RICO filings between December 1979 and January 1988 were estimated by adding the total number of pre-*Sedima* filings to the total number of post-*Sedima* filings through January 1988. There were 500 pre-*Sedima* filings. See Oversight Hearings, *supra* note 12, at 126. There were 2162 filings between November 1985 and January 1988 for an average of 80 per month. See App. C, *infra* p. 1018. Assuming that 80 per month were filed between August and October 1985, the total civil RICO filings were approximately 2902.

ings represent .135 percent of all filings and .156 percent of the civil filings. The "abusive" filings represent .00246 percent of all filings and .00248 percent of the civil filings; they represent 1.8 percent of the civil RICO filings.

Of these fifty-three cases, fifty-three percent had an independent basis for federal jurisdiction. These cases, as well as the general data, do not establish that RICO filings are of floodgate proportions or are wholly new. Of the fifty-three "abusive" cases, none represented a judgment for money damages. None was brought by government-related entities. Only two were brought by charitable organizations. Only two were against accountants, one of the professions that is a moving force in the coalition. Only four included securities allegations. None was a commodities case. Eighty-seven percent of the coalition's "abusive" cases were dismissed in whole or in part on one or more grounds. As such, the existing system is weeding out inappropriate cases. Thirty-two percent were properly dismissed on "pattern" grounds in such a fashion that they will not be refiled and similar cases should not appear in the future. Motions for sanctions were made in only nineteen percent of the cases; they were granted in eight percent (or forty percent of the motions). Accordingly, the defendants themselves apparently did not always believe the cases were frivolous. Many times, the early decisions did not grant the sanctions requested because the courts expressed doubt about the proper construction of the statute. Later cases, however, tend to grant sanctions when they are requested. Ironically, the list of "abusive" cases actually includes a suit against an organized crime figure.<sup>73</sup> In addition, the list includes a suit against an individual who had been charged and convicted for criminal behavior.<sup>74</sup> The cases, moreover, include clear instances of judicial, rather than litigant, abuse of the statute.<sup>75</sup> The case for RICO abuse, in short, has not been made. Instead, a close analysis of the cases produced to justify rewriting RICO shows that the existing system works well.

#### H. *The Litigation Abuse Remedies Myth*

8.1 Myth: The General Remedies Against Litigation Abuse Are Inadequate.

8.2 Fact: The General Remedies Against Litigation Abuse Are Adequate.

Closely related to the Litigation Abuse Myth is the allegation that the general remedies for litigation abuse are inadequate and do not ap-

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73. See App. D, *infra* p. 1046-47.

74. *Id.* at p. 1043-44.

75. *Id.* at p. 1032.

propriately restrict frivolous RICO claims.<sup>76</sup> In fact, the general remedies against litigation abuse are adequate.<sup>77</sup>

The charge of litigation abuse ignores the presence in current law of powerful remedies against litigation abuse, not only under RICO, but also under other federal statutes and related claims for relief. Indeed, the failure to evaluate the remedies for litigation abuse is one of the most telling points against the civil RICO critics' argument that litigation abuse is a ground to rewrite the statute substantively.

Critics who would rewrite RICO based on allegations of litigation abuse must show: (1) that a substantial number of frivolous or otherwise abusive RICO suits are being filed; (2) that existing safeguards against such suits are not adequate to remedy them; (3) that new safeguards adequate against such suits cannot be designed; and (4) that the detriment from these suits outweighs the benefit from legitimate suits. None of these burdens has been met.

76. See *RICO Reform: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess., pt. 1, at 177 (1985-1986) [hereinafter *RICO Reform Hearings*] (statement of Newton N. Minow, Chair, Public Review Board, Arthur Andersen & Co.) (asserting that no effective means exist for controlling frivolous litigation under RICO).

77. See JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 56 (1983) [hereinafter 1983 PROCEEDINGS]. The Proceedings stated:

Judge Hunter stated that the Subcommittee on Judicial Improvements, at the request of Judge Alfred T. Goodwin, 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.

*Id.*; see, e.g., *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) (imposing rule 11 monetary sanctions and an injunction against further litigation under RICO); *Spiegel v. Continental Ill. Nat'l Bank*, 790 F.2d 638, 650-51 (7th Cir. 1986) (applying rule 38 sanctions to RICO); *Gordon v. Heimann*, 715 F.2d 531, 533 (11th Cir. 1983) (awarding bad faith attorney's fees based on the court's inherent power, rule 11, and 28 U.S.C. § 1927 (1982)); *WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate Sys.*, 103 F.R.D. 417, 420-21 (N.D. Cal. 1984) (holding that RICO is not applicable to a labor dispute and imposing rule 11 sanctions); *Financial Fed'n, Inc. v. Ashkenazy*, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,489 (D.C. Cal. 1983) (awarding rule 11 sanctions of \$150,000 in attorney's fees in a 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) (holding that a dispute over a will was a frivolous RICO claim and awarding attorney's fees under rule 11); *Barringer, Giving Law Teeth (and Using Them on Lawyers)*, *N.Y. Times*, Mar. 17, 1989, at B4, col. 3 (assessing \$1 million in sanctions against the Christic Institute for bringing a frivolous RICO lawsuit); see also *Hoover v. Ronwin*, 466 U.S. 558, 601 (1984) (Stevens, J., dissenting). Justice John Paul Stevens stated:

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. . . .

*Id.* (footnote omitted); see also *Myers v. Bethlehem Ship Building Corp.*, 303 U.S. 41, 51-52 (1938) (stating that "[l]awsuits . . . often prove to [be] groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact").

The existing tools to address frivolous litigation are sufficient, even though they may be misunderstood or underutilized.<sup>78</sup> Ethical standards, for example, prohibit a lawyer from asserting a frivolous litigation position.<sup>79</sup> Such litigation abuse is tortious.<sup>80</sup> It is also subject to sanctions under the Federal Rules of Civil Procedure.<sup>81</sup> Indeed, the high cost of litigation itself erects a substantial barrier not only to frivolous litigation, but also for meritorious pleas. To be sure, contingent fee arrangements mitigate the issue of cost to the poor but wronged individual. Contingent fees also act, however, as a screening device employed by counsel, who risk their own funds, to weed out cases in which liability is not sure and damages are not high.

### I. *The Garden Variety Fraud Myth*

#### 9.1 Myth: Fraud Is a Garden Variety Problem.

#### 9.2 Fact: Fraud Is Not a Garden Variety Problem.

The usual punch line in most objections to civil RICO suits is that if some certain set of circumstances were the case, then RICO would apply to garden variety frauds.<sup>82</sup> The unexamined major premise to this

78. See 1983 PROCEEDINGS, *supra* note 77, at 56.

79. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1980).

80. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 119-121 (5th ed. 1984) (discussing the tort actions of malicious prosecution, wrongful civil proceedings, and abuse of process).

81. FED. R. CIV. P. 9(b) (requiring that fraud be pleaded with particularity); FED. R. CIV. P. 11 (permitting sanctions for failure to investigate facts or law); FED. R. CIV. P. 12(f) (authorizing courts to strike scandalous matter); FED. R. CIV. P. 56 (providing for summary judgment); see also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) (permitting an award of fees to defendant for actions that are frivolous, unreasonable, or without foundation).

82. Commissioner Philip A. Feigin aptly observed:

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 Hearings*, *supra* note 12, at 535 (statement of Philip A. Feigin, Assistant Securities Commissioner, Colorado Division of Securities, and Chair, Special Projects Committee, Enforcement Section, North American Securities Administrators Association, Inc.). For a discussion of 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 D. CRESSEY, *OTHER PEOPLES' MONEY* 102 (1953) (stating that the tendency of embezzlers to rationalize their conduct as different from theft is an important fact in behavior pattern); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT* 104-08 (1967) [hereinafter *TASK FORCE REPORT*]; see also *id.* at 107 (stating that "most white-collar crime is not at all morally neutral"). Indeed, it was argued persuasively in 1934 before the Cope-land Committee that it was in part our failure as a society to bring white-collar crime to justice that significantly contributed to the development during Prohibition of what all now concede to be organized crime, a problem that did not end with Prohibition's repeal:

Both crime and racketeering of today have derived their ideals and methods from the



conclusion is that fraud is a garden variety problem that does not need RICO to weed it. In fact, fraud is no garden variety problem in the United States today.

The current controversy over RICO does not center on its possible civil application in the areas of violence, the provision of illicit goods and services, or the corruption of unions and governmental entities. Instead, the controversy focuses almost exclusively on its application to white-collar crime, particularly fraud. Nevertheless, in 1970, Congress expressly targeted RICO on fraud.<sup>83</sup> It expressly found that traditional sanctions were "unnecessarily limited in scope and impact."<sup>84</sup> Nothing has occurred since 1970 that undermines Congress's judgment. Although two decades have passed since RICO became law, the task of confronting fraud remains formidable.<sup>85</sup>

In 1974 the Chamber of Commerce of the United States published a comprehensive study of fraud. The total amount lost to fraud was estimated at 41.78 billion dollars annually.<sup>86</sup> Given the inflation rate

business and financial practices of the last generation . . . . It is a law of social psychology . . . that the socially inferior tend to ape the socially superior . . . .

. . . . It was inevitable that, sooner or later, we would succeed in "Americanizing" the "small fry"—especially the foreign small fry . . . .

. . . . All was relatively safe, since the legal profession was already ethically impaired through its affiliations with the reputable racketeers.

. . . .  
The idea that when prohibition is ended the racketeers . . . will meekly and contritely turn back to blacking shoes . . . is downright silly. They will apply the technique they have mastered to the dope ring . . . . They will find crafty lawyers all too willing to defend them from the "strong arm" of the law for value received.

. . . .  
. . . . So long as the lawless can get protection in return for keeping corrupt politicians in office, we shall not be free from the crime millstone about our necks.

*Investigation of So-Called "Rackets": Hearings Before a Subcomm. of the Senate Comm. on Commerce, 73d Cong., 2d Sess. 710-12 (1933) [hereinafter "Rackets" Hearings] (testimony of Professor Harry Elmer Barnes).*

83. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, preamble, 84 Stat. 922, 922 (1970).

84. *Id.*, 84 Stat. at 923. Congress was well aware that existing law, state and federal, was inadequate to address the problem. *United States v. Turkette*, 452 U.S. 576, 586 (1980).

85. Chief Justice William Rehnquist put it well when he observed that "[w]hite-collar crime is 'the most serious and all-pervasive crime problem in America today.'" *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)). The Chief Justice added, "Although this statement was made in 1980, there is no reason to think the problem has diminished in the meantime." *Id.*

86. See CHAMBER OF COMMERCE OF THE U.S., A HANDBOOK ON WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS 6 (1974). The Chamber estimated the direct economic cost of fraud as follows:

Billions of Dollars

1. Bankruptcy Fraud 0.08
2. Bribery, Kickbacks, & Payoffs 3.00

since the 1974 study, fraud likely costs society more than four times that amount today.<sup>87</sup> That range—200 billion dollars—is similar in dimension to the impact of the illicit traffic in drugs.<sup>88</sup>

The Chamber of Commerce study, moreover, did not account for the entire impact of fraud on the Nation. By interacting with society's other problems, such as poverty and discrimination, fraud has a serious influence on the social structure and interferes with the freedom of commercial and personal dealings.<sup>89</sup> Because white-collar offenders often occupy positions of trust, the effects of their misdeeds extend beyond their immediate impact, which often falls most harshly on the poor, aged, and uneducated.<sup>90</sup> Savers, insurers and insurees, investors, legitimate business people, consumers, and taxpayers are the victims of white-collar fraud.

Since the work of the Chamber of Commerce in 1974, dramatic new developments have occurred in the Nation's basic financial institutions. A nationwide problem of bank and thrift failures caused by criminal conduct is of epidemic proportions.<sup>91</sup> Congress enacted special legisla-

3. Consumer Fraud 21.00
4. Embezzlement 7.00
5. Insurance Fraud 2.00
6. Receiving Stolen Property 3.50
7. Securities Theft and Fraud 4.00
8. Credit Card and Check Fraud 1.10
9. Computer-Related Crime 0.10

*Id.* Obviously, these estimates can only be ballpark figures, for the typical perpetrator of a fraud does not file an honest annual report. It is noted accurately that "[t]here is little systematic data available regarding the incidence of white-collar crime," and two estimates of its cost made at the time RICO was processed: loss of taxes on \$25 to \$40 billion of unreported income annually and \$500 million to \$1 billion annually in securities fraud. See TASK FORCE REPORT, *supra* note 82, at 103. These figures no longer state the extent of the problem.

87. See 1985 ATT'Y GEN. ANN. REP. 42 (\$200 billion).

88. See *Drug Enforcement: Hearings on H.R. 526 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) (remarks of Rep. William J. Hughes) (stating that \$110 billion is spent annually and that lost productivity and other costs equal \$60 billion); see also *The Cost of Drug Abuse, \$60 Billion a Year*, N.Y. Times, Dec. 5, 1989, at D1, col. 1 (stating that the "cost of illicit drugs to American society [is] far more than \$60 billion annually").

89. H. EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME* 6-7 (1970).

90. Former FBI Director William H. Webster aptly commented in 1982: "[T]hrough use of their position of trust, cunning and guile, white-collar criminals undermine professional and governmental integrity to the dismay of all, and ultimately are responsible for the loss of billions of dollars annually from the Nation's economy." *Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1983: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 97th Cong., 2d Sess. 1078 (1982).

91. For the best general treatment of the crisis, see Note, *Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis?*, 64 NOTRE DAME L. REV. 222 (1989); see also J. ADAMS, *THE BIG FIX: INSIDE THE S&L SCANDAL* (1990) (taking a broad view of the banking and thrift crisis and examining in detail the collapse of the Butcher banks in Tennessee and the Ohio thrift crisis

tion,<sup>92</sup> estimated to cost 300 billion dollars over thirty years,<sup>93</sup> to rescue more than 350 troubled thrifts.<sup>94</sup> The President told the Nation that

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as well as some of the Texas and California high fliers, who helped bankrupt the S&L insurance fund and who kept regulators from shutting down the reckless bankers); S. PIZZO, M. FRICKER & P. MUOLO, *INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS* (1989) (presenting an intricately woven account of fraud at dozens of S&Ls and banks, paying particular attention to a group of deposit brokers, real estate developers, and thrift owners who had documented connections to major organized crime figures and kept appearing on the books of failed thrifts).

The criminal misconduct that contributed to the failure of Penn Square Bank (the Bank) in Oklahoma, until recently one of the largest bank failures in American history, resulted in charges of misapplication of bank funds, false entries in bank records, conspiracy, and wire fraud. For criminal prosecutions, see *United States v. Patterson*, 827 F.2d 184 (7th Cir. 1987); *United States v. Patterson*, 782 F.2d 68 (7th Cir. 1986); *United States v. Lytle*, 677 F. Supp. 1370 (N.D. Ill. 1988); and *United States v. Lytle*, 658 F. Supp. 1321 (N.D. Ill. 1987). For civil litigation on fidelity bonds, see *Federal Deposit Ins. Corp. v. Hartford Ins. Co.*, 877 F.2d 590 (7th Cir. 1989). For a description of the circumstances leading to the Penn Square Bank failure, see M. SINGER, *FUNNY MONEY* (1985), and P. ZWEIG, *BELLY UP: THE COLLAPSE OF THE PENN SQUARE BANK* (1985). The role, good and bad, that accountants played in the collapse is instructive in any consideration of the efforts of the accounting profession to limit its liability under RICO in the thrift crisis. Arthur Young and Co. gave the Bank a qualified opinion in 1977, *id.* at 61, criticized the board in a management report in 1978, gave the Bank another qualified opinion in 1981 accompanied by a "material adverse letter," the worst possible opinion an auditing firm can give a client, *id.* at 174, and then was fired, *id.* at 259. After lending Peat Marwick and Mitchell partners money to invest in an office complex, *id.*, the Bank hired the firm and got a clean opinion, *id.* at 304. Within four months the Bank collapsed, and the firm ended up settling numerous multimillion dollar suits for undisclosed sums. Wayne, *Where Were the Accountants?*, N.Y. Times, Mar. 12, 1989, § 3, at 1, col. 2.

Among the professionals, accountants were not alone. Regulators combing through the wreckage of failed thrifts discover that as many as 80% of the institutions' loans are backed by inadequate or fraudulent appraisals. In one of the most notorious prosecution so far, Larry Wayne Hutson pleaded guilty to conspiring to falsify over 400 appraisals for defunct Empire Savings & Loan; he was paid fees five times the norm as well as bonuses. See Allen, *Wrong Numbers: Appraisers, Culprits in S&L Crisis, Are Now Key to S&L Recovery*, Wall St. J., Jan. 24, 1990, at A1, col. 6.

92. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (amending scattered sections of 12 U.S.C.). For a general description of the Resolution Trust Corp., which replaced the Federal Savings and Loan Insurance Corp., see Thomas, *Thrift Bailout, Lacking a Chief and Floundering As Officials Feud, Slows and Grows More Costly*, Wall St. J., Oct. 11, 1989, at A20, col. 1 (stating that the law created "a structure so sprawling and complex that it makes it difficult for anything to happen . . . [which] appear[s] to be raising the cost and slowing the pace of the bailout").

93. See *WORLD ALMANAC AND BOOK OF FACTS* 62 (1990) [hereinafter *ALMANAC*].

94. See *id.* at 83. But see Quint, *New Estimate on Savings Bailout Says Cost Could Be \$500 Billion*, N.Y. Times, April 7, 1990, at A1, col. 1 (reporting estimate of General Accounting Office over 30 year period); Nash, *Policy Shift on Bailouts Is Explored*, N.Y. Times, Feb. 1, 1990, at C20, col. 5 (reporting that regulators warn that the number of institutions will exceed 600, and may go as high as 800, with assets approaching \$500 billion). Indeed, losses continue to mount. See Nash, *Savings Industry Lost \$19.2 Billion, a Record, in 1989*, N.Y. Times, Mar. 27, 1990, at A1, col. 6 (reporting that 485 troubled institutions had fourth quarter losses of \$2.6 billion or \$29 million per day, and that a huge deficit capped a year in which the Nation faced the problems of tax regulation, bad real estate lending, fraud, and insider dealing); Nash, *U.S. Has Trouble Coping with Its Savings Empire*, N.Y. Times, Mar. 13, 1990, at A1, col. 1 (reporting 1991 "healthy" institutions with \$639 billion in assets, 400 "sick" institutions with \$360 billion in assets, 157 "insolvent" institutions with \$113 billion in assets, and 393 "seized" institutions with \$193 billion in assets).

“unconscionable risk-taking, fraud, and outright criminality [were] factors” that led to the crisis.<sup>95</sup> Congressional and other studies support the President’s harsh judgment, indicating that at least one-third of bank failures and three-quarters of thrift failures involve the criminal activity of insiders.<sup>96</sup> Consistent with the President’s pledge that lost funds would be restored and perpetrators punished,<sup>97</sup> the government is bringing criminal RICO prosecutions,<sup>98</sup> and the Federal Deposit Insurance Corporation and the Federal Saving and Loan Insurance Corporation (now the Resolution Trust Corporation) are using civil RICO to sue banks and thrift fraud perpetrators.<sup>99</sup> Banking associations, however,

95. Dowd, *Bush Savings Plan Calls for Shaving the Cost Broadly*, N.Y. Times, Feb. 7, 1989, at D9, col. 1.

96. See H.R. REP. NO. 1088, 100th Cong., 2d Sess. 2-13 (1988) (stating that criminal misconduct by insiders is a major contributing factor in approximately one-third of all commercial bank failures and three-fourths of all thrift failures and estimating loss from \$31 to \$80 billion); OFFICE OF COMPTROLLER OF THE CURRENCY, *BANK FAILURE: AN EVALUATION OF THE FACTORS CONTRIBUTING TO THE FAILURE OF NATIONAL BANKS 9* (1988) (finding that insider abuse is a significant factor in 35% of the bank failures); see also *Savings Unit Fraud Cited*, N.Y. Times, Feb. 28, 1990, at C2, col. 2 (reporting testimony of L. William Seidman, Chairperson of FDIC and RTC, that 60% of savings and loan associations seized are tainted by fraud, which is more than triple the rate of commercial banks, and 1200 possible criminal prosecutions have been referred to the Department of Justice). Citations to other congressional hearings are collected in Note, *supra* note 91, at 223 n.5.

97. The President promised “every effort to recover assets diverted from these institutions and to place behind bars those who had caused losses through criminal behavior.” *President’s News Conference on Savings Crisis and Nominees*, N.Y. Times, Feb. 7, 1989, at D8, col. 1.

98. See *infra* note 99.

99. See, e.g., *Federal Sav. & Loan Ins. Corp. v. Shearson-American Express, Inc.*, 658 F. Supp. 1331 (D.P.R. 1987); *Federal Deposit Ins. Corp. v. Hardin*, 608 F. Supp. 348 (E.D. Tenn. 1985). But see H.R. REP. NO. 1137, 98th Cong., 2d Sess. 5 (1984). The House Report stated:

Despite such enormous losses, neither the banking nor the criminal justice systems impose effective sanctions or punishment to deter white-collar bank fraud. The few insiders who are singled out for civil sanctions by the banking agencies are usually either fined de minimis amounts or simply urged to resign. The few who are criminally prosecuted usually serve little, if any, time in prison for thefts that often cost millions of dollars.

*Id.* Rosemary Stewart, the Director of Enforcement at the Federal Home Loan Bank Board commented that “[w]hen [judges] see nicely dressed bankers, it’s difficult to send them away for very long.” Bartlett, *Savings Fraud Losses Seen As Lost for Good*, N.Y. Times, Feb. 10, 1989, at D2, col. 3; see also Harlan, *Reinforcements for Bank-Fraud Group in Dallas May Arrive There Too Late*, Wall St. J., Feb. 1, 1990, at A16, col. 2 (reporting that the Dallas Bank Fraud Task Force has won 46 jury convictions or guilty pleas of 58 indictments with 2 acquittals and that none of the high-profile operators has been indicted, but indictments seem imminent); *Texas’s Biggest Thrift-Fraud Case Ends in Mistrial*, Wall St. J., Sept. 18, 1989, at B8, col. 4 (reporting that Texas’s biggest thrift fraud case involving a \$166 million loss ended after a six-month trial with a hung jury, and discussing other convictions for misapplying funds to reimburse employees for political contributions to congressmen and to supply female companions to state savings and loan commissioner); *Washington Wire*, Wall St. J., July 7, 1989, at A1, col. 5 (reporting that 40 convictions or guilty pleas have been obtained out of 56 people charged; that 26 indictments have been brought in the first seven months of this year compared to a total of 23 for all of last year; and that those indicted include five presidents and three chairmen or vice chairmen of thrifts, but “the most notorious owners of freewheeling thrifts” still are not indicted, and only \$5 million in restitution

are among those who would rewrite RICO.<sup>100</sup>

The savings and loan crisis is best given concrete meaning by focusing on Charles Keating's scandalous handling of the Lincoln Savings & Loan of Irvine, California. In 1984 Keating was allowed to buy Lincoln Savings despite earlier accusations of his involvement in fraud.<sup>101</sup>

and fines have been recovered compared with the \$157 billion cost of the federal savings and loan bailout); Pusey, *Fast Money and Fraud*, N.Y. TIMES MAG., Apr. 23, 1989, at 30 (analyzing the facts of the prosecution and civil suits under RICO involving the Empire Savings & Loan Association in Dallas, Texas); *The Fraud Patrol: Flashy Federal Posse Pursuing S&L Abuses Bungles Effort in Texas*, Wall St. J., Feb. 10, 1989, at A1, col. 1 (presenting a negative evaluation of the success of the Dallas Bank Task Force). *But see Texas Mistrial Is Said to Spark FBI Inquiry*, Wall St. J., Sept. 25, 1989, at B5, col. 4 (discussing the mistrial in the thrift fraud trial, in which the jury deadlocked 11-1, and which is under a jury tampering investigation).

Unfortunately, regulators are finding it hard under Texas debtor-creditor law to recover the assets taken from the thrifts. Harlan, *Elusive Money: Thrift Regulators Find It Is Tough to Recover Much S&L Bad Debt*, Wall St. J., Dec. 22, 1989, at A1, col. 6. Michael Rochell, a Dallas bankruptcy lawyer, stated that "Texas was essentially founded by debtors. . . . It was populated by people who had come from the East to escape their creditors. If you said someone had 'gone to Texas,' that basically meant that someone had skipped town to avoid paying their bills." *Id.* at A8, col. 2.

Unfortunately, the government also is being forced to make deals with many of those involved to obtain testimony against others, which results in little or no criminal or civil sanction being imposed on those who testify despite their substantial involvement. *See Harris, The S&L Looters Who May Get Away*, Wall St. J., Feb. 12, 1990, at A12, col. 3. Byron Harris wrote:

The U.S. has achieved convictions in most of its cases against high ranking S&L officers. But crimes in thrifts, where they did occur, often required the cooperation of groups of people, in what might be called a "chain of greed."

At their worst, the chains included five kinds of professionals, in addition to the borrowers who benefited from the questionable loans. At the beginning of a transaction, *real estate brokers* masterminded the shady deals. Crooked *appraisers* then inflated real estate values to make the deals work. Inside the institutions, an array of *employees* from loan officers hungry for a loan commission to the executives themselves participated in the fraud. At the conclusion of a deal, *lawyers* "papered" the bogus transactions by drawing up the contracts, and *accountants* either looked the other way or neglected to scour the institutions' books too carefully.

Some of these individuals, particularly the borrowers and the brokers, gained far more than thrift executives. But for the most part, prosecutors have instead sought the convictions of the executives, and have rewarded these less visible figures with probation or reduced sentences in exchange for testimony against the men at the top.

*Id.* (emphasis in original).

100. *Compare S. 438 Hearings, supra* note 6 (testimony of James Harrison, Sr., president and chief executive officer, First Community Bancshares, Inc., for the American Bankers Association) (stating that "civil RICO was never intended to be used . . . to turn ordinary state common law disputes into federal racketeering cases . . . [and that] [t]he American Bankers Association will support any legislative initiative which will leave the remedy for garden variety commercial disputes to state common law or to [other] applicable federal statutes . . .") with *H.R. 1046 Hearings, supra* note 48 (statement of John L. Douglas, General Counsel, Federal Deposit Insurance Corp.) (stating that "the RICO statute can be an important instrument to deter . . . improper behavior [in banks and thrifts] and to facilitate recovery of lost funds").

101. *Sleeping Watchdog: How Regulators, Error Led to the Disaster at Lincoln Savings*, Wall St. J., Nov. 20, 1989, at A1, col. 6. The Securities and Exchange Commission accused Keating and an associate of making \$14 million in preferential loans to insiders, who included Keating himself. Many of these loans were made without collateral or credit checks. Keating settled by

After the acquisition, Keating and his partners started to invest heavily in high-risk investments, which ultimately led to Lincoln's failure and the assumption by the taxpayers of an estimated 2.5 billion dollars in damages.<sup>102</sup> Those who ran Lincoln under Keating apparently engaged in fraudulent transactions that were contrived solely for the purpose of siphoning off funds for its owners and officers.<sup>103</sup> Following Lincoln's collapse, government regulators brought a civil suit against Keating and other officers,<sup>104</sup> accusing them of RICO fraud and conspiracy for their

signing a consent decree without admitting or denying liability. Immediately after acquiring Lincoln, Keating dismissed conservative lending officers and internal auditors, even though he had told federal regulators that he would keep them. Keating's son, who dropped out of Indiana University, worked as a country club busboy until just a few years before he was appointed to the position of Chairman of the Board. *Id.*

102. Kammer & Hall, *Lincoln's "Kamikaze Banking": Wallflower Thrift Became High Roller*, *Ariz. Republic*, Sept. 16, 1989, at A2, col. 1. The savings and loan crisis developed after President Ronald Reagan signed into law the Garn-St. Germain Act,

which permitted S&Ls to branch out from home loans into risky and potentially high-profit investments such as commercial real estate development. Entrepreneurs were soon lining up to start S&Ls. As has now been widely documented, they made large, unsecured loans to associates on overvalued land and used S&L funds to pay for their jets, Rolls-Royces, yachts and French chefs.

. . . Well-paid lobbyists for the S&L industry fought any proposed legislation that might shut down S&Ls, even the sick ones.

*Mob Ties to S&Ls Uncovered in Book on U.S. Thrift Crisis*, *Denver Post*, Sept. 11, 1989, at 4G, col. 1.

When Keating and his associates applied for permission to purchase Lincoln, they assured government officials that they would continue to focus on the type of investments that previously supported Lincoln's operations. Kammer & Hall, *supra*, at A2, col. 1. Before the deregulation, developers financed risky projects personally. Once the institutions' funds were available for such investments, however, the developers freely took chances on risky projects because the funds of the S&Ls were federally insured, and the taxpayers ultimately would bear any losses. *Id.* Consequently, thrift officials started practicing "kamikaze banking" and called the game "heads I win; tails the taxpayers lose." *Id.* Such practices "privatized gain and socialized loss." *Id.* The *Arizona Republic* reported:

Many of the sales involved undeveloped land in Estrella, Lincoln's 20,000-acre master-planned community west of Phoenix. The deals were "devoid of economic substance," . . . [a government civil racketeering suit charged] because "substantially all the funds" for the purchases were provided by Lincoln.

As a result of the sales, the suit charge[d], Lincoln showed \$82 million in profits. Then its directors used a tax-allocation plan to "upstream" the money to the parent corporation, which then diverted the dollars to corporate insiders in the form of high salaries and bonuses.

. . . When the executives came under pressure from federal regulators to limit such risky investments, they devised a plan to camouflage their ownership, the suit claim[ed].

*Id.*

Lincoln also invested in junk bonds; the investments constituted a full 10% of Lincoln's portfolio. *Gonzalez Says New Round of Lincoln Hearings Will Follow Every Thread from the S&L's Mess*, *Wall St. J.*, Dec. 19, 1989, at A16, col. 2. Those purchases of junk bonds resulted in millions of dollars in profits to Michael Milken. *Id.*

103. *U.S. Regulators Sue Owners in Big Savings Unit Failure*, *N.Y. Times*, Sept. 16, 1989, at 33, col. 3.

104. *Id.* Actual damages alone are \$1.1 billion. *Id.* The suit alleges that Keating purchased Lincoln for the sole purpose of milking its funds and that hundreds of millions of

personal misuse of the institution's funds.<sup>106</sup>

The events leading up to the collapse of Lincoln Savings & Loan raise other troubling and as yet unresolved questions, particularly with regard to the effort to rewrite RICO. Five United States Senators, now known as the "Keating Five,"<sup>106</sup> were given substantial campaign contributions at the same time that they intervened in the investigation of Lincoln and Keating; some of them intervened more than once.<sup>107</sup> One of the Senators, Senator Dennis DeConcini, whose reputation for integrity in Washington is one of the highest, is one of the principal sponsors of RICO reform legislation that would directly benefit Keating.<sup>108</sup>

dollars were diverted from the savings association to Mr. Keating's real estate company, the American Continental Corporation.

To accomplish the diversion, . . . Lincoln officials broke Federal banking regulations, backdated and forged documents, undertook "sham transactions," made illegal loans and cash payments, paid "excessive compensation" to some of the owners and spent Lincoln's deposits on "the personal, political and charitable convictions" of Mr. Keating.

*Id.* The suit lists several real estate transactions and insider stock sales that led to Lincoln's demise. *Id.* Those transactions resulted in profits that were recorded improperly by methods that, according to an independent audit released by the Federal Home Loan Bank Board, "amounted to 'accounting gimmickry.'" *Id.*

105. *Id.* An example of one of Lincoln's sham transactions involved Amcor, a subsidiary of Lincoln. Amcor bought an 8500-acre parcel of land for \$3000 per acre. It then sold 1000 acres to a newly formed limited partnership, for \$14,000 per acre, and recorded an \$11 million dollar profit. Amcor then paid Lincoln \$4.4 million in tax payments. The limited partnership, West Continental Land, borrowed the amount needed for the purchase, \$10.5 million, from Lincoln, and a further \$3.5 million from E.C. Garcia, who had just borrowed \$20 million from Lincoln. West Continental had assets of only \$31,000. The interest payments alone on these loans were \$1.4 million per year. Such transactions were devised simply to bolster Lincoln's income statement, creating the appearance of a financially sound institution. Nash, *Takeover of Lincoln Defended*, N.Y. Times, Dec. 8, 1989, at D1, col. 6.

106. These senators are Sen. Dennis DeConcini (D-Ariz.), Sen. Alan Cranston (D-Cal.), Sen. Donald W. Riegle (D-Mich.), Sen. John H. Glenn (D-Ohio), and Sen. John McCain (R-Ariz.). See *The Keating Five* (editorial), Wall St. J., Oct. 16, 1989, at A14, col. 1.

107. See Hall & Kammer, *DeConcini Aides Tied to Keating S&L Loans*, Ariz. Republic, Sept. 14, 1989, at A1, col. 1.

108. See Hall & Kammer, *DeConcini Bill May Offer Keating Help*, Ariz. Republic, Sept. 15, 1989, at A1, col. 5. Sen. Dennis DeConcini initially told Arizona news people that the RICO Reform Act would not "affect government regulators or government cases." *Id.* He now concedes that it would. *Id.* He now also is supporting changes to its retroactive provisions. See *RICO-Reform Bill Won't Be Retroactive*, Wall St. J., Sept. 28, 1989, at B7, col. 1.

The three accounting firms implicated in the Lincoln scandal are Arthur Young & Co., Arthur Andersen & Co., and Touche Ross & Co. See *The Lapses by Lincoln's Auditors*, N.Y. Times, Dec. 28, 1989, at D1, col. 4. "Arthur Young became an advocate of its client," according to Ronald Rus, an attorney representing American Continental's bondholders. *Id.* at D6, col. 2. Arthur Andersen resigned as American Continental's auditor at the same time that the examination of Lincoln by the Federal Home Loan Bank Board revealed questionable accounting practices. The accounting firm of Kenneth Leventhal & Co. was hired by the government to investigate 15 land sales by Lincoln, all of which resulted in the recording of huge profits for American Continental. Leventhal found that the transactions should not be recorded as profits. *Id.* Touche's involvement comes from its current status as American Continental's auditor. *Id.* at D1, col. 1. Bondholders claim that American Continental sold as many bonds as it did because of Touche's involvement. *Id.*

Whatever the Senators intended, Keating frankly acknowledges that he sought to buy influence with the contributions.<sup>109</sup> Senator DeConcini at

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Arthur Andersen & Co. fraudulently backdated loan data, and "stuffed" files with loan documentation. Thomas, *Regulators Cite Delays and Phone Bugs in Examination, Seizure of Lincoln S&L*, Wall St. J., Oct. 27, 1989, at A4, col. 2. The firm admits backdating the data, but claims that it engaged in no improprieties. *Id.*

Ernst & Young, which at the time was still Arthur Young & Co., gave Lincoln and American Continental unqualified auditing opinions at the time that examiners claimed that Lincoln was insolvent. Nash, *Auditors of Lincoln on the Spot*, N.Y. Times, Nov. 14, 1989, at D1, col. 3. The accounting firm did not mention in its opinions the potential problems with Lincoln. *Id.*

Based on the firm's report that American's financial condition was accurately represented, American sold more than \$200 million of junk bonds to over 23,000 investors. *Id.* Following these sales, the Arthur Young partner who handled Lincoln's account, accepted a \$930,000 position with Lincoln, earning much higher pay than he received at Arthur Young. *Id.* Senator Cranston, facing a re-election battle for his fifth term in 1992, promised to help the 23,000 bond purchasers. *Cranston Decides to Fight in Effort to Overcome Image in Savings and Loan Failure*, N.Y. Times, Jan. 21, 1990, § 1, at 24, col. 2 (remarks of Sen. Alan Cranston) (stating that "[t]hese bonds are now worthless, and many widows and elderly people have lost their life savings"). Senator Cranston is planning legislation that would allow the bondholders to pursue civil suits against the federal government for negligence in allowing sales to continue after doubts were raised about the financial state of American Continental and Lincoln Savings. *Id.*

Similar collapses of Arthur Young clients occurred in Texas; Vernon Savings & Loan Association (\$1.1 billion) and Western Federal Savings & Loan Association (\$1 billion) both failed. *See Spotlight on Arthur Young Is Likely to Intensify As Lincoln Hearings Resume*, Wall St. J., Nov. 21, 1989, at A20, col. 2.

109. *See* Jackson, *New Disclosures of Riegle's Lincoln Role Suggest He Was More Than a Bystander*, Wall St. J., Nov. 15, 1989, at A28, col. 1 (stating that Keating "arranged \$1.4 million in political donations for the five senators"). Keating said later that "he hoped his money had induced elected officials to take up his case." Jackson, *FBI Probe Focuses on Senators' Ties to Keating's S&L*, Wall St. J., Nov. 13, 1989, at A7B, col. 2. What Keating thought he bought was substantial; what he paid was substantial, too.

In April 1987 the five Senators met with Edwin Gray, who at that time was head of the Federal Home Loan Bank Board. Stanton, *House Orders Subpoenas in Keating Case*, Ariz. Republic, Oct. 13, 1989, at A1, col. 1. They convinced regulators to take steps to end a regulatory investigation of Lincoln. *Id.* Two of Senator DeConcini's top aides received more than \$50 million in real estate loans from Lincoln. Hall & Kammer, *DeConcini Aides Got Keating S&L Loans*, Ariz. Republic, Sept. 14, 1989, at A1, col. 1. Senator McCain received \$112,000 in campaign money and \$13,433 in unreported airplane trips. Hall & Kammer, *Kin's Deal, Trips Reveal Close McCain-Keating Tie*, Ariz. Republic, Oct. 8, 1989, at A1, col. 1. His wife and father-in-law invested \$359,100 in a shopping center partnership with Keating. *Id.* Senator Cranston received more than \$850,000 in contributions from Keating. Stanton, *Ethics Review Urged of Keating, Senators*, Ariz. Republic, Oct. 14, 1989, at A1, col. 1. Senator Glenn received \$200,000 from Keating for a political committee controlled by the Senator, and \$39,000 in direct contributions, which was probably a violation of federal election law. *Id.*

Subsequently, when the regulators targeted the thrift for closer investigations, Keating used his political influence to get the Senators to cut off the investigation, requiring the regulators to start anew. *See* Kammer & Hall, *supra* note 102, at A2, col. 1. That provided Keating and his friends opportunity to further their frauds, sinking Lincoln into an even deeper pit. *Id.* The five Senators pressured the Federal Home Loan Bank Board to stop the investigation of Lincoln in 1987. *See The Senate Five*, N.Y. Times, Oct. 23, 1989, at A18, col. 1. Senators Cranston and DeConcini intervened again in March 1989. *Id.* At least \$1 billion of damages were caused by the delay. *Id.* Following the recommendation by the examiners that Lincoln be placed in receivership, M. Danny Wall, the newly appointed chairman of the Office of Thrift Supervision (formerly the Federal Home Loan Bank Board), transferred the case from San Francisco to Washington, where



first denied that the legislation would help Keating.<sup>110</sup> His efforts at

it sat for almost two years with no action. *Id.*

When William Robertson, chief of regulation and supervision at the San Francisco office of enforcement, recommended to Wall that Lincoln be placed into receivership in 1987, Wall told Robertson that he would be replaced. *Sleeping Watchdog: How Regulators, Error Led to the Disaster at Lincoln Savings*, Wall St. J., Nov. 20, 1989, at A12, col. 4. Then Wall stripped the San Francisco office of power to act over the case. *Id.*

One of the major concerns of the House Banking Committee investigating the Lincoln failure and Wall's relation to it was why Wall did not heed the San Francisco office's warnings. Jackson & Thomas, *Wall Denies Any Politics in S&L Rulings As Keating Refuses to Testify at Hearing*, Wall St. J., Nov. 22, 1989, at A4, col. 2. Representative Toby Roth stated, "I, for the life of me, can't see why you didn't listen to your people in San Francisco instead of Mr. Keating. When it comes to Mr. Keating, you seem to be rather wimpish." *Id.*

The sentiment held by many of those present at the House hearings was reflected in the words of Representative Jim Leach, who said, "If the allegations the committee has heard so far are true, Charles Keating is a franco-path of obscene proportions—the Rev. Jim Bakker of American commerce—given license to steal by a bank board headed by the Neville Chamberlain of financial regulation, a cheerleader who saw little evil and thus spoke little truth." *Savings Executive Won't Testify and Blames Regulators for Woes*, N.Y. Times, Nov. 22, 1989, at B8, col. 2.

Edwin Gray, who was the head of the Federal Home Loan Bank Board at the time the investigation began, commented on the intervention of the Senators; it is not necessary to agree with his observations to recognize their force:

Sen. DeConcini apparently knows no shame. Like former House Speaker Jim Wright, who resigned in shame, Sen. DeConcini continues to justify his actions to subvert the regulatory process—on behalf of Lincoln—as merely "doing [his] job" to "represent a constituent . . . against rogue bureaucratic regulators."

. . . [A]lmost 29 months ago, senior thrift regulators warned Sen. DeConcini that he was intervening on behalf of an S&L which was "a ticking time bomb." Nevertheless, he continued to intervene for, and serve as an apologist for, Lincoln Savings management. Having hitched himself to the Lincoln Savings wagon in return for substantial political contributions, Sen. DeConcini found it impossible to free himself, even as Lincoln plunged over the precipice and into the abyss. Once bought, he stayed bought.

Lincoln's Charles H. Keating, Jr. has not been shy about his own intentions. Asked whether his very substantial political contributions to DeConcini and other political figures "in any way influenced [them] to take up [his] cause," Keating replied: "I want to say in the most forceful way I can, I certainly hope so." Certainly, Keating's hopes were answered by DeConcini.

Gray, *Regulator Rebuts DeConcini*, Ariz. Republic, Sept. 3, 1989, at C1, col. 1. It also is possible that the fraud at Lincoln Savings was linked to the fraud at Drexel Burnham Lambert. See *The Lincoln Scandal May Lead to Drexel's Door*, Bus. Wk., Jan. 15, 1990, at 26, 27 (reporting that the government is tracing ties between Keating and Milken, noting SEC Chairman Richard C. Breeden's comment that if companies report profits on transactions that are not at "arm's length" and are "arranged" by buyers and sellers, "that is financial fraud," and indicating that thrift regulators are expected to file several suits soon).

110. Senator Dennis DeConcini told the Arizona papers: "If I had known what I know now when I received these contributions, I would not have accepted them." Stanton, *DeConcini to Repay: Returning \$48,000 Keating Donations*, Ariz. Republic, Sept. 19, 1989, at A1, col. 1. Senator DeConcini also acknowledged that such suits were not filed "unless you have at least enough to get to a jury," a strong acknowledgment of wrongdoing. Senator DeConcini's promise to return the contributions to him from Keating is also an acknowledgment of his own wrongdoing. *Id.*

For a story of the relationship between Keating and Senator Alan Cranston, see *The Seduction of Senator Alan Cranston*, Bus. Wk., Dec. 4, 1989, at 82, 84 (reporting how wealthy contributors gain access in Washington and forge alliances that transcend ideological lines, noting that

RICO reform, however, go forward despite the effect such efforts will have on cases like Lincoln's in the future.

The bank and thrift crises on the federal level are paralleled at the state level by the collapse of insurance companies, many of which are also fraud-based failures caused by insiders.<sup>111</sup> From 1969 through 1983,

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Senator Cranston or a group affiliated with him received close to \$1 million from Keating, and quoting Keating, on whether his giving to Cranston and others went to buy influence, "I want to say in the most forceful way I can, I certainly hope so").

The remarkable aspect of the thrift crisis is that the political fall-out is so small. See Rosenbaum, *S&L's: Big Money, Little Outcry*, N.Y. Times, Mar. 18, 1990, at E1, col. 1. David E. Rosenbaum stated:

Before the decade is out, the Federal bailout of the savings and loan industry is expected to cost the Government more than \$200 billion. That is much more than the Government will spend on such critical social programs as preschool education, drug control and aid to the homeless. It is more than will be spent on highways, air traffic control and pollution abatement. It amounts to more than \$1,300 for every American taxpayer, and it will not enhance national security, promote economic growth or improve public welfare one bit.

It is, by any measure, the biggest debacle in public finance in the United States since the Great Depression. One way or another, the public will pick up the tab, in the form of higher taxes or reduced spending for other programs. A natural question is, why has it not become one of the biggest political scandals as well?

To be sure, some elements of scandal are there. Lies, greed, graft, negligence, back-room deals and outright corruption were behind a huge raid on the public till. Powerful politicians and tycoons were largely responsible.

But it has not become a scandal like Watergate or Teapot Dome in part because too many politicians have had their hands soiled by the savings and loan mess. So many are to blame that few are left to blame them.

*Id.*

111. See *Familiar Refrain: Texas Insurer's Demise Raises Fear of Reprise of State's S&L Fiasco*, Wall St. J., Feb. 17, 1988, at A1, col. 6. "Autopsies of several failed insurers across the country have turned up evidence of frauds and inadequate regulation. . . . [T]he indirect cost to taxpayers already is growing, because insurers deduct from state taxes their rising assessments from the guaranty funds." *Id.* A special report by Arthur Andersen & Co. concluded that "a noticeable number of insurance company insolvencies [would occur] over the next five to seven years." *Id.*; see also *Insurance Company Failures: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 596 (1989) (statement of Frederick D. Wolf, Assistant Comptroller General, Accounting and Financial Management Division); GEN. ACCOUNTING OFFICE, *INSURER FAILURES: PROPERTY/CASUALTY INSURER INSOLVENCIES AND STATE GUARANTY FUNDS 3-4* (1987). This report states that between 1969 and 1986, 140 insolvencies occurred, 42% of them since 1983. The number of companies with troubling financial conditions is also increasing, the causes of which include underpricing, underreserving, reinsurance problems, and fraud. *Id.* Indeed, Pacific Standard Life Insurance, a carrier with \$7 billion of insurance in force, which invested heavily in junk bonds, is insolvent. Rosen, *Your Money: Are the Insurers Fiscally Strong?*, N.Y. Times, Jan. 6, 1990, at 34, col. 1. The collapse raised concern about whether it was an isolated event, as insurance companies own 30% of the junk bonds in the United States (pension funds own another 15%). *Id.* Gerald Morlitz, a director of Arthur Andersen & Co., observed, "I think it's the savings and loans five years deferred without any bailout. . . . Junk bonds were accurately named from the start." *Id.* See generally SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 101ST CONG., 2D SESS., *FAILED PROMISES: INSURANCE COMPANY INSOLVENCIES* (Comm. Print 1990). In transmitting the Report, Chairman John D. Dingell observed:

The Subcommittee found that the present system for regulating the solvency of insurance companies is seriously deficient. Consequently, the number of insolvent companies has

state guarantee funds assessed healthy insurers only 454 million dollars to cover claims of insolvent members.<sup>112</sup> In 1987, however, 234 companies were in liquidation, and 74 companies were in reorganization.<sup>113</sup> State guaranty funds paid a record \$909 million to bail out the failures in 1987.<sup>114</sup> The industry holds large portions of the junk bonds issued by corporate America as well as large portfolios of real estate, both of which are particularly vulnerable to an economic down turn, as in the savings and loan crisis.<sup>115</sup> While the state insurance commissioners op-

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increased dramatically, and the resulting costs to the public have skyrocketed due to the changing nature of the insurance industry. With an accelerating international market and the leverage provided by excessive reinsurance, the costs of liquidating failed companies is starting to reach billions of dollars and take many years to resolve.

The parallels between the present situation in the insurance industry and the early stages of the savings and loan debacle are both obvious and deeply disturbing. They encompass scandalous mismanagement and rascality by certain persons entrusted with operating insurance companies, along with an appalling lack of regulatory controls to detect, prevent, and punish such activities. Because the ill effects of fraud and gross incompetence may be hidden for 10 years or more after a policy is written, the problems observed by the Subcommittee could quickly escalate into a real threat to the solvency of the insurance industry if reforms are not implemented very soon.

*Id.* at iii.

112. Nash, *As More Insurance Concerns Fail, Fears Mount of Industry Crisis*, N.Y. Times, Apr. 5, 1989, at A1, col. 2, D22, col. 5.

113. Getschow & Charlier, *Woes Envelop Texas Insurance Industry*, Wall St. J., Nov. 8, 1988, at A8, col. 1.

114. *Familiar Refrain: Texas Insurer's Demise Raises Fear of Reprise of State's S&L Fiasco*, Wall St. J., Feb. 17, 1989, at A1, col. 6.

115. See Nash, *supra* note 112, at A1, col. 2. Recent studies indicate that, over the next five years, "[e]ven in the best-case scenario of an economic 'soft landing' . . . about one out of eight issuers of high-risk, high-yield" bonds will default. Ricks, *Even 'Soft Landing' May Jolt 1 of 8 Junk Bonds*, Wall St. J., July 12, 1989, at C1, col. 2. See generally Garcia, *Junk-Bond Portfolios of Insurers Spark Fears over Adequacy of Regulatory Role*, Wall St. J., Feb. 22, 1990, at A4, col. 1 (reporting that insurance company investments in the troubled junk bond market are raising concern with the state of state systems of regulation); *The Party's Over: Mounting Losses Are Watershed Event for Era of Junk Bonds*, Wall St. J., Sept. 18, 1989, at A1, col. 6 (noting that the mounting losses in junk bonds mark the end of an era).

As noted in the 1974 study of the Chamber of Commerce, fraud against insurance companies by outsiders is also a major component of white-collar crime. It is estimated, for example, that 15% to 20% of all insurance claims are fraudulent for a total loss of over \$15 billion annually, and because an insurance company must generate approximately \$1.25 in premiums for every \$1 it pays in claims, policy holders are paying an extra \$18.75 billion in premiums annually because of fraud. INSURANCE INFORMATION INSTITUTE, *INSURANCE FRAUD 1* (1988). Arson, particularly arson-for-profit, is a particularly disturbing facet of the insurance fraud problem. Fire losses in the United States in 1987 hit a record \$8.5 billion. INS. INFORMATION INST., *INSURANCE FACTS: 1988-89 PROPERTY/CASUALTY FACT BOOK 69* (1989). In 1986 arson was the cause of one in four fires in nonresidential structures, including schools, restaurants, garages, and manufacturing plants. *Id.* at 70. Of the losses, 26.9% were attributable to arson. *Id.* Overall, in 1987, 105,000 incendiary or suspicious origin fires resulted in \$1.59 billion in losses and 730 civilian deaths. *Id.* at 71. For a more complete analysis, including the various motives for arson (revenge, vandalism, concealment of crime, and insurance profit), see generally S. REP. NO. 535, 96th Cong., 1st Sess. (1979); NAT'L INSTITUTE OF LAW ENFORCEMENT & CRIMINAL JUSTICE, *ARSON AND ARSON INVESTIGATION SURVEY AND ASSESSMENT* (1977).

pose rewriting RICO, the insurance industry is behind it.<sup>116</sup>

The Nation's securities and commodities markets are also facing scandals of the most disturbing dimensions. Not unexpectedly, the securities and commodities industry supports the rewriting of RICO.<sup>117</sup>

Fraud by insurance companies is also part of the white-collar crime problem. The insurance industry is, for example, facing "what may become the biggest financial scandal in the history of Medicare: the misspending of as much as \$10 billion in Medicare funds over the past six years." *Medical Mess: Has Medicare Paid out Billions Actually Owed by Private Insurers?*, Wall St. J., Apr. 7, 1989, at A1, col. 6. The subjects of the developing investigation by the Department of Justice include some of the Nation's biggest insurance companies. Losses may reach between \$400 and \$900 million. Gerth, *Enforcement Lax, U.S. Auditors Say*, N.Y. Times, Oct. 4, 1989, at A21, col. 1. During the same period, America's elderly saw their annual deductible in hospital care and doctor care more than double. *Id.* Fraud, too, is widespread in the relationship between doctors and hospitals, but medical fraud statutes seldom are enforced, which contributes to the growth of medical costs in the Nation. See generally *Warm Bodies: Hospitals That Need Patients Pay Bounties for Doctors' Referrals*, Wall St. J., Feb. 27, 1989, at A1, col. 6 (reporting that the Inspector General of the Department of Health and Human Services warns of "nation-wide proliferation" of kickback allegations in medical testing and that federal and state laws are "weak or rarely enforced"); Waldholz & Bogdanich, *Warm Bodies: Doctor-Owned Labs Earn Lavish Profits in a Captive Market*, Wall St. J., Mar. 1, 1989, at A1, col. 6 (terming the increasing practice of demanding referral fees "[s]tickup, extortion, bandit(ry)" (quoting Terrance Gill, consultant)). Kickbacks represent collusion. Often doctors also misrepresent the bills for the work they do, costing patients, employers, and insurance companies millions of dollars a year. Rundle, *Medical Ripoff: How Doctors Boost Bills by Misrepresenting the Work They Do*, Wall St. J., Dec. 6, 1989, at A1, col. 1.

116. Compare H.R. 1046 Hearings, *supra* note 48 (statement of Hon. Jim Long, Commissioner of Insurance, State of North Carolina, for the National Association of Insurance Commissioners) (arguing that "RICO has proven to be an effective tool to state insurance regulators in their battle against insurance fraud and is probably the single most effective deterrent which presently exists against national and international conspiracies to evade oversight by insurance regulators and to defraud consumers of insurance products") with *RICO Reform Hearings, supra* note 76, at 189-92 (testimony of Irvin B. Nathan on behalf of the Alliance of American Insurers, the American Insurance Association, the National Association of Independent Insurers, and the State Farm Insurance Cos.). Mr. Nathan stated that "the [RICO] statute was enacted back in 1970 to prevent the infiltration of legitimate business by organized crime. . . . [F]requently [civil] suits are brought against insurance companies for allegedly engaging in racketeering. . . . [T]he statute is being grossly misused." *Id.* at 189-90. He further stated that "we believe there should be a private remedy for true victims of organized crime. . . . We think, however, that there is no need for a Federal treble damage remedy in . . . ordinary commercial disputes. . . ." *Id.* at 190-91.

117. See, e.g., *RICO Reform Hearings, supra* note 76, at 374 (testimony of Edward L. O'Brien, Securities Industry Association) (stating that "[t]he private right of action of RICO is not essential. . ."); see also H.R. 1046 Hearings, *supra* note 48 (statement of Philip A. Feigin, Securities Commissioner of Colorado, for the North American Securities Administrators Association). Commissioner Feigin stated:

NASAA is opposed to . . . the RICO Reform Act of 1989. The number, size and scope of investment frauds detected in just the last few years are well documented and staggering. At the same time, prosecutorial and regulatory resources remain limited, with little realistic hope of material improvement. These resource restrictions at the state and federal levels argue in favor of broader private remedies, not the opposite. . . .

*Id.* But see H.R. 1046 Hearings, *supra* note 48 (statement of Daniel L. Goelzer, General Counsel, Securities and Exchange Commission) (stating that "the Commission supports legislative efforts to eliminate the overlap between private remedies under RICO and those available under the federal securities laws"); *id.* (statement of Michael E. Don, Deputy General Counsel, Securities Investor

Nevertheless, while the litany of big names proven or alleged to be involved in fraud is long, it is best symbolized by Ivan F. Boesky<sup>118</sup>

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Protection Corp.). Don stated:

RICO has been used by SIPC and its trustees . . . . In each . . . instance, RICO was a necessary tool to redress the wrongs for which SIPC and its trustee seek reimbursement. \* \* \*

SIPC opposed any changes in RICO that would curtail the ability of SIPC or its trustees to use the statute . . . . SIPC, like the [other] federal corporations that [protect depositors] . . . protect[s] the public in their investments.

*Id.* Individual securities firms, too, put their money where their financial interest rests. Drexel Burnham contributed \$250,000 to the anti-RICO campaign. *Drexel's Best Investment*, FORBES, Oct. 17, 1988, at 12.

118. In 1986 the most scandalous year in Wall Street history ended with Ivan F. Boesky's agreeing to plead guilty in connection with insider trading and pay a \$100 million fine. ALMANAC, *supra* note 93, at 454. See generally 133 CONG. REC. H8841 (daily ed. Oct. 20, 1987) (remarks of Rep. John Conyers) (discussing securities fraud, including a detailed analysis of many of the mergers and alleged insider trading involving Boesky); D. FRANTZ, LEVINE & CO.: WALL STREET'S INSIDER TRADING SCANDAL (1987) (recounting the investigation and prosecution of Dennis Levine, Martin Siegel, and Ivan F. Boesky); M. STEVENS, THE INSIDERS: THE TRUTH BEHIND THE SCANDAL ROCKING WALL STREET (1987) (telling the story of the investigation and prosecution of Dennis Levine). Other notable individuals in the unfolding scandals include Robert A. Freeman, a partner at Goldman, Sachs & Co., see *A Top Trader at Goldman, Sachs Pleads Guilty to Insider Charges*, N.Y. Times, Aug. 18, 1989, at A1, col. 1 (felony charge of insider trading); Boyd L. Jefferies, a founder of Jefferies & Co., see *Jefferies, Top Insider-Trading Witness, Draws Modest Fine, Is Put on Probation*, Wall St. J., July 7, 1989, at A2, col. 1 (felony charge of insider trading); Paul Bilzerian, a corporate raider, who took over Singer Co., see *Hagedorn, Sew and Reap: How Paul Bilzerian Fell, Taking Singer Co. for a Very Wild Ride*, Wall St. J., June 28, 1989, at A1, col. 6 (felony conviction of securities and tax laws in connection with takeover); Don Carter, a collector of shareholder proxies in takeover battles, see *Feron, Proxy Firm Founder Pleads Guilty to Theft and Fraud*, N.Y. Times, Mar. 21, 1990, at C6, col. 1 (reporting Carter's felony charge of \$1 million theft and false New York State income tax); Burrough, *Carter Faces up to 4 Years in State Prison*, Wall St. J., Mar. 21, 1990, at A2, col. 3 (reporting that Carter's conduct reflected "a systematic pattern of greed and fraud" (quoting Ronald Goldstock, Director, New York Organized Crime Task Force)); and Salim B. Lewis, a take-over speculator, see *Lewis Pleads Guilty to Three Felony Counts*, Wall St. J., Aug. 31, 1989, at A3, col. 1 (felony charge of manipulation of stock of Fireman's Fund Corp.). Not all of those indicted in the current insider trading scandals were of comparable significance factually; their legal significance is, of course, a difficult matter. See *Carpenter v. United States*, 484 U.S. 19 (1987); R. WINANS, TRADING SECRETS (1986).

and Michael R. Milken.<sup>119</sup> The most common offense is insider trading.

119. See generally C. BRUCK, *THE PREDATORS' BALL: THE INSIDE STORY OF DREXEL BURNHAM AND THE RISE OF THE JUNK BOND RAIDERS* (1989) (telling the story of the investigation and indictment of Michael Milken); *Securities Markets Oversight and Drexel Burnham Lambert: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 2-3 (1988) [hereinafter *Drexel Hearings*] (remarks of Rep. John Dingell) (stating that in 1986, \$32 billion in junk bonds were issued, 40% of which were handled by Drexel, and that Milken was the "most knowledgeable" and "most responsible"); *id.* at 15 (testimony of Michael Milken) (stating that "based on my constitutional right under the fifth amendment [I decline to answer] lest my answers be used in an attempt to incriminate me"); Greenwald, *Predator's Fall*, *TIME*, Feb. 26, 1990, at 46; Dobrzynski, *After Drexel*, *BUS. WK.*, Feb. 26, 1990, at 36; Galen, *And Now, the Predator Is Preyed Upon*, *BUS. WK.*, Mar. 5, 1990, at 70; Dobrzynski, *Could Fred Joseph Have Saved Drexel?*, *BUS. WK.*, Mar. 5, 1990, at 72.

Editorial comment on the sudden bankruptcy of Drexel Burnham Lambert Group, Inc. on February 13, 1990, ravages widely. One theme, which appeared in several editorials, is that its collapse is attributable to RICO. See, e.g., *Fall of the House of Drexel* (editorial), *WALL ST. J.*, Mar. 19, 1990, at A14, col. 1. This editorial stated that the argument "that Drexel was a government victim stands on more than one leg. The most obvious is the half-billion capital drain in the settlement of its RICO charges." *Id.*; see also *Regulating the Financiers* (editorial), *FINANCIAL TIMES*, Mar. 13, 1990, at 18, col. 1. This editorial observed that "Drexel . . . arguably owes its demise to a draconian fine of \$650 m. Fear of . . . [RICO] encouraged the firm to plead guilty . . ." *Id.* A counter point often made is that Drexel's fall was Drexel's fault. Parallels sometimes are drawn in the counter point commentary between the rise and fall of Michael Milken and the rise and fall of Charles Ponzi, who gave his name to the so-called "Ponzi scheme." See Stein, *The Biggest Scam Ever?*, *BARRON'S*, Feb. 19, 1990, at 8; see also 12 *THE OXFORD ENGLISH DICTIONARY* 101 (2d ed. 1989) (from the name of: "A form of fraud in which belief in the success of a fictional enterprise is fostered by payment of quick returns to first investors from money invested by others"). Firm judgments, of course, will have to await careful analysis of the evidence that is brought out in the bankruptcy proceedings and the congressional investigations and hearings, which are sure to follow. It is appropriate, however, to conclude now that efforts to fix the blame for Drexel's fall on RICO reflect more about preexisting attitudes toward the statute than any evidence about Drexel in the public record. Nevertheless, the question merits at least preliminary analysis.

In 1899 Charles Ponzi, an Italian immigrant, sought fame and fortune in the United States; he found both, at least temporarily. After unsuccessfully plotting several get-rich-quick schemes, Ponzi hit upon a postal reply coupon arbitrage. Ponzi hoped he could purchase postal reply coupons in depressed foreign markets and redeem them in the United States, where their market value was as much as 50% higher, taking the spread as his profit. Ponzi's initial efforts failed because of unforeseen transaction costs involved in redeeming the coupons. Nevertheless, Ponzi took his fatally flawed idea public in December 1919 and used it to solicit money from naive investors, promising a 50% interest on each investment in 90 days or 100% of the principal if the investment was redeemed before maturity. Because the underlying coupon redemption scheme did not work, old investors had to be paid with the new investors' monies. But early returns were so high—and came so quickly—that most investors stayed invested, and Ponzi did not have to return their principal. In a period of merely eight months, Ponzi's Security Exchange Co., which was located on School Street in the heart of Boston's financial district, took in at least \$9,582,000. Other sources place the figure as high as \$20,000,000, of which at least \$3,000,000 never was accounted for. See J. NASH, *BLOODLETTERS AND BADMEN* 450-51 (1973); see also D. DUNN, *PONZI, THE BOSTON SWINDLER* 247-48 (1975) (noting that the final bankruptcy report in 1931 indicated liabilities of \$3,986,179.77); C. SIFAKIS, *THE ENCYCLOPEDIA OF AMERICAN CRIME* 582-83 (1982) (stating that "[n]o one ever knew for sure"). Meanwhile, the 24 year old Ponzi lived the life of a young 1980s Wall Street investment banker; he bought: a \$100,000 mansion; his former employer's business; 200 suits; 100 pairs of shoes; four dozen canes with solid gold handles; two dozen diamond stickpins; 100 neck-ties; and a \$12,000 Locomobile, which needed, of course, a hired chauffeur.

The scheme collapsed when the *Boston Post*, which received a Pulitzer Prize in 1921 for its

In 1988, 3637 mergers and acquisitions were completed, a slight rise

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reporting on Ponzi, exposed the scheme and not enough new money came in to service old investors' interest or principal. Indeed, the run on Ponzi's company that followed the newspaper exposé verged on a riot. At the time Ponzi had as much as \$17,000,000 stuffed in shoeboxes and closets in his office and in various banks in Boston. In an attempt to recoup his fortune, Ponzi took \$2,000,000 to the casinos in Saratoga Springs, New York, and promptly lost all of it, leaving only \$15,000,000 to be returned to more than 40,000 investors.

But Ponzi was more than bankrupt; he was also in deep trouble with the law, federal and state. Arrested by United States Marshals, Ponzi plead guilty to a federal indictment for mail fraud. Ponzi's lawyer told the court, "Wild and reckless though he was, he had no intent to defraud. He wasn't the garden variety of criminal. . . . You ought not to deal with him as a man who did this maliciously." D. DUNN, *supra*, at 248. The court replied that it was "impressed with much that . . . [had] been said," but sentenced Ponzi to five years in the Plymouth Jail (Massachusetts had no federal prison), from which Ponzi protested his innocence, claiming that jealous financiers brought about his downfall. *Id.* at 249. Ponzi fought his way to the Supreme Court in an unsuccessful effort to prevent being turned over to the state authorities, while he was serving his federal term, to be tried on a series of 22 state indictments for larceny. *See Ponzi v. Fessenden*, 258 U.S. 254 (1922). Tried in a state court, Ponzi was found not guilty on 12 of the 22 indictments. *See Commonwealth v. Ponzi*, 256 Mass. 159, 160-61, 152 N.E. 307, 308-09 (1926). In a second trial of five of the other indictments, Ponzi secured a directed verdict on one indictment and a hung jury on the others; in a third trial, he was found guilty of the four indictments on which the jury hung, adjudged a "common and notorious thief," and sentenced to not less than seven and not more than nine years in prison. *Id.* When he was released from prison on parole in 1934, he was promptly deported. *See Ponzi v. Ward*, 7 F. Supp. 736, 738 (D. Mass. 1934) (holding that a scheme to defraud constitutes the crime of moral turpitude). Ponzi died in 1949 in a charity hospital in Rio de Janeiro, Brazil.

