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RICO Reform: How Much Is Needed?

*Remarks of Congressman William J. Hughes**

*Chair, Subcommittee on Crime, Committee on the Judiciary
United States House of Representatives
November 10, 1989*

I. INTRODUCTION

My letter of invitation to this Symposium urged me to prepare a "State of the Union" on legislative reform of RICO. This invitation comes at a time when I have spent the last nine months *listening* to various experts *tell* me what should or should not be done with RICO. I, therefore, welcome this opportunity to express my personal thoughts.

RICO reform has been one of the most time-consuming and difficult issues in the 101st Congress. The House Subcommittee on Crime has held three full-day hearings on RICO reform, listening to testimony from a vast array of witnesses on both sides of the reform issue, and several in the middle. From a personal perspective, hardly a day has passed in the last nine months that I have not had a meeting, a discussion with a House colleague, or a staff session on the subject of RICO reform.

At the outset I should mention that I do not have a magic "silver bullet" for this extremely complicated statute and the numerous controversies it has engendered. RICO contains more than forty federal felonies as predicate offenses, and nine generic state statutes. The large number of predicate offenses, combined with such nebulous terms as "enterprise," and "pattern of racketeering activity," leaves many observers wondering whether RICO eventually will sustain a constitutional attack. Indeed, Justice Antonin Scalia virtually asked for such a challenge in his recent concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*, when he stated:

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No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.¹

Combined with this invitation, there is a long list of prominent organizations that have petitioned Congress to amend civil RICO. They include: The American Bar Association, National Association of Manufacturers, American Civil Liberties Union, United States Chamber of Commerce, AFL-CIO, American Institute of Certified Public Accountants, Securities Industry Association, American Bankers Association, Independent Bankers Association of America, Future Industries Association, American Council of Life Insurance, Credit Union National Association, Grocery Manufacturers of America, National Automobile Dealers Association, State Farm Insurance Companies, Alliance of American Insurers, and The American Financial Services Association. At the same time, there is impressive opposition to drastic change in civil RICO. This opposition includes such organizations as: The Public Citizen-Congress Watch, The United States Public Interest Research Group, National Association of Attorneys' General, National District Attorneys Association, National Association of Insurance Commissioners, and The North American Securities Administration Association. Even these organizations, however, concede that some changes may be appropriate.

During my presentation I will outline my views of RICO; offer some specific comments on the mail and wire fraud predicates and the role they play in the problems experienced with RICO, on both the criminal and civil sides; make some general observations about the statute; and comment on the status of the reform efforts before Congress. At the end of my presentation I will outline my thoughts on resolving some of the existing problems, as well as my commitment to pursue answers to future problems.

II. VIEWS ON RICO

Congress created the Racketeer Influenced and Corrupt Organizations Act (RICO)² in 1970. According to its statement of findings and purposes,³ Congress intended RICO as a means to eradicate organized crime in the United States by strengthening the legal tools in the evidence-gathering process, establishing new penal prohibitions, and pro-

1. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2909 (1989) (Scalia, J., concurring).

2. Pub. L. No. 91-452, tit. IX, § 901(a), 84 Stat. 941, 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)) [hereinafter RICO].

3. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23.

viding enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. In the words of the United States Supreme Court, RICO "takes aim at 'racketeering activity'"⁴ and encompasses acts that are either "chargeable" under nine generic state laws or "indictable" under numerous federal criminal provisions.⁵ There is a constant flow of proposals coming to Congress to increase the number of predicate acts, the latest being the bank fraud act,⁶ which was added to the list of predicate offenses in 1989 as part of the savings and loan bill.⁷ Even House Bill 1046,⁸ the Boucher bill, that is the RICO reform proposal supported by a wide coalition of interest groups who want to substantially narrow civil RICO, would add some twenty-five new RICO predicates.

