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Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and Personal Jurisdiction under 18 U.S.C. § 1965

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TABLE OF CONTENTS

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I. INTRODUCTION

Many judges,[1] members of Congress,[2] and commentators[3] have

1. *See, e.g.*, William H. Rehnquist, *Remarks of the Chief Justice on Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9 (1989)(urging reform of civil RICO because "[m]ost of the civil suits filed under the statute have nothing to do with organized crime. . . . They are garden-variety fraud cases of the type traditionally litigated in state courts."). *See also* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984)(protesting that "[g]iven the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous"), *rev'd*, 473 U.S. 479 (1985); PMC, Inc. v. Ferro Corp., 131 F.R.D. 184, 187 (C.D. Cal. 1990)(announcing that "this court is legitimately concerned about the misuse of civil RICO and the increasingly familiar phenomenon of expanding a straightforward breach of contract into a claim of promissory fraud. A plaintiff then asserts two or more mailings in furtherance of promissory fraud and, presto, claims a civil RICO violation. Distressingly, this type of pleading inflation has become all too common."). *See generally* David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 CAMPBELL L. REV. 145 (1990).

2. *See, e.g.*, HOUSE COMM. ON THE JUDICIARY, RICO AMENDMENTS ACT OF 1991, H.R. REP. No. 312, 102d Cong., 1st Sess. 27 (1991)(indicating that RICO should be used in "civil suits [that] would supplement governmental criminal action and attack real criminal conduct, not . . . garden-variety contract disputes written up to sound like crimes" and proposing to "remove[ ] the availability of civil RICO from ordinary business transactions"); *id.* at 28 (declaring that "the Committee intends to eliminate the practice prevalent today of turning ordinary commercial disputes into civil RICO claims"); *Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c): Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 4 (1985) [hereinafter *Oversight Hearings*] (testimony of former Sen. Roman L. Hruska of Nebraska, who introduced the Organized Crime Control Act of 1970, that "I was deeply disturbed and distressed, because it is quite apparent that in the past several years we have seen a distortion and an unintended application of RICO provisions in ways that have produced harmful results."); *id.* at 9 (former Senator Hruska explaining that "it was not my intention that the civil sanctions contained in [the RICO statute] serve as a vehicle to engage in the type and extent of use to which many efforts are directed"); *id.* at 338 (statement of Sen. Orrin Hatch of Utah that "this law is being used by some very resourceful lawyers all over the country to embarrass legitimate business enterprises into settlements that they would not otherwise make"); 123 CONG. REC. H9371 (daily ed. Oct. 7, 1986)(remarks of Rep. Frederick C. Boucher of Virginia that "the federalization of thousands of mere commercial disputes . . . threatened to swamp a [f]ederal judiciary that was never designed to handle these types of cases"). *See also* Interview with Roman L. Hruska, Of Counsel for Kutak, Rock and Campbell, in Omaha (Feb. 9, 1987), *quoted in* Robert L. Sivick, Note, *Civil RICO—What Hath Congress Wrought?* Superior Oil Company v. Fulmer, 20 CREIGHTON L. REV. 1225, 1228 (1987)(explaining that "I feel confident that had [Congress] realized [or] had they been told, 'wait a minute! Seventy percent of these cases will be against stock brokers, against accountants, against lawyers and businessmen' . . . I doubt very much that the Congress would have passed the

bemoaned the fact that attorneys frequently add causes of action under the federal Racketeer Influenced and Corrupt Organizations Act (RICO)[4] to "up the ante"[5] in otherwise ordinary civil actions.[6]

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bill.").

Even before RICO was enacted, some congressmen recognized that litigants could abuse the statute. For example, in a dissent to the House Judiciary Committee's report on the Organized Crime Control Act of 1970, Representatives John Conyers, Jr., Abner Mikva, and William F. Ryan warned: "[The RICO bill] runs amuck. It embodies poor draftsmanship, and it employs penalties and investigative procedures which are both abusive and pregnant with potential abuse." HOUSE COMM. ON THE JUDICIARY, REPORT ON THE ORGANIZED CRIME CONTROL ACT OF 1970, H.R. REP. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 4007, 4081 [hereinafter 1970 HOUSE REPORT]. They concluded that "[RICO] should not be adopted. It both fails to do effectively what it sets out to do and succeeds in doing far too much what it should not do." *Id.* at 4084.

3. *See, e.g.,* articles cited *infra* note 6. *See also* Dan A. Naranjo & Edward L. Pina, *Civil RICO: Overview on the Eve of the 200th Anniversary of the Federal Judiciary*, 21 ST. MARY'S L.J. 23, 57 (1989)(lamenting that "[t]he expansive uses of RICO in the civil arena continue to have devastating results").
4. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1996). RICO's civil remedies are contained in § 1964, which provides in part that "[a]ny person injured in his business or property by reason of violation of section 1962 of this chapter may sue therefor in any appropriate United States district court. . . ." *Id.* § 1964(c)(West Supp. 1996).
5. *See infra* notes 74-75 and accompanying text (discussing civil RICO's treble damages and attorney's fees provision and the stigmatizing effect of civil RICO claims).
6. *See, e.g.,* Beauford v. Helmsley, 843 F.2d 103 (2d Cir. 1988)(apartment-building tenants sued developer and others under civil RICO in connection with conversion of building to condominiums), *cert. denied,* 493 U.S. 992 (1989); Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987)(boat owners sued secured lender and repossession company under civil RICO after they repossessed his boat); Moeller v. Zaccaria, 831 F. Supp. 1046 (S.D.N.Y. 1993)(homeowners sued builder's employees under civil RICO in connection with an addition to the home); U.S. Concord, Inc. v. Harris Graphics Corp., 757 F. Supp. 1053 (N.D. Cal. 1991)(civil RICO suit filed over sale of allegedly defective printing press); Miller v. Moffat County State Bank, 678 F. Supp. 247 (D. Colo. 1988)(customer sued bank under civil RICO over allegedly fraudulent interest overcharges); Abernathy v. Erikson, 657 F. Supp. 504 (N.D. Ill. 1987)(ex-wife sued former husband under civil RICO for allegedly defrauding her of an interest in real property); Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986)(female carpenter's apprentice sued union officials under civil RICO for alleged sexual harassment and discrimination); King v. Lasher, 572 F. Supp. 1377 (S.D.N.Y. 1983)(estate beneficiaries sued executrix and trustee under civil RICO concerning distribution of deceased's assets); American Soc'y of Contemporary Medicine, Surgery & Ophthalmology v. Murray Communications, Inc., 547 F. Supp. 462 (N.D. Ill. 1982)(Society was sued under civil RICO for an alleged breach of contract arising over the publication rights of two medical journals).

Of course, civil RICO has also been alleged in some fairly bizarre cases. *See, e.g.,* McCarthy v. Recordex Serv., Inc., 80 F.3d 842 (3d Cir. 1996)(dismissing civil RICO action brought by hospital patients who sued hospitals and photocopying services retained by the hospitals, after patients were charged excessively high prices for copies of certain medical records), *petition for cert. filed,* 65 U.S.L.W. 3017 (June 28, 1996)(No. 95-2087); Midnight Sessions, Ltd. v. City of Philadel-

Less discussed and well known, however, is that attorneys also add

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phia, 945 F.2d 667 (3d Cir. 1991)(owner of adult dance club sued city under civil RICO after he was denied business licenses), *cert. denied,* 503 U.S. 984 (1992); Eveland v. Director of Central Intelligence Agency, 843 F.2d 46 (1st Cir. 1988)(plaintiff sued director under civil RICO to challenge U.S. foreign policy in the Middle East); Katzman v. Victoria's Secret, 167 F.R.D. 649 (S.D.N.Y. 1996)(recipient of mail order catalogue sued company under civil RICO, claiming that a male with a higher income level received a catalogue with a discount offer worth $15 more than the one in her catalogue), *recounted in* Amy Stevens, *Look What's Underneath Victoria's Secret Lawsuit,* PALM BEACH POST, May 5, 1996, at 7A *and in Street Talk,* USA TODAY, June 27, 1996, at 3B (indicating that court dismissed the case because the defendant failed to show the defendant committed any fraud or had a fraudulent intent); Medallion TV Enters. v. SelecTV of Cal., 627 F. Supp. 1290 (C.D. Cal. 1986)(partner sued other partner under civil RICO to recover losses sustained from lower-than-anticipated sales of broadcast rights to heavyweight boxing match between Muhammed Ali and Trevor Berbick), *aff'd,* 833 F.2d 1360 (9th Cir. 1987), *cert. denied,* 492 U.S. 917 (1989); Morrison v. Syntex Labs., Inc., 101 F.R.D. 743 (D.D.C. 1984)(manufacturer of infant milk formula was sued under civil RICO for alleged fraudulent advertising); Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983)(Chassidic Jewish congregation sued certain congregation members under civil RICO in dispute concerning proper succession to the "Skolyer Rebbe," the congregation's top leadership position); Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125 (D. Mass. 1982)(ex-church member sued church elders under civil RICO for alleged theft of her garbage); Hannah v. Nu/Hart Hair Clinics Inc., No. 95-4493 (N.Y. Common Pleas filed Jan. 6, 1996)(men who underwent hair transplant surgery sued company operator under civil RICO when the results of the surgery were, in their opinion, worse than baldness), *recounted in* Jon Schmitz, *Men Charge Hair Clinic with Racketeering,* PITTSBURGH POST-GAZETTE, Jan. 14, 1996, at G1.

For the outcome of many cases listed above (and other similar cases), see G. Robert Blakey & Thomas A. Perry, *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?,"* 43 VAND. L. REV. 851, 1021-48 (1990). For descriptions of additional cases—both ordinary and bizarre—in which violation of civil RICO has been alleged, see Susan 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, 679-80 (1990); Philip A. Lacovara & Geoffrey F. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO,* 21 NEW ENG. L. REV. 1, 2-3, 10-18 (1985-86); Petra J. Rodrigues, Note, *The Civil RICO Racket: Fighting Back with Federal Rule of Civil Procedure 11,* 64 ST. JOHN'S L. REV. 931, 937-38 & nn.26-33 (1990). In her article, Ms. Getzendanner observed:

> The majority of civil RICO cases involve commonplace commercial controversies, the facts of which reveal an ordinary business relationship gone sour. These mercantile melees are recharacterized by resourceful attorneys to conform with the requirements of RICO. . . . Thus transmogrified, the ordinary state law fraud or contract action becomes a "racketeering" case, threatening treble damages, costs, and attorney's fees.

Susan 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, 679-80 (1990).

civil RICO[7] claims to forum shop;[8] to circumvent the stricter venue and jurisdictional rules that would otherwise apply to their clients' "garden variety"[9] claims;[10] and to corral defendants into an inconvenient jurisdiction with which they may have no contacts.[11]

The RICO section used for these purposes is 18 U.S.C. § 1965(b). Although § 1965(b) is the statute's nationwide service-of-process provision, courts also use it to establish nationwide venue and personal jurisdiction over RICO defendants.[12] Section 1965(b) allows a plaintiff to sue defendants in a foreign forum "when the ends of justice [so]

7. As used in this Article, the term "civil RICO" refers to private causes of action under 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp 1996). In other words, "civil RICO" refers to the use of the civil remedies under 18 U.S.C.A. § 1964.

8. *See* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 776-77 (1995)(remarking that "as suggested by the old adage about the 'home-field advantage,' the location of the forum adjudicating a dispute is critically important. Litigators are well aware of the careful maneuvering over where a lawsuit will proceed and believe—rightly or wrongly—that the answer to the 'where' question may drastically impact the ultimate outcome of the case." (footnote omitted)); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1678 (1990)(explaining that "[a]mong the considerations that may motivate a forum shopper are the convenience or expense of litigation in the forum, the inconvenience to one's adversary, the probable or expected sympathies of a potential jury pool, the nature and availability of appellate review, judicial calendars and backlogs, local rules, . . . and virtually any other interjurisdictional difference"). Some attorneys also add RICO counts to obtain a federal forum. *See* Bruns v. Ledbetter, 583 F. Supp. 1050, 1055 (S.D. Cal. 1984)(stating that if civil RICO were given its broadest possible meaning, it "would literally make a federal case out of nearly every instance of business fraud"). This "federalization" problem falls outside the scope of this Article, but has been addressed by others. *See, e.g.*, Jed S. Rakoff, *The Federalization of Commercial Torts Under RICO*, ALI-ABA COURSE MATERIALS J., Feb. 1986, at 7.

9. A good definition of a "garden variety" claim is one that, absent civil RICO, is remediable under state common-law theories—such as misrepresentation or breach of contract—or other federal statutes. *See* Diane L. Virzera, *Redirecting the Debate on "Garden Variety" Abuses of Civil RICO: Suitability Rule Violations and the Case for Treble Damages*, 26 COLUM. J.L. & SOC. PROBS. 341, 342 n.6 (1993). *Accord* SKADDEN, ARPS, MEAGHER & FLOM, GUIDE TO RICO . . . A PRACTICAL GUIDE FOR THE CORPORATE COUNSELOR 27-28 (John C. Fricano ed. 1986) [hereinafter SKADDEN, ARPS] (explaining that "[t]he expression 'garden-variety fraud' as used in RICO cases refers to 'fraudulent' conduct in the marketplace that, without reliance upon RICO, is regularly subjected to regulation pursuant to statutory schemes or common law doctrines").

10. *Cf.* Paul H. Rubin & Robert Zwirb, *The Economics of Civil RICO*, 20 U.C. DAVIS L. REV. 883, 889 (1987)(stating that "if RICO were applied more generally, plaintiffs could get around the stricter or less generous legal standards (including standing, culpability, causation, reliance, materiality) of statutes covering the underlying predicate acts").

11. *See* SKADDEN, ARPS, *supra* note 9, at 12 (noting that 18 U.S.C. § 1965 "can minimize the question of the court's personal jurisdiction over the defendant"). *See also infra* section III(B)(2)(discussing the "contacts" issue).

12. *See infra* section III(B).

require."[13] As two commentators astutely observed, § 1965(b)

> permit[s] any district court, when "the ends of justice require," to summon any nonresident person—no matter where located—to appear as a defendant in a pending action. This provision, which can effectively compel an individual who lives in Arizona to defend an action pending in Maine if "the ends of justice require," *is a rare expansion of traditional concepts of venue and jurisdiction; its outer parameters have never been meaningfully tested against the standards that ordinarily apply to the exercise of a federal court's personal jurisdiction.*[14]

Because of the "ends of justice" standard, civil RICO has a very long reach—a reach that can drag a defendant from one end of the country to the other.

The "ends of justice" standard can wreak havoc on defendants and courts regardless of how well a RICO claim is pleaded. The standard causes problems in well-founded RICO cases because courts have not developed a systematic test to evaluate when § 1965(b) should be used to exercise personal jurisdiction or venue,[15] how the various subsections of § 1965 relate,[16] or what the phrase "ends of justice" actually means.[17] The "ends of justice" standard causes even more problems in poorly-pleaded "garden variety" cases,[18] because it sometimes becomes the sole reason certain defendants must appear in the foreign forum.[19]

Judicial confusion about when and how to apply § 1965(b) has encouraged some plaintiffs to add questionable RICO claims to draw multiple defendants into a forum in which some have no contacts.[20] To make matters worse, when a defendant attempts to eliminate the RICO claim through an early motion to dismiss for lack of personal jurisdiction[21] or for improper venue,[22] courts typically refuse to examine whether the plaintiff has stated a valid RICO claim.[23] Instead,

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13. 18 U.S.C.A. § 1965(b)(West 1994). For the full text of § 1965(b), see text accompanying *infra* note 87.
14. PAUL A. BATISTA & MARK S. RHODES, CIVIL RICO PRACTICE MANUAL § 2.6 (1995 Cum. Supp. No. 1)(citation omitted and emphasis added). *Accord* Laura Ginger, *Business' Civil RICO Liability Goes Unchecked: No Previous Conviction Required*, 24 AM. BUS. L.J. 179, 187 (1986)(observing that "liberalized venue and jurisdictional provisions allow civil RICO actions to be sustained in far more districts than would diversity of citizenship business cases"); Drew A. Campbell, Comment, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 SW. L.J. 925, 937 (1982)(characterizing § 1965(b) as "the most liberal and potentially far-reaching of RICO's procedural devices").
15. *See infra* section IV.B.
16. *See infra* section III.
17. *See infra* section IV.
18. *See supra* note 9 (defining "garden variety" in the civil RICO context).
19. *See, e.g.*, Getzendanner, *supra* note 6, at 674.
20. *See infra* sections III & IV.
21. *See* FED. R. CIV. P. 12(b)(2).
22. *See* FED. R. CIV. P. 12(b)(3).
23. Pleading defects are typically included in a motion to dismiss for failure to state a

they ignore the allegations and ask only whether all the defendants could be joined in one forum.[24] The result of this incomplete examination is that defendants may be stranded in a foreign forum based only on a deficient RICO claim, which, if dismissed, would render the court's jurisdiction and venue improper.[25]

Systematic and comprehensive tests for analyzing venue and personal jurisdiction under civil RICO must be formulated and applied. New boundaries must be drawn. For years, litigants have manipulated § 1965 in ways Congress never envisioned nor intended. They have twisted the statute's language and legislative history to gain procedural advantages that might be outcome determinative. In addition, federal courts are split and confused about how venue and personal jurisdiction should be analyzed in the civil RICO context.[26] Indeed, the two United States Courts of Appeals that have addressed the issue used completely different factors to reach conflicting results.[27] The federal district courts are even more splintered in their approaches.[28]

After addressing civil RICO's legislative history[29] and § 1965's statutory framework,[30] this Article describes different methods courts currently use to analyze venue and personal jurisdiction under 18 U.S.C. § 1965.[31] Next, this Article proposes separate jurisdictional[32] and venue[33] tests for courts to apply when § 1965(b) is invoked in civil RICO cases. These tests are designed to protect defendants' due process rights, give credence to the actual language of § 1965(b), adhere to legislative intent, bring some degree of uniformity and consistency to jurisdictional determinations under civil RICO, and discourage attorneys from adding RICO claims merely to gain a jurisdictional advantage. If applied, the tests should solve the major problems currently associated with venue and personal jurisdiction under civil

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claim under Federal Rule of Civil Procedure 12(b)(6). *See* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (1990 & Supp. 1996) [hereinafter WRIGHT & MILLER].

24. *See infra* section III.B.2.a.
25. *See, e.g.,* Charles River Data Sys., Inc. v. Oracle Complex Sys. Corp., 788 F. Supp. 54, 57 (D. Mass. 1991)(holding that if a RICO claim is dismissed, venue questions "must be decided by the rules which apply to all diversity cases").
26. *See infra* sections III & IV.
27. *Compare* Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668 (7th Cir. 1987), *cert. denied,* 485 U.S. 1007 (1988) *with* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535 (9th Cir. 1986).
28. These conflicts are addressed throughout the Article, but are highlighted in *infra* sections III and IV.B.
29. *See infra* section II.
30. *See infra* section III.
31. *See infra* section IV.B.
32. *See infra* section IV.C.1.b. *See also infra* App. 1.
33. *See infra* section IV.C.2. *See also infra* App. 2.

RICO. The Article concludes with some practical advice for attorneys representing plaintiffs and defendants in civil RICO actions.[34]

II. A BRIEF HISTORY OF CIVIL RICO

At 10:14 a.m. on October 15, 1970[35]—a dark and cloudy day in Washington, D.C.[36]—President Richard M. Nixon signed[37] the Organized Crime Control Act of 1970,[38] which Congress had approved three days earlier.[39] President Nixon told those gathered to witness the signing that the new law would allow federal law enforcement "to launch a total war against organized crime."[40]

Title IX of the Act[41] was named "Racketeer Influenced and Corrupt Organizations"—commonly known as RICO.[42] Under RICO, a de-

34. *See infra* section V.

35. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 846-47 (1970) [hereinafter PUBLIC PAPERS].

36. DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO § 1.1, at 1 & n.1 (1991)(citing *Washington Post*, Oct. 15, 1970, at B4; *id.* Oct. 16, at D4).

37. 116 CONG. REC. 37264 (1970).

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

39. 116 CONG. REC. 36296 (1970). *See also* 1970 HOUSE REPORT, *supra* note 2, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4007 (indicating that the House of Representatives passed the law on October 7, 1970, and the Senate passed it on October 12, 1970).

40. PUBLIC PAPERS, *supra* note 35, at 846. *See also* ABRAMS, *supra* note 36, § 1.1, at 2.

41. RICO is one of eleven titles of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. The other titles reflect the statute's criminal-law enforcement orientation. *See, e.g.*, 18 U.S.C. §§ 6001-6006 (1994)(Title II; use immunity); *id.* § 3503 (Title VI; pretrial depositions in criminal cases); *id.* § 3504 (Title VII; limiting motions to suppress); *id.* §§ 3575-3578 (Title X; increasing sentences for dangerous special offenders).

42. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. *See* 18 U.S.C.A. §§ 1961-1968 (West 1994 & Supp. 1996). The idea of RICO dates to at least 1967, when the Katzenbach Commission called for Congress to "make a full-scale commitment to destroy the power of organized crime groups." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200 (1967), *cited in* ABRAMS, *supra* note 36, § 1.4, at 24 n.1. For additional legislative history, see 1970 HOUSE REPORT, *supra* note 2, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4012 (listing important dates in the legislative process); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1005 (C.D. Cal. 1982)(detailing the efforts of the 90th and 91st Congresses to implement the Katzenbach Commission's recommendations); ABRAMS, *supra* note 36, § 1.4, at 24-34; American Bar Association, Section on Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* ch. 4 (1985) [hereinafter *ABA Ad Hoc Report*]; G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249-80 (1982) [hereinafter Blakey, *Civil Fraud Action*]; G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980); Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 838-44 (1980). *See also* Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984)(tracing federal anti-racketeering legisla-

fendant could be held liable[43] if the government or a private plaintiff established that the defendant, through a series of predicate acts,[44] received income from a pattern[45] of racketeering activity,[46] acquired control of an enterprise[47] through a pattern of racketeering activity, operated an enterprise through a pattern of racketeering activity, or conspired to engage in racketeering activity.[48]

Although RICO contained both civil and criminal remedies, President Nixon never mentioned the civil remedies[49] and the press mentioned them only in passing.[50] Instead, the focus was almost solely on fighting organized crime.[51] Even when RICO's civil remedies were referenced, the discussion almost always revolved around how those remedies would advance the government's war against organized

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tion to the Colonial era).

43. *See infra* note 74 (discussing damages).
44. *See* 18 U.S.C.A. § 1961(1) (West 1994 & Supp. 1996).
45. *See id.* § 1961(5)(defining "pattern").
46. *See id.* § 1961(1)(defining "racketeering activity"); *id.* § 1961(5)(defining "pattern of racketeering activity"). Collecting an unlawful debt can also be the basis of a RICO claim. *See id.* §§ 1961(6) & 1962.
47. *See id.* § 1961(4)(defining "enterprise").
48. *See* 18 U.S.C.A. § 1962 (West 1994 & Supp. 1996). For a more complete explanation of the essential elements of a RICO action, see ABRAMS, *supra* note 36, chs. 3-5.
49. *See* PUBLIC PAPERS, *supra* note 35, at 847 (focusing on bombing and mobsters, and declaring that "[t]his is a warning by signing this bill: We are going to give tools to the men in the Justice Department and the men in the FBI and we shall see to it that those who engage in . . . terroristic acts are brought to justice.").
50. *See, e.g.,* Marjorie Hunter, *Curbs on Crime and Drug Abuse Gain in Congress*, N.Y. TIMES, Oct. 8, 1970, at 1 (not mentioning civil remedies); *Nixon Finally Gets the Crime Bill He Wanted*, N.Y. TIMES, Oct. 18, 1970, § IV, at 9; (mentioning that the civil section was "tacked on . . . to attack the Mafia with the civil law remedies that have been developed to cope with antitrust conspiracies"); *Nixon Signs Bill to Combat Crime*, N.Y. TIMES, Oct. 16, 1970, at 18 (same); *Review and Outlook: Crime and Punishment*, WALL ST. J., Oct. 20, 1970, at A18 (same).
51. *See, e.g.,* S. REP. No. 617, 91st Cong., 1st Sess. 2 (1969)(stating that the legislation's main objective was "the eradication of organized crime in the United States . . . by providing . . . new remedies to deal with the unlawful activities of those engaged in organized crime"); 116 CONG. REC. H35214 (daily ed. Oct. 6, 1970)(remarks of Rep. Charles E. Bennett of Florida that: "Reducing the amount of crime in the United States is a domestic problem which the Government should give No. 1 priority to in 1970 and 1971. . . . We are all very concerned with the rising crime rate, particularly the continued domination by organized crime, and I believe the Federal Government should be given all the necessary and proper tools to combat this threat to our citizens."); *id.* at H35216 (remarks by Rep. Harold D. Donohue of Massachusetts that "[the bill's] purpose [is] to seek the irredication of organized crime in the United States"); *id.* at H35206 (remarks of Rep. Donald D. Clancy of Ohio that "one way to effectively combat crime, particularly organized crime as well as violence in the streets, is to enact the measure before us today"). The Senate RICO bill did not contain a civil RICO provision when first introduced, when the Senate Judiciary Committee added the fraud predicates, or when the Senate initially passed the bill. *See* ABRAMS, *supra* note 36, § 1.6; GREGORY JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE § 2 (1992).

crime.[52]

Throughout the 1970s and early 1980s, RICO's civil remedies went virtually unnoticed and unused.[53] By 1972, only one civil RICO decision had been reported; by 1980, only nine decisions had been reported.[54] It took fifteen years for a civil RICO case to reach the United

52. *See, e.g., Hearings on S. 30 Before Subcomm. No. 5 of the H.R. Comm. on the Judiciary*, 91st Cong., 2d Sess. 107 (statement of Sen. John L. McClellan of Arkansas that RICO "adapts the full range of procedures used in other civil cases to the organized crime context"); *id.* at 170-71 (Justice Department comments applauding the addition of civil remedies to assist in the war against organized crime); *id.* at 520 (comment by Rep. Sam Steiger of Arizona that the civil remedies "promise to be far more effective than any existing authority as a means of protecting legitimate businessmen from the ruthless and oppressive methods used by organized crime"); 116 CONG. REC. H35201 (daily ed. Oct. 6, 1970)(remarks of Rep. Richard H. Poff of Virginia that "[RICO] mobilizes both the criminal and civil mechanisms of the Sherman Act and other antitrust statutes against the barons of organized crime"). *But see* G. Robert Blakey, *Foreward: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 704 (1990)(explaining that because 18 U.S.C. § 1962 states what is unlawful, as opposed to what is criminal, RICO is not and was never intended to be primarily a criminal statute). In his article, Professor Blakey also cites congressional debate about civil remedies. *Id.* at 704 n.24 (citing 116 CONG. REC. 602 (1970)(statement of Sen. Hruska that "the principal value of this legislation may well be found to exist in its civil provisions") and 115 CONG. REC. 6993 (1969)(statement of Sen. Hruska that "the criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill")). Blakey, however, has taken these quotes out of context. Senator Hruska, at 115 CONG. REC. 6993, also stated "the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman." Further, at 116 CONG. REC. 602, Sen. Hruska emphasized that "I believe that the combination of criminal and civil penalties in this title offers an extraordinary potential for striking a mortal blow against the property interests of organized crime." A fair reading of Sen. Hruska's complete statements thus supports those who claim that the civil remedies were directed at organized crime.

53. *See* ABRAMS, *supra* note 36, § 1.1, at 2 & n.6. *See also id.* at 5 & nn.18-20 (suggesting that civil RICO went virtually unnoticed for nearly a decade after its passage because RICO "is codified in Title 18 of the United States Code (the Crimes and Criminal Procedure title), whose pages plaintiffs' lawyers ordinarily do not consult in search of private remedies").

54. *See ABA Ad Hoc Report*, *supra* note 42, at 55. *See also* American Bar Association, Criminal Justice Section, *A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation* 7 n.17 (1985)[hereinafter *Civil and Criminal RICO*] (noting that even criminal RICO was "[l]argely ignored from 1970 to 1975"). *Cf.* United States v. Turkette, 452 U.S. 576, 591 (1981)(declaring that RICO's "major purpose . . . is to address the infiltration of legitimate business by organized crime"); Larry E. Parrish, *RICO Civil Remedies: An Untapped Resource for Insurers*, 49 INS. COUNS. J. 337, 337 (1982)(explaining: "The purpose of this article is to inform attorneys representing insurers that there is a civil remedy which has survived for over eleven years and the potential of which has remained virtually unnoticed by the insurance industry. . . . While it is hardly a remedy for the exclusive use of insurers, the insurance industry stands to gain more economically from the proper use of private party civil [RICO] remedies than any other segment of the business community.").

States Supreme Court.[55] By that time, however, attorneys had learned the statute's power and "RICO [had] evolv[ed] . . . into something quite different from the original conception of its enactors."[56]

By 1983, "the trickle of private civil RICO lawsuits became a deluge."[57] Soon after the Supreme Court's 1985 decision in *Sedima, S.P.R.L. v. Imrex Co.*,[58] the proverbial floodgates appeared to open and private attorneys began filing nearly 1000 civil RICO actions a year.[59] The statute grabbed the attention—and imagination—of judges,[60] scholars,[61] attorneys,[62] and bar associations,[63] who viewed

55. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)(*Sedima* is described *infra* note 58). *See also* ABRAMS, *supra* note 36, § 1.1, at 5 & n.20 (indicating that by 1978, only two reported opinions had considered civil RICO and that by early 1981, only 13 had considered civil RICO); Blakey, *Civil Fraud Action*, *supra* note 42, at 280 (writing in 1982 that "[o]nly a handful of civil actions have been brought under RICO").

56. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985).

57. Jed S. Rakoff, "Sedima" *Supreme or RICO Resuscitated*, N.Y. L.J., July 11, 1985, at 1, 17.

58. 473 U.S. 479 (1985). In *Sedima*, a Belgian corporation entered a joint venture agreement with Imrex, its American supplier, to provide electronic components to a Belgian firm. *Id.* at 483. Under the agreement, Sedima and Imrex were to split the net proceeds. *Id.* at 484. Although Imrex filled about $8 million in orders, Sedima believed that Imrex was presenting inflated bills, thus cheating Sedima out of a portion of its proceeds by collecting for nonexistent expenses. *Id.* Sedima sued Imrex in the United States District Court for the Eastern District of New York, alleging causes of action for breach of contract, breach of fiduciary duty, unjust enrichment, conversion, and requesting a constructive trust. *Id.* Sedima also sued under the civil RICO statute based on predicate acts of mail and wire fraud. *Id.* The district court dismissed the RICO count for failure to state a claim because the complaint did not allege that Sedima's alleged injuries were a direct result of "a violation of section 1962." *Id.* A divided Second Circuit affirmed the dismissal on grounds that the proper injury was not alleged and that the complaint did not allege that the defendant had been criminally convicted of the predicate acts. *Id.* at 484-85. The Supreme Court reversed and remanded the case for further proceedings by holding that (1) a criminal conviction is not a prerequisite for a civil RICO claim, *id.* at 488-93, and (2) a plaintiff is not required to establish that the alleged injury resulted from the predicate acts themselves; instead, when a plaintiff alleges each element of a § 1962 violation, "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern." *Id.* at 497.

59. *See* William J. Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 644 (1990). *See also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 485-86 (1985)(noting that "[t]he decision below was one episode in a recent proliferation of civil RICO litigation within the Second Circuit and in other Courts of Appeals" (footnotes omitted)). *But see* Blakey & Perry, *supra* note 6, at 869-75 (attempting to dispel the "litigation floodgate" argument).

60. *See, e.g.*, Wolin v. Hanley Dawson Cadillac, Inc., 636 F. Supp. 890, 891 (N.D. Ill. 1986)(observing that "RICO's lure of treble damages and attorneys' fees draws litigants and lawyers . . . like lemmings to the sea"); Parnes v. Heinhold Commodities, Inc., 548 F. Supp. 20, 23 (N.D. Ill. 1982)(explaining: "Clearly the difficulties of drafting [have] caused RICO to sweep up far more than its originally intended compass. Litigators, never at a loss for ingenuity, naturally [find] the prospect of

the civil remedies with both admiration and trepidation.[64] However,

treble damages . . . very inviting for garden-variety fraud claims.").

61. *See, e.g.*, Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 304 (1983)(indicating that civil RICO "could federalize all torts involving business transactions"). *See also* Blakey & Gettings, *supra* note 42. The Blakey and Gettings article has been credited with unleashing the flood of civil RICO cases. ABRAMS, *supra* note 36, § 1.1, at 5-6 (partially attributing increased use of civil RICO to federal prosecutors—who had become familiar with criminal RICO—moving into private practice). *Cf.* James D. Gordon, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1697 (1991)(indicating humorously that an "honest" list of law-school courses might include: "RICO: Learn how to use this powerful anti-extortion law to extort large settlements out of honest business people."); William Safire, *What's Wrong with RICO; It Has Become a Legal Monstrosity*, L.A. DAILY J., Feb. 1, 1989, at 6 (calling civil RICO the "Litigator's Enrichment Clause").

62. *See, e.g., Oversight Hearings*, *supra* note 2, at 224 (statement by the general counsel for Colt Industries, Inc.—whose client was sued under civil RICO—that "[c]ivil causes of action under RICO are only limited by the imagination of the plaintiffs' attorneys. I can assure you that my imagination has conjured up civil RICO actions that have not been pleaded as yet. In light of the current state of affairs, for example, almost any contractual situation involving communication via telephone or the mails—and we are talking about essentially every contract—is fair game for a RICO claim."); CIVIL RICO PRACTICE: CAUSES OF ACTION § 1.7 (Harold Brown ed. 1991)[hereinafter CIVIL RICO PRACTICE] (suggesting that "[l]awyers may themselves be exposed to personal liability when they fail to pursue RICO's expansive remedies including treble damages and allowance for attorneys' fees"); W. Mark Cotham & Rhett G. Campbell, *Civil Actions Under the Racketeer Influenced and Corrupt Organizations Act*, 3 REV. LITIG. 223, 223 (1983)(indicating that the "sudden concern and fascination with a federal statute designed to fight organized crime has not been born out of moral indignation with a centuries old problem" but because "it is possible, according to the statute's language, to use RICO in everyday commercial litigation"); David G. Duggan, *Pleading a RICO Claim*, 34 TRIAL LAW. GUIDE 536, 547 (1991)(concluding that "[t]he point is this: [o]nce you've got your injury, enterprise, pattern and person identified, file the complaint[; w]ith the law . . . in a state of disarray, you have little to lose and threefold your clients' damages plus your fees to gain"). *Cf. Oversight Hearings*, *supra* note 2, at 293 (citing a *Los Angeles Times* article that quoted an attorney who stated that he "was looking for a way to develop business" and he "studied RICO and saw the potential for lots of civil litigation").

63. *See The Authority to Bring Private Treble-Damage Suits Under "RICO" Should Be Reformed, reprinted in Oversight Hearings*, *supra* note 2, at 291 (appendix to statement of Ray J. Groves, Chairman, American Institute of Public Accountants)(observing: "Numerous how-to-do-it courses are being offered nationwide to acquaint lawyers with RICO's possibilities. For example, the ABA already has held four 'continuing legal education' National Institutes on RICO. . . . With ominous accuracy the ABA titled the first three of these sessions, 'RICO: The Ultimate Weapon in Business and Commercial Litigation.' . . . The popularity of the presentations is great; the mailing for the February 1984 course pointed out that the two earlier meetings were sold out, with over 600 lawyers in attendance. . . .").

64. *Compare* Russell Mokhiber, *Dealing with Racketeers in Executive Suites: Triple Damages*, N.Y. TIMES, Sept. 14, 1985, at 23, (praising civil RICO as "one of the most efficient antifraud and anticorporate crime laws on the books") *with* David H. Berg & Philip D. Zelikow, *The RICO Statute, 18 U.S.C. §§ 1961-1968: The Business Client as Racketeer*, 45 TEX. B.J. 159, 160 (1982)(analogizing civil RICO

in light of the statute's powerful strategic advantages,[65] the question clearly became whether "any self-respecting plaintiffs' lawyer [would] omit a RICO charge these days?"[66]

Today, RICO claims are routinely added to many civil lawsuits[67] and are directed at a host of nonracketeer defendants, including usually legitimate categories of businesspersons,[68] such as bankers,[69]

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to the oppressive Soviet Criminal Code).

65. *See infra* notes 74-76 and accompanying text (describing those advantages).

66. Papagiannis v. Pontikis, 108 F.R.D. 177, 179 n.1 (N.D. Ill. 1985). *Accord* Donald J. Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma*, 57 TEMP. L.Q. 731, 735 (1984)(indicating that any attorney risks committing malpractice by omitting civil RICO from a fraud case).

67. Like basic black and fashion, some lawyers think civil RICO is a good choice for any lawsuit. *See supra* note 6 (listing a wide variety of cases in which a civil RICO claim was included). RICO claims have also been filed or suggested in the following areas: credit reporting errors, *see* David Rameden, *When the Database Is Wrong . . . Do Consumers Have any Effective Remedies Against Credit Reporting Agencies or Information Providers?*, 100 COM. L.J. 390 (1995); environmental law, *see* Elizabeth E. Mack, *Another Weapon: The RICO Statute and the Prosecution of Environmental Offenses*, 45 SW. L.J. 1145 (1991); Brendan P. Rielly, Note, *Using RICO to Fight Environmental Crime: The Case for Listing Violations of RCRA as Predicate Offenses for RICO*, 70 NOTRE DAME L. REV. 651 (1994); franchise law, *see* Charles S. Modell & Frederick K. Hauser III, *Franchisor's Use of RICO: The Best Defense Might Be a Good Offense*, FRANCHISE L.J., Summer 1993, at 1; insurance law, *see* Parrish, *supra* note 54, at 337; labor relations, *see* Virginia M. Morgan, *Civil RICO: The Legal Galaxy's Black Hole*, 22 AKRON L. REV. 107 (1988); Victoria G.T. Bassetti, Note, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 COLUM L. REV. 103 (1992); landlord-tenant relations, *see* Richard C. Reuben, *Justices Allow Use of RICO to Sue Slumlords*, L.A. DAILY J., Oct. 13, 1993, at 1; patents and trademarks, *see* Steven Fasman, *The Proper Application of Civil RICO to Patent Fraud*, 1988 INTELL. PROP. L. REV. 125.

68. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 n.16 (1985)(noting that: "The ABA task force found that of the 270 known RICO cases at the trial court level, 40% involves securities fraud, 37% involved common law fraud in a commercial or business setting and only 9% [comprised] 'allegations of criminal activity of a type associated with professional criminals'"); *id.* at 526 (Powell, J., dissenting)(raising his concern that "RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were clearly the intended target of the statute"); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984)(expressing dismay that civil RICO claims were being lodged against legitimate businesses), *rev'd*, 473 U.S. 479 (1985); Thomas F. Harrison, *Look Who's Using RICO*, 75 A.B.A. J., Feb. 1989, at 56 (writing that "[r]ecent case law under RICO has expanded the statute in striking new directions that would have seemed absurd only a few years ago. Increasingly, law firms themselves are becoming targets, and accounting firms and insurance companies are not far behind. And RICO is upsetting the rules of the game in the areas of labor and employment law, bankruptcy, and even pensions."); Lacovara & Aronow, *supra* note 6, at 2-3; Comment, *Tax Fraud and Civil RICO: Implications for Business and Governmental Entities*, 21 U.C. DAVIS L. REV. 1233, 1237 n.17 (1988)(listing many legitimate businesses sued under the RICO statute). *Cf.* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)(explaining that Congress intended RICO to apply to both "legitimate"

lawyers,[70] accountants,[71] insurers,[72] and manufacturers.[73] RICO

and "illegitimate" enterprises, because "legitimate" enterprises "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences"); G. Robert Blakey, *Key to Fight Corporate Fraud*, L.A. DAILY J., Jan. 10, 1986, at 4 (reminding critics that legitimate businesses—including Allstate Insurance Co., IBM, Standard Oil of Indiana, and State Farm Fire and Casualty Co.—have also initiated civil RICO suits).

69. *See, e.g.*, Thornton v. First State Bank, 4 F.3d 650 (8th Cir. 1993)(customer unsuccessfully sued bank under RICO, alleging that bank had promised not to use loan proceeds for offset against past due balances, but later did so); Jackson v. Bank of Haw., 902 F.2d 1385 (9th Cir. 1990)(bank was sued for "hard bargaining" during loan workout negotiations); Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674 (6th Cir. 1988)(bank customers sued several banking groups and individual bank employees for allegedly overcharging interest on commercial, prime-rate based loans); Cory v. Standard Fed. Sav. Bank, [1987-1988 Transfer Binder] RICO Bus. Disputes Guide (CCH) ¶ 6902 (4th Cir. 1988)(depositor sued bank under civil RICO alleging that bank fraudulently underpaid interest on his account); Morosani v. First Nat'l Bank, 703 F.2d 1220 (11th Cir. 1983)(customer sued bank under civil RICO alleging that the prime rate used in computing the interest on a loan was not the bank's true prime rate). *See generally* BATISTA & RHODES, *supra* note 14, § 4.12 (describing civil RICO claims concerning bank lending practices); *ABA Ad Hoc Report*, *supra* note 42, at 36-37 n.41 (listing civil RICO actions filed against banks and financial institutions); Philip L. Guarino, *The Use of RICO Against Financial Institutions*, 45 CONSUMER FIN. L.Q. REP. 301, 305-06 & nn.49-61 (1991)(describing many other cases in which banks and financial institutions have been sued for alleged RICO violations); Lacovara & Aronow, *supra* note 6, at 15 n.94 (listing banks sued under civil RICO); Edward Mannino, *Less Corn and More Hell: The Application of RICO to Financial Institutions*, 35 VILL. L. REV. 883, 886 & nn.16-23 (1990).