The sophistication of the financial instruments, the dimensions of the relevant markets, and the economic and social times are vastly different, but the resemblances between the rise and fall of Michael Milken's junk bond empire and Charles Ponzi's postal arbitrage scheme are haunting. Milken, as head of Drexel Burnham Lambert, Inc.'s high-yield and convertible bond department, promoted a diversified portfolio of junk bonds as the road to substantial profits. His theory was that the market had under evaluated the bonds and that diversification would off-set losses and ample profits would be provided over the long run by the interest rate difference between regular bonds and the high-yield variety. *See generally* C. BRUCK, *supra*, at 27-28. Milken supported his theory by reference to the classic work of W. Braddock Hickman, which he had encountered as a student at the University of California at Berkeley. *Id.* at 27-28; *see* W. HICKMAN, *STATISTICAL MEASURES OF CORPORATE BOND FINANCING SINCE 1900* (1960); W. HICKMAN, *CORPORATE BOND QUALITY AND INVESTOR EXPERIENCE* (1958); W. HICKMAN, *THE VOLUME OF CORPORATE BOND FINANCING SINCE 1900* (1953). A brief and useful summary of part of Hickman's larger work is *FIN. RESEARCH PROGRAM, NAT'L BUREAU OF ECONOMIC RESEARCH, INC., CORPORATE BONDS: QUALITY AND INVESTMENT PERFORMANCE, OCCASIONAL PAPER No. 59* (1957) [hereinafter *CORPORATE BONDS*]. Hickman's impeccable conclusions that investors "paid lower prices for, and thus exacted higher promised yields on the low-grade issues" is widely known in academic and other circles. *Id.* at 16. Less widely quoted outside of academic circles are the substantial qualifications:

The major conclusion that investors obtained higher returns on low-grade issues than on high grades should not be accepted without proper qualification. For it cannot be emphasized too strongly that this finding emerges only when broad aggregates of corporate bonds are considered over long investment periods, and given the price and yield relationships that existed during those periods. In effect, the aggregate results reflect the experience of all investors over long periods, rather than that of any particular investor over any given short period.

Another qualification is that realized yields and loss rates were not nearly so regularly related to quality as were promised yields and default rates. Because of the disparity in the performance of low-grade bonds, small investors (and many large investors that may have been inhibited from practicing the broadest type of diversification) would frequently have

from 3565 mergers in 1987; the value of the deals was a record 311.4

fares best by holding only the highest grade obligations. This conclusion follows both from the higher average default rate on low-grade securities and from the wider scatter of realized yields obtained on them over given periods.

A third qualification is that realized yields were subject to extreme aberrations over time, since they reflected not only the risks of the business cycle but the state of the capital market as well. The average yields realized over selected periods of offering and extinguishment, or over selected chronological periods during which the issues were outstanding, indicate that the market usually overpriced low-grade issues (and underestimated default risks) at or near peaks of major investment cycles. As a general rule, low grades fared better than high grades when purchased near troughs and sold near peaks of investment cycle; but by the same token, losses were heavy on low grades purchased near peaks and sold near troughs.

*Id.* at 16-17.

In the late 1970s Milken's aggressive marketing of junk bonds, in fact, supplied substantial new capital to small companies, whose prior access to capital had been through private placements, which included highly restrictive covenants that severely inhibited managerial flexibility. Traditional American entrepreneurship finally seemed to have a sympathetic banker. Later, Milken extended his theory and practice of junk bond financing to mergers and acquisitions, and he seemed to create a new environment, in which few companies were too large to be taken over even by small concerns. Eichenwald, *Drexel, Symbol of a Wall St. Era, Starts Liquidating After a Default*, N.Y. Times, Feb. 14, 1990, at A1, col. 1.

Indeed, for a while, market demand for junk bonds appeared strong. In fact, it appears that Milken forced the junk bond market beyond its natural boundaries. When companies and takeover specialists sought out Milken, they wanted one thing: financing. To get that financing, they seemingly were willing to pay large underwriting fees (as high as 4%; normal fees for triple A debt are one-half to three-eighths) and to submit to special conditions, which included a proviso that each new issuer of junk had to hold up its share of Milken's junk bond market through the purchase of junk issued by others, paid for with the money that came from the overfinancing that Milken required. C. BRUCK, *supra*, at 290.

The whole scheme, however, rested on an inadequate appreciation—witting or unwitting—of the data on rates of return and defaults and Milken's personal ability to make a market for the issuance or redemption of the bonds for which he was responsible. Milken promoted the market on a theory that the overall default rate on junk bonds generally was between 1% and 2% per year over the life of the bonds. He also promised to make a market in his issuance. In fact, the default rate was as high as 4%. Stein, *supra*, at 9; Asquith, Mullins & Wolff, *Original Issue High Yield Bonds, Aging Analyses of Defaults, Exchanges, and Calls*, 44 J. FIN. 923 (1989) (noting that the cumulative default rate of selected issues from 1977 to 1988 was 34%). A study by the Bond Investors Association, a not-for-profit bond research organization, that included more recent data, finds a cumulative default rate of approximately 38%. See BOND INVESTORS ASS'N, *DEFAULT RATE STUDY OF THE CORPORATE JUNK BOND MARKET 1980-1989*, table 2 (1990). The Association also commented:

The dominant role played by Drexel Burnham in managing the [junk bond] market led to an ever increasing confidence that there was no way, with a diversified portfolio, that one could lose. In addition, Drexel's willingness to stand behind their deals and restructure those that failed gave an ever increasing confidence that displaced good judgement. As a result, the buyers of junk issues became willing to buy any deal that was offered. What followed was the expanded use of junk bonds for buyouts and takeovers, a process that allowed individuals with more nerve than money to run a business they may or may not know anything about, using other peoples money. . . .

While these bonds are legally a creditor instrument, to be so, there has to be someone with an equity stake standing behind the bondholder against whom he can exercise his creditor rights. Too many junk bond issues have nominal or fictional equity behind the bondholders but plenty of senior creditors ahead of them. This leaves junk bondholders de facto shareholders. It is, in fact, a fool's bargain that is offered in many junk issues since the re-



wards of success go to the nominal shareholders while the cost of failure falls squarely on the junk bondholders. . . .

One of the tragedies of junk bonds is the relentless pressure they can impose on a business which causes erroneous decision making that often leads to hardship for suppliers and employees. The financial assumptions that back many of the junk bond offerings are often deal driven. By this we mean that, the financial result necessary to make the deal happen drive the assumptions used for the projections. . . .

Unfortunately, it seems the investment bankers and others responsible for creating these financial fictions receive the bulk of their rewards up front and suffer only in reputation from their faulty handiwork.

*Id.* at 3-4. The Association also estimated that the current risk premium, the amount the junk bond would have to pay over a treasury issue to justify the increased risk of default, may be twice the historic mark (5.3% rather than 2.6%). *Id.* at 9. Further bad tidings in the junk bond default picture are portended by the economic news that the average issue of junk is earning only 71% of what it needs to service its debt. See Lowenstein, *Junk Gets Junkier, and That May Explain Bonds' Current Ills*, Wall St. J., Nov. 5, 1984, at C1, col. 3.

Benjamin J. Stein adds:

[T]he whole concept of Drexel/Milkenism, namely that sub-investment-grade debt was underpriced and that profits could be had above market rates by buying junk on an on-going basis, had a huge theoretical flaw. If, in fact, junk were seriously underpriced, the market should have bid up the price until it was no longer underpriced. If Milken had uncovered a major market anomaly in the pricing of securities, and made his discovery known to anyone who would listen, the market should have bid up the price of junk to eliminate that inefficiency. In short order, if the inefficiency were real, market forces would correct it.

Stein, *supra*, at 9. He then sums up:

Milken . . . in fact discovered not . . . a market anomaly, but a way of fixing bond prices. Buying and selling only issues under his control, he [could] in fact fix the price . . . . He and his backers . . . [could] also reap monopoly rent, price fixed profits, at least for a time.

. . . .

Yet how to sell truly heroic amounts of the Drexel/Milken junk without the bond markets getting a chance to work their will on it and test whether it was junk or not?

. . . .

The answer . . . was [to have] Milken pals buy S&Ls, insurance companies, preferred-stock mutual funds, junk mutual funds, and have them buy the Drexel/Milken junk directly, without ever having to test the discipline of free financial markets. Use the leverage of deregulated financial institutions to keep the Ponzi going for a decade—with taxpayers' money. Don't have your pals put up their money to buy the junk. Have them put up someone else's money—savers, pensioners, insured people.

More than that . . . have every funding deal become the basis for the next. Use overfunding, in which issuers are stocked with more money than they even asked for, and use the Ponzi money for buying bonds of the next issuer.

*Id.* at 30-31. The rise and fall of Milken and Drexel was, in short, the to be expected rise and fall of a vast Ponzi scheme. *Id.* at 32.

Without references to Ponzi, other reports in the financial press—not editorial columns—concur that Drexel's fall was Drexel's fault.

[I]nterviews with numerous Drexel officials reveal the particularly debilitating effect that questionable managerial moves, relentless infighting and high-level greed had upon Drexel's health. . . . Among the events helping to bring Drexel Burnham down were these:

\* The decision in late 1988 to plead guilty to felony counts and dismiss Michael Milken triggered widespread discontent.

\* Rancorous conflicts sprang up among senior officials as to who would get the biggest bonuses. Rather than stand up to such bickering, Mr. Joseph (CEO of Drexel) placated his stars by awarding giant compensation packages for last year, including \$15 million for merger chief Leon Black and more than \$411 million for new junk-bond chief John Kissick. The firm itself

lost money for the year.

\* An equally troublesome and lengthy battle ensued when some employees who personally invested in partnerships formed by Mr. Milken—and had in many cases reaped stratospheric returns—insisted Drexel indemnify them against any lawsuits stemming from possible improprieties committed by the partnerships. Drexel gave in here as well.

\* A series of deals executed by the corporate-finance department over the past year went sour, leaving the firm with hundreds of millions of dollars in illiquid holdings that pushed down its credit rating.

Cohen, *The Final Days: Drexel Itself Made Firm's Sudden Demise All but Inevitable*, Wall St. J., Feb. 26, 1990, at A1, col. 1.

In truth, Drexel's problems were attributable to many sources, only one of which is the fine it paid to settle its fraud plea.

Drexel was hit by a rapid-fire series of catastrophes: The firm suffered losses of tens of millions of dollars in October from takeover-stock speculation after the planned takeover of UAL Corp. collapsed. Standard & Poor's Corp. lowered its credit ratings on Drexel debt. Some lenders cut the firm off. And the junk-bond prices plummeted, leading Drexel to take a huge writedown on its \$1 billion portfolio of the high-yield, high-risk securities in December.

. . . .

Assets and liabilities were mismatched at the holding company level to a degree that shocked some investment bankers at rival firms. The parent's highly illiquid assets—including the privately held stock of its broker-dealer subsidiary, as well as equity and bridge loans the firm had held in companies it helped take private in leveraged buy-outs—were financed with short-term loans such as commercial paper. This setup made the firm extremely vulnerable to any shortfall in liquidity—the ability to raise cash—since assets could not be easily sold.

*Drexel's Unraveling Began Six Months Ago*, Wall St. J., Feb. 15, 1990, at C9, col. 1. Further, as top financial officials at other firms explained:

The way Drexel financed its operations was particularly perilous . . . . Specifically, Drexel relied heavily on a technique called "double leverage" to finance its broker-dealer operations. Double leverage means a firm borrows at the holding company level and lends those funds to a subsidiary, which in turn can use the money as collateral with which to raise more money. Essentially, the same funds can be put to work twice. . . . Double leverage is common on Wall Street and in banking, but Drexel was twice as double leveraged as its competitors. . . . What Drexel appears to have done was to borrow at the holding company level in the short-term commercial paper market and use that money to finance its subsidiary's portfolio of high-yield, high-risk "junk bonds." Those bonds became increasingly illiquid and did not produce the required cash flow. . . .

"It was a very imprudent capital structure," said a financial executive at a large Wall Street firm. "My guess is that it's not practiced by anyone who intends to live for a long time."

Bartlett, *No Epidemic Is Expected from Drexel's Killer Flu*, N.Y. Times, Feb. 26, 1990, at C6, col. 5.

The operation of Drexel Burnham Lambert Group, Inc., itself was also a significant contributor to its own collapse. Solvency was not the securities firm's immediate problem; it became the parent's. Only when the parent began siphoning funds from the brokerage did federal regulators become concerned and intervene:

The rapid collapse of Drexel was precipitated by financial dealings between the firm and its corporate parent. The parent company—which had sizable holdings of junk bonds and other securities that had declined sharply in value and could not be easily sold—last week began to siphon some of the \$500 million in capital that the investment bank held in excess of the amount Federal law required.

Eichenwald, *supra*, at C4, col. 2.

While editorial critics of RICO accuse the government of ruining Drexel with a \$650 million fine, they forget that the fine was not completely paid. In fact, the Securities and Exchange Commission still is owed \$150 million of the fine, which was earmarked for the victims of the frauds

billion dollars, compared with 219 billion dollars in 1987.<sup>120</sup> Few felt confident that investors, stock holders, and employees were not cheated by breaches of integrity in many of these transactions, and many felt that the ongoing federal investigations would reveal only a small part of these losses.<sup>121</sup> Nevertheless, the data indicate that something far more

Drexel confessed to perpetrating. Eichenwald, *For Drexel, Creditors Galore*, N.Y. Times, Feb. 15, 1990, at C1, col. 6.

Following the parent's bankruptcy filing, the bonuses that the securities firm paid out to favored employees shortly before the parent sank came to the public's attention. These bonuses may total as much as \$350 million. Smith, *Drexel Creditors Focus on Firm's Big Bonuses to Staff*, Wall St. J., Feb. 21, 1990, at C1, col. 2. While bonuses are a standard portion of income on Wall Street, the parent's creditors may try to show that they are excessive, preferential, and must be returned. See *Cunningham v. Brown*, 265 U.S. 1, 11 (1924) (requiring Ponzi's creditors to return funds when they sought "a preference by . . . diligence"). An editorial in the *New York Times* put the question best:

The firm needed \$350 million to survive, executives reportedly said. What a striking figure.

It's the same amount the brokerage firm is said to have paid out in bonuses since the end of December. . . . How can the executives of Drexel Burnham Lambert sleep at night . . . ?

*Drexel Eats the Golden Goose*, N.Y. Times, Feb. 22, 1990, at A26, col. 1.

120. ALMANAC, *supra* note 93, at 87. The largest corporate merger in history occurred in 1988: R.J.R. Nabisco for \$24.9 billion. See generally B. BURROUGH & J. HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* (1990); H. LAMPERT, *TRUE GREED: WHAT REALLY HAPPENED IN THE BATTLE FOR RJR NABISCO* (1990). It is argued, among other claims, that leveraged buyouts strengthen the market by cutting corporate fat and building leaner companies, while shareholder value is maximized; others disagree. Compare Tierney, *Ethics and Takeover: A Debate (1): The Ethos of Wall Street*, in *ETHICS AND THE INVESTMENT INDUSTRY* 65 (G. Williams, F. Kelly & J. Howek eds. 1989) with Hanson, *Ethics and Takeover: A Debate (2): A Continuing Assessment of Wall Street Ethics*, in *ETHICS AND THE INVESTMENT INDUSTRY*, *supra*, at 77. See generally W. ADAMS & J. BROCK, *DANGEROUS PURSUITS: MERGERS AND ACQUISITIONS IN THE AGE OF WALL STREET* (1989) (arguing that leveraged buyouts divert the Nation's resources from building new plants, investing in research and development and job creation, lack economic purpose, and are stimulated by investment bankers seeking fees). If these recent books on the merger are to be believed, the chief immediate effects of the R.J.R. Nabisco takeover seem to have been the breakup, despite assurances that it would not occur, of pieces of the company, not for economic reasons, but to meet crushing interest payments; the use of "golden parachutes" by top executives (the chief executive's was worth \$53 million); the axing of 2600 employees (none of whom was so royally protected); and a 30% rise in the cost of Ritz crackers. It now seems, too, that the junk bonds used to finance the deal may not be strong. See Ruffenach & Smith, *RJR Nabisco Gets Major Jolt in Debt Ratings*, Wall St. J., Jan. 29, 1990, at A3, col. 1 (reporting that Standard & Poor's and Moody's assigned speculative rate to the planned debt offering). This sort of activity hardly inspires confidence in the working of our free enterprise system under the current rules. If it also is to be accompanied by illicit profits and inadequate methods for legal redress, the fear must be well founded that the goose that is laying the golden egg for us all is being killed by those in whose hands its care and feeding are entrusted. See L. BRANDEIS, *OTHER PEOPLE'S MONEY* 17-18 (1914). Justice Louis Brandeis stated, "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." *Id.*

121. It was believed that the ongoing federal investigations most likely would "vastly understate the total losses incurred by stock-market investors, as well as many target companies that no longer exist and their acquirers, who doubtless paid too dearly for them." Metz, *Trading Abuses Run Deep on Wall Street*, Wall St. J., Feb. 17, 1987, at 31, col. 1. See generally GEN. ACCOUNTING OFFICE, *SECURITIES REGULATION: EFFORTS TO DETECT, INVESTIGATE, AND DETER INSIDER TRADING* (1988) (reporting that federal investigation uncovers intricate insider trading schemes in which individuals accumulate millions of dollars in a vulnerable securities market, but detection and

serious is awry on Wall Street. No wonder the small investor has little confidence in the basic integrity of the market.<sup>122</sup>

Having a blue-chip name is not enough.<sup>123</sup> Some of the most well-known names in the financial industry are associated in the data of the Central Registration Depository of the National Association of Securities Dealers and the North American Securities Administration Association with "forging customer signatures, mailing phony statements, laundering money, selling bogus securities, stealing customer funds, churning client accounts, and price-gouging."<sup>124</sup> More typically, these reputable firms sold new products that they did not understand to people who had no business buying them.<sup>125</sup>

Wall Street is not alone in its problems with fraud; LaSalle Street is implicated as well. In 1982 it was estimated that various forms of commodity investment fraud cost 200 million dollars each year.<sup>126</sup> While the Securities and Exchange Commission is generally thought to be one of the most professional of the regulatory agencies, few have similar confidence in the Commodity Futures Trading Commission (CFTC).<sup>127</sup> In 1982 the Senate Committee on Government Operations

proof of violations is usually difficult).

122. See *infra* note 176 and accompanying text.

123. See generally Henriques, *A Blue-Chip Name Is Not Enough*, N.Y. Times, Jan. 14, 1990, § 3, at 15, col. 3 (reviewing the disciplinary records of the major retail brokerage firms for the years 1981-1989).

124. *Id.*

125. *Id.*

126. See S. REP. NO. 495, 97th Cong., 2d Sess., at v (1982). One of the largest commodities frauds in the history of the Nation was perpetrated by W. Herbert and Lamar Hunt, the Texas Oil millionaires. In 1979 the Hunt brothers began buying large quantities of silver, driving up the price on world markets from \$9 an ounce in September 1979 to \$50 in January 1980. Prices collapsed in March 1980. The drop, which shook a number of financial institutions, cost the Hunts well over \$1 billion. Minpeco, S.A., a Peruvian mineral company, won a \$132.5 million civil RICO suit against the brothers that prompted them to file for personal bankruptcy. See generally *Minpeco, S.A. v. Hunt*, 724 F. Supp. 259 (S.D.N.Y. 1989) (denying motions for reargument and reconsideration); *Minpeco, S.A. v. Hunt*, 127 F.R.D. 460 (1989) (denying relief from judgment based upon settlement agreement); *Minpeco, S.A. v. Hunt*, 718 F. Supp. 168 (1989) (entering judgment and denying motions for judgment notwithstanding the verdict and new trial); *Minpeco, S.A. v. Hunt*, 693 F. Supp. 58 (1988) (holding for the defendant); *Minpeco, S.A. v. Hunt*, 686 F. Supp. 427 (1988) (denying motion for summary judgment); *Minpeco, S.A. v. Hunt*, 686 F. Supp. 420 (1988) (denying motion to dismiss); *Hunts' Assets Will Pay Creditors, Court Rules*, N.Y. Times, Dec. 17, 1989, § 1, at 36, col. 5 (discussing the bankruptcy proceeding); *2 Hunts Fined and Banned from Trades*, N.Y. Times, Dec. 21, 1989, at D1, col. 6 (reporting that the CFTC suit was settled for a \$10 million fine and lifetime ban).

127. In 1986 the General Accounting Office and the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee both conducted investigations. "[T]heir inquiry . . . [was focused on] the adequacy of surveillance systems at [the Securities and Exchange Commission, the New York Stock Exchange,] the American Stock Exchange, the National Association of Securities Dealers, the Chicago Board Options Exchange and other major markets." Nash, *G.A.O. in Insider Inquiry*, N.Y. Times, Dec. 5, 1986, at D1, col. 6. In particular, however, the CFTC was "criticized for a perceived lack of control over the futures markets, and reports of the

termed the CFTC ineffective and expressed the sentiment that the industry was a scandal waiting to happen, as the CFTC was thoroughly outgunned.<sup>128</sup> The unfolding indictments and guilty pleas in Chicago are that prophecy fulfilled. Forty-six traders and one clerk have been indicted, principally through the efforts of a Federal Bureau of Investigation (FBI) sting operation and the United States Attorney's Office.<sup>129</sup> A number of guilty pleas have been taken.<sup>130</sup> The CFTC, however, did not become aware of the trading abuses until it was informed of the FBI investigation.<sup>131</sup> A majority of commodities brokers are properly concerned that a perception that the game is fixed will erode investor confidence when foreign competition is gearing up,<sup>132</sup> particularly be-

fraud investigation have intensified the criticism." *Commodity Case Seen Expanding*, N.Y. Times, Jan. 24, 1989, at D1, col. 6; see also *C.F.T.C. Insists It Had Role All Along*, N.Y. Times, Jan. 24, 1989, at D11, col. 1 (reporting that the CFTC said it was participating for more than two years in the investigation in Chicago, but knowledgeable insiders said that "[f]undamentally, they did not know what was happening"). See generally GEN. ACCOUNTING OFFICE, FUTURES MARKETS: STRENGTHENING TRADE PRACTICE OVERSIGHT (1989) (giving background on federal investigations and concluding that weakness in controls over futures trading provides dishonest floor participants with the opportunity to cheat customers).

128. S. REP. No. 495, *supra* note 126, at 10.

129. See *46 Commodities Traders Indicted After a 2-Year F.B.I. Investigation*, N.Y. Times, Aug. 3, 1989, at A1, col. 4.

130. See Drew & Crawford, *Indictments Name 46 Traders, 14 to Enter Guilty Pleas, Cooperate*, Chicago Tribune, Aug. 3, 1989, at 1, col. 6 (noting that 14 persons were to plead guilty and cooperate). It is widely alleged that RICO was abused in the investigations. See, e.g., Siler, *2 Trading Practices Could Bring Prosecution*, N.Y. Times, Feb. 15, 1989, at D8, col. 3. Only one of those indicted under RICO, however, pleaded guilty. McMurray, *Ex-Trader Enters Guilty Plea to Charge of Racketeering in Chicago Futures Case*, Wall St. J., Jan. 24, 1990, at C14, col. 3 (reporting that 15 of 48 individuals indicted in commodities fraud plead guilty, 1 under a RICO charge). The scope of the problem and attitude of the traders toward their customers was indicated in trial testimony and vividly reflected in conversations secretly taped by the FBI. See *Crime at Merc Widespread, FBI Testifies*, Wall St. J., Jan. 31, 1990, at C1, col. 3 (reporting that an official at the Chicago Mercantile Board of Trade states that abuses are not widespread, but FBI testimony calls them "systemic and pervasive"); McMurray, *Tapes Depict Traders Routinely Scheming*, Wall St. J., Jan. 9, 1990, at C1, col. 4 (reporting that in conversations taped by the government, traders stated, "[Expletive] the customers . . . [w]e should have the advantage" and "I'll pay, but I'm going to rip every Paine Webber order I get").

131. *C.F.T.C. Insists It Had Role All Along*, *supra* note 127, at D11, col. 1.

132. The much beleaguered chairwoman of the CFTC put it succinctly that "if customers feel they are being ripped off by an exchange or that the exchange is not vigilant against fraud, they will leave the markets." Wayne, *With Futures Under Fire, a Watchdog Feels the Heat*, N.Y. Times, Mar. 26, 1989, § 3, at 1, col. 3. The Nation's positive investment climate encourages domestically based multinational corporations to invest in the United States and attracts capital from abroad. The ability to invest in the stock exchanges and then hedge the risk in a connected and liquid market are key selling points for the American securities industry. Other countries, especially the United Kingdom, Japan, Singapore, and Australia, consider developing active commodities markets an important part of their economic strategy. As distrust of the integrity of the markets erodes investor confidence, the volume on the exchanges could erode and damage the prominence of the Nation's capital markets. See *Chicago Case Spurs Tough Stance*, N.Y. Times, Jan. 23, 1989, at D5, col. 4.

The crisis's severity can be seen by looking at the percentages of the industry volume that are

cause similar investigations are also pending in New York.<sup>133</sup>

Running through each of these tragic scandals is the general problem of fraudulent financial reporting. When fraudulent financial reporting occurs, widespread consequences result, sometimes causing a devastating ripple effect.<sup>134</sup> Government agencies are sharply critical of

affected by the current investigations. In 1988 the total number of contracts traded in the United States was 246 million. The Chicago Board of Trade has 47.5% of this volume, the Chicago Mercantile Exchange has 26.7%, the other exchanges under investigation together account for 22.9%. Accordingly, the exchanges not under investigation have less than 3% of the market.

From a relatively quiet system of trading agricultural commodities, the futures markets have become a major part of the world's financial system. Banks, pension funds and other institutional investors trade billions of dollars worth of contracts on interest rates, stock indexes and currencies daily, seeking to reduce their risk or to profit on volatility in the markets.

Norris, *Old Habits Dominate in the Pits*, N.Y. Times, Feb. 10, 1989, at D1, col. 3. See generally Gilpin, *A Painful Way to Be Noticed*, N.Y. Times, May 10, 1989, at D1, col. 3 (giving market statistics).

133. In addition to the ongoing FBI investigation at the two Chicago exchanges, other investigations of fraud are being conducted at the New York Mercantile Exchange; the Commodity Exchange, Inc.; the Coffee, Sugar, and Cocoa Exchange; and the Cotton Exchange (which includes a separate market, Citrus Associates of the New York Cotton Exchange, Inc.). Accordingly, of the eleven contract markets in the United States, seven, whose aggregate volume accounts for all but a minuscule fraction of the total commodity contracts traded, are under sweeping criminal and civil investigations. See Eichenwald, *New York Commodity Inquiry*, N.Y. Times, May 5, 1989, at D1, col. 6; Gilpin, *supra* note 132, at D1, col. 3. But see E. LEFEVRE, *REMINISCES OF A STOCK OPERATOR* (1985) (writings by stock speculators and commodities traders about the cliques, pools, insider trading tips, and operators since the early 1900s).

134. NAT'L COMM'N ON FRAUDULENT FIN. REPORTING, *REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING 4* (1987). Ohio's experience with the 1985 failure of E.S.M. Government Securities, Inc., including a paid-for false audit report, and the repercussions it caused in the savings and loan industry and on the gold market illustrates this problem. In addition to the collapse of E.S.M., the fraud led to the insolvency of Home State Savings Bank in Ohio and the shutdown of 69 privately insured thrift institutions that cost at least \$315 million. See *Prison Awaits 2 E.S.M. Figures As 3d Awaits Jury*, Chicago Tribune, Feb. 26, 1987, at 3, col. 6. Home State alone lost \$144 million in its dealings with E.S.M. *Convictions Reversed in Ohio Bank Failure*, N.Y. Times, Nov. 16, 1989, at D2, col. 5. Subsequently, the accounting firm of Grant Thornton reached a \$22.5 million settlement with the American Savings and Loan Association of Miami, which lost \$55.3 million; it also reached a \$50 million settlement with 17 municipal governments, which sued under RICO. Nash, *10 Charged in Collapse of E.S.M.*, N.Y. Times, Sept. 17, 1986, at D1, col. 6. Marvin L. Warner, the owner of Home State, was convicted in 1987 of securities fraud and misrepresentation. The conviction, reversed by an appellate court, is now pending before the Ohio Supreme Court. *Convictions Reversed in Ohio Bank Failure, supra*, at D2, col. 5. Warner is in bankruptcy, attempting to avoid the \$4 billion in claims pending against him. *Id.* See generally D. MAGGIN, *BANKERS, BUILDERS, KNAVES AND THIEVES* (1989) (telling the story of the collapse of E.S.M. Government Securities, Inc. and its relationship to a crooked auditor, a lawyer who formerly worked for the SEC, but committed suicide when the scandal broke, and Marvin Warner, who transferred huge chunks of his fortune to family trusts to put it beyond the reach of creditors, regulators, and litigants).

Other types of frauds abound. See, e.g., *Combs v. Bakker*, 886 F.2d 673 (4th Cir. 1989) (reinstating a civil RICO suit against James and Tammy Faye Bakker for fraudulently selling 55,000 "lifetime" partnerships in PTL); Gottschalk, *Churchgoers Are the Prey As Scams Rise*, Wall St. J., Aug. 7, 1989, at C1, col. 3 (reporting that "[m]ore than 15,000 Americans lost a total of \$450 million in the five years in bogus money-making schemes promoted by religious charlatans," according to the North American Securities Administrators Association (NASAA) and the Council of

the accounting profession, also a participant in the effort to rewrite RICO,<sup>135</sup> for its failure to uncover the widespread fraud in the bank and thrift crisis.<sup>136</sup> Litigation is pending against at least ten firms that au-

Better Business Bureaus); see also *The Penny Stock Scandal*, Bus. Wk., Jan. 23, 1989, at 74 (analyzing the penny stock market fraud). Binkley Short, portfolio manager of the Over-The-Counter Securities Fund, stated, "Penny stock operators are damaging the public's pocket book much more than Ivan Boesky or Mike Milken." *Id.*; see Steptoe, *Big Broker Hurt by Clampdown on Penny Stocks*, Wall St. J., Sept. 18, 1989, at C1, col. 5 (estimating that fraud and manipulation in the penny stock market costs \$2 billion annually); Ingersoll & Stricharchuk, *Critical Condition: Generic-Drug Scandal at the FDA Is Linked to Deregulation Drive*, Wall St. J., Sept. 13, 1989, at A1, col. 6 (trying to meet mounting demands with its shrinking staff, the Food and Drug Administration is hit by a scandal involving acceptance of gratuities from generic drug makers); *Convictions for Fraud Against SBA Set a Record; Audit on Venture-Capital Liquidations Spurs Cash*, Wall St. J., Sept. 11, 1989, at B2, col. 3 (reporting that fraud actions against the Small Business Administration resulted in nearly twice as many convictions as last year, and that one-half involved the agency's minority procurement program and one-third involved loan programs); *Guilty Plea by Ex-Officer of Beech-Nut*, N.Y. Times, Nov. 14, 1989, at D1, col. 6 (reporting that the president of the Beech-Nut Nutrition Corp. pleaded guilty to selling sugar water as apple juice for babies to consumers).

*The NASAA Report on Fraud and Abuse in the Penny Stock Industry* concluded:

Penny stock swindles are now the No. 1 threat of fraud and abuse facing small investors in the United States. [It is] estimate[d] that Americans lose at least \$2 billion each year as a result of schemes involving penny stocks—the shadowy netherworld of the U.S. equity markets. The penny stock industry increasingly is dominated by utterly worthless or highly dubious securities offerings that are systematically manipulated by repeat offenders of state and federal securities laws and other felons, some of whom have been identified as having ties to organized crime. Since *unmanipulated* penny stock investors are believed to lose all or some of their investment 70 percent of the time and the presence of fraud pushes up that figure to 90 percent, abusive promoters of these low-priced securities rely on sophisticated, high-pressure telemarketing techniques to lure in hundreds of thousands of new, unsophisticated investors, a majority of whom appear to be first-time entrants to the market and are clearly unsuitable candidates for risky penny stocks.

NORTH AM. SEC. ADM'RS ASS'N, *THE NASAA REPORT ON FRAUD AND ABUSE IN THE PENNY STOCK INDUSTRY* 1 (1989) (emphasis in original); see also Stern & Poole, *"Like a Slaughterhouse for Hogs,"* FORBES, Dec. 25, 1989, at 42 (reporting the major role played by the mafia in the manipulation of penny stocks, laundering of money, and theft through boiler-room type sale operations selling worthless stock of public companies).

Mylan Laboratories, Inc., a small Pittsburgh based generic drug company in the \$3.5 billion market, is largely responsible for uncovering the widespread fraud in the Food and Drug Administration; it is now processing a \$200 million civil RICO suit against four competitors because of their fraudulent filings that resulted in delay of the consideration of Mylan's own filings. Freudenheim, *Exposing the F.D.A.*, N.Y. Times, Sept. 10, 1989, § 3, at 1, col. 3.

135. See *RICO Reform Hearings*, *supra* note 76, at 3, 4-6 (testimony of Ray J. Groves, Chairman of the Board, American Institute of Certified Public Accountants). Mr. Groves stated that RICO's "private civil remedy was [not] intended for use against legitimate business people, corporations and licensed professional partners, or . . . in commercial disputes having nothing . . . to do with . . . organized crime." *Id.* at 4. "[T]he need for reform is clear." *Id.* at 6.

136. GEN. ACCOUNTING OFFICE, *CPA AUDIT QUALITY: FAILURES OF CPA AUDITS TO IDENTIFY AND REPORT SIGNIFICANT SAVINGS AND LOAN PROBLEMS* 1 (1989). The GAO Report stated:

We concluded that for 6 of the 11 S&Ls, CPAs did not adequately audit and/or report the S&Ls' financial or internal control problems in accordance with professional standards. The CPAs' problems involved (1) inadequate audit work in evaluating loan collectibility and (2) inadequate reporting on S&Ls' accounting practices, regulatory compliance, and internal

dited failed thrifts.<sup>137</sup> More generally, major accounting firms have paid millions of dollars since 1980 to settle liability suits.<sup>138</sup>

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controls. The nature of the audit and reporting problems was significant enough to warrant our referring the CPA firms performing the audits to regulatory and professional bodies for their review.

The latest audit reports for the 11 S&Ls before they failed showed combined positive net worth totaling approximately \$44 million. At the time of the S&Ls' failures, which ranged from 5 to 17 months after the date of the last audit reports, the 11 S&Ls had combined negative net worth totaling approximately \$1.5 billion.

*Id.*

137. Wayne, *Where Were the Accountants?*, *supra* note 91, § 3, at 1, col. 2; *see also* Andrews, *U.S. Sues Ernst & Young on Savings Unit Audits*, *N.Y. Times*, Mar. 3, 1990, at 21, col. 5 (reporting an FDIC suit for \$560 million against Ernst & Young in connection with Western Savings Association of Dallas, Texas and noting other suits: Touche Ross for audits of Beverly Hills Savings Association in Mission Viejo, California (\$2.9 billion in assets); Deloitte Haskins & Sells for audits of Sunrise Savings of Boynton Beach, Florida (\$1.5 billion in assets); Grant Thornton for audits of Sunbelt Savings of Dallas and Rooks County Savings in Kansas; and Coopers & Lybrand for First Federal Savings and Loan Association of Shawnee, Oklahoma); *Arkansas Firm Pays \$12 Million Over S&L Claims*, *Wall St. J.*, Sept. 6, 1989, at B7, col. 1 (reporting that an Arkansas law firm paid \$12 million to settle claims arising from its failure to provide adequate counseling to FirstSouth, F.A., a \$1.68 billion thrift that collapsed because of speculative loans to stock holders and other borrowers, and that other settlements include \$6.6 million from officers and directors of the thrift and \$9 million from a mortgage brokerage firm); Berton, *Friendly Watchdog: An S&L in California Dumped Peat Marwick for Congenial Auditor*, *Wall St. J.*, May 9, 1989, at A1, col. 6 (analyzing a fraud by an auditor in Ramona Savings & Loan Association, by which the federal fund has lost \$65.5 million). *See generally Prosecuting Fraud in the Thrift Industry: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 73 (1989) (testimony of Gary L. Kepplinger, Associate General Counsel, General Accounting Office) (stating that as of Mar. 30, 1989, in 16 of 26 failed thrifts studies, civil suits have been filed against officers, directors, borrowers, attorneys, and related persons, six of which included civil RICO counts requesting \$638 million dollars); Berton, *Big Accounting Firms Face Ban in S&L Bailouts*, *Wall St. J.*, Mar. 14, 1990, at A3, col. 1 (reporting that six of the biggest accounting firms—five of the top six (excluding Price Waterhouse)—were banned from doing new work for thrifts by the Resolution Trust Corp. because of pending litigation for past faulty audits and dozens of additional, impending civil suits against accountants).

138. *See* Russell, *All Eyes on Accountants*, *TIME*, Apr. 21, 1986, at 61. The accounting profession, once thought to play the role of an outside watchdog, is under heavy competitive pressure to go along with questionable annual reports and increasingly is losing its independence, because it also offers management consulting advice. *See* Klott, *Accounting Role Seen in Jeopardy*, *N.Y. Times*, Feb. 21, 1985, at D22, col. 1. "After a spectacular string of corporate failures and financial scandals in recent years, the industry that is supposed to audit company books and sniff out chicanery" is itself coming under close scrutiny. Russell, *supra*, at 61. "Some auditors may have been too close to their clients and allowed them to do things that they shouldn't have done. I'm not sure the industry was as independent as it should have been," observes Arthur Bowman, the editor of *Bowman's Accounting Report*, an Atlanta based newsletter. Wayne, *supra* note 91, at 12, col. 1. Indeed, the Big Eight, insiders say, are agreeing not to testify against one another. *Id.* No wonder the accounting profession is a major contributor to the political campaigns of those in the forefront of the effort to disembowel RICO. *See* Corrigan, *Rolling Back RICO*, 18 *NAT'L J.* 2114-15 (1986); *see also* Campbell, *U.S. Suing Lawyers to Recoup S&L Losses*, *Chicago Tribune*, Nov. 20, 1989, at 1, col. 5 (stating that more than 24 lawsuits against attorneys and accountants for thrift losses are pending, and that in 1988, more than \$105 million was recovered in settlements and judgments against professionals, returning \$2.50 in recoveries for every \$1 spent on the suits). Theodore C. Barreaux, Vice President of the American Institute of Certified Public Accountants, attributes the Department of Justice's switch in 1988 from opposition to support of the prior criminal conviction



In addition to the savings and loan crisis and widespread securities and commodities frauds, the 1974 study of the Chamber of Commerce also did not focus on fraud against the government. Federal prosecutors today are successfully using criminal RICO to attack a variety of forms of governmental corruption at the federal<sup>139</sup> and state<sup>140</sup> level. Similarly, governmental victims of such corruption are seeking civil relief.<sup>141</sup>

Only estimates exist of the full extent of fraud against the federal government, but the numbers are "staggering."<sup>142</sup> If those estimates are applied to state expenditures, the numbers become even larger.<sup>143</sup>

limitation on RICO to a series of meetings between Accounting Institute lawyers and Department officials. Corrigan, *supra*, at 2115. See generally Cowan, *Rivalries, Responsibilities and Some New Risks*, N.Y. Times, Mar. 11, 1990, § 3, at 11, col. 1 (reporting that accounting firms, which most state laws require to practice as private partnerships without the limited liability enjoyed by corporations, are becoming more likely to face responsibility for clients' problems, no major firm is close to insolvency but several face claims totaling hundreds of millions of dollars, and annual insurance premiums and deductibles, which may be as high as \$5 million on each claim and with a \$30 million worldwide annual deductible, can consume up to 5% of a firm's total fees or as much as 25% of a partner's pretax profits).

139. See, e.g., *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982) (contract procurement fraud), *cert. denied*, 459 U.S. 1170 (1983).

140. See, e.g., *United States v. Robinson*, 763 F.2d 778, 780 (6th Cir. 1985) (state liquor commission).

141. See, e.g., *Alcorn County v. United States Interstate Supplies, Inc.*, 731 F.2d 1160, 1162-63 (5th Cir. 1984); *Oklahoma ex rel Dep't of Human Servs. v. Children's Shelter, Inc.*, 604 F. Supp. 867 (W.D. Okla. 1985); *Pennsylvania v. Cianfrani*, 600 F. Supp. 1364, 1368-69 (E.D. Pa. 1985); *Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 636-37 (D. Alaska 1982); *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245, 247 (D. Md. 1980).

142. In 1985 Senator Joseph Biden told the Senate:

A generally accepted estimate of fraud against the Government . . . does not . . . exist.

That the figure must be enormous is indicated by a variety of factors. . . .

. . . A general estimate of fraud in [nondefense] programs was put at 1 to 10 percent by the U.S. Department of Justice. . . .

. . . [I]f that estimate were to be applied to the defense budget, it would mean that between \$2.85 to \$28.5 billion of fraud is worked on our national Government each year.

Applied to the domestic direct payments to individual sides of the ledger—a \$259 billion figure—it would mean that the range is between \$2.99 and \$29.9 billion . . . a staggering sum.

131 CONG. REC. S11,885 (daily ed. Sept. 20, 1985).

The government's program to combat fraud, particularly procurement fraud is understaffed and poorly managed. Shenon, *Dept. of Justice Faulted on Drive to Combat Fraud*, N.Y. Times, July 3, 1988, § 1, at 1, col. 6 (stating that the GAO finds that of 680 military fraud cases referred to the Justice Department from October 1983 to May 1987, 286 still await action). Nevertheless, individual investigations are impressive. See, e.g., Pasztor, *Prosecutors Close in on Unisys, Other Contractors As Arms-Procurement Inquiry Gains Momentum*, Wall St. J., Jan. 8, 1990, at A14, col. 1 (providing a score card on Operation Ill Wind, a military fraud scam: Emerson Electric entered a guilty plea and agreed to a \$2 million settlement; Teledyne, Inc. entered a guilty plea and agreed to an \$8.3 million settlement; Whittaker Corp. entered a guilty plea and agreed to a \$7 million settlement; Loral Corp. entered a guilty plea and agreed to a \$10.5 million settlement; and Unisys Corp. is expected to enter a guilty plea soon and settle for \$130 million).

143. In 1987 the states spent \$455 billion. ALMANAC, *supra* note 93, at 92. If Senator Biden's estimate of one to ten percent of this total is fraudulent, see *supra* note 142, between \$4.55 and \$45.5 billion of fraud occurred in the states.

Fraud against the government exists, moreover, not only on the expenditures side but also in the area of tax fraud. Estimating the size of the underground economy that goes tax-free is difficult,<sup>144</sup> but the tax gap may exceed 100 billion dollars a year.<sup>145</sup> Drug sales and gambling estimates exist and reflect a measure of precision,<sup>146</sup> but two other areas within RICO's scope merit particular mention: cigarette smuggling and gasoline tax evasion. Each carries overtones of organized crime's infiltration of legitimate business and implicates RICO's core concerns.

Estimates in 1978 of multimillion dollar tax losses in cigarette smuggling led to the enactment of special federal legislation and its inclusion in RICO.<sup>147</sup> Heavy organized crime involvement—in the traditional sense—is present in cigarette smuggling.<sup>148</sup> Lower estimates since 1978 are attributable to the effective enforcement of the earlier legislation.<sup>149</sup>

While systematic cigarette tax evasion is declining, gasoline sales tax evasion is rising. Estimates place the loss of gasoline sales tax at three billion dollars a year—one billion dollars federal and two billion dollars state.<sup>150</sup> Organized crime also is involved heavily in gasoline tax evasion.<sup>151</sup> Gasoline sales tax fraud increased after 1982, when the federal government increased the tax from four to five cents, which was more than twice the normal retail profit margin. Since 1982 more than

144. See S. REP. NO. 122, 98th Cong., 1st Sess. 2-4 (1983).

145. PRICE WATERHOUSE & CO., *THE PRICE WATERHOUSE GUIDE TO THE NEW TAX LAW*, at ix (1986).

146. See, e.g., ABT ASSOCS., *UNREPORTED TAXABLE INCOME FROM SELECTED ILLEGAL ACTIVITIES* 61, 108, 147 (1984) (estimating that the unreported taxable income in 1982 relating to drugs is \$22.15 billion, to gambling is \$2.39 billion, and to prostitution is \$11.58 billion).

147. See Contraband Cigarette Act, Pub. L. No. 95-575, 92 Stat. 2463 (1978) (codified at 18 U.S.C. §§ 2341-2346 (1988)); H.R. REP. NO. 1629, 95th Cong., 2d Sess. 4 (1978) (reporting that 34 states are losing \$400 million each year).

148. H.R. REP. NO. 1629, *supra* note 147, at 4 (stating that "organized crime involvement in cigarette bootlegging . . . [is] a serious national problem which state law enforcement efforts have failed to adequately deter").

149. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *CIGARETTE TAX EVASION: A SECOND LOOK* 2-4 (1985).

150. *Bootleg Gas and "Butt-Leg" Cigarettes* (pt. 3), *NEWSDAY*, Sept. 8, 1986, at 7.

151. *Id.* (reporting that the Colombo, Luchese, and Genovese families are active). In particular, the involvement of organized crime in gasoline tax evasion has been documented in New York City, New York State, New Jersey, Connecticut, and Florida. See Raab, *Mafia-Aided Scheme Evades Millions in Gas Taxes*, *N.Y. Times*, Feb. 6, 1989, at A1, col. 2. By 1985 the estimated illicit take was \$300 million a year in the New York area alone. *Id.* Columbo family mobster Michael Franzese's operations, however, extended beyond New York into New Jersey and Florida. He not only defrauded New Jersey of gasoline taxes, but also robbed Mobil Oil Corp. of its gas revenue monies. See *Reputed Mobster, Floridian Indicted for Racketeering*, *Sarasota Herald-Tribune*, Dec. 20, 1985, at 1, col. 2; *Corporations, Officers Charged with Tax Fraud*, *Tallahassee Democrat*, May 23, 1985, at 1, col. 1; see also Cook, *Making Crime Pay*, *FORBES*, July 27, 1987, at 56 (stating that "[g]asoline bootlegging is one of organized crime's great growth business[es] in the Eighties").

forty states and countless municipalities boosted their levies.<sup>152</sup> The victims of such evasion include not only the state treasuries and honest taxpayers, but also competing businesses.<sup>153</sup>

While the cost of vexatious litigation is generally spread throughout society by director's and officer's liability insurance,<sup>154</sup> too often the

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152. Cook, *supra* note 151. In 1989 fuel taxes went up in 23 states, cigarette taxes went up in 13 states, and sales taxes went up in 14 states. *Study Says Prison Spending Is Fastest-Growing Part of State Budgets*, N.Y. Times, Aug. 8, 1989, at A16, col. 3.

153. Retailers that have to compete with tax cheating competitors are put at a substantial and often disabling competitive disadvantage. This problem also implicates RICO's core concerns. Unfair competition, rooted in the profits of illegal behavior, goes to RICO's basic rationale. "When a gas station on one corner decides to cheat," New York Attorney Robert Abrams rightly observes, "the gas stations on the other three corners have to cheat or lose money and in some cases go out of business." Cook, *supra* note 151, at 59. Enforcement in this area seeks to achieve, as New York State Tax Department Chief Enforcement Officer Frank Munoz put it so well, a "level playing field." Wexler, *Tax Enforcers Try to Keep Ahead of More Wily Cheats*, CAP. DISTRICT BUS. REV., Jan. 4, 1988, at 1. Far from objecting to vigorous enforcement in this area, the legitimate business community applauds it. The New York State Petroleum Council, for example, fully supports New York's efforts. *Id.* It is difficult to understand, therefore, the objection some have to the use of RICO in such prosecutions as *United States v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989). See, e.g., *RICO's Taxing Problem*, Wall St. J., Aug. 22, 1989, at A14, col. 4 (opinion editorial of former Representative Harold Sawyer and defense attorney in civil RICO litigation involving tax fraud) (arguing that civil RICO "created a dangerous situation for legitimate businessmen and women"). Compare *Porcelli*, 865 F.2d at 1355 (holding that "prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at the time that the fraudulent returns were filed") with N.Y. Penal Law §§ 460.10-.80 (McKinney 1989) (enterprise corruption effective date Nov. 1, 1986) and *id.* §§ 190.60-.65 (McKinney 1988) (dealing with a scheme to defraud more than one person) (effective date Jan. 1, 1977) and *id.* § 10.00 (stating that "person" includes "government") and *People v. Block & Kleaver, Inc.*, 103 Misc. 2d 758, 759, 427 N.Y.S.2d 133, 136 (County Ct. 1980) (holding that N.Y. PENAL LAW § 190.65 was derived from the federal mail fraud statute, 18 U.S.C. § 1341 (1988)) and *Abramson & Marcus, Buchwald Wins Battle with Paramount*, Wall St. J., Jan. 9, 1990, at B6, col. 4 (reporting that former senior vice president for finance of Drexel Burnham Lambert, 11 individuals, and 14 corporations were indicted for enterprise corruption for use of \$10 million stolen from Drexel to set up network to evade motor fuel taxes and sales taxes).

Numerous successful federal and state prosecutions, including federal RICO indictments, are brought in this area. The *Porcelli* prosecution itself was one of the largest tax fraud prosecutions in the history of New York. It grew out of a joint New York, United States Attorney, FBI, and Internal Revenue Service investigation. See *In re Grand Jury Subpoena Served on John Doe*, 889 F.2d 384, 385 (2d Cir. 1989) (describing the task force as created in 1982 and "charged with investigating the influence of organized crime on the distribution of fuel oil and gasoline on Long Island"). The criminal forfeiture was transferred by the federal government to New York State. The impact of the prosecution was noted by the New York Commissioner of Taxation and Finance, Roderick Chu, who stated, "This is the first time that the state and the taxpayers will make a profit from the commission of a crime." *State Gets Gas Stations in Fraud Case*, N.Y. Times, Dec. 18, 1986, at B3, col. 1. The prosecutor, in fact, was an Assistant Attorney General of New York specially deputized as an United States Attorney. See generally *4-Million Fraud Trial Begins in U.S. Court*, N.Y. Times, Jan. 12, 1987, at B4, col. 1. Far from illustrating the misuse of RICO by invading a matter of exclusive local concern, the *Porcelli* prosecution illustrates the best in traditional federalism, a federalism not seen in terms of autonomous entities acting independently in criminal or civil matters, but a close working relationship or a partnership using federal and state criminal and civil sanctions in tandem to achieve a measure of justice for the Nation's people.

154. See Green, *Directors' Insurance: How Good a Shield?*, Wall St. J., Aug. 14, 1989, at B1,

cost of fraud is not shared through various kinds of insurance, but rests instead on the shoulders of victims, who can ill afford it. No one ought to contend, therefore, that fraud is a garden variety problem that can be weeded without special tools like RICO.<sup>155</sup>

### J. *The Adequacy of State Law Myth*

10.1 Myth: State Common-Law Jurisprudence Alone Is Adequate to Deal with Fraud.

10.2 Fact: State Common-Law Jurisprudence Alone Is Not Adequate to Deal with Sophisticated Forms of Fraud.

As part of the general effort to undermine the statute, RICO's antagonists typically assert, without supporting analysis, that state common-law jurisprudence is adequate to deal with fraud.<sup>156</sup> In fact, state

col. 3 (reviewing current issues in the dramatic growth from 52 director and officer suits per 100 companies in 1978 to 88 per 100 companies in 1988); *see also* Note, *supra* note 91, at 233-34 (discussing regulator suits under fidelity bonds and director and officer policies).

155. The crises in banking, insurance, securities, and commodities are making the headlines. Equally disturbing are prospects for the Pension Benefit Guaranty Corporation (PBGC), which insures 31 million workers and retirees in 110,000 single employer pension funds and 8.2 million workers in 2300 multiemployer plans. PENSION BENEFIT GUAR. CORP., ANNUAL REPORT TO THE CONGRESS: FISCAL YEAR 1987 [hereinafter PBGC REPORT]. In 1987, \$1.5 trillion were held in pension plan assets. PENSION & WELFARE BENEFITS ADMIN., U.S. DEP'T OF LABOR, EMPLOYEE RETIREMENT INCOME SECURITY ACT: 1986 REPORT TO CONGRESS, at i (1986). Yet 1987 also marked "the largest deficit . . . and the most threatening crisis [in the] 13-year history" of the PBGC. PBGC REPORT, *supra*, at 3 (stating that "[b]y mid-January 1987, the PBGC faced . . . [a] deficit . . . [of] almost \$4 billion"); *see* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF LABOR, SEMIANNUAL REPORT 3 (1989) (predicting that "today's S&L bail-out may become tomorrow's ERISA nightmare"); Drew & Tackett, *Pension Insurer Struggles to Stay Solvent*, Chicago Tribune, Dec. 8, 1989, at 1, col. 2 (claiming that the PBGC is struggling under a multibillion dollar deficit that experts fear might slide into a crisis similar to that faced by the savings and loan industry); *U.S. Agency Warns of Financial Crisis That Could Develop Over Worker Funds*, Wall St. J., June 5, 1989, at B6, col. 1 (reporting that the Labor Department warned that a major financial crisis involving pension funds could develop because of inadequate governmental attention to those funds and, "[n]oting that auditors have been criticized for failing to report properly on S&L's, [the Department] said independent public accountants' reporting on pension and other employee plans is similarly inadequate"); *see also* 134 CONG. REC. H1072 (daily ed. Mar. 22, 1988) (remarks of Rep. John Conyers). Rep. Conyers stated that the Employee Retirement Income Security Act of 1974 (ERISA) "alone is not able effectively to protect the plans from fraud and misuse and . . . much hard-earned money is at substantial risk . . . [A] national tragedy is in the making." *Id.*; *see also* Thornton v. Evans, 692 F.2d 1064, 1065 (7th Cir. 1982) (observing in a pension plan fraud case that the "[e]vidence . . . traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence"). *See generally* Note, *Who Should Pay*, *supra* note 1.

156. *See Oversight Hearings*, *supra* note 12, at 634-35 (remarks of Edward I. O'Brien, Securities Industry Association) (stating that "hundreds of years of common law interpretation of state law fraud is completely subverted to RICO," and that "the nation [ought not]. . . abandon well over 200 years of common law development by the states of what fraudulent practices are. . ."). *Id.*; *see also id.* at 590-91 (remarks of Richard P. Swanson, New York State Bar Association). Swanson concluded that "[t]here are, and there have always been, remedies for common law fraud

common-law jurisprudence is not adequate to deal with sophisticated forms of fraud.

In the eighteenth and nineteenth centuries, state common-law fraud jurisprudence developed in the context of the then prevailing philosophies of *laissez faire* and *caveat emptor*.<sup>157</sup> Writing in 1967, the President's Commission on Crime and Administration of Justice, whose studies led to RICO, commented on the nature and effects of fraud in modern society.<sup>158</sup> Congress specifically found in 1970 that the current law was inadequate when it have enacted RICO.<sup>159</sup> Since 1970, twenty-

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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." *Id.*

157. For many Americans, faith in private enterprise was restored in the 1980s. By promoting individual initiative, governmental institutions supported those aspects of our national life that many believed contributed most clearly to our national prosperity. Yet individual initiative in excess is greed, and fraud in corporate finance, in particular, flourished during the decade. Capitalism showed both virtue and vice. An historical analysis of the development of common-law fraud, which culminated in the 1930s with the federal securities acts, also reveals a long-standing and still present tension between managerial autonomy and market dynamics and investor protection and market integrity. Traditionally, the balance was struck in favor of financial interests. The early English history of common-law fraud between the fifteenth and eighteenth centuries occurred at a time when the English courts and Parliament adjusted medieval doctrines to promote, yet discipline, an emerging capitalist socio-economic order. Unfortunately, as some commentators note, the rules that developed were "colored to a considerable extent by the ethics of bargaining between distrustful adversaries," see PROSSER & KEETON, *supra* note 80, § 105, at 726, and "reflected . . . dubious business ethics . . ." *Id.* at 737. In short, the rules tended to favor the entrepreneur capitalist, who raised capital or ran an enterprise and to disfavor those who invested in, worked in, or competed with him. Managerial autonomy was thought crucial to the governance of enterprises and was promoted at the expense of investor protection and other interests. Illustrations are multiple. To establish common-law fraud, for example, clear and convincing evidence was required, as opposed to a preponderance of the evidence. Whatever the rationale offered, the rule "expresse[d] a preference for one side's interest." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-91 (1983) (holding that civil securities fraud need only be shown by a preponderance of the evidence, not clear and convincing evidence). "[U]nder the influence of the prevalent doctrine of 'caveat emptor' . . . great stress, [moreover, was laid] upon the plaintiff's 'duty' to protect himself and distrust his antagonist. . . ." The doctrine was called "justifiable reliance." PROSSER & KEETON, *supra* note 80, § 108, at 751. Because a modern market differs, however, "from the face to face transactions contemplated by early fraud cases," newer concepts obtain today. *Basic Inc. v. Levinson*, 485 U.S. 224, 241-45 (1988) (establishing the fraud-on-the-market theory); see also PROSSER & KEETON, *supra* note 80, § 80, at 571-72 (explaining the fellow servant rule of Chief Justice Shaw in *Farwell v. Boston & Worcester Ry.*, 45 Mass. (Metc.) 494 (1842), by the "highly individualistic viewpoint of common law courts and their desire to encourage industrial undertakings"). Not until the stock market crash of 1929 did an imperfect shift away from the nineteenth century balance take place. In calling for securities reform in 1933, President Franklin D. Roosevelt suggested that to *caveat emptor* should be added, "[L]et the seller also beware." *Drexel Hearings*, *supra* note 119, at 1 (statement of Rep. John Dingell (quoting Franklin D. Roosevelt)). The task of adapting the law of the nineteenth century to twentieth century life is still unfinished business. See generally S. Barber, *Civil RICO: Preserving the Promise of Investor Protection* (1989) (unpublished Harvard Law School senior essay) (source on file with Author).

158. See *supra* note 32 and accompanying text.

159. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, preamble, 84 Stat. 922,

nine states enacted RICO-type legislation; twenty-one of these statutes include the private multiple damages claim for relief.<sup>160</sup> As such, the law of the eighteenth and nineteenth centuries clearly can be characterized as simply not “adequate.”

Similarly, Congress enacted legislation in the 1930s to deal with securities fraud, precisely because state fraud law was inadequate to deal with “racketeering” on Wall Street.<sup>161</sup> Just as critics seek to reform RICO today, critics in the 1930s sought to repeal or modify the Securities Act of 1933. They suggested that the legislation was so “draconian” that it would “dry up the nation’s underwriting business and that ‘grass would grow on Wall Street.’”<sup>162</sup> History repeats itself. Santayana sug-

923.

160. See App. A., *infra* p. 988.

161. See, e.g., 77 CONG. REC. 3801 (1933) (remarks of Sen. Duncan Fletcher, leading sponsor of the Securities Act of 1933) (stating that the Securities Act is “designed to protect the public from financial racketeering of . . . investment bankers. . .”).

162. D. RATNER, *SECURITIES REGULATION IN A NUTSHELL* § 11, at 80 (2d ed. 1982). Justice Felix Frankfurter, then a professor and one of the leading spokesmen for the securities acts, put it well:

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 holdest abuses of fiduciary responsibility. . . .

J. SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 79 (1983) (quoting Letter from Felix Frankfurter to Henry Stimson (Dec. 19, 1933)). See generally Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959). Mr. James Landis stated:

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 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.

*Id.* The Securities Act of 1933 encountered both open and undercover resistance from brokers and investment bankers. 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. J. SELIGMAN, *supra*, at 90. In addition, George O. May of Price Waterhouse & Co. was “opposed to . . . requirements for independent accountants.” Landis, *supra*, 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 results . . . [would] be to suspend the underwriting or distribution of many capital issues . . .” *Id.* at 40 n.18. The 1933 Act then, like RICO today, was subject to “misinterpretation, deliberate to a great degree, by the widely publicized utterances of persons prominent in the financial world together with their lawyers.” *Id.* In the end, Congress passed the President’s legislation, including not only the Securities Act of 1933, but also the Securities Exchange Act of 1934, which entrusted much

gested that those "who cannot remember the past are condemned to repeat it."<sup>163</sup> The more melancholy truth may be, as Hegel notes, what experience and history teach is "that peoples and governments never learn anything from history."<sup>164</sup>

### K. *The Adequacy of Law Enforcement Myth*

11.1 Myth: Because Law Enforcement Agencies Can Be Depended upon to Prosecute the Real Malefactors, Private Enforcement Mechanisms Are Not Needed.

11.2 Fact: Law Enforcement Cannot Do the Whole Job.

As part of the general effort to undermine the statute, RICO's antagonists also assert that private enforcement mechanisms are not needed because law enforcement agencies can be depended upon to prosecute the real malefactors.<sup>165</sup> In fact, law enforcement cannot do the whole job. Indeed, if this myth were supported by the facts, it would justify the repeal of the antitrust statutes, which also contain a private multiple damages claim for relief. Yet the antitrust acts, including their private enforcement mechanisms, are termed "the Magna Carta of free enterprise."<sup>166</sup>

authority over the market to the Securities and Exchange Commission. *See generally* A. SCHLESINGER, *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); *see also* R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 146-53 (1941). "The 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 . . . ." *Id.* at 153-54.

163. G. SANTAYANA, *THE LIFE OF REASON* 284 (2d ed. 1922).

164. G. HEGEL, *THE PHILOSOPHY OF HISTORY* 6 (J. Sibree trans. rev. ed. 1900).

165. *See Oversight Hearings, supra* note 12, at 310 (appendix to statement of Ray J. Groves, Chair, American Institute of Certified Public Accountants) (stating that "[i]t 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"). Comptroller General Charles Bowsher testified that past governmental losses amounted to \$200 billion and projected losses to \$150 billion. "The seemingly never-ending disclosures of fraud, waste, abuse and mismanagement in federal programs continue to paint the picture of a government unable to manage its programs, protect its assets, or provide taxpayers with effective and economical services they expect and deserve." *Id.*; *see also* Gerth, *Regulators Say 80's Budget Cuts May Cost U.S. Billions in 1990's*, N.Y. Times, Dec. 19, 1989, at A1, col. 5 (reporting that budget cuts in enforcement personnel in the 1980s may cost billions in the 1990s).

166. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Like the antitrust laws, RICO creates a "private enforcement mechanism that . . . deter[s] violators and . . . provide[s] ample compensation to the victims . . ." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (interpreting § 4 of the Clayton Act); *Alcorn County v. United States Interstate Supplies, Inc.*, 731 F.2d 1160, 1165 (5th Cir. 1984) (stating that Congress intended RICO's treble damages action to "provide strong incentives to civil litigants . . . in deterring racketeering"). RICO's treble damages provisions were "intended by Congress . . . to encourage private enforcement of the laws on which RICO is predicated." *Id.* Accordingly, RICO and the antitrust statutes are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or

RICO is needed to maintain integrity in the market place—fiscal and physical. Public enforcement with its principal reliance on the criminal law, cannot be relied upon to do the whole job of policing fraud.<sup>167</sup> Candor is required about the substantial 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 most often will be treated as “first offenders” even if they actually had engaged in a pattern of behavior over a substantial period of time. A few convictions will yield only a minimal deterrent effect.<sup>168</sup>

It is doubtful that public agencies ever will be funded at adequate levels. The Securities and Exchange Commission’s annual budget is

market power.” C. KAYSER & D. TURNER, *ANTITRUST POLICY* 17 (1959). RICO focuses on the first two; antitrust law focuses on the third. Just as the antitrust laws seek to maintain economic freedom in the market place, RICO seeks to promote integrity in the market place.

Then Assistant Attorney General Stephen S. Trott, now Judge, stated before the Senate Judiciary Committee, describing RICO’s private enforcement mechanism:

[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 the area 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 Hearings*, *supra* note 12, at 140-141.

167. As Justice Robert Jackson observed, the criminal law has “long proved futile to reach the subtler kinds of fraud at all, and [is] able to reach grosser fraud, only rarely.” R. JACKSON, *supra* note 162, at 152.

168. See J. CONKLIN, “ILLEGAL BUT NOT CRIMINAL”: BUSINESS CRIME IN AMERICA 129 (1977). Mr. John E. Conklin rightly concluded:

[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 toward 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. This failure to punish business offenders may encourage “feelings of mistrust, lower 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.

*Id.* (footnote omitted).



only 135 million dollars.<sup>169</sup> More resources are needed to address the

169. The SEC requested an increase from the \$135,221,000 appropriated in 1988 and the \$142,640,000 estimated in 1989 to \$168,707,000 for 1990. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1990: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 101st Cong., 1st Sess., pt. 6, at 173 (1989) (statement of David S. Ruder, Chair, Securities and Exchange Commission). Justification for the increases rested on the increased complexity of investigations:

The Commission's enforcement staff has become increasingly involved in larger investigations for which resource requirements tend to increase exponentially. In addition, the Insider Trading and Securities Fraud Enforcement Act of 1988 signed in November 1988 contains a number of provisions that may have a substantial impact on the staff. Insider trading, market manipulation, accounting fraud, and broker-dealer cases are among the most demanding to investigate, requiring the analysis of large numbers of documents and of market trading activity and the taking of extensive testimony. Many of these cases also involve trading in U[nited] S[tates] securities through foreign financial institutions. Such investigations not only involve more documents and witnesses, but concern more complex issues of fact and law, thus requiring greater resource allocations. While investigations were formerly conducted by one or two staff attorneys, current insider trading, manipulation and financial fraud cases often require several attorneys and financial analysts or accountants.

*Id.* at 205. The general securities environment itself was thought to mandate increases in resources:

The securities industry has undergone unprecedented change and growth in virtually every area under the Commission's jurisdiction. The number of broker-dealers, investment advisers and other regulated entities has grown significantly, and banks and other financial institutions have extended the range of their securities activities. . . .

The trading markets have experienced notable increases in volatility and trading volume. At one end of the spectrum, abuses in the offering and trading of low priced or penny stocks continue to be a serious problem. At the other end, the markets continue to witness the introduction of new and complex financial instruments and intermarket trading strategies. Trading markets are becoming increasingly internationalized, as both foreign trading in U.S. securities and U.S. trading in foreign securities continue to increase.

Such change and growth in the size and complexity of the securities industry have increased the already heavy demands placed on the Commission's enforcement program. The proliferation of new trading products and the increased volume of trading have significantly affected the resources which must be committed to investigating trading and manipulation schemes. . . .