Increasing the number of predicate offenses under RICO makes absolutely no sense. The problems with civil RICO stem largely from the breadth and vagueness of criminal RICO. Even the Supreme Court is sending signals that if Congress does not rein RICO in, the Court will.⁹ In my judgment, this is not the time to add twenty-five new predicates. Increasing the number of predicates will only aggravate the problems of reach and vagueness that are inherent in the statute. To make matters worse, some of the proposed new predicate offenses are even misdemeanors, which do not belong in a statute that targets major organized crime.¹⁰

I understand that the Department of Justice says they are not worried about turmoil in the lower courts and rumblings in the Supreme Court about the breadth, vagueness, and even the very constitutionality of the RICO statute. Don't believe it. They are very worried. That is why the Department of Justice has issued the new guidelines on temporary restraining orders and the use of RICO in tax cases.¹¹ That is also why, when the Senate added nine new predicates in the savings and loan bailout bill, the Justice Department supported only two, and said that in a choice between nine and none, they preferred none.

4. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985).

5. *See generally* RICO, *supra* note 2, 18 U.S.C. §§ 1961-1968 (1988).

6. 18 U.S.C. § 1344 (1988).

7. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

8. H.R. 1046, 101st Cong., 1st Sess. (1989).

9. *See, e.g., H.J. Inc.*, 109 S. Ct. at 2893.

10. For example, the Boucher bill would add 18 U.S.C. § 1501 (1988), a misdemeanor that prohibits obstructing or assaulting a federal process server. *See* H.R. 1046, *supra* note 8, § 9.

11. *See infra* notes 18 & 19 and accompanying text.

III. MAIL AND WIRE FRAUD

The keys to RICO litigation, in both the criminal and civil areas, are the mail¹² and wire fraud¹³ statutes. The popularity of the mail fraud statute was described most vividly in an article by Jed Rakoff. Rakoff wrote:

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law “darling,” but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability and comfortable familiarity.¹⁴

That popularity, shared by private litigants as well as prosecutors, also extends to the wire fraud statute. The mail and wire fraud statutes can be used to reach almost all fraudulent activity. This “adaptability” has caused much of the problem in both criminal and civil RICO. For example, Justice Byron White’s opinion in *Sedima, S.P.R.L. v. Imrex Co.* noted: “The ‘extraordinary’ uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud. . . .”¹⁵

There is, however, little or no support in Congress to delete mail and wire fraud laws from RICO. One of the main reasons for this lack of support is the adamant opposition to any such change by the Department of Justice because mail and wire fraud predicates predominate in criminal RICO cases. Therefore, solutions to the problems must come from elsewhere.

IV. THE STATUS OF RICO REFORM

Since its enactment, RICO has been a very effective tool for law enforcement. Neither Congress nor the Justice Department wants to jeopardize that effectiveness. Some members of Congress, however, do not share the ostrich-like view apparently taken by the Justice Department that the mere *suggestion* of changing criminal RICO is an act of heresy. Nonetheless, criminal RICO may be politically immune from major change.

In its first ten years, RICO was used sparingly in criminal cases and hardly at all in civil cases. Only in the last eight years has the United States Supreme Court made definitive interpretations of RICO’s broad language. For example, from 1970 through 1985 there were only 300

12. 18 U.S.C. § 1341 (1988).

13. *Id.* § 1343.

14. Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 DUQ. L. REV. 771, 771 (1980) (footnotes omitted).

15. *Sedima*, 473 U.S. at 500.

civil RICO decisions,¹⁶ and the Department of Justice prosecuted fewer than 300 criminal RICO cases from 1970 to 1980.¹⁷

A. Criminal RICO

In the criminal area the pace has increased to a current average of about 100 to 125 cases a year. Although I perceive some problems in the criminal area, particularly in the area of forfeiture, Congress largely believes that the Department of Justice has been restrained and responsible in its use of this very broad and powerful statute.