70. *See, e.g.*, McDonald v. Schencker, 18 F.3d 491 (7th Cir. 1994)(client unsuccessfully sued attorneys for alleged overbilling and failure to return money in an escrow account); Nolte v. Pearson, 994 F.2d 1311 (8th Cir. 1993)(investors sued attorneys who prepared an opinion letter after IRS disallowed certain investment tax credits); Doe v. Roe, 958 F.2d 763, 765 (7th Cir. 1992)(divorce lawyer sued under civil RICO by former client who contended the lawyer "defrauded her into having sexual relations with him in lieu of payment for his services"); Hartz v. Friedman, 919 F.2d 469 (7th Cir. 1990)(clients attempted to transform a legal malpractice case into a civil RICO case by alleging use of mails and wires). *See generally ABA Ad Hoc Report*, *supra* note 42, at 38-39 n.41 (listing civil RICO actions filed against attorneys); Lacovara & Aronow, *supra* note 6, at 15 n.94 (listing law firms sued under civil RICO).

71. *See, e.g.*, University of Md. v. Peat, Marwick, Main & Co., 996 F.2d 1534 (3d Cir. 1993)(policyholders of insolvent insurer sued accounting firm under civil RICO for allegedly conducting materially deficient audits); Davis v. Coopers & Lybrand, 787 F. Supp. 787 (N.D. Ill. 1992)(investors in commodity pool limited partnerships sued many defendants, including the partnerships' accountants, for allegedly diverting pool funds). *See generally ABA Ad Hoc Report*, *supra* note 42, at 38 n.41 (listing civil RICO actions filed against accounting firms); Lacovara & Aronow, *supra* note 6, at 15 n.94 (listing national accounting firms sued under civil RICO).

The threat to accountants, auditors, and others similarly situated may have been lessened by the Supreme Court's 1993 decision in Reves v. Ernst & Young, 507 U.S. 170 (1993). RICO § 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect,

claims are added to civil actions to take advantage of the statute's procedural and strategic advantages, including its treble damages and attorney's fees provision,[74] its *in terrorem* and stigmatizing effect,[75]

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." 18 U.S.C. § 1962(c). After the respondent's predecessor, the accounting firm of Arthur Young and Co., engaged in certain activities relating to the valuation of a gasohol plant on the annual audit and financial statements of a farming cooperative, the cooperative filed for bankruptcy and the trustee sued the firm under civil RICO. Reves v. Ernst & Young, 507 U.S. 170, 172-75 (1993). In *Reves*, the Court addressed "whether one must participate in the operation or management of the enterprise itself to be subject to liability under this provision." *Id.* at 172. Affirming the lower courts' rulings in favor of the firm, the Court adopted the "operation or management test," which states that, to be liable under civil RICO, the individual or organization must have "participate[d] in the operation or management of the enterprise itself." *Id.* at 185. For more complete treatment of *Reves* and its impact, see Stuart L. Bass, *Supreme Court Limits RICO Liability for Accountants and Other Outside Professionals*, 98 COM. L.J. 452 (1993); Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61 (1994); Michael Vitello, *More Noise from the Tower of Babel: Making "Sense" out of* Reves v. Ernst & Young, 56 OHIO ST. L.J. 1363 (1995); Catherine M. Clarkin, Note, *The Elimination of Professional Liability Under RICO*, 43 CATH. U. L. REV. 1025 (1994); Jeffrey N. Shapiro, Comment, *Attorney Liability Under RICO § 1962(c) After* Reves v. Ernst & Young, 61 U. CHI. L. REV. 1153 (1994).

72. *See, e.g.*, Schroeder v. Acceleration Life Ins. Co., 972 F.2d 41 (3d Cir. 1992)(insureds sued over non-payment of credit disability insurance benefits); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982)(retirement community residents sued insurance company and others for financial mismanagement that allegedly jeopardized the "life care" they had been promised), *cert. denied*, 464 U.S. 1008 (1983); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983)(insurance company sued under civil RICO following disallowance of insurance claim). *See generally ABA Ad Hoc Report*, *supra* note 42, at 37 n.40 (listing civil RICO actions filed against insurers); Lacovara & Aronow, *supra* note 6, at 16 n.94 (listing insurance companies sued under civil RICO).

73. *See generally* Richard A. Salomon & Jonathan S. Quinn, *Civil RICO in Manufacturing, in* CIVIL RICO PRACTICE, *supra* note 62, ch. 4; *ABA Ad Hoc Report*, *supra* note 42, at 37-38 n.41 (listing civil RICO actions filed against manufacturing and commercial companies); Lacovara & Aronow, *supra* note 6, at 16 n.94 (listing manufacturing companies sued under civil RICO).

74. 18 U.S.C.A. § 1964(c) (West Supp. 1996)(providing in part that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and *shall recover threefold the damages he sustains* and the cost of the suit, including a reasonable attorney's fee" (emphasis added)). *See also* Tellis v. United States Fidelity & Guar. Co., 805 F.2d 741, 745 (7th Cir. 1986)(observing that "[t]he treble damages provision . . . is the most significant aspect of civil RICO"); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 486 (2d Cir. 1984)(noting that "[t]he fact that successful RICO plaintiffs may obtain treble damages and attorneys' fees provides, of course, additional incentives to plaintiffs to categorize their actions as RICO claims"), *rev'd*, 473 U.S. 479 (1985); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984)(imposing Rule 11 sanctions in a civil RICO case because "[a] RICO defendant . . . needs to be protected from unscrupulous claimants lured by the prospect of treble damages"); Jonathan Turley, *The RICO*

Lottery and the Gains Multiplication Approach: An Alternative Measure of Damages under Civil RICO, 33 VILL. L. REV. 239, 242-45 (1988); David Manogue, Comment, *Liability for General Business Fraud: Putting a Contract Out on RICO Treble Damages*, 45 U. PITT. L. REV. 481, 492-97 (1984).

Congressional attempts to eliminate or limit the treble damages provisions have failed. For example, in 1986, Rep. Conyers introduced House Bill 5391, which would have eliminated treble damages in civil suits. H.R. 5391, 99th Cong., 2d Sess. (1986). Although the bill was approved by the Criminal Justice Subcommittee, it never became law. *See* 1985-86 Cong. Index (CCH) 35,100 (tracing the history of H.R. 5391). In 1989, Senators DeConcini, Hatch, Heflin, and Symms introduced Senate Bill 438, which would have limited recovery of treble damages to suits in which the plaintiff was a governmental entity; other plaintiffs would be limited to recovery of actual damages and costs, or in some egregious cases, twice actual damages. S. 438, 101st Cong., 1st Sess. 4-9 (1989). *Accord* H.R. 1046, 101st Cong., 1st Sess. 4-10 (1989)(House version of S. 438). Neither Senate Bill 438 nor House Bill 1046 was ever enacted. *See* 1989-90 Cong. Index (CCH) 21,009-10 (concerning S. 438); *id.* at 35,015 (concerning H.R. 1046).

75. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 506 (1985)(Marshall, J., dissenting)(remarking that RICO is wrongfully used for "extortive purposes"); *id.* at 504 (explaining that a RICO defendant faces "tremendous financial exposure in addition to the threat of being labeled a 'racketeer'," and that, as a result, many RICO defendants settle rather than face the embarrassment of social stigma); UNR Indus., Inc. v. Continental Ins. Co., 623 F. Supp. 1319, 1331 (N.D. Ill. 1985)(commenting that "[t]o delay as long as [the plaintiff] did to assert a RICO injury suggests that either [the plaintiff] did not suffer that kind of serious injury or that the charge is made because of the in terrorem effect of any treble damage or racketeering claim"); Katzen v. Continental Ill. Nat'l Bank & Trust Co., No. 80-C-1378 (N.D. Ill. Aug. 14, 1980)(LEXIS, Genfed library, Courts file)(finding it "[n]eedless to say every defendant is offended by the notion that he or it would fall within the scope of the private remedies fashioned by the Congress to control organized crime"). *Cf. Oversight Hearings*, *supra* note 2, at 335 (testimony of Robert H. Hodges, Jr. on behalf of the American Bankers Association that "the defamatory effect . . . of being labeled a 'racketeer' in itself is a strong incentive for banks and other industries, legitimate industries, to settle rather than go to court in these cases"); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)(observing that "[a]rgument is unnecessary to demonstrate that the [term] 'damn racketeer' . . . [is] likely to provoke the average person to retaliation"); United States v. Regan, 858 F.2d 115 (2d Cir. 1988)(explaining that a limited partnership, whose primary business was investing in securities and commodities arbitrage, was sued under RICO and then forced into bankruptcy before the case could proceed to trial); Nancy Blodgett, *Revamping RICO: Congress Gets into the Act*, A.B.A. J., Dec. 1985, at 32 (quoting the chair of the ABA RICO Cases Committee, who suggested that the Act be renamed the "Criminal Enterprises and Corruption of Enterprises Act" and complained that "[t]he term 'racketeer' raises undesirable connotations; [i]t conjures up images of B-grade movie gangsters"); *Business Is Picking up an Anticrime Weapon*, BUS. WK., Feb. 20, 1984, at 85 (noting that "[l]awyers say the number of court awards under RICO is not an accurate measure of the problem because few cases go to trial[; t]he mere threat of a headline suggesting a connection with organized crime often induces a settlement"). *But see* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 (1985)(White, J.)(stating that "[a]s for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings"); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399 n.16 (7th Cir. 1984)(remarking that "[b]y adding to the settlement value of . . . valid claims in certain

and—particularly in actions involving multiple defendants—its broad venue and jurisdictional provisions.[76]

Although some courts have[77] and still do[78] react hostilely to civil

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cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls"), *aff'd*, 473 U.S. 606 (1985). *See generally* Paul A. Batista, *The Uses and Misuses of RICO in Civil Litigation: A Guide for Plaintiffs and Defendants*, 8 DEL. J. CORP. L. 181 (1983); Mark E. Duval, *A Trial Lawyer's Guide: Everything You Always Wanted to Know About RICO Before Your Case Was Dismissed*, 12 WM. MITCHELL L. REV. 291, 311 (1986)(commenting that a RICO action is considered a "powerful weapon in terms of both monetary and reputational damage"); Edward I. O'Brien, *RICO's Assault on Legitimate Business*, CHI. DAILY L. BULL., Apr. 25, 1986, at 2 (describing the negative effects of civil RICO on legitimate businesses); Rubin & Zwirb, *supra* note 10, at 892-94 (discussing the stigma associated with being sued under civil RICO).

76. *See, e.g.*, Turley, *supra* note 74, at 242-43 & n.22 (referring to the "generous" service provision, 18 U.S.C. § 1965(b)); Malcolm B. Wittenberg & Kit L. Knudsen, *RICO Increasingly Used in Infringement Cases: Advantages Include Broader Jurisdiction, Greater Ease of Service*, NAT'L L.J., May 17, 1993, at S6 (indicating that civil RICO allegations are becoming more common in trademark infringement cases because of several advantages, including "that RICO authorizes nationwide service of process, which courts have recognized as authority for general jurisdiction over any plaintiff with sufficient contacts anywhere in the country"); Joe M. Cox, Comment, *Business and Commercial Applications of Civil RICO*, 25 LAND & WATER L. REV. 207, 226 n.169 (1990)("[c]onsidering the broad venue of the statute and the state of the law, forum shopping is definitely in order for the plaintiff considering a RICO claim").

77. *See generally* Michael A. Bertz, *Pursuing a Business Fraud RICO Claim*, 21 CAL. W. L. REV. 246 (1985); Kenneth F. McCallion & James W. Johnson, *Judiciary Devises New Theories in Effort to Dismiss Civil Suits*, NAT'L L.J., Feb. 12, 1990, at 22; Moran, *supra* note 66, at 734 (noting that "[i]f a RICO cause of action is asserted together with common law counts against an otherwise legitimate business for conduct involving garden-variety commercial fraud, the practitioner risks incurring judicial hostility" and detailing ways in which courts have attempted to limit RICO claims); Rubin & Zwirb, *supra* note 10; Sentelle, *supra* note 1, at 148-50 (indicating that judges do not like civil RICO actions); Cynthia L. Malaun, Comment, *Putting a Halt to Judicial Limitations on Civil RICO*, 52 U.M.K.C. L. REV. 56 (1983).

78. This animosity is manifested by the fact that many United States district courts have local rules or standing orders that require plaintiffs to file "RICO case statements" early in the action. *See, e.g.*, S.D. CAL. LOCAL R. 11.1; S.D. GA. LOCAL R. 9; N.D.N.Y. LOCAL R. 9.2; E.D. WASH. LOCAL R. 8; Irwin v. Hawk, 40 F.3d 347 (11th Cir. 1994)(appeal from the Southern District of Georgia), *cert. denied*, 116 S. Ct. 112 (1995); Jones v. County of Los Angeles, No. 93-55638, 1994 U.S. App. LEXIS 33549 (9th Cir. Nov. 14, 1994)(appeal from the Central District of California); Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580 (5th Cir. 1992)(appeal from the Western District of Texas); Boogarerts v. Bank of Bradley, 961 F.2d 765 (8th Cir. 1992)(appeal from the Western District of Arkansas); Landry v. Air Line Pilots Ass'n, 901 F.2d 404 (5th Cir. 1990)(appeal from the Eastern District of Texas); Sheridan v. Jaffe, No. 94 Civ. 9344, 1996 U.S. Dist. LEXIS 8809 (S.D.N.Y. June 21, 1996); S. Kane & Son Profit Sharing Trust v. Marine Midland Bank, No. 95-7058, 1996 U.S. Dist. LEXIS 8023 (E.D. Pa. June 12, 1996); Grove v. Gilman Secs., Inc., No. 95-C-1606, 1996 U.S. Dist. LEXIS 6307 (N.D. Ill. May 8, 1996); Harvey v. Harvey, No. 3:95cv253, 1996 U.S. Dist. LEXIS

RICO claims, following the savings and loan debacle[79] and other recent scandals,[80] cries for complete repeal of civil RICO have dwindled.[81] Civil RICO, therefore, is here to stay.[82] Consequently, courts

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9138 (D. Conn. Mar. 25, 1996); Dejager Constr., Inc. v. Schleininger, No. 1:94-CV-239, 1996 U.S. Dist. LEXIS 4510 (W.D. Mich. Mar. 13, 1996); Manning v. Stigger, 919 F. Supp. 249 (E.D. Ky. 1996); May v. United States Chamber of Commerce, No. C-95-4148, 1996 U.S. Dist. LEXIS 3136 (N.D. Cal. Mar. 12, 1996). These RICO case statements typically require plaintiffs to provide specific factual information about the basis for the RICO claim, including details concerning the alleged misconduct, the identities of the alleged wrongdoers and the alleged victims, the injury to each alleged victim, a detailed description of the pattern of racketeering activity, a description of the enterprise, whether the pattern of racketeering activity is separate from the enterprise, the benefits the alleged enterprise receives from the racketeering activity, the effect of the enterprise on interstate commerce, the causal relationship between the racketeering activity and the injury, and other information. *See, e.g.*, E.D. WASH LOCAL R. 8. *See also* Kernus v. Morrison, No. 94-3179, 1996 U.S. Dist. LEXIS 4769, at *36 (E.D. Pa. Apr. 16, 1996)(reprinting questions to be answered in RICO case statement in the app.). If the RICO case statement is incomplete or insufficient, the court may dismiss the RICO claim. *See, e.g.*, Irwin v. Hawk, 40 F.3d 347, 347 (11th Cir. 1994), *cert. denied*, 116 S. Ct. 112 (1995); Kramer v. Bachan Aero. Corp., 912 F.2d 151, 153 n.3 (6th Cir. 1990).

79. *See* H.R. REP. 312, *supra* note 2, at 2 (indicating that civil RICO can be an effective tool "against the most serious kinds of fraud, such as that in many of the savings and loan and bank fraud cases"). *See also Oversight Hearings*, *supra* note 2, at 209-17 (statement of Daniel W. Persinger, Deputy General Counsel for the Federal Deposit Insurance Corporation, concerning the FDIC's use of civil RICO actions against failed financial institutions); BATISTA & RHODES, *supra* note 14, § 1.1 (remarking that "[i]n the wake of the savings-and-loan industry fiasco in the late 1980s and early 1990s, various agencies and representatives of the federal government . . . have seen in the civil racketeering statute a last, best hope for attempting to repair an irreparable debacle"). *See also* Barbara Franklin, *Two Bills Aim to Reduce Number of Civil Claims*, N.Y. L.J., May 16, 1991, at 5, 5 (quoting the director of a consumer group: "Financial institutions in this country are toppling under the weight of fraud. Civil RICO is an ideal tool in these cases."); Stephen Labaton, *House Panel Backs Easing of RICO Law*, N.Y. TIMES, May 3, 1991, at D8 (quoting the same director: "We're in the middle of one financial debacle after another, and civil RICO is the strongest financial remedy available.").

80. *See* Mary Jane Fisher, *NAIC Blasts Attempt to Restrict RICO Lawsuits, Nat'l Underwriter Co. Prop. & Cas. / Employee Benefits Ed.*, May 6, 1991, at 6 (quoting the president of the National Association of Insurance Commissioners as saying that "[t]he civil provisions of RICO are the single most potent weapon in [insurance regulators'] arsenal against conspiracies to pillage insurance companies and their policyholders").

81. *See, e.g.*, John S. Siffert, *Recent Developments in RICO Litigation*, STANDARD & POOR'S REV. SECS. & COMMODITIES REG., Aug. 1995, at 139 (noting that "[t]oday, courts no longer routinely look to undercut RICO's extensive reach, but from time to time decisions continue to evidence a hesitation to embrace its full force"). The most recent amendment to RICO was enacted in 1995. The amendment was limited to 18 U.S.C. § 1964(c) and provided that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C.A. § 1964(c) (West Supp. 1996). In other words, civil RICO no longer applies to private securities

should (1) be wary about how plaintiffs use the statute, especially when multiple defendants—over whom the court might otherwise lack personal jurisdiction or venue—are sued,[83] and (2) adopt tests that can be consistently applied when determining when to invoke and how to interpret the broad language of § 1965(b), civil RICO's venue and jurisdictional provision.[84]

III. STATUTORY LANGUAGE AND FRAMEWORK

Title 18 U.S.C. § 1965 was enacted as part of RICO in 1970[85] and has never been amended.[86] Section 1965 contains civil RICO's venue, jurisdictional, and service-of-process provisions:

> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.
> . . .
> (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.[87]

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actions. H.R. REP. No. 104-369, 104th Cong., 1st Sess. 45 (1995). Other recent amendments have actually expanded RICO's scope. *See, e.g.*, Criminal Law and Procedure Technical Amendment Act of 1986, Pub. L. No. 99-646, § 50(a), 100 Stat. 3605 (expanding the definition of racketeering activity by adding new predicate acts, codified as 18 U.S.C. § 1961(a)(b) (1994)); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1365(b), 100 Stat. 3207-3235 (codified as 18 U.S.C. § 1961(1)(B) (1994)); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, § 7054, 102 Stat. 4402 (1988)(codified as 18 U.S.C. § 1961(1)(B) (1994)); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, tit. IX, § 968, 103 Stat. 506 (codified as 18 U.S.C. § 1961(1)(B) (1994)).

82. Civil RICO has withstood many constitutional challenges. *See generally ABA Ad Hoc Report*, *supra* note 42, ch. 5.

83. *See* FED. R. CIV. P. 11. *Cf.* Naranjo & Pina, *supra* note 3, at 58 (recommending that RICO be amended "to allow the awarding of *treble attorney fees* in cases where the racketeering nexus has been determined to be frivolous and, as a result, the business' reputation has been injured" (emphasis added)); *Civil and Criminal RICO*, *supra* note 54, at 126 & 129-30 (minority of ABA committee advocating for a "special RICO sanction" in frivolously-filed cases, which sanction would consist of "treble actual expenses, including attorneys' fees"). *See generally* Rodrigues, *supra* note 6, at 943-51 (describing how Rule 11 can be used to curb frivolous RICO claims).

84. *See infra* section IV.C (proposing venue and jurisdictional tests).

85. Organized Crime Control Act of 1970, Pub. L. 91-452, Title IX, § 901(a), 84 Stat. 944.

86. *See* 18 U.S.C.A. § 1965 (West 1994).

87. 18 U.S.C.A. § 1965(a), (b), & (d) (West 1994). Subsection (c) concerns subpoenas served by the United States:

> In any civil or criminal action or proceeding instituted by the United

Courts have not uniformly applied these subsections. Some courts and commentators consider subsections (a) and (b) to be only venue provisions,[88] while others consider subsections (a) and (b) to be both venue and jurisdictional provisions.[89] Still others consider subsection (a) to be a venue provision and subsection (b) to be a venue and jurisdictional provision.[90] Some sources consider subsections (b) and (d) to be merely service-of-process provisions,[91] while others consider those subsections to be jurisdictional provisions as well.[92] To paraphrase

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States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

18 U.S.C.A. § 1965(c) (West 1994).

88. *See, e.g.*, Abeloff v. Barth, 119 F.R.D. 315, 329 (D. Mass. 1988)(explaining that § 1965(d) is the jurisdictional provision and § 1965(a) and (b) are merely venue statutes). The following courts have described § 1965(b) as a venue provision in cases when venue would not otherwise be proper for a particular defendant, but is proper for other RICO defendants in the same case: American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 755 F. Supp. 1292, 1303 n.15 (E.D. Pa. 1990)(stating that the defendant "contended that before this court exercised its jurisdictional power over him, I first must have found that the 'ends of justice' required it. [He] relied on . . . section 1965(b) for support for this unavailing argument. . . . [He] has confused personal jurisdiction with venue. Section 1965(b) is a venue provision that only comes into play if the court first finds that jurisdiction is proper under section 1965(a) and (d). . . ."); Goldwater v. Alston & Bird, 664 F. Supp. 403, 408 (S.D. Ill. 1986); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1055-56 n.10 (S.D.N.Y. 1987); Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290-91 (E.D. Wis. 1985); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1459 & n.2 (E.D.N.Y. 1984), *aff'd* 832 F.2d 1325 (2d Cir. 1987).