The litigation burden on the staff has intensified significantly. There has been an increase in Commission actions for preliminary injunctions and temporary restraining orders. Efforts to secure disgorgement and other ancillary relief may require world-wide searches for assets, and increasingly result in protracted negotiations, preparation of detailed plans for disposition of proceeds, and contested motions for freeze orders. . . .

Continuing vigilance is necessary to detect potential frauds on investors. Investor complaints, which have increased significantly in recent years, especially following the October 1987 market break, are a traditional indicator of potential fraud. In 1987, the Commission received over 40,000 complaints and inquiries from investors, over 230% the number received in 1982. The National Association of Securities Dealers (NASD) reported receiving over 5,000 additional complaints, approximately 340% greater than the number it received in 1982.

*Id.* at 208-09. From 1980 to 1987 alone, annual exchange share volume increased from 15.5 billion to 63.9 billion, exchange option turnover grew from 96.8 million to 305.1 million contracts, and over-the-counter share volume in securities quoted on the National Association of Securities Dealers' automated quotations system (NASDAQ) increased from 6.7 billion to 37.9 billion. Moreover, the trend toward global securities markets continued to accelerate. Between 1980 and 1987, the value of foreign trading in U.S. stocks grew from \$75 billion to \$482 billion, a 543% increase, and U.S. trading in foreign stocks expanded from \$18 billion to \$189 billion, a 950% increase.

growing problem of securities fraud.<sup>170</sup> Similarly, the futures industry in the United States is growing tremendously. Nevertheless, the resources of the Commodity Futures Trading Commission are remaining relatively constant. Its annual budget is only 35 million dollars.<sup>171</sup> The need

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During the 1980s, the size of the regulated population has grown significantly. The number of registered broker-dealer firms, currently 12,140, has grown 80% since 1980. These firms have approximately 21,400 branch offices and 460,000 registered representatives, amounting to increases of 190% and 135%, respectively, since 1980. Also, the scope of the SEC's regulatory concerns has broadened because many financial institutions, such as banks and savings and loan associations, have recently extended the range of their securities activities. Moreover, the 1986 amendments to the Exchange Act gave the Commission additional oversight responsibility for approximately 50 government securities brokers and dealers—mostly large firms—and three clearing agencies that are registering with the Commission for the first time. *Id.* at 220-21. Such growth is not isolated. In fact, the growth of investment company assets from 1983 to 1988 was from \$315 billion to \$1.13 trillion, a 257% increase. *Id.* at 233.

Staffing has not kept pace with such huge increases in needs. In 1983 there was one staff year to 66 registrants and \$6 billion in assets. In 1988, however, the ratios were one staff year to 113 registrants and \$28 billion of assets. *Id.* at 235. While the number of investment companies rose 97% from 1983 to 1990, the value of their assets rose 281%. The number of investment company shareholders increased 124%, and the number of investment advisers escalated 166%. Their assets jumped 587%. The SEC staffing for these areas only marginally increased by 26%. *Id.* at 247.

170. See generally GEN. ACCOUNTING OFFICE, STATISTICS ON SEC'S ENFORCEMENT PROGRAM (1985); Salwen, *Enforcement Chief Charts SEC Course on Pending Cases*, Wall St. J., Jan. 10, 1990, at C15, col. 1 (reporting that the new SEC enforcement chief says the Commission has a hefty backlog of pending cases, many focusing on financial fraud and accounting problems, and that new investigations are expected to shift from insider trading to "fraud on Main Street and improper conduct by Wall Street brokers who sell inappropriate investments to clients"); Power & Salwen, *SEC Prods Wall Street to Police Its Own Neighborhood*, Wall St. J., Nov. 27, 1989, at C1, col. 3 (stating that the overworked SEC seeks to have a self regulating Wall Street take on more policing duties); Labaton, *The S.E.C.'s Top Cop Moves On*, N.Y. Times, May 21, 1989, § 3, at 1, col. 2 (reporting the resignation of Gary Lynch, the enforcement director, and evaluating the efforts of the SEC: of a \$45 million budget and 650 people in Washington and 9 regional offices, 15% of the resources are devoted to insider trading, 15% to 20% to market manipulation, 25% to improper disclosure, and the rest on other problems); Sontag, "Desperate" SEC Seeks More Aid, NAT'L L.J., May 1, 1989, at 1, col. 4 (analyzing the size of the market, the number of transactions, dealers, and staff resources over the past 10 years and stating that the "agency [is] becom[ing] dangerously unable to keep pace").

171. The 1989 appropriation for the Commodity Futures Trading Commission was \$34,723,000. The 1990 budget estimate is \$37,984,000. See *Rural Development, Agriculture, and Related Agencies Appropriations for 1990: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 101st Cong., 1st Sess., pt. 6, at 4, 20 (1989) (testimony of Dr. Wendy L. Gramm, Chair, CFTC). The CFTC requested an increase of 20 staff years to raise the total staff level to 555. Seventeen of the 20 will be used for increased market surveillance and enforcement in the trading and contract market surveillance area. The remaining three will be used for support. *Id.* at 69.

Data in recent years reflect a significant increase in the number and volume of futures contracts traded worldwide, an increase in the number of market participants operating, and an increasing economic interdependence among world financial markets. The internationalization process in the United States in recent years includes linkages between United States and foreign exchanges, the development of domestic futures contracts based on foreign debt securities and equity indices, expanded trading hours to attract more foreign trading in domestic futures contracts, and the recent approval for firms in certain foreign jurisdictions to offer and sell foreign futures contracts in the United States. As the process of globalization of the futures markets and

for a more effective deterrent to fraud in the world of legitimate business is, therefore, manifest.

*L. The Multiple Damages Myth*

12.1 Myth: Multiple Damage Suits Are Not Needed.

12.2 Fact: Multiple Damage Suits Are the Heart of the Necessary Private Enforcement Mechanism.

Closely related to the State Law Is Adequate and the Law Enforcement Is Adequate myths is the allegation that multiple damages suits are not needed.<sup>172</sup> In fact, multiple damages suits are the heart of the necessary private enforcement mechanism.

It is, of course, true that not all federal claims for relief provide for multiple damages, but it hardly can be contended seriously that they work as an adequate compensatory scheme or mechanism for the deterrence of systematic fraudulent practices.<sup>173</sup> The need for a strengthened

market participants continues, cooperative enforcement efforts with foreign futures authorities increasingly will become part of the Commission's enforcement responsibilities under the Act. According to Jamie L. Whitten, Chairman of the House Committee on Appropriations, concern is widespread that the commodity industry's self-regulation procedures and the CFTC's oversight are not adequate to prevent abuses. *Id.* at 22. He also stated, "The volume of futures trading has doubled every three to five years between 1975 and 1987," and asked, "What has happened in the futures market since the October 1987 market crash and the recent FBI investigation?" *Id.* at 27.

Dr. Wendy L. Gramm responded with an analysis of recent trading activity:

Futures trading volume has continued to increase, although at a somewhat slower rate, since the October 1987 market crash. Volume for all of 1988 increased by about 7 percent over that for 1987. Annual volume had increased by 24 percent in 1987, and by 16 percent in 1986.

. . . The volume of futures trading during February and March 1989 was about 11 percent greater than the average monthly volume during 1988.

*Id.* at 27. The data presented in the hearings was charted:

*Total Volume of Trading in Futures and Options from 1984 to 1988*

<i>Fiscal Year</i>	<i>Total Volume</i>
1984	156,775,762
1985	169,456,576
1986	213,557,706
1987	254,549,361
1988	290,789,955

*See id.* at 46.

172. *See Oversight Hearings, supra* note 12, at 177-78 (statement of Charles L. Marinaccio, Securities and Exchange Commissioner). Commissioner Marinaccio stated:

The RICO civil remedy may substantially alter the balance of private and public rights and remedies under the securities laws that Congress and the courts have carefully crafted over the last 50 years . . . [I]t enables plaintiffs to claim treble damages even in cases where Congress has expressly limited recovery under the securities laws to actual damages.

. . . .

. . . [The Securities Acts' private claims for relief] have served well [with only actual damages] as supplements to other enforcement mechanisms. . . .

*Id.*

173. *See Metz, supra* note 121, at 31, col. 1 (stating that "the abuse of inside information in the takeovers game is endemic and has grown systematically over the past half-decade . . .").

private enforcement mechanism in the securities market, for example, is manifest.<sup>174</sup> The stock market and the futures market operate well only when people have confidence in their integrity.<sup>175</sup> Small investors

174. When Michael Milken was indicted, acting United States Attorney Benito Romano observed that "[t]he three-year investigation has uncovered substantial fraud in a very significant segment of the American financial community. A serious criminal problem has infected Wall Street." *"Junk Bond" Leader Is Indicted by U.S. in Criminal Action*, *supra* note 16, at A1, col. 6; see also Stein, *Betrayer of Capitalism: That Is the Essence of the Government's Charges Against Milken*, BARRON'S, Apr. 3, 1989, at 7. Mr. Benjamin J. Stein summed up the charges against Milken:

Michael Milken has been charged with a variety of crimes. But almost all of them had a common theme—the perversion and betrayal of principals by agents, the abuse of those who placed their trust by those in whom they placed their trust.

. . . The capitalist system, which has done so well for most Americans, is based on the notion that principals can trust their agents . . . . If that trust is a joke, then the whole system is handicapped, not least by investor reluctance to invest.

But according to the indictments . . . Milken and his co-indictees took advantage of the trust placed in them as agents by their corporate principals . . . . [C]orporate officers brought him plans for acquisitions and restructurings, all on promise of confidence. Over and over again, Milken bought stock and tipped friends to buy stock in the targets, according to the indictments.

Those buy orders moved the stock price upwards, often raising the takeover price to his own clients by tens or hundreds of millions of dollars. Conversely, those trades made millions for Milken and his pals . . . Milken made money personally by violating his clients' trust and thereby cost his clients, his principals, large bucks . . . .

Milken . . . made himself the principal in a great many cases in which he had been hired to be the agent. This is a basic attack on the credibility of the system which cannot function without trust between principals and agents, especially at that exalted level.

*Id.* at 24.

175. Trust is an important ingredient in a free enterprise system. It should be, but apparently is not, deeply disturbing to some of those who lobby against RICO that their own areas of activity are those that have the least consumer confidence: insurance (27%), banks (23%), and stockbrokers (22%). See Schwadel, *Consumer Trust: An Elusive Quarry*, Wall St. J., Sept. 20, 1989, at B1, col. 3. This article expressed the percentage of people expressing the "least" confidence in a particular industry, when the option was given to select four. Only the airlines industry (43%) and the oil and gas industry (22%) did as bad or worse among all other industries. *Id.* Indeed, it is likely that the individual investors, who are effectively missing in the 1988-1989 bull market, "may not return until stockbrokers demonstrate more honesty," among other virtues. Putka, *People Invest Little Faith in Wall Street*, Wall St. J., Sept. 25, 1989, at B1, col. 3. Currently, institutional investors—insurance companies, banks, foundations, investment firms, and pension funds—account for at least 60% of the trades on the New York Stock Exchange. White, *The Decade of Phenomenal Growth for Institutions*, Wall St. J., Dec. 26, 1989, at C1, col. 3. Since the October 1987 crash, "nothing less than a redistribution of the individual investors' assets away from stocks and into a variety of other investments" occurred "and shows few signs of ceasing." Wallace, *How the Little Guy Is Playing the Market*, Wall St. J., Sept. 3, 1989, § 3, at 1, col. 2. "In 1989, while the markets reached record highs, individuals, who own \$3.6 trillion worth of equities, continued as net sellers, liquidating 3.5 million shares of stock a day. . . ." *Id.* Institutional investors now hold \$6 trillion, almost twice the stake of the individual. White, *supra*, at C1, col. 3. Unfortunately, the "Ivan Boesky-greed-is-good stereotype is well entrenched . . ." Putka, *supra*, at B1, col. 3. Public trust in Congress also is gone. Toner, *A Jittery Senate Confronts Its Ethics*, N.Y. Times, Jan. 29, 1990, at A14, col. 1 (alleging that 18% of Americans say that "most" members of the House and Senate are "financially corrupt," while 22% say about 50% are). Nothing that is happening in the RICO reform debate so far undermines those tragic stereotypes or promises to

today are avoiding the market.<sup>176</sup> Investor confidence must be restored. The notion that the game is fixed against the small investor ultimately will dry up a major portion of the Nation's capital pool. An effective fraud remedy will contribute to restoration of that trust. The use of multiple damages is essential to that remedy.

The idea of multiple damages for certain kinds of unlawful practices goes far back in history. The earliest provision in English law was the Statute of Gloucester.<sup>177</sup> Modern antitrust statutes are rooted in the Statute Against Monopolies.<sup>178</sup> Multiple damages provisions also were found in early colonial laws.<sup>179</sup> Further, the idea of multiple damages for various kinds of wrongs was a characteristic feature of Roman law.<sup>180</sup> Greek law provided for double damages if stolen property was recovered and for tenfold damages otherwise.<sup>181</sup> Biblical law, too, reflected multiple damages recovery.<sup>182</sup>

Modern economic analysis supports the wisdom of this history.<sup>183</sup>

restore that badly needed trust.

176. DeMaria, *Market Place: Low-Risk Tactics for Investors*, N.Y. Times, Apr. 21, 1989, at D6, col. 3. Individual households today own 58.5% of United States stocks compared with 82.2% in 1968. Power, *Small Investors Are Punier Than Many Think*, Wall St. J., Mar. 28, 1989, at C1, col. 3. Little people seldom have golden parachutes. The first people hurt when the small investor left the market were the little people in the securities industry, because when the individual investor is not in the market, employment in the securities industry sharply declines. See Power, *Wall Street Wilds Ax Again As Woes Deepen*, Wall St. J., Jan. 29, 1990, at C1, col. 3 (reporting that 17,000 Wall Streeters have been cut since 1987 and 10,000 more are expected to lose jobs as a consequence of individual investors deserting the market).

177. 6 Edw. 1, ch. 5 (1278) (authorizing treble damages for waste).

178. 21 Jac. 1, ch. 3, § 4 (1624) (authorizing treble damages for those injured by unlawful monopolies). Parliament recognized that it was "one thing to pass statutes and . . . quite another thing to ensure that [they were] actually enforced." 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355 (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.*

179. See, e.g., THE LAWS AND LIBERTIES OF MASSACHUSETTS 5 (1648 & photo. reprint 1929) (authorizing treble damages for pilfering and theft); *id.* at 24 (authorizing treble damages for gaming).

180. The offense of theft ran back at least to the Twelve Tables (450 B.C.E.). THE INSTITUTES OF GAIVS, pt. 1, at 217 (F. de Zulueta trans. 1958). "[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.

181. 5 C. KENNEDY, THE ORATIONS OF DEMOSTHENES app. 6, at 187 (1909) (quoting a law of Solon), quoted in J. WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 343 (1936).

182. See Exodus 22:1 (requiring for the theft of ox or sheep, if killed, restoration of five for ox and four for sheep); Exodus 22:9 (requiring double damages for trespass to property); 2 Samuel 12:1-6 (requiring fourfold restoration for taking a lamb).

183. See generally R. POSNER, ECONOMIC ANALYSIS OF LAW § 7.2 (3d ed. 1986). As the Seventh Circuit in *Mosler v. S/P Enters., Inc.* observed of treble damages in RICO fraud:

Because [such] frauds are concealable, trebling is important to produce proper incentives. If perpetrators pay what they took when they get caught, and keep the proceeds the rest of the time, then fraud is profitable. If victims recoup only what they lost, and face the burdens and uncertainties of the legal process plus the costs of their own counsel, then victory will not

Indeed, a number of other federal statutes, particularly in the commercial area, contain treble damages provisions.<sup>184</sup> Professor (now Judge) Richard Posner argues for private enforcement mechanisms of more than actual damages against deliberate antisocial conduct, particularly when the factor of concealment is present.<sup>185</sup> Concealment is a necessity for successful fraud.<sup>186</sup> If society authorizes the recovery of only actual damages for deliberate antisocial conduct engaged in for profit, it lets perpetrators know that if they are caught, they must return the misappropriated sums. If they are not caught, they may keep the money. Even if they are caught and sued, they may be able to defeat part of the damage claim or at least compromise it. In short, recovery provides little economic disincentive to those who would engage in such conduct.<sup>187</sup> Studies under the antitrust statute show that most treble damages suits are now settled at close to, although less than, actual damages.<sup>188</sup> No reason exists to believe that a similar pattern will not develop under RICO, at least in the fraud area. Ironically, it may be necessary to authorize treble damages to assure that deserving victims receive actual damages.<sup>189</sup>

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make them whole, and the shortfall may mean that victims will not vigorously investigate and litigate. Trebling [under RICO] addresses both halves of this equation.

*Mosler*, 888 F.2d at 1143-44 (citation omitted).

184. See, e.g., 12 U.S.C. § 1464 (1988) (Home Owners' Loan Act of 1933); *id.* § 1975 (Bank Holding Company Act); *id.* § 2607 (Real Estate Settlement Act of 1974); 15 *id.* § 15 (Clayton Act: antitrust); *id.* § 72 (Revenue Act of 1916: restraints on import trade); *id.* § 1117 (Trademark Act of 1946); *id.* § 1693f (Electronic Fund Transfer Act); *id.* § 1989 (Motor Vehicle Information and Cost Savings Act); 22 *id.* § 4209 (consular officers: penalty for exacting excessive fees); 30 *id.* § 689 (1982) (Lead and Zinc Stabilization Program); 35 *id.* § 284 (patents); 42 *id.* § 9607 (CERCLA); 45 *id.* § 83 (government aided railroads); 46 *id.* § 1227 (Merchant Marine Act of 1970).

185. See R. POSNER, *supra* note 183, at 560 (private enforcement); *id.* at 293 (concealment).

186. See 1 GEN. ACCOUNTING OFFICE: FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT?—HOW CAN IT BE CONTROLLED? cover page (1980). The GAO publication states that “[m]ost 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.” *Id.*

187. See R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 223 (1976) (stating that “[i]f, 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 punishment cost for the violation”). As the Seventh Circuit observed:

[It is also true that t]he 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.

*Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

188. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS., SERIAL NO. 8, *STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY* 15 (Comm. Print 1984).

189. See generally Note, *Treble Damages*, *supra* note 1. The commentator stated:

### M. The Federalism Myth

#### 13.1 Myth: RICO Suits Are Inconsistent with Federalism.

#### 13.2 Fact: RICO Suits Implement Federalism.

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. *Id.* at 533-34 (footnotes omitted).

Representative Rick Boucher, however, makes another point. Apart from the "new" or "flood-gate" proportions of the civil RICO filings, he argues that the possibility as well as the fact of a RICO suit gives a plaintiff an opportunity to "leverage" settlements, particularly in the commercial fraud area, for more than "they are worth." *H.R. 1046 Hearings, supra* note 48 (comment of Rep. Rick Boucher). Representative Boucher's argument warrants analysis.

It is well to turn to the economics of litigation strategy and basic notions of justice. See generally R. COOTER & T. ULEN, *LAW AND ECONOMICS* 477-505 (1988). If a person is defrauded of \$100,000, the scale of justice would be even if the perpetrator returned the \$100,000 plus "i," the value of the victim's money during the period of time the perpetrator deprived him of it. The victim's recovery ought also to include "c," that is, any transaction costs or opportunity costs associated with the victim having to sue the perpetrator to obtain the legal redress. Otherwise, the victim would not be made whole, and justice would not be done. The law, however, does not work that way. Actual damages are not actual, and they are never worth their face value. The victim's case is not worth \$100,000 plus (i) plus (c). In fact, the case will usually fall, roughly, into one of three categories: (1) clear winner (85-15), (2) clear loser (15-85), or (3) middle area (50-50) litigation. The clear winner is worth \$85,000 minus the cost of litigation, etc. Neither i nor c may be recovered in the usual case. The law, in short, does not do justice; it does not make victims whole.

Moreover, if the perpetrator has more resources than the victim does, he can raise the cost of litigation for the victim by pursuing a "scorched earth" defense policy. See *JUSTICE FOR ALL, supra* note 63, at 6 (stating that the "high costs of litigating . . . give[] an unfair advantage to 'large interests' . . ."). The perpetrator's dollars are also worth less than the victim's dollars are to the victim because money always must be evaluated in terms of its marginal utility. The perpetrator also may be able to insure against legal costs, particularly in commercial contexts, spreading them out over a larger pool of similarly situated entities and passing them on to others. Individual victims, however, seldom carry insurance against fraud, and they have little opportunity to pass losses on to others. Contingent fee arrangements, of course, may operate as a method by which individual victims are able to pool attorney's fee costs, but contingent fees also place a discipline on the litigation instituted. Plaintiffs' attorneys do not lightly expend their own resources to litigate marginal cases. As such, contingent fee arrangements act as a valuable screening device that tends to keep marginal cases out of litigation.

The law assumes that those who come before it are equal; this assumption, however, is only formally true. It is a sad fact that the relatively wealthy perpetrator is usually able to buy the claim of the relatively poor victim at a substantial discount of any figure that approaches justice. *Id.* at 5 (noting that victims are "often compelled by high costs and delay to settle early for less than satisfactory amounts"). Apparently, most victims are willing to settle when they are made whole and do not want to litigate for the premium. Edward F. Mannino, a prominent RICO defense attorney and a moving force in the ABA Coordinating Committee on RICO, frankly concedes that few defendants actually pay out more than actual damages. "You tend to get closer to the untrebled amount because of the [potential] trebling." Jost, *supra* note 15, at 51 (quoting Edward F. Mannino). Ironically, it may be necessary to authorize treble damages recovery merely to assure that deserving victims of patterns of unlawful behavior under RICO receive something close to actual damages. Accordingly, Representative Boucher is correct that RICO settlements are higher, but his frame of reference for determining "worth" is a system that does not, in fact, do justice.

Clearly, authorizing treble damages and attorney's fees changes the litigation equation. Appro-

A variation of the State Law Is Adequate myth is the contention that federal litigation under RICO is inconsistent with federalism.<sup>190</sup> In

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propriately, it raises the price of settlements. Clear winners will be settled quickly and for more than they would be otherwise. Trial time and other judicial resources will be saved. Clear losers may be worth more than nothing, but because they will always remain high risk ventures, they seldom will be brought. Middle area litigation is more apt to be brought, and will be worth more, but the issue, in both cases, remains whether a higher settlement is unjust. Susan Getzendanner, a former federal judge who, at one time, had the distinction of having decided more RICO cases than any other single district court judge and now a defense counsel, although favoring the elimination of trebling "says that in her tenure on the bench she never saw a settlement she considered unjust—nor a settlement by an innocent party." *Id.*; see also Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673 (1990). Representative Boucher cites none.

Representative Boucher, moreover, seemingly forgets that RICO has more than a compensatory goal. The conduct that falls within its terms—systemic patterns of violence and provision of illegal goods and services, for instance—is conduct that should be unconditionally deterred. RICO is not, like some aspects of antitrust, a "regulatory offense." It also does not include strict liability, as the predicate offenses are all fault-based. Society has a general stake in seeing that this sort of illicit conduct is sanctioned. From an economic point of view, it is a detail that is sanctioned in private civil litigation, rather than criminal prosecutions. Accordingly, private civil RICO litigation plays an important public law function. The private enforcement that Representative Boucher so vociferously decries is, in fact, enforcement in the public interest. For contrasting views of the economics of civil RICO, compare Ruhin & Zwirb, *Opinion* (editorial), 6 RICO L. REP. 795 (1987) with Blakey, *Opinion* (editorial), 7 RICO L. REP. 1 (1988).

190. This Nation is justly proud of its federalism tradition. Our form of federalism is a model widely copied throughout the world. See generally Elazar, *Federalism*, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 353 (D. Sills ed. 1968). The Founders transformed and organized the philosophical principles of federalism that they knew into a practical system of government. Their idea of federalism, while it had ancient roots, owed its origins to covenant theories of the Bible. See generally Y. KAUFMANN, *THE RELIGION OF ISRAEL* (1960). The term "federal," derived from the Latin *foedus*, or "covenant," was coined in the seventeenth century to describe the relation between God and humanity, which was at the bottom of British and New England theological world views. See generally P. MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* (1953). The federal system reflected a desire to build a society on the basis of coordinate rather than subordinate relationships. The emphasis was on partnership, with each partner having equal rights to cultivate his or her diverse interests within a commonwealth.

The Great Compromise of 1789, rationalized in *The Federalist Papers*, the classic essays on our form of federalism, is the prototype of modern federal systems. It often is thought that the measure of the maintenance of that kind of federalism, however, is the degree of separation of governmental activity between the federal and state levels. In fact, the American experience from the first was characterized by extensive intergovernmental functional collaboration within the framework of a federal republic. This experience currently is modified, of course, by extensive democratic elements. See generally D. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (1966).

When the delegates met in Philadelphia in the summer of 1786, they represented sovereign states, whose preindustrial economics were focused inwardly, but in which a substantial element of international trade existed. A key element of the Constitution was the attempt to create a "common market" throughout the new Nation, a notion that the European democracies took 200 years to see the benefit of and which they will not realize until at least 1992. The Constitution that the Founders designed, and the people ratified, was not, however, an example of pure federalism. It was, as James Madison put it in *The Federalist No. 39*, "in strictness, neither a national nor a federal Constitution, but a composition of both." *THE FEDERALIST No. 39*, at 246 (J. Madison) (C. Rossiter ed. 1961). Plenary powers were granted to the federal government, which would operate directly to achieve the ends desired. Other powers were reserved to the states or to the people.



fact, RICO implements, not frustrates, federalism. Over the years, Congress has enacted various laws to preserve, strengthen, or modify the

Among the plenary powers granted to the federal government was the power to regulate commerce. It was hoped that the new Constitution would, through its commerce clause, facilitate "intercourse throughout the Union . . . by new improvements," that is, "[r]oads, . . . accommodations for travelers, . . . interior navigation," among others. *THE FEDERALIST* No. 14, at 102-03 (J. Madison) (C. Rossiter ed. 1961). The grant of a "commerce power" to the federal government was, moreover, not intended to be narrowly construed. Alexander Hamilton expressly spelled it out in *The Federalist* No. 16:

[I]f it be possible . . . to construct a federal government capable of regulating the common concerns and preserving the general tranquillity, . . . [it] must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is entrusted, that are possessed and exercised by the governments of the particular States.

*THE FEDERALIST* No. 16, at 116 (A. Hamilton) (C. Rossiter ed. 1961); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (holding that commerce is a "general power").

The delegates at Philadelphia also sought to guarantee to the states a republican form of government, one duty of which would be protecting the states from foreign or domestic corruption. See, e.g., *THE FEDERALIST* No. 68, at 412 (A. Hamilton) (C. Rossiter ed. 1961). See generally 133 CONG. REC. H10,656 (daily ed. Nov. 19, 1987) (statement of Rep. John Conyers) (discussing the republican form of government clause and the federal anticorruption program).

The hopes of the Founders for a common market free of old-world style corruption were realized beyond their highest expectations. At all levels of government, efforts were made to develop the Nation's economy. See, e.g., J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (1947). Today, consumers everywhere realize the benefits of our common market. Its economies of scale, which come from its nationwide breadth, help keep prices down and make diverse choices by consumers possible.

But if the dreams of the late eighteenth and nineteenth centuries are realized today largely in our free enterprise system, the twentieth century has its own problems. National and state laws make possible our free enterprise system with its common market and other advantages. These laws must now maintain it. Economically, the Nation aspires to "allocative efficiency," that is, each consumer, exercising "sovereignty," makes individual choices, the aggregate of which controls the allocation of goods and services and marshals the forces of production. When that individual choice is maximized, economic "efficiency" is realized. But "allocative efficiency . . . [is] consistent with the poor starving and the economy's productive activity channelled into the manufacture of . . . luxury items." Veljanovski, *The New Law-and-Economics: A Research Review*, in *READINGS IN THE ECONOMICS OF LAW AND REGULATION* 22 (A. Ogus & C. Veljanovski eds. 1984). Justice also has its demands. Professor Lawrence Friedman makes the point:

Legal decisions are by their very nature economic. They allocate scarce goods and services. The legal system is in this sense a rationing system. What it does and what it is reflects the distribution of power in society—who is on top and who is on the bottom; law also sees to it that this social structure stays stable or changes only in approved and patterned ways. The system issues commands, extends benefits, and tells people what they can or cannot do; in each case, the rule of law, if followed, has made some choice about who has or keeps or gets what good. Rules of law reflect past decisions about allocations. Some conflicts or disputes occurred or threatened to occur between people or groups. Inconsistent wants were expressed. Two men fought over one piece of land. Farmers wanted high prices, consumers wanted low. The resulting legal act (rule or decision) chose among possible alternatives. Very likely it was some kind of compromise, but it was surely an allocation. Every function of the law, general or specific, is allocative.

L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 20 (1975).

national economy, providing for their enforcement through criminal, civil, and regulatory means. These laws include the antitrust statutes, the money and banking statutes, labor legislation (including statutes dealing variously with wages, hours, working conditions, health and safety, and welfare and pension funds), food and drug laws, securities statutes, and environmental legislation. RICO fits well into this pattern of twentieth century economic and social legislation.

Our national marketplace not only must be free, but also must be characterized by integrity. Street crime is, and will remain, a problem principally of the legal systems of state and local governments. Organized and white-collar crime—each an inevitable incident of our free enterprise system—are, and will remain, problems addressed principally by the legal systems of the federal and state governments.

While no one can deny that criminal and civil RICO litigation is controversial, the statute's two-track system of public and private enforcement, which was modeled on the antitrust statutes, is today, after an uncertain start, beginning to operate as it was originally designed. Its impact on organized and white-collar crime promises to be substantial. Federal and state officials and private parties, using alternative criminal and civil sanctions, are forging partnerships to work toward a more just society. Nothing in these developments is inconsistent with federalism.

Elements in the business community fought the antitrust statutes in 1890 and 1914.<sup>191</sup> Elements of our securities industry and the accounting profession fought the securities statutes in the 1930s.<sup>192</sup> Both of these communities, now fighting RICO on federalism grounds, at the same time are supporting tort reform, which is seen as a national problem, requiring national legislation,<sup>193</sup> and which would, unlike RICO, preempt state law.<sup>194</sup> Similarly, a witness, representing Bristol-Myers Co. and testifying on antitrust legislation in the 96th Congress, stated that retroactivity was unconstitutional and unfair.<sup>195</sup> Now, the same witness testifying on behalf of other interests, says that such legislation

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191. See generally G. MOWRY, *THE ERA OF THEODORE ROOSEVELT, 1900-1912*, at 130-33 (1958).

192. See generally J. SELIGMAN, *supra* note 162, at 79.

193. McQueen, *Bush Administration Strongly Backs Overhaul of U.S. Product-Liability Laws*, *Wall St. J.*, Dec. 1, 1989, at A6, col. 1.

194. See, e.g., S. 2760, § 103, 99th Cong., 2d Sess. (1986) (stating that "[t]his Act supersedes only state law"); *Product Liability Reform Act: Hearings on S. 2760 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

195. *Restoring Effective Enforcement of the Anti-Trust Laws: Hearings on H.R. 2060 and H.R. 2204 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 384-96 (1979) (testimony of Philip A. Lacovara).

is constitutional and fair.<sup>196</sup> Apparently, perspective is powerfully influenced by the table at which one eats.<sup>197</sup>

Federalism in this argument looks like a matter of principal, not principle. When elements opposed to RICO suggest that its subject matter be returned to the states, they really mean that it be enforced inadequately or not at all, as most state and local agencies lack the interest or expertise to do sophisticated organized or white-collar crime investigations or prosecutions, and state legal systems were primarily designed to deal with nineteenth century type crimes and torts. Similarly, when elements opposed to RICO suggest that its subject matter be enforced only or mainly criminally, they really mean that it be enforced inadequately or not at all. If our markets are free, it is not because of the work of public agencies enforcing the antitrust statutes, as important as they are. Private enforcement is, in fact, the linchpin of the antitrust statutes.<sup>198</sup> When civil rights legislation was under consideration in the 1960s, many critics emphasized states' rights, which were then, at least for some, only a smoke screen behind which to hide a rotten system of segregation.<sup>199</sup> Criticism of RICO based on federalism also looks like a smoke screen behind which the swindlers and others seek to hide. Accordingly, those who are opposed to RICO are working, wittingly or unwittingly, to free those who engage in organized or white-collar crime from the appropriate legal accountability.

## II. PROPOSALS FOR REFORM

On February 23, 1989, Senator Dennis DeConcini and Representative Rick Boucher introduced "The RICO Reform Act of 1989," Senate Bill 438/House Bill 1046.<sup>200</sup> Senator DeConcini and Representative

196. See Lacovara Statement, *supra* note 47.

197. See *id.* Lacovara stated:

[T]he opponents of RICO reform claim that it is special interest legislation. . . . I submit that it is the effort to scuttle RICO reform to protect the particular interests of a few lobbying groups, private attorneys, and law professors that have developed a lucrative practice bringing civil RICO lawsuits that smacks more of protecting special interest in the face of demands of national public policy.

*Id.*

198. See Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 440 (1981). These commentators argue that "[n]either imprisonment nor monetary penalties posed a credible threat to colluding firms. . . . [T]he deterrent effect [comes] . . . from the . . . likelihood of an award of private treble damages. . . ." *Id.*

199. See generally Miller, *Constitutional Law and the Rhetoric of Race*, in *LAW IN AMERICAN HISTORY* 147, 147 (D. Fleming & B. Bailyn eds. 1971) (stating that "[i]n law and typically in politics . . . [a]n examination of how and why particular words are used, and with what effects, . . . illuminate[s] substantial areas in the political and legal culture").

200. S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1653 (daily ed. Feb. 23, 1989); H.R. 1046, 101st Cong., 1st Sess. (1989); *id.* at H368 (daily ed. Feb. 22, 1989).

Boucher offered the bill ostensibly to end alleged "litigation abuse" by private civil plaintiffs. In fact, the proposed legislation largely would set aside the right of victims injured by sophisticated white-collar criminals, organized criminals, and other offenders to obtain adequate civil redress. Senator DeConcini and Representative Boucher drafted the proposed legislation principally at the request of representatives of the securities and commodities industries and the accounting profession. The proposed legislation, in most civil litigation under RICO, would: (1) reduce the measure of damages from treble to actual damages; (2) eliminate the provision for prevailing party attorney's fees; (3) specifically exclude securities and commodities offenders from the scope of the 1970 Act; and (4) apply its provisions retroactively to pending litigation.

Congress failed to pass similar, but less restrictive, legislation in the 100th Congress, because members of Congress widely perceived it to be special interest legislation. Representative John Conyers, a principal spokesman for those who opposed the legislation, aptly observed:

[I]n light of the current scandals on Wall Street, I believe that it is wholly unjustifiable to treat securities or commodities fraud in any fashion different from, say, insurance or bank fraud. I see no valid reason why aggravated patterns of criminal behavior in the securities or commodities industries do not merit RICO's enhanced sanctions. I see no ground, in short, for a double standard.

Similarly, I believe that it would be profoundly unwise, wholly inappropriate, and constitute both a troubling and unseemly precedent to make RICO reform retroactive so as to restrict the measure of recovery in pending cases.

I see no reason to give the likes of Boesky or Butcher in their stock fraud or bank fraud activities a special bill of relief. Congress sits to legislate, not settle pending litigation.<sup>201</sup>

A need exists both to fine-tune and strengthen RICO, but as the *New York Times* editorially observed: "Reducing damages would reduce deterrence. It makes no sense to exempt commodities and securities frauds when these seem rampant. Above all, retroactive relief is unfair. By going along with it, Congress would turn itself into a partial substitute for impartial courts."<sup>202</sup> Congress should not pass the "RICO Reform Act of 1989" unless it is substantially amended. Suggested changes will be discussed below.

The most telling objection to the provisions of the proposed legislation is that little or no relation exists between the allegations of abuse and the provisions supposedly designed to remedy them. Time after time, the baby of RICO's basic design to vindicate the rights of crime victims is being thrown out with the bath water of supposed litigation abuses.

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201. 134 CONG. REC. E3720 (daily ed. Oct. 21, 1988) (remarks of Rep. John Conyers).

202. *Save Rico from "Reform"* (editorial), N.Y. Times, Oct. 6, 1988, at A30, col. 1.

### A. Title<sup>203</sup>

Several provisions in the bill<sup>204</sup> reflect legitimate efforts to reform RICO. Thus, the bill's proposed title, "The RICO Reform Act of 1989," is not entirely inappropriate. But the central thrust of the proposed legislation—both retroactively and prospectively—will tilt RICO litigation sharply in favor of defendants and inhibit the ability of victims of crime, particularly victims of fraud, to vindicate their rights. Accordingly, the bill might more appropriately be re-entitled, "The RICO Reform, Defendant's Protection, and Swindler's Relief Act of 1990."

### B. Predicate Offenses<sup>205</sup>

RICO was enacted in 1970. Since 1970 Congress has passed significant criminal legislation creating new offenses. Congress did not always

203. H.R. 1046 states:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SECTION 1. SHORT TITLE.

This Act may be cited as the "RICO Reform Act of 1989".

204. This analysis focuses on the Boucher bill, H.R. 1046. Nevertheless, only slight stylistic differences are present in the texts of the Boucher bill and the DeConcini bill, S. 438. For an alternative proposal, see App. E, *infra* p. 1049.

205. H.R. 1046 provides:

#### SEC. 2. ADDITION OF PREDICATE OFFENSES.

Section 1961(1) of title 18, United States Code, is amended—

(1) in subparagraph (A), by inserting "prostitution involving minors," after "extortion,";

(2) in subparagraph (B) —

(A) by inserting before "section 201 relating to bribery," the following: "section 32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112(a), (c)-(f) (relating to protection of foreign officials and other persons), section 115 (relating to acts against Federal officials and other persons),";

(B) by inserting after "sections 471, 472, and 473 (relating to counterfeiting)", the following: "section 510 (relating to forging of Treasury or other securities), section 513 (relating to forgery of State and other securities),";

(C) by inserting after "section 664 (relating to embezzlement from pension and welfare funds)," the following: "section 875(a) (relating to threats and extortion),";

(D) by inserting after "section 1029 (relating to fraud and other activity in connection with access devices)," the following: "section 1030 (relating to fraud in connection with computers),";

(E) by inserting after "section 1084 (relating to the transmission of gambling information)," the following: "sections 1111-1112, 1114, 1116-1117 (relating to homicide), section 1203 (relating to hostage taking),";

(F) by striking out "section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant)," and inserting in lieu thereof the following: "sections 1501-1506, 1508-1513, and 1515 (relating to obstruction of justice);";

(G) by inserting after "sections 2251-2252 (relating to sexual exploitation of minors)," the following: "section 2277 (relating to vessels),";

include the new offenses in RICO.<sup>206</sup> Similarly, Congress did not include in RICO certain relevant offenses that were in existence in 1970. These crimes—those in existence in 1970 and those enacted since—should be added as predicate offenses.<sup>207</sup> In particular, Congress should add hazardous waste offenses. Traditional organized crime groups increasingly are engaging in these offenses.<sup>208</sup> The National Association of Attorneys General recommends this step.<sup>209</sup> Care should be taken, however, to assure that only substantial, not technical, violations of the relevant statutes are incorporated.<sup>210</sup>

Congress also should incorporate into the proposed legislation the

(H) by inserting after “sections 2314 and 2315 (relating to interstate transportation of stolen property)”, the following: “section 2318 (relating to counterfeit materials);” and

(I) by inserting after “section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts),” the following: “section 2331 (relating to terrorist acts abroad);”

(3) by striking out “or” at the end of subparagraph (D);

(4) by striking out the semicolon at the end of subparagraph (E) and inserting in lieu thereof “(F) any offense under section 134 of the Truth in Lending Act, or (G) section 5861(b)-(k) of the Internal Revenue Code of 1986 (relating to firearms controls);”

H.R. 1046, *supra* note 200, § 2.

206. The following general offenses were included in the proposed bill: (1) prostitution involving minors under state law; (2) chapter 51 of title 18 (relating to homicide); (3) chapter 73 of title 18 (relating to obstruction of justice); (4) chapter 110 of title 18 (relating to sexual exploitation of children); (5) chapter 113A of title 18 (relating to extraterritorial jurisdiction over terrorists acts); (6) section 32 of title 18 (relating to destruction of aircraft or aircraft facilities); (7) section 81 of title 18 (relating to arson); (8) section 112 of title 18 (relating to protection of foreign officials and other persons); (9) section 115 of title 18 (relating to assaults and other acts against Federal and other persons). The following offenses should be included in RICO but are not in the proposed legislation: (10) 18 U.S.C. § 215 (1988) (relating to bank bribes); (11) *id.* § 373 (relating to solicitation to commit a crime of violence); (12) *id.* § 666 (relating to theft or bribery in benefit programs); (13) *id.* § 831 (relating to prohibited transactions involving nuclear materials); (14) *id.* § 844 (relating to explosive materials); (15) *id.* § 875 (relating to interstate communications); (16) *id.* § 876 (relating to the mailing of threatening communications); (17) *id.* § 877 (relating to threatening communication from foreign country); (18) *id.* § 878 (relating to threats); (19) *id.* § 929 (relating to restricted ammunition); (20) *id.* § 1203 (involving the taking of hostages); (21) *id.* § 1362 (relating to communications); (22) *id.* § 1363 (relating to buildings); (23) *id.* § 1364 (relating to foreign commerce); (24) *id.* § 1366 (relating to energy); (25) *id.* § 1958 (relating to murder-for-hire); (26) *id.* § 1959 (relating to violent crime in aid of racketeering); (27) *id.* § 1992 (relating to trains); (28) *id.* § 2277 (relating to vessels); (29) *id.* §§ 2318, 2320 (relating to counterfeit and other materials).

The following fraud-related offenses should be included in RICO: (1) *id.* § 510 (relating to the forging of Treasury or other securities); (2) *id.* § 513 (relating to forgery of state and other securities); (3) *id.* § 1030 (relating to fraud in connection with computers); (4) *id.* § 1344 (relating to bank fraud); (5) section 134 of the Truth in Lending Act (*id.* § 1644) (relating to credit card fraud) (included in the proposed legislation). See App. E, *infra* pp. 1056-60.

207. The relevant offenses are those in the areas of: (1) violence, (2) provision of illegal goods and services, (3) government corruption, (4) union corruption, and (5) criminal fraud.

208. See 134 CONG. REC. H6788 (daily ed. Aug. 10, 1988) (statement of Rep. John Conyers).

209. 133 CONG. REC. E3362 (daily ed. Aug. 7, 1987) (statement of Rep. John Conyers).

210. The following hazardous waste offenses should be added: (1) Resource Conservation and Recovery Act, 42 U.S.C. § 6928 (1982 & Supp. V 1987), and (2) an offense under a similar provision of a state hazardous waste program that is authorized by the Administrator of the Environmental Protection Agency under *id.* § 6926).

existing securities offenses specifically and not generically.<sup>211</sup> Because some confusion exists about whether RICO incorporates the "civil" or the "criminal" provisions of the securities statutes,<sup>212</sup> Congress should clarify that RICO includes only the criminal provisions.

### C. *Burden of Proof*<sup>213</sup>

The proposed reform provision codifies present law and represents sound policy.<sup>214</sup> It requires neither criticism nor change.

### D. *Government Suits*<sup>215</sup>

Significantly, these provisions recognize the utility of treble damages litigation coupled with court costs and attorney's fees as a mecha-

211. The appropriate securities and commodities offenses are as follows: (1) the Securities Act of 1933, 15 U.S.C. § 77x (1988); (2) the Securities Exchange Act of 1934, *id.* § 78ff; (3) the Public Utility Holding Company Act of 1935, *id.* § 79z-3; (4) the Trust Indenture Act of 1939, *id.* § 77yyy; (5) the Investment Company Act of 1940, *id.* §§ 80a-49, 80b-17; and (6) the Commodity Exchange Act, 7 *id.* § 13.

212. *See, e.g.*, *Frota v. Prudential-Bache Sec., Inc.*, 639 F. Supp. 1186, 1192 (S.D.N.Y. 1986) (holding that it must be criminal); *Pandick, Inc. v. Rooney*, 632 F. Supp. 1430, 1434 (N.D. Ill. 1986) (holding that it must be willful).

#### 213. SEC. 3. BURDEN OF PROOF.

Section 1964(a) of title 18, United States Code, is amended by inserting after "of this chapter by issuing" the following: " , upon proof by a preponderance of the evidence,". H.R. 1046, *supra* note 200, § 3.

214. *See United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (governmental suit), *cert. denied*, 420 U.S. 925 (1975); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1303 (7th Cir. 1987) (private suit); Note, *Burden of Proof*, *supra* note 1.

#### 215. SEC. 4. CIVIL RECOVERY.

"Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A governmental entity (excluding a unit of local government other than a unit of general local government), whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefor and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages to the business or property of the governmental entity sustained by reason of such violation, and shall recover the costs of the civil action, including a reasonable attorney's fee.

"(B) A civil action under subparagraph (A) of this paragraph must be brought by—

"(i) the Attorney General, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the United States;

"(ii) the chief legal officer of a State, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the State;

"(iii) the chief legal officer, or other legal officer authorized to sue, of a unit of general local government of a State, if the injury is to the business or property of the unit of general local government; or

"(iv) a court-appointed trustee, if the injury is to the business or property of an enterprise for which the trustee has been appointed by a United States district court under section 1964(a) of this title."

H.R. 1046, *supra* note 200, § 4.

nism to vindicate important public interests.<sup>216</sup> They are, however, defective in two ways: (1) their exclusion of key governmental entities, and (2) their exclusion of key types of governmental damages.

### 1. Exclusion of Key Governmental Entities

First, the provisions do not include Indian tribes and tribal organizations as governmental entities entitled to sue for treble damages.<sup>217</sup> The sovereignty of Indian tribes is, of course, as fundamental as the sovereignty of states and local units of government. The history of this Nation's treatment of Indian tribes, however, is characterized by perfidy, mismanagement of solemn trust, and outright fraud.<sup>218</sup> Sadly, the

216. See generally Note, *Treble Damages*, *supra* note 1, at 533-34 (discussing the three functions of treble damages: (1) to encourage enforcement, (2) to deter violators, and (3) to compensate for accumulative harm beyond actual damages).

217. See H.R. 1046, *supra* note 200, § 9 (defining "governmental entity").

218. See generally S. REP. NO. 216, 101st Cong., 1st Sess. 3-4 (1989) [hereinafter INDIAN REPORT]. The Senate Report stated:

At the birth of our constitutional democracy, our Founding Fathers chose to recognize the original inhabitants of America as independent, self-governing nations which long predated European settlement. In calling for agreements by treaty with Indians, President Washington and the founders pledged that the United States would deal with the continent's native people with consistency, fairness and honor.

In the century following 1789, however, frontier settlement unleashed economic and political forces that undermined Washington's call for stability and mutual respect in Indian affairs. Hounded by Western expansionists, and thrown on the defensive by the outspoken enemies of American Indians, Congress abandoned the Founding Fathers' commitment to fair and honorable agreements with Indian peoples. Throughout the 19th century, the federal government conducted brutal wars to subjugate resistant tribes. The military campaigns often led to conquest and forced removal of Indians from their native territory.

In exchange for the vast lands that now comprise most of the United States, the federal government promised the tribes permanent, self-governing reservations, along with federal goods and services. Instead, government administrators, many of whom were corrupt, tried to substitute federal power for the Indians' own institutions by imposing changes in every aspect of native life. At its height, there seemed no limit to the government's paternalistic ambitions. It severed ties between parents and children by confining students in government boarding schools; it shattered the authority of religious leaders by prohibiting traditional rituals and jailing those who resisted; and it destroyed indigenous economies by seizing tribal territories and renegeing on the promises it made for land, federal support and financial assistance. Finally, while the government offered Indians equal membership in the United States, it failed to grant them the basic freedom enjoyed by all other Americans: the right to choose their own form of government and live free from tyranny.

*Id.*; see also *id.* at 27-67 (discussing the history of congressional investigations and American Indian affairs from 1789 to 1989); *Federal Government's Relationship with American Indians: Hearings Before the Special Comm. on Investigations of the Senate Select Comm. on Indian Affairs*, 101st Cong., 1st Sess. (1989); G. NAMMOCK, *FRAUD, POLITICS, AND THE DISPOSSESSION OF THE INDIANS* (1969); M. WAX, *SOLVING "THE INDIAN PROBLEM": THE WHITE MAN'S BURDENSOME BUSINESS* (1975); *WHO'S THE SAVAGE?* (D. Wrono & R. Nelson eds. 1982) (describing the mistreatment of the Native North Americans from the days of the Vikings to the present).

No record in American history is more sad than that of the treatment of the State of Georgia and President Andrew Jackson of the Cherokee Nation. It produced two major Supreme Court decisions by Chief Justice John Marshall. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 594-96



contemporary story is not different from that of the late nineteenth century or early twentieth century.<sup>219</sup> Accordingly, Congress should add Indian tribes and tribal organizations to the list of governmental entities entitled to sue in the future for treble damages. Moreover, in light of the retroactive features of the reform legislation, Congress's failure to add these entities will adversely affect important pending tribal RICO litigation.<sup>220</sup>

Second, the provisions exclude state insurance commissioners, who serve at the state level much like governmental insurance entities at the federal level. Accordingly, Congress should add state insurance commis-

(1832) (ordering the release of two missionaries illegally held by Georgia); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-30 (1831) (holding that the tribe was a nation, but not a foreign nation under the Constitution). The Cherokees were removed forcibly from their lands in Georgia and made to migrate to an area now located in Oklahoma. See generally C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 329-79 (rev. ed. 1926). The tragic story is vividly told in J. EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* (1988). The impact of the seizure and the long journey is summarized by John Ehle:

There are various estimates and several arguments about the social, cultural, and physical damage caused by the 1838 removal. The main portions of all five tribes were uprooted and the people became socially disoriented, their town and clan organizations disrupted. Families dwindled and were divided; many people died. It was sometimes true that those too feeble to travel were left with a kinswoman in the Qualla Cherokee band in North Carolina, but only a few of these handicapped, aged individuals were protected that way. Most elders had been sent along and, weakened by the traveling, assaulted by a different diet of meal and pork, had fallen into illnesses unknown by name to doctors of the time. Traveling five to ten miles daily was not of itself deadly, but the diet, the filth of the camps, the flies feeding at the slit trenches and visiting the food and hands of the people proved to be. Then, too, there was the mosquito, carrying malaria, which struck in summer seasons. And there was smallpox, which struck the Choctaws and became an epidemic among them. There was gonorrhea, a complication for many. And finally, there was the old reaper, who could be relied on to make everyday, standard visits, selecting travelers for that other western journey.

Many of the deaths were of infants whose nursing mothers were ill with intestinal diseases. The sick infants bawled until too weak to cry. One mother carried the corpse of her infant for two days, keeping it company.

How many Cherokees and their slaves died? The answer is a mystery, enhanced, complicated by decades. In the detention camps, from three hundred to two thousand died, depending on the authority accepted; on the trail, from five hundred to two thousand. In other words, the answer is a combined total of between eight hundred and four thousand.

*Id.* at 389-90. Chief Justice Marshall said of the Indians, "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." *Id.* at 244 (quoting Chief Justice John Marshall). President Jackson's attitude toward the Indians and the laws is summed up in his comment on Marshall's decision in *Worcester*, "John Marshall has made his decision: let him enforce it now if he can." *Id.* at 255 (quoting President Andrew Jackson).

219. INDIAN REPORT, *supra* note 218, at 69-212 (presenting the findings of Select Committee's investigation).

220. See, e.g., *Navajo Members Level RICO Charges Against Interior Dep't, Corporations, Civ. RICO REP.*, June 13, 1989, at 6 (discussing a RICO suit over the purchase at an inflated price (more than \$10 million) of Big Boquillas Ranch); see also *Navajo Leader Faces Fraud Suit in Arizona Court*, N.Y. Times, Jan. 28, 1990, § 1, at 23, col. 1 (reporting that an Arizona civil racketeering suit has been filed in a Navajo corruption scandal, but that state jurisdiction has been challenged).

sioners to the list of governmental entities entitled to sue in the future for treble damages. Moreover, in light of the retroactive features of the reform legislation, the failure to add state insurance commissioners will adversely affect important pending RICO litigation in several states.<sup>221</sup>

Finally, the "court-appointed trustee" language of proposed provision section 4 may be too narrow. It also is not implemented in the proposed provision's definition of "government entity" in 9(a). Either in the text or the legislative history, Congress should clarify that "court-appointed trustee" includes other similar court-appointed officers who are working to clean up racketeer dominated unions or other organizations.<sup>222</sup> Congress should add appropriate language to the definition of "governmental entity" to ensure that union trustees may sue.

## 2. Exclusion of Key Kinds of Governmental Damages

Today, this Nation is plagued by fraud in financial institutions—banks, thrifts, welfare and pension funds, securities dealers, and other similar institutions. These failures are attributable in major part not to bad management or poor economic conditions but to outright fraud. Swindlers have inflicted untold harm upon these financial institutions. Various governmental insurance programs, including the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Pension Benefit Guaranty Corporation, and the Securities Investor Protection Corporation, insure these institutions.<sup>223</sup> Nevertheless, when these governmental corporations sue for injury to their funds, they sue derivatively, not directly.<sup>224</sup> Accordingly, unless

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221. Compare *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.), cert. denied, 464 U.S. 1002 (1983) (upholding a suit by a commissioner) with *Corcoran v. American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989) (refusing to uphold a suit by a commissioner).

Language also should be added to guarantee that the Securities Investor Protection Corp. (SIPC), which is not a government corporation, is treated like the Federal Deposit Insurance Corp. and other government corporations that insure financial institutions.

In 1970 the same Congress that enacted RICO created the SIPC as a nonprofit membership corporation in response to the collapse of numerous brokerage houses to provide greater protection for customers of registered brokers, dealers, and members of national exchanges. See S. REP. NO. 1218, 91st Cong., 2d Sess. 4 (1970); H.R. REP. NO. 1613, 91st Cong., 2d Sess. (1970); *In re Application of Executive Sec. Corp.*, 702 F.2d 406, 410 (2d Cir. 1983) (observing that "[a]lthough not formally part of the federal government, SIPC and its trustees vindicate important public interests"). In almost 20 years of existence, SIPC paid out more than \$180 million to investors with accounts at brokerage firms that went bust and helped more than 200,000 investors recover more than \$1 billion. See generally *Jasen, If Your Broker Goes Belly Up, There Is a Safety Net*, Wall St. J., Mar. 9, 1990, at C1, col. 2. See *supra* note 117 and accompanying text.

222. See, e.g., *United States v. Local 30, United Slate, Tile, & Composition Roofers*, 871 F.2d 401 (3d Cir. 1989) ("decreeship").

223. See also *Barrett, HUD Mortgage-Fraud Losses Estimated to Total Hundreds of Millions of Dollars*, Wall St. J., June 19, 1989, at A5, col. 1.

224. See, e.g., *Securities Investor Protection Corp. v. Vigman*, 803 F.2d 1513 (9th Cir. 1986).

Congress clarifies the language of the proposed legislation to assure that "direct or indirect" injury is within the scope of the authorized suits, little of the cost of these financial failures, which ultimately is borne by taxpayers, will be recoverable by the government under RICO's treble damages provisions. Accordingly, Congress must unequivocally authorize suits in corporate and liquidator capacity for injury to the fund and to the failed entity. Moreover, in light of the retroactive features of the reform legislation, the failure to add these clarifying provisions adversely will affect pending RICO litigation.<sup>225</sup>

### *E. General Private Suits for Multiple Damages*<sup>226</sup>

Currently, RICO authorizes "any person" injured in his "business or property" by reason of "a violation" of its provisions to sue for treble

225. See, e.g., *Federal Sav. & Loan Ins. Corp. v. Shearson/American Express, Inc.*, 658 F. Supp. 1331 (D.P.R. 1987); *Federal Deposit Ins. Corp. v. Hardin*, 608 F. Supp. 348 (E.D. Tenn. 1985).

226. The legislation provides:

"(2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefor and, upon proof by a preponderance of the evidence, shall recover—

"(A) the actual damages to the person's business or property sustained by reason of such violation;

"(B) the costs of the civil action, including a reasonable attorney's fee, if the person whose business or property is injured is—

"(i) a unit of local government other than a unit of general local government; or

"(ii)(I) a natural person, or an organization meeting the definition of exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986, or an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939, or an organization meeting the definition of a pension fund under the Employee Retirement Income Security Act, or an organization meeting the definition of an investment company under the Investment Company Act of 1940; and

"(II) the person is injured by conduct proscribed by section 21(d)(2)(A) of the Securities Exchange Act of 1934; or

"(iii)(I) a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, investment, service, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union, or other savings institution; and

"(II) neither State nor Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based; and

"(C) punitive damages up to twice the actual damages if the plaintiff may collect costs under the provisions of subparagraph (B) of this paragraph, and the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied: *Provided, however*, That in actions in which the plaintiff may collect costs under the provisions of subparagraph (B)(ii) of this paragraph, the calculation of punitive damages also shall be consistent with section 21(d)(2)(C) of the Securities Exchange Act of 1934, and the assessment of punitive damages against a person employing another person who is liable under this clause shall be consistent with section 21(d)(2)(B) of the Securities Exchange Act of 1934.

H.R. 1046, *supra* note 200, § 4.

damages and attorney's fees.<sup>227</sup> The proposed provisions, however, only preserve multiple damages recovery for a limited class of suits under a limited set of circumstances against a limited class of perpetrators for a limited range of remedies.

### 1. Who Can Sue

Under the provisions of the proposed legislation, only the following limited classes may sue: (1) units of local government, (2) natural persons, (3) charities, (4) indenture trustees, (5) pension funds, and (6) investment companies. Ostensibly, the proposed legislation's purpose is to curtail general commercial fraud litigation under RICO. As such, it would make more sense for Congress directly to limit—subject to carefully drafted exceptions—such litigation between commercial entities. The proposed legislation's general limitation of RICO litigation, therefore, goes well beyond the rationale of the allegations of misuse.

If RICO's limitation is to proceed by circumscribing the class who may sue, sound policy reasons may be offered for redrafting the class. The class should include individuals and entities in our society who are in need of special protection, either because of their relative vulnerability or because they institutionally represent others who fall into that class.<sup>228</sup>

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227. See 18 U.S.C. § 1964(c) (1988).

228. The list would include at least the following:

(1) A defense contractor (including a subcontractor or prospective contractor or subcontractor) meeting (or that would meet) the definition of defense contractor under § 702(f) of the Defense Production Act of 1950, 50 U.S.C. app. § 2152(f) (1982); (2) an organization meeting the definition of exempt organizations under § 501(c) or (d) of the Internal Revenue Code of 1986, 26 U.S.C. § 501(c), (d) (1982 & Supp. V 1987); (3) an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939, 15 U.S.C. § 77jjj (1988); (4) an organization meeting the definition of a welfare plan, pension plan, or plan under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(1), (2)(A), (3) (1982); (5) an organization meeting the definition of an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-3(a) (1988); (6) an organization meeting the criteria for a small business concern under § 3 of the Small Business Act, 15 U.S.C. § 632(a) (1988); (7) a financial institution meeting the definition of financial institution under 31 U.S.C. § 5312(2)(A) (insured bank); *id.* § 5312(2)(B) (commercial bank or trust company); *id.* § 5312(2)(C) (private banker); *id.* § 5312(2)(D) (agency or branch of a foreign bank); *id.* § 5312(2)(E) (insured institution); *id.* § 5312(2)(F) (thrift institution); *id.* § 5312(2)(L) (operator of credit card system); *id.* § 5312(2)(M) (insurance company); or *id.* § 5312(2) (T) (agency of government), when such agency is acting for an institution within this subparagraph; (8) a federally chartered or insured financial institution meeting the definition of federally chartered or insured financial institution under 18 *id.* § 1344(b); and (9) a person whose business or property is injured who is a natural person and whose injury occurred in connection with the purchase or lease, for personal or noncommercial use or investment, of a product, service, investment, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union, or other savings institution.

## 2. Conduct for Which Suit May Be Brought

Under the provisions of the proposed legislation, only the following limited classes of conduct will remain subject to multiple damages suits: (1) undefined insider trading suits, and (2) defined consumer suits. Insider trading suits may be brought by units of local government, but only natural persons can bring consumer suits.

### a. Insider Trading

Under present law, insider trading is undefined by statute. Congress considerably clarified its scope, however, with the Insider Trading and Securities Fraud Enforcement Act of 1988.<sup>229</sup> Accordingly, Congress must modify the draft of the insider trading provisions of the proposed legislation. Paragraph (2)(A) was struck by the 1988 Act. The new reference should be section 21A.<sup>230</sup>

The insider trading exception contained in the proposed legislation, moreover, appears to be more political than principled. Only the insider trading stock market scandal involving Ivan Boesky and others appear to account for the exception.<sup>231</sup> Insider trading, however, is hardly the only securities-related violation characteristic of Wall Street's recent lawless actions. For example, a central allegation against Michael Milken and others in their ninety-eight count criminal RICO indictment is "parking."<sup>232</sup> Congress, therefore, should either generalize or

229. Pub. L. No. 100-704, 102 Stat. 4677 (1988) [hereinafter ITSFEA].

230. See 15 U.S.C. § 78(v)(1) (1988). The new provisions clarified original congressional intent and set aside the unfortunate result in *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984). See H.R. REP. NO. 910, 100th Cong., 2d Sess. 26-88 (1988); see also 133 CONG. REC. H8835 (daily ed. Oct. 20, 1987) (remarks of Rep. John Conyers).

231. See Rushford, *RICO Reform Foes Make Boesky Their Bogeyman*, Legal Times, Apr. 25, 1988, at 1, col. 4, at 14, col. 7 (reporting that when critics call the former version of RICO reform legislation, "the Boesky bail-out bill," Rep. Rick Boucher responds, "Our intention was not to provide an escape for a person such as Ivan Boesky").

232. Parking is selling stock under a secret agreement to repurchase it at a prearranged time and price.

Apparently, an impression is widespread in the securities industry today that RICO overlaps all securities fraud. Justice Thurgood Marshall's dissent in *Sedima* expressed a similar concern. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 505 (1985) (Marshall, J., dissenting) (finding that RICO "virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws"). RICO, however, states that any offense involving "fraud in the sale of securities . . . [is] punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (1988). An "offense" under RICO means a criminal offense. *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 29 (2d Cir. 1983) (stating that RICO "obviously refers to criminal punishment"); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983) (holding that "[c]riminal intent is . . . necessary to either mail fraud or securities fraud [under RICO]"); *Levine v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 639 F. Supp. 1391, 1395-96 (S.D.N.Y. 1986) (stating that RICO securities violations must be criminal); *Frota v. Prudential-Bache Sec., Inc.*, 639 F. Supp. 1186, 1192 (S.D.N.Y. 1986) (stating that RICO securities violations must be criminal); *Kronfeld v. First Jersey Nat'l Bank*, 638 F. Supp. 1454, 1471 (D.N.J. 1986) (concluding that RICO securities violations must be willful); *In*

abandon the exception for certain kinds of securities fraud. Congress

re Nat'l Mortgage Equity Corp. Mortgage Pool, 636 F. Supp. 1138, 1157 (C.D. Cal. 1986) (holding that recklessness suffices for criminal violation); *Pandick, Inc. v. Rooney*, 632 F. Supp. 1430, 1434 (N.D. Ill. 1986) (stating that 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 (1988) ("willfully"); Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a) (1988) ("willfully"). Mere negligent conduct or a transaction that operates only as a fraud does not fall within the statute. See *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980) (holding that intent to defraud rather than negligence in § 10(b) of the 1934 Act or § 17(a)(1) of the 1933 Act is actionable under RICO, but not untrue statements or admissions or transactions that operate as a fraud in § 17(a)(2) or § 17(a)(3) of the 1933 Act).

The interrelationship between RICO and the securities statutes also is misconstrued on another score. Courts are split on the issue of applying the "purchaser-seller" standing to sue limitations contained in securities law jurisprudence to RICO. Compare *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 152 (4th Cir. 1987) (holding that securities fraud under RICO is limited by purchaser-seller requirements for standing to sue) and *Brannan v. Eisenstein*, 804 F.2d 1041, 1046-47 (8th Cir. 1986) (holding that standing for securities identical to standing for mail fraud) with *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987) (holding that standing to sue for RICO is not limited by purchaser-seller requirements). *Warner*, not *Zepkin* or *Eisenstein*, correctly analyzes the issue.

Section 1962 is enforced by private suits through § 1964(c), which provides that "[a]ny person injured in his business or property by reason of a violation of section 1962" may sue. 18 U.S.C. § 1964(c) (1988). The definition of "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3). The plain text of RICO, therefore, does not impose "purchaser or seller" limitations on "any person." See *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100 (2d Cir. 1988), cert. denied, 109 S. Ct. 1642 (1989) (holding that there is "no special limitation on standing"). If Congress wanted to narrow the class of persons entitled to sue to enforce RICO's remedial provisions, narrowing the definition of "person" in this section was all it took to achieve that objective; Congress could have "narrowed the sweep of the definition by inserting a single word." *United States v. Turkette*, 452 U.S. 576, 581 (1981) (discussing the definition of "enterprise"). "The short answer [to the contention that RICO is limited by purchaser-seller limitations] is that Congress did not write the statute that way." *United States v. Monsanto*, 109 S. Ct. 2657, 2664 (1989) (holding that "any property" does not exclude funds for legal fees) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)). See also *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2902-05 (1989) (holding that "pattern" is not limited to organized-crime-type perpetrators); *Sedima*, 473 U.S. at 495 (stating that "any person" is not limited to "mobsters"); *Russello v. United States*, 464 U.S. 16, 21-22 (1983) (concluding that "any interest" is not limited to "interest in enterprise"); *Turkette*, 452 U.S. at 580-81 (holding that "any enterprise" is not limited to "illegal enterprise").

Congress explicitly set out the only limitations on civil recovery under RICO: The "person" must show that "his business or property" was "injured." *First Pac. Bancorp. Inc. v. Bro*, 847 F.2d 542, 547 (9th Cir. 1988). "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . . But the statute requires no more than this." *Sedima*, 473 U.S. at 496-97; see also *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (holding that it is wrong to require a plaintiff to show more).