An example of this circumspection was demonstrated recently when the media gave considerable attention to Justice Department memoranda regarding pretrial temporary restraining orders in RICO cases,¹⁸ and the use of RICO in tax cases generally.¹⁹ These orders, contained in changes to the United States Attorneys' Manual known as the "Blue Sheet," detail policies that United States Attorneys must follow when seeking temporary restraining orders in RICO cases and contain extensive ground rules that must be complied with before criminal prosecutions can be initiated. For example, under the most recent "Blue Sheet," prior to seeking a temporary restraining order, the United States Attorney must: (1) show that less-intrusive remedies, such as bonds, are not likely to preserve the assets for forfeiture in the event of a conviction; (2) articulate any anticipated impact that forfeiture and the temporary restraining order would have on innocent third parties, balanced against the government's need to preserve the assets; (3) consider the nature and severity of the offense and whether forfeiture would be disproportionate to the defendant's crime; *and* (4) not seek to vitiate legitimate business transactions occurring between the defendant and third parties.²⁰

This type of prosecutorial restraint emanating from the Department of Justice leads me to believe that extensive change in the criminal area will not be on the agenda for RICO reform in this Congress. Internal rules such as the temporary restraining order procedures create a large expanse between the reach of criminal RICO as written and its reach as applied. These salutary steps also serve to mute opposition to

16. A.B.A. SECTION OF CORP., BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55 (1985) [hereinafter ABA RICO REPORT].

17. Conversation with Paul Coffey, Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice (Sept. 21, 1989).

18. Edward G. Dennis, Assistant Attorney General, Criminal Division, Pretrial Temporary Restraining Order Memorandum (June 30, 1989) [hereinafter Dennis Memorandum].

19. Shirley D. Peterson, Assistant Attorney General, Tax Division, Tax Memorandum (July 14, 1989).

20. Dennis Memorandum, *supra* note 18.

criminal RICO and undercut any support for changing it. While I applaud Justice's restraint, my preference is that this type of restraint should be built into the statute itself.

B. Civil RICO

The RICO law also provides for a private civil action for "[a]ny person injured in his business or property."²¹ Moreover, a successful plaintiff "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."²² It is in this area that the greatest problem exists, although the extent of the problem is in dispute. Between 1970 and 1985, only 300 civil RICO cases were filed.²³ However, the Administrative Office of the United States Courts indicates that there were 614 filings in 1986, 1095 cases in 1987, and 957 cases in 1988.²⁴ Despite this dramatic increase, these cases still constitute only a small fraction of the total number of federal civil cases filed each year. Of the 855 civil RICO cases closed in 1988, 389 were dismissed and 186 settled; only fourteen went to jury trial, and only eight were tried by a court.²⁵ Statistics in this area, however, may be misleading because of the manner in which the Administrative Office collects its data. Some knowledgeable parties believe that civil RICO-related cases may be as high as ten times these figures.

Numbers alone, however, do not reflect the effect of the infusion of these complex cases into the federal system, nor the impact of the mere filing of such a case against a defendant. This latter situation was brought to the Subcommittee on Crime's attention by the testimony of a West Virginia banker who had "won" two RICO cases against his small bank, but had been damaged severely by the suits.²⁶

Also, the Judicial Conference of the United States has called twice upon Congress to reform the civil provisions of RICO. Chief Justice William Rehnquist recently reiterated the need for reform of the statute by stating:

Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with

21. RICO, *supra* note 2, 18 U.S.C. § 1964(c) (1988).

22. *Id.*

23. ABA RICO REPORT, *supra* note 16, at 55.

24. *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 *RICO Hearings*] (statement of Robert L. Chiesa on behalf of the American Bar Association).

25. Letter from L. Ralph Mecham, Director, Administrative Office of the United States Courts, to the Honorable William J. Hughes, Chair, House Subcommittee on Crime (June 9, 1989).

26. *H.R. 1046 Hearings, supra* note 24 (testimony of James Harrison representing the American Bankers Association).

organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts.²⁷

Justice Anthony Kennedy noted, while still sitting on the Ninth Circuit Court of Appeals, the breadth that mail and wire fraud brings to RICO. He observed that on the civil side, there is no prosecutorial discretion to hold the statute in check.²⁸ Justice Thurgood Marshall made the same observation in even stronger terms in his dissenting opinion in the *Sedima* case. Justice Marshall concluded that RICO "stretches the mail and wire fraud statutes to their absolute limits."²⁹ Even Justice Byron White in his majority opinion in *Sedima* stated, "We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."³⁰ Justice White also invited Congress to act when he stated, "Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."³¹ The *Sedima* case itself identifies the problem in civil RICO. *Sedima* was essentially a commercial dispute, and nothing in its facts would seem to merit special federal jurisdiction much less the extraordinary remedy of RICO.