89. *See* Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987)(holding that § 1965(a) is really a jurisdictional statute and stating that "§ 1965(b) creates personal jurisdiction by authorizing service[; s]ervice of process is how a court gets jurisdiction over the person"), *cert. denied*, 485 U.S. 1007 (1988).

90. *See, e.g.*, Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 330 (S.D. Miss. 1989)(explaining that § 1965(b) is a venue and jurisdictional statute); United States v. Bonanno Organized Crime Family of La Cosa Nostra, 695 F. Supp. 1426, 1431 (E.D.N.Y. 1988)(explaining that "[a]lthough the House and Senate Reports on RICO characterize § 1965(b) as a nationwide service of process provision, . . . those sources do not state that § 1965(b) is only a service of process/personal jurisdiction provision and not a venue provision").

91. 1970 HOUSE REPORT, *supra* note 2, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 (indicating that "[s]ubsection (b) provides nationwide service of process on parties"). *But see* Bernstein v. IDT Corp., 582 F. Supp. 1079, 1087-88 (D. Del. 1984)(stating that although "[t]he legislative history of Section 1965 can be read to suggest that subsection (b) is only a service of process provision[,] I find it difficult to read its text to be this limited").

92. *See, e.g.*, cases cited *infra* section III.B (concerning subsection (b)) and *infra* section III.C (concerning subsection (d)).

one federal district court: "[T]he precise meaning of [§ 1965] is far from clear and what case law there is construing the provision is not uniform."[93]

The keys to begin unraveling this statutory tangle include the plain language of § 1965, the statute's legislative history, and basic civil procedure concepts. As will be detailed below, subsection (a) is merely a venue provision.[94] Neither the language of nor legislative history explaining subsection (a) can be used to transform it into a jurisdictional provision.[95] Subsection (b)—because it permits nationwide service of process—is a service-of-process provision, a jurisdictional provision, and—because of language in the legislative history[96]—a venue provision.[97] Subsection (d) is merely a service-of-process provision for process other than a summons.[98] To read subsection (d) in any other way would render subsection (b) superfluous.[99]

A. Section 1965(a)

Congress intended § 1965(a) to serve as a venue statute.[100] Because subsection (a) does not address personal jurisdiction or service of process, its use must not be expanded beyond the venue context.[101]

Section 1965(a) provides a four-part test to determine whether venue in a particular forum is proper in a RICO case.[102] Under this

93. Abeloff v. Barth, 119 F.R.D. 315, 325 (D. Mass. 1988)(commenting on § 1965(a) specifically).

94. *See infra* section III.A.

95. A federal statute that expressly permits nationwide service-of-process can be used to establish personal jurisdiction. *See infra* notes 140-41 and accompanying text. Because subsection (a) does not concern nationwide service—or any type of service—it should not be read as a jurisdictional provision.

96. *See infra* notes 102 & 108.

97. *See infra* section III.B.1.

98. *See infra* section III.C.

99. *See* text accompanying *infra* note 175. *See also infra* note 144 (discussing rules of statutory construction).

100. 1970 HOUSE REPORT, *supra* note 2, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034.

101. *See infra* notes 140-41 and accompanying text (discussing how a service-of-process provision can be used to establish personal jurisdiction).

102. The language of § 1965(a) was taken virtually verbatim from the Clayton Act's two venue provisions. *See* 15 U.S.C. § 15 (1994)(providing for venue in any federal district "in which the defendant resides or is found or has an agent"); *id.* § 22 (providing, in antitrust actions against corporations, for venue in any district in which the corporate defendant "is an inhabitant [or] in any district wherein it may be found or transacts business"). *Accord* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985)(stating that "[t]he clearest current in [RICO's] history is the reliance on the Clayton Act model"). *See also* Bulk Oil (USA), Inc. v. Sun Oil Trading Co., 584 F. Supp. 36, 39 (S.D.N.Y. 1983)(relying on prior interpretations of the antitrust venue provision to analyze whether venue was proper under § 1965(a)); King v. Vesco, 342 F. Supp. 120, 122 (N.D. Cal. 1972)(same). *See generally* DAVID B. SMITH & TERRANCE REED, CIVIL RICO ¶ 6.01 (1996).

test, venue is proper if the RICO defendant (1) resides in the forum,[103] (2) is found in the forum,[104] (3) has an agent in the forum,[105] or (4) transacts his affairs[106] in the forum.[107]

103. *See* Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1134 (D. Mass. 1982)(relying on 28 U.S.C. § 1391(c) to determine a corporation's residency for venue over a RICO claim). *See also* Berry v. New York State Dep't of Correctional Servs., 808 F. Supp. 1106, 1108 (S.D.N.Y. 1992)(explaining that the "residence" of a public official means his official, not actual, residence); Wood v. Barnette, Inc., 648 F. Supp. 936, 939 (E.D. Va. 1986)(holding that a corporation's residence can be determined from its place of incorporation). *See generally* SMITH & REED, *supra* note 102, § 6.01[b] (explaining that counsel should refer to 28 U.S.C. § 1391(c) to analyze the residence issue).

104. "The term 'is found' has been construed to mean presence and continuous local activity." Shuman v. Computer Assocs. Int'l, Inc., 762 F. Supp. 114, 116 (E.D. Pa. 1991). *See also* Ancel v. Rexford Rand Corp., Civ. No. 3:93-CV-2379-H, 1994 U.S. Dist. LEXIS 13977 (N.D. Tex. Sept. 19, 1994); Now Plastics, Inc. v. HPT Plastics, Inc., 1990 WL 301521, at *3 (S.D.N.Y. Apr. 10, 1990); Wichita Fed. Sav. & Loan v. Landmark Group, Inc., 674 F. Supp. 321, 328 (D. Kan. 1987). For a corporate defendant in a civil RICO action "to be found" in the forum means that it "must be present in the district by its officers and agents carrying on the business of the corporation." DeMoss v. First Artists Prod. Co., Ltd., 571 F. Supp. 409, 411 (N.D. Ohio 1983), *appeal dismissed,* 734 F.2d 14 (6th Cir. 1984). *Accord* Payne v. Marketing Showcase, Inc., 602 F. Supp. 656, 659 (N.D. Ill. 1985). *See generally* SMITH & REED, *supra* note 102, ¶ 6.01[c].

105. "[T]o establish venue based on the activities of an agent in a district, the agent must be carrying on the business of the principal." Welch Foods, Inc. v. Packer, No. 93-CV-0811E(F), 1994 U.S. Dist. LEXIS 16974 (W.D.N.Y. Nov. 22, 1994). One of the most heated debates concerning the language "has an agent" is whether the actions of alleged co-conspirators within the forum may be attributed to co-conspirators outside the forum to find proper venue under the RICO statute. Some courts have said yes. *See, e.g.,* Dooley v. United Technologies Corp., 786 F. Supp. 65, 79, 81 (D.D.C. 1992); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 757 F. Supp. 545, 556 & n.16 (E.D. Pa. 1991)(holding that one RICO defendant's co-conspirators "engaged in significant forum-related activity which can be attributed to [the defendant] for venue purposes under the RICO statute"); American Trade Partners, L.P. v. A-1 Int'l Importing, 755 F. Supp. 1292, 1304 (E.D. Pa. 1990)(explaining: "The co-conspirator theory is equally, if not more, appropriate in the RICO context than in securities fraud litigation. Section 1965(a) provides that venue may be found in the district where the defendant 'has an agent.' The co-conspirator theory is based on agency theory. It is said that each co-conspirator acts as the agent for the others and any co-conspirator's act in a district is attributable to the other co-conspirators."). Other courts have rejected the co-conspirator theory in RICO cases. *See, e.g.,* Payne v. Marketing Showcase, Inc., 602 F. Supp. 656 (N.D. Ill. 1985); Eaby v. Richmond, 561 F. Supp. 131, 140 n.2 (E.D. Pa. 1983)(explaining: "Clearly, venue must be properly laid as to *each* defendant. The mere fact that some alleged co-conspirators may have engaged in conduct in furtherance of the conspiracy within this district, does not properly establish venue as to all other co-conspirators. Indeed, this so-called 'conspiratorial theory' of venue has been firmly rejected." (emphasis added)); Sportmart, Inc. v. Frisch, 537 F. Supp. 1254 (N.D. Ill. 1982). *See generally* SMITH & REED, *supra* note 102, ¶ 6.01[d].

106. "The term 'transacts his affairs' was drawn from section 12 of the Clayton Antitrust Act, 15 U.S.C. § 22." Obee v. Teleshare, Inc., 725 F. Supp. 913, 916 (E.D. Mich. 1989). "Transacts his affairs" has been construed to require a level of regu-

The legislative history[108] and many cases indicate that § 1965(a) was intended to liberalize the general venue provisions and to afford plaintiffs a broad choice of forum.[109] Section 1965(a), therefore, sup-

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lar, substantial, and continuous activity within the forum to establish venue. Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 329 (S.D. Miss. 1989). *Accord* Caldwell v. Palmetto State Savs. Bank, 811 F.2d 916, 918 (5th Cir. 1987); Obee v. Teleshare, Inc., 725 F. Supp. 913, 916 (E.D. Mich. 1989). Dody v. Brown, 659 F. Supp. 541 (W.D. Mo. 1987); Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1288 (E.D. Wis. 1985).

Courts are split on whether the phrase "transacts his affairs" in § 1965(a) refers only to the personal contacts of a defendant, or whether contacts made by a defendant on behalf of an employer may also be considered. Some courts have held that the phrase "transacts his affairs" refers only to the personal affairs of the defendant, not affairs he may have transacted on behalf of his employer. Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 329 (S.D. Miss. 1989). *Accord* Shuman v. Computer Assocs. Int'l, Inc., 762 F. Supp. 114, 116 (E.D. Pa. 1991); Medoil Corp. v. Clark, 753 F. Supp. 592, 599 (W.D.N.C. 1990); Payne v. Marketing Showcase, Inc., 602 F. Supp. 656, 659 (N.D. Ill. 1985); Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co., 584 F. Supp. 36, 39 (S.D.N.Y. 1983). Other courts have rejected this position and held that the phrase "transacts his affairs" "does not mean that venue of an individual defendant is restricted to a district in which the individual defendant conducts his personal affairs." Abeloff v. Barth, 119 F.R.D. 315, 328 (D. Mass. 1988). *Accord* Phoenix Home Life Mut. Ins. Co. v. Brown, 857 F. Supp. 7, 10 (W.D.N.Y. 1994)(questioning the *Payne/Bulk Oil* position and indicating that the *Payne/Bulk Oil* position would not apply in a case in which "each of the individual defendants is conducting activities of their own partnership as a partner thereof"); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 755 F. Supp. 1292, 1304 n.17 (E.D. Pa. 1990); Rolls Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040 (S.D.N.Y. 1987); Soltex Polymer Corp. v. Fortex Indus., 590 F. Supp. 1453 (E.D.N.Y. 1984)(reasoning that the fiduciary shield doctrine is solely a creation of state law and should not apply to venue determinations under § 1965), *aff'd,* 832 F.2d 1325 (2d Cir. 1987). *See generally* SMITH & REED, *supra* note 102, ¶ 6.01[e].

107. 18 U.S.C.A. § 1965(a) (West 1994).

108. 1970 HOUSE REPORT No. 1549, *supra* note 2, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 (noting that § 1965 "contains broad provisions regarding venue and process, which are modeled on present antitrust legislation"). *See also* 116 CONG. REC. H35196 (daily ed. Oct. 6, 1970)(remarks of Rep. Emanuel Celler that "provision is made for nationwide venue and service of process").

109. *See* Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 327 n.7 (S.D. Miss. 1989)(indicating that the special RICO venue provision "liberalizes" those found in § 1391(b)); Farmers Bank of Del. v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280-81 (D. Del. 1978)(concluding that "[g]iven the language and legislative history of Section 1965, . . . its provisions were not intended to be exclusive, but rather, were intended to liberalize the already existent venue provisions found in Title 28"); BATISTA & RHODES, *supra* note 14, § 2.6 (explaining that, in seeking venue, the plaintiff's "general objective . . . is to secure the broadest possible venue" while "defendants typically seek the narrowest range of venue. . . . Civil RICO . . . serves the plaintiff's objectives. . . ."). *Cf.* Cotham & Campbell, *supra* note 62, at 249 (explaining that "[t]he tremendous variations in state venue provisions make it impossible to generalize about the advantages that RICO's venue provisions offer. Since state venue provisions may often require that a suit be brought in the county where defendant is domiciled, RICO

plements[110] 28 U.S.C. § 1391(b),[111] the general civil venue provision

may uniquely permit suits in a district where defendant is merely 'found,' has an agent, or transacts its affairs." (footnotes omitted)). *But see* Medoil Corp. v. Clark, 753 F. Supp. 592, 598-99 (W.D.N.C. 1990)(discussing the "transacts his affairs" prong of § 1965(a) and stating that "[b]ecause venue can also be established through the use of § 1391, the Court believes that the proper statutory construction *requires that the statute be interpreted narrowly*" (emphasis added)). *See also* King v. Vesco, 342 F. Supp. 120 (N.D. Cal. 1972)(relying on the differences between the Clayton Act venue provisions and § 1965(a) to construe the language in § 1965(a) narrowly).

110. *See, e.g.,* Eastman v. Initial Inv., Inc., 827 F. Supp. 336, 338 (E.D. Pa. 1993)(noting that "[t]he RICO statute has its own venue provision, which is supplementary to the general venue statute"); Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 899, 904 (D. Kan. 1993)(concluding that "[t]he venue provisions of RICO supplement the provisions of § 1391(b)"). Some courts have stated the test differently; they have stated that § 1391(b) supplements § 1965(a). *See, e.g.,* Juliano v. Kane, 701 F. Supp. 492, 493 (D.N.J. 1988)(stating that "[t]he venue provisions of § 1391(b) supplement the venue provisions of RICO"); Eaby v. Richmond, 561 F. Supp. 131, 139 (E.D. Pa. 1983)(explaining that the language in § 1965(a) is "precatory; it describes the districts in which suit 'may', rather than 'must' be brought"; therefore, § 1391(b) supplements "RICO's more specific venue provision"). Courts adopting this latter position tend to analyze whether venue is established under § 1965(a) before addressing whether venue is proper under § 1391(b). Courts adopting the former position tend to analyze § 1391(b) before turning to § 1965(a). In reality, the order in which courts analyze § 1391(b) and § 1965(a) should not matter; the tests are—for all practical purposes—alternatives. *See, e.g.,* Welch Foods, Inc. v. Packer, No. 93-CV-0811E(F), 1994 U.S. Dist. LEXIS 16974, at *9 (W.D.N.Y. Nov. 23, 1994)(indicating that § 1965(a) "provides an alternative to section 1391(b)"); Dooley v. United Technologies Corp., 786 F. Supp. 65, 80 n.15 (D.D.C. 1992)(calling § 1965(a) and § 1391(b) alternative sources of venue); Magic Toyota, Inc. v. Southeast Toyota Distribs., Inc., 784 F. Supp. 306, 319 (D.S.C. 1992)(calling § 1965(a) "an alternative source" of venue that is "supplemental to those found in § 1391"); So-Comm, Inc. v. Reynolds, 607 F. Supp. 663, 665 (N.D. Ill. 1985)(indicating that venue in a civil RICO case can be predicated on either § 1391(b) or § 1965(a)).

111. Title 28 U.S.C.A. § 1391(b), as amended in 1995, provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C.A. § 1391(b)(West Supp. 1996).

If the defendant is a corporation, § 1391(c) may be applied. Section 1391(c) provides that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business." 28 U.S.C.A. § 1391(c) (West Supp. 1996). *Accord* Shulton, Inc. v. Optel Corp., No. CIV.A. 85-2925, 1986 WL 15617, at *4 (D.N.J. Sept. 29, 1986). Section 1391(d) may be applied if the defendant is an alien. 28 U.S.C.A. § 1391(d) (West Supp. 1996). *Accord* Bulk Oil (USA), Inc. v. Sun Oil Trading Co., 584 F. Supp. 36, 39 n.6 (S.D.N.Y. 1983). Further, 28 U.S.C.A. § 1392(a), which provides that in a "civil

that applies to federal-question cases.[112] Accordingly, venue in a civil RICO case may be established if the plaintiff meets any test articulated in either § 1391(b) or § 1965(a). The plaintiff need not meet the tests in both statutes.[113] In a single-defendant RICO action, when the plaintiff meets one test in either § 1391(b)[114] or § 1965(a), the venue analysis typically ends.[115] In a case involving multiple defendants, if

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action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts," supplements § 1391(b) and may be used in a RICO case. *See* Uniroyal Goodrich Tire Co. v. Munnis, No. 89-2690, 1989 U.S. Dist. LEXIS 13352, at *3 & n.1 (E.D. Pa. July 31, 1989). However, "[t]he more liberal venue provisions of 28 U.S.C.A. § 1391(a) are not available in a RICO suit even where jurisdiction over the parties exists by virtue of diversity of citizenship . . . because section 1391(a) is limited to actions 'wherein jurisdiction is founded only on diversity of citizenship.'" *Id.* at *2 n.1.

112. Subsection (b) of § 1391 applies to RICO actions because RICO, a federal statute, provides the court with federal-question jurisdiction. Therefore, a civil RICO action is "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship." 28 U.S.C.A. § 1391(b) (West Supp. 1996). *See* Jones v. City of Buffalo, 901 F. Supp. 19, 22 (D.D.C. 1995)(explaining that § 1391(b) defines when venue is proper for "civil suits in which jurisdiction is not based on diversity of citizenship"); Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 899, 903 n.3 (D. Kan. 1993)(determining that "§ 1391(a) is inapplicable to this case because jurisdiction is not founded only on diversity of citizenship [because t]he plaintiffs' inclusion of a RICO claim gives this court federal question subject matter jurisdiction").

113. *See, e.g.*, Ancel v. Rexford Rand Corp., No. 3:93-CV-2379-H, 1994 U.S. Dist. LEXIS 13977, at *3 (N.D. Tex. Sept. 19, 1994)(indicating that venue in the civil RICO case could be established under either § 1965(a) or § 1391(b)); Dooley v. United Technologies Corp., 786 F. Supp. 65, 80 n.15 (D.D.C. 1992)(explaining that § 1965 is an alternative ground that need not be determined if § 1391 is met); General Envtl. Science Corp. v. Horsfall, 753 F. Supp. 664, 674 (N.D. Ohio 1990)(noting that "due to the court's holding that venue is proper under § 1391(b), it is not necessary to examine the propriety of venue under § 1965(a)"); Todaro v. Orbit Int'l Travel, Ltd., No. 85-CIV-9953 (S.D.N.Y. Nov. 7, 1986)(LEXIS, Genfed library, Courts file)(concluding that "[i]f venue for a RICO claim can be established under § 1391(b), it is unnecessary to address the application of § 1965(a)"). *Cf.* Clement v. Pehar, 575 F. Supp. 436, 439, 443 (N.D. Ga. 1983)(remarking first that the plaintiff's RICO claim "must satisfy the independent venue requirements of 18 U.S.C. § 1965(a)" but later indicating that "18 U.S.C. § 1965(a) was not intended to be exclusive" and "where venue is improper under § 1965(a), the court should inquire whether the action can be maintained under the general venue statute, 28 U.S.C. § 1391(b)").

114. The primary advantage in using § 1391(b) is that it permits venue to be established "where the claim arose." *See, e.g.*, DeMoss v. First Artists Prod. Co., 571 F. Supp. 409, 411 (N.D. Ohio 1983), *appeal dismissed,* 734 F.2d 14 (6th Cir. 1984). Section 1965(a) does not contain such a provision. 18 U.S.C.A. § 1965(a) (West 1994 & Supp. 1996).