Because the judiciary implied a private claim for relief in rule 10b-5, circumscribing it with an implied standing rule may be appropriate. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975). The private right of action under civil RICO, however, is express, and a judicial limitation on its scope with implied standing rules is improper. To require civil RICO plaintiffs to be purchasers or sellers ignores the Supreme Court's clear injunction in *Blue Chip Stamps*: The "[j]udiciary may not circumscribe [an express claim for relief] . . . because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability." *Id.* at 748. The decisions in *H.J. Inc.* and *Monsanto* also are relevant: "RICO's language supplies no grounds to

should treat securities fraud, as well as other kinds of swindling, in a

believe that Congress meant to impose such a limit on the Act's scope." *H.J. Inc.*, 109 S. Ct. at 2903 (holding that "pattern" is not limited by organized crime). "[T]he statute, as presently written, cannot be read any other way." *Monsanto*, 109 S. Ct. at 2665 (stating that "any property" does not exclude funds for legal fees). The Supreme Court also was unequivocal in *Sedima*. The judiciary must not limit liability under RICO; "it is a form of statutory amendment [in]appropriately undertaken by the courts." *Sedima*, 473 U.S. at 500 (holding that injury is not limited to racketeering-type injury). "[C]orrection must lie with Congress," if there is "a defect." *Id.* at 499. "[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for [a court]." *H.J. Inc.*, 109 S. Ct. at 2905.

Nevertheless, courts impose artificial standing requirements on parties who sue under RICO. The Fourth Circuit in *Zepkin* conceded that Congress did not expressly limit RICO by "purchaser or seller" limitations, and noted the absence not only of "purchaser-seller" language but also of § 10(b)'s "in connection with" causation standard. Yet the *Zepkin* court argued that RICO required explicit statutory language to overcome judicially imposed limitations on private actions under rule 10b-5. *Zepkin*, 812 F.2d at 152.

*Zepkin* is fundamentally misguided, misreads the statutory scheme of RICO, and reflects bad policy. See *Fedorenko v. United States*, 449 U.S. 490 (1981). The Supreme Court held that it was "not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it." *Id.* at 513 (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)). First, *Tafflin*, *H.J. Inc.*, *Monsanto*, and *Sedima* squarely hold that RICO's express text structure and legislative history, not its silence in the text or legislative history, control the interpretation of RICO. See *Tafflin v. Levitt*, 110 S. Ct. 792, 795-97 (1990); *H.J. Inc.*, 109 S. Ct. at 2899-900; *Monsanto*, 109 S. Ct. at 2662-64; *Sedima*, 473 U.S. at 495 n.13. RICO must be construed liberally, and its remedial purpose is to be enhanced, not retarded. *Sedima*, 473 U.S. at 497-98. The court in *Zepkin* ignores the Supreme Court's instruction that RICO should be construed liberally and narrowly interprets the statute. Indeed, the court in *Zepkin* does not even address § 1964, the civil provision that expressly deals with standing, injury, and causation. As the Supreme Court in *Sedima* noted, the legislation was enacted outside of the antitrust statutes in order to avoid such narrow standing limitations on RICO's remedies. *Id.* at 498. The Fourth Circuit "create[s] exactly the problems Congress sought to avoid" by reading such limitations back into RICO. *Id.* at 499.

Rule 10b-5 standing limitations are inapplicable to RICO on another more fundamental ground. By itself, the implied claim for relief of rule 10b-5 seeks only private civil redress. RICO, however, seeks to make effective the substantive standards of the statute through both criminal and civil sanctions. The substantive standards of RICO reflect the substantive elements of its predicate acts, each of which is a crime. RICO fills this objective civilly through a private attorney general enforcement mechanism. See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241-42 (1987); *Sedima*, 473 U.S. at 493. The purchaser/seller limitation of rule 10b-5 is imposed only for private civil actions. The violation of rule 10b-5 that constitutes a predicate act under RICO, however, is a criminal securities fraud. See Securities Exchange Act of 1934, § 32(a), 15 U.S.C. § 78ff(a) (1988) ("willfully violates"). The standards of § 32(a) are not limited by "purchaser-seller" limitations. See *United States v. Charnay*, 537 F.2d 341, 349 n.11 (9th Cir.), cert. denied, 429 U.S. 1000 (1976) (holding that "[i]n a criminal prosecution, the standing problem is, of course, not present and Rule 10b-5 is applicable if the conduct charged falls within the Rule's prohibitions"); see also *United States v. Naftalin*, 441 U.S. 768, 774 n.6 (1979) (finding that *Blue Chip Stamps* does not limit criminal prosecutions); *United States v. Newman*, 664 F.2d 12, 17 (2d Cir. 1981), cert. denied, 464 U.S. 863 (1983) (holding that "[i]t is only because the judiciary has created a private cause of action . . . that standing . . . has become a pivotal issue").

Plaintiffs under RICO act as private prosecutors. Had Congress wanted to impose "purchaser-seller" standing limitations on this civil enforcement mechanism, it could have done so with appropriate language. Congress was aware of the overlap between RICO and the securities statutes, because the point specifically was drawn to its attention. Blakey, *supra* note 1, at 272-73. Forcing

defensible and evenhanded fashion.

b. *Consumer Fraud*

The proposed legislation grants certain kinds of consumer fraud special status because only natural persons can bring consumer suits. This limitation, however, ignores the fact that consumer fraud is not limited to natural persons. For example, much of the cost of consumer fraud is borne by nonprofit organizations, including churches, schools, and hospitals. While the cost of insurance fraud is carried initially by commercial organizations, it, too, usually is passed on to consumers.

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civil RICO into a purely private law model, as the Fourth Circuit does in *Zepkin*, misconceives civil RICO's important public law functions. See generally Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4-5 (1982) (contrasting the classic model of private dispute resolution with the contemporary model of public grievances against aggregates of power); *id.* at 8-26 (analyzing inappropriate private law standing limitations); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

No language in the mail or wire fraud statutes, moreover, warrants reading into them "purchaser or seller" limitations. The purpose of the two statutes, taken together, is to prohibit schemes to defraud that utilize, in varying circumstances, the mails or interstate wire communications. See *Parr v. United States*, 363 U.S. 370, 389 (1960); *United States v. Bohonus*, 628 F.2d 1167, 1171 n.7 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) (reading the mail and wire fraud statutes together). The statutes say nothing about "purchasers or sellers."

Only two elements need come together: a scheme to defraud and the use of the mails or interstate wires to execute it. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 195 (9th Cir. 1987). A "scheme to defraud" is not limited to common-law concepts of fraud. *Durland v. United States*, 161 U.S. 306, 314 (1896). 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, 478-80 (1910); *Bohonus*, 628 F.2d at 1171 (applying a "non-technical standard") (citing *United States v. Louderman*, 576 F.2d 1383, 1389 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978)); *Blakey & Cessar*, *supra* note 1, at 587-88 n.237; *Rakoff, The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 771 (1980) (discussing the general treatment of the development of mail fraud).

Conceptual difficulties may arise, however, when parties or 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), because neither (1) "purchaser or seller" standing limitations, (2) materiality or justifiable and detrimental reliance, nor (3) misrepresentation or omission are elements that circumscribe the substantive definition of a "scheme to defraud" in the mail and wire fraud statutes incorporated into RICO. *Brandenburg v. Seidel*, 859 F.2d 1179, 1187 (4th Cir. 1988) (requiring no detrimental reliance for mail or wire fraud); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988) (requiring no materiality or reliance for mail or wire fraud); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987) (finding no purchaser or seller standing limitations); *Armco Indus.*, 782 F.2d at 481-82 (requiring no justifiable or detrimental reliance for mail fraud); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1506-10 (D.N.J. 1985) (noting the inapplicability of misrepresentation or omission in "scheme to defraud"); *cf. Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 531 n.7 (9th Cir. 1987) (holding that it need not decide if elements of common-law fraud and RICO mail fraud are identical); *United States v. Halbert*, 640 F.2d 1000, 1007-09 (9th Cir. 1981) (holding that no misrepresentation is required, but that if it is alleged, materiality, but not reliance, is necessary). Accordingly, neither mail nor wire fraud's concept of "scheme to defraud" under RICO is limited by "purchaser or seller" standing or similar common-law requirements.



The inconsistency between recognizing that a variety of nonnatural persons are victimized by insider trading fraud, but not recognizing that a similar variety are victimized by consumer fraud cannot convincingly be defended. If the consumer fraud provision is included to serve the best interests of consumers, it is a half measure because the provision is too limited in scope to benefit the group it ostensibly was designed to help.

Even more troubling is the provision's securities and commodities exception to consumer fraud. First, the exception is unprincipled. Why exclude securities or commodities fraud from consumer fraud? The activities on Wall Street in New York<sup>233</sup> and on LaSalle Street in Chicago do not warrant the exception.<sup>234</sup> Second, if it is suggested that current securities and commodities statutes adequately deal with widespread patterns of fraud, the current scandals themselves surely refute the argument. Third, if it is suggested that RICO-type remedies are inappropriate in routine securities or commodities frauds, a tighter definition of "pattern" will meet that objection. Indeed, the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>235</sup> already provided for a tighter definition.<sup>236</sup> In fact, when a systematic pattern of criminal misconduct is present, heightened remedies are appropriate.<sup>237</sup> Fourth, if every other industry or profession will be subject to a RICO claim for relief, how can the exclusion of the securities and commodities industries be justified? The proposed legislation is neither defensible nor evenhanded in this area.

Even if the provision's securities and commodities exception to consumer fraud is justifiable, it is poorly drafted. Thousands of hours of legal research and judicial time will be required to determine its scope because the provision incorporates generically all federal and state law, either express or implied. Similarly, the provision is fatally flawed by a fundamental ambiguity: the meaning of "type of behavior." The phrase is a "loophole for wrongdoers of Carl Sagan proportions—billions of dollars of fraudulent stolen money may well safely pass through it."<sup>238</sup> Is the phrase designed to ensure that if a defrauded consumer possesses

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233. See *supra* note 118 and accompanying text.

234. See *supra* note 126 and accompanying text.

235. 109 S. Ct. 2893 (1989).

236. For a detailed analysis of "pattern," see *infra* notes 338-48 and accompanying text.

237. In drafting RICO, Congress

acknowledge[d] the breakdown of the traditional conception of organized crime, and respond[ed] to a new situation in which persons engaged in long-term criminal activity often operate *wholly* within legitimate enterprises. Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways.

*H.J. Inc.*, 109 S. Ct. at 2905 (emphasis in original). This judgment is not undermined by anything that occurred since 1970.

238. 133 CONG. REC. H8841 (daily ed. Oct. 20, 1987) (remarks of Rep. John Conyers).

a remedy under the securities or commodities statutes, it is the consumer's exclusive remedy; that is, the consumer can bring a cause of action under the securities or commodities statutes, or under RICO, but not under both? Or is it intended that if a transaction involves "the type of behavior" regulated by the securities or commodities statutes, but, even though a defrauded consumer does not have a remedy under these statutes,<sup>239</sup> that consumer will be precluded from suing under RICO, although the suit otherwise fully qualifies under RICO; that is, will a gap of "unremedied fraud" exist between the coverage of the securities and commodities statutes and the coverage of RICO? Currently, the proposal's text is ambiguous, and the legislative history on the point is in conflict.<sup>240</sup> If Congress does not clarify this issue before the legislation is enacted, it will be unconscionable. It is difficult to envision, moreover, how the "gap" position can be convincingly defended.

The retroactive impact of this potential loophole also will be severe on thousands of bank depositors, who lose their life savings through fraud, who are not covered by FDIC or FSLIC insurance programs, and who are not able to collect from failed state insurance programs in Maryland, Nebraska, Tennessee, Ohio, and Colorado. *Tafflin v. Levitt*<sup>241</sup> illustrates this point. In *Tafflin*, litigation that grew out of Old Court Savings & Loan, Inc.'s failure in Maryland, depositors sued for massive fraud under the securities statutes and civil RICO.<sup>242</sup> The Fourth Circuit, however, held that the "certificates of deposit" at issue were not "securities" within the meaning of *Marine Bank v. Weaver*;<sup>243</sup> it then "abstained" on the civil RICO claim and remanded it to state court.<sup>244</sup>

It could, of course, be contended plausibly that while the "certificates of deposit" were not "securities," the transactions were the "type of behavior" that the securities acts regulate. If this argument were ac-

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239. For example, the transaction did not involve a "security," the customer was not a "purchaser or seller," or the claim is barred by the statute of limitations.

240. Compare 132 Cong. Rec. S16,701 (daily ed. Oct. 16, 1986) (remarks of Sen. Patrick Leahy) (stating that the gap is present) with *id.* S16,698 (remarks of Sen. Howard Metzenbaum) (stating that the gap is not present).

241. 865 F.2d 595 (4th Cir. 1989), *aff'd*, 110 S. Ct. 792 (1990). Like counterparts in Texas, Oklahoma, and Colorado, the Maryland collapse was the "product of lax regulation, poorly trained examiners, high-risk investments, mismanagement and outright fraud." Nash, *Savings Fugitive Indicted; U.S. Offers \$200,000 Reward*, N.Y. Times, Jan. 31, 1990, at D1, col. 1. Its cost may be as high as \$370 million. *Id.* A central figure in the Maryland scandal, Tom J. Billman, former chairman of Bethesda's Community Savings & Loan Association, who is a fugitive in Europe, apparently with no more than \$20 million of Community's depositors' money, is under a RICO indictment with a \$200,000 reward for information leading to his arrest and successful extradition. Lambert & Abramson, *Judges Join Forces on Asbestos Litigation*, Wall St. J., Jan. 31, 1990, at B6, col. 3.

242. *Tafflin*, 865 F.2d at 595.

243. 455 U.S. 551 (1982).

244. *Tafflin*, 865 F.2d at 599-60.

cepted, victims in *Tafflin*-type litigation could end up losing both their securities and RICO claims. This result is not easily justified, particularly because the text of (iii)(I) expressly includes within consumer fraud "a deposit in a bank." In light of the retroactive features of the reform legislation, this result might be obtained in the *Tafflin* litigation itself and in similar litigation now underway elsewhere.<sup>245</sup>

c. *Against Whom Suit May Be Brought*

RICO may be violated by "any person," that is defined expressly as any "individual or entity."<sup>246</sup> Similarly, "whoever," which expressly includes individuals, corporations, etc., defines the class who may be indicted.<sup>247</sup> Liability under criminal and civil RICO is, therefore, not only direct, but derivative, although technical rules limit the fact patterns in which derivative liability may be imposed.<sup>248</sup> The rationale of vicarious responsibility is "in accord with the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss."<sup>249</sup> It is a mark of the securities industry's legislative influence that, at least until recently, the industry was successful in narrowing its vicarious liability for multiple damages for insider trading under the securities statutes, and that, at least so far, the industry is succeeding in writing similar limitations into the proposed legislation. How it can be justified as a matter of principle is a different matter.

Under the provisions of the proposed legislation, punitive damages for insider trading must be calculated and assessed consistent with section 21(d)(2)(C) and section 21(d)(2)(B). Section 21(d)(2)(C) formerly defined "profit gained" and "loss avoided" in terms of the stock's trading price during a reasonable period of time after public dissemination of the nonpublic information. Previously, section 21(d)(2)(B) eliminated: (1) aiding and abetting liability, (2) controlling person liability, and (3) respondeat superior liability. As such, the notion that the present draft of the legislation includes an effective remedy for insider trading is a half-truth. In fact, liability is personal or not at all; deep pocket defendants practically are excluded from the bill. As such, all that the bill affords insider trading victims in most situations is a right

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245. See, e.g., *Weimer v. Amen*, 870 F.2d 1400 (8th Cir. 1989).

246. 18 U.S.C. §§ 1961(3), 1962 (1988).

247. *Id.* § 1963; 1 *id.* § 1.

248. See generally Note, *Innocence by Association*, *supra* note 1.

249. PROSSER & KEETON, *supra* note 80, § 69 (5th ed. 1984); see also *Guy v. Donald*, 203 U.S. 399, 406 (1906) (Holmes, J.) (noting that "[w]hen a man is carrying on business in his private interest and entrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself").

without a meaningful remedy. These insider trading provisions, however, were struck from current law by the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA).<sup>250</sup> Under the new provisions, "profit gained" and "loss avoided" are defined in section 21A(f).<sup>251</sup> Accordingly, if these concepts are to be retained, modifications to the proposed legislation will have to reflect the 1988 Act. Under ITSFEA's new provisions, moreover, controlling person liability is imposed, not eliminated, by section 21A(a)(3) and (b). "Controlling person" liability is defined as reckless disregard, failure to take appropriate steps to prevent, or knowingly or recklessly failing to establish, maintain, or enforce policies that substantially contributed to the violation.<sup>252</sup> In addition, and in sharp contrast to prior law, ITSFEA does not restrict aiding and abetting liability. Finally, ITSFEA expressly equates respondeat superior liability with controlling person liability.<sup>253</sup>

These new authorizations and restrictions on vicarious liability for insider trading are not as objectionable as former law. Nevertheless, the changes illustrate the special interest character of the proposed legislation: Swindlers in the securities industry are to be afforded special vicarious liability rules for multiple damages suits that will not apply to other kinds of swindlers. Treble damages, for example, are vicariously applicable under the usual rules for violations of those antitrust provisions that protect freedom in the marketplace.<sup>254</sup> Why should different rules be applicable to the securities industry when integrity in the marketplace is at issue under RICO? If multiple damages are a special problem when imposed vicariously, they are a special problem for everyone under all statutes, and not just for one industry under RICO.

Accounting firms, for instance, are deeply concerned about the effect of treble damages liability under RICO. In particular, because accountants practice under a partnership form, they do not obtain the benefit of limited liability. The E.S.M. Government Securities, Inc. litigation illustrates the point.<sup>255</sup> E.S.M. Government Securities' insolvency was hidden fraudulently by a bribed accountant, who worked for Grant Thornton, an accounting firm. When the insolvency was discovered, the entire savings and loan industry in Ohio virtually collapsed. Was it fair

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250. See *supra* note 229.

251. ITSFEA, *supra* note 229, § 21A(f), 102 Stat. at 4679 (codified at 15 U.S.C. § 78u-1(f) (1988)).

252. ITSFEA, *supra* note 229, § 21A(b), 102 Stat. at 4678 (codified at 15 U.S.C. § 78u-1(b) (1988)).

253. See generally H.R. REP. No. 901, 100th Cong., 2d Sess. 17-20 (1988).

254. See, e.g., *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 573-74 (1982).

255. See *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 528, 530-31, 539-43 (S.D. Fla. 1986) (providing the text of the indictment).

for Grant Thornton's innocent partners to be held vicariously and personally liable for multiple damages arising from the corrupt conduct of the bribed partner? The accountants' argument that the result is unfair is persuasive. Nevertheless, under the proposed legislation, accountants will be subject to punitive damages under the usual rule of vicarious liability for consumer fraud not involving securities. Why exclude the securities industry, but include the accounting profession? No convincing rationale may be offered for this anomalous result. The bill, in short, is neither principled nor evenhanded.

Actual damages, of course, play primarily a compensatory role, although they are, in fact, not "actual." In truth, actual damages should be called "legal" damages because they do not actually compensate. They exclude, for example, "transaction" and "opportunity" costs, as those terms are used in economic analysis.<sup>256</sup> Multiple damages, of course, play a variety of other roles, whether they are punitive or treble. Accordingly, it might make sense for Congress to consider restricting the application of RICO's multiple damages—punitive or treble—along the lines that the Model Penal Code<sup>257</sup> restricts corporate criminal liability. The issues are similar; similar approaches would be preferable to the unjustifiable approach of the proposed legislation. Treble damages could be generally authorized. Nevertheless, individuals or entities could be given an affirmative defense that would reduce multiple damages liability to actual damages. The individual or entity would have to show that he or it did not at least recklessly tolerate the conduct constituting the RICO violation. Under this alternative, the public interest might be better served.<sup>258</sup> Congress, therefore, should reject the current provisions and adopt a more justifiable and evenhanded reform.

#### *d. Remedy Authorized*

Currently, RICO authorizes automatic treble damages and attorney's fees. If the matter is settled, even though a plaintiff "substantially prevails," attorney's fees may not be awarded.<sup>259</sup> Courts are split on the availability of equity-type relief under RICO.<sup>260</sup> Under the provisions of

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256. See R. POSNER, *supra* note 183, § 1.1 (fundamental concepts); *id.* § 21.4 (transaction costs in settlements).

257. MODEL PENAL CODE § 2:07(1)(c) (1962) (providing that high managerial agents at least recklessly tolerated).

258. Because the individual or entity would be in the best position to prove that he or it did not act recklessly, the exception should be an affirmative defense. See generally J. THAYER, PRELIMINARY TREATISE ON EVIDENCE ch. 9 (1898).

259. See *Aetna Casualty & Surety Co. v. Liebowitz*, 730 F.2d 905 (2d Cir. 1984).

260. Compare *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1080-89 (9th Cir. 1986) (holding that equitable relief must be denied as a matter of legislative intent, despite sound policy reasons in support), *cert. denied*, 479 U.S. 1103 (1987) with *Chambers Dev. Co. v. Brown-*

the proposed legislation, the remedies authorized are actual damages and attorney's fees, and, upon a showing of clear and convincing evidence, up to double punitive damages.

Because treble damages are superior to punitive damages, they should be retained. Treble damages are mandatory, not discretionary, so they contain an appropriate balance of swift, sure, and severe deterrence. They are related to the damage done to the victim, not to the defendant's conduct or wealth, so they avoid prejudice to the defendant. They also are not penal in character, but compensate for accumulative harm, so they carry an appropriate measure of compensation for the victim.<sup>261</sup> As such, treble damages serve the public interest better than punitive damages.

Indefensible anomalies will be created if Congress eliminates treble damages in private claims for relief, circumscribes the authorization of punitive damages by a unique substantive standard ("consciously malicious, etc."), and heightens the plaintiff's burden of proof ("clear and convincing, etc."). Treble damages, for example, are awarded in private antitrust litigation without any additional showing or a heightened burden of proof.<sup>262</sup> Why should Congress treat violence or corruption in the marketplace under RICO differently than freedom under the antitrust statutes? No convincing rationale for this sort of anomaly can be offered.

Federal courts generally award punitive damages, moreover, based on no greater showing than "reckless or callous indifference."<sup>263</sup> Why treat punitive damages under RICO differently? Nor must a special burden of proof be met to obtain punitive damages under general federal law.<sup>264</sup> To be sure, the matter no longer is well settled under state law, under which, by statute or decision, jurisdictions have moved to the clear and convincing evidence standard as part of general and ill-fated tort reform.<sup>265</sup> Nevertheless, the better reasoned judicial opinions

ing-Ferris Indus., 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984) (holding that equity relief may be granted under RICO). See generally Blakey & Cessar, *supra* note 1 (analyzing and rejecting the reasoning in *Religious Technology Center*).

261. See generally Note, *Treble Damages*, *supra* note 1, at 527-28.

262. See *Ramsey v. United Mine Workers*, 401 U.S. 302, 307-11 (1971) (holding the preponderance of the evidence rule applicable in antitrust actions against labor unions).

263. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (civil rights).

264. See, e.g., *Central Armature Works, Inc. v. American Motorists Ins. Co.*, 520 F. Supp. 283, 293 (D.D.C. 1981) (holding that the "contention that entitlement to punitive damages must be proven by 'clear and convincing' evidence. . . [is without] support").

265. See Hilder, *Tort Wars: Insurers' Push to Limit Civil Damage Awards Begins to Slow Down*, *Wall St. J.*, Aug. 1, 1986 at 1, col. 6 (summarizing state law changes and reporting that "[w]hile 32 states have made changes in the way civil lawsuits are tried and damages awarded, the moves aren't expected to yield broad benefits for insurers or their customers").

still maintain the traditional rule.<sup>266</sup> Finally, under state RICO legislation, the preponderance of the evidence standard usually is specifically retained.<sup>267</sup>

The rationale for retaining the traditional burden of proof standard is persuasive.<sup>268</sup> When a person is injured by a pattern of unlawful conduct that would, if prosecuted by the government, amount to a crime, it is difficult to envision how Congress justifiably could put its thumb on the side of the scale of the perpetrator.<sup>269</sup>

Reforms also should be made to the attorney's fee provisions of RICO and the proposed legislation. Attorney's fees should be awarded in all RICO litigation. More than 119 federal statutes authorize the grant of attorney's fees to a prevailing party.<sup>270</sup> Attorney's fees also should be recoverable not only on an award of damages, but also if the injured party "substantially prevails." A failure to award attorney's fees to those injured by violations of RICO would be grossly invidious.

Finally, a provision ought to be added to the proposed legislation that would guarantee that a victim of a RICO violation would be able to obtain full justice. No court should be limited to the award of only legal relief; all courts also should be able to grant equity relief.<sup>271</sup> Unless such relief is available, private parties will not be able to secure full justice under RICO under a uniform rule. The failure to authorize equity relief under RICO, moreover, would promote forum shopping. The victim would have to depend on the federal court's pendent jurisdiction to obtain equity relief under state law, but because the exercise of pendent jurisdiction is discretionary, it is not dependable.<sup>272</sup> A party should not have to rely on shopping around for a state that grants appropriate equity relief in which to file a RICO claim and then hope that the district court will exercise such relief. Pretrial equity relief is particularly neces-

266. Compare *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985) (retaining the traditional rule) with *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (adopting the clear and convincing standard). See generally Annotation, *Standard of Proof As to Conduct Underlying Punitive Damage Awards—Modern Status*, 58 A.L.R.4th 878 (1987).

267. Compare ARIZ. REV. STAT. ANN. § 13-2314J (1989) ("preponderance") with WIS. STAT. ANN. § 946.86(5) (West Supp. 1989) ("reasonable certainty").

268. "[A] standard of proof 'serves to allocate the risk of error between the litigants. . . .'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). "Any . . . standard [other than preponderance] expresses a preference for one side's interest." *Id.* at 390 (holding that the burden of proof for securities fraud, like antitrust and civil rights, is preponderance of the evidence).

269. See generally Note, *Burden of Proof*, *supra* note 1, at 580-88.

270. See *Marek v. Chesny*, 473 U.S. 1, 43-51 (1985) (Brennan, J., dissenting).

271. See generally *Blakey & Cessar*, *supra* note 1.

272. See, e.g., *Matek v. Murat*, 862 F.2d 720, 732-34 (9th Cir. 1988) (dismissing a state claim under pendent jurisdiction as a matter of discretion and holding that the basis for equity jurisdiction was lost).

sary to prevent defendants from dissipating their assets prior to judgment.<sup>273</sup> Unless a court can preserve the assets of organized crime or fly-by-night white-collar offenders during the litigation, it is doubtful that RICO actions even will be brought against them. Ironically, this failure may mean that RICO actions only will be brought against white-collar offenders who have substantial assets in the community.

#### F. *Personal Injury Private Suits for Multiple Damages*<sup>274</sup>

Currently, RICO does not authorize recovery for personal injuries.<sup>275</sup> The proposed legislation would afford a natural person, who suf-

273. See, e.g., *Republic of Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (upholding under California law an injunction to prevent the dissipation of assets of the former dictator), *cert. denied*, 109 S. Ct. 1933 (1989); *Federal Deposit Ins. Co. v. Antonio*, 843 F.2d 1311 (10th Cir. 1988) (upholding under Colorado RICO law an injunction to prevent the dissipation of assets of bank swindlers); *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.) (upholding under the securities statutes an injunction to prevent the dissipation of corrupt financier assets, including a Boeing 707 and a yacht), *cert. denied*, 417 U.S. 932 (1974). In fact, such injunctions are granted routinely in securities fraud matters. See, e.g., *Accounts Are Frozen in Inside-Trading Case of Rorer Group Stock*, Wall St. J., Mar. 6, 1990, at C15, col. 3 (reporting on the granting of a preliminary injunction and an order freezing brokerage accounts at the request of the SEC).

In 1975 English law began to move away from an older view that was unsympathetic to injunctions to preserve assets. Traditionally, injunctions against persons to restrain the removal of assets were not permitted in English law under *Lister & Co. v. Stubbs*, 45 Ch. D. 1 (1890). The historical materials are reviewed in *Rasu Maritima v. Pertamina*, [1977] 3 All E.R. 324, 331-32. *Mareva Compania Naviera SA v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509, marked a dramatic turn, because it upheld the issuance of injunctions to freeze assets. The English court formulated a new test in *Third Chandris Shipping v. Unimarine, SA*, [1979] 2 All E.R. 972, 984-85. While at first the new test appeared to be applicable only to international litigation, in *Barclay-Johnson v. Yuill* [1980] 3 All E.R. 190, 194 the court determined that the test rested solely on the "risk of the defendant removing . . . assets." See also *Prince Abdul Al Sudairy v. Abu-Taha* [1980] 3 All E.R. 409, 412. The present state of English law, in which such injunctions are obtained fairly easily, is reflected in *Bayer A.G. v. Winter*, [1986] 1 All E.R. 733, 737. See generally HOWARD LEAGUE FOR PENAL REFORM, PROFITS OF CRIME AND THEIR RECOVERY 104-11 (1984) (discussing the *Mareva* injunctions). For an alternative proposal, see App. E, *infra* pp.1061-63, 1069-70.

274. The legislation provides:

"(3) A natural person who suffers serious bodily injury by reason of a crime of violence that is racketeering activity and that is an element of a violation of section 1962 of this title may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall recover—

"(A) the costs of the civil action, including a reasonable attorneys' fee;

"(B) the actual damages to the person's business or property sustained by reason of such violation;

"(C) the actual damages sustained by the natural person by reason of such violation, as allowed under applicable State law (excluding pain and suffering); and

"(D) if the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied, punitive damages of up to twice the actual damages.

H.R. 1046, *supra* note 200, § 4.

275. See, e.g., *Grogan v. Platt*, 835 F.2d 844 (11th Cir.) (holding that "property" within RICO does not include economic aspects of murder of FBI agents), *cert. denied*, 109 S. Ct. 531 (1988); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1986) (holding that RICO does not



fers serious bodily injury by reason of a crime of violence that is racketeering activity and that is an element of a violation of RICO, a claim for relief. Recovery is limited to the immediate person. "Serious bodily injury" is not defined. "Crime of violence," however, is given a special definition in (11)(c), which is narrower than 18 U.S.C. section 16, which includes the use, alleged use, or threatened use of physical force against a person or property or a felony that involves a substantial risk of the use of physical force against a person or property.<sup>276</sup> Under the proposed legislation, recovery is authorized for: (1) attorney's fees, (2) actual damages to business or property, (3) actual damages to person (excluding pain and suffering) allowed under applicable state law, and (4) up to two times punitive damages if the plaintiff proves by clear and convincing evidence that the conduct is consciously malicious or so egregious and deliberate that malice may be implied.

These provisions are seriously defective. The rationale for limiting RICO by the proposed legislation is RICO's alleged abuse in commercial fraud litigation. Objection is not voiced to RICO's use against other types of offenders. It is difficult to justify, therefore, the proposed sharp limitations on the extension of RICO to suits involving personal injury based on crimes of violence.

#### 1. Limitation to Immediate Serious Bodily Injury

Why limit the recovery of damages to the immediate person? What of his family? If an individual is injured, why limit his right to recover damages to "serious" bodily injury? A plaintiff possibly could recover damages for less than serious bodily injury under a pendent state claim, but because a federal court has discretion to dismiss pendent state claims, they may not be retained in the litigation. It is also possible that a legitimate dispute over "seriousness" might be resolved by the jury against the plaintiff after discovery and trial. If this result occurs, the plaintiff may obtain no recovery, even though the case had gone to trial and the jury concluded that the plaintiff's basic claim was meritorious. This limitation, therefore, invites the waste of federal judicial resources and multiple proceedings without substantial countervailing gains for the administration of justice. It also mistreats victims of crimes of violence.

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include toxic chemical personal injury); *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 500-01 (W.D. Wis. 1985) (holding that RICO does not include personal injury in a products liability claim).

276. 18 U.S.C. § 16 (1988).

## 2. Limitation to Crimes of Violence Narrowly Defined

Section 9(c) defines "crime of violence" to mean the state law offenses of murder, kidnapping, arson, robbery, and dealing in narcotics; it also defines it to include a host of similar or related federal statutory crimes.<sup>277</sup> The definition is, however, narrower than the general definition of "crime of violence" in 18 U.S.C. section 16. The provision also excludes crimes of violence now expressly within RICO: extortion under state law, and robbery (section 1951) and crimes of violence, extortion, arson, and drugs (section 1952) under federal law. These omissions do not reflect any easily discernible rationale. Given the rationale of the proposed legislation to limit RICO's misuse in commercial litigation, it is difficult to understand why the crabbed approach of the proposed legislation was adopted. The provision promises little gain and much loss. The general definition of "crime of violence" in 18 U.S.C. section 16 should be followed.

## 3. Limitation to Elements of Violation

Under the provisions of the proposed legislation, a natural person who suffers serious bodily injury by reason of a crime of violence would have to show: (1) that the defendant's action was racketeering activity, and (2) that the activity is an element of a RICO violation. These two limitations will produce irrational results. *United States v. Zemek*<sup>278</sup> and a subsequent civil suit illustrate the point. In *Zemek* various defendants were convicted under RICO for attempting to gain a monopoly

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277. The statute lists the following offenses:

- (1) state law: the offenses of murder, kidnapping, arson, robbery, or dealing in narcotic or other dangerous drugs; and
- (2) federal law: the offenses under title 18 when accompanied by serious bodily injury of—
  - (i) section 32 (destruction of aircraft or aircraft facilities);
  - (ii) section 81 (arson);
  - (iii) section 112 (a) (violence to foreign officials and other persons) and section 112(c)-(f) (definitions and limitations);
  - (iv) section 115 (acts against United States officials and other persons);
  - (v) section 878 (threats and extortion to foreign officials and other persons);
  - (vi) sections 891-894 (extortionate credit transactions);
  - (vii) sections 1111-1112 (murder and manslaughter), section 1114 (killing or attempted killing), sections 1116-1117 (killing or attempted killing or conspiracy to kill);
  - (viii) section 1203 (hostage taking);
  - (ix) sections 1501-1506, 1508-1513, 1515 (obstruction of justice);
  - (x) section 1951 (extortion);
  - (xi) section 1958 (murder-for-hire);
  - (xii) sections 2251-2252 (sexual exploitation of children), section 2256 (definitions);
  - (xiii) section 2278 (explosives and dangerous weapons on vessels);
  - (xiv) section 2331 (terrorist acts abroad); or
  - (xv) felonious drug offenses under federal law.

278. 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

over the tavern and topless bar business in Pierce County, Washington, by engaging in a pattern of offenses, including murder, arson, and extortion.<sup>279</sup> It is difficult to imagine a more appropriate RICO criminal prosecution. In *Rice v. Janovich* a janitor and night watchman of a tavern that was fire bombed sued for lost wages resulting from an assault that occurred during the RICO violation prosecuted in *Zemek*.<sup>280</sup> It is difficult to imagine a more appropriate civil RICO suit. While assault was not a racketeering activity, the janitor was able to recover because the assault was an overt act engaged in during the RICO conspiracy under 18 U.S.C. section 1962(d).<sup>281</sup> The proposed legislation, at least in theory, is designed to extend to natural persons, like the janitor in *Rice*, the right to recover damages not only for property injury, but also for serious bodily injury resulting from crimes of violence. The proposed legislation, however, would not permit the janitor to recover damages for his bodily injury, even though it might be serious and even though it occurred during the course of and in furtherance of a RICO violation, because the assault, although an overt act pursuant to a RICO conspiracy, is neither a racketeering activity nor an element of a RICO violation. This result is indefensible. As such, these limitations should be removed from the proposed legislation. Any injury caused by any crime of violence engaged in during the course of and in furtherance of a RICO violation should be the basis for a claim for relief. Any other result would be unjust.

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279. *Id.* at 1162-65.

280. 109 Wash. 2d 48, 742 P.2d 1230 (1987) (en banc).

281. *Rice* is correctly decided, and is consistent with the well-reasoned decision of the Third Circuit in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-70 (3d Cir. 1989) and the decision in *Williams v. Hall*, 683 F. Supp. 639, 642-44 (E.D. Ky. 1988). It is apparently inconsistent with the Tenth Circuit's cryptic decision in *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 76 (1989). The *Grider* decision is hard to square with the common-law rule or the rule under other federal statutes. Compare *Nalle v. Oyster*, 230 U.S. 165, 182 (1913) (holding that "the well-settled rule is that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff") and *Hoods v. Hooks*, 771 F.2d 935, 944 (6th Cir. 1985) and *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983) with *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971) (42 U.S.C. § 1985(3)). See also *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 744 (9th Cir. 1984) (antitrust), *cert. dismissed*, 469 U.S. 1200 (1985); *Lenard v. Argento*, 699 F.2d 874, 883 (7th Cir.) (42 U.S.C. § 1985(3)), *cert. denied*, 464 U.S. 815 (1983); *Lawrence v. Acree*, 665 F.2d 1319, 1323-24 (D.C. Cir. 1981) (42 U.S.C. § 1985); *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423, 1437 (S.D.N.Y. 1986) (antitrust); *United States v. Excellair, Inc.*, 637 F. Supp. 1377, 1388 n.7 (D. Colo. 1986) (finding no standing under antitrust, but standing under civil conspiracy).

#### 4. Limitation to Damage Excluding Pain and Suffering Allowable Under Applicable State Law

No reason exists to exclude pain and suffering if a plaintiff's recovery is to be limited to actual damages. If the actual damages were trebled automatically, this limitation might be justifiable. Nevertheless, situations are easily imagined in which such a limited recovery would be unjust. Indeed, pain and suffering may be the most significant aspect of a bodily injury. A disfiguring injury, for example, inflicted as part of an extortion or of the intimidation of a witness may well result principally in mental pain and suffering.

The provisions also limit damages to those "allowed under applicable state law." This provision assumes that state law will be applicable. This assumption is not always true. For example, the bombing of Pan Am Flight 103 in December 1988 took place over Scotland, not the United States; it killed 270 persons, including 189 Americans.<sup>282</sup> It is generally thought that this incident is one of a series of international terrorist acts directed toward Americans.<sup>283</sup> Nevertheless, because the attack took place over Scotland, United States state law is not applicable and Americans injured in this sort of incident would not be able to recover damages for personal injury under RICO. The amendment of RICO to include new violent predicates and to include more than injury to business or property ought to reflect a less parochial imagination.<sup>284</sup> Why it is necessary to circumscribe the right of violent crime victims to protect securities dealers and accountants from fraud suits is difficult to justify.

#### 5. Limitation of Punitive Damages by a Special Standard and Burden of Proof

Congress should retain treble damages for crimes of violence. If, however, punitive damages are substituted for treble damages, Congress should not impose on the plaintiff the extra burden of proving by clear and convincing evidence that the defendant's actions met a "special standard."<sup>285</sup> Treble damages provide an appropriate measure of swift, sure, and severe deterrence. No convincing reason can be offered for

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282. See U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988, at 1 (1989) [hereinafter GLOBAL TERRORISM].

283. *Id.*

284. See Carley, *Legacy of Terror: Lockerbie Bombing on Pan Am Flight 103 Bred Anger and Fear*, Wall St. J., July 7, 1989, at A1, col. 1 (reporting the story on how the bombing of Pan Am Flight 103 affected the lives of the families of the victims). Children of John Cummock, one of the dead, asked their mother, "Where are the terrorists? Are they going to come here and kill you, Mommy? Will they kill us, too?" *Id.*

285. See *supra* note 157.

abandoning treble damages in favor of specially circumscribed punitive damages when crimes of violence are at issue.

*G. Limitation on Order of Proof*<sup>286</sup>

Federal courts, like all courts, possess ample discretion to vary the order in which a party introduces evidence.<sup>287</sup> Only mischief will result if Congress attempts to micro-manage the time in the trial when plaintiffs introduce evidence relevant only to the amount of punitive damages. As a practical matter, the provision will result in bifurcated trials, hardly a justifiable result in legislation that is designed ostensibly to conserve judicial resources. The "good cause" and "undue prejudice" standards found in this section are concepts that will invite appeals and reversals on issues that should be dealt with more flexibly by trial courts.<sup>288</sup> Accordingly, Congress should strike this provision from the proposed legislation. The matter should be left to the good sense and sound discretion of trial judges.

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286. The legislation provides:

"(4) In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability, except the court may permit, for good cause shown and in the absence of any undue prejudice to the defendant, introduction of such evidence prior to a finding of liability on motion of a party or in the exercise of its discretion.

H.R. 1046, *supra* note 200, § 4.

287. *See, e.g.*, Philadelphia & Trenton R.R. Co. v. Stimpson, 39 U.S. (14 Pet.) 448, 463 (1840).

288. *See* 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1867, at 660 (Chadbourn rev. ed. 1976). Professor John Henry Wigmore aptly observed:

[E]rror in the allowance of . . . a variation [in the order of proof] should rarely be treated as sufficient ground for a new trial. . . . [T]he trial court can better be trusted to understand the situation.

. . . [N]o opportunity should be lost to lament the abuse by which . . . rules of customary order are sought to be turned into inflexible dictates of absolute justice . . . Courts often lend ear to such appeals and thereby partake in the abuse of such a practice. To purport to preside over the investigation of truth, and then, at an inordinate expense of time, labor, and money, to insist on reopening the entire investigation. . . is to furnish a spectacle fit to make Olympus merry over the serious follies of mortals.

*Id.*

H. *Treble Damages for Injury to Business or Property After Criminal Conviction*<sup>289</sup>

The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*<sup>290</sup> rejected the criminal conviction limitation.<sup>291</sup> The Court followed not only the language of RICO, but the amply supported traditional rule.<sup>292</sup> The proposed provisions, which would alter the Supreme Court's holding in *Sedima*, are not as objectionable as the position of the Second Circuit because the provisions do not circumscribe all claims for relief. Nevertheless, the central strictures of the Court's analysis remain.

The provisions are ill-advised, unfair, and ill-drafted. They are ill-advised principally because they adversely will affect plea bargaining in criminal prosecutions, cross examination in criminal trials, and the decision to bring criminal charges. No prosecutor ought to be able to affect the measure of civil damages a party will receive in a RICO action by his decision to bring a particular charge against a defendant. The prosecutor's stick is big enough now. Nor should prosecutors be subject to pressure to bring a case so that a private litigant can recover a higher

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289. The legislation provides:

"(5) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefor and, upon proof by a preponderance of the evidence of such violation, shall recover threefold the actual damages to the person's business or property sustained by reason of such conduct, and the costs of the civil action, including a reasonable attorney's fee, from any defendant convicted of a Federal or State offense based upon the same conduct upon which the plaintiff's civil action is based: *Provided, however,* That such offense shall include a showing of a state of mind as a material element of the offense and is punishable by death or imprisonment for a term of more than one year.

H.R. 1046, *supra* note 200, § 4.

290. 473 U.S. 479 (1985).

291. The Court in *Sedima* aptly observed:

[The criminal conviction limitation] arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive "pattern," or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The decision below [imposing a criminal conviction limitation] would also create peculiar incentives for plea bargaining to non-predicate-act offenses so as to ensure immunity for a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications.

*Sedima*, 473 U.S. at 490 n.9. The matter is considered at greater length in 133 CONG. REC. H9050 (daily ed. Oct. 27, 1987) (remarks of Rep. John Conyers) (stating the position of the Department of Justice in support of a criminal conviction limitation).

292. See generally Note, *Burden of Proof*, *supra* note 1.

measure of damages. The credibility of witnesses, moreover, should not be judged on the basis of what they might receive if the defendant is convicted.

The provisions are unfair because they do not extend the treble damages liability to those equally culpable—aiders and abettors, conspirators, and others responsible for the defendant's conduct. Similarly situated perpetrators should be treated similarly; justice requires no less. No adequate reason, moreover, exists why a plaintiff may recover only treble measure damages for injury to business or property. Why not include all injury a plaintiff sustains? Nor should the provision be limited to federal or state offenses. Why not include foreign offenses that would be a federal or state offense if prosecuted in the United States? Many countries refuse to extradite terrorists but are willing to try them in their own courts.<sup>293</sup> It makes little sense not to include these kinds of convictions.

Finally, the provisions are ill-drafted. If the drafters intended to exclude strict liability offenses, the present language in the provision does not accomplish that objective. Paragraph (B)(ii) of the proposed legislation should read "include a showing of a state of mind [as a] *for each* material element of the offense."<sup>294</sup>

### I. *Statute of Limitations*<sup>295</sup>

Currently, the common-law period of limitations for private civil RICO is four years.<sup>296</sup> The period of limitations for general federal government suits varies.<sup>297</sup> Arguably, the provisions of the proposed legisla-

293. See GLOBAL TERRORISM, *supra* note 282, at 35 (discussing the trial of a Lebanese for air piracy and the murder of Navy diver, Robert Stethem, during the June 1985 hijacking of TWA Flight 847).

294. See H.R. 1046, *supra* note 200, § 4. The emphasized language should be inserted into this portion of the statute and the bracketed language omitted.

295. The legislation provides:

"(6)(A) Except as provided in subparagraph (B), a civil action or proceeding under this subsection may not be commenced after the latest of—

"(i) four years after the date the cause of action accrues; or

"(ii) two years after the date of the criminal conviction required for an action or proceeding under paragraph (5) of this subsection.

"(B) A civil action brought pursuant to subsection (c)(1)(B)(i), (ii), or (iii) may not be commenced more than six years after the date the cause of action accrues.

"(C) The period of limitation provided in subparagraphs (A) and (B) of this paragraph on the commencement of a cause of action does not run during the pendency of a government civil action or proceeding or criminal case relating to the conduct upon which such cause of action is based.

H.R. 1046, *supra* note 200, § 4. See App. E, *infra* pp. 1073-74.

296. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 156 (1987).

297. See, e.g., 28 U.S.C. § 2415 (1982 & Supp. V 1987) (providing that with a contract, express or implied, the statute of limitations is six years); *id.* § 2416 (providing that for tort actions,

tion do little more than codify present law. They ought to do more. Of the twenty-one state RICO statutes that provide for multiple damages, fifteen include special statutes of limitations.<sup>298</sup> The usual period of limitations in these statutes is five years, although others are longer. The general federal criminal period of limitations is five years.<sup>299</sup> Congress should make every effort, when possible, to parallel federal and state criminal and civil RICO statutes to avoid unseemly results and forum shopping. Congress should, therefore, extend the civil period of limitations for private suits to five years.

*J. Affirmative Defense for Good Faith and Limitation on Discovery*<sup>300</sup>

Currently, good faith is a defense to a charge which includes "intent to defraud."<sup>301</sup> A defendant may establish a good faith defense by showing that he relied on the advice of counsel.<sup>302</sup> The good faith defense provision of the proposed legislation, however, is unnecessary, ill-advised, and poorly drafted.<sup>303</sup> To the degree that the provision codifies traditional rules about good faith defenses, it is unnecessary. To the degree that the provision makes the good faith defense an "affirmative" defense, the result of its impact is unclear. Is it intended that the provision shift the burden of coming forward with evidence and persuasion to the defendant? It is doubtful that the drafters intended this result, if their single-minded pursuit of defendants' interests elsewhere in the proposed legislation is any guide. Why, then, did they use the "affirmative defense" language? Does this language limit the present defense of advice of counsel? It is doubtful that the drafters intended this limitation. Nevertheless, by setting out the elements of a new affirmative de-

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the period is three years, except it is six years for diversion of money paid or conversion). It is not clear if *Malley-Duff* applies to government suits. See *United States v. Bonanno Organized Crime Family*, 683 F. Supp. 1411, 1457-58 (S.D.N.Y. 1988) (declining to decide the issue).

298. See generally App. A, *infra* p. 988.

299. See 18 U.S.C. § 3282 (1988).

300. The legislation provides:

"(7) It shall be an affirmative defense to an action brought under this subsection that a defendant acted in good faith and in reliance upon an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law. Before the commencement of full discovery on and consideration of the plaintiff's claim, the court shall determine, upon defendant's motion, the availability of any affirmative defense asserted under this paragraph. However, the discovery of such defense shall be allowed, as provided by law or rule of procedure, before the court's determination.

H.R. 1046, *supra* note 200, § 4.

301. See, e.g., *Durland v. United States*, 161 U.S. 306, 314 (1896) (mail fraud).

302. See, e.g., *Tarvestad v. United States*, 418 F.2d 1043, 1047 (8th Cir. 1969) (securities statutes).

303. See *supra* note 300.



fense, it is likely that such a limitation will result, because the general rule is "expressio unius est exclusio alterius."<sup>304</sup> While current law generally affords an "advice of counsel" defense to fraud or similar offenses, the proposed language is not so limited. Is it really intended to extend the defense to crimes of violence and other offenses? What justifies this radical change?

Finally, like the issue of the order in which evidence is introduced at trial, the issues of discovery and summary judgment on affirmative defenses are best left to the sound discretion of trial judges. It is unwise for Congress to attempt to micro-manage trial procedure, especially in a bill ostensibly designed to conserve judicial resources.

### K. Pleading With Particularity<sup>305</sup>

Currently, Federal Rule of Civil Procedure 9(b) requires a party to plead fraud with particularity.<sup>306</sup> Rule 9(b) applies to the fraud elements of RICO.<sup>307</sup> Case law applies a similar requirement to allegations of conspiracy.<sup>308</sup> To the degree that these provisions codify present law, they are unnecessary. To the degree that they will extend particularity pleading beyond present law, they are profoundly unwise.<sup>309</sup> In short, "[t]he circumstances in which . . . [merit] decisions are possible on the pleadings . . . are distressingly limited."<sup>310</sup> It ought to be frankly recognized that this sort of throwback to fact pleading will make RICO litigation more complex, time consuming, and reflective of the defendant's interest on issues that do not go to the merits of the litigation.<sup>311</sup> RICO

304. H. BROOM, A SELECTION OF LEGAL MAXIMS 658 (7th Am. ed. 1874).

305. The legislation provides, "(8) In an action under this subsection, facts supporting the claim against each defendant shall be averred with particularity." H.R. 1046, *supra* note 200, § 4.

306. FED. R. CIV. P. 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

307. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362-63 (10th Cir. 1989) (collecting the cases that have applied rule 9(b) to RICO).

308. *See, e.g., Slotnick v. Garfinkle*, 632 F.2d 163, 165 (1st Cir. 1980).

309. *See generally* Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 436 (1986). After a comprehensive study of pleading and practice under the Federal Rules, Professor Richard Marcus rightly observed:

[More specific pleading] does not provide a reliable method for determining whether a defendant has violated the plaintiff's rights because it requires the plaintiff to marshal evidence before conducting discovery. Neither can it be justified as a special way of handling certain "specious" claims or as a step toward discretionary dismissals. Instead, the preferable route for probing plaintiff's factual conclusions should be to rely on more flexible use of summary judgment.

*Id.*

310. *Id.* at 493.

311. *See* Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 619 (1908) (observing that "[e]very time a party goes out of court on a mere point of practice, substantive law suffers an injury"). "Important as it [is] that people should get justice, it [is] even more important that they should be made to feel and see that they [are] getting it." *Id.* at 606 n.4 (quoting Lord Herschell).

plaintiffs, if they have meritorious claims, are victims of patterns of criminal conduct. No sound public policy reason can be offered for favoring defendants at the pleading stage before the question of merit is fairly put in issue. Only the guilty will profit by such a policy. If Congress makes other appropriate reforms to RICO, it safely may strike this proposal from the bill.

#### L. Abatement and Survival<sup>312</sup>

This provision codifies the results, if not the rationales, of *State Farm Fire & Casualty Co. v. Estate of Caton*<sup>313</sup> and *Summers v. Federal Deposit Insurance Corp.*<sup>314</sup> It is a valuable provision.

#### M. Racketeer Label<sup>315</sup>

Under this provision of the proposed legislation, use of the terms "racketeer" or "organized crime" in civil litigation will be restricted to proceedings in which the pattern of unlawful behavior involved a "crime of violence." The term "racketeer," however, is wholly appropriate to describe the sort of conduct RICO makes unlawful.<sup>316</sup> Neverthe-

312. The legislation provides:

"(9)(A) An action or proceeding under this subsection shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(B) An action or proceeding under this subsection shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages.

H.R. 1046, *supra* note 200, § 4.

313. 540 F. Supp. 673, 683-85 (N.D. Ind. 1982).

314. 592 F. Supp. 1240, 1243 (W.D. Okla. 1984).

315. The legislation provides:

"(10) In a civil action or proceeding under this subsection in which the complaint does not allege a crime of violence—

"(A) the term 'racketeer' or the term 'organized crime' shall not be used by any party in any pleading or other written document submitted in the action, or in any argument, hearing, trial, or other oral presentations before the court; and

"(B) the terms used to define conduct in violation of section 1962 of this title shall be referred to as follows:

"(i) 'racketeering activity,' as defined in section 1961(1) of this title, shall be referred to as 'unlawful activity'; and

"(ii) 'pattern of racketeering activity,' as defined in section 1961(5) of this title, shall be referred to as 'pattern of unlawful activity.'

H.R. 1046, *supra* note 200, § 4.

316. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (W. Morris ed. 1969) (defining racket as a "business that obtains money through fraud or extortion"); Gurfein, *Racketeering*, in 13 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 45, 45 (E. Seligman & A. Johnson eds. 1934) (stating that "[r]acketeering" . . . applies to the operation of an illegal business as well as to the illegal operation of a legal business"); see also *United States v. Culbert*, 435 U.S. 371, 375 (1978) (holding that racketeering is "used loosely to designate . . . activity [that is] . . . questionable, unmoral, fraudulent . . . whether criminal or not" (quoting S. REP. No. 1189, 75th Cong., 1st Sess. 2 (1937))). Nevertheless, it must be conceded that "racketeer" is a "fighting word." See Chaplinsky

less, its curtailment in civil litigation may result in the settlement of litigation that otherwise would be prolonged unnecessarily.<sup>317</sup> As such, the provision may do more good than harm.

### N. Definitions<sup>318</sup>

The interaction of these definitions with the other provisions of the proposed legislation is analyzed under the other provisions of this Article.

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v. New Hampshire, 315 U.S. 568, 574 (1942) (defining fighting words as those "likely to provoke the average person to retaliation").

317. RICO CASES COMMITTEE REPORT, *supra* note 70, at 121-23 (stating that contrary to a popular misconception, experience shows that the label inhibits, not facilitates, settlement).

#### 318. SEC. 9. DEFINITIONS.

(a) For purposes of subsection (c) of section 1964 of title 18, United States Code, the term "governmental entity" means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, or any political subdivision of a State which has the power (1) to levy taxes and spend funds, and (2) to exercise general corporate and police powers.

(b) For purposes of subsection (c) of section 1964 of title 18, United States Code, the term "unit of general local government" means any political subdivision of a State which has the power (1) to levy taxes and spend funds, and (2) to exercise general corporate and police powers.

(c) For purposes of subsection (c) of section 1964 of title 18, United States Code, the term "crime of violence" means an offense involving—

(1) when chargeable under State law the following: murder, kidnapping, arson, robbery, or dealing in narcotic or other dangerous drugs;

(2) when indictable under title 18 of the United States Code, and when accompanied by serious bodily injury the following: destruction of aircraft or aircraft facilities as defined by section 32; arson as defined by section 81; acts against foreign officials and other persons as defined by section 112(a), (c)-(f); acts against Federal officials and other persons as defined by section 115; threats and extortion as defined by section 878; loansharking and other extortionate credit transactions as defined by sections 891-894; homicide as defined by sections 1111-1112, 1114, 1116-1117; hostage taking as defined in section 1203; obstruction of justice as defined in sections 1501-1506, 1508-1513, and 1515; extortion as defined by section 1951; murder-for-hire as defined by section 1958; sexual exploitation of children as defined in sections 2251-2252 and 2256; explosives or dangerous weapons aboard vessels as defined in section 2277; terrorist acts abroad as defined in section 2331; or

"(3) 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.

H.R. 1046, *supra* note 200, § 9.

O. *International Service of Process*<sup>319</sup>

Currently, RICO provides for nationwide, but not international, service of process.<sup>320</sup> International service of process, however, is essential for dealing with criminal groups whose often violent activities extend across international boundaries.<sup>321</sup> International service of process is provided for in the securities statutes because securities violations always do not occur in the United States.<sup>322</sup> This provision is also valuable here. Although it is probably unnecessary, it also might be wise for Congress expressly to assert extraterritorial jurisdiction for RICO.<sup>323</sup>

P. *Exclusive Jurisdiction*<sup>324</sup>

While courts initially were split on the issue of exclusive or concurrent federal jurisdiction,<sup>325</sup> the Supreme Court in *Taffin v. Levitt*<sup>326</sup> held that federal jurisdiction was concurrent with state jurisdiction. The prosecution of federal offenses, however, is exclusive in the federal courts,<sup>327</sup> as are actions dealing with forfeitures.<sup>328</sup> Uniformity in the application of federal offenses would be promoted best by guaranteeing

319. SEC. 5. INTERNATIONAL SERVICE OF PROCESS.

Section 1965 of title 18, United States Code, is amended—

(1) in subsection (b), by striking “residing in any other district”;

(2) in subsection (b), by striking “in any judicial district of the United States by the marshal thereof.” and inserting “anywhere the party may be found”;

(3) in subsection (c), by striking “in any other judicial district” and inserting “anywhere the witness is found”;

(4) in subsection (c), by striking “in another district”; and

(5) in subsection (d), by striking “in any judicial district in which” and inserting “where”.

H.R. 1046, *supra* note 200, § 5.

320. *See, e.g., Nordic Bank PLC v. Trend Group Ltd.*, 619 F. Supp. 542, 564-65, 569 n.30 (S.D.N.Y. 1985).

321. *See generally* GLOBAL TERRORISM, *supra* note 282, app. B, at 55-83 (providing a worldwide overview of organizations that engage in terrorism).

322. *See, e.g., SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir.) (stating that the United States must not be permitted to become a “Barbary Coast” for fraud), *cert. denied*, 431 U.S. 938 (1977).

323. *See, e.g.,* 18 U.S.C. § 1751(k) (1988). *See generally* United States v. Bowman, 260 U.S. 94, 97-98 (1922) (holding that extraterritoriality, when the statute is silent, may be inferred from the nature of the offense).

324. SEC. 6. EXCLUSIVE FEDERAL JURISDICTION.

Chapter 96 of title 18, United States Code, shall not be construed to confer jurisdiction to hear a criminal or civil proceeding or action under its provisions on a judicial or other forum of a State or local unit of government.

H.R. 1046, *supra* note 200, § 6.

325. *Compare* Cianci v. Superior Court, 221 Cal. Rptr. 575, 710 P.2d 375 (1985) (finding concurrent federal jurisdiction) *with* Main Rusk Assocs. v. Interior Space Constr., Inc., 699 S.W.2d 305 (Tex. Ct. App. 1985) (finding exclusive federal jurisdiction).

326. 110 S. Ct. 792 (1990).

327. *See* 18 U.S.C. § 3231 (1988).

328. *See* 28 *id.* § 1355 (1982).

that they be applied only by federal courts.<sup>329</sup> The countervailing policy consideration is that federal judges are hostile to new litigation, especially civil RICO litigation. As such, RICO might receive better treatment in state courts. While the issue is close, the better policy would be to make jurisdiction exclusive.

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329. The Supreme Court in *Tafflin* thought differently:

We perceive no "clear incompatibility" between state court jurisdiction over civil RICO actions and federal interests.

. . . [O]ur decision today creates no significant danger of inconsistent application of federal criminal law. Although petitioners' concern with the need for uniformity and consistency of federal criminal law is well-taken, federal courts, pursuant to § 3231, would retain full authority and responsibility for the interpretation and application of federal criminal laws, for they would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts. State courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law. State court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court. Thus, we think that state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law.

. . . [W]e have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise. To hold otherwise would not only denigrate the respect accorded co-equal sovereigns, but would also ignore our "consistent history of hospitable acceptance of concurrent jurisdiction."

*Tafflin*, 110 S. Ct. at 798-99 (citations omitted). The Court's reasoning, as far as it goes, may be accepted, but it ignores the problem of a mistake of law defense. A number of RICO's predicate offenses, particularly in the white-collar crime area, require a showing of intent to defraud, which may be negated by advice of counsel, even though it was based on an erroneous state decision. See *Williamson v. United States*, 207 U.S. 425, 453 (1908); *United States v. Poludniak*, 657 F.2d 948, 958-59 (8th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Tarvestad v. United States*, 418 F.2d 1043, 1047 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970). The possibility of such defenses is not easily corrected by the Supreme Court, because it does not have time to resolve all conflicts in the circuits, much less other pressing matters. See Greenhouse, *Justices' Rulings Have a Ripple Effect on the Law*, N.Y. Times, Mar. 9, 1989, at 14, col. 1 (stating that the Supreme Court hears only 160 out of 5000 general appeals brought to it). Thus, the problem is not so much uniformity of legal decision as it is uniformity of factual outcome. Finally, the Court's faith in the ability of state courts to handle sophisticated RICO questions is not borne out by the initial efforts under RICO. See, e.g., *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 455, 530 N.E.2d 860, 865 (1988) (adopting a single scheme limitation on pattern). The wisdom, if not the legal reasoning, of the Court's decision that jurisdiction is concurrent may be questioned. It may turn out to be ill-starred, as the current RICO reform will make each the jurisdiction exclusive. See also JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24 (1988) (stating that exclusive jurisdiction is appropriate for civil RICO, "since many of the predicate acts involve violation of federal criminal statutes exclusively enforced by federal courts").

Q. *Stylistic Amendment*<sup>330</sup>

No analysis is required.

R. *Retroactivity*<sup>331</sup>

Under this provision of the proposed legislation, the reduction from treble to actual damages would be retroactive in most cases. The issue would be left for judicial resolution, however, under a "clearly unjust" standard. Court costs, including attorney's fees and litigation expenses, still could be recovered.

Approximately 1549 civil RICO cases were pending as of September 30, 1989.<sup>332</sup> Most of those cases were filtered through a judicial process that is basically hostile to civil RICO litigation.<sup>333</sup> Thus, most of the litigation still pending before the courts is in all likelihood meritorious. The Supreme Court's unanimous decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>334</sup> ought to lay to rest any serious argument that the use of RICO outside of the organized crime area is beyond original congressional intent or somehow abusive.<sup>335</sup> As such, these provisions will give retroactive relief to undeserving defendants. The issue

330. SEC. 7. STYLISTIC AMENDMENT.

The table of sections at the beginning of chapter 96, title 18, United States Code, is amended by striking out the item relating to section 1962 and inserting in lieu thereof the following: "1962. Prohibited activities." H.R. 1046, *supra* note 200, § 7.

331. SEC. 8. JUDICIAL STANDARD TO DETERMINE REMEDY.

(a) The amendments made by this Act shall apply to any civil action or proceeding commenced one day after the date of enactment; except that in any pending action under section 1964(c) of title 18, United States Code, in which a person would be eligible to recover only under paragraph (2)(A) of section 1964(c) as amended by this Act because the action does not meet the requirements of paragraph (2)(B) of section 1964(c), if this Act has been enacted before the commencement of that action, the recovery of that person shall be limited to the recovery provided under paragraph (2)(A), unless in the pending action—

(1) there has been a jury verdict or district court judgment, establishing the defendant's liability, or settlement has occurred; or

(2) the judge determines that, in light of all the circumstances, such limitation of recovery would be clearly unjust.

(b) For purposes of this subsection, in any action in which a person would be eligible, by operation of subsection (a) of this section, to recover only under paragraph (2)(A) of section 1964(c) of title 18, United States Code, as amended by this Act, the person shall also recover the cost of the civil action, which includes, in addition to a reasonable attorneys' fee, reasonable litigation expenses.

H.R. 1046, *supra* note 200, § 8.

332. Letter from Ellyn L. Vail, Chief, Non-Criminal Branch, Administrative Office of the United States Courts, to Professor G. Robert Blakey (Jan. 18, 1990); Telephone interview with Ellyn L. Vail (Jan. 31, 1990).

333. See Blakey & Cessar, *supra* note 1, app. B, at 630 (noting that 51% of post-*Sedima* published opinions were dismissed and that 40% were dismissed on lack of pattern grounds).

334. 109 S. Ct. 2893 (1989).

335. See *supra* note 18 and accompanying text.

is not a matter of power, but of wisdom.<sup>336</sup> Congress sits to legislate, not adjudicate. Cynics will believe that monies of potential RICO defendants bought this legislation through political contributions. Americans, however, do not conduct their affairs that way. Their elected representatives ought not legislate that way. Congress should not do anything on the civil RICO reform that will contribute to a further decline in the opinion that the American people hold of their legislators.<sup>337</sup>

336. Representative John Conyers put it well:

The Constitution only prohibits without qualifications ex post facto criminal legislation. 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.” Making legislation retroactive—whatever its naked constitutionality—is, in the words of Justice Doe, one of the giants of American jurisprudence, in *Kent v. Gray* “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 . . . has been rested. . . . [S]uch an exercise of power is irreconcilable . . . with the great principles of freedom upon which [our institutions] are founded . . . .

RICO, in short, did not make anything unlawful that was not already unlawful before its passage under its predicate offenses. No question is present here of a sudden or unexpected new liability. When we passed RICO, we held out to victims of sophisticated forms of crime the promise of treble damages to encourage the private enforcement of the law. Litigation has now been instituted in a trusting reliance on that promise. It is a promise, therefore, that we ought not lightly break, particularly when the character of the conduct that it will insulate from its just desserts is noted: the principal beneficiaries of the retroactive elimination of the treble damage remedy will be the perpetrators of the recent bank fraud and insider trading scandals. Can such a result, which protects the Butchers and Boeskys of the world, be justified in the clear light of day?