Numerous hearings in Congress over the last four years, including three in the Subcommittee on Crime this year, demonstrate that a problem exists with civil RICO. In the 99th Congress, a civil RICO reform bill sponsored by Representative Rick Boucher passed the House of Representatives by a vote of 371 to 28.³² A similar bill was rejected by a narrow margin by the Senate as an amendment to the continuing resolution.³³ In the 100th Congress another bill, Senate Bill 1523,³⁴ was

27. Rehnquist, *Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9 (1989) (originally presented at the Brookings Institution's Eleventh Seminar on the Administration of Justice, Apr. 7, 1989).

28. See *Schreiber Distrib. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986).

29. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting). Justice Marshall concluded further:

In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. Then the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a "racketeer," will have a strong interest in settling the dispute. The civil RICO provision consequently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the States.

Id. (citation omitted).

30. *Id.* at 500.

31. *Id.* at 499.

32. H.R. 5445, 99th Cong., 2d Sess., 132 CONG. REC. H9377 (daily ed. Oct. 8, 1986).

33. The substance of H.R. 5445, as an amendment, was defeated on a motion to table by a vote of 47-44 on Oct. 16, 1986.

34. S. 1523, 100th Cong., 2d Sess. (1988).

reported favorably by the Senate Judiciary Committee, but neither this bill nor the Boucher bill ever came to a floor vote.

Most of the legislative attention in this Congress has been on the companion bills, House Bill 1046³⁵ and Senate Bill 438,³⁶ introduced on February 22, 1989. The House Subcommittee on Crime has held three hearings on House Bill 1046; the Senate Judiciary Committee has held one hearing on Senate Bill 438 and presently has a markup of the Bill scheduled early next session. I also hope to move legislation in my Subcommittee early next year.

As I indicated earlier in my remarks, these bills would add twenty-five new predicates, but otherwise would leave criminal RICO unchanged. They also would leave unchanged civil RICO in the hands of most governmental litigants. Under these bills, most private civil RICO actions would be detrebled. Some litigants, such as certain units of local government would be entitled to treble damages, but persons injured by insider trading, and various consumer litigants, would be entitled to discretionary punitive damages. The remainder would be relegated to actual damages. These bills also create an affirmative defense for defendants acting in good faith reliance on official regulatory action. Finally, in one of the most controversial provisions, in many cases these changes would be retroactive and applicable to cases already pending in federal courts. That, in a nutshell, is the status of RICO reform today.

V. RESOLVING THE PROBLEMS

There are basically three major options to the question of what direction reform should take. First, we could reform the basic criminal law as Professor Gerard E. Lynch suggested to the Subcommittee on Crime in early spring.³⁷ Frankly, I would be inclined to take that task on, but as I have said, I do not believe there is sufficient support in Congress to accomplish it. Second, we could make civil RICO unavailable or unattractive for numerous categories of offenses covered by civil RICO. This is essentially the approach of House Bill 1046 and Senate Bill 438, which drastically curtail civil RICO by detrebling and disallowing attorney's fees from most private, some governmental litigants, and for most commercial transactions and consumer suits. Third, we could tighten up both criminal and civil RICO, and make changes to civil RICO that attempt to emulate the results attained by prosecutorial discretion in the criminal area. I have been working closely with the ranking Republican on our Subcommittee, Representa-

35. See H.R. 1046, *supra* note 8.

36. See S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1642 (daily ed. Feb. 23, 1989).

37. H.R. 1046 Hearings, *supra* note 24 (testimony of Prof. Gerard E. Lynch).

tive Bill McCollum, and Representative Boucher to develop legislation that takes this latter approach. Representative Boucher has made RICO reform one of his top priorities for the past two Congresses. He is a bright and accomplished attorney who has contributed greatly to identifying the problems in RICO, and to formulating legislative improvements. Representative McCollum also has taken on a substantial share of the burden of hammering out the best legislation we can fashion to correct some of the ills of RICO.