115. *See, e.g.*, Gurnicz v. Guindon, No. 90-3796, 1991 U.S. Dist. LEXIS 112, at *8 (E.D. Pa. Jan. 2, 1991); M.F. Fletcher & Assocs., Inc. v. Caramanica, 708 F. Supp. 1263, 1265 (M.D. Fla. 1989); S.D. Warren Co. v. Engelman, No. 87-8339, 1988 U.S. Dist. LEXIS 10474, at *14 (E.D. Pa. Sept. 20, 1988). The venue analysis will also end if a plaintiff fails all tests in § 1391 and § 1965(a). *See, e.g.*, Ashland Oil Co. v. Arnett, No. 84-C-1324, 1984 WL 874 (N.D. Ill. Aug. 20, 1984). *Cf.* Monarch

the plaintiff fails to establish venue over any defendant under § 1965(a), the analysis also ends.[116] However, if venue in a multiple-defendant case has been established over at least one defendant under § 1391(b) or § 1965(a), the venue analysis should shift to § 1965(b).[117]

Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 899, 904 (D. Kan. 1993)(proceeding to a § 1965(b) analysis when plaintiffs failed to advance "any reasoned argument that venue is proper under 18 U.S.C. § 1965(a)").

Of course, the defendant may still request that venue be transferred under 28 U.S.C. § 1404 or the doctrine of forum non conveniens, both of which can be applied in civil RICO actions. *See, e.g.,* Transunion Corp. v. Pepsico, Inc., 811 F.2d 127, 130 (2d Cir. 1987)(concluding that "[a] review of the legislative history . . . discloses no mandate that the doctrine of forum non conveniens should not apply"); Berry v. New York State Dep't of Correctional Servs., 808 F. Supp. 1106, 1111 (S.D.N.Y. 1992)(holding that "the doctrine of forum non conveniens applies to RICO actions"); Project 74 Allentown, Inc. v. Frost, 770 F. Supp. 207, 209 (S.D.N.Y. 1991)(holding that forum non conveniens applies); DeMoss v. First Artists Prod. Co., 571 F. Supp. 409, 412 (N.D. Ohio 1983)(transferring a civil RICO case under 28 U.S.C. §§ 1404 and 1406), *appeal dismissed,* 734 F.2d 14 (6th Cir. 1984). Further, venue in RICO actions may be challenged when the action also concerns an agreement with a forum-selection clause). *See, e.g.,* Nova Ribbon Prods., Inc. v. Lincoln Ribbon, Inc., No. 89-4340, 1992 WL 211544, at **7-10 (E.D. Pa. Aug. 24, 1992)(enforcing a broadly-written forum-selection clause in a RICO case). Although these topics fall outside the purview of this Article, they are discussed in SMITH & REED, *supra* note 102, ¶ 6.02[6] (discussing forum non conveniens) & ¶ 6.02[7] (discussing forum selection and choice of law clauses). *Cf.* Population Planning Assocs., Inc. v. Life Essentials, Inc., 709 F. Supp. 342, 345 (S.D.N.Y. 1989)(indicating that the RICO case could be transferred under § 1406(a) even when the court found venue to be improper under § 1391 and § 1965(a)). *Contra* General Envtl. Science Corp. v. Horsfall, 753 F. Supp. 664, 667 (N.D. Ohio 1990)(finding that the RICO claim fell outside the contractual forum-selection clause); Snider v. Lone Star Art Trading Co., 672 F. Supp. 977, 979 (E.D. Mich. 1987)(same), *aff'd,* 838 F.2d 1215 (6th Cir. 1988).

116. *See, e.g.,* Project 74 Allentown, Inc. v. Frost, 770 F. Supp. 207, 209 (S.D.N.Y. 1991); Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 709 F. Supp. 1279, 1286 (S.D.N.Y. 1989); Juliano v. Kane, 701 F. Supp. 492 (D.N.J. 1988); Sunray Enter., Inc. v. David C. Bouza & Assocs., Inc., 606 F. Supp. 116 (S.D.N.Y. 1984); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453 (E.D.N.Y. 1984), *aff'd,* 832 F.2d 1325 (2d Cir. 1987); Clement v. Pehar, 575 F. Supp. 436 (N.D. Ga. 1983).

117. *See, e.g.,* Eastman v. Initial Inv., Inc., 827 F. Supp. 336, 338 (E.D. Pa. 1993)(emphasizing that the "ends of justice" provision in § 1965(b) will not be used when venue is proper as to every defendant in another district under § 1391(b)); Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 489-91 (D. Del. 1991)(instructing: "In a RICO action, venue may be proper with respect to a particular defendant even though the venue provisions of 18 U.S.C. § 1965(a) and 28 U.S.C. § 1391 do not apply to that defendant. If venue is proper in a district pursuant to 18 U.S.C. § 1965(a) or 28 U.S.C. § 1391 as to one or more defendants, venue will also be proper with respect to defendants not covered by these venue provisions if, pursuant to 18 U.S.C. § 1965(b), the 'interests of justice' dictate that these other defendants be brought before the same court. . . . [I]f there is a district where venue is proper as to every RICO defendant, without resort to § 1965(b), under normal circumstances, a court in a different district will not fur-

B. Section 1965(b)

1. Venue under § 1965(b)

Section 1965(b) is "a venue provision of last resort."[118] Section 1965(b) was enacted to enable a plaintiff to bring before a single court, in a single trial, all members of an alleged nationwide RICO conspiracy.[119] Section 1965(b) can be used only in multi-defendant cases

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ther the ends of justice if it exercises its discretion under § 1965(b) to bring the same litigants into a district where venue would not otherwise have been proper. On the other hand, if no district is a proper venue as to all defendants without resort to § 1965(b), and at least one defendant is subject to venue in the district pursuant to § 1965(a) or § 1391, then the interests of justice weigh heavily in favor of the court bringing the other defendants before it under § 1965(b)." (citations omitted)); Farmer's Bank of Del. v. Bell Mortgage Corp., 452 F. Supp. 1278, 1282 n.8 (D. Del. 1978)(explaining that "section 1965(b) provides that the district court may summon other parties over whom there would not otherwise be venue in the district if 'it is shown that the ends of justice [so] require. . . .'"). *But see* Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987)(explaining that § 1965(b) is a jurisdictional provision and § 1965(a) is a venue provision), *cert. denied,* 485 U.S. 1007 (1988). In *Lisak*, the Seventh Circuit ruled that although an Illinois district court would have personal jurisdiction over a Florida RICO defendant under the nationwide service of process provision, that court probably would not have venue. *Id.* at 671. The facts in *Lisak* made venue inapplicable under 28 U.S.C. § 1348, and doubtful under section 1965(a). The Seventh Circuit stated that even if venue existed under section 1965(a) with respect to two defendants, the ends of justice may not require other defendants to appear when it was obvious that an Indiana district court would have jurisdiction over all defendants. *Id.* at 672. *Cf.* Bridge v. Invest Am., Inc., 748 F. Supp. 948, 951 n.4 (D.R.I. 1990)(holding that § 1965(b) does not, however, mandate the existence of venue merely because personal jurisdiction is attainable).

A few courts seem to have ended the RICO venue analysis at least one step too soon. In Van Schaick v. Church of Scientology of California, Inc., 535 F. Supp. 1125 (D. Mass. 1982), for example, the court determined that venue under § 1965(a) was proper as to one defendant, but was not proper for another defendant. *Id.* at 1133. The court then concluded that venue as to the second defendant was not proper under § 1391(b). *Id.* But instead of determining whether venue over the second defendant might have been proper under § 1965(b), the court dismissed the RICO claim as to that defendant. *Id. See also* Smith v. Mark Twain Bancshares, No. 84-4282-S (D. Kan. Aug. 11, 1986)(failing to address § 1965(b)).

118. SMITH & REED, *supra* note 102, ¶ 6.01[4]. *See also* Bridge v. Invest Am., Inc., 748 F. Supp. 948, 951 (D.R.I. 1990)(indicating that "section 1965(b) is a special venue provision, supplementing the basic RICO venue provision found in subsection (a) of section 1965, as well as any other applicable venue provision"). The legislative history expressly refers to § 1965(b) as a venue provision. *See supra* note 108.

119. Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 330 (S.D. Miss. 1989). *See also* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986). Like § 1965(a), § 1965(b) is also based on an antitrust venue provision. The Sherman Antitrust Act, 15 U.S.C. § 5, provides:

> Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that *the ends of justice* require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any

when at least one defendant is subject to venue in the forum under either § 1965(a) or § 1391(b).[120] The key to § 1965(b) is that it can be used only when the "ends of justice" so require.[121] Unfortunately, the courts either do not know, or cannot agree on, what that term means.[122] Thus, application of § 1965(b) as a venue statute has been haphazard and has yielded conflicting results.[123]

2. Personal jurisdiction under § 1965(b)

The plain language of § 1965(b) belies that it also can be used to establish personal jurisdiction.[124] Indeed, the word "jurisdiction" does

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juridical district. . . . (Emphasis added.)

Contra SMITH & REED, *supra* note 102, ¶ 6.01[4] (explaining that "the language of section 1965(b) cannot be traced to an antitrust venue counterpart in sections 4 or 12 of the Clayton Act").

120. *See* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986)(holding that "[f]or nationwide service to be imposed under section 1965(b), the court must have personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators"); Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 491 (D. Del. 1991)(reasoning that "if there is a district where venue is proper as to every RICO defendant, without resort to § 1965(b), under normal circumstances, a court in a different district will not further the ends of justice if it exercises its discretion under § 1965(b) to bring the same litigants into a district where venue would otherwise not have been proper[; but] . . . if no district is a proper district as to all defendants without resort to § 1965(b), and at least one defendant is subject to venue in the district pursuant to § 1965(a) or § 1391, then the interests of justice weigh heavily in favor of the court bringing the other defendants before it under § 1965(b)"); Medoil Corp. v. Clark, 753 F. Supp. 592, 599 (W.D.N.C. 1990); Bridge v. Invest Am., Inc., 748 F. Supp. 948, 953 (D.R.I. 1990)(stating that "[t]he forum must also be the proper venue for at least one defendant and there must not be any other district which would have venue over all the defendants"); Abeloff v. Barth, 119 F.R.D. 315, 329 (D. Mass. 1988)(explaining that § 1965(b) "has been construed to be applicable only in a case in which there is venue for the RICO claim for at least one defendant in the forum but not as to others and there is no other district which would have venue of all defendants named in the RICO count"); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1459 (E.D.N.Y. 1984)(indicating that to invoke 1965(b), venue must be proper to at least one other RICO defendant under 1965(a)), *aff'd*, 832 F.2d 1325 (2d Cir. 1987); Clement v. Pehar, 575 F. Supp. 436, 443 n.5 (N.D. Ga. 1983)(concluding that "[s]ince . . . venue is in fact improper as to all defendants under section 1965(a), subsection (b) is simply not applicable").

121. 18 U.S.C.A. § 1965(b) (West 1994); *see infra* sections III & IV.

122. *See infra* section IV.B.

123. *See infra* section IV.C (describing the factors that courts consider under § 1965(b) and proposing a § 1965(b) venue test).

124. For the text of § 1965(a) & (b), see *supra* text accompanying note 87. Subject matter jurisdiction is not at issue because civil RICO—a federal statute—falls within a federal court's federal-question subject matter jurisdiction. *See* 28 U.S.C. § 1331 (providing that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

not appear in the subsection.[125] Many courts, however, have used the provision to establish personal jurisdiction over RICO defendants,[126] or have at least considered it when conducting a personal-jurisdiction analysis.[127] Subsection (b) can be invoked to establish personal jurisdiction because it expressly permits nationwide service of process.[128] Courts are split, however, on whether and how the "ends of justice" language affects a federal court's ability to exercise personal jurisdiction over a RICO defendant. Specifically, as with many other statutes allowing nationwide service of process,[129] courts are divided on

125. For the language of § 1965(b), see *supra* text accompanying note 87.

126. *See, e.g.,* Northern Trust Co. v. Ralston Purina Co., No. 94-C-4045, 1994 U.S. Dist. LEXIS 15730, at *9-11 (N.D. Ill. Oct. 28, 1994); Mulhern v. West Coast Video Enters., Inc., Nos. 90-C-0471 & 91-C-0711, 1992 U.S. Dist. LEXIS 8275, at *13-14 (N.D. Ill. June 15, 1992); Ginsburg v. Faragalli, 776 F. Supp. 806, 808 (S.D.N.Y. 1991); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 757 F. Supp. 545, 556 (E.D. Pa. 1991); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 755 F. Supp. 1292, 1303 (E.D. Pa. 1990); Lentz v. Woolley, No. 89-0805-JGD, 1989 U.S. Dist. LEXIS 12651, at *14 (C.D. Cal. June 12, 1989); Matlok Fertilizer Co. v. Bost, No. 87-C-3946, 1989 U.S. Dist. LEXIS 1995, at *3-4 (N.D. Ill. Feb. 27, 1989); Shulton, Inc. v. Optel Corp., No. 85-2925, 1986 WL 15617, at *10-12, *26 n.3 (D.N.J. Sept. 29, 1986).

127. *See, e.g.,* Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 672 (7th Cir. 1987), *cert. denied,* 485 U.S. 1007 (1988); Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 537-38 (9th Cir. 1986); Magic Toyota, Inc. v. Southeast Toyota Distrib., Inc., 784 F. Supp. 306, 311-12 (D.S.C. 1992); Steingold v. Harper, No. 3:91CV00012, 1991 U.S. Dist. LEXIS 15768, at *10 (E.D. Va. Apr. 25, 1991); Staff Builders of Philadelphia, Inc. v. Koschitzki, No. 88-6103, 1989 U.S. Dist. LEXIS 9837, at *8-10 (E.D. Pa. Aug. 17, 1989); Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 330-31 (S.D. Miss. 1989); Faircloth v. Jackie Fine Arts, Inc., 682 F. Supp. 837, 841-42 (D.S.C. 1988), *aff'd in part and rev'd in part sub nom.* Faircloth v. Finesad, 938 F.2d 513 (4th Cir. 1991).

128. *See, e.g.,* Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987)(providing that "[s]ection 1965(a) deals with venue in RICO cases, but § 1965(b) creates personal jurisdiction by authorizing service"), *cert. denied,* 485 U.S. 1007 (1988); Northern Trust Co. v. Ralston Purina Co., No. 94-C-4045, 1994 U.S. Dist. LEXIS 15730, at *9 (N.D. Ill. Oct. 28, 1994); R.C.M. Executive Gallery Corp. v. ROLS Capital Co., No. 93 Civ. 8571 (LMM), 1994 U.S. Dist. LEXIS 11252, at *7-8 (S.D.N.Y. Aug. 12, 1954). *See also* Bridge v. Invest Am., Inc., 748 F. Supp. 948, 951 (D.R.I. 1990)(holding that "[s]ection 1965(b) does contain a provision for nationwide service of process, and thus authorizes personal jurisdiction as well as venue").

129. Several other federal statutes contain a nationwide service of process provision that courts might construe as personal jurisdiction provisions. *See* 9 U.S.C. § 9 (1994)(actions to confirm arbitration awards under the Federal Arbitration Act); 15 U.S.C. § 5 (1994)(actions by the United States under the Sherman Act); 15 U.S.C. § 22 (1994)(actions against a corporation under the antitrust laws); 15 U.S.C. § 25 (1994)(actions by the United States under the Clayton Act); 15 U.S.C. § 49 (1994)(actions to enforce Federal Trade Commission subpoenas); 15 U.S.C. § 77v (1994)(actions under the Securities Act of 1933); 15 U.S.C. § 77vvv (1994)(actions under the Trust Indenture Act of 1939); 15 U.S.C. § 78aa (1994)(actions under the Securities Act of 1934); 15 U.S.C. § 79y (1994)(actions under the Public Utility Holding Company Act of 1935); 15 U.S.C. § 80a-43

whether contact with the United States as a whole is sufficient,[130] or

(1994)(actions under the Investment Company Act of 1940); 15 U.S.C. § 80b-14 (1994)(actions under the Investment Advisors Act of 1940); 28 U.S.C. § 1391(e)(1994)(actions under the Mandamus and Venue Act of 1962); 28 U.S.C. § 1397 (1994)(statutory interpleader actions); 28 U.S.C. §§ 1408, 1409 (1994)(litigation connected to a bankruptcy case); 28 U.S.C. § 1608 (1994)(actions under the Foreign Sovereign Immunity Act of 1976); 28 U.S.C. § 1651 (1994)(appeals of administrative orders under the All Writs Act); 28 U.S.C. § 1655 (1994)(actions to assert rights in property when the defendant cannot be served within the state); 28 U.S.C. § 1692 (1994)(actions concerning land that lies in more than one district); 28 U.S.C. § 1695 (1994)(actions against a corporation in a shareholders' derivative suit); 28 U.S.C. § 2321 (1994)(actions under interstate commerce laws); 28 U.S.C. § 2361 (1994)(actions under the Federal Interpleader Act); 29 U.S.C. § 1451(d) (1994)(actions under ERISA); 33 U.S.C. § 921 (1994)(action under the Longshoreman's Workers' Compensation Act); 40 U.S.C. § 270(b) (1994)(actions by the United States on bonds for public works and buildings); 42 U.S.C. § 9613(e) (1994)(actions under CERCLA); 45 U.S.C. § 362(a) (1994)(actions under the Railroad Unemployment Insurance Act); FED. R. BANKR. P. 7004(d)(bankruptcy actions). *See generally* 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 5.03 (2d ed. 1991)(discussing nationwide service-of-process statutes).

Some of the listed statutes do not raise the same concerns as the RICO statute because broad jurisdictional provisions are tempered by narrow venue provisions. *See* Daniel N. Gregoire, Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction*, 61 B.U. L. REV. 403, 409 n.36 (1981). For example, 9 U.S.C. § 9 provides for nationwide service of process in actions to confirm awards under the Federal Arbitration Act, but limits venue to the district in which the arbitration award was made. *Id. Cf.* Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 628-33 (1954)(proposing a broadened nationwide service of process scheme that would include a liberal transfer provision). In the RICO statute, § 1965(b), which contains the broad "ends of justice" language, can be used as a venue and jurisdictional provision. Thus, the statute does not contain a "venue check" on its nationwide personal jurisdiction provisions.

130. *See, e.g.*, Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 899, 902 (D. Kan. 1993); Obee v. Teleshare, Inc., 725 F. Supp. 913, 915 (E.D. Mich. 1989); Perez-Rubio v. Wyckoff, 718 F. Supp. 217, 228-30 (S.D.N.Y. 1989); Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 330 n.10 (S.D. Miss. 1989); Matlok Fertilizer Co. v. Bost, No. 87-C-3946, 1989 U.S. Dist. LEXIS 1995, at *3-4 (N.D. Ill. Feb. 27, 1989); Hirt v. UM Leasing Corp., 614 F. Supp. 1066, 1069 (D. Neb. 1985); Clement v. Pehar, 575 F. Supp. 436, 438-39 (N.D. Ga. 1983).

At least one court has labelled the contacts issue an "open question." *See* VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership, 727 F. Supp. 1167, 1173 n.6 (N.D. Ill. 1989). The *VMS/PCA* court explained:

> [The] application of the jurisdictional aspect of the RICO venue statute raises an interesting question which we need not address in this opinion. By exercising jurisdiction over a non-resident defendant under [1965(b)], a court could conceivably run afoul of the requisites of due process. . . . We note that it remains an open question whether there are due process limitations on the jurisdictional power of the federal courts, operating under a federal jurisdictional statute, similar to the limits on the state courts embodied in the minimum contacts doctrine.

Id.

whether a RICO defendant must have contacts with the forum state or district.[131]

a. National contacts approach

Courts that embrace the national contacts theory reason that, because RICO is a federal statute, the personal jurisdiction analysis should focus solely on the defendant's contacts with the United States as a whole.[132] This analysis differs from the personal jurisdiction analysis conducted by state courts or by federal courts sitting in diversity. Typically, a state court may exercise personal jurisdiction over a defendant only if the defendant has certain "minimum contacts" with the forum state.[133] This minimum contacts approach derives from the Due-Process Clause of the Fourteenth Amendment to the United States Constitution.[134] The same Fourteenth Amendment "minimum contact" analysis is also applied when a federal court's subject-matter

131. *See, e.g.*, FMC Corp. v. Varonos, 892 F.2d 1308, 1313 (7th Cir. 1990); Steingold v. Harper, No. 3:91CV00012, 1991 U.S. Dist. LEXIS 15768, at *10 (E.D. Va. Apr. 25, 1991); Radcliffe v. Founders Title Co., 720 F. Supp. 170, 172-74 (M.D. Ga. 1989); Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc., 657 F. Supp. 1182, 1193-94 (D. Kan. 1987).

132. *See, e.g.*, Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 330 n.10 (S.D. Miss. 1989)(explaining that "the due process clause of the fifth amendment represents a limit on a federal court's power to acquire personal jurisdiction by way of nationwide service of process; however, the rule in this circuit, as in most circuits, is that in a federal question case in which nationwide service is statutorily authorized, minimum contacts with the United States rather than with a particular state will satisfy the due process prong of the personal jurisdiction test"). Many commentators have also argued that the Fifth Amendment does not impose limits on federal jurisdiction beyond the requirement of minimum contacts with the United States. *See, e.g.*, Thomas F. Green, Jr., *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 981 (1961); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). A few more recent articles, however, have called for federal courts to place additional limits on personal jurisdiction or to employ an analysis closer to that used in the Fourteenth Amendment context. *See, e.g.*, Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1 (1984); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988); Pamela J. Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. RICH. L. REV. 697 (1984); Gregoire, Note, *supra* note 129, at 411-12.