133 CONG. REC. E3353 (daily ed. Aug. 7, 1987) (remarks of Rep. John Conyers) (citations omitted).

337. Ultimately, government depends on the consent of the governed. Too many people today are turned off by politics-as-usual in Washington. Andrew Kohut of Gallup put it well when he discussed the current Washington scandals such as the one in the S&L institutions. These scandals “reinforc[e] a value that runs through American politics: there are only limited amounts of trust you can put into politicians and Washington.” Oreskes, *Is Anybody Watching?*, N.Y. Times, July 30, 1989, § 4, at 1, col. 1. In 1964, 64% of the voters believed that the American government was “run for the benefit of all,” while only 29% said that it was “pretty much run by a few big interests looking out for themselves.” Yang, *Sudden Sanctimony: Congress Gets Ethical, Shuns Any Hint It Is in Debt to Big Givers*, Wall St. J., Aug. 4, 1989, at A1, col. 1. Last year, the proportion was reversed: 63% believed that the American government is run by the few for the few, while only 31% thought that the government was run for the greater good of all. *Id.* Congress should not do anything in processing RICO reform legislation that will contribute further to that rising tide of cynicism.

Much is made of the federalism implications of civil RICO. It is appropriate here to quote one of federalism’s fathers. James Madison, a principal architect of the Constitution, argued in *The Federalist No. 44*, that retroactive legislation was “contrary to the first principles of the social compact and to every principle of sound legislation.” THE FEDERALIST No. 44, at 282-83 (J. Madison) (C. Rossiter ed. 1961). He added:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of the enterprising

## S. Pattern

In *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>338</sup> the Supreme Court unanimously reversed the Eighth Circuit's multischeme test for "pattern." The Court recognized that the "pattern" concept played a key role in each of RICO's substantive provisions, sections 1962(a), (b), and (c). Beginning with the ordinary meaning of the word, the Court paraphrased it as an "arrangement or order of things or activity."<sup>339</sup> Turning to the legislative history of the statute, the Court determined that Congress used "pattern" with a "fairly flexible concept of a pattern in mind."<sup>340</sup> The Court concluded that the "order or arrangement" should reflect "continuity [or its threat] plus relationship."<sup>341</sup> The Court then recognized that continuity, a "temporal concept," meant a "substantial period of time," more than a "few weeks or months."<sup>342</sup> A finding of a threat of continuity also was dependent "on the specific facts of each case."<sup>343</sup> The development of the concept would have to

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and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

*Id.*

Finally, the danger that people, not without justification, will believe the worst, even if untrue, about the motivation behind the sponsors of RICO reform is well-borne out by Benjamin J. Stein: [P]owerful people who are accustomed to stealing in peace . . . are now trying to buy retroactive immunity for their wrongs through powerful efforts spear headed by Sen. Dennis DeConcini of Arizona, who is a beneficiary of contributions from Charles Keating and his friends and who helped keep Keating's wildly mismanaged Lincoln S & L alive longer so that it could buy more Milken junk, speculate more in real estate, cost the taxpayers more, and lose hundreds of millions of dollars of debenture holder's money. . . . The Congress, like a Dark Ages pope, will grant retroactive indulgences, plenary and eternal, for fraud, bribery, looting, inside trading, cheating the government, and stock manipulation— with no countervailing gain at all except to the treasuries of individual legislators.

Stein, *Don't Mess with RICO—Congress Should Spurn Effort to Curb It*, BARRON'S, July 3, 1989, at 15, col. 4.

338. 109 S. Ct. 2893 (1989).

339. *Id.* at 2900 (quoting 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)).

340. *Id.*

341. *Id.* (quoting S. REP. NO. 617, 91st Cong., 1st Sess. at 158 (1960)).

342. *Id.* at 2902.

343. *Id.* As such, the Court developed a fairly precise six-step process that can be used for determining if a "pattern" is present within the meaning of RICO. Two goals must be realized: relationship and continuity (or a threat of continuity). To see if these two goals are met up to six questions must be asked and answered: (1) is the series of acts (at least two) related to one another, for example, are they part of a single scheme? (2) if not, are they related to an external organizing principle, for example, to the affairs of the enterprise? If both questions are answered in the negative, relationship is not present, one prong of the two-prong test is not met, and it is not necessary to proceed further. If either question is answered in the affirmative, up to three additional questions must be asked: (3) is the series of acts open-ended, that is, do the acts have no obvious



await, the Court concluded, on "future cases, absent a decision by Congress to revisit RICO to provide clearer guidance."<sup>344</sup> The question

termination point? (4) if not, did the closed-ended series of acts go on for a substantial period of time, that is, more than a few weeks or months? If either question is answered in the affirmative, continuity is present. If both questions are answered in the negative, up to two additional questions must be asked: (5) may a threat of continuity be inferred from the character of the illegal enterprise? (6) if not, may a threat of continuity be inferred because the acts represent the regular way of doing business or a lawful enterprise? If either question is answered in the affirmative, a threat of continuity is present.

344. *Id.* In his concurring opinion, Justice Antonin Scalia—joined by Chief Justice William Rehnquist, and Justices Sandra Day O'Connor and Anthony Kennedy—expressed considerable dissatisfaction with the majority's decision on the meaning of "pattern." *Id.* at 2906-09 (Scalia, J., concurring). Justice Scalia's concurring opinion is filled with sarcastic remarks, which are extremely out of character for usual Supreme Court discourse. The explanation in the legislative history relied upon by the majority that "pattern" requires a showing of "continuity plus relationship" was, he suggested, as helpful as the phrase "life is a fountain." *Id.* at 2907. "Relationship" defined in terms of 18 U.S.C. § 3575(e) was "utterly uninformative." *Id.* He added that the phrase "closed period of repeated conduct" communicates "no idea [of] what [it] means." *Id.* The Court's discussion was, in short, "murky" and "vague." *Id.* at 2907-08. What "pattern" requires beyond "two acts" was, for him, simply "beyond" understanding. *Id.* at 2908. *But see* Jones v. SEC, 298 U.S. 1, 33 (1936) (Cardozo, J., dissenting) (stating that "[h]istorians may find hyperbole in the sanguinary simile"); *Supremely Surly* (editorial), N.Y. Times, July 9, 1989, § 4, at 26, col. 1. The *New York Times* stated that "[w]hat's [not] acceptable [in Supreme Court opinions] is the raucous tone and unruly language . . . [T]he cases are hard enough, and maintaining public respect for the Court difficult enough, without the added burden of inflammatory, surly argumentation." *Id.*

The speculation that Justice Scalia originally was assigned to write *H.J. Inc.*, took too long to do it, and lost the five votes necessary to produce a majority opinion to Justice William Brennan may account for his intemperate language. *See* Greenhouse, *Broad Use of RICO Is Upheld*, N.Y. Times, June 27, 1989, at D1, col. 6. "[T]he case appeared to have been unusually troublesome. . . . There was some evidence that Justice Scalia had initially been assigned to write the opinion but was either unable to finish the job or was unable to hold four Justices to his view." *Id.* at D23, col. 3. More difficult to understand is his not too veiled suggestion that "pattern" is unconstitutionally vague. *H.J. Inc.*, 109 S. Ct. at 2909 (Scalia, J., concurring) (stating that it "bodes ill for the day when [it is] challenge[d]").

The Court's present jurisprudence on vagueness is hardly inconsistent with the statute. *See generally* Blakey, *Is "Pattern" Void for Vagueness?*, Civ. RICO REP., Dec. 12, 1989, at 6. To be sure, "ascertainable standards of guilt" are required. *Winters v. New York*, 333 U.S. 507, 515 (1948). But vagueness is a question of degree. *Nash v. United States*, 229 U.S. 373, 377 (1913). "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). The Constitution "does not require impossible standards." *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947). A statute is not vague merely because it is difficult to determine if "marginal" cases fall within it. *United States v. Powell*, 423 U.S. 87, 93 (1975). Apart from first amendment considerations, statutes are judged in light of the conduct of the defendant. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982). Additionally, less clear notice is required when a person engages in commercial activity, *see* *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983), or when state of mind is required, *see* *United States v. Ragen*, 314 U.S. 513, 523-24 (1942); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502 (1925). Moreover, vagueness is not present when two statutes—each with a different penalty—apply, because the defendant knows the maximum, and no more doubt is present than when a statute permits alternative punishments. *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979). Finally, any possible unusual complexity in RICO is mitigated substantially by its use of predicate offenses. It is not possible to violate RICO without first violating one of its predicate offenses, not once, but at least twice. The line between guilt and innocence, which is at the heart of the void-for-vagueness doctrine, is drawn under RICO at the point of the predicate offense. S. REP.

raised is whether Congress should try to make "pattern" more definite.

No. 617, 91st Cong., 1st Sess. 158 (1969) (stating that there is "no due process constitutional barrier . . . [because] any proscribed act in the pattern must violate an independent statute"). No persons seeking to keep their conduct within the law need fear the statute. All they must do is not violate the predicate offenses. Public officials cannot use RICO impermissibly against the innocent, because only those who independently violate the predicate offense are subject to RICO prosecutions. Persons convicted of RICO lose their innocence when they violate the predicate offense. Accordingly, those persons get their vagueness "bite" at that point. Complaining about RICO itself is asking for "two bites" at the "vagueness apple." Accordingly, the issue of vagueness must be faced at the point of the predicate offense, and if the predicate offense is "not unconstitutionally vague, [then RICO] cannot be vague either." *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 925 (1989); see also *United States v. Stofsky*, 409 F. Supp. 609, 612 (S.D.N.Y. 1973) (finding RICO not vague because the predicate offenses are clearly defined), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); Blakey & Gettings, *supra* note 1, at 1031-33 (stating that "RICO . . . [does] not draw a line between criminal and innocent conduct . . . [but] authorize[s] the imposition of different criminal or civil remedies on conduct already criminal when performed in a specific fashion").

Indeed, *Fort Wayne* should be read as settling the issue of the facial constitutionality of RICO-type legislation. In *Fort Wayne* the defendant attacked Indiana's RICO statute on first amendment grounds, which is the most stringent constitutional standard of vagueness, and which permits its most searching possible attack, that is, "facial validity." *Fort Wayne*, 109 S. Ct. at 924. The Court aptly observed:

[B]ecause the scope of the Indiana RICO law is more limited than the scope of the State's obscenity statute—with obscenity-related RICO prosecutions possible only where one is guilty of a "pattern" of obscenity violations—it would seem that the RICO statute is inherently less vague than any state obscenity law; a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.

*Id.* at 925 n.7 (emphasis in original). The Court also rejected a challenge to the statute based on the "draconian" character of the criminal sanctions. *Id.* at 925 (concluding that there is no "constitutionally significant difference between the two potential punishments[, because they] . . . function quite similarly to an enhanced sentencing scheme for multiple obscenity violations").

What is not explained is how, as a matter of principled jurisprudence, Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Anthony Kennedy could, along with Justice Antonin Scalia, join in the *Fort Wayne* majority and Justice Scalia's *H.J. Inc.* concurrence. Apart from ire at losing his opinion to Justice William Brennan, Justice Scalia appears to forget that a major source of the difficulty with "pattern" under RICO may not be with semantics, but politics. See L. FRIEDMAN, *supra* note 190, at 33. Professor Lawrence Friedman stated that "uncertainty exists not because but in spite of the text. What unsettles . . . rules is social controversy—challenge, social demand." *Id.* Apparently, RICO is not hard to read, but hard to accept.

So far, the circuit courts of appeals generally have declined to face vagueness challenges to RICO in the appeals already on their dockets. See, e.g., *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 836 (4th Cir. 1990) (noting that "[o]n remand there will be ample opportunity to raise any question about the constitutionality of RICO and to litigate the issue in the normal course of events"). The First Circuit, however, in *United States v. Angiulo*, in upholding the statute against a vagueness challenge by several organized crime figures, observed:

We begin by acknowledging that potential uncertainty exists regarding the precise reach of RICO's "pattern of racketeering" element. The Court itself in *H.J. Inc.* acknowledged that defining "pattern" has not proven to be an easy task and that the exact scope of the meaning of "continuity plus relationship" cannot be fixed in advance with precise clarity. This admission, however, does not mean that defendants' vagueness challenge necessarily succeeds. The statute is not rendered unconstitutionally vague simply because potential uncertainty exists regarding the precise reach of the statute in marginal fact situations not currently before us. Rather, in the absence of first amendment considerations, vagueness challenges must be examined in light of a case's particular facts. Thus, for defendants' vagueness challenge to suc-

Wittgenstein<sup>345</sup> aptly observed: "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 the word is its use in the language."<sup>346</sup> Before an effort is made to draft a more concrete definition of "pattern," it is necessary to determine how the word is used in the statute. Any definition of "pattern" also must meet two tests. First, the definition must work in both criminal and civil litigation. Second, it must work in all sections of the statute.<sup>347</sup> Finally, careful attention must be given to the setting in which the word appears in the statute.<sup>348</sup>

ceed, they must demonstrate that the meaning and scope of RICO's "pattern" element was unclear and vague as to their conduct at issue here. Phrased another way, they must show that persons of ordinary intelligence in their situation would not have had adequate notice that the gambling, loansharking and conspiracy offenses at issue here constituted a "pattern of racketeering activity" under RICO.

Defendants have not even come close to making this showing, for if anything is clear about RICO, it is that "a pattern of racketeering activity" is intended to encompass the activities of organized crime families. In *H.J. Inc.*, the Court explicitly noted that in drafting RICO to target "patterns" of racketeering activity, Congress' main focus was the eradication of organized crime. Given the history behind RICO, we have no doubt that the murder conspiracies and the gambling and loansharking operations for which defendants were charged and convicted here are precisely the type of activity that Congress intended to reach through RICO. Thus, although RICO's "pattern" element may be vague in some contexts, a matter on which we express no opinion, it is not vague in the context before us. A person of ordinary intelligence could not help but realize that illegal activities of an organized crime family fall within the ambit of RICO's pattern of racketeering activity.

Nos. 86-1331, 89-1212, 89-1800 (1st Cir. Mar. 8, 1990) (LEXIS, Genfed library, US app file) (citation omitted) (upholding Mafia family member prosecution for conspiracy and substantive RICO for gambling, loansharking, and murder). How cases outside of the organized crime area will be handled remains an open question.

The courts do not experience such difficulties with similar concepts in other areas. *See, e.g.*, *Gregory v. Home Ins. Co.*, 876 F.2d 602, 604-06 (7th Cir. 1989) (interpreting an insurance policy limitation of coverage, with the definition of "claim" being two or more of which arise out of "single act . . . or series of related acts"); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1237 (7th Cir. 1986) (discussing municipal liability under 42 U.S.C. § 1983 (1982) and holding that "a plaintiff must allege a specific pattern or series of incidents that support the general allegation of a custom or policy . . ."); *Downes v. FAA*, 775 F.2d 288, 293 (Fed. Cir. 1985) (concluding that sexual harassment cannot be occasional, isolated, or sporadic, but must be repeated, routine, or patterned); *United States v. Iron Workers Local 86*, 443 F.2d 544, 551-52 (9th Cir.) (defining the "pattern or practice" prerequisite for an attorney general suit under Title VII as "more than an isolated, sporadic incident, but is repeated routine of a generalized nature" (quoting 110 Cong. Rec. 14,270 (1970) (remarks of Sen. Hubert H. Humphrey))), *cert. denied*, 404 U.S. 984 (1971).

345. L. WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 20e (2d ed. 1953).

346. *Id.* (emphasis in original).

347. A definition of "pattern" will be crucial for at least the following issues: (1) definition of criminality (when an indictment may be returned); (2) statement of a claim for relief (when an action may be brought); (3) principle of issue or claim preclusion (when an element may be litigated or an action must be brought either criminally (double jeopardy) or civilly); (4) application of statute of limitations (when, in whole or in part, it is too late to bring an action); (5) the scope of discovery before trial; and (6) the admissibility of evidence at trial.

348. *See* Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1898-1899) (stating that "[y]ou have to consider the sentence in which [a word] stands to decide . . . [its]

Under RICO, "enterprise" includes four basic types of organizations.<sup>349</sup> It includes commercial entities such as domestic<sup>350</sup> and foreign<sup>351</sup> corporations, partnerships,<sup>352</sup> and sole proprietorships;<sup>353</sup> it includes benevolent organizations such as unions,<sup>354</sup> benefit funds,<sup>355</sup> and cooperatives;<sup>356</sup> it includes governmental entities such as the office of a governor<sup>357</sup> or legislator,<sup>358</sup> a court<sup>359</sup> or a prosecutor,<sup>360</sup> and police<sup>361</sup> and general governmental agencies;<sup>362</sup> and it also includes lawful and unlawful associations-in-fact.<sup>363</sup> Under RICO, "racketeering activity" includes five basic types of offenses.<sup>364</sup> It includes violence,<sup>365</sup> the provision of illegal goods and services,<sup>366</sup> corruption in the labor movement,<sup>367</sup> corruption among public officials,<sup>368</sup> and commercial and other

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meaning["); *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 678 (1950) (holding that "[t]he same words in different settings, may not mean the same thing").

349. Blakey, *supra* note 1, at 291-99.

350. *United States v. Weisman*, 624 F.2d 1118, 1120 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

351. *United States v. Parness*, 503 F.2d 430, 440-41 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

352. *United States v. Jannotti*, 501 F. Supp. 1182, 1185-86 (E.D. Pa. 1980), *rev'd on other grounds and conviction reinstated*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982).

353. *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985) (holding that a sole proprietor is an enterprise if it has employees or associates); *United States v. Benny*, 559 F. Supp. 264, 266-71 (N.D. Cal. 1983) (holding that a personal real estate business operated by fraud is an enterprise), *aff'd*, 786 F.2d 1410 (9th Cir.) (following *McCullough*), *cert. denied*, 479 U.S. 1017 (1986); *State v. Bowen*, 413 So. 2d 798 (Fla. Dist. Ct. App. 1982) (convicting a sole proprietorship dealing in stolen property).

354. *United States v. Provenzano*, 688 F.2d 194, 199-200 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982).

355. *United States v. Rubin*, 559 F.2d 975, 978 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979).

356. *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982).

357. *United States v. Thompson*, 685 F.2d 993, 994-95 (6th Cir.), *cert. denied*, 459 U.S. 1072 (1982).

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

359. *United States v. Stratton*, 649 F.2d 1066, 1074-75 (5th Cir. 1981).

360. *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980).

361. *United States v. Grzywacz*, 603 F.2d 682, 685-87 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980).

362. *United States v. Hocking*, 860 F.2d 769, 778 (7th Cir. 1988); *United States v. Dozier*, 672 F.2d 531, 543 & n.8 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982).

363. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (holding that there is "no restriction upon the associations embraced"); *United States v. Riccobene*, 709 F.2d 214, 221-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); *Dorsey v. State*, 402 So. 2d 1178 (Fla. 1981).

364. Blakey, *supra* note 1, at 300-06.

365. 18 U.S.C. § 1961(1) (1988) (including murder, arson, and robbery).

366. *Id.* (including gambling, narcotics, and prostitution).

367. *Id.* (including kickbacks under 18 U.S.C. § 1954 (1988)).

368. *Id.* (including extortion and bribery).

forms of criminal fraud.<sup>369</sup> Accordingly, RICO makes unlawful four basic forms of "racketeering activity" by, through, or against an "enterprise": (1) receiving and using proceeds, (2) taking over, (3) operating, and (4) conspiring to use, take over, or operate.<sup>370</sup> Under RICO, the "enterprise," therefore, plays four separate but not necessarily mutually exclusive roles: perpetrator, victim, instrument, or prize.<sup>371</sup> As such, under RICO, "pattern" is used in its various violations in at least 240 different but related contexts.<sup>372</sup> While the uses in each context may be different, they reflect a "family of meanings."<sup>373</sup>

As the Supreme Court recognized in *H.J. Inc. v. Northwestern Bell Telephone Co.*, the notion of "relationship" in "pattern" is not difficult to apply.<sup>374</sup> Acts may be related among themselves or by reason of a

369. *Id.* (including mail, wire, and securities fraud).

370. Section 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) 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.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

*Id.* § 1962.

371. Blakey, *supra* note 1, at 290-325, cited in *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); G. DILLON, *INTRODUCTION TO CONTEMPORARY LINGUISTIC SEMANTICS* 68-82 (1977) (surveying the semantic role literature).

372. Four kinds of enterprises times five kinds of predicate offenses times three sections times four roles equals 240 contexts.

373. L. WITTGENSTEIN, *supra* note 345, at 36e (stating that "we see a complicated network of similarities overlapping and criss-crossing; sometimes overall similarities, sometimes similarities of detail"); *id.* at 32e ("family resemblances"). See generally Goldsmith, *RICO and "Pattern": The Search For "Continuity Plus Relationship"*, 73 CORNELL L. REV. 971 (1988); Note, *Reconsideration of Pattern*, *supra* note 1.

374. 109 S. Ct. 2893, 2900-01 (1989).

connection to an enterprise.<sup>375</sup> The principal tension in the use of “pattern” comes from the concept of “continuity or its threat” and its contrasting uses in section 1962(a) (receive and use), section 1962(b) (takeover), and section 1962(c) (operation). Emphasis on “continuity” in subsections (a) and (c) appropriately focuses the statute so that it does not apply to a single episode—the area of greatest alleged abuse in the commercial field—but it tends to read subsection (b) out of the statute, if the word is given the same inflexible meaning in each section.<sup>376</sup> In fact, some courts wrongfully follow that direction.<sup>377</sup> One way to break this tension would be to eliminate the requirement of “pattern” in subsection (b) for takeovers. It is not the provision most often used in the commercial fraud area; its elimination in subsection (b) would pave the way for a more rigorous definition in subsections (a) and (c), reflecting the Supreme Court’s *H.J. Inc.* approach.<sup>378</sup>

Sound arguments can be made, on the other hand, that Congress should not further define “pattern.” Like the concept of “fraud” itself, “pattern” might be left flexible so it can be used in a variety of situations.<sup>379</sup> RICO’s sister provision, the Continuing Criminal Enterprise Act, is not difficult to administer.<sup>380</sup> RICO should not be more difficult.

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375. Compare *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (common scheme), *aff’d*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) with *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir.) (not to each other, but to enterprise), *cert. denied*, 439 U.S. 953 (1978).

376. See *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986) (holding that it “effective[ly] eliminate[s] this provision”); *Paul S. Mullin & Assocs. v. Bassett*, 632 F. Supp. 532, 541 (D. Del. 1986) (holding that it would require multiple takeovers).

377. See, e.g., *A.L. Williams Corp. v. Faircloth*, 652 F. Supp. 51, 55 (N.D. Ga. 1986).

378. It also would make sense to eliminate the “collection of unlawful debt” language in subsections (a) and (c) and make the “collection of unlawful debt” a “racketeering activity.” This step would tighten up those subsections.

379. See, e.g., *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.) (stating that “[t]he 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); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 186, at 212 (4th ed. 1846) (noting that “[i]t is not easy to give a definition of fraud . . . ; and it has been said, that these Courts . . . very wisely, never laid down, as a general proposition, what shall constitute fraud . . . lest . . . means of avoiding the Equity of the Courts should be found out”).

380. 21 U.S.C. § 848 (1988); see *Garrett v. United States*, 471 U.S. 773, 781 (1985) (describing it as a “carefully crafted prohibition”); *United States v. Valenzuela*, 596 F.2d 1361, 1366-67 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979). The Ninth Circuit held that the “continuing series” language was not unconstitutionally vague and that the “phrases [in the Continuing Criminal Enterprise Act] cannot properly be considered in the abstract. They draw meaning both from each other and from the larger statutory context.” *Id.* For an alternative proposal, see App. E, *infra* pp. 1053-56.

### T. *Parens Patriae*

Unlike the antitrust statute, RICO does not provide for *parens patriae* suits by state attorneys general.<sup>381</sup> Such suits should be authorized.<sup>382</sup> Their authorization would strengthen the statute in its impact on both white-collar and organized crime. The experience with state attorneys general in the antitrust area demonstrates that such power will not be abused.

### U. *Prejudgment Interest*

Currently, courts are split on whether a party can recover prejudgment interest under RICO.<sup>383</sup> Prejudgment interest is provided for under the antitrust statutes. Congress should add a similar provision to RICO, particularly if it reduces recovery to actual damages.<sup>384</sup>

### V. *Resolution or Clarification of Issues in Conflict*

Any reform legislation should resolve or clarify major issues under RICO that are in conflict among the courts. Congress should include a provision which would provide that: (1) an enterprise may be a defendant, if it is a perpetrator; (2) violations under the statute may have occurred, even though the defendants did not act from a financial motive; (3) associations-in-fact must be structured groups; (4) the personal act rule is eliminated; and (5) state of mind is required.

First, Congress should set aside the result of the line of cases which hold that, without regard to the circumstances, a person may not be a defendant and an enterprise in criminal or civil RICO indictments or complaints.<sup>385</sup> The Eleventh Circuit properly rejected this rule in *United States v. Hartley*.<sup>386</sup> The defendant-enterprise rule reflects a

381. *Illinois v. Life of Mid-America Ins. Co.*, 805 F.2d 763, 767 (7th Cir. 1986).

382. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, tit. III, 90 Stat. 1383, 1394. See also App. E, *infra* pp. 1078-82.

383. Compare *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1142-43 (5th Cir. 1988) (allowing the recovery of prejudgment interest, but only to compensate) with *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 810-11 (E.D. La. 1986) (not allowing recovery).

384. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 382, tit. III, 90 Stat. at 1394. See also App. E, *infra* p. 1082.

385. The cases are collected in *Bennett v. United States Trust Co.*, 770 F.2d 308, 314-15 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

386. 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). See generally Note, *Innocence by Association*, *supra* note 1. The reluctance of courts not to follow this rule set forth in *Hartley* because of a concern with a "victim" enterprise moved the ABA's Civil RICO Task Force, usually no friend to civil RICO, 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." ABA RICO REPORT, *supra* note 70, at 375 n.607 (emphasis in original). In fact, the Task Force recommended that the enterprise should be treated as a defendant under appropriate circumstances. The Task Force offered the following rationale for its position:

technical reading of section 1962(c) which suggests that an enterprise cannot be "employed by or associated" with itself. The rule also is rooted in an unease at holding an entity, which is an enterprise, liable when it is the "victim" of the pattern of unlawful conduct engaged in

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[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 corporate 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 375-76.

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 the rules' judicial development to the same economic-based motivation that lies behind its advocacy by the Bar Association would be too facile. COORDINATING COMMITTEE REPORT, *supra* note 63, at 1-2; see also *id.* at 10 (stating that "banks . . . [and] securities brokers . . . would be insulated from the application of RICO . . .").

The simultaneous development of the rule that does not prohibit an enterprise from being a defendant, at least in a majority of courts, under § 1962(a) undermines the general inference that the courts are, as a whole, seeking to insulate corporations and other economic entities from appropriate legal accountability. Compare *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 402 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985) with *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1196 (S.D.N.Y. 1985). Dean Roscoe Pound rightly offers powerful alternative explanations related to aspects of legal reasoning not immediately related to economic considerations (force of logic, authority, etc.) 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 extravagances of its advocates [and that] it has an element of truth which we may not ignore . . ." R. POUND, INTERPRETATIONS OF LEGAL HISTORY 113 (1923). *But see* M. COHEN, LAW AND THE SOCIAL ORDER 329-30 (1933). Professor Morris R. Cohen stated:

[Pound] seems to argue as if the presence of ethical motives and logical reasons 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 moulded by the interests of the class to which we belong.

*Id.*; see also M. COHEN, AMERICAN THOUGHT 161 (1954) (stating that "[i]t 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 of law excludes a social or economic motive for it"). The explanation for the enterprise-defendant rule appears to lie in the force of shallow logic and snowballing precedent. Once district courts adopted the rule—for the wrong reasons—it seemed to acquire a life of its own, and it swept through the courts of appeals largely without careful or independent analysis of its rationale or perverse consequences. Accordingly, it is to be hoped but not expected that the remaining circuit courts of appeals will decline to adopt the rule, 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 overturn it.



by a person employed by or associated with it. Neither justification, however, supports the defendant-enterprise rule. The issue is not whether the enterprise can 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 under the usual criminal rules of agency or respondeat superior. These same rules also answer the other concern that underlies the defendant-enterprise rule. When the enterprise is the victim, the conduct of a person employed by or associated with the enterprise will not be attributed to it because persons must act not only within the scope of their agency or employment, but also with intent to benefit their principal or employer.<sup>387</sup> In addition, the rule threatens to frustrate RICO's chief purpose—an attack on organized crime groups—when it is used to strike down indictments framed under a group enterprise theory.<sup>388</sup> If the rule were applied to the association-in-fact theory in a prosecution of an organized crime family, it would abort the prosecution.

Second, Congress should set aside the result of *United States v. Ivic*,<sup>389</sup> in which the Second Circuit reversed a RICO conviction because no financial motive was shown for the offense. While RICO was intended to attack the infiltration of legitimate business by organized crime, it was not limited to that purpose; RICO was designed to apply to any form of sophisticated criminal group engaging in specified kinds of activities, including violence, without regard to the motive of the perpetrators. Motive may be relevant, but no showing of a particular kind of motive ought to be required. *Ivic* effectively eliminates RICO's application to organized crime-related violence that is not specifically tied to its money making endeavors; it also makes RICO's application problematic to other violence-based conspiracies, including international terrorist organizations and domestic anti-Semitic or white hate groups.<sup>390</sup>

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387. See, e.g., *United States v. Cincotta*, 689 F.2d 238, 241-43 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States v. Local 560, Int'l Bhd. of Teamsters*, 581 F. Supp. 279, 332 n.30, 337 (D.N.J. 1984), aff'd, 780 F.2d 267, 284 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); see also *United States v. Spittler*, 800 F.2d 1267, 1275-79 (4th Cir. 1986) (holding that a passive, but not an active victim is excluded from criminal liability under *Gebardi v. United States*, 287 U.S. 112 (1932)).

388. Compare *United States v. Standard Drywall Corp.*, 617 F. Supp. 1233, 1292-94 (E.D.N.Y. 1985) (holding that a defendant cannot be one of a group constituting an enterprise) with *Fustok v. Conticommodity Servs., Inc.*, 618 F. Supp. 1074, 1075-76 (S.D.N.Y. 1985) (holding that a defendant can be one of a group constituting an enterprise).

389. 700 F.2d 51, 59-65 (2d Cir. 1983).

390. Terrorism, foreign or domestic, is an ugly fact in the modern world. In 1988 worldwide international terrorist activity was almost unchanged, rising by three percent, with 856 incidents compared with 832 for 1987. See GLOBAL TERRORISM, *supra* note 282, at 1.

Terrorists were responsible for three "spectaculars" in 1988—the hijacking of a Kuwaiti airliner in April, the attack of a Greek day-excursion ship in July, and the bombing of Pan Am Flight

### Third, Congress should set aside the result of the line of cases

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103 in December. *Id.* From 1970 through 1985, some 24,722 foreign and domestic violent incidents occurred, resulting in more than 45,000 deaths and 27,000 injuries. *See generally* CONGRESSIONAL RESEARCH SERV., TERRORIST INCIDENTS INVOLVING U.S. CITIZENS OR PROPERTY 1981-1989: A CHRONOLOGY (CRS Issue Brief IB86096 1990).

Domestic terrorism and similar types of violence are also present. Sadly, but increasingly, it is a bad time to be a member of a minority group. If your name is Mulugeta Seraw and you live in Portland, Oregon, it is not a good idea to stand on the public streets, at least when Skinhead-connected people are around with baseball bats. You can get beaten to death. *See Neo-Nazi Gets Life Sentence for Beating Black to Death*, N.Y. Times, June 6, 1989, at A21, col. 1. This violence also can happen if you are a Jewish couple (with a 2-week-old infant), and even if a Black man attempts to intervene. *4 Charged with Racial Attack in California*, N.Y. Times, May 30, 1989, at A19, col. 3. Skinheads do not like Blacks or Jews. *See generally* Barrett, *Hate Crimes Increase and Become More Violent*; *U.S. Prosecutors Focus on "Skinhead" Movement*, Wall St. J., July 14, 1989, at A12, col. 1 (stating that hate crimes are increasing and that the Anti-Defamation League of B'nai B'rith reports 3000 skinheads belong to explicitly racist organizations in 31 states). It is not a good time either to be a federal judge on the Eleventh Circuit or a leader of the National Association for the Advancement of Colored People. *See* Page, *Haters and Bigots Endanger Us All*, Chicago Tribune, Dec. 24, 1989, at 3C, col. 1. (reporting that the bombings of federal judge and civil rights lawyer are thought to be racially motivated).

Domestic terrorist groups, which include neo-Nazi, Ku Klux Klan, and other violent racist and anti-Semitic organizations, commit crimes including armed robbery, synagogue bombings, murder, and arson. *See generally* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *YOUNG AND VIOLENT: THE GROWING MENACE OF AMERICA'S NEO-NAZI SKINHEADS* (ADL Special Report 1988); CIVIL RIGHTS DIV., ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *THE HATE MOVEMENT TODAY: A CHRONICLE OF VIOLENCE AND DISARRAY* (1987) (reporting that criminal RICO prosecutions and civil suits substantially undermining neo-Nazi, Ku Klux Klan and other violent racist and anti-Semitic groups).

Criminally, RICO is used effectively against a wide range of terrorist type activity in the United States. *See, e.g.,* Berger, *Report on Hate Groups Says They're Weaker*, N.Y. Times, June 11, 1987, at A22, col. 4 (reporting that a study by the Anti-Defamation League of B'nai B'rith concludes that federal prosecutions, including RICO, have "depleted the leadership" of several groups). RICO is, as yet, largely unimplemented civilly against violent crime groups. Substantial evidence supports the belief, however, that terrorist organizations engage in fraud to raise funds to support their violent activities. The Palestine Liberation Organization (PLO), and in particular its most violent subgroup, The Popular Front for the Liberation of Palestine (PFLP), for example, is widely involved in a variety of fraudulent fund-raising activities in the United States. The PLO and its related subgroup are implicated in food stamp fraud, arson, insurance fraud, auto insurance fraud, and securities/bond fraud. In 1980 federal investigators uncovered a food stamp ring operated by 47 Palestinians in New York, Denver, Chicago, and San Francisco. Landauer, *An "Abscam" Evolves with Actual Arabs, in Grocery Business*, Wall St. J., Feb. 7, 1980, at 1, col. 4. The \$400,000 profits reaped from this fraud were alleged to have been donated to the PLO. Although the Department of Agriculture officials denied the operation was centrally controlled, Representatives William Wampler (R-Va.), Marvin Mathis (D-Ga.), and Steven Symms (R-Idaho) pointed to PLO involvement. Both police informants and an arrested Jordanian told police that the rash of New York City grocery store fires in the late 1970s was the product of arson perpetrated for the purpose of acquiring insurance proceeds for the PLO. *See* Lathem & Smith, *The Arab Arson Connection*, Passaic Morning News, Dec. 14, 1979, at 1, col. 4; Egan, *PLO Terrorists Cash in on City Arson Racket*, N.Y. Post, July 30, 1979, at 13, col. 2. More than 100 PLO sympathizers also organized an automobile insurance fraud scheme in the late 1970s in California. *Auto Insurance Fraud Is Believed to Aid PLO*, Wash. Post, Feb. 21, 1977, at A24, col. 2. Two members of the group admitted the money obtained by the fraud was funneled to the PLO. This scheme, in which multiple-insurance autos were destroyed by the owners, apparently netted nearly \$5 million. Lindsey, *Insurance Frauds by Arab Students Said to Aid P.L.O.*, N.Y. Times, Feb. 20, 1977, § 1, at 1, col. 4. Recently, PLO advisor Hassan Zubaidi was implicated in selling forged and valueless Indonesian

holding that the existence of an enterprise may be demonstrated merely by showing a pattern of predicate offenses. A person who is attempting to demonstrate the existence of an enterprise should be required to show the existence of a distinct structure beyond that which is merely required for the commission of the predicate offenses.<sup>391</sup> If this rule is not adopted, the concept of "enterprise," which is a distinct element of the offense relating to the existence of an entity, would be reduced to a mere conspiracy or merged with the concept of a "pattern" of predicate offenses, which is a separate and distinct element of the offense relating to the commission of individual offenses.<sup>392</sup>

Fourth, Congress should set aside the result of the line of cases which requires that each person named as a defendant in an indictment or complaint personally committed, or agreed to commit, the minimum number of acts required to constitute a pattern. This rule originated in dictum in *United States v. Elliott*,<sup>393</sup> in which the Fifth Circuit used it as a rule of evidence, that is, an agreement to commit the number of acts required to constitute a pattern could be inferred from the actual commission of the required number of acts. The Fifth Circuit, however,

bonds to undercover agents. Zuhaidi is said to have diverted the profits of the enterprise to PLO terrorists. Morais, *The Assad Connection*, FORBES, June 15, 1987, at 32. Arab-Americans also have purchased a considerable number of "mom and pop" food stores, including over 700 in the San Francisco area, in recent years. Allegations indicate that these store owners are being "assessed" payments by the PLO. Landauer, *supra*, at 1, col. 1. These payments are said to be funded through various fraudulent activities, including coupon fraud. *See, e.g.*, *United States v. Fakhoury*, 819 F.2d 1415 (7th Cir. 1987). Recently, a Southern Florida United States Postal Service prosecution of 70 defendants for coupon fraud connected many of the defendants with PLO activities. Glabman, *PLO Coupon Clip: Millions of Dollars Reportedly Diverted*, ADVERTISING AGE, Mar. 9, 1987, at 1. A primary defendant admitted ties to the PLO, and authorities believe that profits from the clipping operation were funneled to the PLO.

Not only do the PLO and its subgroups operate widely in the United States, but many of its assets are invested in this country. The modification of RICO to provide "a much-needed civil remedy to the victims of violence by domestic extremist groups . . . and various forms of violence commonly practiced by international terrorist organizations" is supported by the Anti-Defamation League of B'nai B'rith. *H.R. 1046 Hearings, supra* note 48 (statement of the Anti-Defamation League of B'nai B'rith). The "civil rights statutes are not drafted to reach organizations which engage in patterns of racial or political violence." *Id.* RICO would facilitate such litigation, because "a civil action could be predicated simply upon a pattern of violent behavior." *Id.* *See generally* 134 CONG. REC. S2770 (daily ed. Aug. 11, 1988) (statement of Rep. John Conyers) (discussing hate crimes and RICO reform); Nathan & Justen, *Law Enforcement Against International Terrorists: Use of RICO Statute*, 60 *COLO. L. REV.* 553 (1985).

391. Compare *United States v. Bledsoe*, 674 F.2d 647, 659-65 (8th Cir.) (requiring a "distinct" structure), *cert. denied*, 495 U.S. 1040 (1982) and *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.) (following *Bledsoe*), *cert. denied*, 464 U.S. 849 (1983) with *United States v. Mazzei*, 700 F.2d 85, 87-90 (2d Cir.) (rejecting *Bledsoe*), *cert. denied*, 461 U.S. 945 (1983) and *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.) (rejecting *Bledsoe*), *cert. denied*, 464 U.S. 856 (1983).

392. *See United States v. Turkette*, 452 U.S. 576, 583 (1981).

393. 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

treated the rule of evidence as a rule of law in *United States v. Martino*,<sup>394</sup> and held that responsibility could not be established under RICO unless a party could show the personal commission of the required number of predicate offenses, or an agreement to commit them personally. The personal act rule then was adopted by other courts.<sup>395</sup> It was rejected by other courts.<sup>396</sup> Ironically, the Fifth Circuit no longer follows the rule.<sup>397</sup>

The personal act rule should be set aside. It is inconsistent with traditional jurisprudence, which recognizes aiding and abetting or conspiracy theories of responsibility without a requirement that the aider, abettor, or coconspirator personally engage in the substantive offenses.<sup>398</sup> Under the personal act rule, a leader of an organized crime family, like a Luciano, who keeps his hands "clean" by merely directing others will not be criminally or civilly responsible for a RICO conspiracy or for violating RICO substantively by aiding and abetting. Such a result is indefensible.

Fifth, Congress should set aside the result of the line of cases which holds that RICO is a strict liability offense, that is, because no state of mind element is set out expressly on the face of the statute, no state of mind is required for a violation of RICO other than that required for the commission of the predicate offense.<sup>399</sup> The rule is not generally accepted.<sup>400</sup> The Fifth Circuit followed the better rule in *United States v. Elliott*,<sup>401</sup> in which it held that Elliott could not be convicted of RICO, even though he engaged in drug offenses, unless he was aware of the other essential element of the RICO violation. The usual rules for reading into statutes a state of mind element should apply under RICO.

394. 648 F.2d 367, 394 (5th Cir. 1981), *rev'd on other grounds on reh'g*, 681 F.2d 952 (5th Cir. 1982) (en banc), *rev'd and aff'd on other grounds sub nom. Russello v. United States*, 464 U.S. 16 (1983).

395. *See, e.g., United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981).

396. *See United States v. Adams*, 759 F.2d 1099, 1115-16 (3d Cir.), *cert. denied*, 474 U.S. 906 (1985); *United States v. Alonso*, 740 F.2d 862, 870-72 (11th Cir. 1984), *cert. denied*, 469 U.S. 1166 (1985); *United States v. Tille*, 729 F.2d 615, 619-20 (4th Cir. 1984); *United States v. Carter*, 721 F.2d 1514, 1528-32 (11th Cir. 1984).

397. *See United States v. Cauble*, 706 F.2d 1322, 1339 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

398. *See, e.g., People v. Luciano*, 277 N.Y. 348, 361, 14 N.E.2d 433, 446 (holding that Luciano, a founder of organized crime, did not take an active part in the management of daily operation of a prostitution business, "but he cannot escape his criminal responsibility as the leader and principal"), *cert. denied*, 305 U.S. 620 (1938).

399. *See, e.g., United States v. Scotto*, 641 F.2d 47, 55-56 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

400. *See, e.g., United States v. Bledsoe*, 674 F.2d 647, 661 (8th Cir.) ("express[ing] grave doubts as to the propriety of these holdings"), *cert. denied*, 459 U.S. 1040 (1982).

401. 571 F.2d 880, 903-04 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

State of mind is a question of legislative intent.<sup>402</sup> State of mind generally will be read into common law, but not regulatory offenses.<sup>403</sup> RICO is not a regulatory offense: it is more analogous to a common-law offense. As such, the defendant's conduct should be held to be "knowing," while any surrounding circumstances and the result of that conduct should be held to be "reckless." No state of mind should be required for elements of the offense—value or use of an instrument of commerce—that are only of grading or jurisdictional significance.<sup>404</sup> No persuasive reason can be offered for treating RICO as if it were not like other similar offenses requiring an appropriate showing of state of mind for each essential element. Given its seriousness, it is anomalous to treat RICO as a strict liability offense.

### *W. Discovery and Findings in Arbitration*

Currently, RICO claims for relief are subject to voluntary agreements to arbitrate.<sup>405</sup> Any reform legislation should include a provision

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402. *United States v. Bailey*, 444 U.S. 394, 406-09 (1980).

403. *Compare United States v. Balint*, 258 U.S. 250, 251-52 (1922) (regulatory) *with Morissette v. United States*, 342 U.S. 246, 250-52 (1952) (common law).

404. *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975). *See App. E, infra* pp. 1086-87.

405. *Shearson-American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). Doubtlessly, *Shearson-American Express* reflects flawless legal reasoning; it also makes good sense from a perspective of crowded court dockets. Nevertheless, it may mean something else altogether to living people. Consider for example:

In the summer of 1987, Patricia Chegut of Englewood, N.J., received \$51,751 as the settlement of a dispute involving her ex-husband's business. Mrs. Chegut, a single parent living "from paycheck to paycheck" on her teacher's salary, saw the money as a security blanket for herself and a ticket to college for her 9-year-old son, Derek.

On the advice of her accountant, she says, she invested the funds with an old friend of his, a broker at Shearson Lehman Hutton in New York, and empowered the two of them to make her investments.

No one familiar with the gritty edges of Wall Street will be too surprised at what happened next. Mrs. Chegut's funds were invested in stock index options, a risky gambit usually used by very wealthy speculators. Her account was traded so energetically that brokerage commissions ate up \$10,000 of her money in less than three months. Even before the October 1987 market crash, Derek's college funds were gone and Mrs. Chegut's home had become dangerously mortgaged. Her accountant, she says, persuaded her to take out a home equity loan for \$45,000 to add "a cash cushion" to her account. After the crash, she faced a sea of debts, including a bill from Shearson for \$56,000 to cover losses run up on her behalf.

When she consulted a lawyer, Mrs. Chegut discovered that, like a substantial number of American investors, she had signed papers to open her account requiring her to submit any dispute with Shearson to a brokerage-industry arbitration panel, precluding her from taking her grievance to court. By February 1988, like thousands of other investors stung by Black Monday, she had filed an arbitration complaint against her broker and Shearson for misrepresentation. And like scores of others, she found little comfort in the outcome. Not only did Mrs. Chegut fail to recover any of her investment, but she has not been able to learn why arbitrators ruled against her.

Henriques, *When Naiveté Meets Wall Street*, N.Y. Times, Dec. 3, 1989, § 3, at 1, col. 2.

Ms. Chegut may be a victim of her own naivete about investing. She also may be a victim of

for discovery and findings of fact in arbitration proceedings. The provision also should exclude from arbitration crimes of violence and provide that arbitration agreements obtained through adhesion contracts are not enforceable. To make arbitration effective, Congress also should include a provision for prearbitration discovery, so that just results may be obtained; and findings of fact, so that awards will have finality.<sup>406</sup>

### X. *Demonstration Related Litigation Abuse*

Few can disagree that the aftermath of the Supreme Court's decision in *Webster v. Reproductive Health Services*<sup>407</sup> promises continued controversy and public demonstrations involving those who support and oppose abortion. Recently, the Third Circuit in *Northeast Women's Center, Inc. v. McMonagle*<sup>408</sup> upheld the use of civil RICO in the context of antiabortion demonstrations at an abortion clinic. The potential for litigation abuse in this area is manifest, and its impact could chill proabortion or antiabortion demonstrations. In fact, up to 30,000 individuals were arrested throughout the Nation in approximately 380 protests over the past year in connection with such demonstrations.<sup>409</sup> If all of these individuals become embroiled in RICO litigation in the federal courts (thirty to a suit), it will increase the number of RICO cases by a factor of three. The suits, too, would be complex conspiracy litigation. Such suits are being filed.<sup>410</sup> Nevertheless, the danger of litigation abuse

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what is a deeply flawed process for settling grievances on Wall Street: a mandatory arbitration system that is blatantly biased, that is inadequate, and that undermines the investor protection provided under the Nation's 1933 and 1934 securities laws. *Id.*

The complaints against the current system are many. The system, critics say, never was designed to cope with the volume or complexity of the cases it now handles. *Id.* at 6, col. 1. Arbitrators are selected by the exchanges and associations that are beholden to their members, not customers. *Id.* A need exists for stating reasons and findings to back up decisions. *Id.* The overall data on results are not comforting. The results produced give little indication to disbelieve the critics: about half of investors win something, but seldom more than 21% of what they sought. *Id.* Thus, minimum reforms, if only in basic fairness, are necessary. *See also* Robb, *Massachusetts Sets Change in Settling Investor Disputes*, N.Y. Times, Sept. 22, 1988, at 33, col. 5 (reporting that Massachusetts plans to be the first state to ban mandatory arbitration agreements by brokerage firms, that 16 other states are poised to consider similar action, and that the SEC staff proposed such a rule, but in the face of strong industry pressure, the Commission voted to improve procedures).

406. *See* C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1099-1100 (9th Cir. 1987) (upholding preclusion between arbitration and court); CAL. CIV. PROC. CODE §§ 1282.6-1283.1 (West 1982) (authorizing discovery in arbitration). *See also* App. E, *infra* pp. 1067, 1074-76.

407. 109 S. Ct. 3040 (1989).

408. 868 F.2d 1342 (3d Cir.), *cert. denied*, 109 S. Ct. 261 (1989). One of our number, Professor G. Robert Blakey, was a counsel of record in the petition for certiorari in *McMonagle*.

409. Johnson, *Connecticut Abortion Protesters Clog Jails*, N.Y. Times, June 21, 1989, at B1, col. 2.

410. *See* Town of Brookline v. Operation Rescue, Inc., No. 89-0805-T (D. Mass. filed Apr. 13, 1989) (suit by municipality under, *inter alia*, RICO, 18 U.S.C. § 1964(c) (1988), and the Hobbs

and of a chill on first amendment rights in the federal courts is not RICO-specific. The original claim for relief in *McMonagle* included, for example, counts for antitrust, trespass, intentional interference with contractual relation, intentional infliction of emotional distress, assault, battery, libel, and slander.<sup>411</sup> Similar demonstrations take place in peace rallies, at nuclear facilities, and at research hospitals that use animals. The Supreme Court guidelines for civil litigation in the area of

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Act, 18 U.S.C. § 1951 (1988), against prolife protestors to recover the costs incurred by the municipality to arrest protestors who participated in sit-ins at Brookline, Massachusetts abortion clinics); *Allegheny Women's Center v. Operation Rescue, Inc.*, No. 89-0792 (W.D. Pa. filed Apr. 10, 1989) (alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without any entry into clinic, constituted Hobbs Act extortion); *Roe v. Operation Rescue, Inc.*, No. 88-5157 (E.D. Pa. filed June 29, 1988); *National Org. for Women v. Scheidler*, No. 86-C-7888 (N.D. Ill. filed Feb. 2, 1986) (alleging violation of RICO as a result of defendants' alleged conspiracy to steal the bodies of aborted babies from garbage disposals in the Chicago area and transport them across state lines for burial); *North Highland Bldg. Corp. v. Operation Rescue, Inc.*, No. 88-2121 (W.D. Pa. filed Sept. 30, 1988) (suit by owner of building that leases space to abortion clinic alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without entry into clinic, constitutes Hobbs Act extortion). Those intimately involved in this litigation, at least on the defendants' side, are virtually unanimous in their expression of belief and frustration that the federal courts are being used to suppress antiabortion demonstrations contrary to the first amendment and the unequivocal teaching of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981). These parties are bringing actions in federal courts under a variety of theories, including RICO, antitrust, civil rights, and interference with contract. Standard RICO complaints are circulated by groups such as the National Abortion Federation, a trade organization for the abortion industry. See LEGAL CLEARINGHOUSE, NAT'L ABORTION FED'N, GOING TO COURT AGAINST ANTIABORTION ACTION: A MODEL PLEADINGS BOOK (1987). Incredibly, the American Civil Liberties Union, while decrying RICO, is advocating its use in abortion demonstrations. Compare Glasser, *RICO Chickens Come Home to Roost*, Wall St. J., Feb. 17, 1989, at A14, col. 3 (reporting that in 1988, "RICO began to be used systematically to threaten First Amendment rights . . .") with ACLU, PRESERVING THE RIGHT TO CHOOSE: HOW TO DEAL WITH DISRUPTION AT AN ABORTION CLINIC ch. 6 (1987) (providing instruction on the filing of RICO suits against prolife protestors). The litigation is being used to harass antiabortion demonstrators by including people in the complaints who are not even remotely involved in any unlawful activity, but who are merely sympathetic to the antiabortion movement, by making sweeping discovery requests for confidential materials (including membership lists, appointment books, and telephone records), and scheduling extensive depositions at widely separated times and places. Neither district courts nor magistrates are showing vigilance in policing these blatant abuses of the litigation process. Soundly based motions to dismiss and motions for summary judgment are being denied routinely, forcing innocent persons to stand costly and time-consuming mass trials. Juries are being asked to return general verdicts with only vague guidance, when Supreme Court jurisprudence mandates far more discriminating procedures, including special instructions and special verdicts. Astronomical sums are being spent on attorney's fees to obtain paltry, if any, damages awards and to impose similar costs on defendants of modest means. The principal purpose and calculated effect of these litigation tactics are to chill the exercise of constitutional rights in the antiabortion movement. See generally Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?*, 56 UMKC L. Rev. 287, 309-12 (1988); Hentoff, *The RICO Dragnet*, Wash. Post, May 13, 1989, at A19, col. 1; Mario Cuomo, *Racketeer?* (editorial), Wall St. J., Mar. 9, 1989, at A16, col. 1. See also Califa, *ACLU: RICO Chilling Effect "Enormous,"* NAT'L L.J., June 5, 1989, at 72; Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805 (1990).

411. *McMonagle*, 868 F.2d at 1347.

free speech are fairly specific, if not apparently widely known.<sup>412</sup> Congress should codify these guidelines, strengthen them, provide for discovery and evidentiary limitations, and provide related provisions that will make possible early vindication of litigant and lower court abuse in first amendment litigation. RICO reform legislation provides an appropriate vehicle for making those general changes.

### Y. *Necessities and Forfeiture*

In *Caplin & Drysdale, Chartered v. United States*<sup>413</sup> and its companion decision *United States v. Monsanto*,<sup>414</sup> the Supreme Court held that assets subject to forfeiture under the Comprehensive Forfeiture Act of 1984<sup>415</sup> include assets that were to be used to pay bona fide legal fees and that such a forfeiture was consistent with the sixth amendment right to counsel and due process under the fifth amendment. These decisions settle the constitutionality of such forfeitures. Their wisdom, however, remains a matter for congressional debate.<sup>416</sup>

While few would argue with the proposition that a "robbery suspect . . . has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended,"<sup>417</sup> the interests implicated are somewhat more complicated.<sup>418</sup>

Four situations may be broadly distinguished: (1) wholly innocent defendants (sufficient "clean" funds will probably be relatively easy to identify); (2) white-collar defendants, innocent or not (sufficient "clean" funds will probably be relatively easy to identify); (3) professional or organized crime defendants, innocent or not ("clean" funds, if any, may well be intertwined with "tainted" funds, an insufficient amount of which may be not more than five years old); and (4) indigent defendants, innocent or not (no funds of any kind). Forfeiture issues are crucial only in the category of the professional or organized crime offender; they focus on the process of disentanglement and the ultimate proof of separation of "clean" and "tainted" assets. They are not limited to for-

412. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981).

413. 109 S. Ct. 2646 (1989).

414. 109 S. Ct. 2657 (1989).

415. Pub. L. No. 98-473, 98 Stat. 2044.

416. Justice Harry Blackmun's dissent in the decisions, for himself and Justices William Brennan, Thurgood Marshall and John Paul Stevens, may be read, not only as constitutional, but also as policy arguments. See *Monsanto*, 109 S. Ct. at 2678 (Blackmun, J., dissenting) (stating that the fact "[t]hat a majority of this Court has upheld the constitutionality of the Act . . . will not deter Congress . . . from amending the Act to make clear that Congress did not intend" to seriously undermine the basic fairness of our criminal justice system).

417. *Caplin & Drysdale*, 109 S. Ct. at 2652.

418. See generally Blakey, *Forfeiture of Legal Fees: Who Stands to Lose?*, 36 EMORY L.J. 781 (1987).



feiture of legal fees, but extend to all "necessities," including food, clothing, shelter, and medical care. The basic problem with such forfeitures is that they threaten to render defendants in RICO and similar prosecutions "legally indigent" before trial and conviction.

Four interests may be distinguished in the forfeiture context. First, victims of crime are interested in preventing the use of "their" funds to defend "perpetrators." Second, another class, which is comprised of suspects, defendants, and offenders, is concerned with having "its" funds available to be used for fair trial, counsel, and other "necessities." A third interest is represented by third parties, who want to have the ability to deal in arms length transactions with those suspected or indicted without fear of losing consideration extended in good faith. Fourth, society is involved in each of these interests combined, and, just as importantly, it possesses an interest in maintaining an economically viable defense bar in complex criminal proceedings. The reconciliation of these conflicting interests is not beyond the wit of fair minded people. A court ought to have the discretion to set aside a reasonable sum for necessities, except when an identifiable victim's property is at issue. "Untainted" funds should be used first. The government should not seek revenue enhancement but merely the sterilization of illicit funds. Otherwise, it ought to be viewed as a trustee of the funds for the benefit of innocent persons.

### Z. Labor Disputes

A central purpose of RICO is to vindicate the rights of victims of corruption in the labor-management area.<sup>419</sup> Nevertheless, RICO was not designed to be used as a negotiating tool in the standard collective bargaining context. Litigation in this area, however, is being instituted. Fortunately, district courts act to sanction its most abusive manifestations.<sup>420</sup> One of the least justifiable suits filed in this area is *Texas Air Corp. v. Air Line Pilots, Association International*.<sup>421</sup> Little or no discretion was exercised in joining parties even remotely related to the unions now so deeply involved in the struggle, not yet settled, over the future of Eastern Airlines. Congress should enact a specific amendment that will make clear its intent to leave the parties to resolve their dis-

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419. See generally S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969); Blakey & Goldstock, "On The Waterfront": RICO and Labor Racketeering, 17 AM. CRIM. L. REV. 341 (1980). For a proposal, see App. E, *infra* p. 1067.

420. See, e.g., WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate Sys., 103 F.R.D. 417 (N.D. Cal. 1984) (applying rule 11 sanctions to the use of RICO in a labor dispute).

421. Civ. No. 88-804 (S.D. Fla. 1989). The embattled unions have counterclaimed with their own civil RICO suit. *Texas Air Corp.*, Wall St. J., Oct. 3, 1989, at A4, col. 3. That any substance exists in either suit is questionable.

putes at the bargaining table. This form of litigation abuse ought to be curtailed.

#### IV. CONCLUSION

On February 1, 1990, the Senate Judiciary Committee approved an amended version of Senate Bill 438.<sup>422</sup> The *New York Times* editorialized against the Bill to no avail.<sup>423</sup> The vote was twelve to two.<sup>424</sup> Floor opposition to the measure, however, is assured,<sup>425</sup> and the ultimate outcome is uncertain, as the controversy is hardly settled.<sup>426</sup> House Bill

422. SENATE COMM. ON THE JUDICIARY, AMENDING THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, S. REP. NO. 101-269, 101ST CONG., 2D SESS. 5 (1990) [hereinafter S. REP.]; S. 438, 101ST CONG., 1ST SESS. (1989) (amended version). Brushing aside complaints from consumer groups, Senator Joseph R. Biden, Jr. observed, "Broad language that may be appropriate against the Mafia can be abused when used in garden-variety fraud cases." *Revamping Racketeering Law* (editorial), N.Y. Times, Feb. 2, 1990, at A12, col. 5.

423. The *New York Times* has editorialized:

The Senate Judiciary Committee's vote on a bill masquerading as a "reform" of RICO, the Racketeer Influenced and Corrupt Organizations Act, could provide the year's first indication of Congressional seriousness about ethics and public justice. The bill would remove or weaken the strong civil remedies now available to victims of commercial fraud perpetrated either by mobsters or white-collar professionals who behave like mobsters.

. . . .

The 1970 RICO law could use some improvement, such as denying plaintiffs the right to label defendants as "racketeers" when they sue for fraud unaccompanied by typical mob violence. Otherwise it's a splendid Federal civil fraud law especially suited to 1990. It gets redress from the perpetrators of fraud, not just from the Federal Treasury. And it helps victims by letting them sue privately on their own behalf whether or not the Government prosecutes the perpetrators.

"RICO reform" has been kicking around so long that lawmakers may not have the nerve to vote for it with a straight face.

*RICO Racket in the Senate* (editorial), N.Y. Times, Dec. 1, 1990, at A14, col. 1.

424. S. REP. *supra* note 422, at 10.

425. Biskupic, *An Edgy Senate Committee OKs Relaxation of RICO*, CONG. Q., Feb. 3, 1990, at 329 (reporting that Sen. Alan Cranston announced his opposition after meeting with constituents trying to recover through RICO litigation money invested in worthless bonds sold by Lincoln Savings). Sen. Cranston said: "Civil RICO suits are one of the most effective ways that individuals who have been defrauded by sophisticated financial schemes can recover their losses. . . . We should be strengthening not weakening, the penalties for consumer fraud." *Id.* "We see the tide turning," said Pamela Gilbert, a consumer lobbyist. "We hope to beat the bill on the Senate floor." Hagedorn & Marcus, *Law: Senate Judiciary Committee Approves RICO Reform Bill*, WALL ST. J., Feb. 2, 1990, at B6, col. 2.

426. See Biskupic, *supra* note 425, at 330. Richard Moe, lobbyist for the American Institute of Public Accountants, argued: "The consumer's lobby and plaintiffs' lawyers don't want a change. . . . They get tremendous leverage out of treble damages, attorneys fees, and calling the defendant a racketeer. . . . They are now trying to politicize this by linking it to the savings and loan crises." *Id.* Public Citizen and United States Public Interest Research Group stated: "This nation is suffering through a white-collar crime wave, from insider trading on Wall street to S&L fraud on Main street; from commodities fraud in Chicago to telemarketing fraud in California. It would be fitting cause for citizen outrage if Congress' responses to this avalanche of sleaze is to weaken the laws against fraud." *Id.*

1046 is not moving in the House Judiciary Committee.<sup>427</sup> Instead, Representative William Hughes is continuing to develop the "gatekeeper" approach he espoused in this Symposium.<sup>428</sup>

The principal changes in the reported version of Senate Bill 438 would clarify the ability of state insurance commissioners to recover for injury to state guarantee funds,<sup>429</sup> clarify the ability of federal insurance agencies to recover for money paid out in connection with financial losses,<sup>430</sup> authorize suits by Indian tribes within the government suit

427. *Id.* at 330 (reporting that House Judiciary Committee members are taking a different track, which would complicate efforts to agree on a single RICO overhaul); Hagedorn & Marcus, *supra* note 425, at B6, col. 2 (reporting that the House Judiciary Committee is drafting a different approach).

428. See Hughes, *RICO Reform: How Much is Needed?*, 43 VAND. L. REV. 639 (1990). *But see* Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 27 (1989) (suggesting that the Department of Justice approve all private civil RICO suits, because it is "appropriate for the office of prosecution to be selected as the screening agency"). For a proposal based on the principles of federal prosecution of the Department of Justice, see App. E, *infra* pp. 1063-84. See also Civiletti, *U.S. Department of Justice Principles of Federal Prosecution*, 27 CRIM. L. REP. (BNA) 3277 (Aug. 6, 1980).

429. Section 5, which amends 18 U.S.C. § 1964(c), is amended to add in (c)(1)(A) after "injured":

or a Department of insurance of a State which controls distribution of a fund generated by the regulation of the business of insurance, for injury to the fund in connection with the insolvency or liquidation of an entity engaged in the business of insurance,

It also is amended to add in (c)(1)(B) a new paragraph:

(iv) a Commissioner of insurance of a State if authorized by state law to sue, or by certification of the State Attorney General if required by State law, who has been appointed liquidator or rehabilitator of an entity regulated by such Commissioner, if the injury is to the fund controlled by the department of insurance and is in connection with the insolvency or liquidation of an entity engaged in the business of insurance.

These amendments to S. 438 were added to clarify the authorization of insurance commissions to sue for injury to state insurance funds. S. REP., *supra* note 422, at 18. The amendments would set aside the result in *Corcoran v. American Plan Corp.*, 886 F.2d 16, 20-21 (2d Cir. 1989) (holding that the superintendent of insurance lacked standing to sue for injury to a fund when fraud was directed toward insurance company). These provisions move in the right direction. They generally leave unremedied under RICO's treble damages provisions, however, fraud against insurance companies themselves, even when they are taken over for insolvency by state commissioners. Treble damages recovery is limited to damage to the fund, not the insolvent entity. In the absence of a record of misuse of RICO by public officials, this narrowing of the statute is unjustified.

430. Section 5, which amends 18 U.S.C. § 1964(c), is amended to add in (c)(1)(A) after "United States": "including monies paid out by a governmental corporation by operation of statute requiring compensation of persons for financial loss." This amendment to S. 438 was added to clarify the authorization "of Federal governmental corporations to sue under RICO for damages arising out of the savings and loan and financial crisis. . . ." S. REP. *supra* note 422, at 18; see *supra* note 91 and accompanying text. It moves in the right direction, but it does not go far enough. Left generally unremedied under RICO's treble damages provisions are injuries to the financial institutions themselves. See *supra* note 224 and accompanying text. In the absence of a record of misuse of RICO by public officials, this narrowing of the statute is unjustified. Finally, the right of the Securities Investor Protection Corp. to sue remains unclarified. See *supra* note 221 and accompanying text.

category,<sup>431</sup> authorize the recovery of attorney's fees,<sup>432</sup> circumscribe the use of RICO in certain first amendment areas,<sup>433</sup> and limit the retroactive features in the original draft.<sup>434</sup> A bad bill made better, however,

431. Section 5, which amends 18 U.S.C. § 1964(c), is amended in (c)(1)(B) to add:

(iii) the chief legal officers, or other legal officer authorized to sue, of an Indian tribe as defined by 25 U.S.C. § 450(b), if the injury is to the business or property of the Indian tribe,  
or

This amendment is a welcome addition. *See supra* note 217 and accompanying text. Unfortunately, a parallel amendment was not made to the definition of "government entity" under paragraph (10).

432. Section 5, which amends 18 U.S.C. § 1964(c), is amended to add in (c)(2)(A) after "civil action": "and the costs of the civil action including a reasonable attorneys fee." The amendment is a welcome addition. *See supra* note 226 and accompanying text. Unfortunately, it still leaves open issues that should have been clarified. *See supra* note 260 and accompanying text.

433. A new § 3 is added:

#### NON VIOLENT PUBLIC SPEECH

Section 1962 of title 18, United States Code, is amended by adding the following at the end thereof:

(e) For purposes of this chapter, the term "racketeering activity" shall not include participation in, or the organization or support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage, and no action may be maintained under this chapter based on such activities.