The highlights of the bill we are now working on include the following provisions. We recommend tightening up the "pattern of racketeering" requirement and codifying the concept of continuity as articulated by the majority in the recent Supreme Court case *H.J. Inc. v. Northwestern Bell Telephone Co.*³⁸ This new definition would adopt from *H.J. Inc.* a requirement that the two or more acts of racketeering required under the statute to form a "pattern of racketeering" must be related to one another or to a common external organizing principle.³⁹ This new definition also would eliminate RICO coverage of cases in which there is really only one act of fraud, but the fraud is carried out by a series of phone calls, letters, or similar activity. This would codify the decision in *Lipin Enterprises v. Lee*⁴⁰ and is consistent with the present Department of Justice guidelines.

Second, the new bill would require particularity in pleading in every RICO case. This provision is an expansion of the present Federal Rules of Civil Procedure, which require particularity only in fraud cases.⁴¹

Third, the bill will contain a judicial "gatekeeper" provision. One category of cases that are entitled automatically to pass through the gate are those in which the civil RICO conduct alleged has been the subject of a criminal conviction. The gatekeeper provision then will express the intent of Congress that civil RICO is an "extraordinary civil remedy" and that commercial disputes in which fraud is alleged and other controversies involving ordinary criminal conduct should not be filed as civil RICO cases and shall be dismissed if plaintiffs persist in filing them. It will state that only cases involving egregious criminal conduct may be brought, and the court is to dismiss even these cases, unless there is a determination that the civil suit serves a public

38. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2902 (1989) (suggesting that the "continuity" standard could eliminate many cases, because "[p]redicate acts extending over [only] a few weeks or months and threatening no future criminal conduct do not satisfy this requirement").

39. *Id.* at 2900.

40. 803 F.2d 322, 324 (7th Cir. 1986).

41. See FED. R. CIV. P. 9(b).

interest.

The Bill then provides for a hearing by the court either on its own motion or on motion by the defendant. The court is instructed further that only those cases in which (1) the remedy is appropriate because of the significance of the loss to plaintiff; (2) the defendant's conduct was central to the harm; and (3) the remedy is needed to deter criminal conduct, should be permitted to go forward.

Our rationale is simple. We believe it is clear from the legislative history of RICO that the primary purpose for allowing private civil suits under RICO was to promote the public interest by allowing for "private attorneys general" suits. It was based on the premise that these civil suits would supplement governmental action and would attack real criminal conduct, not just contract disputes written to sound like crimes. These cases, therefore, should be the kind that the Justice Department would bring as criminal cases, but does not for reasons of resources or otherwise. In terms of promoting the public interest, these civil litigants, in effect, would be serving as surrogates of the Justice Department. The thrust of this approach is to rein in civil RICO, so that it serves these purposes. Routine fraud allegations, which are often nothing more than contract disputes, would be weeded out. In this process the judge is directed to throw out all cases that do not meet the stricter limits for civil RICO cases expressed by Congress. The amended provisions would emphasize that civil RICO is an "extraordinary civil remedy," and would call upon judges to exercise discretion analogous to the granting of injunctive relief,⁴² or the exercise of pendent jurisdiction⁴³ or ruling on forum nonconveniens cases.⁴⁴

We would not eliminate treble damages, because treble damages are not the problem. Indeed, treble damages are a traditional and appropriate ingredient, perhaps even a necessary one, in a system designed to encourage private attorneys general suits that are in the public interest. The Bill also will specifically authorize the court to award costs for violations of rule 11 of the Federal Rules of Civil Procedure.⁴⁵ Finally, we would clarify that RICO is not available as a remedy in nonviolent free speech and assembly situations.

I believe that this approach is a sound basis for curbing most of the abuses of RICO while at the same time maintaining civil RICO as a

42. See generally 7 J. MOORE, J. LUCAS & K. SINCLAIR, MOORE'S FEDERAL PRACTICE ¶ 65.04 (2d ed. 1989); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2942-2948 (1973).

43. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). See generally 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567.1 (2d ed. 1984).

44. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). See generally 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (2d ed. 1986).

45. See FED. R. CIV. P. 11.

useful tool to combat and deter criminal activity. I also believe that the guidance contained in this Bill and the legislative history will provide a legal framework to limit civil RICO to appropriate major criminal activity.