133. *See, e.g.*, World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe v. Washington, 326 U.S. 310 (1945). For a detailed discussion on the development of Fourteenth Amendment Due-Process limits on state courts' exercise of personal jurisdiction, see Fullerton, *supra* note 132, at 7-14.

134. The Fourteenth Amendment provides in pertinent part that "[n]o State shall . . . deprive any personal of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

jurisdiction is founded on diversity.[135] However, when faced with a federal-question case, many courts have held that the Fifth Amendment's Due-Process Clause[136] applies and requires only that the defendant have minimum contacts with the United States, not the particular judicial district in which suit is filed.[137] Stated differently, courts adopting the national contacts approach believe that since federal courts were created by the federal government,[138] the forum is the entire nation.[139]

"National contacts" courts reinforce their position by pointing to federal statutes that authorize nationwide service of process.[140] As

135. *See, e.g.,* Burke v. Woods, No. 95-6094, 1996 U.S. App. LEXIS 10222, at *5-6 (10th Cir. May 3, 1996); Wilson v. Berlin, 20 F.3d 644, 646-47 (5th Cir.), *cert. denied,* 115 S. Ct. 322 (1994); Carlough v. Amchem Prods., Inc., 10 F.3d 189, 199 (3d Cir. 1993). The cited cases indicate that the Fourteenth Amendment Due-Process analysis typically occurs when the federal court analyzes whether it can exercise personal jurisdiction over a defendant under a state long-arm statute. *See, e.g.,* Wilson v. Berlin, 20 F.3d 644, 646-47 (5th Cir.), *cert. denied,* 115 S. Ct. 322 (1994). *See generally* Gerald Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process,* 8 VILL. L. REV. 520, 523-31 (1963)(suggesting that the Erie doctrine may limit Congress's power to give the federal courts nationwide jurisdiction in diversity cases); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases,* 70 TEX. L. REV. 1589, 1593-97 (1992)(discussing when federal courts must follow the Fourteenth Amendment Due-Process clause).

136. The Fifth Amendment provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

137. *See, e.g.,* United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992); Hogue v. Milodon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir. 1984). *See also* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 103 (1987)(suggesting that the Fifth Amendment Due-Process Clause governs in federal-question cases); Terry v. Raymond Int'l, Inc., 658 F.2d 398, 401-02 (5th Cir. 1981), *cert. denied,* 456 U.S. 928 (1982); Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974). *See generally* CASAD, *supra* note 129, § 5.01.

138. *See* U.S. CONST. art. III, § 1.

139. Fullerton, *supra* note 132, at 15.

140. For a federal court to exercise personal jurisdiction over a defendant, the defendant must first be amenable to service of process in that jurisdiction under a statute or court rule. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987). *See also* United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1985 (1st Cir. 1992)(explaining that "though personal jurisdiction and service of process are distinguishable, they are inextricably intertwined, since service of process constitutes the vehicle by which the court obtains jurisdiction"). Early on, a federal court's authority to exercise personal jurisdiction over a defendant was, as a general rule, limited to persons found or residing within the forum. *See* Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838). In 1925, however, the Supreme Court indicated that Congress had the power to authorize federal courts' process to extend throughout the United States. Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925). In *Robertson,* however, the action arose under the Transportation Act of 1920, which did not contain a nationwide service of process provision. *Id.* Therefore, the Court concluded the traditional

one court explained, "Where Congress has authorized nationwide service of process by federal courts under specific federal statutes, so long as the assertion of jurisdiction over the defendant is compatible with due process, the service of process is sufficient to establish the jurisdiction of the federal court over the person of the defendant."[141]

Courts adhering to the national contacts approach in RICO cases conduct the § 1965(b) personal jurisdictional analysis either (1) by disregarding any factor other than the defendant's contacts with the United States[142] or (2) by considering only whether another RICO defendant is amenable to jurisdiction in the forum and whether an alternative forum exists in which all RICO defendants would be amenable to process.[143] Courts that delve no deeper than a defendant's mini-

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rule—that a district court's exercise of personal jurisdiction was restricted to the district in which the defendant lived or could be found—should be applied. *Id.* at 627. Today, Federal Rule of Civil Procedure 4 contains the general rule for service of process in federal courts. *See* FED. RULE CIV. P. 4(e)(providing that "[u]nless otherwise provided by federal law, service upon an individual . . . may be effected in any judicial district of the United States"); *id.* 4(h)(1)(providing that "[u]nless otherwise provided by federal law, service upon a domestic or foreign corporation . . . shall be effected . . . in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1)). *See also* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 108 (1987)(explaining that when no specific statutory provision authorizes nationwide service, federal courts must follow Rule 4, which limits a court's exercise of personal jurisdiction to persons who can be reached by the forum state's long-arm statute). In addition, many federal statutes—including RICO—contain their own nationwide service of process provision. *See supra* note 129 (identifying the nationwide service provisions of many federal statutes). *But cf.* 4 WRIGHT & MILLER, *supra* note 23, § 1067.1, at 329 (1987)(noting: "Nor does the recitation of Congress' supposed power to provide for nationwide service of process settle the issue. The relevant language in the cases offered in support of this power is only dictum; none of the cases actually hold in favor of a burdensome exercise of extraterritorial jurisdiction" (footnote omitted)).

141. Hogue v. Milodon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir. 1984), *quoted in* Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392, 397 (E.D.N.C. 1996). *Accord* Clement v. Pehar, 575 F. Supp. 436, 438 (N.D. Ga. 1983)(explaining that a federal district court's jurisdiction is "co-extensive with the boundaries of the United States, [and] due process requires only that a defendant in a federal suit have minimum contacts with the United States" (quoting F.T.C. v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981)). *See generally* CASAD, *supra* note 129, § 5.01.

142. *See, e.g.,* Northern Trust Co. v. Ralston Purina Co., No. 94-C-4045, 1994 U.S. Dist. LEXIS 15730, at *10-11 (N.D. Ill. Oct. 28, 1994); Mulhern v. West Coast Video Enters., Inc., Nos. 90-C-0471 & 91-C-0711, 1992 U.S. Dist. LEXIS 8275, at *13-14 (N.D. Ill. June 15, 1992); Ginsburg v. Faragalli, 776 F. Supp. 806, 808 (S.D.N.Y. 1991); Matlok Fertilizer Co. v. Bost, No. 87-C-3946, 1989 U.S. Dist. LEXIS 1995, at *4-5 (N.D. Ill. Feb. 27, 1989).

143. *See, e.g.,* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986); Staff Builders of Philadelphia, Inc. v. Koschitzki, No. 88-6103, 1989 U.S. Dist. LEXIS 9837, at *9 (E.D. Pa. Aug. 17, 1989); Lentz v. Woolley, No. 89-0805-JGD, 1989 U.S. Dist. LEXIS 12651, at *14 (C.D. Cal. June 12, 1989); Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 330-31 (S.D.

mum contacts with the United States effectively delete the "ends of justice" language from § 1965(b). If Congress intended the courts to do no more than determine whether a defendant has ties with the United States—which, for United States citizens and residents is really no test at all—it would not have included the "ends of justice" language in § 1965(b). Because this "national contacts" interpretation of § 1965(b) renders part of the statute mere surplusage, it is blatantly incorrect and must be rejected.[144]

The national contacts courts that also consider whether at least one RICO defendant is properly before the court and whether another district court can exercise personal jurisdiction over all RICO defendants at least recognize that § 1965 contains an "ends of justice" test. However, those courts, which consider personal jurisdiction to be automatically established once service is effected, do not go far enough. Their restrictive analysis does not address, much less solve, the real problem.[145] It does not help curb instances of plaintiffs adding deficient RICO claims to obtain what they perceive to be a more favorable and convenient forum for themselves or a less favorable and convenient forum for the defendants. Nor does it solve the related problem of forcing defendants in well-pleaded RICO claims to litigate in a faraway forum with which they have no contacts and in which they had no expectation of being sued.[146]

Some national contacts courts believe that allowing a federal court to exercise nationwide personal jurisdiction is of little consequence since the defendants can always request a transfer of venue.[147]

Miss. 1989); Faircloth v. Jackie Fine Arts, Inc., 682 F. Supp. 837, 841-42 (D.S.C. 1988), *aff'd in part and rev'd in part sub nom.* Faircloth v. Finesod, 938 F.2d 513 (4th Cir. 1991); Shulton, Inc. v. Optel Corp., No. 85-2925, 1986 WL 15617, at *4 (D.N.J. Sept. 29, 1986).

144. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992)(explaining that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . or insignificant"). *See also id.* § 46.05 (explaining that a statute must be construed as a whole, which means that "when interpreting a statute all parts must be construed together without according undue importance to a single or isolated portion").

145. *See infra* section IV.C.2.

146. As one court stated, this approach "which divorces due process from personal jurisdiction inquiries, affords plaintiffs inordinate flexibility and does not provide enough due process protection for defendants." Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F. Supp. 1102, 1106 (S.D. Ga. 1994). *Accord* 4 WRIGHT & MILLER, *supra* note 23, § 1067.1 (1987).

147. *See, e.g.,* Matlok Fertilizer Co. v. Bost, No. 87-C-3946, 1989 U.S. Dist. LEXIS 1995, at *4 (N.D. Ill. Feb. 27, 1989)(remarking that "[a]ny fairness argument pursued by the defendants can be resolved by the venue provisions authorizing transfer"). *See generally* Fullerton, *supra* note 132, at 35-38. As an aside, Australia authorized its courts to exercise personal jurisdiction on a nationwide basis and relies on venue transfers to relieve problems of inconvenient forum selection. *See* Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction,*

Although examining fairness and convenience in the venue context may, as a practical matter, afford some defendants a degree of protection, adopting this approach in RICO cases is disconcerting. First, while personal jurisdiction is typically cloaked with some degree of constitutional protection, venue considerations are not, and can be abolished by congressional action.[148] Second, a popular method of obtaining venue over a RICO defendant is by way of § 1965(b), the same section used to obtain personal jurisdiction over the RICO defendant. If courts are willing to read the "ends of justice" out of the statute for a constitutional personal jurisdiction analysis—or to severely restrict the factors they will consider when engaging in an § 1965(b) "ends of justice" analysis—they probably will be willing to do the same when using § 1965(b) as a venue statute. Why would they read the same words differently? Because § 1965(b) can be used as both a jurisdictional and venue statute, it is highly likely that some RICO defendants will be stranded in far-away forums.

In conclusion, the national contacts test, as currently applied by courts, is too restrictive and should be modified to ensure fairness and discourage plaintiffs from filing RICO claims merely to gain a forum advantage.[149]

b. Forum contacts approaches

A smaller group of courts rejects the national contacts approach in favor of a state contacts approach[150] or a district contacts ap-

22 RUTGERS L.J. 611, 626 (1991)(citing Jurisdiction of Courts (Cross-Vesting) Act, 1987, No. 24, AUSTL. ACTS P.).

148. *See* 15 WRIGHT & MILLER, *supra* note 23, § 3801 (1985). In addition, in a securities-law case in which the plaintiff attempted to collapse the jurisdictional consideration into the venue consideration, the court explained:

> [Section 27 of the 1934 Exchange Act] includes a venue requirement which serves as a statutory limitation upon extraterritorial service, akin to the minimum contacts principle of *International Shoe*. Plaintiffs contend that such an approach, which would require venue plus *in personam* jurisdiction, furnishes the applicable test here. Since venue and *in personam* jurisdiction are historically and conceptually different notions (although both may be established by the same record facts), we believe that looking to venue as a limitation on nationwide service of process begs the difficult question of whether federal *in personam* jurisdiction alone is constrained by constitutional due process standards.

Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203 n.24 (E.D. Pa. 1974). For a detailed description of *Oxford First*, see *infra* notes 233-47 and accompanying text.

149. *See infra* section IV.C (proposing a new RICO personal jurisdiction test); *infra* App. 1.

150. *See supra* note 131 (identifying RICO cases that have rejected the national contacts test). For non-RICO courts that have rejected the national contacts test, see, e.g., Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Party Ltd., 647 F.2d 200, 203-07 (D.C. Cir. 1981); Chem Lab Prods., Inc. v. Stepanek, 554 F.2d 371 (9th Cir. 1977); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137,

proach.[151] Although "forum contacts" courts typically recognize that nationwide service provisions can lead to nationwide personal jurisdiction, they also recognize that the national contacts approach can lead to unfair results, such as forcing individuals from one end of the country to litigate in a far-away jurisdiction with which they have no contacts and in which they never anticipated having to defend themselves.[152]

RICO courts adopting a forum contacts approach usually recognize what other courts overlook—that nationwide service of process under § 1965(b) is not automatic, but is conditional—conditional on the "ends of justice" requiring nationwide service.[153] Courts in this group are typically more willing to consider factors other than whether another RICO defendant is amenable to jurisdiction in the forum and whether an alternative forum exists. In fact, they tend to conduct an analysis closely akin to a Fourteenth Amendment "minimum contacts" analysis.[154]

In addition, forum contacts courts are usually quick to explain that the court, not the plaintiff, possesses the discretion to effect nationwide service.[155] Therefore, a plaintiff's mere allegation that jurisdiction is proper under § 1965(b) is not enough to establish venue;

1143 n.2 (7th Cir. 1975); Fraley v. Chesapeake & Ohio Ry., 397 F.2d 1, 3 (3d Cir. 1968); Stubbs v. United States, 593 F. Supp. 521, 526 (E.D. Ark.), *aff'd*, 744 F.2d 58 (8th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); Bamford v. Hobbs, 569 F. Supp. 160, 164-67 (S.D. Tex. 1983); Medeco Sec. Locks, Inc. v. Fichet-Bauche, 568 F. Supp. 405, 409 (D. Va. 1983). *See generally* CASAD, *supra* note 129, ch. 5; Fullerton, *supra* note 132, at 44-49.

151. *See, e.g.*, Hartley v. Sioux City & New Orleans Barge Lines, Inc., 379 F.2d 354, 359 (3d Cir. 1967); Lone Star Package Car Co., v. Baltimore & Ohio R.R., 212 F.2d 147, 153-55 (5th Cir. 1954); Getter v. R.G. Dickinson & Co., 366 F. Supp. 559, 567-68 (S.D. Iowa 1973). *See generally* Fullerton, *supra* note 132, at 49-51. Because 26 federal judicial districts are statewide districts, the district contacts approach is sometimes identical to the state contacts approach. *Id.* at 49 (also explaining that "[t]he other twenty-four states are divided into sixty-three districts, with two to four districts per state"). *Cf. infra* note 287 (describing a "regional contacts approach" proposed by one scholar).

152. *See, e.g.*, Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 201 (E.D. Pa. 1974). *See generally* Fullerton, *supra* note 132.

153. Wolfe v. Langford, No. C-90-3500-DLJ, 1991 U.S. Dist. LEXIS 5581, at *10-11 (N.D. Cal. Apr. 19, 1991), *aff'd*, 1994 U.S. App. LEXIS 12303 (9th Cir. May 25, 1994); Does v. Republic Health Corp., 669 F. Supp. 1511, 1517-18 (D. Nev. 1987)(emphasizing that "[n]ationwide service in RICO suits is not unlimited" and that "[i]t is also necessary, for nationwide service of process, that the complaint state a claim under civil RICO and that the ends of justice require nationwide service").

154. *See, e.g.*, Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc., 674 F. Supp. 321 (D. Kan. 1987).

155. *See* Wolfe v. Langford, No. C-90-3500-DLJ, 1991 U.S. Dist. LEXIS 5581, at *11 (N.D. Cal. Apr. 19, 1991). *See also* Steingold v. Harper, No. 3:91CV00012, 1991 U.S. Dist. LEXIS 15768, at *10 (E.D. Va. Apr. 25, 1991)(stressing that "the language of [§ 1965(b)] makes clear that it has limited application").

instead, if personal jurisdiction is challenged by a RICO defendant, the court must independently analyze whether the "ends of justice" require that it exercise its discretionary jurisdiction.[156]

Despite the fact that the forum contacts approach includes a fairness element not present in the national contacts approach, the forum contacts approach by itself will not suffice in the civil RICO context for two reasons. First, it too ignores the sufficiency of the allegations pleaded to support the RICO claim. Thus, it does nothing to solve the problem of plaintiffs filing deficient RICO claims to gain a forum advantage. Second, it ignores the nationwide service of process provision and the legislative intent that defendants alleged to have participated in nationwide conspiracies should be tried in a single court, in a single trial. Therefore, even the forum contacts approach must be modified to ensure fairness and discourage plaintiffs from filing RICO claims merely to gain a forum advantage.[157]

C. Section 1965(d)

Many federal courts have used § 1965(d)—which is not limited by "ends of justice" language—to establish personal jurisdiction over RICO defendants.[158] They use § 1965(d)[159] in this way because it too

156. Procedurally, the plaintiff should include a reference to § 1965(b) in its jurisdictional statement and should consider alleging facts showing why the court should exercise personal jurisdiction over the RICO defendants. The court, in response to a jurisdictional challenge, or on its own initiative, will then conduct an "ends of justice" analysis. If the court determines that personal jurisdiction is proper under § 1965(b), then service under § 1965(b) will be deemed adequate nunc pro tunc. *See* Shulton, Inc. v. Optel Corp., No. 85-2925, 1996 WL 15617, at *4-5, *26 n.3 (D.N.J. Sept. 29, 1986); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1459 n.2 (E.D.N.Y. 1984), *aff'd*, 832 F.2d 1325 (2d Cir. 1987).

157. *See infra* section IV.C (proposing a new RICO personal jurisdiction test).

158. *See* United States v. International Bhd. of Teamsters, 911 F. Supp. 743, 750 (S.D.N.Y. 1996); Kondrath v. Arum, 881 F. Supp. 925, 929 (D. Del. 1995); Caterpillar, Inc. v. Jerryco Footwear, Inc., 880 F. Supp. 578, 586 (C.D. Ill. 1994); R.C.M. Executive Gallery Corp. v. ROLS Capital Co., No. 93-Civ.-8571 (LMM), 1994 U.S. Dist. LEXIS 11252, at *6-8 (S.D.N.Y. Aug. 12, 1994); Glen Eagle Square Equity Assocs., Inc. v. First Nat'l Bank of Pasco, No. 93-2441, 1993 U.S. Dist. LEXIS 14235, at *3-4 (E.D. Pa. Oct. 7, 1993); Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 899, 902 (D. Kan. 1993); Dooley v. United Technologies Corp., 786 F. Supp. 65, 70-71 (D.D.C. 1992); Bank of Crete, S.A. v. Koskotas, No. 88-Civ.-8412 (KMW), 1991 U.S. Dist. LEXIS 12169, at *4 (S.D.N.Y. Aug. 30, 1991); University Sav. Ass'n v. Bank of New Haven, 765 F. Supp. 35, 37 (D. Conn. 1991); Omni Video Games, Inc. v. Wing Co., 754 F. Supp. 261, 263-64 (D.R.I. 1991); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 755 F. Supp. 1292, 1303 n.15 (E.D. Pa. 1990); Deem v. Lockheed Corp., 749 F. Supp. 1230, 1234 (S.D.N.Y. 1989); Bridge v. Invest Am., Inc., 748 F. Supp. 948, 950-51 (D.R.I. 1990); Obee v. Teleshare, Inc., 725 F. Supp. 913, 915 (E.D. Mich. 1989); Murphy v. National Ceiling Cleaning, Inc., No. 88-C-10681, 1989 U.S. Dist. LEXIS 7694, at *6-7 (N.D. Ill. June 16, 1989); Selman v. American Sports Underwriters, Inc., 697 F. Supp. 225, 233-34 (W.D.

contains a nationwide service provision.[160] These courts also adopt

Va. 1988); Stetson Assocs. Inc. v. Bennington Iron Works, Inc., No. 86-3061-Y, 1987 U.S. Dist. LEXIS 15346, at *6 (D. Mass. Aug. 20, 1987); Babst v. Morgan Keegan & Co., No. 86-5614, 1987 U.S. Dist. LEXIS 7165, at *16 (E.D. La. Aug. 6, 1987); DePietro v. Shoff, No. 87-0290-Y, 1987 U.S. Dist. LEXIS 15344, at *5-6 (D. Mass. July 31, 1987); Soltron Inc. v. McAngus, No. 86-CIV.-486 (PKL), 1987 U.S. Dist. LEXIS 4905, at *3-4 (S.D.N.Y. June 12, 1987); Federal Sav. & Loan Ins. Corp. v. Provo Excelsior Ltd., 664 F. Supp. 1405, 1422 (D. Utah 1987); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1055 & n.10 (S.D.N.Y. 1987); Novatel Communications, Inc. v. Cellular Tel. Supply, Inc., 1986-2 Trade Cas. (CCH) ¶ 67,412, at 67,431 (N.D. Ga. Dec. 23, 1986); McIntyre's Mini Computer Sales Group, Inc. v. Creative Synergy Corp., 644 F. Supp. 580, 585 (E.D. Mich. 1986); Barber-Colman Co. v. Trend Group, No. 85-C-4434 (N.D. Ill. Feb. 7, 1986)(LEXIS, Genfed library, Courts file); Ashland Oil, Inc. v. Arnett, No. 84-C-1324 (N.D. Ill. Aug. 20, 1984)(LEXIS, Genfed library, Courts file); Clement v. Pehar, 575 F. Supp. 436, 438 (N.D. Ga. 1983); Medical Emergency Serv. Assocs. v. Duplis, 558 F. Supp. 1312, 1314 n.1 (N.D. Ill. 1983). *See also* Headwear, U.S.A., Inc. v. Stange, No. 95-2438-GTV, 1996 U.S. Dist. LEXIS 4088, at *5-6 (D. Kan. Mar. 22, 1996)(noting that many courts have construed § 1965(d) as a nationwide service of process provision); Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392, 397 (E.D.N.C. 1996)(citing § 1965(d) as allowing nationwide service of process); Welch Foods, Inc. v. Packer, No. 93-CV-0811E(F), 1994 U.S. Dist. LEXIS 16974, at *4 (W.D.N.Y. Nov. 22, 1994)(indicating that defendants conceded to jurisdiction under § 1965(d)). *But see* NL Indus., Inc. v. Gulf & Western Indus., Inc., 650 F. Supp. 1115, 1137 (D. Kan. 1986)(explaining that "it is not clearly established that § 1965(d) affords nationwide jurisdiction" and noting that courts may still be obligated to apply "the traditional due process analysis of examining the nature and quality of defendants' contacts with the forum state").