This amendment to S. 438 was added "to prevent the use of RICO actions as a means of suppressing or penalizing the exercise of First Amendment freedoms." S. REP. NO., *supra* note 422, at 7. The amendment's goals are welcome. *See supra* note 407 and accompanying text. The means chosen, however, may not achieve the end. The amendment will apply to criminal and civil proceedings, as it amends 18 U.S.C. § 1962. The Committee Report, therefore, should have indicated that it would be improper to raise the first amendment bar in general fraud or other criminal or civil proceedings. *See Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (holding that "[t]he State may . . . prohibit . . . speech related to illegal behavior"); *Combs v. Bakker*, 886 F.2d 673, 678 (4th Cir. 1989) (upholding a civil action under RICO for fraudulent lifetime partnership in a religious enterprise). Courts may reach this result without clarifying language. It would have been helpful if the Committee Report had been explicit. No doubt litigation will be made more difficult because it was not included. The language chosen may not have the effect of making future abortion related litigation beyond the pale. *See Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1349 (3d Cir.) (holding that jury award was proper, because it was based on forcible entry that went beyond "mere dissent and publication of . . . political views"), *cert. denied*, 110 S. Ct. 261 (1989). In fact, the language may be read more easily to validate *McMonagle* type litigation, which is obviously not the Committee's intent. Finally, by including "other than economic or commercial gain or advantage," the amendment unjustifiably discriminates against the valid exercise of first amendment freedoms in other contexts. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (invalidating state antipicketing law under the first amendment in context of a labor dispute).

434. Section 9 is rewritten to read:

#### EFFECTIVE DATE

This Act and the amendments made to this Act shall apply with respect to civil actions commenced after the date of the enactment of this act.

The original draft of the effective date provision applied to pending suits. S. REP., *supra* note 422, at 24; *see supra* note 331 and accompanying text. Controversy over the application of the legislation to the failed Lincoln Savings and Loan Association led to the amendment. *See supra* note 101 and accompanying text. To underscore the modification in the Judiciary Committee markup, Senator Dennis DeConcini "waved a large tablet of paper toward reporters and cameras

remains a bad bill. Unless substantial additional changes are made, Congress should not pass Senate Bill 438.

In January 1931, Warner Bros.-First National released a film entitled *Little Caesar*.<sup>435</sup> Based on a book by W.R. Burnett,<sup>436</sup> the movie

and recited the words on the page: "The RICO Reform Bill Does Not Apply to the Lawsuit Against Lincoln." Biskupic, *supra* note 425, at 329.

The *New York Times* editorially commented:

Initially [S. 438] . . . would have wiped out pending lawsuits like the claim of California investors against Charles Keating, whose Lincoln Savings and Loan Association sold them uninsured and now worthless junk bonds. The bill's sponsor, Senator Dennis DeConcini of Arizona, was shamed into dropping that provision because he is one of the "Keating Five," the Senators whom Mr. Keating brazenly enlisted in his attack on Federal regulators.

That leaves at least two major problems. One is that Senator DeConcini's willingness to preserve lawsuits like the Keating case doesn't bind his Congressional colleagues; other misguided "reformers" may move to restore language that exempts pending cases. Another is that the bill would eliminate many treble-damages actions in the future. Future Charles Keatings who are powerful or clever enough to escape Federal regulation wouldn't have to fear treble-damage suits from defrauded customers.

*RICO Racket in the Senate* (editorial), N.Y. Times, Feb. 1, 1990, at A14, col. 1.

The editorial writers also might have commented that the bill is still retroactive to conduct engaged in before its effective date for which a suit is not filed. Approximately 1500 pending civil RICO suits will not be retroactively affected. *See supra* note 332. The number of suits that will be retroactively affected, however, far exceeds 1500. A victim under RICO may bring a claim for relief within four years. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156 (1987). The period of limitations does not begin to run until the victim knows or should have known of the claim. *See, e.g., Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1484, 1489-90, 1494 (D.C. Cir. 1989). Suit will be possible, therefore, for at least four years after the effective date of the legislation for conduct that occurred before its effective date. Approximately 1000 suits are filed each year. *See supra* note 46. As such, while 1500 suits are saved by the new retroactive provision, as many as 4000 suits still will be retroactively subject to the new rules. The litigation that will be affected also may be expected to come from the current savings and loan, securities, commodities, insurance, and pension fund scandals. It is misleading to suggest, therefore, that the legislation is no longer retroactive.

435. *Little Caesar* (Wisconsin/Warner Bros. Screenplay Series 1981) [hereinafter *Script*]. *Little Caesar*, which was directed by Mervyn LeRoy, took 31 days to shoot in July and August of 1930. A. GANSBERG, *LITTLE CAESAR: A BIOGRAPHY OF EDWARD G. ROBINSON* 41 (1983). Warner Bros., however, withheld it from release until its January 21, 1931, premiere in New York City, hoping to get the most mileage out of it. *Id.* at 42-43. The movie was "an immediate smash hit, surpassing all box office records of Warner's . . . earlier gangster [movies] . . ." Peary, *Introduction: Little Caesar Takes over the Screen, Script, supra*, at 25 [hereinafter *Peary Script*]; A. GANSBERG, *supra*, at 47 (stating that it is "one of the highest grossing films of 1931"). Along with William Wellman's *The Public Enemy* (Warner Bros. 1931), which starred James Cagney, and Howard Hawks's *Scarface* (United Artists 1931), which starred Paul Muni, it became one of the classic gangster films of the 1930s. J. GABREE, *GANGSTERS: FROM LITTLE CAESAR TO THE GODFATHER* 15 (1973); A. KNIGHT, *THE LIVELIEST ART* 161-62 (1957). In these three films, all of the basic icons of the genre were established: clothes, as a mark of social standing; cars, as a special tool of violence; guns, as an instrument of unbridled power; telephones, as an extension of the power to dominate; women, as either mothers or mistresses; and the city, as the background for the gangster's rise and fall. *Id.* at 17-29; *see also* S. KAMINSKY, *AMERICAN FILM GENRES* 23-43 (1957). The basic character of the movie gangster also was established:

The gangster believes that might makes right. He cares nothing for other people's moralities. He lives by a code, but one drawn so narrowly in his own interest that it doesn't act as a limit on his behavior. His business is crime—bootlegging, gambling, prostitution, drugs. He

was modeled loosely on the life of Alphonse Capone.<sup>437</sup> The principal

lets nothing stand in his way. His weapons are anything that will do the job. He lives outside society, preying on it, undermining it; left unchecked he would destroy it.

Politically, the gangster is an anarchist, even though his own institution, the mob, is rigidly authoritarian. Wherever he strikes at society he weakens it, destroys its self-respect, leaves it less able to function and survive. His attitude toward society is reflected in the environment he inhabits: he lives in a world of sirens and gunfire, of dark, menacing streets and threatening shadows. His efforts to "be somebody" are successful only at the expense of other people, and he spares no one to satisfy his drive to power. He is tough, cold-blooded, ruthless, brutal, often unbalanced, always as cunning as he is evil.

But he has that other side. If he is the personification of much that is wrong with America, he is also an expression of American ideals. He achieves many of the goals—power, money, fame, status—that are held out by society as symbols of success. What is he if not the rugged individualist, the aggressive entrepreneur. He vanquishes his enemies, overcomes often incredible odds to come out on top. His energy, dedication, and ingenuity make us admire him, in some films even love him.

J. GABREE, *supra*, at 13-14.

436. W. BURNETT, *LITTLE CAESAR* (1929). During a long and prolific career, Burnett wrote a number of classics, including *High Sierra* in 1940 and *The Asphalt Jungle* in 1949. *Peary Script*, *supra* note 435, at 13. Burnett conceived of the *Little Caesar* story after reading of the rise and fall of the Sam Cardinelli gang in Chicago, Illinois. *Id.* Thus, Rico's story originally was not patterned after the life of Alphonse Capone.

437. Jack L. Warner says he bought the Burnett novel because he thought Rico "was a thinly disguised portrait of Al Capone." J. WARNER & D. JENNING, *MY FIRST HUNDRED YEARS IN HOLLYWOOD* 199 (1964). Robert N. Lee and Francis Edwards Faragoh were assigned to do the shooting script. *Peary Script*, *supra* note 435, at 14. Lee's initial draft retained the elements from the novel that made Rico resemble Capone (proletariat Italian origins, rabidly ambitious gunman, fastidious dress, etc.). Lee also transformed Burnett's "Big Boy" into a refined and polished figure, so that Rico alone would resemble Capone. Diamond Pete Montana was modeled after Diamond Jim Colosimo, the boss in Chicago when Capone arrived from New York; he based Rico's shooting of Alvin McClure, the new crime commissioner, on the murder in 1926 of William McSwiggin, an assistant states attorney of Cook County. Faragoh's final script also added other elements, including the funeral scene, which was modeled on the 1924 procession for Dion O'Banion, a Chicago gangster, and the final scene, which ended with the Mother of Mercy line. *See generally id.* at 16-17.

The literature on Capone and his era in Chicago is extensive. One of the best biographies is J. KOBLER, *CAPONE: THE LIFE AND WORLD OF AL CAPONE* (1971). Contemporary material is reviewed in the classic J. LANDESCO, *ORGANIZED CRIME IN CHICAGO* (1968 reprint). The Special Senate Committee to Investigate Organized Crime in Interstate Commerce, chaired by Senator Estes Kefauver, also traced the rise and fall of Capone. *See THE KEFAUVER REPORT ON ORGANIZED CRIME* 31-42 (Didier ed. undated); E. KEFAUVER, *CRIME IN AMERICA* 53-57 (1951). The story of Capone's downfall is told in F. BUSCH, *ENEMIES OF THE STATE* 174-231 (1954) and E. NESS & O. FRALEY, *THE UNTOUCHABLES* (1947).

In March 1929 a group of Chicago citizens visited President Herbert Hoover and told him that their city was ruled by Capone. Hoover then directed the Department of Justice and the Treasury Department to investigate and prosecute him. H. HOOVER, *MEMOIRS: THE CABINET AND THE PRESIDENCY, 1920-1933* 276-77 (1952). A two-pronged strategy was developed. Frank J. Wilson headed up a special unit of the Internal Revenue Service that directed its attention to Capone's tax returns. F. BUSCH, *supra*, at 196. Eliot Ness was in charge of a special unit of the Prohibition Bureau that directed its attention to Capone's beer empire. *See E. NESS & O. FRALEY, supra*. Capone was charged with and convicted of tax evasion. *See Capone v. United States*, 56 F.2d 927 (7th Cir.), *cert. denied*, 286 U.S. 553 (1932). A separate indictment for a violation of the prohibition law was not tried, because of the sentence on the tax charge, for which he ultimately served 10 years. F. BUSCH, *supra*, at 229. While Capone was one of this Nation's most notorious gangsters, Capone

character in the movie was Caesar Enrico Bandello or "Little Caesar" or "Rico," played by Edward G. Robinson.<sup>438</sup> The movie portrays the rise and fall of an underworld figure; it tracks his rise from an obscure gas station robber to a powerful leader in organized crime, who ultimately meets a tragic end, hiding out in a flop house, being shot in an alley by police bullets, and gasping incredulously, "Mother of Mercy—is this the end of Rico?"<sup>439</sup> Robinson's characterization of Rico became the prototype of the film gangster, and the end line of the movie is one of the most famous in film history.

Less well remembered is the portrayal by veteran character actor Sidney Blackman of "Big Boy," the upperworld figure behind the rackets. Big Boy was not brought to justice in the movie, either by police bullets or by prosecution.<sup>440</sup>

himself may have summed up most aptly the public's ambivalent attitude toward him: "[T]hey called Capone a bootlegger . . . What's Al done? He's supplied a legitimate demand. . . Some call it racketeering. I call it a business." J. KOBLER, *supra*, at 313.

438. Like all great casting stories, the role of Rico did not just fall into Robinson's lap. See generally A. GANSBERG, *supra* note 435, at 40. Mervyn LeRoy had seen Robinson in *The Racket*, a successful Broadway theater production, when it played in Los Angeles. Warner, however, wanted Clark Gable for the part; Gable was tested, but he did not get it, because Warner thought his ears were too big and his features too wide-eyed. J. WARNER, *supra* note 437, at 200. Today *Little Caesar* is remembered largely for the image of Robinson snarling, "Yeah, yeah." In fact, these lines were not in the original script. Peary Script, *supra* note 435, at 169-72. LeRoy added a final scene in which Rico, down and out in the flophouse, overhears two bums reading a newspaper that contains a put-down on Rico, who then calls Flaherty, a policeman, and challenges him in a conversation, in which the "Yeah, yeah" lines appear; they became Robinson's trademark. A. GANSBERG, *supra* note 435, at 42.

439. The last line in Burnett's novel is: "'Mother of God,' he said, 'is this the end of Rico?'" BURNETT, *supra* note 436, at 158. In the late 1920s, however, the Motion Picture Producers and Distributors of America, which was organized in 1922 in the wake of a series of scandals in the movie industry, advised members "just how far they dared go." A. KNIGHT, *supra* note 435, at 112. The rules were quaintly Victorian: "if virtue were always rewarded and sin punished, if good eventually triumphed and evil doers perished miserably, the law of God, man and drama would be simultaneously satisfied." *Id.* Nevertheless some films were censored. "Mother of God" became, therefore, "Mother of Mercy." M. FREEDLAND, *THE WARNER BROTHERS* 55 (1983). Duly edited, the question will be "remembered . . . as long as there are pictures." *Id.*; see also A. GANSBERG, *supra* note 435, at 42.

440. Peary's essay, otherwise remarkable, does not, for example, even mention "Big Boy" in its treatment of "The Meaning of Little Caesar." Peary Script, *supra* note 435, at 17-21. But see S. KAMINSKY, *supra* note 435, at 36. Stuart Kaminsky stated:

In the gangster film, the gang is often a loose feudal system with individual war lords held in two by one strong regent who reports to a mysterious boss or bosses. The bosses remain above the gang, anonymous, aloof, but in control. When the bosses are revealed, we find they are "upper class," affluent, influential, wealthy. They may be idle rich (Sidney Blackmer in *Little Caesar*), bankers and government officials (*Bullets or Ballots*), or apparently respectable middle-class businessmen (Jack Elam in *Baby Face Nelson* and Fred Clark in *White Heat*). It is these upper- and middle-class bosses, hiding behind a gang leader of courage, whom we are taught to hate in the gangster films. They, in the midst of the Depression we know exists in the films of the 1930s (but which we seldom see), are accumulating wealth, taking what there is of available money, wearing tuxedos, and living off the labor of

It is suggested that RICO the federal statute at least was titled after Rico the film character.<sup>441</sup> Be that as it may,<sup>442</sup> the statute in fact was designed to change the ending of the movie. Racketeers—like Rico—should not be shot by the police. They are entitled to due process. Big Boys—racketeers as much as their underworld counterparts—should not be above the law.<sup>443</sup> They, too, deserve due process as

ambitious gangsters who have risen from the working classes. We see the gangster take the risks, hold the small gang bosses in line, protect his own position, exact tribute from the workers who don't have enough for themselves, and finally, inevitably, fall, only to be replaced by another like himself while the bosses continue to be protected. This pattern is apparent in *Little Caesar*, in which the Big Boy is not caught or punished, and can be seen, strikingly, in the quasi-gangster film *On the Waterfront*, where Lee J. Cobb is the ambitious gangster who fronts for the bosses.

In contrast to the upper-class manipulators—the social chairmen of the board of crime—are the workers, the on-the-line gangster. Between these extremes are the tragic figures of the genre, the Ricos, members of a minority trying to get ahead. The attainable goal of such men is to replace the man who reports to the bosses, to replace a man who, like himself, also has risen from a lower class. More recently, in films like *The St. Valentine's Day Massacre*, *The Godfather*, *The Valachi Papers*, and *Honor Thy Father*, we see an ironic twist—the immigrant gangsters as bosses, controlling destinies and dividing spoils at business-like meetings of the board.

*Id.*

441. Judge Milton I. Shadur wondered, “[g]iven . . . [RICO’s] very awkward title and the convenient acronym it generated . . . [whether] the person who christened the legislation was a movie buff with a sense of humor . . . [for in] ‘*Little Caesar*,’ the first Hollywood gangster movie of the ‘30s . . . , Edward G. Robinson played the thinly disguised Al Capone leading role—and was named ‘Rico.’” *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982). Judge Shadur’s question was first raised by *Newsweek* reporters, Tony Marro and Elaine Shannon, in a story on RICO that appeared in Marro & Shannon, *Are Prosecutors Going Wild over RICO?*, *Legal Times of Wash.*, Oct. 8, 1979, at 32, col. 1. They reported that G. Robert Blakey, “who had a major role in drafting the statute . . . will neither admit nor deny that the title was [so] construed.” *Id.* For an alternative, but not necessarily inconsistent, explanation of the development of RICO’s title, see Blakey & Gettings, *supra* note 1, at 1025.

442. John Ford’s *The Man Who Shot Liberty Valance* (Paramount 1962), which starred James Stewart and John Wayne, makes the point that a legend surrounding an incident may be more important than the incident. In Ford’s classic western, a newspaperman learns that Wayne, a gunfighter, not Stewart, a rising political figure, who is about to be nominated for Congress, shot Valance, a notorious gunfighter. When faced with either printing the truth or continuing to promote a political persona, the newspaperman responds, “This is the West, Sir. When the legend becomes fact, print the legend.” *Id.*

443. Edmund Burke put it well to his son in 1793: “A very great part of the mischiefs that vex the world arises from words. People soon forget the meaning, but impression and the passion remain.” E. BURKE, *SELECTED WRITING AND SPEECHES* 269 (P. Stanlis ed. 1963). Contrary to the contentions of legislative reformers, “racket” and “racketeer” are not words limited to “organized crime” in the classic mobster sense. Etymologically, the basic term is probably onomatopoeic. 8 *THE OXFORD ENGLISH DICTIONARY* 94 (2d ed. 1989). Its principal meaning is “noise;” its secondary meaning is “reveling” or “merrymaking;” and its tertiary meaning is “a fraudulent scheme, enterprise or activity.” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE* 1871 (1966). Murray I. Gurfein wrote:

Racketeering, a term loosely applied to a variety of criminal schemes has not yet received exact legal definition. . . . It . . . applies to the operation of an illegal business as well as to the illegal operation of a legal business. . . .



much as they deserve to be brought to justice. If RICO contributes to

The word gained currency in the 1920s, but its origin remains obscure. . . . [T]he most plausible [theory notes that the] . . . word racket has long been used to describe a loud noise and hence a spree or party or "good time." In the 1890s social clubs of young men in New York City, under the auspices of political leaders, gave affairs called rackets; since among their number there were members of neighborhood gangs, it was found easy to coerce local tradesmen to buy tickets.

Gurfein, *supra* note 316, at 45. Hence, obtaining money by coercion or fraud became racketeering. Calling business fraud anything else, therefore, is a euphemism. On the role of euphemisms in encouraging public and official reluctance to enforce the law and providing rationalizations for the violators themselves in the area of white-collar crime, see TASK FORCE REPORT, *supra* note 82, at 104-08 (stating that "most white collar crime is not at all morally neutral"); D. CRESSEY, *supra* note 82, at 102 (noting that the fact that embezzlers rationalize their conduct as different from theft is an important factor in their behavior pattern).

Objection to RICO's racketeer label, however, may go deeper. Indeed, Professor Harry Elmer Barnes, one of the Nation's leading sociologists, argued in 1934 that it was in part the failure to bring white-collar crime to justice that contributed to the developments during Prohibition of organized crime:

Both crime and racketeering of today have derived their ideals and methods from the business and financial practices of the last generation . . . . It is a law of social psychology that the socially inferior tend to ape the socially superior. . . . It was inevitable that, sooner or later, we would succeed in "Americanizing" the "small fry"—especially the foreign small fry. . . . All was relatively safe, since the legal profession was already ethically impaired through its affiliations with the reputable racketeers . . . . The idea that when prohibition is ended the racketeers . . . will meekly and contritely turn back to blacking shoes . . . is downright silly. They will apply the technique they have mastered to the dope ring. . . . They will find crafty lawyers all too willing to defend them from the "strong arm" of the law for value received. . . . So long as the lawless can get protection in return for keeping corrupt politicians in office, we shall not be free from the crime millstone about our necks.

"Rackets" Hearings, *supra* note 82, at 710-11 (testimony of Harry Elmer Barnes). The origins of many modern fortunes are in the conduct of nineteenth century Robber Barons who could just as easily be referred to as racketeers. Antipathy toward identifying the affinities between unlawful conduct in the upperworld and the underworld may lie, therefore, not so much in resentment toward a misplaced comparison, but toward the messenger who speaks the truth. See E. ROSOW, *BORN TO LOSE: THE GANGSTER FILM IN AMERICA* 11 (1978). Eugene Rosow observes:

The gangster's origins in industrial America can be found in the actions and attitudes of men like Cornelius Vanderbilt, Jim Fisk, Jay Gould, Andrew Carnegie, John D. Rockefeller, and J.P. Morgan—the captains of capital who dominated America's age of enterprise. . . . The Robber Barons, the richest and most powerful men in America, were so named by journalist E.L. Godkin because they behaved like the feudal German noblemen who extorted money from passersby and acted as a law unto themselves. They were strongly etched in the public imaginations as models of successful Americans. . . .

"'Rico's a smart guy! Everything's going to be all right,' whispers Otero to Tony as Little Caesar tells the gang his plans for a holdup. 'Well, Sir, he is a smart man,' was the repeated defense made of the famous persons who had so quickly pre-empted railroads, ore fields and harbor rights. Jay Gould was universally envied for his smartness and so was Jim Fisk smart; . . .; the age admired him without stint . . . . What Fisk did, like other Robber Barons, was to amass a fortune as quickly and ruthlessly as possible.

*Id.* Indeed, the gangster in the 1930s movie may be seen as a perverse incarnation in art of the Horatio Alger hero. A. BERGMAN, *WE'RE IN THE MONEY* 7-9 (1971); see S. KAMINSKY, *supra* note 435, at 24.

The gangster films of the 1930s, of which *Little Caesar* was the first, were generally semi-conscious attempts to deal with the Depression and the public's shaken confidence in Ameri-

equal justice under law, for those in the upperworld as well as for those in the underworld, its end through so-called reform legislation, designed by the Big Boys of this world, is not in the public interest.<sup>444</sup>

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can economics, politics, and myths of the self-made man. . . . Specifically the business milieu of the gangster film reflects our view of American business enterprise in general, even if we happen to be part of a business structure which does not conform to this view.

*Id.* But see A. KNIGHT, *supra* note 435, at 238 (stating that “[i]f there was any element of escapism in these films, it lay in their tendency to blame isolated individuals for what were in fact national problems”); see also Jowett, *Bullets, Beer and the Hays Office: Public Enemy* (1931) in AMERICAN HISTORY/AMERICAN FILM: INTERPRETING THE HOLLYWOOD IMAGE 69 (J. O’Connor & M. Jackson eds. 1987). “[T]he comparison between the gangster and the grasping, well-organized, business tycoons . . . must have been obvious [to movie audiences]. The gangster embodied both the best and the worst elements in the American ideal . . . .” *Id.*; see also Yates, *The Godfather Saga: The Death of the Family*, in MOVIES AS ARTIFICES: CULTURAL CRITICISM OF POPULAR FILM 198-99 (M. Marsden, J. Nachbar & S. Grogg eds. 1982). John Yates observes:

The *Godfather* and its sequel [are about] American corruption . . . . [Francis Ford] Coppola’s mobsters constantly refer to themselves as “businessmen.” The meeting of the heads of the families in *Part I* mirror the meeting in *Part II* of Michael, Hyman Roth, and Batista with the heads of the various U.S. corporations. “We’re bigger than U.S. Steel,” Roth boasts later to Michael. It is clear that size, and the ruthless will to do anything to achieve that size, are the only differences between U.S. Steel and the Mafia. The business of America is business, as Calvin Coolidge said; it’s what the country is all about, and that core is rotten in *The Godfather*.

*Id.* Coppola himself said of the *Godfather*:

I always wanted to use the Mafia as a metaphor for America. If you look at the film, you see that it’s focused that way. The first line is “I believe in America.” I feel that the Mafia is an incredible metaphor for this country. Both the Mafia and America have roots in Europe. America is a European phenomenon. Basically, both the Mafia and America feel they are benevolent organisations (sic). Both the Mafia and America have their hands stained with blood from what it is necessary to do to protect their power and interests. Both are totally capitalistic phenomena and basically have a profit motive. But I feel that America does not take care of its people. America misuses and shortchanges its people; we look to our country as our protector, and it’s fooling us, it’s lying to us. And I thought the reason the book was so popular was that people love to read about an organisation (sic) that’s really going to take care of us. When the courts fail you and the whole American system fails you, you can go to the Old Man—Don Corleone—and say, “Look what they did to me,” and you get justice.

Farber, *Coppola and the Godfather*, in 41 SIGHT AND SOUND 217, 223 (Autumn 1972) (quoting Francis Ford Coppola). Some confirmation of Coppola’s artistic judgment may be seen in the award of Oscars to *The Godfather* in 1972 and *The Godfather II* in 1974. ALMANAC, *supra* note 93, at 357. It also may be seen in that *The Godfather* (\$86,275,000) and *The Godfather II* (\$30,673,000) are among the top money-making films of all time. *All-Time Film Rental Champs*, VARIETY, Jan. 20, 1988, at 26, 26-27. Mario Puzo, who wrote the script for the *Godfather* series with Coppola, shares Coppola’s judgment on the relationship between the Mafia and business. M. Puzo, THE GODFATHER PAPERS AND OTHER CONFESSIONS 70, 225 (Fawcett Crest) ed. undated. Puzo’s best selling *The Godfather* (1969) also remains in print in paperback. The fate of RICO may well depend on whether or not life imitates art.

444. After this Article went to print, Michael Milken pleaded guilt. The plea vindicated “the whole prosecutorial effort” against Milken, according to Attorney General Richard Thornburgh. See Cohen, *Milken Pleads Guilty to Six Felony Counts*, Wall St. J., April 25, 1990, at A12, col. 6. The plea also underscores the need for RICO to remain a strong weapon to battle fraud in this country. See *supra* note 119 and accompanying text.

APPENDIX A  
 Chart of Comparison: Federal and State  
 RICO Legislation

	Federal	Hawaii	Pennsylvania	Florida	Arizona
<b>EFFECTIVE AMENDED</b>	Oct. 15, 1970 Oct. 1, 1979, 1984, 1986, 1988	May 19, 1972 June 9, 1988, 1990	June 6, 1973 June 27, 1978 Dec. 4, 1980	Oct. 1, 1977 June 23, 1979, 1981, 1983, 1984, 1985 Yes Fla. Stat. § 895	Oct. 1, 1978 Apr. 27, 1980, 1982, 1985, 1986
<b>CRIMINAL ACTION</b>	Yes 18 U.S.C. § 1963	38 Haw. Rev. Stat. § 842	Yes 18 Pa. Cons. Stat. Ann. § 911	Yes Fla. Stat. § 895	Yes Ariz. Rev. Stat. Ann. § 13-2313
<b>ACTS</b>					
1. Proceeding allowed	NP NP NP	NP NP NP	Yes § 911(e)(2) Yes § 911(e)(2) or Commonwealth § 911(d)(1)	NP NP	NP NP Superior § 13-2313
2. Brought by -AG -DA 3. Court	Yes § 1962(a)	Yes § 842-2(1)	Yes § 911(b)(1)	Yes § 895.03(1)	Yes § 13-2312A
4. Prohibited Activities -investment of \$ from pattern or debt -investment or control through pattern or debt -participation through pattern or debt -conspiracy to do the above 5. Pattern	Yes § 1962(b) Yes § 1962(c) Yes § 1962(d) 2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excluding imprisonment § 1961(5) Yes § 1961(1)	Yes § 842-2(2) Yes § 842-2(3) NP NP	Yes § 911(b)(2) Yes § 911(b)(3) Yes § 911(b)(4) 2 rel., 1 after eff. date § 911(b)(4)	Yes § 895.03(2) Yes § 895.03(3) Yes § 895.03(4) 2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior § 895.02(5)	Yes § 13-2312A Yes § 13-2312A Yes § 13-2312B NP NP
6. Predicate offenses	Yes § 1961(3) Yes § 1961(4)	Yes § 842-1 Yes § 842-1 Yes § 842-1	Yes § 911(h)(1) Yes § 911(h)(2) Yes § 911(h)(3)	Yes § 895.02(1) NP Yes § 895.02(3)	Yes § 13-2301D(4) NP Yes § 13-2301D(2) Knowing § 13-2312C
7. Person	NP	NP	NP	Criminal Intent § 895.03(1)	
8. Enterprise					
9. State of mind					

STATE RICO SURVEY (continued)

	Federal	Hawaii	Pennsylvania	Florida	Arizona
SANCTIONS	10. Sanctions -imprisonment	up to 10 yrs. \$ 842-3	Fel. 1 § 911(c)	Fel. 1, § 895.01(4)	Class 3 Fel. § 13-2312C
	-fine	up to \$10,000 \$ 842-3	Fel. 1 § 911(c)	Up to 3x gain or harm § 895.04(2)	Class 3 Fel. § 13-2312C
	-forfeiture -costs	Yes § 842-3 NP	NP NP	NP NP	NP NP
CIVIL SUIT	11. Injunctive relief -restraining order	NP	Yes § 911(d)(1)(2) NP	NP	Yes § 13-2314C
	-racketeering lien	NP	NP	Yes § 895.07	Yes § 13-2314-02
CIVIL SUIT	12. Proceeding allowed	Yes § 842-8	Yes § 911(d)	Yes § 895.05	Yes § 2314-02
	13. Brought by -AG	Yes §§ 842-5, -6, -8(b)	Yes § 911(e)	Yes § 895.05(5)	Yes § 13-2314A
	-DA	NP	Yes § 911(e)	Yes § 895.05(5)	Yes § 13-2314A
	-Private Party	Yes § 842-8(c)	NP	Yes § 895.05(6)	Yes § 2314A
	14. Court	Circuit §§ 842-5, -6, -8	Common Pleas or Commonwealth § 911(d)(1)	Circuit § 895.05(1)	Superior § 13-2314B
	15. Burden of Proof -Law	NP	NP	NP	Preponderance § 13-2414J
	-Equity	NP	NP	NP	Preponderance § 13-2314J
	16. Provision for innocent parties	Yes § 1964(a)	Yes § 842-8(a)	Yes § 911(d)(1)(ii)	Yes § 13-2314B
	17. Preliminary relief	Yes § 1964(b)	Yes § 842-8(b)	Yes § 911(d)(2)	Yes § 13-2314C
	-harm requirement	NP	NP	NP	NP
-bond is an option	Yes § 1964(b)	Yes § 842-8(b)	Yes § 911(d)(2)	Yes § 13-2314C	
18. -Showing for relief -general	NP	NP	NP	NP	
-no special	NP	NP	NP	NP	

## STATE RICO SURVEY (continued)

	Federal	Hawaii	Pennsylvania	Florida	Arizona
19. Scope of equitable relief	Yes § 1964(a)	Yes § 842-8(a)	Yes § 911(d)(1)(i)	Yes § 895.05(1)(a)	Yes § 13-2314D(1)
-divest	Yes § 1964(a)	Yes § 842-8(a)	Yes § 911(d)(1)(i)	Yes § 895.05(1)(b)	Yes § 13-2314D(2)
-restrict	Yes § 1964(a)	Yes § 842-8(a)	Yes § 911(d)(1)(ii)	Yes § 895.05(1)(c)	Yes § 13-2314D(3)
-dissolve	Yes § 1964(a)	Yes § 842-8(a)	NP	Yes § 895.05(1)(c)	Yes § 13-2314D(3)
-reorganize	NP	Yes § 842-5	Yes § 911(d)(1)(ii)	Yes § 895.05(1)(d)	NP
-revoke permits	NP	Yes § 842-5(2)	Yes § 911(d)(1)(ii)	Yes § 895.05(1)(e)	NP
-forfeit charter	NP	damages § 842-8(c)	NP	3x no punitive § 895.05(7)	3x § 13-2314A
20. Scope of legal relief	3x § 1964(c)	Yes § 842-8(c)	NP	Yes § 895.05(7)	Yes § 13-2314A
-amount	Yes § 1964(c)	Yes § 842-8(c)	NP	Yes § 895.05(7)	Yes § 13-2314A
-costs	Yes § 1964(c)	Yes § 842-8(c)	NP	Yes § 895.05(7)	Yes § 13-2314A
-attorney's fees	Yes § 1964(c)	Yes § 842-8(c)	NP	Yes § 895.05(7)	Yes § 13-2314A
21. Type of property subject to forfeiture	Yes § 1963(b)(1)	NP	NP	Yes § 895.05(2)(a)	Yes § 13-2314D(6)(a), (b)
-real property	Yes § 1963(b)(2)	NP	NP	Yes § 895.05(2)(a)	Yes § 13-2314D(6)(a), (b)
-personal property	Yes § 1963(m)	NP	NP	Yes § 895.05(2)(a)	Yes § 13-2314D(6)(c)
-money	Yes § 1968	Yes § 842-10	Yes § 911(f)	Yes § 895.06	Yes § 13-2315
-may substitute other property if forfeited property is not available	NP	NP	NP	Yes § 895.05(3)	NP
22. Civil investigation demand (subpoena &/or interrogatory)	NP	NP	NP	Yes § 895.05(2)(b)	NP
23. Seizure without process in certain instances	NP	NP	NP	Yes § 895.05(2)(b)	NP
24. Relation back	NP	NP	NP	Yes § 895.05(7)(a)	NP
25. Jury trial	NP	NP	NP	NP	NP
<b>PROPERTY SUBJECT</b>					
<b>PROCEDURE AND PRIORITY</b>					

STATE RICO SURVEY (continued)

	Federal	Hawaii	Pennsylvania	Florida	Arizona
26. Estoppel	Yes § 1964(d) NP	Yes § 842-8(d) NP	Yes § 911(d)(3) NP	Yes § 895.05(8) Yes § 895.05(9)	Yes § 2314G Yes, but not in action by DA § 13-2314K Yes § 13-2314N
27. Intervention by State					
28. Civil suit not precluded by criminal action	NP	NP	Yes § 911(d)	Yes § 895.05(11)	NP
29. Priority of individual over State to compensation	NP	NP	NP	Yes § 895.05 (7)(b)	NP
30. Fund for invest. & prosec.	NP	NP	NP	NP	§ 2314.01 NP
31. Reciprocity of enforcement	NP	NP	NP	5 yrs. susp. § 895.05(10)	7 yrs. after actual discovery of violation
32. Statute of limitations	NP	NP	NP		§ 2314H Fair Meaning § 13-104
33. Construction	Liberal Pub. L. No. 91-452 § 904(a) NP	Fair Import § 701-104 NP	Fair Import § 105 Generally § 1 1925 Yes § 911(a)	Strict § 775.021(1) NP	NP
34. Severability					NP
35. Findings & Intent	Yes Pub. L. No. 91-452 § 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

	Rhode Island	New Mexico	Georgia	Indiana	New Jersey
<b>EFFECTIVE AMENDED</b>					
<b>CRIMINAL ACTION</b>	May 5, 1979 Yes R.I. Gen. Laws § 7-15	Feb. 28, 1980 July 1, 1988 Yes N.M. Stat. Ann. § 30-42	July 1, 1980 Apr. 16, 1982, 1983, 1985, 1989 Yes Ga. Code Ann. § 16-14	Aug. 30, 1980 Yes Ind. Code Ann. § 35-45-6	July 15, 1981 Yes N.J. Rev. Stat. § 2C:41-3
1. Proceeding allowed	NP	Yes § 30-42-5	NP	NP	Yes § 2C:41-3(c)
2. Brought by -AG -DA	NP	Yes § 30-42-5	NP	NP	Pros. Att'y § 2C:41-1(g) when authorized
3. Court	Superior § 7-15-8	District 30-42-4F	NP	NP	NP
<b>ACTS</b>					
4. Prohibited Activities					
-investment of \$ from pattern or debt	Yes § 7-15-2(a)	Yes § 30-42-4A	Yes § 16-14-4(a)	Yes § 35-45-6-2(1)	Yes § 2C:41-2(a)
-investment or control through pattern or debt	Yes § 7-15-2(b)	Yes § 30-42-4B	Yes § 16-14-4(a)	Yes § 35-45-6-2(2)	Yes § 2C:41-2(b)
-participation through pattern or debt	Yes § 7-15-2(c)	Yes § 30-42-4C	Yes § 16-14-4(b)	Yes § 35-45-6-2(3)	Yes § 2C:41-2(c)
-conspiracy to do the above	NP	Yes § 30-42-4D	Yes § 16-14-4(c)	NP	Yes § 2C: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 § 16-14-3(8)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior § 35-45-6-1	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment § 2C:41-1(d)
6. Predicate offenses	Yes § 7-15-1(a)	Yes § 30-43-3A	Yes § 16-14-3(9)(A)(B)	Yes § 35-45-6-1	Yes § 2C:41-1(a)
7. Person	Yes § 7-15-1(b)	Yes § 30-42-3B	NP	NP	Yes § 2C:41-1(b)
8. Enterprise	Yes § 7-15-1(c)	Yes § 30-42-3C	Yes § 16-14-3(G)	Yes § 35-45-6-1(b)	Yes § 2C:41-1(c)
9. State of mind	Knowing § 7-15-2	NP	NP	Knowledge or Intent § 35-45-6-2	NP

STATE RICO SURVEY (continued)

	Rhode Island	New Mexico	Georgia	Indiana	New Jersey	
SANCTIONS	10. Sanctions -imprisonment	Fel. 2d deg. or 3d deg. § 30-42-4A to -4D NP	5-20 yrs. § 16-14-5(a) Up to the greater of \$25,000 or 3x gain § 16-14-5(b) Yes § 16-14-7 NP	Class C Fel. § 35-45-6-2 Class C Fel. § 35-45-6-2 NP NP	1st deg. w/gun, 2d deg. w/out § 2C:41-3-(a) 1st w/gun § 2C:41-3(a) 2d w/out gun § 2C:41-3(a) Yes § 2C:41-3(b) NP	
	-fine	Up to \$10,000 § 7-15-3 NP	Yes § 30-42-4E NP	NP NP	NP NP	
	-forfeiture -costs	Yes § 7-15-3 NP	Yes § 30-42-4F Yes § 30-42-4F	NP Yes § 16-19-13	NP NP	
	11. Injunctive relief -restraining order -racketeering lien	Yes § 7-15-4 3.1(A) Yes § 7-15-4	Yes § 30-42-6A	Yes § 16-14-6	Yes § 34-4-30.5	Yes § 2C:41-4
	CIVIL SUIT	Yes § 7-15-4(b)	Yes (state) § 30-42-6B	Yes (state) § 16-14-6(b)	Yes § 34-4-30.5-5(e)	Yes § 2C:41-4(b)
	12. Proceeding allowed	NP	Yes (state) § 30-42-6B	Yes (state) § 16-14-6(b)	Pros. Att'y § 34-4-30.5-2	NP
	13. Brought by -AG	Yes § 7-15-4(c)	Yes § 30-42-6A	Yes § 16-14-6(b)	Yes § 34-4-30.5-5	Yes § 2C:41-4(c)
	-DA	Superior § 7-15-4(a)	District § 30-42-6A		Circuit or Superior § 34-4-30.5-2	Superior § 2C:41-4(a)
	14. Court	NP	NP	NP	Preponderance § 34-4-30.5-2	NP
	15. Burden of Proof -Law	NP	NP	NP	Preponderance § 34-4-30.5-2	NP
-Equity	Yes § 7-15-4(a)	Yes § 30-42-6C	Yes § 16-14-6(a)	Yes § 34-4-30.5-2	Yes § 2C:41-4(a)	
16. Provision for innocent parties	Yes § 7-15-4(b)	Yes § 30-42-6C	Yes § 16-14-6(b)	Yes § 34-4-30.5-5(a)	Yes § 2C:41-4(b)	
17. Preliminary relief	NP	NP	Yes § 16-14-6(b)	Yes § 34-4-30.5-5(a)	NP	
-harm requirement	Yes § 7-15-4(b)	Yes § 30-42-6C	Yes § 16-14-6(b)	Yes § 34-4-30.5-5(a)	Yes § 2C:41-4(b)	
-bond is an option						



STATE RICO SURVEY (continued)

	Rhode Island	New Mexico	Georgia	Indiana	New Jersey
18. -Showing for relief -general	NP	NP	Yes § 16-14-6(b)	Yes § 34-4-30.5-5(a)	NP
-no special	NP	NP	Yes § 16-14-6(b)	Yes § 34-4-30.5-5(a)	NP
19. Scope of equitable relief					
-divest	Yes § 7-15-4(a)	Yes § 30-42-6D(1)	Yes § 16-14-6(a)(1)	Yes § 34-4-30.5-2(1)	Yes § 2C:41-4(a)(1)
-restrict	Yes § 7-15-4(a)	Yes § 30-42-6D(2)	Yes § 16-14-6(a)(2)	Yes § 34-4-30.5-2(2)	Yes § 2C:41-4(a)(2)
-dissolve	Yes § 7-15-4(a)	Yes § 30-42-6D(3)	Yes § 16-14-6(a)(3)	Yes § 34-4-30.5-2(3)	Yes § 2C:41-4(a)(3)
-reorganize	Yes § 7-15-4(a)	Yes § 30-42-6D(3)	Yes § 16-14-6(a)(3)	Yes § 34-4-30.5-2(3)	Yes § 2C:41-4(a)(3)
-revoke permits	NP	NP	Yes § 16-14-6(a)(4)	Yes § 34-4-30.5-2(4)	Yes § 2C:41-4(a)(4)
-forfeit charter	NP	NP	Yes § 16-14-6(a)(5)	Yes § 34-4-30.5-2(5)	Yes § 2C:41-4(a)(5)
20. Scope of legal relief					
-amount	3x § 7-15-4(c)	3x § 30-42-6A	3x + punitive § 16-14-6(c)	3x + punitive § 34-4-30.5-5(b)(1), (4)	3x § 2C:41-4(c)
-costs	Yes § 7-15-4(c)	Yes § 30-42-6A	Yes § 16-14-6(c)	Yes § 34-4-30.5-5(b)(2)	Yes § 2C:41-4(c)
-attorney's fees	Yes § 7-15-4(c)	Yes § 30-42-6A	Yes § 16-14-6(c)	Yes § 34-4-30.5-5(b)(3)	Yes § 2C:41-4(c)
21. Type of property subject to forfeiture					
-real property	NP	NP	Yes § 16-14-7(a)	Yes § 34-4-30.5-3	Yes § 2C:41-4(c)(2)
-personal property	NP	NP	Yes § 16-14-7(a)	Yes § 34-4-30.5-3	Yes § 2C: 41-4(b)(2)
-money	NP	NP	Yes § 16-14-7(a)	NP	Yes § 2 C:41-3(b)(2)
-may substitute other property if forfeited property is not available	NP	NP	NP	NP	NP
PROPERTY SUBJECT					

STATE RICO SURVEY (continued)

PROCEDURE AND PRIORITY	Rhode Island	New Mexico	Georgia	Indiana	New Jersey
22. Civil investigation demand (subpoena &/or interrogatory)	Yes § 7-15-7	NP	NP	NP	Yes § 2C:41-5
23. Seizure without process in certain instances	NP	NP	Yes § 16-14-7(e)	Yes § 34-4-30.5-4	NP
24. Relation back	NP	NP	Yes § 16-14-7(h)	NP	NP
25. Jury trial	NP	NP	Yes § 16-14-6(c)	Yes § 34-4-30.5-5(c)	NP
26. Estoppel	Yes § 7-15-4(d)	NP	Yes § 16-14-6(e)	Yes § 34-4-30.5-6	Yes § 2C:41-4(d)
27. Intervention by State	NP	NP	NP	NP	NP
28. Civil suit not precluded by criminal action	Yes § 7-15-4(e)	NP	Yes § 16-14-9	NP	Yes § 2C:41-6.1
29. Priority of individual over State to compensation	Yes § 7-15-4.1(a)	NP	Yes § 16-14-6(d)	Yes § 34-4-30.5-5(d)	NP
30. Fund for invest. & prosec.	Yes § 7-15-4.1	NP	NP	NP	Yes § 2C:41-3(b)
31. Reciprocity of enforcement	NP	NP	Yes § 16-14-10	NP	NP
32. Statute of limitations	NP	NP	5 yrs. susp. § 16-14-8	NP	NP
33. Construction	Liberal § 7-15-10	Approved Usage § 12-2-2	Fair Warning construed to further intent § 16-14-2(b)	Plain, ordinary usual sense § 1-1-4-1	Liberal § 2C:41-6
34. Severability	Yes § 7-15-11	NP	NP	NP	Yes § 2C:41-6.2
35. Findings & Intent	NP	Yes § 30-42-2	Yes § 16-14-2	NP	Yes § 2C: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
<b>EFFECTIVE AMENDED</b>	July 31, 1981 1985, 1987, 1989	July 1, 1981 1981, 1982, 1983, 1984, 1987, 1988	July 1, 1981 1989	Nov. 1, 1981 1983, 1985, 1987	Apr. 27, 1982 July 17, 1982
<b>CRIMINAL ACTION</b>	Yes Utah Code Ann. § 76-10- 1603	Yes Colo. Rev. Stat. § 18-17- 105	Yes Idaho Code § 18-7801	Yes Or. Rev. Stat. § 166.720	Yes Wis. Stat. § 946.87
1. Proceeding allowed					
2. Brought by	Yes § 76-10- 1604	NP	NP	NP	Yes § 946.87(3)
-AG					
-DA	Yes § 76-10- 1604	NP	NP	NP	Yes § 946.87(3)
3. Court	NP	District § 18-17 105(6)	District § 18- 7804(g)	NP	NP
4. Prohibited Activities					
-investment of \$ from pattern	Yes § 76-10- 1603(1)	Yes § 18-17- 104(1)(a)	Yes § 18-7804(a)	Yes § 166.720(1)	Yes § 946.83(1)
or debt					
-investment or control through	Yes § 76-10- 1603(2)	Yes § 18-17- 104(2)	Yes § 18-7804(b)	Yes § 166.720(2)	Yes § 946.83(2)
pattern or debt					
-participation through pattern	Yes § 76-10- 1603(3)	Yes § 18-17- 104(3)	Yes § 18-7804(c)	Yes § 166.720(3)	Yes § 946.83(3)
or debt					
-conspiracy to do the above	Yes § 76-10- 1604(4)	Yes § 18-17- 104(4)	Yes § 18-7804(d)	Yes § 166.720(4)	NP
5. Pattern	3 rel., 1 after eff. date, 1 w/in 5 yrs. of prior § 76-10-1062(2)	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment § 18-17-103(3)	2 rel., 1 after eff. date, last w/ in 5 yrs. of prior § 18-7803(d)	2 rel., 1 after eff. date, last w/ in 5 yrs. of prior § 166.715(4)	3 rel., 1 after eff. date, last w/ in 7 yrs. of first Mult. acts at same time & place count § 946.82(3)
6. Predicate offenses	Yes § 76-10- 1602(4)	Yes § 18-17- 103(6)	Yes § 18-7803(a)	Yes § 166.715(6)	Yes § 946.82(4)
7. Person	Yes § 76-10- 1602(3)	Yes § 18-17- 103(4)	Yes § 18-7803(b)	Yes § 166.715(5)	NP
8. Enterprise	Yes § 76-10- 1602(1)	Yes § 18-17- 103(2)	Yes § 18-7803(c)	Yes § 166.715(2)	Yes § 946.82(2)
9. State of mind	NP	Knowingly § 18- 17-104	NP	Knowledge § 166.720(1)	Knowledge § 946.83(1)

## STATE RICO SURVEY (continued)

SANCTIONS		Utah	Colorado	Idaho	Oregon	Wisconsin
10. Sanctions						
-imprisonment		2d deg. Fel. § 76-10-1603.5(1)	Class 2 Fel. § 18-17-105(1)	Up to 14 yrs. § 18-7804(e)	Class A Fel. § 166.720(5)(a)	Class C Fel. § 946.84(1)
-fine		Up to 2x gross profits or proceeds § 76-10-1603.5(3)	Up to \$25,000, § 18-17-105(1)(a) up to 3x gain or harm § 18-17-105(2)	Up to \$25,000 § 18-7804(e)	3x gain or harm § 166.720(5)(b)	Up to the greater of 2x gain or loss § 946.84(2)
-forfeiture		Yes § 76-10-1603.5(1)	Yes § 18-17-105(1)(b)	Yes § 18-7804(f)	Yes § 166.725(2)	NP
-costs		Yes § 76-10-1603.5(1)	Yes § 18-17-105(2)	NP	Yes § 166.720(5)(b)	Yes § 946.84(2) greater penalties for "Continuing Criminal Enterprise" § 946.85
11. Injunctive relief						
-restraining order		Yes § 76-10-1603.5(8)	Yes § 18-17-105(5)	Yes § 18-7804(g)	Yes § 166.725(1)	NP
-racketeering lien		NP	NP	NP	NP	NP
12. Proceeding allowed		Yes § 76-10-1605(1)	Yes § 18-17-106(5)	Yes § 18-7805	Yes § 166.725	Yes § 946.86
13. Brought by						
-AG		Yes § 76-10-1605(6)	Yes § 18-17-106(5)	Yes § 18-7805(b)	Yes § 166.725(5)	Yes § 946.86(3)
-DA		Yes § 76-10-1605(6)	Yes § 18-17-106(5)	Yes § 18-7805(b)	Yes § 166.725(5)	Yes § 946.86(3)
-Private Party		Yes § 76-10-1605(1)	Yes § 18-17-106(6)	Yes § 18-7805(a)	Yes § 166.725(6)	Yes § 946.86(4)
14. Court		District § 76-10-1605(1)	District § 18-17-106(1)	District § 18-8705(a)(c)	Circuit § 166.725(1)	Circuit § 946.86(1)
15. Burden of Proof						
-Law		Clear & convincing § 76-10-1605(5)	Preponderance § 18-17-106(11)	NP	NP	Reasonable Certainty § 946.86(5)
-Equity		Clear & convincing § 76-10-1605(5)	NP	NP	NP	Reasonable Certainty § 946.86(5)
16. Provision for innocent parties		Yes § 76-10-1605(10)(a)	Yes § 18-17-106(1)	Yes § 18-7805(c)	Yes § 166.725(1), (2)	Yes § 946.86(1)

## STATE RICO SURVEY (continued)

	Utah	Colorado	Idaho	Oregon	Wisconsin
17. Preliminary relief	Yes § 76-10-1605(10)(b) NP	Yes § 18-17-106(6) Yes § 18-17-106(6) Yes § 18-17-106(6)	Yes § 18-7805(c) NP	Yes § 166.725(5) NP for gov't § 166.725(5) Yes § 166.725(5), (6)	Yes § 946.86(3) NP
-harm requirement					
-bond is an option	Yes § 76-10-1605(10)(b)(ii) NP	Yes § 18-17-106(6) Yes § 18-17-106(6)	Yes § 18-7805(c) NP	Yes § 166.725(5) NP	Yes § 946.86(3) NP
18. -Showing for relief					
-general	NP	Yes § 18-17-106(6) Yes § 18-17-106(6)	NP	NP	NP
-no special	NP	Yes § 18-17-106(6) Yes § 18-17-106(6)	NP	Yes § 166.725(6)	NP
19. Scope of equitable relief					
-divest	Yes § 76-10-1605(10)(c)(i) Yes § 76-10-1605(10)(c)(ii) Yes § 76-10-1605(10)(c)(iii) NP	Yes § 18-17-106(1)(a) Yes § 18-17-106(1)(b) Yes § 18-17-106(1)(c) Yes § 18-17-106(1)(c) Yes § 18-17-106(1)(c) Yes § 18-17-106(1)(d) Yes § 18-17-106(1)(e)	Yes § 18-7805(d)(1) Yes § 18-7805(d)(2) Yes § 18-7805(d)(3) Yes § 18-7805(d)(3) Yes § 18-7805(d)(5) Yes § 18-7805(d)(6)	Yes § 166.725(1)(a) Yes § 166.725(1)(b) Yes § 166.725(1)(c) Yes § 166.725(1)(c) Yes § 166.725(1)(d) Yes § 166.725(1)(e)	Yes § 946.86(1)(a) Yes § 946.86(1)(b) Yes § 946.86(1)(c) Yes § 946.86(1)(c) Yes § 946.86(1)(d) Yes § 946.86(1)(e)
-restrict					
-dissolve					
-reorganize					
-revoke permits					
-forfeit charter					
20. Scope of legal relief					
-amount	2x § 76-10-1605(1) Yes § 76-10-1605(2) Yes § 76-10-1605(2)	3x § 18-17-106(7) Yes § 18-17-106(7) Yes § 18-17-106(7)	3x § 18-7805(a) Yes § 18-7805(a) Yes § 18-7805(a)	3x + punitive § 166.725(7)(a) Yes § 166.725(7)(a) Yes § 166.725(7)(a)	2x + punitive § 946.86(4) Yes § 946.86(4)
-costs					
-attorney's fees					
21. Type of property subject to					
forfeiture	Yes § 76-10-1603.5(a) Yes § 76-10-1603.5(4)(b) § 76-10-1603.5(4)(b) NP	Yes § 18-17-106(2) Yes § 18-17-106(2) Yes § 18-17-106(2) NP	NP NP NP NP	Yes § 166.725(2) Yes § 166.725(2) Yes § 166.725(2) NP	Yes § 946.86(2)(a) Yes § 946.86(2)(a) Yes § 946.86(2)(a) 946.86(2)(a)
-real property					
-personal property					
-money					
-may substitute other property if forfeited property is not available					

PROPERTY  
SUBJECT

STATE RICO SURVEY (continued)

PROCEDURE AND PRIORITY	Utah	Colorado	Idaho	Oregon	Wisconsin
22. Civil investigation demand (subpoena &/or interrogatory)	NP	Yes § 18-17-107	NP	Yes § 166.730	NP
23. Seizure without process in certain instances	NP	Yes § 18-17-106(3)	NP	Yes § 166.725 (3)	NP
24. Relation back	NP	NP	NP	NP	NP
25. Jury trial	NP	Yes § 18-17-106(7)(a)	NP	Yes § 166.725 (7)(b)	Yes § 946.86(4)
26. Estoppel	Yes § 76-10-1607	Yes § 18-17-106(8)	NP	Yes § 166.725(9)	Yes § 946.86(6)
27. Intervention by State	NP	NP	NP	Yes § 166.725(10)	NP
28. Civil suit not precluded by criminal action	NP	Yes § 18-17-106(9)	NP	Yes § 166.725(12)	Yes § 946.87(2)
29. Priority of individual over State to compensation	NP	Yes § 18-17-106(7)(b)	NP	Yes § 166.725(7)(c)	Yes § 946.86(2)(b)
30. Fund for invest. & prosec.	NP	NP	NP	NP	NP
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statute of limitations	3 yrs. § 76-10-1605(9)	NP	NP	5 yrs. suspended § 166.725(11)	6 yrs. susp. § 946.87(1)
33. Construction	Fair Import § 76-1-106	Liberal § 18-17-108	Liberal § 73-102(1)	Liberal § 166.735(2)	Reasonable intendment § 990.001
34. Severability	Yes § 76-10-1608	Yes § 18-17-109	NP	NP	NP
35. Findings & Intent	NP	Yes § 18-17-102	Yes § 18-7802	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
<b>EFFECTIVE AMENDED</b>	Aug. 10, 1982 1986, June 1, 1987 Yes Ill. Rev. Stat. ch. 56½, ¶ 1651	Jan. 1, 1983 1984, 1986, 1987, 1988 Yes Cal. Penal Code § 186	Oct. 1, 1982 1984 Yes Conn. Gen. Stat. § 53-397	1983 1987 Yes N.D. Cent. Code § 12.1-06.1	July 1, 1983 May 30, 1985, 1989 Yes Nev. Rev. Stat. § 207.400
<b>CRIMINAL ACTION</b>	1. Proceeding allowed				
	2. Brought by -AG -DA	Yes § 186.4(a) Yes 186.4(a)	Yes § 53-394(f) Yes § 53-394(f)	NP NP	NP § 207.430 Pros. Att'y NP
	3. Court	Circuit ¶¶ 1656(a), 1657	Superior § 53- 398(a)	NP	NP
<b>ACTS</b>	4. Prohibited Activities -investment of \$ from pattern or debt -investment or control through pattern or debt -participation through pattern or debt -conspiracy to do the above	Yes ¶ 1654(b) Yes ¶ 1654(c) Yes ¶ 1654(d) Yes ¶ 1654(d) NP	Yes § 53-395(a) Yes § 53-395(b) Yes § 53-395(c) NP	NP Yes § 12.1-06.1- 03(1) Yes § 12.1-06.1- 03(2) NP	Yes § 207.400 (1)(a) Yes § 207.400(1)(h) Yes § 207.400(1)(c) Yes § 207.400(1)(h) 2 rel. 1 after eff. date, 1 w/in 5 yrs. of prior § 207.390
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment § 186.2(b) Yes § 186.2(a)	2 rel., 1 after Oct. 1, 1982, last w/in 5 yrs. of prior § 53-394(e)	2 rel., 1 after July 8, 1987, last w/in 10 yrs. of prior Yes § 12.1-06.1- 03(2)(e) Yes § 12.1-06.1- 03(2)(e) NP NP	Yes § 207.360 NP Yes § 207.380
	6. Predicate offenses	2 Fel. ¶ 1653(b) Yes ¶ 1653(a)(1), (2) Yes ¶ 1653(c) Yes ¶ 1653(d)	Yes 53-394(a) Yes § 53-394(d) Yes § 53-394(c)		
	7. Person	NP			
	8. Enterprise	NP			

STATE RICO SURVEY (continued)

	Illinois	California	Connecticut	North Dakota	Nevada
9. State of mind	knowing ¶ 1654	NP	Knowingly § 53-396(a)(c)	Knowing § 12.1-06.1-3.3	§ 207.400(1)(a) criminal intent, (e) knowledge, (d), (f), (g) intent
SANCTIONS					
10. Sanctions	Class I Fel. ¶ 1655(a)(1)	NP	1-20 yrs. § 53-397(a)	Class B Fel. § 12.1-06.1-03(3)	5-20 yrs.
-imprisonment	Up to \$25,000 ¶ 1655(a)(2)	NP	up to \$25,000 § 53-397(a)	Class B Fel. § 12.1-06.1-03(3)	Up to \$25,000 § 207.400 or 3x gain or loss § 207.410
-fine	Yes ¶ 1655(a)(3)	Yes §§ 186.3, 186.7(a)	Yes § 53-397(a)	Yes § 12.1-06.1-04, § 12.1-06.1-05(4)(f)	Yes §§ 207.420, 207.450(1)
-forfeiture	NP	NP	NP	Yes § 12.1-06.1-05(4)(e)	Yes § 207.410
-costs	Yes ¶ 1655(c)	Yes § 186.6(a)	Yes § 53-397(b)(4)(C)	Yes §§ 12.1-06.1-06.1-04, 12.1-06.1-05(2)	Yes §§ 207.430, 207.440(1), 207.450(2)
11. Injunctive relief	NP	NP	Yes § 53-399(a)	Yes § 12.1-06.1-06	NP
-restraining order	Yes ¶ 1656(c)	NP	NP	Yes § 12.1-06.1-05(1)	Yes § 207.470(1)
CIVIL SUIT					
12. Proceeding allowed	Yes ¶ 1656(b)	NP	NP	Yes § 12.1-06.1-05(1)	Yes § 207.490(4)
-racketeering lien	Yes ¶ 1656(b)	NP	NP	NP	Yes § 207.490(4)
13. Brought by	Yes ¶ 1656(c)	NP	NP	Yes § 12.1-06.1-05(1)	Yes § 207.470(1)
-AG	Circuit ¶ 1657	NP	NP	Yes § 12.1-06.1-05(1)	Yes § 207.490(4)
-DA	NP	NP	NP	NP	Yes § 207.490(4)
-Private Party	NP	NP	NP	NP	Yes § 207.470(1)
14. Court	NP	NP	NP	District § 12.1-06.1-05(2)	District § 207.470(3)
15. Burden of Proof	NP	NP	NP	Preponderance § 12.1-06.1-05(9)	NP
-Law	NP	NP	NP	Preponderance § 12.1-06.1-05(9)	NP
-Equity	Yes ¶ 1656(a)	NP	Yes § 53-397(b)(4)	Yes § 12.1-06.1-05(2)	Yes § 207.500(2)
16. Provision for innocent parties					



## STATE RICO SURVEY (continued)

	Illinois	California	Connecticut	North Dakota	Nevada
17. Preliminary relief	Yes ¶ 1656(b)	NP	NP	Yes § 12.1-06.1-05(3)	Yes § 207.490(5)
-harm requirement	NP	NP	NP	NP	NP
-bond is an option	Yes ¶ 1656(b)	NP	NP	Yes § 12.1-06.1-05(3)	Yes § 207.490(5)
18. -Showing for relief	NP	NP	NP	NP	NP
-general	NP	NP	NP	NP	NP
-no special	NP	NP	NP	NP	NP
19. Scope of equitable relief	Yes ¶ 1656(a)	NP	NP	Yes § 12.1-06.1-05(4)(a)	NP
-divest	Yes ¶ 1656(a)	NP	NP	Yes § 12.1-06.1-05(4)(b)	NP
-restrict	Yes ¶ 1656(a)	NP	NP	Yes § 12.1-06.1-05(4)(c)	NP
-dissolve	Yes ¶ 1656(a)	NP	NP	Yes § 12.1-06.1-05(4)(c)	NP
-reorganize	Yes ¶ 1656(a)	NP	NP	NP	NP
-revoke permits	NP	NP	NP	NP	NP
-forfeit charter	NP	NP	NP	NP	NP
20. Scope of legal relief	3x ¶ 1656(c)	NP	NP	3x § 12.1-06.1-05(1)	3x actual § 207.470(1)
-amount	Yes ¶ 1656(c)	NP	NP	Yes § 12.1-06.1-05(1)	Yes § 207.470(1)
-costs	Yes ¶ 1656(c)	NP	NP	Yes § 12.1-06.1-05(1)	Yes § 207.470(1)
-attorney's fees	Yes ¶ 1656(c)	NP	NP	Yes § 12.1-06.1-05(1)	Yes § 207.470(1)
21. Type of property subject to forfeiture	Yes ¶ 1655(a)(3)	Yes § 186.3(b), (c)	Yes §§ 53-394(g), 53-397(a)	Yes § 12.1-06.1-05(4)(f)(2)	Yes § 207.460(1)(a)
-real property	Yes ¶ 1655(a)(3)	NP	Yes § 53-397(a)	Yes § 12.1-06.1-05(4)(f)(2)	Yes § 207.460(1)(a)
-personal property	Yes ¶ 1655(a)(3)	NP	Yes § 53-397(a)	Yes § 12.1-06.1-05(4)(f)(3)	Yes § 207.460(1)(a)
-money	NP	NP	NP (§ 53-397(b)(3) nullifies conveyance to avoid forfeiture)	Yes § 12.1-06.1-05(4)(g)	Criminally § 207.420(3)
-may substitute other property if forfeited property is not available	NP	NP			
PROPERTY SUBJECT					

	Illinois	California	Connecticut	North Dakota	Nevada
PROCEDURE AND PRIORITY					
22. Civil investigation demand (subpoena &/or interrogatory)	NP	NP	NP	Yes § 12.1-06.1-07	NP
23. Seizure without process in certain instances	NP	NP	NP	NP	Yes § 207.490(1)
24. Relation back	NP	NP	Yes § 53-402(c)	Yes § 12.1-06.1-06(9)	NP
25. Jury trial	NP	NP	NP	NP	Yes § 207.470(1)
26. Estoppel	Yes ¶ 1656(d)	NP	NP	Yes § 12.1-06.1-05(6)	Yes § 207.470(2)
27. Intervention by State	NP	NP	NP	Yes § 12.1-06.1-05(11)	Yes § 207.490(4)
28. Civil suit not precluded by criminal action	NP	NP	NP	Yes § 12.1-06.1-05(13)	Yes § 207.470(4)
29. Priority of individual over State to compensation	NP	NP	NP	NP	Yes § 207.470(1)
30. Fund for invest. & prosec.	Yes ¶ 1655(g)	NP	NP	NP	NP
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statute of limitations	NP	NP	5 yrs. § 54-403	7 yrs. after actual discovery § 12.1-06.105(7)	5 yrs. susp. § 207.520
33. Construction	Liberal ¶ 1658	NP	NP	Liberal § 12.11-02-01	Fair Import § 193.030
34. Severability	Yes ¶ 1659	NP	NP	NP	NP
35. Findings & Intent	Yes ¶ 1652	Yes § 186.1	Yes § 53-403(b)	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	Tennessee
EFFECTIVE AMENDED CRIMINAL ACTION	July 22, 1983 1985 Yes La. Rev. Stat. Ann. § 15:1353	July 1, 1984 1985, 1986 Yes Miss. Code Ann. § 97-43-5	July 1, 1985 1985, 1986, 1988 Yes Wash. Rev. Code § 9A.82.080	Jan. 1, 1986 1986, 1988 Yes Ohio Rev. Code Ann. § 2923.32(B)(1)	July 1, 1986 Nov. 1, 1989 Yes Tenn. Code Ann. § 39-12- 205
	NP	NP	Yes § 9A.82.100(1)(b)	NP	NP
	NP	NP	Yes § 9A.82.100(1)(b) Superior § 9A.82.100(1)(a)	NP	NP
	NP	Circuit § 97-43-9	Yes § 9A.82.080(1)	NP	NP
	Yes § 15:1353(A)	Yes § 97-43-5(1)	Yes § 9A.82.080(1)	Yes § 2923.32(A)(3)	Yes § 39-12- 204(a)
	Yes § 15:1353(B)	Yes § 97-43-5(2)	Yes § 9A.82.080(2)	Yes § 2923.32(A)(2)	Yes § 39-12- 204(b)
	Yes § 15:1353(C)	Yes § 97-43-5(3)	NP	Yes § 2923.32(A)(1)	Yes § 39-12- 204(c)
	Yes § 15:1353(C)	Yes § 97-43-5(3)	Yes § 9A.82.080(3)	NP	Yes § 39-12- 204(c)
	Yes § 15:1353(D)	Yes § 97-43-5(4)	Yes § 9A.82.080(3)	NP	Yes § 39-12- 204(d)
	2 rel., 1 after eff. date, last w/ in 5 yrs. of prior § 15:1352(C)	2 rel., 1 after eff. date, last w/ in 5 yrs. of prior § 97-43-3(d)	3 rel., 1 after eff. date, last w/ in 5 yrs. of prior excl. imprisonment § 9A.82.010(15)	2 rel., 1 after eff. date, last w/ in 6 yrs. § 2923.31(E)	2 rel., 1 after eff. date, last w/ in 2 yrs. of prior § 39-12-203(6)
Yes § 15:1352(A)	Yes § 97-43-3(a)	Yes § 9A.82.010(14)	Yes § 2923.31(I)	Yes § 39-12- 203(9)	
NP	Yes (general) § 1-3-39	NP	Yes § 2923.31(G)	Yes § 39-12- 203(7)	
Yes § 15:1352(B)	Yes § 97-43-3(c)	Yes § 9A.82.010(12)	Yes § 2923.31	Yes § 39-12- 203(3)	
Knowing § 15:1353(A)	Criminal Intent § 97-43-5(1)	Knowing § 9A.82.080	Knowingly § 2923.32(A)(3)	Criminal intent, knowingly § 39- 12-204(a), (c)	
ACTS	1. Proceeding allowed				
	2. Brought by -AG				
	-DA				
	3. Court				
	4. Prohibited Activities -investment of \$ from pattern or debt				
	-investment or control through pattern or debt				
	-participation through pattern or debt				
	-conspiracy to do the above				
	5. Pattern				
6. Predicate offenses					
7. Person					
8. Enterprise					
9. State of mind					