159. For the language of § 1965(d), see *supra* text accompanying note 87.

160. *See* cases cited *supra* note 158. Section 1965(d) will not, however, support international service of process. *See, e.g.,* Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 709 F. Supp. 1279, 1285 (S.D.N.Y. 1989); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1460 (E.D.N.Y. 1984)(dismissing counterclaim against Belgian defendants), *aff'd,* 832 F.2d 1325 (2d Cir. 1987). Instead, a foreign party against whom a RICO claim is asserted must be served with process in the United States. Gap, Inc. v. Stone Int'l Trading, Inc., No. 93-Civ.-0638 (SWK), 1994 U.S. Dist. LEXIS 16999, at *17 (S.D.N.Y. Nov. 30, 1994); Shaw v. Rolex Watch U.S.A., Inc., 745 F. Supp. 982, 987 (S.D.N.Y. 1990). *Contra* Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L., 817 F. Supp. 326, 331-32 (E.D.N.Y. 1993). Similarly, § 1965(b) cannot be used to gain jurisdiction over foreign parties who are not present in the United States. *See, e.g.,* Stauffacher v. Bennett, 969 F.2d 455, 460-61 (7th Cir.), *cert. denied,* 506 U.S. 1034 (1992); North Carolina *ex rel.* Long v. Alexander & Alexander Servs., Inc., 680 F. Supp. 746, 749 (E.D.N.C. 1988); Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 564 (S.D.N.Y. 1985). *See generally* Kelly Christie, *To Apply or Not to Apply: Extraterritorial Application of Federal RICO Laws,* 8 FLA. J. INT'L L. 131 (1993); Robert F. Ruyak, *Venue and In Personam Jurisdiction Involving Alien Corporations,* 50 ANTITRUST L.J. 599 (1982); Brian B. Frasch, Comment, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Questions Suits,* 70 CAL. L. REV. 686, 687 (1982)(analyzing nationwide service of process and national contacts and contending that "federal courts should be permitted to aggregate national contacts of alien defendants to determine in personam jurisdiction in federal question suits").

the national contacts approach to establishing personal jurisdiction.[161]

The case that explains this position most thoroughly is *Bridge v. Invest America, Inc.*[162] In *Bridge*, two defendants filed motions to dismiss the plaintiff's RICO claim under Federal Rule of Civil Procedure 12(b)(2).[163] The plaintiffs contended that the court had jurisdiction over these defendants under the nationwide service provision in § 1965(b) or under the Rhode Island long-arm statute.[164] The court denied the defendants' motion to dismiss, but not on the grounds urged by the plaintiffs.[165] Instead of analyzing personal jurisdiction under § 1965(b), the court stated that "plaintiffs' efforts to secure *in personam* jurisdiction . . . under section 1965(b) of RICO is misplaced"[166] and decided, sua sponte, to analyze the jurisdictional issue under § 1965(d).[167]

Explaining first that a court may obtain personal jurisdiction over a defendant through service of process,[168] the court then declared that the service language in § 1965(d) "controls the outcome here."[169] The court continued its analysis by explaining why it believed § 1965(b) did not apply:

> It is section 1965(d) not 1965(b) that has been construed to be the general nationwide service of process provision in RICO.[170]
>
> Section 1965(b) has been consistently construed to be "applicable *only* in a case in which there is venue for the RICO claim for at least one defendant in the forum but not as to others and there is no other district which would have venue of all defendants named in the RICO count."[171] Thus, section 1965(b) is a special venue provision, supplementing the basic RICO venue provision found in subsection (a) of section 1965, as well as any other applicable venue

161. *See* cases cited *supra* note 158. *See also supra* section III.B.2 (describing the national contacts approach).
162. 748 F. Supp. 948 (D.R.I. 1990).
163. *Id.* at 949.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id. See also id.* at 952 (explaining that "a district court is empowered to make an independent determination of its power to exercise personal jurisdiction").
168. *Id.* at 950.
169. *Id.*
170. *Id.* at 951 (citing Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 709 F. Supp. 1279, 1285 (S.D.N.Y. 1989); United States v. International Bhd. of Teamsters, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987); McIntyre's Mini Computer Sales Group, Inc. v. Creative Synergy Corp., 644 F. Supp. 580, 585 (E.D. Mich. 1986); Hirt v. UM Leasing Corp., 614 F. Supp. 1066, 1069 (D. Neb. 1985); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1458 (E.D.N.Y. 1984), *aff'd*, 832 F.2d 1325 (2d Cir. 1987); Clement v. Pehar, 575 F. Supp. 436, 438 (N.D. Ga. 1983)).
171. *Id.* (citing Abeloff v. Barth, 119 F.R.D. 315, 329 (D. Mass. 1988)(emphasis added)).

> provision. . . .
>
> Section 1965(b) does contain a provision for nationwide service of process, and thus authorizes personal jurisdiction as well as venue. . . . However, the section 1965(b) service of process provision is only calculated to ensure that a district court will have personal jurisdiction over any defendant brought before it via the authority granted by the special venue provision. Without a concurrent expansion of personal jurisdiction, Congress' expansion of venue in section 1965(b) would be meaningless.[172]

The court reasoned that because § 1965(b) can be reached only if the court has venue over at least one RICO defendant under § 1965(a), § 1965(d) should be used as the service-of-process provision whenever § 1965(b) could not be used.[173] The *Bridge* court could not invoke § 1965(b), because no defendant was amenable to venue under § 1965(a); thus, it resorted to § 1965(d) and concluded that it could properly exercise personal jurisdiction over the RICO defendants.[174]

The logic of *Bridge* is flawed. By holding that § 1965(d) provides nationwide venue over virtually all RICO defendants, the *Bridge* court reads the limiting "ends of justice" language out of the statute.[175] If a plaintiff can rely on § 1965(d) without any prerequisites, why would a plaintiff ever rely on § 1965(b), when that section requires them to establish venue over at least one other RICO defendant under § 1965(a) and to pass the "ends of justice" test? Accordingly, § 1965(d) should be used not as a venue statute, but as a service statute for process other than a summons, such as subpoenas issued by private parties.[176] Therefore, the only RICO provision that can be used to establish personal jurisdiction over a defendant is § 1965(b).[177]

IV. WHEN AND HOW DO WE REACH THE "ENDS OF JUSTICE"?

A. An introduction to the "ends of justice"

By its express language, § 1965(b)—whether used as a venue or jurisdictional provision—can be applied only when the "ends of justice" so require.[178] Although the "ends of justice" test was intended to

172. *Id.* (footnotes and citations omitted).
173. *Id.* at 952-53.
174. *Id.*
175. *See supra* note 144 (discussing rules of statutory construction).
176. *See supra* note 87 (concerning § 1965(c), which governs subpoenas issued by the U.S. government).
177. *See supra* section III.B.2.
178. 18 U.S.C. § 1965(b); Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 330 (S.D. Miss. 1989)(concluding that "section 1965(b) effectively operates as a waiver of the applicable venue requirements if the 'ends of justice' so require"). *See also* United States v. Bonanno Organized Crime Family of La Cosa Nostra, 695 F. Supp. 1426, 1431 (E.D.N.Y. 1988); Goldwater v. Alston & Bird, 664 F. Supp. 403, 408 (S.D. Ill. 1986); Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985); Bernstein v. IDT Corp., 582 F. Supp. 1079, 1087-88

limit nationwide venue and jurisdiction,[179] as Professor Robert Blakey[180] wrote in 1980:

> Section 1965(b) is one of the most potentially far-reaching procedural devices of the RICO statute. It authorizes the court, if the interests of justice require, to serve and join parties over whom the court would not ordinarily have personal jurisdiction and where venue would normally be improper. The suit need only be brought in a proper court for at least one defendant. Section 1965(b) then authorizes "other parties" to be joined and brought before the court.[181]

Although some courts have adopted Blakey's broad reading,[182] other courts have been more restrained,[183] while still others attempt to avoid the "ends of justice" analysis if at all possible.[184] Because courts[185] have not agreed on a uniform standard about when the "ends of justice" require or allow them to exercise venue and personal

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(D. Del. 1984).

As one court explained:

> The venue provisions found in RICO balance two policy concerns. The first concern is the traditional one that a defendant should not be unfairly inconvenienced by a plaintiff's choice of forum. The second concern is that a RICO conspiracy should be tried as a whole, with all defendants before one court, whenever possible. Section 1965(b) strikes a balance between these two policy concerns by giving the court discretion to bring all defendants into a single district when the "ends of justice" require such action.

Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 490-91 (D. Del. 1991)(footnotes omitted). For a discussion about what the "ends of justice" means—or should mean—see *infra* section IV.

179. *See supra* text accompanying notes 153 & 155.

180. *See* Blakey & Gettings, *supra* note 42, at 1009 (author's biographical note); Fred Strasser, *RICO and the Man: "Dr. Frankenstein" Tirelessly Pushes a Monster of a Law*, NAT'L L.J., Mar. 20, 1989, at 1 (tracing Prof. Blakey's career and involvement with and interest in the RICO statute and designating him as "RICO's chief spokesman"). Dick Goldberg, *Profile: G. Robert Blakey*, L.A. DAILY J., Aug. 28, 1989, at 1 (stating: "If RICO is Jaws, the Great White of anti-crime legislation, then Blakey is Capt. Quint, who tracks the predator and keeps it in a state of controlled fury"). In 1970, Blakey served as Chief Counsel of the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures. *See id.* This was the subcommittee responsible for holding hearings on the Organized Crime Control Act of 1970. *See* 1970 U.S.C.C.A.N. 4007, 4012 (tracing the history of Senate Bill 30).

181. Blakey & Gettings, *supra* note 42, at 1039 (citations omitted and emphasis added).

182. *See supra* note 130 and accompanying text. *See also supra* section III.B.2.a.

183. *See supra* note 131. *See also supra* section III.B.2.b.

184. The following courts seemingly attempted to avoid an "ends of justice" analysis. *See, e.g.*, R.C.M. Executive Gallery Corp. v. ROLS Capital Co., 93 Civ. 8571 (LMM), 1994 U.S. Dist. LEXIS 11252 (S.D.N.Y. Aug. 2, 1994); Goldwater v. Alston & Bird, 664 F. Supp. 403 (S.D. Ill. 1986).

185. Although state courts have concurrent jurisdiction to hear federal RICO matters, *see* Tafflin v. Levitt, 493 U.S. 455, 457 (1990), this Article is limited to federal courts' interpretations of 18 U.S.C. § 1965.

jurisdiction over RICO defendants,[186] confusion has reigned and has permitted plaintiffs' attorneys to manipulate and misuse the statute by forum shopping and selecting forums with which some defendants have no contacts.[187] This problem is compounded by the fact that, when attempting to attack the plaintiff's misuse of § 1965(b), the normal weapons—motions to dismiss under Rule 12(b)(2)[188] or Rule 12(b)(3)[189]—are sometimes ineffective, because courts typically will not analyze the substantive RICO allegations,[190] which often reflect that the one claim that caused the defendants to be haled into the forum is deficient.

B. Current Status

As one court observed in 1985, "the standards for determining whether an 'ends of justice' finding should be made have not been well defined."[191] Over a decade later, this statement still rings true. Courts have not developed a uniform test for determining whether the "ends of justice" require that venue or personal jurisdiction be exercised over a particular RICO defendant.

Two factors upon which many courts agree are that § 1965(b) cannot be triggered unless (1) at least one RICO defendant[192] is amenable to venue under § 1965(a) or § 1391 and (2) no other federal district

186. *See infra* notes 191-214 and accompanying text and *supra* note 14.

187. *See infra* section III.

188. *See infra* note 374 and accompanying text.

189. *See infra* note 375 and accompanying text.

190. *See, e.g.*, Combs v. Bakker, 886 F.2d 673, 675 (4th Cir. 1989)(explaining that lower court should have resolved Rule 12(b)(2) challenge without regard to whether the RICO claim was sufficiently well pleaded); Cote v. Wadel, 796 F.2d 981, 983 (7th Cir. 1986)(indicating that "[j]urisdictional rules should be as simple as possible" and that judges should not waste time deciding whether the case should have been brought); Ealing Corp. v. Harrods Ltd., 790 F.2d 978, 982 (1st Cir. 1986)(refusing to consider merits of claims under a Rule 12(b)(2) motion). *But see* Data Disc, Inc. v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1285-86 & n.2 (9th Cir. 1977)(stating that when the jurisdictional facts are "intertwined with the merits" of the action, determining the jurisdictional issue may determine the merits of the action).

191. Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985). *Accord* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 538-39 (9th Cir. 1986)(lamenting that "[t]he term 'ends of justice' does not have an ordinary and unambiguous meaning"); S.D. Warren Co. v. Engelman, No. 87-8339, 1988 U.S. Dist. LEXIS 10474, *13 (E.D. Pa. Sept. 20, 1988)(also noting that the standards "are not well-defined"). *See also* Preway Inc. v. Touche Ross & Co., No. 85-C-645-C (W.D. Wis. Feb. 27, 1986)(LEXIS, Genfed library, Courts file)(remarking that "[t]he phrase 'ends of justice' is very broad and undefined").

192. If proceeding under 18 U.S.C. § 1962(c), where the enterprise cannot be a defendant, the court's ability to exercise jurisdiction and venue over the alleged RICO enterprise should not be considered. Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1043 n.2 (S.D.N.Y. 1987).

court can exercise venue or jurisdiction over all RICO defendants.[193] Courts use these factors to close a potential "jurisdictional gap"[194] that would require the same RICO action to be tried piecemeal in several judicial districts. Likewise, courts use these factors to implement Congress's intent that at least one federal district court have personal jurisdiction over everyone connected with an alleged RICO enterprise or conspiracy.[195]

Some courts have rejected[196] or ignored[197] these two factors, while

193. *See, e.g.,* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986); Magic Toyota, Inc. v. Southeast Toyota Distrib., Inc., 784 F. Supp. 306, 311-12 (D.S.C. 1992); Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 491 (D. Del. 1991); Shuman v. Computer Assocs. Int'l, Inc., 762 F. Supp. 114, 118 (E.D. Pa. 1991); Johnson v. Investacorp, Inc., No. 3-89-2607-H, 1990 U.S. Dist. LEXIS 2576, at *4 (N.D. Tex. Jan. 31, 1990); Staff Builders of Philadelphia, Inc. v. Koschitzki, No. 88-6103, 1989 U.S. Dist. LEXIS 9837, at *9 (E.D. Pa. Aug. 17, 1989); Lentz v. Woolley, No. 89-0805-JGD, 1989 U.S. Dist. LEXIS 12651, at *14 (C.D. Cal. June 12, 1989); Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 331 (S.D. Miss. 1989); S.D. Warren Co. v. Engelman, No. 87-8339, 1988 U.S. Dist. LEXIS 10474, at *13 (E.D. Pa. Sept. 20, 1988); Marshall v. Q-L Inv., Inc., No. 3-87-3068-H, 1988 U.S. Dist. LEXIS 18537, at *5 (N.D. Tex. Mar. 4, 1988); Does v. Republic Health Corp., 669 F. Supp. 1511, 1517-18 (D. Nev. 1987); Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1058 n.13 (S.D.N.Y. 1987); Shulton, Inc. v. Optel Corp., No. 85-2925, 1986 WL 15617, at *4 (D.N.J. Sept. 29, 1986); Ash v. Wallenmeyer, No. 85-C-8557 (N.D. Ill. Sept. 17, 1986)(LEXIS, Genfed library, Courts file); Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1459 (E.D.N.Y. 1984), *aff'd*, 832 F.2d 1325 (2d Cir. 1987); Bernstein v. IDT Corp., 582 F. Supp. 1079, 1088 (D. Del. 1984); Farmers Bank of Del. v. Bell Mortgage Corp., 577 F. Supp. 34, 35 (D. Del. 1978); Farmers Bank of Del. v. Bell Mortgage Corp., 452 F. Supp. 1278, 1282 n.8 (D. Del. 1978).

194. In Shulton, Inc. v. Optel Corp., No. 85-2925, 1986 WL 15617, at *4 (D.N.J. Sept. 29, 1986), the court explained:

> The requirement that the "ends of justice" be satisfied as a pre-requisite to nation-wide service of process has been variously construed. Generally, however, the ends of justice requirement is fulfilled when venue is properly laid in the district in question under section 1965(a) at least as to one defendant, and there exists no other district in which venue would be appropriate as to all defendants. The rationale for allowing nationwide service of process in such circumstances is to avoid a "jurisdictional gap", in which no single court could obtain jurisdiction in personam over all defendants. The "ends of justice" provision furthers the congressional purpose of "eradicat[ing] organized crime in this country" by enabling plaintiffs "to bring all members of a nationwide RICO conspiracy before a court in a single trial," without unnecessarily sacrificing any defendant's interest in having the action litigated in a forum convenient to it.

(Citations omitted.).

195. *See, e.g.,* Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 672 (7th Cir. 1987), *cert. denied,* 485 U.S. 1007 (1988); Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986); Ginsburg v. Faragalli, 776 F. Supp. 806, 808 (S.D.N.Y. 1991).

196. *See, e.g.,* Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 899, 905 (D. Kan. 1993)(retaining venue "[d]espite the fact that venue would appear to be proper in the Central District of California").

others have added factors to the "ends of justice" inquiry.[198] Among the additional factors offered for consideration—either in addition to or in place of the other two factors—are:

- Whether the defendants participated in a nationwide RICO conspiracy.[199]
- How much time has been expended in litigating the RICO claim in the current forum.[200]
- Whether dismissal or transfer would greatly delay a resolution or would cause extreme prejudice to the plaintiff.[201]
- The defendant's contacts with the forum.[202]

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197. *See, e.g.,* Northern Trust Co. v. Ralston Purina Co., No. 94-C-4045, 1994 U.S. Dist. LEXIS 15730, at *11 (N.D. Ill. Oct. 28, 1994)(failing to consider whether all RICO defendants could be sued in one forum); R.C.M. Executive Gallery Corp. v. ROLS Capital Co., 93-Civ.-8571 (LMM), 1994 U.S. Dist. LEXIS 11252, at *6-7 (S.D.N.Y. Aug. 12, 1994)(same); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 755 F. Supp. 1292, 1305 (E.D. Pa. 1990); Leavey v. Blinder, Robinson & Co., No. 85-7018, 1986 WL10556, at *8 n.2 (E.D. Pa. Sept. 18, 1986). In addition, a few courts have exercised venue or jurisdiction under § 1965(b) without disclosing their reasons for doing so. *See, e.g.,* Goldwater v. Alston & Bird, 664 F. Supp. 403, 408 (S.D. Ill. 1986).

198. *See infra* notes 199-214 and accompanying text.

199. *See* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986).

200. *See, e.g.,* Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 899, 905 (D. Kan. 1993); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 757 F. Supp. 545, 556 n.16 (E.D. Pa. 1991); American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 755 F. Supp. 1292, 1304-05 (E.D. Pa. 1990)(concluding that "section 1965(b) would permit this court to host this action against Santangelo because the 'ends of justice' require it. *This is so, despite the fact that the Southern District of New York would also be an appropriate forum to hear this case.* Were I to transfer this case, already five months old and laboring with delay, to the New York court, further delay would necessarily ensue. Moreover, the proceedings here have advanced considerably and it would be an enormous waste of time and resources of both the court and the parties to transfer this case to New York. Santangelo, and the other defendants, have been well represented here and I do not see why that will not continue. I recognize that New York is, perhaps, a more convenient forum for Santangelo and his co-defendants, however, their gain pales in comparison to the harm that would be suffered by ATP upon such a transfer." (footnote and citations omitted; emphasis added)); Leavey v. Blinder, Robinson & Co., No. 85-7018, 1986 WL10556, at *8 n.2 (E.D. Pa. Sept. 18, 1986). *See also* Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290-91 (E.D. Wis. 1985)(noting that if § 1965(b) were the only way to establish venue, the ends of justice would be met because of the months of delay that would result from transferring the case).