STATE RICO SURVEY (continued)

	Louisiana	Mississippi	Washington	Ohio	Tennessee
<b>SANCTIONS</b>					
10. Sanctions -imprisonment	Up to 50 yrs. \$ 15:1354(A)	Up to 20 yrs. \$ 97-43-7(1)	Class B Fel. \$ 9A.82.080(4), (conspiracy- Class C Fel.) Up to \$25,000, \$ 9A.82.100(1)(d)	Fel. \$ 2923.32(B)(1)	Class B Fel., range II \$ 39-12-205(a)
-fine	Up to \$1,000,000 or 3x loss or gain \$ 15:1354(B)	Up to \$25,000 \$ 97-43-7(1) or 3x loss or gain \$ 97-43-7(2)	Yes \$ 9A.82.100(3)	3x gain or loss 2923.32 (B)(2)(a)	\$25,000 alt. fine 3x loss/gain \$ 39-12-205(b)(1)
-forfeiture	Yes \$ 15:1356(A)(1)	Yes \$ 97-43-9(2)	Yes \$ 9A.82.100(3)	Yes \$ 2923.32(B)(3)	Yes \$ 39-12-205(b)(1)
-costs	Yes \$ 15:1354(B)	Yes \$ 97-43-7(2)	Yes \$ 9A.82.100(4)(e)	2923.32(B)(2)(b), (c)	Yes \$ 39-12-206(k)
11. Injunctive relief -restraining order	Yes \$ 15:1356(D)	NP	Yes \$ 9A.82.090	Yes \$ 2923.33(A)	NP
-racketeering lien	NP	NP	Yes \$ 9A.82.120	Yes \$ 2923.36	Yes \$ 39-12-207(k)
12. Proceeding allowed	Yes \$ 15:1356	Yes \$ 97-43-9	Yes \$ 9A.82.100	Yes \$ 2923.34	Yes \$ 39-12-206(a)
13. Brought by -AG	NP	Yes \$ 97-43-9(4)	Yes \$ 9A.82.100(1)(b)	NP	Yes \$ 39-12-206(e)
-DA	Yes \$ 15:1356(D)	Yes \$ 97-43-9(4)	Yes \$ 9A.82.100(1)(b)	Yes \$ 2923.34(A)	NP
-Private Party	Yes \$ 15:1356(E)	Yes \$ 97-43-9(5)	Yes \$ 9A.82.100(1)(a)	Yes \$ 2923.34(B)	NP
14. Court	District \$ 15:1356(D)	Circuit \$ 97-43-9(1)	Superior \$ 9A.82.100(1)(a)	NP	Circuit or Chancery \$ 39-12-206(a), (e)
15. Burden of Proof -Law	NP	NP	Preponderance \$ 9A.82.100(9)	Clear/convinc. \$ 2923.34(F)	NP
-Equity	NP	NP	Preponderance \$ 9A.82.100(9)	Preponderance \$ 2923.34(C)	NP
16. Provision for innocent parties	Yes \$ 15:1356(A)(2)	Yes \$ 97-43-9(1)	\$ 9A.82.100(3)	Yes \$ 2923.34(C)	Yes \$ 39-12-206(a), (b)
17. Preliminary relief -harm requirement	NP	Yes \$ 97-43-9(4)	Yes \$ 9A.82.100(3)	Yes \$ 2923.34(E)	Yes \$ 39-12-206(f)
-bond is an option	Yes \$ 15:1356(D)	NP	NP	Yes \$ 2923.34(E)	Yes \$ 39-12-206(f)
		Yes \$ 97-43-9(4)	Yes \$ 9A.82.100(3)	Yes \$ 2923.34(E)	Yes \$ 39-12-206(f)

## STATE RICO SURVEY (continued)

	Louisiana	Mississippi	Washington	Ohio	Tennessee
18. -Showing for relief -general	NP	Yes § 97-43-9(5)	NP	NP	Yes § 39-12-206(f)
-no special	NP	Yes § 97-43-9(5)	NP	Yes § 2923.34(E)	Yes § 39-12-206(f)
19. Scope of equitable relief					
-divest	NP	Yes § 97-43-9(1)	Yes § 9A.82.100(4)(a)	Yes § 2923.34(C)(1)	Yes § 39-12-206(a)(1)
-restrict	NP	Yes § 97-43-9(1)(b)	Yes § 9A.82.100(4)(b)	Yes § 2923.34(C)(2)	Yes § 39-12-206(a)(2)
-dissolve	NP	Yes § 97-43-9(1)(c)	Yes § 9A.82.100(4)(c)	Yes § 2923.34(C)(3)	Yes § 39-12-206(a)(3)
-reorganize	NP	Yes § 97-43-9(1)(d)	Yes § 9A.82.100(4)(c)	Yes § 2923.34(C)(4)	Yes § 39-12-206(a)(3)
-revoke permits	NP	Yes § 97-43-9(1)(d)	NP	Yes § 2923.34(C)(4)	Yes § 39-12-206(a)(3)
-forfeit charter	NP	Yes § 97-43-9(1)(e)	NP	2932.34(C)(5)	Yes § 39-12-206(a)(4)
20. Scope of legal relief					
-amount	greater of 3x or \$10,000 § 15:1356(E)	3x + punitive § 97-43-9(6)	3x or actual damage § 9A.82.100(4)(e)	3x § 2923.34(F)	NP
-costs	Yes § 15:1356(E)	Yes § 97-43-9(6)	Yes § 9A.82.100(1)(c)	Yes § 2923.34(G)	Yes § 39-12-206(k)
-attorney's fees	Yes § 15:1356(E)	Yes § 97-43-9(6)	Yes § 9A.82.100(1)(c)	Yes § 2923.34(G)	Yes § 39-12-206(k)
21. Type of property subject to forfeiture					
-real property	Yes § 15:1356(A)(1)	Yes § 97-43-9(2)	Yes § 9A.82.100(4)(f)	Yes 2923.32(B)(3)	Yes § 39-12-206(b)
-personal property	Yes § 15:1356(A)(1)	Yes § 97-43-9(2)	Yes § 9A.82.100(4)(f)	Yes 2923.32(B)(3)	Yes § 39-12-206(b)
-money	Yes § 15:1356(A)(1)	Yes § 97-43-9(2)	Yes § 9A.82.100(4)(f)	Yes 2923.32(B)(3)	Yes § 39-12-206(b)
-may substitute other property if forfeited property is not available	NP	NP	NP	Yes § 2923.32(B)(5)	NP
PROPERTY SUBJECT					

STATE RICO SURVEY (continued)

PROCEDURE AND PRIORITY	Louisiana	Mississippi	Washington	Ohio	Tennessee
22. Civil investigation demand (subpoena &/or interrogatory)	NP	NP	NP	NP	Yes § 39-12-209
23. Seizure without process in certain instances	Yes § 15:1356(B)	Yes § 97-43-9(3)	NP	NP	Yes § 39-12-206(c)
24. Relation back	NP	NP	NP	Yes § 2923.36(G)	Yes § 39-12-207(k) (time of notice)
25. Jury trial	NP	Yes § 97-43-9(6)(a)	NP	NP	NP
26. Estoppel	Yes § 15:1356(F)	NP	Yes § 9A.82.100(G)	Yes § 2923.34(J)	Yes § 39-12-206(g)
27. Intervention by State	Yes § 15:1356(G)	Yes § 97-43-9(7)	Yes § 9A.82 w/ certification by AG § 9A.82.100(11), (12)	Yes § 2923.34(D)	NP
28. Civil suit not precluded by criminal action	Yes § 15:1356(I)	Yes § 97-43-9(9)	Yes § 9A.82.100(13)	Yes § 2923.32(D)	Yes § 39-12-206(i)
29. Priority of individual over State to compensation	Yes § 15:1356(A)(1)	Yes § 97-43-9(6)(b)	NP	Yes § 2923.35(B)(L)	NP
30. Fund for invest. & prosec.	Yes § 15:1356(A)(3)	NP	Yes § 9A.82.110	Yes § 2923.35(D)	NP
31. Reciprocity of enforcement	NP	NP	NP	NP	NP
32. Statute of limitations	5 yrs. susp. § 15:1356(H)	5 yrs. susp. § 97-43-9(8)	3 yrs. from discovery of pattern § 9A.82.100(7)	5 yrs. § 2923.34(K)	5 yrs. susp. § 39-12-206(h)
33. Construction	Fair Import § 14:3	Common Meaning § 1-3-65	Fair Import § 9A.04.020(2)	NP	Further intent § 39-12-202(b)(3)
34. Severability	NP	Yes (general) § 1-3-77	Yes § 9A.82.900	NP	NP
35. Findings & Intent	NP	NP	NP	NP	Yes § 39-12-202

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

## STATE RICO SURVEY

	New York	Delaware	North Carolina	Oklahoma	Minnesota
<b>EFFECTIVE AMENDED</b>	Nov. 1, 1986	July 9, 1986	Oct. 1, 1986 July 6, 1987, 1989	Nov. 1, 1988	Aug. 1, 1989
<b>CRIMINAL ACTION</b>	Yes N.Y. Penal Law § 460.20	Yes Del. Code Ann. tit. 11, § 1504	NP	Yes Okla. Stat. tit. 22 § 1404	Yes Minn. Stat. § 609.903
1. Proceeding allowed					
2. Brought by	Yes § 460.50(1)	NP	NP	Yes § 1404(C)	NP
-AG	Yes § 460.50(1)	NP	NP	Yes § 1404(C)	NP
-DA		Superior § 1504		District § 1403	District § 609.904
3. Court					
4. Prohibited Activities	Yes § 460.20(1)(c)	Yes § 1503(c)	Yes N.C. Gen. Stat. § 75D-4(a)(1)	Yes § 1403(C)	Yes § 609.903(3)
-investment of \$ from pattern or debt			Yes § 75D-4(a)(1)		
-investment or control through pattern or debt	Yes § 460.20(1)(b)	Yes § 1503(b)	Yes § 75D-4(a)(1)	Yes § 1403(B)	Yes § 609.903(2)
-participation through pattern or debt	Yes § 460.20(1)(a)	Yes § 1503(a)	Yes § 75D-4(a)(2)	Yes § 1403(A)	Yes § 609.903(1)
-conspiracy to do the above	NP	Yes § 1503(d)	Yes § 75D-4(a)(3)	Yes § 1403(D)	NP
5. Pattern	3 rel. w/in 10 yrs. of commencement of criminal action § 460.104	2 rel., 1 after eff. date, last w/ in 10 yrs. of prior § 1502(5)	2 rel., 1 after Oct. 1, 1986, 1 w/in 4 yrs. of prior § 75D-3(b)	2 Felonies, 1 after eff. date, last w/in 3 yrs. prior excl. imprisonment § 1402(5)	3 rel., w/in 10 yrs. of commencement of action § 609.902(6)
6. Predicate offenses	Yes § 460.101	Yes § 1502(9)	Yes § 75D-3(c)	Yes § 1402(10)	Yes § 609.902(4)
7. Person		NP	Yes § 75D-3(a)	Yes § 1402(7)	Yes § 609.902(8)
8. Enterprise	Yes § 460.102	Yes § 1502(3)	Criminal intent	Yes § 1402(2)	Yes § 609.902(3)
9. State of mind	knowledge, intentionally § 460.21	NP	not necessary § 75D-4(b)	NP	knowing or intent § 609.904(1), (3)

## STATE RICO SURVEY (continued)

	New York	Delaware	North Carolina	Oklahoma	Minnesota
SANCTIONS	10. Sanctions -imprisonment	5-20 yrs. \$ 1504(a)	NP	Not less than 10 yrs. \$ 1404(A)	Up to 20 yrs. \$ 609.904(1)
	-fine	Up to \$25,000 fine 3x gain or loss \$ 1504(c)	Yes \$ 75D-5(a)	3x gain or loss \$ 1404(B)	Up to \$1,000,000 or 3x gain or loss \$ 609.904(2)
	-forfeiture -costs	Yes \$ 1504(b) Yes \$ 1504(c)	NP	Yes \$ 1405(A) \$ 1405(A)	Yes \$ 609.905(1) Yes \$ 609.904(2)
CIVIL SUIT	11. Injunctive relief -restraining order	NP	NP	Yes §§ 1406, 1407	Yes \$ 609.907(1)
	12. Proceeding allowed -trackeering lien	Yes N.Y. Civ. Prac. L. & R. Law § 1353.1	Yes \$ 75D-13 Yes \$ 75-D-2(6)	Yes \$ 1412 Yes \$ 1409(A)	Yes \$ 609.911 Yes \$ 609.911
	13. Brought by -AG	Yes \$ 1505(b)	Yes §§ 75D-5(d), 75D-8(b)	Yes \$ 1409(A)	Yes \$ 609.911(1)
	-DA	NP	NP	Yes \$ 1409(A)	Yes \$ 609.911(1)
	-Private Party	Yes \$ 1505(c)	Yes \$ 75D-8(i)	NP	NP
	14. Court	Superior \$ 1505(a)	Superior \$ 75D- 8(a)	NP	District \$ 609.911(1)
	15. Burden of Proof -Law	NP	NP	Preponderance \$ 1409	Preponderance \$ 609.911(1)
	-Equity	NP	NP	Preponderance \$ 1406	Preponderance \$ 609.911(1)
	16. Provision for innocent parties	Yes \$ 1505(a)	Yes \$ 75D-5(i)	Yes \$ 1409(A)	Yes \$ 609.909(5)
	17. Preliminary relief -barm requirement	Yes \$ 1505(b)	Yes \$ 75D-5(d)	Yes \$ 1409(A)	Yes \$ 609.909(5)
	-bond is an option	NP	NP	Yes \$ 1409(A)	NP
		Yes \$ 1505(b)	Yes \$ 75D- 5(h)(1)	Yes \$ 1409(A)	Yes \$ 609.907(1)



STATE RICO SURVEY (continued)

	New York	Delaware	North Carolina	Oklahoma	Minnesota
18. -Showing for relief -general	NP	NP	NP	Conformity § 1409(A) Yes § 1409(A)	NP
19. -no special Scope of equitable relief -divest	Yes § 1353(1)(a)	Yes § 1505(a)	Yes § 75D-8(b)	Yes § 1409(A)(1)	Yes § 609.911(1)(1)
-restrict	Yes § 1353(1)(b)	Yes § 1505(a)	Yes § 75-D-8(a)(1)	Yes § 1409(A)(2)	Yes § 609.911(1)(2)
-dissolve	Yes § 1353(1)(c)	Yes § 1505(a)	Yes § 75-D-8(3)	Yes § 1409(A)(3)	Yes § 609.911(1)(3)
-reorganize	Yes § 1353(1)(c)	Yes § 1505(a)	Yes § 75-D-8(a)(3)	Yes § 1409(A)(3)	Yes § 609.911(1)(3)
-revoke permits	Yes § 1353(1)(d)	NP	Yes § 75-D-8(a)(4)	Yes § 1409(A)(4)	Yes § 609.911(1)(4)
-forfeit charter	Yes § 1353(1)(e)	NP	Yes § 75-D-8(a)(5)	Yes § 1409(A)(5)	Yes § 609.911(1)(5)
20. Scope of legal relief -amount	NP	3x + punitive \$ 1505(c)	3x § 75D-8(c)	Up to \$100,000	Yes § 609.911(3)
-costs	NP	Yes § 1505(c)	NP	Yes § 1409(B)	Yes § 609.911(3)
-attorney's fees	NP	Yes § 1505(c)	Yes § 75D-8(c)	Yes § 1409(B)	Yes § 609.911(4)
21. Type of property subject to forfeiture	Yes § 460.30(1)(a)	Yes § 1506(a)	Yes § 75D-5(a)	Yes § 1405(A)	Yes § 609.905(1)
-real property	Yes § 460.30(1)(a)	Yes § 1506(a)		Yes § 1405(A)	Yes § 609.905(1)
-personal property	Yes § 460.30(1)(a)	NP		NP	NP
-money	NP	Yes § 1506(c)	Yes § 75D-5(1)(2)	Yes § 1405(B)(2)	Yes § 609.905(2)
-may substitute other property if forfeited property is not available	NP	Yes § 1506(c)			

PROPERTY  
SUBJECT

STATE RICO SURVEY (continued)

PROCEDURE AND PRIORITY	New York	Delaware	North Carolina	Oklahoma	Minnesota
22. Civil investigation demand (subpoena &/or interrogatory)	Yes § 460.80	Yes § 1509	Yes § 75D-6	Yes § 1415(A)	NP
23. Seizure without process in certain instances	NP	Yes § 1507(j)	Yes § 75D-5(i)(1)	NP	Yes § 609.907(3)
24. Relation back	NP	Yes § 1505(e)	Yes § 75D-8(g)	Yes § 1412(D)	NP
25. Jury trial	NP	NP	Yes § 75D-8(e)	(time of notice)	NP
26. Estoppel	NP	NP	NP	Yes § 1409(A)	NP
27. Intervention by State	NP	NP	Yes § 75D-10	Yes § 1409(D)	NP
28. Civil suit not precluded by criminal action	Yes § 460.30(7)	NP	Yes § 75D-8(d)	Yes § 1409(C)	NP
29. Priority of individual over State to compensation	NP	Yes § 1505(d)(cf. § 1507)(g)	NP	Yes § 1409(G)	Yes § 609.910(1)
30. Fund for invest. & prosec.	NP	Yes § 1511	NP	NP	NP
31. Reciprocity of enforcement	NP	Civil 5 yrs. § 1505(f)	Yes § 75D-11	Yes § 1411	Yes § 609.904(4)
32. Statute of limitations	NP	NP	5 yrs. susp. § 75D-9	NP	NP
33. Construction	NP	NP	NP	5 yrs. § 1469(E)	NP
34. Severability	NP	NP	NP	in conformity with federal law § 1419	Liberal § 609.902
35. Findings & Intent	Yes § 460.00	Yes § 1501	NP	NP	NP
			NP	NP	NP

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

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

## APPENDIX B

## CHART COMPARING RICO REFORM ACT OF 1989 AND PRESENT LAW

## RICO Reform Act of 1989

*Introduction*

In 1970 Congress enacted the Organized Crime Control Act, title IX of which is known as the Racketeer Influenced and Corrupt Organizations Act or "RICO." 18 U.S.C. §§ 1961-1968 (1988). RICO prohibits "enterprise criminality," that is, "patterns" of "racketeering," including: (1) violence; (2) the provision of illegal goods and services; (3) corruption in government, or unions; and (4) criminal fraud; by, through, or against various kinds of "entities." Licit entities include corporations, partnerships, unions, and governmental entities. Illicit entities include organized crime and violent crime groups.

In addition to criminal sanctions, the statute authorizes governmental civil suits and a treble damages claim for relief with attorney's fees for injury to business or property for victims of RICO violations.

*RICO Reform Proposals*

Various proposals to reform RICO have been made in the past several congressional sessions. Some proposals reflected an effort to strengthen the statute, but none have altered its core provisions.

S. 1523, sponsored by Sen. Howard Metzenbaum, was reported, as amended, by the Senate Judiciary Committee to the full Senate on May 24, 1988. *See* S. REP. No. 458, 100th Cong., 2d Sess. (1988). When it was introduced it was similar to H.R. 2983.

H.R. 4923, sponsored by Rep. Rick Boucher, was introduced on June 28, 1988. It was identical to S. 1523, as reported by the Senate Judiciary Committee.

H.R. 4920 was introduced by Rep. John Conyers and Rep. Don Edwards on June 28, 1988. It was similar in structure to S. 1523, as reported, but it also reflects many of the provisions of H.R. 3240.

S. 2793 would have created a new federal anticorruption statute, applicable to federal, state, and local corruption.

None of this proposed legislation passed in the 100th Congress.

The RICO Reform Act of 1989 was introduced on February 23, 1989, by Sen. Dennis DeConcini and Rep. Rick Boucher. This chart of comparison is based on the August 30, 1989, Draft of this Legislation.

Summary of Various Reform Proposals on Twenty-Nine Issues

<u>Issues</u>	<u>RICO Reform Act of 1989</u>	<u>Present Law</u>
1. findings	no provision	limited findings
2. burden of proof for government civil suits for equity relief	preponderance	preponderance
3. government related suits for damages (federal, state, local, and government corporations, insurance liquidators, and Indian tribes)	automatic 3x; brought by chief legal officer, but no insurance liquidator or Indian tribe	not clear federal, but otherwise automatic 3x
4. private suits for damages (general rule)	actual damages, but no attorney's fees	automatic 3x and attorney's fees

5. private suits for damages  
(exceptions)
  - optional 2x punitive with  
attorney's fees:
    1. unit of local government
    2. natural person (consumer)
    3. insider trading if victim:
      - a. natural person
      - b. charity
      - c. investment trustee
      - d. welfare/pension fund, or
      - e. investment companies
    4. individual conviction of crime  
(3x)  
limited by clear and convincing  
evidence and other standards  
(Note: no secondary liability  
provided)

Issues

- 6. private suit for personal injury
- 7. statute of limitations
- 8. defense of good faith

RICO Reform Act  
of 1989

optional 2x punitive with  
attorney's fees

private: 4 years  
public: 6 years  
provision

Present Law

not authorized

private: 4 years  
public: not clear

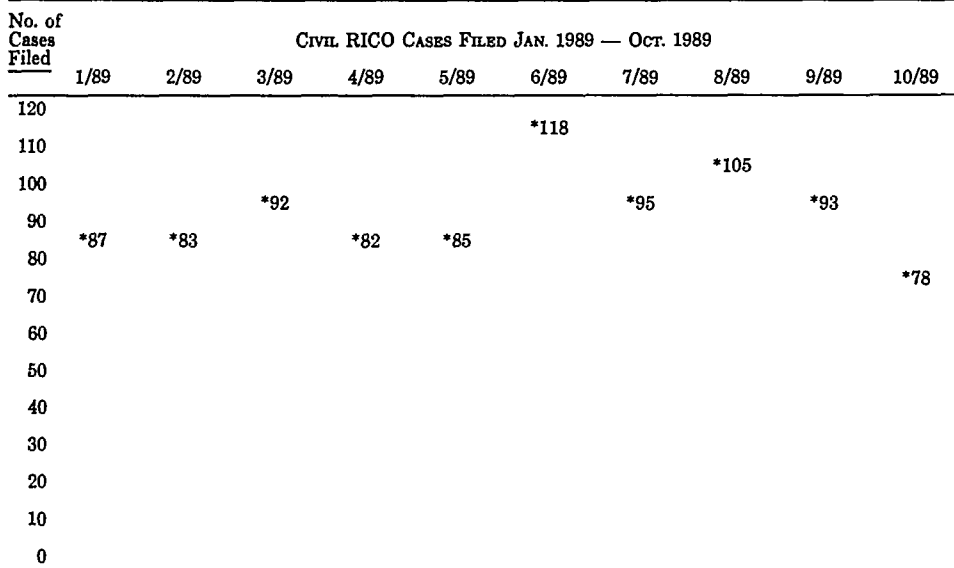
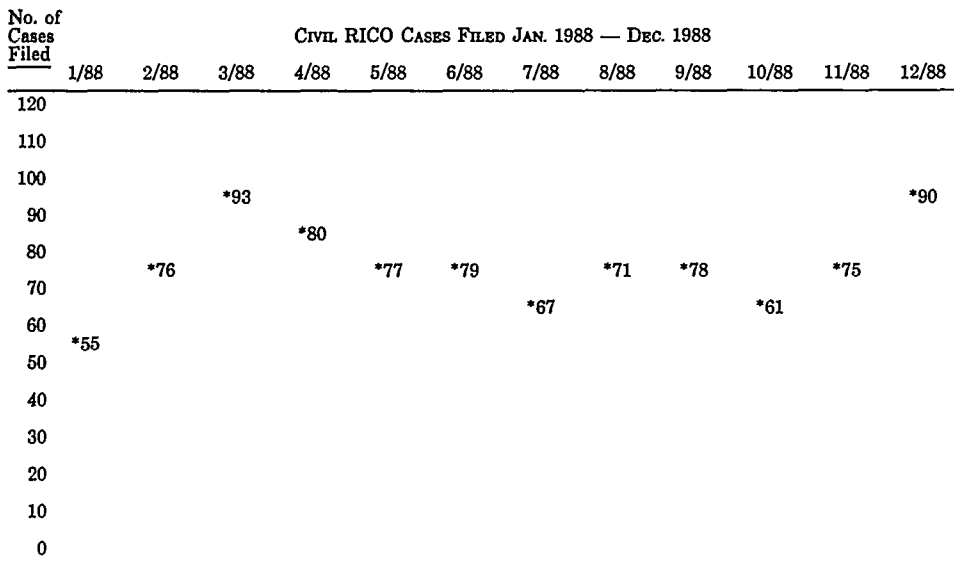
present, but matter of case law

<u>Issues</u>	<u>RICO Reform Act of 1989</u>	<u>Present Law</u>
9. evidence of punitive damages	restricted until liability	no provision
10. evidence relating to free speech	no provision	not clear
11. abatement	provision	not clear
12. survival in bankruptcy	provision for actual	not clear
13. limitation of "racketeer" label to crime of violence	provision	none
14. penalty for death (life imprisonment)	no provision	20 years, or for life, if predicate offenses authorize life
15. additional predicate offenses in areas of violence, illegal goods and services, corruption, and criminal fraud	some	not applicable
16. international service of process	provision	no provision
17. exclusive federal jurisdiction	provision	not clear, but trend concurrent
18. effective date	retroactive on measure of damages, except clearly unjust	not applicable
19. equity relief	no provision	not clear, but trend against
20. labor disputes	no provision	applicable

<u>Issues</u>	<u>RICO Reform Act of 1989</u>	<u>Present Law</u>
21. pleading	particularity	particularity for conspiracy and fraud
22. parens patriae	no provision	not clear, but trend against
23. prejudgment interest	no provision	not clear
24. voluntary arbitration agreements	no provision	voluntary arbitration of all claims
25. resolution of conflicting opinions	no provision	not applicable
26. conforming amendment	no provision	not applicable
27. securities and commodities	excluded	included
28. criminal conviction 3x	provision	not applicable
29. provisional remedies	no provision	state by state procedure







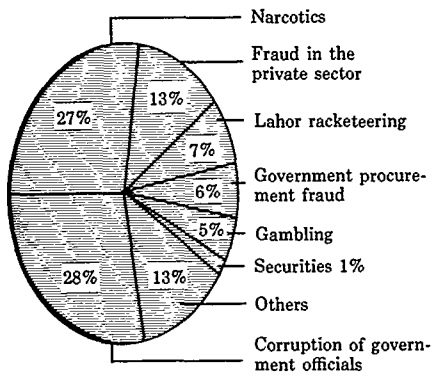
Total — 3937  
 48 months  
 Average per month — 82  
 Pending as of 9/30/89, 1549

Source: Letter of Pamela D. Crawford, Civil Program Analyst, Administrative Office of the United States Court to G. Robert Blakey (June 16, 1989); Letter of Ellyn L. Vail, Chief, Non-Criminal Branch, Administrative Office of the United States Court to G. Robert Blakey (Jan. 18, 1990); Telephone interview with Ellyn L. Vail (Jan. 31, 1990).

Compare Jost, *Racketeering Law Comes Under Attack*, 1989 EDITORIAL RES. REP. 134, 141 (noting the types of reported civil RICO filings: 37% commercial fraud; 34% securities commodities fraud; 5.3% profession crime; 4.2% unfair trade practices; 3.6% employment disputes; 1.8% political corruption; 14.1% other) with Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 621 (1987) (52.7% common-law fraud; 32% securities fraud; 29% not stated; 9% non-securities fraud; 6.8% unfair trade; 6.8% bribery; 6.8% theft or conversion; 4.5% labor related).

TABLE NO. 2

Types of RICO Indictments



Criminal RICO Indictments 1981-1989\*



\*The government estimates that 217 indictments were returned between 1970 and 1981.

Source: Telephone interview with Lester M. Joseph, Organized Crime and Racketeering Section, United States Department of Justice (Jan. 31, 1990).

## APPENDIX D

## DETAILED COMMENT ON "ABUSIVE" CASES

The following fifty-three "abusive" cases include the case name and citation as included in the Business/Labor Coalition for Civil RICO Reform Report. Each section labeled "Coalition Comment" is the description of the case included in the Coalition's Report. The "Analysis" section is a comment on the facts by the Author.<sup>1</sup>

1. Abernathy v. Erickson<sup>2</sup>*Coalition Comment*

An ex-wife brought a civil RICO action against her former husband for defrauding her of an interest in real property. The wife complained that she did not receive certain proceeds from the sale of property, a hunting lodge.

*Analysis*

The district court properly dismissed the case for failure to allege a "pattern" and for failure to file within the statutory period. These filings should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

2. A.L. Lee Corp. v. SRE Carlsbad, Inc.<sup>3</sup>*Coalition Comment*

The plaintiff, a coal mining equipment manufacturer, brought a civil RICO action against a business it was acquiring, alleging fraudulent misrepresentations as to the marketability of the acquired business's products.

*Analysis*

The district court properly dismissed the case for failure to allege a "pattern." These filings should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

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1. The able assistance of Joseph E. Bauerschmidt (Notre Dame Law School Class of 1991), Mary K. Hartigan (Notre Dame Law School Class of 1991), and Bernardo M. Garcia (Notre Dame Law School Class of 1991) in the preparation of this Appendix is acknowledged. The Coalition Report is a currently unpublished document, available from the Business/Labor Coalition for Civil RICO Reform and on file with the Author.

2. 657 F. Supp. 504 (N.D. Ill. 1987) (coalition's case number 34). The cases have been rearranged to make them alphabetical.

3. [1987-1988 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6903 (S.D.N.Y. 1988) (coalition's case number 14).

This case also suggests that the Coalition did not develop its list of "abusive cases" through thorough investigation. The "abusive" list includes ten cases, including *A.L. Lee Corp.*, which appear on pages 7971 through 8054 of the Business Disputes Guide Transfer Binder (1987-88).

3. *American Society of Contemporary Medicine, Surgery & Ophthalmology v. Murray Communications, Inc.*<sup>4</sup>

*Coalition Comment*

Civil RICO action arising from a breach of contract dispute over the publication rights of two of the Society's medical journals.

*Analysis*

The district court properly dismissed part of a RICO counterclaim. The counterclaim, however, was partially valid because the plaintiff alleged a pattern of fraudulent withholding of monies due. This case is not abusive.

4. *Ark Travel, Inc. v. Travellers International Tour Operators, Inc.*<sup>5</sup>

*Coalition Comment*

The plaintiffs, individual travel agents, brought a civil RICO action against several tour packagers over a dispute concerning commissions owed by the tour packagers to the travel agents.

*Analysis*

The district court properly upheld the fraud claims of travel agents, who systematically were swindled out of commissions. The court also granted the plaintiff leave to amend the complaint to allege fraud with more particularity. The litigation is not abusive.

5. *Barker v. Underwriters at Lloyd's, London*<sup>6</sup>

*Coalition Comment*

Lloyd's of London and the Lincoln Insurance Company denied a claim under a fire insurance policy because they believed the fire had been set by one of the plaintiffs. The plaintiff brought a civil RICO action against both companies, alleging that "defendants [through the

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4. 547 F. Supp. 462 (N.D. Ill. 1982) (coalition's case number 35).

5. Civ. No. 84-623 (D.N.J. Feb. 12, 1985), reprinted in 2 RICO L. REP. 283 (Aug./Sept. 1985) (coalition's case number 48).

6. 564 F. Supp. 352 (E.D. Mich. 1983) (coalition's case number 42).

use of the mails] have engaged in a scheme to defraud by fraudulently refusing to pay claims without valid reasons in order to force persons to compromise their claim for an amount less than they are entitled to under the insurance policies.”<sup>7</sup>

### *Analysis*

The district court properly dismissed the case for failure to allege a “pattern” and for failure to plead fraud with particularity. These filings should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

Nevertheless, while one may consider this litigation inappropriate, it is not beyond the pale to consider that an insurance company could engage in a pattern of fraud that might be an appropriate subject for RICO litigation.<sup>8</sup>

### 6. Battlefield Builders, Inc. v. Swango<sup>9</sup>

#### *Coalition Comment*

The plaintiff, a condominium developer, brought a civil RICO action against two purchasers of an office condominium and the two purchasers’ wives, alleging the defendants were trying to “extort” an unreasonably high price from the developer in connection with the developer’s effort to repurchase the property in order to include it in a block of units the developer wanted to sell to IBM. The district court dismissed the claim, stating, “If its allegations are true, it might have an approved claim, but it is at best a garden-variety commercial breach of contract, perhaps fraud, even perhaps conspiracy. . . . But this is not what RICO was designed to remedy.”<sup>10</sup> The Fourth Circuit overturned the district court’s dismissal, concluding that the allegations might make out a claim of “extortion” under state law, and therefore ruled the developer could bring the RICO action.

### *Analysis*

The district court granted a motion to dismiss for failure to state a claim for relief, holding that the activities had to be “racketeer” re-

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7. *Id.* at 356.

8. *See, e.g.,* Unocal Corp. v. Superior Court, 198 Cal. App. 3d 1245, 244 Cal. Rptr. 540 (1988) (upholding RICO fraud because insurance company fraudulently intended to cancel directors and officers’ liability policy at first sign of hostile takeover and tried to coerce insureds into accepting a replacement policy with higher deductibles, higher premiums, and exclusion clauses for acts related to hostile takeovers).

9. 743 F.2d 1060 (4th Cir. 1984) (coalition’s case number 44).

10. *Id.* at 1062-63 (quoting the district court’s oral opinion from the bench).

lated. The Fourth Circuit properly reversed on this issue.

*Battlefield Builders*, however, no longer states the law. Today, a court would dismiss this litigation on "pattern" grounds.<sup>11</sup> As such, filings of this type should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

#### 7. *Beauford v. Helmsley*<sup>12</sup>

##### *Coalition Comment*

The plaintiffs, tenants of an apartment building, brought a civil RICO suit against the developer, the developer's sales agent, and two engineering firms in connection with the conversion of their apartment building to a condominium.

##### *Analysis*

Although the district court and a panel of the Second Circuit dismissed the RICO count for failure to allege a "pattern," on a rehearing en banc<sup>13</sup> the court held its previous focus on the "continuity of the enterprise" was amiss:

Since Congress's goal in fashioning its definition of "pattern of racketeering activity" was to exclude from the reach of RICO criminal acts that were merely "isolated" or "sporadic," we must determine whether two or more acts of racketeering activity have sufficient interrelationship and whether there is sufficient continuity or threat of continuity to constitute such a pattern. Accordingly, our analysis of relatedness and continuity has shifted from the enterprise element to the pattern element.<sup>14</sup>

The court first stressed that the defendants mailed offers to 8286 tenants and potential buyers. The defendants also made several amendments to the offering, which included the original misrepresentations. The court then appropriately concluded that "[t]here [could] be no question that the thousands of alleged mail frauds . . . had the necessary interrelationship to be considered a pattern."<sup>15</sup> Finally, due to the vacancy rate, the court held that "there was reason to believe that similarly fraudulent mailings would be made over an additional period of years."<sup>16</sup> As such, *Beauford* cannot fairly be termed anything but an example of a systematic fraud properly within RICO.

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11. See, e.g., *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988).

12. 843 F.2d 103 (2d Cir. 1988) (coalition's case number 12).

13. *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir.), *vacated and remanded*, 109 S. Ct. 3236 (1989) (in light of *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989)).

14. *Id.* at 1391.

15. *Id.* at 1392.

16. *Id.*

8. Bingham v. Zolt<sup>17</sup>*Coalition Comment*

The plaintiff, the estate of famed Jamaican reggae performer Bob Marley, brought a civil RICO action against several of Marley's attorneys and accountants alleging fraudulent diversion of Marley's music companies from the estate.

*Analysis*

The district court properly dismissed the case on "pattern" grounds. These filings should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

9. Bishop v. Corbitt Marine Ways, Inc.<sup>18</sup>*Coalition Comment*

Plaintiff brought a civil RICO action over a dispute regarding repairs of a commercial fishing boat.

*Analysis*

The court properly dismissed this litigation based on the plaintiff's improper categorization of the defendant as an "enterprise." Filings of this type should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

10. Brayall v. Dart Industries, Inc.<sup>19</sup>*Coalition Comment*

Independent distributors of Tupperware products sued the manufacturer of Tupperware, Dart Industries, alleging that Dart fraudulently induced plaintiffs to become Tupperware distributors.

*Analysis*

This litigation is not abusive. The fraud consisted of "cult-like" indoctrination techniques, which misstated the income and business gain available to distributors. The plaintiffs originally brought the action in state court, but the defendant removed it to federal district court. The district court temporarily stayed the RICO claim pending the outcome

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17. 683 F. Supp. 965 (S.D.N.Y. 1988) (coalition's case number 20).

18. 802 F.2d 122 (5th Cir. 1986) (coalition's case number 37).

19. [1987-1988 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6861 (D. Mass. 1988) (coalition's case number 8).



of an injunction request and state law claims, which it had remanded to state court. The district court, however, observed that "[a]lthough defendants have moved to dismiss the RICO claim, it cannot be said that the claim 'is "obviously without merit". . . .'"<sup>20</sup>

11. Bruce Church, Inc. v. United Farm Workers<sup>21</sup>

*Coalition Comment*

Agricultural business brought a civil RICO suit against Cesar Chavez, the United Farm Workers Union (UFW), their attorneys, and strike coordinators, alleging that the UFW, along with the other defendants, had induced the California Agricultural Labor Relations Board to issue fraudulent complaints against the business.

*Analysis*

The district court properly dismissed the complaint for failure to plead fraud with particularity.

12. Christian Populist Party v. Secretary of State<sup>22</sup>

*Coalition Comment*

Plaintiffs brought a civil RICO action against the State of Arkansas, challenging the Arkansas state election statute with regard to its filing deadlines and petitioning requirements.

*Analysis*

The plaintiffs, Ralph P. Forbes and the Christian Populist Party, brought eight different claims against the defendants. The district court properly dismissed all charges.

Ralph P. Forbes first gained notoriety as a captain in George Lincoln Rockwell's American Nazi Party.<sup>23</sup> Most recently, he was the campaign manager for David Duke, former Grand Wizard of the Knights of the Ku Klux Klan, in Louisiana's 1989 House of Representatives election.<sup>24</sup> Additionally, in 1986, Mr. Forbes filed a lawsuit on behalf of Jesus Christ, minor children, and himself against Satan, various governmental units, the Russellville School District, and a state education offi-

20. *Id.* ¶ 6861, at 7835.

21. No. CV-F-84-231 REC (E.D. Cal. Jan. 24, 1986), reprinted in 3 RICO L. REP. 723 (May 1986) (coalition's case number 4).

22. 650 F. Supp. 1205 (E.D. Ark. 1987) (coalition's case number 30).

23. Berry, *A Master Racist Jumps Parties to Land in the Louisiana Legislature*, L.A. Times, Feb. 26, 1989, § 5, at 3, col. 1.

24. Berry, *supra* note 23, at 6, col. 1; see also Grogan & Greene, *An Ex Klansman Trades His Robes for a Cloak of Respectability in the Louisiana Legislature*, TIME, Mar. 6, 1989, at 215.

cial, to stop the celebration of Halloween in the schools. That case, too, was dismissed properly.<sup>25</sup>

Accordingly, this litigation has little or nothing to do with civil or criminal RICO. No matter what the law is, however, people like Mr. Forbes will file frivolous claims for relief. The proposed reform, therefore, will do nothing to deter Mr. Forbes from filing another claim under RICO or any other theory.

### 13. Church of Scientology v. Armstrong<sup>26</sup>

#### *Coalition Comment*

The plaintiff, the Church of Scientology, brought a civil RICO action against former church members, alleging they conspired to steal church scriptures for their personal financial benefit and were "perverting" the scriptures' texts.

#### *Analysis*

This case is part of the same litigation as *Religious Technology Center v. Wollersheim*.<sup>27</sup> In *Wollersheim* defendants stole certain scriptures and higher level materials from church offices in Copenhagen, Denmark. Danish officials later convicted them of burglary. The Church of the New Civilization, a splinter group from the Church of Scientology, acquired the materials and the competing "New Church" allegedly used them to lure away adherents and to damage the Church spiritually and financially. *Wollersheim* denied the Church injunctive relief under civil RICO. The Church refiled in *Religious Technology Center v. Scott*,<sup>28</sup> alleging that the scriptures were trade secrets with economic value. The district court denied the application. The Church appealed to the Ninth Circuit and properly prevailed.<sup>29</sup>

This litigation is not abusive. It strikes at the sort of extensive fraud RICO was designed to redress. The defendants traveled across the globe to burglarize the Church. They were convicted of crimes in a foreign country. They then set up a competing enterprise with the burglarized material seeking fraudulently to induce patrons to seek spiritual guidance at the "New Church" instead of the Church.<sup>30</sup>

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25. Olander, *Devil Made Him Do It*, NAT'L L.J., Sept. 4, 1987, at 47.

26. D.C. Cal. July 16, 1985 (coalition's case number 39); see CIV. RICO REP., July 24, 1985, at 2.

27. 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987).

28. 660 F. Supp. 515 (C.D. Cal. 1987).

29. 869 F.2d 1306 (9th Cir. 1989).

30. As Joseph Yanny, an attorney in the litigation, aptly observed, it "proves that Scientology can receive justice in the courts without putting its religious beliefs on trial." *Church of Scientology RICO Suit Against Former Members Upheld by Court*, CIV. RICO REP., July 24,

14. *Compton v. Ide*<sup>31</sup>*Coalition Comment*

Plaintiff brought a civil RICO action against the Federal Bureau of Investigation, individual FBI agents, and others in connection with the investigation and arrest of the plaintiff which led to his conviction for illegal possession of a dangerous weapon.

*Analysis*

Plaintiff filed several federal claims, including a RICO claim. The district court properly dismissed the RICO claim for failure to file within the statutory period. The Ninth Circuit disposed of the RICO charges in only three paragraphs.

The RICO claim also was subject to dismissal on "pattern" grounds. As such, filings of this type should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

Further, federal law enforcement officers, acting in an objectively reasonable fashion, are immune from federal and state criminal prosecution.<sup>32</sup> Civilly, a court must determine whether federal law enforcement officers are immune on a case by case basis.<sup>33</sup> When officers act outside the scope of their immunity, they have no valid objection to criminal or civil actions against them under RICO or any other statutes or claims for relief.<sup>34</sup>

15. *Conan Properties, Inc. v. Mattel, Inc.*<sup>35</sup>*Coalition Comment*

Conan Properties brought a civil RICO action against Mattel alleging copyright infringement by Mattel of its fictitious character "Conan the Barbarian."

1985, at 2.

31. 732 F.2d 1429 (9th Cir. 1984) (coalition's case number 36).

32. See, e.g., *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982) (holding that an FBI agent was not subject to state prosecution for bribery for participation in a sting operation).

33. Compare *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (finding that the President has absolute civil immunity from damages liability predicated on his official acts) with *Butz v. Economou*, 438 U.S. 478, 504-08 (1978) (holding that the Secretary of Agriculture has qualified immunity for unconstitutional action arising out of the exercise of discretion).

34. Compare *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976) (upholding a civil rights conviction for unlawful burglary of a doctor's office by White House personnel), *cert. denied*, 429 U.S. 1120 (1977) with *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986) (alleging civil claim for relief for an unlawful wire tap by government officials).

35. 619 F. Supp. 1167 (S.D.N.Y. 1985) (coalition's case number 1).

*Analysis*

The district court properly upheld claims and counterclaims for fraudulent misuse of copyright materials. The court granted leave to both parties to amend their pleadings. Both parties subsequently abandoned their RICO claims, but the other claims remain in court.<sup>36</sup> This litigation is not abusive.

16. *Condict v. Condict*<sup>37</sup>*Coalition Comment*

A brother brought a civil RICO action against his mother and brother alleging that they tried to wrest control of the family's 25,000-acre Wyoming ranch from him, and deprive him of any of the proceeds from the ranch's operation.

*Analysis*

The district court improperly dismissed the complaint on the ground that the complaint lacked a connection to "organized crime." The Tenth Circuit, however, decided *Plains Resources, Inc. v. Gable*<sup>38</sup> by the time of the appeal. In *Gable* the court held that "neither RICO nor Colorado Organized Crime Control Act (COCCA) requires [plaintiff] to plead a connection between defendant's activities and organized crime. . . . We are persuaded by the opinions which have held that there is no such requirement in a civil setting."<sup>39</sup> The court, however, dismissed the complaint on a different ground: failure to allege a "pattern." Nevertheless, the *Gable* opinion is not a proper construction of the RICO statute. Contrary to plaintiff's complaint, which alleged a claim for relief under section 1962(b),<sup>40</sup> the court reached its judgment under section 1962(c). The court held that no "pattern" was present because only a single scheme was alleged. This holding largely reads section 1962(b) out of the statute.<sup>41</sup> In fact, the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>42</sup> rejected the Tenth Circuit's reading of "pattern." As such, *Condict* is a better illustration of judicial abuse of RICO rather than a litigant's abuse of the statute.

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36. See *Conan Properties, Inc. v. Mattel*, 13 U.S.P.Q.2d 1017 (S.D.N.Y. 1989).

37. 815 F.2d 579 (10th Cir. 1987) (coalition's case number 7).

38. 782 F.2d 883 (10th Cir. 1986).

39. *Id.* at 885-86.

40. Section 1962(b) prohibits the takeover of an enterprise by a pattern of racketeering activity. See 18 U.S.C. § 1962(b) (1988).

41. See *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986) (stating that "requiring two schemes to establish pattern would effectively eliminate" § 1962(b)), *cert. denied*, 483 U.S. 1006 (1987).

42. 109 S. Ct. 2893 (1989).

17. Congregation Beth Yetzhuk v. Briskman<sup>43</sup>*Coalition Comment*

The plaintiff, a Chassidic Jewish congregation, filed a civil RICO suit against other members of the congregation over a dispute concerning the proper succession to the "Skolyer Rebbe," the religious leadership position within the congregation.

*Analysis*

The district court improperly dismissed the RICO claim on the grounds of a lack of an "organized crime" allegation.

The district court probably should have dismissed the claim on first amendment grounds.<sup>44</sup> It also is doubtful that a "pattern" could be alleged properly. Filings of this type should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

18. Cory v. Standard Federal Savings Bank<sup>45</sup>*Coalition Comment*

The plaintiff, an individual bank depositor, brought a civil RICO action against a bank for the bank's alleged fraudulent underpayment of interest on the plaintiff's "T-bill Plus" account.

*Analysis*

The district court properly dismissed the case because the plaintiff failed to establish a "pattern." The Fourth Circuit determined that this appeal was so insignificant that it affirmed the district court's dismissal without publishing its opinion.<sup>46</sup> Filings of this sort should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

19. Creative Bath Products v. Connecticut General Life Insurance Co.<sup>47</sup>*Coalition Comment*

A partnership brought a civil RICO action against Connecticut General alleging that the insurance company's agent made three false

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43. 566 F. Supp. 555 (E.D.N.Y. 1983) (coalition's case number 52). The correct spelling of the plaintiff's name is "Congregation Beth Yitzhok."

44. See, e.g., Jones v. Wolf, 443 U.S. 595 (1979).

45. [1987-1988 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6902 (4th Cir. 1988) (coalition's case number 13).

46. See Cory v. Lang, 843 F.2d 1386 (4th Cir. 1988).

47. 837 F.2d 561 (2d Cir. 1988) (coalition's case number 9).

representations in order to induce the partnership to purchase four life insurance policies for its officers.

*Analysis*

The Supreme Court denied certiorari.<sup>48</sup> The district court properly dismissed the complaint for failure to allege a "pattern" and the Second Circuit affirmed. Filings of this type should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

20. District Telecommunications Development Corp. v. District Cablevision, Inc.<sup>49</sup>

*Coalition Comment*

The plaintiff, a disappointed bidder of a cable television franchise, brought a civil RICO action against the successful bidder of the franchise.

*Analysis*

The district court improperly dismissed the case because it held that the plaintiff lacked cognizable injury. This decision represents a view of RICO that would deny defense contractors standing to sue for a systematic pattern of obtaining defense contracts through fraud. As such, it is inconsistent with the better view.<sup>50</sup> It is, therefore, a better illustration of judicial rather than litigant abuse.

21. Erlbaum v. Erlbaum<sup>51</sup>

*Coalition Comment*

The plaintiff, a divorced wife, brought a civil RICO action against her ex-husband because she believed he had not lived up to his part of the property settlement.

*Analysis*

The district court dismissed this case because it determined that the plaintiff was not a "purchaser or seller" under section 10b-5 of the securities statute. The district court wrongly decided this issue.<sup>52</sup> The

48. 109 S. Ct. 3241 (1989).

49. 638 F. Supp. 418 (D.D.C. 1985) (coalition's case number 41).

50. See, e.g., *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988).

51. [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. 1982) (coalition's case number 43).

52. See *infra* notes 60-61 and accompanying text.

court probably should have dismissed the case on "pattern" grounds.

22. *Eveland v. Director of Central Intelligence Agency*<sup>53</sup>

*Coalition Comment*

The plaintiff, challenging the conduct of the U[nited] S[tates] foreign policy in the Middle East, brought a civil RICO action against the CIA and its director, William Casey, in which various current and former government officials, including Henry Kissinger, Robert McFarlane, Richard Helms, George Schultz, and others were served.

*Analysis*

The First Circuit properly dismissed the claim for relief. The court used the case for a clear statement that RICO is not a tool for resolving "political differences." Future similar cases should result in sanctions.

The sort of litigation abuse illustrated by this case, however, is not RICO-specific. All legislation is exposed to it. Individuals who believe that litigation can resolve all of their personal dissatisfactions will seek to use any legislation on the books. It is doubtful that even the repeal of RICO would prevent this sort of litigation from being brought in the future.

23. *Flip Mortgage Corp. v. McElhone*<sup>54</sup>

*Coalition Comment*

A mortgage company brought a civil RICO action against the officers and directors of a computer services firm alleging fraudulent breach of a contractual arrangement to share revenues generated by firm computerized mortgage-related services.

*Analysis*

Flip Mortgage Corp. brought civil RICO charges against the directors of Shamrock Computer Services alleging multiple counts of fraud over a seven year span. The district court dismissed the RICO count on "pattern" grounds. The Fourth Circuit affirmed.

This construction of "pattern," however, was incorrect. If multiple frauds occurred over a substantial period of time, the court should have found a "pattern."<sup>55</sup> This decision is a better illustration of judicial abuse than litigant abuse.<sup>56</sup>

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53. 843 F.2d 46 (1st Cir. 1988) (coalition's case number 16).

54. 841 F.2d 531 (4th Cir. 1988) (coalition's case number 10).

55. *See, e.g., Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1303-04 (7th Cir. 1987).

56. *See, e.g., Eastern Publishing & Advertising v. Chesapeake Publishing & Advertising*, 831

24. Flip Side Productions, Inc. v. Jam Productions, Ltd.<sup>57</sup>*Coalition Comment*

The plaintiff, a Chicago rock concert promoter, brought a civil RICO action against another local rock promoter, the Village of Rosemont, Illinois, and the University of Illinois, alleging a RICO conspiracy to exclude the plaintiff from the University of Illinois' arena by the operation of an exclusive lease for the arena which allegedly operated to prevent rock performers appearing at the University's arena from discovering that defendant promoter was charging artificially high promotional fees.

*Analysis*

The Supreme Court denied certiorari.<sup>58</sup>

The court properly dismissed this action on "pattern" grounds, and it imposed sanctions of 42,496 dollars on the plaintiff. This case illustrates the Seventh Circuit's position on abusive RICO claims: such claims will not be tolerated, and the court will not hesitate to sanction those bringing abusive actions. This case illustrates how well the present system is working; it is not an illustration of litigation abuse that requires the rewriting of RICO.

25. Hunt v. Weatherbee<sup>59</sup>*Coalition Comment*

The plaintiff, a female carpenter's apprentice, brought a civil RICO action against officers of a union local and a superintendent of a construction company alleging a pattern and practice of sex discrimination and sexual harassment.

*Analysis*

This case is not abusive. Instead, it illustrates how a plaintiff can use RICO to redress wrongs that otherwise may be difficult to redress. Here, the labor union systematically sexually harassed and subjected Hunt to extortionate behavior until she was compelled to leave her work. RICO provided an apt remedy to a wronged person.

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F.2d 488 (4th Cir. 1987) (finding no pattern), *cert. granted and vacated* 109 S. Ct. 3234 (1989); *Walk v. Baltimore & Ohio R.R.*, 847 F.2d 1100 (4th Cir. 1988) (finding no pattern), *cert. granted and vacated*, 109 S. Ct. 3235 (1989).

57. 843 F.2d 1024 (7th Cir. 1988) (coalition's case number 19).

58. 109 S. Ct. 261 (1988).

59. 626 F. Supp. 1097 (D. Mass. 1986) (coalition's case number 24).



26. International Data Bank, Ltd. v. Zepkin<sup>60</sup>*Coalition Comment*

The plaintiffs, outside investors, filed a civil RICO suit against the owners of a firm for including a fraudulent statement in the stock prospectus for the firm.

*Analysis*

The court dismissed the case because plaintiffs lacked "standing" to recover under section 10b-5 of the securities statute. The Fourth Circuit, however, is incorrect when it applies civil instead of criminal standing elements to a civil RICO claim.<sup>61</sup> The court also dismissed the case for lack of a "pattern." In fact, this second justification for the court's dismissal rests on better legal ground.

27. Jerome v. SmithKline Beckman Corp.<sup>62</sup>*Coalition Comment*

The plaintiffs brought a civil RICO action against a pharmaceutical company for damages for alleged personal injuries caused by use of a drug manufactured by the company.

*Analysis*

The district court properly dismissed the RICO count, because personal injuries do not give rise to a claim for relief under RICO. In addition, because the plaintiffs did not allege a crime of violence, the proposed RICO reform legislation, which would authorize recovery for personal injury in some situations, would not change this result. This type of litigation should not continue in the future. If it does continue, the filing parties should be subject to sanctions.

28. King v. Lasher<sup>63</sup>*Coalition Comment*

The plaintiffs, beneficiaries of an estate and trust, brought a civil RICO action against the executrix and trustee of the estate over the administration and distribution of the deceased's estate.

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60. 812 F.2d 149 (4th Cir. 1987) (coalition's case number 53).

61. See, e.g., Warner v. Alexander Grant & Co., 828 F.2d 1528, 1530-31 (11th Cir. 1987); United States v. Newman, 664 F.2d 12, 15-20 (2d Cir. 1981).

62. 842 F.2d 208 (8th Cir. 1988) (coalition's case number 11).

63. 572 F. Supp. 1377 (S.D.N.Y. 1983) (coalition's case number 31).

*Analysis*

Mrs. Lasher, the executrix, properly recovered her attorney's fees from plaintiff's counsel upon dismissal. The court found that the plaintiffs brought the action in bad faith and without factual basis. It is possible that the court could have dismissed the claim on other grounds.<sup>64</sup>

29. K-N Energy, Inc. v. Gulf Interstate Co.<sup>65</sup>

*Coalition Comment*

The plaintiff brought a civil RICO action against a large shareholder to enjoin the shareholder from voting its shares at an annual meeting and from exercising any control over the plaintiff, alleging that the shareholder had obtained its common stock of the plaintiff in violation of RICO.

*Analysis*

This case dealt with the fraudulent filing of a Schedule 13(d) with the Securities and Exchange Commission. Section 13(d) requires a group acquiring more than five percent of the stock in a corporation to explain the group's intent in acquiring the stock. The court acknowledged that the defendants had intentions beyond what the filed form indicated, but it found no "pattern." The court, therefore, found that the claim should not be dismissed and denied the defendant's motion for summary judgment.

30. Kouvakas v. Inland Steel Co.<sup>66</sup>

*Coalition Comment*

The plaintiffs, a husband and wife, brought a civil RICO action against Inland Steel Company alleging that Inland officials conducted a pattern of racketeering by causing fraudulent invoices and other documents to be mailed to Inland Steel Company customers, and that Inland's harassment of plaintiff for refusing to participate in the pattern of racketeering activity caused plaintiff Spiro Kouvakas to become permanently disabled and caused plaintiff Judith Kouvakas the loss of consortium of her husband.

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64. See C. WRIGHT, LAW OF FEDERAL COURTS § 25, at 143-46 (1983) (discussing the inherent exceptions to jurisdiction).

65. 607 F. Supp. 756 (D. Colo. 1983) (coalition's case number 51).

66. 646 F. Supp. 474 (N.D. Ind. 1986) (coalition's case number 23).

*Analysis*

The district court properly dismissed this case on summary judgment. RICO does not include personal injury claims.

31. *Lightner v. Tremont Auto Auction*<sup>67</sup>*Coalition Comment*

Civil RICO suit brought against FBI agents who orchestrated an undercover sting operation.

*Analysis*

Two FBI agents were charged with violating RICO and the civil rights statute through their scheme of entering disguised stolen vehicles into the stream of commerce. The agents used the scheme to sting a ring of interstate auto thieves. Lightner was injured when he purchased stolen vehicles. The district court did not dismiss the RICO charges on the defense of qualified immunity, because it would not hold as a matter of law that defendants had the requisite good faith reasonable belief in the constitutionality of their scheme.

The FBI agents appealed the issue of qualified immunity in *Powers v. Lightner*.<sup>68</sup> The Seventh Circuit first held that the district court's order denying summary judgment was not immediately appealable; the resolution of the issue of qualified immunity would require a final judgment. In *Powers v. Lightner*<sup>69</sup> the court reversed itself in light of the Supreme Court's decision in *Mitchell v. Forsyth*,<sup>70</sup> which held that a summary judgment order is an appealable final decision. The court further held that the FBI agents were entitled to summary judgment on the grounds that federal agents had qualified immunity against civil suits that failed to allege criminal intent. The Supreme Court denied certiorari in *Lightner v. Jones*.<sup>71</sup> Although the court acknowledged that "it would be illogical to extend good faith immunity to a government official who has intentionally violated an individual's constitutional rights,"<sup>72</sup> the FBI agents did not violate Lightner's rights; it was merely the "fallout of the sting operation."<sup>73</sup> As such, the FBI agents were vindicated on appeal. Finally, this type of litigation is not RICO-specific. It properly could reoccur under the civil rights statutes if FBI

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67. 564 F. Supp. 1112 (N.D. Ill. 1983) (coalition's case number 3).

68. 752 F.2d 1251 (7th Cir. 1985).

69. 820 F.2d 818 (7th Cir. 1987).

70. 472 U.S. 511 (1985).

71. 484 U.S. 1078 (1988).

72. *Powers*, 820 F.2d at 822 (quoting *Perry v. Larson*, 794 F.2d 279, 284 n.1 (7th Cir. 1986)).

73. *Id.*; see *supra* notes 31-34 and accompanying text.

agents do not act in good faith.

This type of litigation should not reoccur. If it does reoccur, the ground rules, under which these types of actions are to be resolved, are settled.

32. Marks v. Pannell Kerr Forster<sup>74</sup>

*Coalition Comment*

The plaintiff, a former business partner, brought a civil RICO action against a former partner and the partnership's accounting firm alleging that defendants engaged in a pattern of racketeering activity by mailing false partnership tax returns to him, thus adversely affecting his tax liability for the year in question.

*Analysis*

Plaintiff had an expectation of in excess of 8,000,000 dollars that was invested in various partnership arrangements. The district court properly dismissed the case on "pattern" grounds. The Seventh Circuit affirmed. Filings of this type should not occur in the future. If they do continue, the filing parties should be subject to sanctions.

33. Medallion TV Enterprises v. SelecTV of California<sup>75</sup>

*Coalition Comment*

The plaintiff, a joint venture partner, brought a civil RICO action against a former joint venture partner to recover losses sustained from lower than anticipated sales of the broadcast rights to a heavyweight prize fight between Muhammed Ali and Trevor Berbick.

*Analysis*

The district court properly dismissed the case for failure to allege a "pattern." Filings of this type should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

34. Medical Emergency Service Associates v. Foulke<sup>76</sup>

*Coalition Comment*

The plaintiff, a corporation providing medical services to hospitals, brought a civil RICO action against four employee-physicians, alleging

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74. 811 F.2d 1108 (7th Cir. 1987) (coalition's case number 28).

75. 627 F. Supp. 1250 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987) (coalition's case number 33).

76. 844 F.2d 391 (7th Cir. 1988) (coalition's case number 18).

they had fraudulently schemed to replace the corporation as the provider of emergency room services for a hospital.

### *Analysis*

The court dismissed the plaintiff's RICO claim for failure to allege a "pattern." The district court imposed sanctions on the plaintiff because he made inaccurate statements in his attempt to establish a "pattern." The Seventh Circuit affirmed. This case illustrates how well rule 11 is working. It hardly justifies rewriting RICO on other issues.

35. Michaels Building Co. v. Ameritrust Co., N.A.<sup>77</sup>

### *Coalition Comment*

The plaintiffs, two commercial bank customers, brought a civil RICO class action against six different banking groups and fifty individuals employed by or associated with the banks, alleging overcharges in interest on various prime rate-based loans.

### *Analysis*

This case does not illustrate litigation abuse. The Sixth Circuit properly acknowledged the dilemma courts face in trying to distinguish between illegitimate and meritorious claims. The court held that there is tension between rule 8 (notice pleading) and rule 9(b) (pleading with particularity) of the Federal Rules of Civil Procedure. Rule 9(b)'s particularity requirement cannot be viewed to undercut rule 8's "short and plain statement of a claim" provision. The two rules should be viewed in harmony. The court, however, found that rule 9(b)'s particularity requirement must be read to give the defendant fair notice of the substance of the plaintiff's claim so that the defendant can prepare a responsive pleading.

Bank lending practices, if fraudulent, may be challenged properly under RICO.<sup>78</sup> Many of the so-called prime-rate cases under RICO,

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77. 848 F.2d 674 (6th Cir. 1988) (coalition's case number 22).

78. See Note, *Prime-Rate Fraud Under RICO*, 72 GEO. L.J. 1885, 1889-90 (1984). The commentator stated:

Prime-rate discounting is widely practiced by banks that wish to reap the benefits of lending at high market rates to small businesses, while discounting the rates to large corporate borrowers in order to retain their valued business. But such bank practices have an inherently negative impact on a sensitive economy. As the Committee report on prime-rate lending noted,

For the public at large, the highly visible prime rate is an important economic indicator, and artificially high prime rate announcements that are not truly reflective of interest rate conditions add to inflationary expectations. While the prime rate refers to commercial loans, there is an indirect effect on other lending activity.

however, do not fare well.<sup>79</sup>

### 36. *Miller v. Moffat County State Bank*<sup>80</sup>

#### *Coalition Comment*

The plaintiff, an individual bank customer, brought a civil RICO action against a state bank alleging fraudulent overcharges in interest on a series of prime rate-based loans.

#### *Analysis*

The district court dismissed this case on "pattern" grounds. The significant aspect of *Miller*, however, is the court's statement that the courtroom is not the proper place for attorneys to learn about RICO; the court threatened to impose rule 11 sanctions on attorneys in the future in similar situations.<sup>81</sup>

### 37. *Montesano v. Seafirst Commercial Corp.*<sup>82</sup>

#### *Coalition Comment*

The plaintiffs, owners of a mortgaged boat, brought a civil RICO action against the secured lender and the repossession company, alleging a RICO conspiracy in repossession of the boat.

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For example, as long as the prime remains high, local mortgage lenders are unlikely to modify terms or make new commitments. Although consumer rates are less volatile than other loan rates, both the cost and the availability of consumer loans are affected by the "trickle-down" from the perceived prime. Thousands of loan contracts, particularly those entered into by small- and medium-sized businesses, are tied to the prime rate. Moreover, the Small Business Administration uses the *Wall Street Journal's* daily prime-rate listing as the official base for its loan programs.

It is clear, therefore, that society is best served when interest rates reflect the true opportunity cost of borrowing—and in a free market, this would occur. If a major borrower refused to pay the published prime, interest rates would decline. This natural supply-and-demand effect is vitiated, however, when banks deceive small-business borrowers. Awarding damages on fraud claims in such cases would deter the practice of making secret discounts to favored borrowers and issuing loans to smaller borrowers based on an artificial prime, and will motivate banks to reveal their lowest interest rates in order to avoid lawsuits. This flow of information, in turn, will stimulate interest-rate competition among banks, leading to the lowest rate the market will bear.

The widespread use and effect of prime-rate discounting thus provide compelling reasons for seeking nontraditional methods of damage recovery which will simultaneously remedy injuries caused to a plaintiff and deter future behavior of this kind. The RICO treble-damage provision provides such a mechanism.

*Id.* (footnotes omitted).

79. See, e.g., *Walters v. First Tenn. Bank, N.A.* Memphis, 855 F.2d 267, 273 (6th Cir. 1988) (directing verdict in favor of bank on issue of intent to defraud when prime rate fraud is alleged).

80. 678 F. Supp. 247 (D. Colo. 1988) (coalition's case number 21).

81. See *supra* notes 77-79 and accompanying text.

82. 818 F.2d 423 (5th Cir. 1987) (coalition's case number 26).

*Analysis*

The court properly dismissed this case on "pattern" grounds. This type of case should not reoccur. If it does reoccur, the filing party should be subject to sanctions.

38. *Moore v. Eli Lilly & Co.*<sup>83</sup>

*Coalition Comment*

The plaintiffs, a husband and wife, brought a civil RICO action against a pharmaceutical company for alleged damages suffered from ingestion of arthritis medication.

*Analysis*

The district court properly dismissed this case on the grounds that RICO does not protect against personal injuries.

39. *Morosani v. First National Bank*<sup>84</sup>

*Coalition Comment*

The plaintiff, an individual bank customer, brought a civil RICO action against the bank alleging that the prime rate used in computing the interest on the customer's loan was not the bank's true prime rate.

*Analysis*

The Eleventh Circuit properly ruled that the district court incorrectly held that the bank's activities have "not traditionally been treated as criminal in nature."<sup>85</sup> In fact, the bank systematically charged a particular interest rate to a certain class of customers when it claimed it was charging a lower rate. The Eleventh Circuit thus reinstated the customer's claim, stating that fraud is criminal.<sup>86</sup>

40. *Morrison v. Syntex Laboratories, Inc.*<sup>87</sup>

*Coalition Comment*

The plaintiff brought a civil RICO action against a manufacturer of infant milk formula alleging fraudulent advertising.

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83. 626 F. Supp. 365 (D. Mass. 1986) (coalition's case number 25).

84. 703 F.2d 1220 (11th Cir. 1983) (coalition's case number 47).

85. *Id.* at 1221.

86. *See supra* notes 77-79 and accompanying text.

87. 101 F.R.D. 743 (D.D.C. 1984) (coalition's case number 50).

*Analysis*

Ms. Morrison had a products liability case pending in the federal courts for eighteen months before she requested leave to amend her complaint to include a RICO count. The district court denied the plaintiff's request because of her undue delay.

41. *Park South Associates v. Fischbein, Oliveri, Rozenholc & Badillo*<sup>88</sup>

*Coalition Comment*

A New York real estate development partnership headed by Donald Trump brought a civil RICO action against the law firm representing tenants in an apartment building that were resisting efforts of the development company to convert the apartment building into a condominium entity by initiating a number of legal proceedings aimed at delaying and preventing Trump from undertaking the conversion of the property.

*Analysis*

The district court properly dismissed the RICO allegations as insufficiently plead. The court added: "Since it appears that future pleading would merely waste the time and resources of the litigants as well as divert scarce judicial resources, we deny plaintiff's motion to re-plead and dismiss the complaint with prejudice."<sup>89</sup>

The Second Circuit affirmed the district court's decision without a published opinion.<sup>90</sup> This case illustrates that the system is working well. Courts do not tolerate flagrantly ill-plead RICO suits.

42. *Peckarsky v. American Broadcasting Co.*<sup>91</sup>

*Coalition Comment*

The plaintiff, a free-lance journalist and attorney, brought a civil RICO suit against ABC for its use of an article without giving plaintiff audio-visual credit during times when broadcast was made of the article.

*Analysis*

Mr. Peckarsky filed a multicount suit against ABC alleging, among other claims, Copyright Act and RICO violations. The district

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88. 626 F. Supp. 1108 (S.D.N.Y. 1986) (coalition's case number 6).

89. *Id.* at 1115.

90. 800 F.2d 1128 (2d Cir. 1986).

91. 603 F. Supp. 688 (D.D.C. 1984) (coalition's case number 32).



court dismissed the RICO claim for failure to allege a "pattern." In addition, the court held that the defendant did not commit the alleged predicate acts with the scienter necessary to complete the crime. This case again illustrates that the present system is working well.

43. *Pit Pros, Inc. v. Wolf*<sup>92</sup>

*Coalition Comment*

The plaintiff, a prospective commercial tenant, brought a civil RICO action against the landlord for the return of \$3000 rental deposit, alleging misrepresentation as to zoning and covenants running with the property.

*Analysis*

The district court properly dismissed the RICO claim for failure to allege a "pattern." Filings of this type should not continue in the future. If they do continue, the filing parties should be subject to sanctions.

44. *Routh v. Philatelic Leasing, Ltd.*<sup>93</sup>

*Coalition Comment*

The plaintiff, the lessee of "Stamp Masters," photographic color separators and plates used for printing postage stamps, brought a civil RICO action against the lessor of "Stamp Masters," alleging fraudulent misrepresentation in connection with the lease.

*Analysis*

Plaintiffs entered into a complicated financial arrangement with defendant Philatelic to lease printing plates ("Stamp Masters") for printing local postage stamps bearing the names of small islands just off the Scottish coast. Philatelic promoted this tax shelter with a national sales marketing campaign, which involved three to four hundred commissioned sales representatives. During 1982 Philatelic sold the rights to produce over 1600 different designs, with the rights for a typical design selling for around 15,000 dollars. The plaintiffs' lease was to generate an investment tax credit, deductions, and other credits, creating a lucrative tax shelter (up to a four dollar write off for each dollar invested, according to plaintiffs), and allegedly turn a possible profit.

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92. 554 F. Supp. 284 (N.D. Ill. 1983) (coalition's case number 38).

93. [1987-1988 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6914 (E.D. Wash. 1988) (coalition's case number 17).

Nevertheless, the government in *United States v. Philatelic Leasing, Ltd.*<sup>94</sup> sought and obtained an injunction closing down this tax shelter scheme under the Tax Equity and Fiscal Responsibility Act of 1982. The plaintiffs then sued under RICO, alleging securities fraud as one of the predicate acts. The court dismissed the claim on the bases that the predicate acts were not pleaded with sufficient specificity and that the tax shelter was neither an investment contract nor a security.<sup>95</sup> This litigation is neither abusive nor frivolous.

45. *Schalz v. Botica*<sup>96</sup>

#### *Coalition Comment*

The plaintiff, a widow, brought a civil RICO action against the administrator of her deceased husband's pension fund, alleging that the administrator refused to award her benefits unless she agreed to have sex with him and gave him a ten percent kickback of the funds due her.

#### *Analysis*

The defendant, Joseph Botica, is the former administrator of the pension fund of Local 1, Structural Ironworker's Union in Chicago, Illinois.<sup>97</sup> United States District Judge Nicholas J. Bua ordered Botica's resignation in February 1986, when he was convicted of racketeering, extortion, and income tax fraud.<sup>98</sup> In Botica's indictment, one of the incidents related to his demand of a ten percent kickback from a 1884 dollar annuity fund death benefit owed to the four children of Robert Ray. Mr. Ray was Ms. Schalz's ex-husband.<sup>99</sup>

In this case, Ms. Schalz merely was trying to collect the pitiful sum due her and her children from a convicted racketeer who, in addition to demanding a kickback, demanded sexual favors from her before he would release the funds.

Whatever else this litigation illustrates, it is not illustrative of abusive RICO litigation. Indeed, Ms. Schalz still would be entitled to treble

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94. 601 F. Supp. 1554 (S.D.N.Y.), *aff'd*, 794 F.2d 781 (2d Cir. 1986).

95. For a better analysis of the same scheme, see *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989). Other litigation involving the fortunes of Philatelic and its principals can be found at *Bausch v. Philatelic Leasing, Ltd.*, 728 F. Supp. 1201 (D. Md. 1990); *Hersch v. United States*, 685 F. Supp. 325 (E.D.N.Y. 1988); and *White v. Philatelic Leasing, Ltd.*, No. CIV-1-86-508 (E.D. Tenn. Dec. 7, 1987) (LEXIS, Genfed library, Dist file).

96. No. 86-C-20113 (N.D. Ill. June 25, 1987) (coalition's case number 27); see *Civ. RICO REP.*, Oct. 13, 1987, at 3.

97. *Possley, Union Official Ordered to Quit After Conviction*, *Chicago Tribune*, Feb. 20, 1986, § 2, at 3, col. 1.

98. *Id.*

99. *Frantz & Possley, Embezzlement Charge Hits Peter Vrdolyak*, *Chicago Tribune*, Oct. 4, 1985, § 2, at 1, col. 2.

damages under the proposed reform legislation. It is difficult to understand why the Coalition selected this case as an example of litigant abuse.

46. *Schiller & Schmidt, Inc. v. Nordisco Corp.*<sup>100</sup>

*Coalition Comment*

The plaintiff, an office equipment supplier, brought a civil RICO action against a former employee and a printing company for fraudulently obtaining materials used in its sales catalog for use in the sales catalog of the former employee's competing business.

*Analysis*

The district court dismissed one of the RICO claims and allowed the other to stand. The claim involved a systematic pattern of fraud. It is not an example of abuse.

47. *Sendar Co. v. Megaware, Inc.*<sup>101</sup>

*Coalition Comment*

The plaintiff, a distributor of housewares, brought a civil RICO action against a glassware importer alleging that the importer paid sales commissions to the distributor at lower rates than those agreed upon.

*Analysis*

The district court dismissed the case, pursuant to rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, and granted the plaintiff leave to amend. The district court, however, dismissed the amended complaint because plaintiff failed to plead fraud with particularity.<sup>102</sup>

48. *Shaw v. Rolex Watch, U.S.A., Inc.*<sup>103</sup>

*Coalition Comment*

The plaintiff, an importer of watches, brought a civil RICO action against the Rolex company alleging a RICO conspiracy to submit documents to the U[nited] S[tates] Customs Service which fraudulently stated that Rolex U.S.A. was not owned or controlled by the Swiss

100. [1985-1987 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6336 (N.D. Ill. 1986) (coalition's case number 49).

101. [1987-1988 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6905 (S.D.N.Y. 1988) (coalition's case number 15).

102. *Sendar Co., Inc. v. Megaware, Inc.*, 705 F. Supp. 159 (S.D.N.Y. 1989).

103. 673 F. Supp. 674 (S.D.N.Y. 1987) (coalition's case number 45).

owner of the Rolex trademark.

### *Analysis*

Shaw was a Rolex dealer, whose inventory was seized by Customs during shipment after the defendants in fact filed fraudulent claims with Customs. Plaintiff brought this litigation in federal district court on an antitrust claim that was separate from the RICO claim. The district court's denial of defendant's motions for rule 11 sanctions and dismissal of at least one of the RICO counts shows that the litigation was neither frivolous nor abusive.

49. *Sigmond v. Brown*<sup>104</sup>

### *Coalition Comment*

The plaintiff, a chiropractor, brought a civil RICO action against the California Chiropractors Association and members of its peer review committee. The plaintiff claimed that the defendants engaged in various acts of price fixing, kickback schemes, and conspired to reduce payments to chiropractors.

### *Analysis*

Plaintiff alleged that defendants were deriving unfair benefits from their membership in a peer review committee. The district court found that the plaintiff did not establish the alleged predicate acts either factually or as a matter of law. Based on plaintiff's failure sufficiently to establish the elements of the predicate acts, the district court granted the defendant's motion for summary judgment. The judgment was affirmed on appeal.<sup>105</sup> The Ninth Circuit also suspended plaintiff's attorney from appellate practice for six months for making misstatements in the pleading.<sup>106</sup>

While this case was pending, the Los Angeles Superior Court ordered the plaintiff to undergo regular psychiatric treatment for a chronic mental illness described as "paranoid personality disorder."<sup>107</sup> Plaintiff later shot and wounded a bailiff in court and was himself shot and killed.<sup>108</sup>

Obviously, litigation undertaken by mentally ill plaintiffs and irre-

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104. 645 F. Supp. 243 (C.D. Cal. 1986) (coalition's case number 29).

105. 828 F.2d 8 (9th Cir. 1987).

106. See *In re Disciplinary Action Boucher*, 837 F.2d 869 (9th Cir.), modified by 850 F.2d 597 (9th Cir. 1988). The suspension subsequently was revoked, but the censure remained unchanged.

107. *Boucher*, 850 F.2d at 598.

108. *Id.*

sponsible attorneys is not RICO-specific. The proposed reform legislation will not stop this sort of litigation abuse.

50. *Taylor v. Mondale*<sup>109</sup>

*Coalition Comment*

Suit filed against former Vice President Walter Mondale, the Democratic National Committee (DNC), and several members of the DNC, alleging they offered to channel political contributions to other Democratic candidates in exchange for promises not to oppose certain Reagan Administration policies.

*Analysis*

The district court properly dismissed the RICO bribery charges brought against Mondale, the DNC, and the named individual members of the DNC, because RICO does not reach violations of 18 U.S.C. section 203's antibribery provisions.

51. *Van Schaick v. Church of Scientology*<sup>110</sup>

*Coalition Comment*

The plaintiff, a former member of the Church of Scientology, brought a civil RICO action claiming she had been defrauded into joining the church and defrauded into purchasing church educational materials.

*Analysis*

The district court properly dismissed the RICO claim for failure to plead fraud with particularity. The court also properly dismissed the claim because RICO does not cover personal injury.

52. *White v. Fosco*<sup>111</sup>

*Coalition Comment*

A civil RICO action was brought against the two attorneys who had represented members of the Mail Handlers Union in a successful class action against the U[nited] S[tates] Postal Service over the right of the attorneys to personally retain the award of attorney's fees.

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109. No. 84-3149 (D.D.C. 1985) (coalition's case number 2); see *Civ. RICO REP.*, June 5, 1985, at 6.

110. 535 F. Supp. 1125 (D. Mass. 1982) (coalition's case number 40).

111. 599 F. Supp. 710 (D.D.C. 1984) (coalition's case number 46).

### Analysis

In fact, members of a mob-controlled union actually brought this litigation against the controlling figures. This case hardly is abusive. The Laborer's Union is thought to be "a tool of the crime syndicate" by the Department of Justice.<sup>112</sup> The President's Commission on Organized Crime in 1986 reached a similar conclusion.<sup>113</sup>

Angelo Fosco, who took over the Union when his father, Peter Fosco, died in 1975, is thought to take orders from Joseph Aiuppa. Aiuppa is the current head of the organized crime family in Chicago.<sup>114</sup> Peter Fosco, in turn, was an associate of Paul Ricca, the former head of the Chicago family.<sup>115</sup> Angelo Fosco and Anthony Accardo, another leader from Chicago, were tried in Florida for skimming an alleged two million dollars from the Union's health and welfare funds.<sup>116</sup> An associate was convicted; Fosco and Accardo were acquitted.<sup>117</sup> A grand jury now is investigating allegations that the jury was fixed.<sup>118</sup>

The district court improperly dismissed the RICO claim on the grounds that no "racketeering injury" occurred. This position was rejected in *Sedima, S.P.R.L. v. Imrex Co.*<sup>119</sup> The district court, however, properly refused to dismiss the claims alleging that the defendant's lawyers breached their fiduciary responsibility. Whatever else this litigation illustrates, it does not illustrate litigation abuse under RICO.

53. *Zimmerman v. HBO Affiliates Group*<sup>120</sup>

### Coalition Comment

HBO was sued by a group of homeowners, each of whom had been sent a letter accusing them of illegal reception of HBO programming; HBO's letter advised the homeowners that they would be included as defendants in a civil suit unless they stopped illegally receiving HBO's signal. The plaintiff homeowners alleged that HBO's action in mailing the letter constituted a pattern of racketeering activity based on

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112. Fritz, *Union Corruption: Worse Than Ever*, U.S. NEWS & WORLD REP., Sept. 8, 1980, at 33, 35.

113. PRESIDENT'S COMM'N ON ORGANIZED CRIME, *THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR UNIONS: REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL* 145-66 (1986).

114. Fritz, *supra* note 112, at 35.

115. *Id.*

116. *U.S. Jury Acquits Reputed Crime Figure in Union Embezzling Trial*, N.Y. Times, June 19, 1982, at A8, col. 2.

117. *Id.*

118. *F.B.I. Investigation Reported in 3 Racketeering Acquittals*, N.Y. Times, July 13, 1982, at A18, col. 3.

119. 473 U.S. 479 (1985).

120. 834 F.2d 1163 (3d Cir. 1987) (coalition's case number 5).

extortion.

*Analysis*

The court properly dismissed the case as to the lead plaintiff, Zimmerman, because he could not allege more than mental distress. In addition, the Third Circuit properly held that the conduct did not constitute extortion.

APPENDIX E  
PROPOSED SAMPLE LEGISLATION

101st CONGRESS  
2nd Session

H.R. \_\_\_\_\_

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IN THE HOUSE OF REPRESENTATIVES

[Insert date]

Mr. or Ms. [insert sponsor(s)] introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 96 (relating to racketeer influenced and corrupt organizations) of title 18, United States Code and for other purposes.

1 Be it enacted by the Senate and House of  
2 Representatives of the United States of America  
3 in Congress assembled,

4

5 TITLE I - RICO REFORM

6 SECTION 101. SHORT TITLE.

7 This Act may be cited as the "Crime Control  
8 Act of 1989."



1 SEC. 102. FINDINGS.

2 Based on published data and its own stud-  
3 ies, the Congress finds that--

4 (1) Organized crime, white-collar  
5 crime, violent group crime, and other  
6 sophisticated forms of criminal conduct  
7 unlawfully inflict each year billions of  
8 dollars of damage on public and private  
9 institutions as well as individuals;

10 (2) Organized crime includes the  
11 importation and distribution of narcotics  
12 and other illicit drugs, loan sharking,  
13 syndicated gambling, theft and fencing,  
14 prostitution, extortion, arson for-profit,  
15 bankruptcy fraud, conterefting, hazardous  
16 waste offenses, the infiltration of legiti-  
17 mate business and labor organizations, and  
18 political and other forms of public corrup-  
19 tion;

20 (3) White-collar crime includes  
21 contract procurement fraud, credit card  
22 fraud, bribery, price-fixing, illicit  
23 market allocation, securities and commodi-  
24 ties, frauds, tax fraud, medical fraud,  
25 bank and thrift fraud, insurance fraud,  
26 product counterfeiting and diversion,

1 coupon fraud, and home improvement fraud;

2 (4) Violent group crime includes  
3 murder, kidnapping, robbery, arson, gun-  
4 running, and explosive offenses, which are  
5 engaged in for a variety of motives,  
6 including individual pathology, economic  
7 profit, the desire to change governmental  
8 structures, and racial, religious and  
9 ethnic animosity, none of which is toler-  
10 able in a free society;

11 (5) Organized crime, white-collar  
12 crime, violent group crime and other  
13 sophisticated forms of criminal conduct are  
14 not mutually exclusive categories of  
15 criminal conduct;

16 (6) Federal, State, local, and for-  
17 eign law enforcement agencies have forged  
18 increasingly effective partnerships in  
19 efforts to curtail organized crime, white-  
20 collar crime, violent group crime, and  
21 other sophisticated forms of criminal con-  
22 duct;

23 (7) The curtailment of organized  
24 crime, white-collar crime, violent group  
25 crime, and other sophisticated forms of  
26 criminal conduct requires extraordinary

1 techniques of investigation and prose-  
2 cution, as well as special criminal and  
3 civil sanctions, which are not always  
4 available to State and local law enforce-  
5 ment agencies;

6 (8) The existence of an effective  
7 private enforcement mechanism is essential  
8 to any effort to curtail organized crime,  
9 white-collar crime, violent group crime,  
10 and other sophisticated forms of criminal  
11 conduct;

12 (9) Any private enforcement mechanism  
13 must be carefully tailored to maximize the  
14 advantage and to minimize the disadvantage  
15 to the interest of justice;

16 (10) Because of marketplace and other  
17 relative inequalities, a private enforce-  
18 ment mechanism, to be effective, must sanc-  
19 tion conduct, deter violators, compensate  
20 victims for accumulative harm, and encour-  
21 age private enforcement by authorizing the  
22 recovery of multiple damages and litigation  
23 costs, including attorney's fees;

24 (11) To curtail litigation abuse in  
25 the administration of the private enforce-  
26 ment mechanism, standards must be set for

1 the bringing of private enforcement actions  
2 and proceedings, the use of terms of oppro-  
3 brium must be circumscribed, verification  
4 must be required in certain litigation, and  
5 more particularity in pleading standards  
6 involving secondary liability must be  
7 enforced; and

8 (12) Divergent court practices and  
9 decisions require the clarification of ori-  
10 ginal Congressional intent under Title IX  
11 of The Organized Crime Control Act of 1970  
12 (18 U.S.C. 1961 et seq.).

13 SEC. 103. PATTERN.

14 (a) Section 1961 of title 18, United  
15 States Code, is amended--

16 (1) by striking "or" after "States"  
17 in paragraph (D),

18 (2) by inserting after "Reporting  
19 Act" in paragraph (E)--

20 ", or (F) the collection of an  
21 unlawful debt",

22 (3) by striking "(5)" through "racke-  
23 teering activity" and inserting--

24 "(5) 'pattern of racketeering  
25 activity' means

26

1           (A) at least two acts of  
2 racketeering activity (excluding  
3 elements of jurisdictional signi-  
4 ficance only, including the use  
5 of the mails, interstate wires,  
6 radio communications, or travel  
7 or transportation in interstate  
8 or foreign commerce),

9           (B) the last act of racke-  
10 teering activity occurred within  
11 five years of a prior act of  
12 racketeering activity,

13           (C) the acts of racketeer-  
14 ing activity were related to each  
15 other or to a common external or-  
16 ganizing principle, including the  
17 affairs of an enterprise, and

18           (D) the acts of racketeer-  
19 ing activity continued over a  
20 substantial period of time (more  
21 than a few weeks or months) or a  
22 threat existed that they would  
23 continue.

24           For the purpose of paragraph (C), acts  
25 of racketeering activity are related if  
26 they have the same or similar purposes,

1 results, participants, victims, or methods  
2 of commission, or are otherwise interre-  
3 lated by distinguishing characteristics and  
4 are not isolated.

5 For the purpose of paragraph (D), acts  
6 of racketeering activity are not continuous  
7 if they are so closely related to each  
8 other and connected in point of time and  
9 place that they constitute a single episode  
10 of activity so that in reference to the  
11 manner of their commission, the purpose for  
12 which they were committed, the person who  
13 committed them, the enterprise in whose  
14 affairs they were committed, or otherwise,  
15 they do not give rise to an inference of  
16 the possibility of continuing acts of  
17 racketeering activity.

18 (b) Section 1962 of title 18, United  
19 States Code is amended--

20 (1) in subsection (a) by striking "or  
21 through collection of an unlawful debt",

22 (2) in subsection (b) by striking  
23 "through a pattern of racketeering activity  
24 or through a collection of unlawful debt",

25 (3) in subsection (b) by inserting  
26 after "acquire"--

1                   "through racketeering activity",  
2           and  
3           (4) in subsection (b) by inserting  
4   after "maintain"--  
5                   "through a pattern of racketeer-  
6           ing activity".

7 SEC. 104. ADDITION OF PREDICATE OFFENSES.

8       Section 1961(1) of title 18, United States  
9 Code, is amended--

10           (1) in subparagraph (A), by inserting  
11 "prostitution involving minors," after  
12 "extortion,";

13           (2) in subparagraph (B)--

14           (A) by inserting "sections 1111-  
15 1117 (relating to homicide), section  
16 1203 (relating to hostage taking)," after  
17 "gambling information),";

18           (B) by striking out "section  
19 1503" and inserting "sections 1501-  
20 1506, 1508-1513, and 1515" in lieu  
21 thereof;

22           (C) by inserting "section 1992  
23 (relating to wrecking trains), sec-  
24 tions 2251-2252 and 2256 (relating to  
25 sexual exploitation of minors), sec-  
26 tion 227 (relating to vessels)," after

1 "specified unlawful activity),";

2 (D) by inserting "section 2331  
3 (relating to terrorists acts)," after  
4 "vehicle parts),";

5 (E) by inserting "32 (relating  
6 to destruction of aircraft or aircraft  
7 facilities), section 81 (relating to  
8 arson), section 112 (relating to pro-  
9 tection of foreign officials and other  
10 persons), but not subsection (b), sec-  
11 tion 115 (relating to assaults and  
12 other acts against Federal and other  
13 persons), section" after ": Section";

14 (F) by inserting "section 373  
15 (relating to solicitation to commit a  
16 crime of violence)," after "sports  
17 bribery),";

18 (G) by inserting "section 510  
19 (relating to forging of Treasury or  
20 other securities), section 513 (relat-  
21 ing to forgery of State and other se-  
22 curities)," after "counterfeiting),";

23 (H) by inserting "section 844  
24 (relating to explosive materials), but  
25 not subsections (b), (c), or (g), sec-  
26 tion 875 (relating to interstate com-



1           munications), but not subsection (d),  
2           section 876 (relating to mailing  
3           threatening communications), but not  
4           the fourth paragraph, section 877 (re-  
5           lating to threatening communications  
6           from foreign country), but not the  
7           fourth paragraph, section 878 (relat-  
8           ing to threats and extortion)," after  
9           "pension and welfare funds),";

10           (I) by inserting "section 1029  
11           (relating to fraud and other activity  
12           in connection with access devices),  
13           section 1030 (relating to fraud in  
14           connection with computers)," after  
15           "extortionate credit transactions),";

16           (J) by inserting section 1362  
17           (relating to destruction of communica-  
18           tion lines), section 1363 (relating to  
19           destruction of buildings), section  
20           1364 (relating to obstruction of for-  
21           eign commerce), section 1366 (relating  
22           to destruction of energy facility),"  
23           after "(relating to wire fraud),";

24           (K) by inserting ", section  
25           1952A (relating to murder for hire),  
26           section 1952B (relating to violent

1 crime in aid of racketeering)," after  
2 "1952 (relating to racketeering)"; and  
3 (L) by inserting "section 2318  
4 (relating to trafficking in counter-  
5 feit labels and audiovisual works),  
6 section 2320 (relating to trafficking  
7 in counterfeit goods and services),"  
8 after "of stolen property),";

9 (3) by striking "or" at the end of  
10 subparagraph (D);

11 (4) by striking out the semicolon at  
12 the end of subparagraph (F), as relettered  
13 by this Act, and inserting in lieu  
14 thereof --

15 ", (G) any offense under section  
16 134 of the Truth in Lending Act (15  
17 U.S.C. 1644), (H) any offense commit-  
18 ted by a transporter under section  
19 3008(e) of the Resource Conservation  
20 and Recovery Act of 1976 (42 U.S.C.  
21 6928(e)) or a substantially similar  
22 knowing endangerment provision of a  
23 State hazardous waste program author-  
24 ized by the Administrator of the  
25 Environmental Protection Agency under  
26 section 3006 of the Resource Conser-

1 vation and Recovery Act of 1976 (42  
2 U.S.C. 6926), but only if such trans-  
3 porter's conduct manifested an unjustified and inexcusable disregard for  
4 human life or an extreme indifference  
5 for human life, or (I) section 5861 of  
6 the Internal Revenue Code of 1986 (re-  
7 lating to firearm control) (26 U.S.C.  
8 5861);" and

9  
10 (5) in subparagraph (D), by striking  
11 out "fraud in the sale of securities," and  
12 inserting in lieu thereof--

13 "any offense under the Securities  
14 Act of 1933 (15 U.S.C. 77x), the  
15 Securities Exchange Act of 1934 (15  
16 U.S.C. 78ff), the Public Utility  
17 Holding Company Act of 1935 (15 U.S.C.  
18 79z-3), the Trust Indenture Act of  
19 1939 (15 U.S.C. 77yyy), the Investment  
20 Company Act of 1940 (15 U.S.C. 80a-49  
21 and 80b-17), or the Commodity Exchange  
22 Act (7 U.S.C. 13),".

23 SEC. 105. CIVIL RECOVERY.

24 Section 1964 of title 18, United States  
25 Code, is amended to read as follows:

1 "1964. Civil remedies

2 "(a) In any civil action or proceeding  
3 instituted under this section, the district  
4 courts of the United States shall have,  
5 except as provided in subsection (j) of  
6 this section, exclusive jurisdiction to  
7 prevent, restrain, or remedy violations of  
8 section 1962 of this chapter by rendering  
9 an appropriate judgment or decree, includ-  
10 ing--

11 "(1) ordering any person to  
12 divest himself of any interest, direct  
13 or indirect, in any enterprise;

14 "(2) imposing reasonable restric-  
15 tions on the future activities or  
16 investments of any person, including  
17 prohibiting any person from engaging  
18 in the same type of endeavor as the  
19 enterprise engaged in or the activi-  
20 ties of which affect interstate or  
21 foreign commerce;

22 "(3) ordering dissolution or re-  
23 organization of any enterprise, making  
24 the due provision for the rights of  
25 innocent persons;

26

1           "(4) imposing damages and assess-  
2           ing costs, including attorney's fees,  
3           as provided in this section, or

4           "(5) taking such other action as  
5           may be in the interest of justice.

6           "(b)(1) The Attorney General, or  
7           other legal officer authorized to sue if a  
8           department or agency of the United States  
9           is involved, may institute a proceeding  
10          under this section.

11          "(2) Pending final determination of a  
12          proceeding instituted by the Attorney  
13          General or other legal officer under this  
14          section, the court may at any time enter  
15          such restraining orders or prohibitions, or  
16          take such other actions, including the  
17          acceptance of satisfactory performance  
18          bonds, as might be just.

19          "(3) Whenever the United States, or  
20          department or agency of the United States,  
21          is, directly or indirectly, injured in its  
22          business or property by a violation of  
23          section 1962 of this chapter, the Attorney  
24          General, or other legal officer authorized  
25          to sue, if a department or agency of the  
26          United States is involved, may institute a

1 civil action under this section in an  
2 appropriate United States district court  
3 and shall recover threefold the actual  
4 damages (but recovery against a State or an  
5 agency of a State shall be actual damages),  
6 upon a preponderance of evidence, caused by  
7 such violation under circumstances where  
8 injury of that kind was reasonably fore-  
9 seeable, and if the United States, or  
10 department or agency of the United States,  
11 substantially prevails, the costs of the  
12 action, including the cost of investigation  
13 and litigation.

14 "(e)(1) Any person may institute a  
15 civil action or proceeding under this sec-  
16 tion if it meets the litigation standards  
17 of this subsection. The litigation stan-  
18 dards of this subsection are that the civil  
19 action or proceeding of the plaintiff must  
20 be based, in whole or in part, upon conduct  
21 of the defendant--

22 "(A) for which the defendant (or  
23 a co-conspirator or accomplice in such  
24 conduct) was convicted for a Federal,  
25 State, or foreign offense that re-  
26 quired a showing of a state of mind as

1 a material element of the offense and  
2 that was punishable by death or im-  
3 prisonment for a term exceeding one  
4 year,

5 "(B) which is substantially  
6 comparable to the conduct of another,

7 "(i) for which a convic-  
8 tion was obtained in prior crim-  
9 inal litigation under this  
10 Chapter, or

11 "(ii) which met the liti-  
12 gation standards of this subsec-  
13 tion in prior civil litigation  
14 under this Chapter, or

15 "(C) which requires the remedies  
16 of this section adequately--

17 "(i) to sanction the  
18 defendant's conduct,

19 "(ii) to deter him or  
20 another from engaging in similar  
21 conduct in the future,

22 "(iii) to compensate the  
23 plaintiff for accumulative harm,  
24 or

25 "(iv) to provide an  
26 incentive to the plaintiff to

1 engage in private enforcement.

2 For the purpose of paragraph (C), the fol-  
3 lowing are to be given due consideration in  
4 articulating and applying the litigation  
5 standards of this subsection for civil  
6 actions or proceedings to remedy conduct  
7 for which the defendant is responsible--

8 "(i) the number and character  
9 (including the age, health, or other  
10 indicia of special vulnerability, the  
11 non-profit status, or the relative  
12 size of the business or activities) of  
13 the victims of the conduct for which  
14 the defendant is responsible,

15 "(ii) the seriousness and  
16 impact of the conduct for which the  
17 defendant is responsible, including  
18 the individual or aggregate damage  
19 (physical, economic, or peace of mind)  
20 done or contemplated, or if minor, the  
21 impact the conduct might have, if  
22 widespread,

23 "(iii) the geographical extent  
24 of the conduct for which the defendant  
25 is responsible within a State, between  
26 States, or internationally,



1           "(iv) the diversified character  
2 of the offenses that compose the  
3 conduct for which the defendant is  
4 responsible and the enterprise, if  
5 any, in whose affairs they were  
6 conducted,

7           "(v) the difficulty (incurred or  
8 estimated) of the investigation and  
9 litigation factually and legally and  
10 the expertise of the attorney for the  
11 plaintiff in bringing complex  
12 litigation,

13           "(vi) the status of the  
14 defendant and his relation to others  
15 relative to the seriousness and impact  
16 of his offense, his culpability  
17 (including his position of trust or  
18 responsibility), and his history of  
19 similar conduct (including when it  
20 occurred, its relation, if any, to the  
21 conduct for which the defendant is  
22 responsible, and its disposition),

23           "(vii) the national investiga-  
24 tive and prosecutive priorities of the  
25 Department of Justice for offenses,  
26 and

1           "(viii) any other factor appro-  
2           priate in the interest of justice.

3 Civil actions or proceedings under this section  
4 shall be instituted with restraint (not against  
5 marginal, inconsequential, or technical viola-  
6 tors or violations) and uniformly within the  
7 general framework of the litigation standards  
8 of this subsection. Civil actions or proceed-  
9 ings may not be instituted under this subsec-  
10 tion--

11           "(i) to coerce unjust settlements in  
12           mere commercial or labor disputes,

13           "(ii) to chill the protected exer-  
14           cise of freedom of religion, speech, press  
15           or peaceable assembly, or petition of  
16           government for redress of grievance, or

17           "(iii) to discriminate against a  
18           person because of race, religion, sex,  
19           national origin, or political beliefs,  
20           associations, or activities.

21           "(2) Upon the institution of a civil action  
22 or proceeding under this subsection by com-  
23 plaint, counterclaim, or otherwise, the court  
24 may, on its own motion or the motion of a  
25 defendant, require the filing, under seal or  
26 otherwise, by dates certain, of a litigation

1 standards statement by the plaintiff, an answer  
2 by the defendant, and a response to the answer  
3 by the plaintiff. A litigation standards  
4 statement, answer, and response may be accom-  
5 panied by affidavits, exhibits, or other rele-  
6 vant material and shall establish or controvert  
7 reasonable grounds to belief that the action or  
8 proceeding, based on its character (known or  
9 which may reasonably be expected to become  
10 known after discovery), meets the litigation  
11 standards of this subsection. A motion to  
12 file, or the consideration of, a litigation  
13 standards statement, answer, or response shall  
14 not deprive the court of its power to take any  
15 other action in the interest of justice. The  
16 court may postpone, in whole or in part, dis-  
17 covery during the filing of, or its considera-  
18 tion of, a litigation standards statement,  
19 answer, or response. The court may hold a  
20 hearing to consider testimony or arguments on a  
21 litigation standard statement, answer, or  
22 response. The court may receive and evaluate  
23 in a litigation standards statement, answer, or  
24 response and consider and evaluate at any hear-  
25 ing on them evidence or information that would  
26 be inadmissible under the Federal Rules of Evi-

1 dence. After the court's consideration of the  
2 litigation standards statement, answer, and  
3 response and the hearing and arguments, if any,  
4 the court shall enter an appropriate order per-  
5 mitting the civil action or proceeding to con-  
6 tinue, dismissing it, or taking any other  
7 action that is in the interest of justice.

8       "(3) An order permitting a civil action or  
9 proceeding under this section to continue or  
10 dismissing it as consistent or inconsistent  
11 with the litigation standards of this subsec-  
12 tion shall be treated as an interlocutory order  
13 granting or refusing to grant an injunction  
14 under 28 U.S.C. § 1292(a)(1), but the standard  
15 of review on appeal shall be plenary.

16               "(4)(i) In any proceeding instituted  
17 by any person under subsection (a) of this  
18 section, injunctive relief shall be granted  
19 in conformity with the principles that  
20 govern the granting of such relief from  
21 threatened loss or damage in other cases,  
22 including the possibility that any judgment  
23 for money damages might be difficult to  
24 execute (including secreting and dissipat-  
25 ing assets or other similar conduct that  
26 might defeat a judgment for money damages),

1 but no showing of special or irreparable  
2 injury shall have to be made.

3 "(ii) Upon the execution, in the  
4 discretion of the court, of a proper bond  
5 against damages for an injunction improvi-  
6 dently granted, a temporary restraining  
7 order or a preliminary injunction may be  
8 issued in any proceeding under this section  
9 before a final determination of it upon its  
10 merits. Such undertaking shall not be  
11 required when the applicant is a State.

12 "(iii) If the person who institutes  
13 a proceeding under this section for injunc-  
14 tive relief substantially prevails, his  
15 recovery shall include the costs of the  
16 action, including a reasonable attorney's  
17 fee in the trial and appellate courts.

18 "(5)(i) Any person, other than the  
19 United States or a department or agency of  
20 the United States, who is, directly or in-  
21 directly, injured by a violation of section  
22 1962 of this chapter may institute a civil  
23 action under this section in an appropriate  
24 United States district court and shall  
25 recover threefold the actual damages (but  
26 recovery against the United States, or a

1 department or an agency of the United  
2 States, or a State, or department or an  
3 agency of a State, shall be actual dama-  
4 ges), upon a preponderance of evidence,  
5 caused by such violation under circum-  
6 stances where injury of that kind was  
7 reasonably foreseeable, and if the person  
8 substantially prevails, the costs of the  
9 action, including a reasonable attorney's  
10 fee in the trial and appellate courts.

11 "(ii) It shall be an affirmative  
12 defense that precludes recovery of more  
13 than actual damages and costs, including a  
14 reasonable attorney's fee, to be plead,  
15 insofar as practicable, with particularity  
16 in his answer and established by the defen-  
17 dant, upon preponderance of the evidence,  
18 where responsibility rest solely on respon-  
19 deat superior, that he did not authorize,  
20 request, commence, ratify, or recklessly  
21 tolerate the violation of another either  
22 himself or by a high managerial agent or  
23 employee acting on his behalf and within  
24 the scope of his authority or employment.

25

26

1           "(d) Damages recovered under this sec-  
2           tion shall not be limited to competitive or  
3           distinct injury.

4           "(e) If the court determines that the  
5           filing of any pleading, motion, or other  
6           paper under subsection (c) of this section  
7           was frivolous or that any civil action or  
8           proceeding was brought or continued under  
9           subsection (c) of this section in bad  
10          faith, vexatiously, wantonly, or for an  
11          improper or oppressive reason, it shall  
12          award a proper sanction to deter such con-  
13          duct in the future, including the costs of  
14          the civil action or proceeding (including  
15          the costs of investigation and a reasonable  
16          attorney's fee in the trial and appellate  
17          courts), unless the court finds that spe-  
18          cial circumstances, including the relative  
19          disparate economic position of the parties,  
20          make such an award unjust.

21          "(f) Upon the institution of a civil  
22          action or proceeding under subsection (c)  
23          of this section, the person instituting the  
24          action or proceeding shall immediately  
25          notify the Attorney General in such manner  
26          as the Attorney General shall direct by

1 regulations. The Attorney General may,  
2 upon timely application, intervene in any  
3 civil action or proceeding brought under  
4 subsection (c) of this section, if the  
5 proceeding is of general public import-  
6 ance. In such action or proceeding, the  
7 Attorney General shall be entitled to the  
8 same relief as if he had instituted the  
9 civil action or proceeding. In any event,  
10 the court may, at any time, request the  
11 Attorney General to comment on the applica-  
12 tion of the litigation standards of subsec-  
13 tion (c) of this section to the civil  
14 action or proceeding.

15 "(g)(1) Except as provided in para-  
16 graph (2) of this subsection, a civil  
17 action or proceeding under subsection (c)  
18 of this section shall be barred unless it  
19 is instituted within five years after the  
20 unlawful conduct terminates or the cause of  
21 action otherwise accrues, whichever is  
22 later.

23 "(2) A civil action of proceeding  
24 instituted by the Attorney General, or a  
25 legal officer authorized to sue of a de-  
26 partment or an agency of the United States,



1 a State, or a department or an agency of a  
2 State under subsection (c) of this section,  
3 shall be barred unless it is instituted  
4 within six years after the unlawful conduct  
5 terminates or the cause of action otherwise  
6 accrues, whichever is later.

7 "(3) Whenever any criminal action or  
8 civil action or proceeding is instituted or  
9 intervened in by the Attorney General to  
10 punish, prevent, restrain, or remedy any  
11 violation of section 1962 of this chapter,  
12 the running of the period of limitations  
13 provided in this subsection with respect to  
14 any cause of action, arising under subsec-  
15 tion (c) of this section, which is based,  
16 in whole or in part, on any matter com-  
17 plained of in such action or proceeding by  
18 the Attorney General shall be suspended  
19 during the pendency of such action or pro-  
20 ceeding by the Attorney General and for two  
21 years after the pendency of such action or  
22 proceeding.

23 "(h)(1) A civil cause of action or  
24 proceeding under this section not based, in  
25 whole or in part, on a crime of violence as  
26 a racketeering act shall be subject to the

1 procedures of chapter 1 of title 9 (relat-  
2 ing to arbitration) of the United States  
3 Code.

4 "(2) No agreement to arbitrate any  
5 dispute that is an adhesion contract shall  
6 preclude the bringing of a civil action or  
7 proceeding under this section.

8 "(3) If the parties to a dispute under  
9 this section submit any dispute to arbitra-  
10 tion, the arbitrator shall--

11 "(A) order on behalf of each  
12 party appropriate discovery from other  
13 parties or persons of the sort permit-  
14 ted in civil actions or proceedings in  
15 district courts of the United States,  
16 and

17 "(B) render any award in writing  
18 with findings of fact and conclusions  
19 of law, if so requested by any party.

20 "(4) If any person fails to comply  
21 with discovery ordered under this subsec-  
22 tion, an interested person may bring a  
23 civil action or proceeding in an appro-  
24 priate United States district court and  
25 obtain enforcement of that order.

26

1           "(5) For the purpose of this sub-  
2 section, 'adhesion contract' means an  
3 agreement, standardized in form, over which  
4 one party does not have a meaningful oppor-  
5 tunity to bargain either because its impli-  
6 cations are not explicitly set out or  
7 because of the degree of disparity in the  
8 bargaining positions of the parties, or  
9 both.

10       "(i)(1) Notwithstanding any other provi-  
11 sion of law, any complaint, counterclaim, an  
12 answer, or any litigation standards statement,  
13 answer, or response, filed by a person in con-  
14 nection with a civil action or proceeding under  
15 subsection (c) of this section shall be veri-  
16 fied by at least one party or his attorney.  
17 Where the person is represented by an attorney,  
18 any pleading, motion or other paper shall be  
19 signed by at least one attorney of record in  
20 his individual name, whose address shall be  
21 stated.

22       "(2) The verification by a person or his  
23 attorney and the signature by an attorney  
24 required by this subsection shall constitute a  
25 certification by the person or attorney that he  
26 has carefully read the pleading, motion, or

1 other paper and, based on a reasonable inquiry,  
2 believes that--

3           "(A) it is well grounded in fact;

4           "(B) it is warranted by existing law,  
5 or a good faith argument for the extension,  
6 modification, or reversal of existing law;  
7 and

8           "(C) it is not made for any bad faith,  
9 vexatious, wanton, improper or oppressive  
10 reason, including to harass, to cause  
11 unnecessary delay, to impose a needless  
12 increase in the cost of litigation, or to  
13 force an unjust settlement through the  
14 serious character of the averment.

15       "(3) If a pleading, motion, or other paper  
16 is verified or signed in violation of the cer-  
17 tification provisions of this subsection, the  
18 court, on its own motion or the motion of the  
19 other party, shall, after a hearing and appro-  
20 priate findings of fact, impose upon the person  
21 who verified it or the attorney who signed it,  
22 or both, a proper sanction to deter such con-  
23 duct in the future, including the costs of the  
24 proceeding under subsection (h) of this  
25 section, unless the court finds that special  
26 circumstances, including the relative disparate

1 economic position of the parties, make such an  
2 award unjust.

3 "(4) Where such pleading, motion, or other  
4 paper includes an averment of fraud, coercion,  
5 agency, respondent superior, accomplice, or  
6 conspiratorial liability, it shall state, inso-  
7 far as practicable, such circumstances with  
8 particularity.

9 "(j)(1) The attorney general of a State  
10 may bring a civil action or proceeding under  
11 subsection (c) of this section in the name of  
12 the State, as *parens patriae*, on behalf of  
13 individuals residing in the State, in any  
14 appropriate United States district court or any  
15 appropriate court of the State. The court  
16 shall exclude from the amount of monetary  
17 relief awarded in the action or proceeding any  
18 amount of monetary relief--

19 "(A) that duplicates amounts that have  
20 been awarded for the same claim; or

21 "(B) that is properly allocable to  
22 natural persons who have excluded their  
23 claims pursuant to this subsection and any  
24 commercial entity.

25 "(2)(A) In any civil action or proceeding  
26 brought under this subsection, the attorney

1 general of a State shall, at such times, in  
2 such manner, and with such content as the court  
3 may direct, cause notice of it to be given by  
4 publication. If the court finds that notice  
5 given solely by publication would deny due pro-  
6 cess of law to any person, the court may direct  
7 further notice to such person according to the  
8 circumstances of the case.

9 "(B) Any person on whose behalf of action  
10 or proceeding is brought under this subsection  
11 may elect to exclude from adjudication the por-  
12 tion of the State claim for monetary or other  
13 relief attributable to him by filing notice of  
14 such time as specified in the notice given  
15 under this subsection.

16 "(C) Any final judgment or decree in any  
17 civil action or proceeding under this subsec-  
18 tion shall preclude any issue or claim under  
19 subsection (c) of this section by any person on  
20 behalf of whom such action was brought and who  
21 fails to give such notice within the period  
22 specified in the notice given under this sub-  
23 section.

24 "(3) Any civil action or proceeding under  
25 this subsection shall not be dismissed or com-  
26 promised without the approval of the court, and

1 notice of any proposed dismissal or compromise  
2 shall be given in such manner as the court  
3 directs.

4 "(4) In any civil action or proceeding  
5 under this subsection--

6 "(A) the amount of the plaintiffs'  
7 attorney's fee, if any, shall be determined  
8 by the court; and

9 "(B) the court may, in its discretion,  
10 award a reasonable attorney's fee to a pre-  
11 vailing defendant upon a find that the  
12 attorney general of the State has acted in  
13 bad faith, frivolously, vexatiously, wan-  
14 tonly, or for an improper or oppressive  
15 reason.

16 "(5) For purposes of this subsection,  
17 'attorney general of a State' means the  
18 chief legal officer of a State, or any  
19 other person authorized by State law to  
20 bring actions under subsection (c) of this  
21 section, including the Corporation Counsel  
22 of the District of Columbia, except that  
23 such term does not include any person  
24 employed or retained on--

25 "(A) a contingency fee based on a per-  
26 centage of the monetary relief awarded

1 under this subsection; and

2 "(B) any other contingency fee basis,  
3 unless the amount of the award of a reason-  
4 able attorney's fee to a prevailing plain-  
5 tiff is determined by the court under this  
6 subsection.

7 "(k) A final judgment or decree ren-  
8 dered in favor of the United States in any  
9 criminal action or civil action or proceed-  
10 ing in favor of the United States or any  
11 plaintiff or a defendant in any civil  
12 action or proceeding shall preclude the  
13 plaintiff or defendant in any subsequent  
14 civil action or proceeding as to all issues  
15 or claims respecting which the judgment or  
16 decree would preclude an issue or claim  
17 between the parties to it.

18 "(l)(1) The court may award under  
19 this section, upon the motion made after  
20 verdict, simple interest on actual damages  
21 for the period beginning on the date of  
22 service of the pleading setting forth a  
23 cause of action under this section and  
24 ending on the date of verdict, or for any  
25 shorter period, if the court finds that the  
26 award of interest for the period is in the



1 interest of justice.

2 "(2) In determining whether an award  
3 of interest under this section for any per-  
4 iod is in the interest of justice the court  
5 shall give due consideration to that--

6 "(A) the opposing party, or  
7 either party's representative, filed  
8 pleadings, made motions, or filed  
9 other papers so lacking in merit as to  
10 show that such party or representative  
11 acted in bad faith, vexatiously, wan-  
12 tonly, or for an improper or oppres-  
13 sive reason;

14 "(B) in the course of the pro-  
15 ceeding or action involved, the oppos-  
16 ing party, or either party's represen-  
17 tative, violated any applicable rule,  
18 statute, or court order providing for  
19 sanctions for dilatory behavior or  
20 otherwise providing for expeditious  
21 proceedings;

22 "(C) the opposing party, or  
23 either party's representative engaged  
24 in conduct primarily for the purpose  
25 of delaying the litigation or increas-  
26 ing the cost of the litigation; and

1           "(D) the award of such interest  
2           is necessary to compensate the oppos-  
3           ing party for the injury sustained by  
4           him.

5           "(m)(1) A civil action or proceeding  
6           under this section shall not abate on the  
7           death of the plaintiff or defendant, but  
8           shall survive and be enforceable by and  
9           against his estate and by and against a  
10          surviving plaintiff or defendant.

11          "(2) A civil action or proceeding  
12          under this section shall survive and be en-  
13          forceable against a receiver in bankruptcy,  
14          but only to the extent of actual damages or  
15          other relief.

16          "(3) In any civil action of proceeding  
17          under this subsection in which the plead-  
18          ing, motion, or other paper does not allege  
19          a crime of violence as a racketeering act--

20                 "(A) 'racketeer' or 'organized  
21                 crime' shall not be used in referring  
22                 to any person; and

23                 "(B) the terms used to refer to  
24                 conduct in violation of section 1962  
25                 of this chapter shall be as follows:

26

1                   "(i) 'racketeering activ-  
2                   ity' as defined in section  
3                   1961(1) of this chapter, shall be  
4                   referred to as 'unlawful activ-  
5                   ity'; and

6                   "(ii) 'pattern of racketeering activity,' as defined in  
7                   section 1961(5) of chapter, shall  
8                   be referred to as 'pattern of un-  
9                   lawful activity.'

11 SEC. 106. VENUE AND PROCESS AND JURISDICTION.

12       (a) Section 1965 of title 18, United  
13 States Code, is amended--

14               "(1) in subsection (b), by striking  
15               "residing in any other district";

16               "(2) in subsection (b), by striking  
17               "in any judicial district of the United  
18               States by the marshal thereof." and  
19               inserting "anywhere the party may be  
20               found.";

21               "(3) in subsection (c), by striking  
22               "in any other judicial district" and  
23               inserting "anywhere the witness is found";

24               "(4) in subsection (c), by striking  
25               "in another district"; and

26

1           "(5) in subsection (d), by striking  
2           "in any judicial district in which" and  
3           inserting "where".

4           (b) Section 1962 of title 18, United  
5 States Code, is amended by adding at the end--

6           "(e) There is extraterritorial juris-  
7           diction over the conduct prohibited by this  
8           section."

9 SEC. 107. COSTS OF PROSECUTION AND INVESTIGA-  
10 TION.

11           Section 1918 of title 28, United States  
12 Code, is amended by adding at the end thereof  
13 the following new subsection:

14           "(c)(1) Upon conviction in a court  
15 of the United States for an offense in  
16 chapter 96 of title 18, the court may order  
17 the defendant pay the costs of investiga-  
18 tion and prosecution. Amounts collected  
19 under the preceding sentence shall be for-  
20 warded to the Treasurer of the United  
21 States for deposit in accordance with  
22 section 524(c) of title 28.

23           "(2) For the purposes of this sub-  
24 section, 'costs of investigation'  
25 includes--  
26

1           "(A) attorney, investigator, and  
2           auditor salaries and expenses;

3           "(B) special contract costs and  
4           special purchases;

5           "(C) travel costs and witness  
6           fees; and

7           "(D) grand jury fees and other  
8           related costs of investigation".

9 SEC. 108. CONSTRUCTION DIRECTIVES.

10       Chapter 96 of title 19, United States Code,  
11 shall not be construed--

12           (1) to prohibit a person from consti-  
13           tuting an enterprise, or a part thereof,  
14           and a defendant in the same count of an  
15           indictment or a complaint;

16           (2) to require in a criminal or civil  
17           action or proceeding the showing of econo-  
18           mically motivated conduct or a mercenary  
19           motive;

20           (3) to permit the showing of an  
21           enterprise by no more than a showing of a  
22           pattern of racketeering activity;

23           (4) to require a showing that each  
24           person named as a defendant in a criminal  
25           or civil action or proceeding commit, or  
26           agree to commit, personally the minimum

1 number racketeering acts required to con-  
2 stitute a pattern; or

3 (5) to permit a showing of criminal  
4 responsibility or civil liability without a  
5 showing of a state of mind other than that  
6 required for the racketeering acts included  
7 in the pattern of racketeering.

8 SEC. 109. CONFORMING AMENDMENT.

9 The analysis of chapter 96 of title 18,  
10 United States Code, is amended by striking out  
11 the item for section 1962 and inserting in lieu  
12 thereof--

13 "1962. Prohibited activities."

14

15 TITLE II - FORFEITURE REFORM

16 SEC. 201. FORFEITURE AND NECESSITIES.

17 (a) Part II - Criminal Procedure of title  
18 18, United States Code, is amended by adding a  
19 new chapter immediately after Chapter 232A--

20 "Chapter 232B - FORFEITURE AND NECES-  
21 SITIES

22 "Sec. 3685 Right to Reasonable Neces-  
23 sities.

24 "(a) With respect to any property of a  
25 defendant or other person subject to a  
26 restraining order, an injunction, bond, or

1 other action designed to assure its availa-  
2 bility for forfeiture under any provision  
3 of law, the defendant or other person may  
4 petition the United States District Court  
5 or other judicial officer to set aside  
6 designated portions of the property for  
7 reasonable necessities.

8 "(b) The petition filed by the defen-  
9 dant or other person as provided in subsec-  
10 tion (b) shall be accompanied by a showing  
11 under oath supporting the request for a set  
12 aside for reasonable necessities that esta-  
13 blishes--

14 "(i) why property owned by the  
15 defendant or other person that is not  
16 subject to an order, injunction, bond,  
17 or other action is insufficient to  
18 maintain a reasonable lifestyle;

19 "(ii) the amounts needed by the  
20 defendant or other person to maintain  
21 a reasonable lifestyle; and

22 "(iii) the interest that any  
23 third party may have in property to be  
24 subject or subject to an order, in-  
25 junction, bond, or other action that  
26 the defendant or other person seeks to

1 have set aside for necessities.

2 "(c) Upon petition of a defendant or  
3 person, as provided in subsection (b), the  
4 United States District Court or other judi-  
5 cial office shall, after given notice to  
6 the United States and to any person appear-  
7 ing to have an interest in any property  
8 that the defendant or other person seeks to  
9 have set aside, grant a set aside if the  
10 court or officer determines by a preponder-  
11 ance of the evidence that the property  
12 subject to the set aside--

13 "(i) is needed by the defendant  
14 or other person for reasonable neces-  
15 sities; and

16 "(ii) may not be property un-  
17 lawfully obtained from another person  
18 with rights of damages, restitution,  
19 or other relief.

20 "(d) Any hearing held under this sec-  
21 tion shall, at the request of any party, be  
22 held in camera.

23 "(e) No information presented by any  
24 person in support of a request for a set  
25 aside for reasonable necessities in a hear-  
26 ing held under this section (or any infor-



1 mation directly or indirectly derived from  
2 such information) may be used against such  
3 person in any criminal case, except a pro-  
4 secution for perjury or giving a false  
5 statement.

6 "(f) Any property set aside for rea-  
7 sonable necessities under this section that  
8 cannot be located upon the exercise of due  
9 diligence, is transferred or sold to or  
10 deposited with a third party, is placed  
11 beyond the jurisdiction of the court, is  
12 substantially diminished in value, or is  
13 combined with other property that cannot be  
14 divided without difficulty, but is subse-  
15 quently forfeited under any provision of  
16 law shall be restored by the defendant or  
17 other person in an amount up to the value  
18 of such property and such amount shall be  
19 forfeited in substitution of such property.

20 "(g) For the purpose of this section,  
21 'necessities' includes food, clothing,  
22 shelter, transportation, medical care, and  
23 professional fees."

24 (b) The Table of Chapter Headings at the  
25 beginning of Part II - Criminal Procedure of  
26 Title 18, United States Code, is amended by

1 inserting immediately after the entry for  
2 chapter 232A--

3 "232B - FORFEITURE AND NECESSITIES"

4 SEC. 202. THIRD PARTY RIGHTS.

5 (a)(1) Subsections (a), (b), (c), and (d)  
6 of section 2409a of title 28, United States  
7 Code, are amended to read--

8 "(a) The United States may be named as  
9 a party defendant in a civil action under  
10 this section to adjudicate a disputed title  
11 to real personal or other property of any  
12 kind in which the United States claims an  
13 interest, including a criminal or civil  
14 forfeiture, other than a security interest  
15 or water rights. This section does not  
16 apply to trust or restricted Indian lands,  
17 nor does it apply to or affect actions  
18 which may be or could have been brought  
19 under section 1346, 1347, 1491, or 2410 of  
20 this title, section 7424, 7425, or 7426 of  
21 the Internal Revenue Code of 1954, as  
22 amended (26 U.S.C. 7424, 7425, and 7426),  
23 or section 208 of the Act of July 10, 1952  
24 (43 U.S.C. 666).

25

26

1           "(b) The United States shall not be  
2     disturbed in possession or control of any  
3     real personal or other property of any kind  
4     involved in any action under this section  
5     pending a final judgment or decree, the  
6     conclusion of any appeal therefrom, and  
7     sixty days; and if the final determination  
8     shall be adverse to the United States, the  
9     United States nevertheless may retain such  
10    possession or control of the real personal  
11    or other property of any kind or of any  
12    part thereof as it may elect, upon payment  
13    to the person determined to be entitled  
14    thereto of an amount which upon such elec-  
15    tion the district court in the same action  
16    shall determine to be just compensation for  
17    such possession or control.

18           "(c) The complaint shall set forth  
19    with particularity the nature of the right,  
20    title, or interest which the plaintiff  
21    claims in the real personal or other pro-  
22    perty of any kind or interest therein  
23    adverse to the plaintiff at any time prior  
24    to the actual commencement of the trial,  
25    which disclaimer is confirmed by order of  
26    the court, the jurisdiction of the district

1 court shall cease unless it has jurisdic-  
2 tion of the civil action or suit on ground  
3 other than and independent of the authority  
4 conferred by section 1346(f) of this title.

5 "(d) If the United States disclaims  
6 all interest in the real personal or other  
7 property of any kind or interest therein  
8 adverse to the plaintiff at any time prior  
9 to the actual commencement of the trial,  
10 which disclaimer is confirmed by order of  
11 the court, the jurisdiction of the district  
12 court shall cease unless it has jurisdic-  
13 tion of the civil action or suit on ground  
14 other than and independent of the authority  
15 conferred by section 1346(f) of this  
16 title."

17 (2)(A) Section 2409a of title 28, United  
18 States Code, is amended by striking out the  
19 caption and inserting--

20 "2409a. Property quiet title  
21 actions".

22 (B) The item relating to section 2409a in  
23 the chapter analysis of chapter 161 of title  
24 28, United States Code, is amended to read--

25 "2409a. Property quiet title  
26 actions".

1           (b) Subsection (p) of section 1346 of  
2 title 28, United States Code is amended  
3 by--

4           (1) inserting "personal or  
5 other" before "property"; and

6           (2) inserting "of any kind"  
7 between "property" and "in".

8           (c) Section 1347 of title 28, United  
9 States Code, is amended by inserting "or  
10 other property of any kind" between "lands"  
11 and "where".

12 SEC. 203. STATUTE OF LIMITATIONS.

13           Section 3282 of title 18, United States  
14 Code, is amended by

15           (1) inserting "(a)" before "Except",  
16 and

17           (2) adding at the end

18           "(b) No property may be crimin-  
19 ally forfeited by reason of a viola-  
20 tion of an offense unless an indict-  
21 ment is found or information is insti-  
22 tuted within five years after the act  
23 giving rise to such forfeiture.".

24

25

26

1 TITLE III - DEMONSTRATION LITIGATION REFORM

2 SEC. 301. FIRST AMENDMENT DEMONSTRATIONS AND  
3 RELATED LITIGATION LIMITATIONS.

4 (a) Rule 9 of the Federal Rules of Civil  
5 Procedure is amended by adding at the end--

6 "(h) Constitutionally Protected Con-  
7 duct. In any civil action or proceeding  
8 involving conduct that includes the pro-  
9 tected exercise of freedom of religion,  
10 speech, press, peaceable assembly, or  
11 petition of government for redress of  
12 grievance, any averment of unprotected  
13 conduct of any natural person, its proxi-  
14 mate consequences, the association, if any,  
15 of any natural person with another, the  
16 unlawful objective, if any, of the associa-  
17 tion, the state of mind of any natural  
18 person with regard to an unlawful objective  
19 of the association, and the evidence on  
20 which the averment of state of mind is  
21 based shall be stated, insofar as practi-  
22 cable, with particularity."

23 (b) Rule 26 of the Federal Rules of Civil  
24 Procedure is amended by adding at the end--

25 "(h) Discovery may not be obtained  
26 that interferes with the protected exercise

1 of freedom of religion, speech, press, or  
2 peaceable assembly, or petition of govern-  
3 ment for redress of grievance."

4 (c) Rule 403 of the Federal Rules of Evi-  
5 dence is amended by--

6 (1) inserting before "Although"--

7 "(a)", and

8 (2) adding at the end--

9 "(b) Evidence may not be admitted  
10 that would try the protected exercise  
11 of freedom of religion, speech, press,  
12 or peaceable assembly, or petition of  
13 government for redress of grievance."

14 (d) Section 1292(a) of title 28, United  
15 States Code, is amended--

16 (1) by striking the "." at the end of  
17 paragraph (4) and inserting--

18 ":", and

19 (2) by adding after paragraph (4)--

20 "(5) Interlocutory orders of the  
21 district courts of the United States  
22 granting or enforcing discovery or  
23 admitting evidence that is claimed to  
24 interfere with or try the protected  
25 exercise of freedom of religion,  
26 speech, press, or peaceable assembly,

1 or petition of government for redress  
2 of grievance.".

3 SEC. 302.

4 (a) Part VI. Particular Proceedings of  
5 title 28, United States Code, is amended by  
6 inserting at the end thereof the following new  
7 chapter--

8 "Chapter 178. First Amendment Demon-  
9 strations and Related Litigation.

10 "Section 3001. First Amendment Demon-  
11 strations and Related Litigation.

12 "§ 3001. First Amendment Demon-  
13 strations and Related Litigation

14 "(a) in any civil action or pro-  
15 ceeding that involves conduct consist-  
16 ing of the protected exercise of free-  
17 dom of religion, speech, press, or  
18 peaceable assembly, or petition of  
19 government for redress of grievance--

20 "(1) no natural person may  
21 be held liable in damages or for  
22 other relief--

23 "(i) for the conse-  
24 quences of his protected  
25 conduct, or

26



1                   "(ii) for the conse-  
2                   quences of his unprotected  
3                   conduct,

4                   except for those consequences es-  
5                   tablished by clear and convincing  
6                   evidence to be proximately caused  
7                   by his unprotected conduct,

8                   "(2) no natural person may  
9                   be held liable in damages or for  
10                  other relief solely because of  
11                  his associations with another  
12                  where another engages in unlawful  
13                  conduct, unless it is established  
14                  by clear and convincing evidence  
15                  that the natural person intended,  
16                  through his associations with the  
17                  other, or otherwise, proximately  
18                  to cause or further the unlawful  
19                  conduct;

20                  "(3) no natural person may  
21                  be held liable in damages or for  
22                  other relief based on the conduct  
23                  of another, unless the fact-  
24                  finder finds by clear and con-  
25                  vincing evidence that the natural  
26                  person authorized, requested,

1           commanded, ratified, or reckless-  
2           ly tolerated the unlawful conduct  
3           of the other;

4           "(4) no natural person may  
5           be held liable in damages or for  
6           other relief, unless the fact-  
7           finder makes particularized find-  
8           ings sufficient to permit full  
9           and complete review of the  
10          record, if any, of the conduct of  
11          the natural person; and

12          "(5) notwithstanding any  
13          other provision of law authoriz-  
14          ing the recovery of costs, in-  
15          cluding attorney fees, the court  
16          may not award costs, including  
17          attorney fees, if such award  
18          would be unjust because of spe-  
19          cial circumstances, including the  
20          relevant disparate economic posi-  
21          tion of the parties or the dis-  
22          proportionate amount of the  
23          costs, including attorney fees,  
24          to the nature of the damage or  
25          other relief obtained.

1           "(b) For the purpose of this  
2 section, a natural person acts reck-  
3 lessly when he consciously disregards  
4 a substantial and unjustifiable risk,  
5 where his conduct is a gross deviation  
6 from the standard of conduct that a  
7 law-abiding natural person would  
8 observe in the situation of the  
9 natural person."

10       (2) The Table of Chapter Headings and the  
11 beginning of title 28, United States Code, is  
12 amended by inserting immediately after the  
13 entry for chapter 175--

14           "178. First Amendment Demonstrations  
15 and Related Litigation."

16

17           TITLE IV - GENERAL PROVISIONS

18 SEC. 401. SEPARABILITY.

19       If the provisions of any part of this Act,  
20 or the application thereof to any person or  
21 circumstances be held invalid, the provisions  
22 of the other parts and their application to  
23 other persons or circumstances shall not be  
24 affected there.

25

26

1 SEC. 402. EFFECTIVE DATE.

2 This Act shall be effective on enactment,  
3 but its provisions shall not apply to any crim-  
4 inal or civil action or proceeding instituted  
5 before its enactment.

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