201. *See* Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985)(noting that it need not reach the § 1965(b) analysis because all RICO defendants were subject to venue under 1965(a), but commenting that "[w]hile this fact militates against making an 'ends of justice' finding under § 1965(b), the Court opines that it should not be the sole consideration, especially where transferring the case would result in extraordinary delay or some other extreme prejudice against the plaintiff's interests"). *Accord* Preway Inc. v. Touche Ross & Co., No. 85-C-645-C (W.D. Wis. Feb. 26, 1986)(LEXIS, Genfed library, Courts file).

202. *See* Preway Inc. v. Touche Ross & Co., No. 85-C-645-C (W.D. Wis. Feb. 26, 1986)(LEXIS, Genfed library, Courts file).

- Actions of alleged co-conspirators that occurred within the forum.[203]
- The number of RICO defendants amenable to venue and jurisdiction in the district weighed against the number not amenable to venue and jurisdiction in the district.[204]
- Whether the plaintiff has stated a valid RICO claim against the defendants.[205]
- The distance between the current forum and any proposed, alternative forum.[206]
- Which district has the greatest contacts with the RICO claim.[207]

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203. *See* American Trade Partners, L.P. v. A-1 Int'l Importing Enters., Ltd., 757 F. Supp. 545, 556 n.16 (E.D. Pa. 1991).

204. *See, e.g.,* Morin v. Trupin, 747 F. Supp. 1051, 1069 (S.D.N.Y. 1990); Mylan Lab., Inc. v. Akzo, No. 89-1671, 1990 U.S. Dist. LEXIS 3521, at *33-34 (D.D.C. Mar. 26, 1990); Anchor Glass Container Corp. v. Stand Energy Corp., 711 F. Supp. 325, 331 (S.D. Miss. 1989)(refusing to invoke § 1965(b) when only one of three defendants was amenable to venue and jurisdiction in the forum); Wood v. Barnette, Inc., 648 F. Supp. 936, 939 (E.D. Va. 1986)(transferring case, even though one defendant was subject to venue under § 1965(b), because three others lived in another district); Payne v. Marketing Showcase, Inc., 602 F. Supp. 656, 659 (N.D. Ill. 1985)(transferring case because only one of seven RICO defendants was amenable to venue under § 1965(a)). *See also* VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership, 727 F. Supp. 1167, 1173 (N.D. Ill. 1989)(finding that the "ends of justice" were met since venue was proper over four of the five defendants).

205. *See, e.g.,* FDIC v. Renda, No. 85-2216-O, 1987 U.S. Dist. LEXIS 8305, at *24-25 (D. Kan. Aug. 6, 1987). Some courts have evaluated defendants' Rule 12(b)(6) motions to dismiss to avoid having to address the venue and jurisdictional issues. The following courts were faced with motions to dismiss under Rule 12(b)(6) and Rule 12(b)(2) or Rule 12(b)(3) and dismissed the RICO claim under Rule 12(b)(6), thus avoiding the jurisdictional and venue issues. *See* Ogilvie v. Beale, No. 93-C-2934, 1994 U.S. Dist. LEXIS 1123, at *6-15 (N.D. Ill. Feb. 3, 1994). *See also* Mulhern v. West Coast Video Enters., Inc., Nos. 90-C-0471 & 91-C-0711, 1992 U.S. Dist. LEXIS 8275, at *13 (N.D. Ill. June 15, 1992)(addressing Rule 12(b)(6) motion first, but later addressing Rule 12(b)(2) motion because the RICO claim survived the Rule 12(b)(6) challenge); Smith v. Mark Twain Bancshares, No. 84-4282-S (D. Kan. Aug. 11, 1986)(LEXIS, Genfed library, Courts file).

206. *See* United States v. Bonanno Organized Crime Family of La Cosa Nostra, 695 F. Supp. 1426, 1431 (E.D.N.Y. 1988)(concluding that the ends of justice require the court to exercise venue because venue as to the other defendants in the forum is proper and it would not be overly inconvenient for the defendant, a New Jersey resident, to try the case in New York). *See also* Abeloff v. Barth, 119 F.R.D. 315, 329-30 (D. Mass. 1988)(holding that "the requirements of the ends of justice would, in certain circumstances, permit the assertion of venue over some of the defendants in a RICO count pursuant to § 1965(b) even though venue as to all defendants would lie in another district. However, the availability of a *nearby forum* in which venue would exist for all defendants in the RICO count in the instant case prevents the invocation of § 1965(b) in the absence of some countervailing extraordinary circumstances which are not present in the instant case." (emphasis added)(citation omitted)).

207. *See* Bernstein v. IDT Corp., 582 F. Supp. 1079, 1088 (D. Del. 1984). *Contra* Shulton, Inc. v. Optel Corp., No. 85-2925, 1986 WL 15617, at *26 n.3 (D.N.J. Sept. 29, 1986)("[r]equiring a plaintiff to anticipate a court's view of the one, most convenient forum in which to pursue a RICO claim, particularly in the case of a complex, nationwide conspiracy, prior to any discovery of the defendant, will

- Whether the defendants are subject to venue on other causes of action alleged in the same lawsuit.[208]
- Where the allegedly improper conduct occurred.[209]
- Where the majority of witnesses and evidence are located.[210]
- Where factually similar or related cases are pending.[211]
- Which state's law will govern any supplemental claims.[212]
- Whether the prejudice to the defendant in having to defend in the forum is outweighed by the prejudice to the plaintiff in having the case dismissed or transferred.[213]
- General concerns about judicial economy.[214]

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invariably result in a number of wrong guesses and an uneconomical overuse of the case transferring mechanism provided in 28 U.S.C. § 1404"); Farmers Bank of Del. v. Bell Mortgage Corp., 577 F. Supp. 34, 35 (D. Del. 1978).

208. *See* Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 491 (D. Del. 1991)(explaining that the RICO defendants would not be inconvenienced if the court exercised jurisdiction under § 1965(b) because, among other things, venue was proper under other counts in the same lawsuit; thus, defendants would have to appear before the court anyway).

209. *See* Wood v. Barnette, Inc., 648 F. Supp. 936, 939 (E.D. Va. 1986)(noting, as one factor in its ends of justice analysis, that the plaintiff's claims arose in another district); Leavey v. Blinder, Robinson & Co., No. 85-7018, 1986 WL 10556, at *8 n.2 (E.D. Pa. Sept. 18, 1986)(stating "[t]he fraudulent claim arose here and the ends of justice so require venue in this district"). *Contra* Bernstein v. IDT Corp., 582 F. Supp. 1079, 1088 (D. Del. 1984)(indicating that where the plaintiff's claim arose should not be part of the "ends of justice" analysis).

210. *See* Walters v. Beavers, No. 89-696-JJF, 1991 U.S. Dist. LEXIS 1432, at *18 (D. Del. Feb. 6, 1991); Wood v. Barnette, Inc., 648 F. Supp. 936, 939 (E.D. Va. 1986).

211. *See* Wood v. Barnette, Inc., 648 F. Supp. 936, 940 (E.D. Va. 1986). *Cf.* Welch Foods, Inc. v. Packer, No. 93-CV-0811E(F), 1994 U.S. Dist. LEXIS 16974, at *11 (W.D.N.Y. Nov. 22, 1994)(explaining that "[a]lthough related cases are currently venued in this Court, such does not outweigh the fact that all of the defendants and most of the witnesses are located in the Western District of Michigan").

212. *See* Walters v. Beavers, No. 89-696-JJF, 1991 U.S. Dist. LEXIS 1432, at *18 (D. Del. Feb. 6, 1991).

213. *See* Preway Inc. v. Touche Ross & Co., No. 85-C-645-C (W.D. Wis. Feb. 26, 1986)(LEXIS, Genfed library, Courts file).

214. *See* Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 492 (D. Del. 1991)(indicating that one factor the court should consider when conducting an "ends of justice" analysis under § 1965(b) is "judicial economy"; "judicial economy" would involve considerations such as whether the RICO claim was factually intertwined with the other causes of action alleged, whether other defendants have consented to venue in the forum with regard to the RICO claim, and whether two courts will have to hear essentially the same case). *See also* Collins v. Polk, 115 F.R.D. 326, 327 (M.D. La. 1987)(concluding that the ends of justice required court to assert venue over all defendants because "[t]he facts pertaining to this case are so interwoven that the Court believes that any attempt to try this case in two districts would only cause piecemeal litigation and needless waste of costs, expenses, and judicial resources" (from the unpublished portion of the opinion found at No. 85-1165-B, 1987 U.S. Dist. LEXIS 3200, at *4 (M.D. La. Apr. 16, 1987)); Brooks v. Elliott, No. 85-2206-S (D. Kan. Oct. 15, 1985)(LEXIS, Genfed library, Courts file)(exercising venue as to some defendants under § 1965(b) because venue was proper over some defendants and "[i]n the interests of judicial economy and for the convenience of all parties involved, the action should be tried in one court"); Farmers Bank of Del. v. Bell Mortgage Corp., 577 F. Supp. 34, 35

Unfortunately, because these factors have been applied by only a few courts on an ad hoc basis, they have not been incorporated into the "ends of justice" analysis conducted by most courts.

Finally, some courts have rejected certain factors advanced by plaintiffs seeking to maintain venue or jurisdiction in their home forum. In one case, the court rejected the plaintiffs' four-part argument that (1) the defendants would experience no substantial hardship in defending the case in the forum, (2) the defendants would have to come to the forum to testify anyway, (3) the defendants "were horrible people who have committed horrible acts in violation of the RICO statute," and (4) the plaintiffs should not be forced to pursue their action outside their home state.[215] Labeling the plaintiffs' test "too broad," the court focused its attention on the availability of an alternative forum, and, finding that one did indeed exist, refused to exercise personal jurisdiction over the RICO defendants.[216]

In another case, the RICO defendants filed a motion to transfer venue under 28 U.S.C. § 1404 from the federal district court in Delaware to the federal district court in North Dakota.[217] The plaintiffs encouraged the Delaware court to exercise venue over the RICO defendants under § 1965 and opposed the transfer because, in their opinion, "they would be unable to receive a fair trial in North Dakota because of the popularity of some of the people who will necessarily be implicated in this litigation."[218] The court rejected the plaintiffs' arguments because they failed "to acknowledge the integrity of the federal system"[219] and because plaintiffs did not show they could not receive a fair trial in a North Dakota federal court.[220]

The lack of commonly-accepted standards has resulted in factually similar cases being decided differently[221] and has only emboldened plaintiffs to add RICO causes when they otherwise might not have. Therefore, the time has come for courts to develop and consistently apply new and separate "ends of justice" tests in the personal jurisdiction[222] and venue[223] contexts.

(D. Del. 1978).

215. Magic Toyota, Inc. v. Southeast Toyota Distrib., Inc., 784 F. Supp. 306, 311 (D.S.C. 1992).

216. *Id.* at 311-12.

217. Walters v. Beavers, No. 89-696-JJF, 1991 U.S. Dist. LEXIS 1432, at *3 (D. Del. Feb. 6, 1991).

218. *Id.* at *17.

219. *Id.*

220. *Id.*

221. *Compare* Leavey v. Blinder, Robinson & Co., No. 85-7018, 1986 WL 10556, at *8 n.2 (E.D. Pa. Sept. 18, 1986) *with* Bernstein v. IDT Corp., 582 F. Supp. 1079, 1088 (D. Del. 1984).

222. *See infra* section IV.C.1.b; *infra* App. 1.

223. *See infra* section IV.C.C; *infra* App. 2.

C. Proposed Tests

1. Jurisdiction

Under RICO, the term "ends of justice" does not mean "the ends of due process." If the statute is interpreted to mean that jurisdiction under § 1965(b) extends to the ends of Fifth Amendment Due Process, then the phrase "ends of justice" would be rendered mere surplusage. Had Congress not included the "ends of justice" language, a case for unfettered nationwide jurisdiction might be made.[224] However, Congress did add the words—and since the concept of nationwide jurisdiction predates the RICO statute[225]—it is reasonable to assume that Congress intended to place some limits on when a federal court could exercise personal jurisdiction over a RICO defendant.

At a minimum, therefore, federal courts must engage in a due process analysis that includes more than an examination of whether the RICO defendant has contacts with the United States.[226] Due process under the Fifth Amendment—just like due process under the Fourteenth Amendment—includes selecting a fair forum. On the other hand, courts should not overlook Congress's intent that at least one federal district court should be able to exercise jurisdiction over all alleged RICO defendants in a single case.[227]

a. A survey of fairness tests

Given these competing interests—fairness and congressional intent—courts faced with a RICO jurisdiction problem should apply an enhanced version of the "basic fairness standard." Under the basic fairness standard, "mere contact with the nation as a whole may not satisfy Fifth Amendment Due Process. On the other hand, contact with the state in which the federal court sits is not required."[228] This

224. *See, e.g., Casad, supra* note 134, at 1596 (arguing "nationwide jurisdiction should be extended to all federal question cases in federal courts").

225. The concept was approved by the Supreme Court at least as early as 1946. *See supra* note 140.

226. The Supreme Court has not determined whether or how the Fifth Amendment's Due-Process Clause limits a federal court's exercise of personal jurisdiction in federal-question cases. 4 WRIGHT & MILLER, *supra* note 23, § 1067.1, at 305-06 (1987). In dicta, the Supreme Court has noted that "Congress could provide for service of process anywhere in the United States." Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946). This case, however, did not squarely address limitations on federal court's jurisdiction in the Fifth Amendment context. Stephens, *supra* note 132, at 706-07. In two recent cases, the Court explicitly declined to decide whether national contacts are adequate for the exercise of personal jurisdiction in federal-question cases. *See* Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113 (1987)(plurality opinion).

227. *See supra* note 194 and accompanying text.

228. *Casad, supra* note 134, at 1601.

standard, as its name implies, recognizes that a principal concern in personal jurisdiction analysis should be fairness, not territorial sovereignty.[229] This view was espoused by the United States Supreme Court[230] when, in a diversity case,[231] it emphasized that fairness, not sovereignty, is now the paramount concern in personal jurisdiction analysis.[232]

The case most frequently associated with the basic fairness standard is *Oxford First Corp. v. PNC Liquidating Corp.*[233] In *Oxford First*, individual and corporate defendants were served with process in California by a Pennsylvania-based finance corporation in a suit concerning the 1934 Securities Exchange Act[234] and related state-law

229. Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 200 (E.D. Pa. 1974).

230. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

231. This discussion of personal jurisdiction arose in the context of a diversity dispute in a diversity-jurisdiction case. A Delaware corporation with its principal place of business in the Republic of Guinea filed suit in the United States District Court for the Western District of Pennsylvania against many foreign insurance companies. Some insurers filed Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction. After the insurers repeatedly failed to submit discovery responses concerning their Pennsylvania-based activities, the district court, using Federal Rule of Civil Procedure Rule 37(b)(2)(A), ruled as a sanction that the insurers were subject to personal jurisdiction in Pennsylvania. *Id.* at 696-98. The Supreme Court affirmed the Court of Appeal's action. *Id.* at 709.

232. The Court stated:

> The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice."'

Id. at 702-03 (footnote omitted). *Accord* Keeton v. Hustler Magazine, 465 U.S. 770, 781 (1984)(Brennan, J., concurring)(reiterating the Court's position in *Insurance Corp. of Ireland* that the personal jurisdiction limitation on judicial power exists to protect defendants' liberty interests, not state sovereignty). The Supreme Court's rejection of the sovereignty test is significant because it formed the basis for the national contacts test. Fitzsimmons v. Barton, 589 F.2d 330, 332 (7th Cir. 1979).

233. 372 F. Supp. 191 (E.D. Pa. 1974). Other courts that have applied this or a similar fairness test include Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F. Supp. 1102, 1107 (S.D. Ga. 1994); Nieves v. Houston Indus., Inc., 771 F. Supp. 159, 160 (M.D. La. 1991); Duckworth v. Medical Electro-Therapeutics, Inc., 768 F. Supp. 822, 830 (S.D. Ga. 1991)(applying a "new national contacts test" that incorporates the *Oxford First* factors); U.S. Telecom, Inc. v. Hubert, 678 F. Supp. 1500, 1507-08 (D. Kan. 1987); Smith v. Pittsburg Nat'l Bank, 674 F. Supp. 542, 544-45 (W.D. Va. 1987); GRM v. Equine Inv. & Management Group, 596 F. Supp. 307, 314 (S.D. Tex. 1984); Fulk v. Bagley, 88 F.R.D. 153, 167 (M.D.N.C. 1980). *Accord* Haile v. Henderson Nat'l Bank, 657 F.2d 816, 827 (6th Cir. 1981)(Keith, J., dissenting), *cert. denied,* 455 U.S. 949 (1982).

234. 15 U.S.C. § 78aa (1994).

tort claims.[235] The defendants moved to dismiss the case for lack of personal jurisdiction.[236] Citing the Supreme Court's holding in *International Shoe v. Washington*,[237] the defendants argued that the court could not exercise personal jurisdiction over them because they did not have the minimum contacts with the district needed to satisfy due process.[238] The court then posed and tried to answer the following question: "Are there due process limitations upon the congressional grant of (nationwide) extra-territorial service of process under the Securities Acts?"[239]

After examining competing views concerning what constitutional limits, if any, constrain personal jurisdiction in federal-question cases,[240] the court explained why it was not satisfied with either prevailing perspective:

> Even though we are not persuaded that federal service of process statutes are constrained by constitutional due process strictures as defined by *International Shoe*, we believe that the federal extraterritorial service power is not unlimited, and that some limitations thereon must be imposed. But we believe that it is better to include the traditional due process notions as a part of a judicial fairness test, rather than impose the *International Shoe* mandate of due process on federal nationwide service of process statutes. While the underlying elements of procedural due process still should be applied, they should not outweigh all other elements of the fairness test, as they might if the only test for *in personam* jurisdiction were a strict constitutional one.[241]

The *Oxford First* court then articulated a "fairness test,"[242] which urged courts in nationwide service-of-process cases to examine the following elements, in the following order:

> (1) "[T]he extent of the defendant's contacts with the place where the action was brought."[243]

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235. Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 192-93 (E.D. Pa. 1974).
236. *Id.* at 192.
237. 326 U.S. 310 (1945).
238. Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 196 (E.D. Pa. 1974). The defendants also challenged the plaintiffs' argument that "the 1934 Exchange Act, which provides that a combination of proper venue with extraterritorial service of process can fulfill the statutory requirements for in personam jurisdiction." *Id.* (footnote omitted). The court concluded that "venue properly lies in this court." *Id.* at 198.
239. *Id.* (initial capital letters omitted to enhance readability).
240. *Id.* at 198-203. For two competing views regarding personal jurisdiction in RICO cases, see *supra* notes section III(B)(2).
241. Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203 (E.D. Pa. 1974)(footnote omitted).
242. *Id.* at 203-04.
243. *Id.* at 203. The court referred to this element as "the *International Shoe* type criteria." *Id.* In *International Shoe*, the Supreme Court held that due process requires that a defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. 310, 316 (1945). It is important to note that *Oxford First* rejects the state contacts approach. 372 F. Supp. 191, 199-201 (E.D.

(2) "[I]nconvenience to the defendant in having to defend in a jurisdiction other than his residence or place of business."[244]
(3) Judicial economy.[245]
(4) "[T]he probable situs of the discovery proceedings in the case and the extent to which the discovery proceedings will . . . take place outside the state of defendant's residence or place of business, thus muting the significance of his claim that he is inconvenienced by the distant forum."[246]
(5) "[T]he nature of the regulated activity in question and the extent of impact that defendant's activities have beyond the borders of his state of residence or business."[247]

A more recent case applying the fairness test adopted the *Oxford First* factors as the second-prong of its two-prong jurisdictional test.[248] In *Duckworth v. Medical Electro-Therapeutics, Inc.*,[249] Georgia residents sued Tennessee residents in the United States District Court for the Southern District of Georgia for allegedly violating section 10b of the Securities and Exchange Act of 1934 and for related state-law tort claims.[250] The defendants moved to dismiss for lack of personal jurisdiction and, in the alternative, requested a transfer under 28 U.S.C. § 1404(a) to the United States District Court for the Middle District of Tennessee.[251]

The plaintiffs' complaint indicated that defendants were served with process under 15 U.S.C. § 78aa,[252] which provides for nationwide service in civil actions to enforce the Securities and Exchange Act of 1934. Realizing that the Supreme Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites*[253] had cast doubt on a strict national con-

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Pa. 1974). *See* Smith v. Pittsburg Nat'l Bank, 674 F. Supp. 542, 545 (W.D. Va. 1987).

244. Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203 (E.D. Pa. 1974). The court indicated that "[s]ubsidiary considerations" under this element "might include the nature, extent, and interstate character of the defendant's business, the defendant's access to counsel" in the forum, and the distance of the forum from the defendant's residence or place of business. *Id.*

245. *Id.* "In particular, a court should gauge: (a) the potentiality and extent of any adverse impact upon the litigation that may result from having a part of the action sheared off; and (b) the prospect of duplication of effort by counsel and the courts in conducting two parts of the same lawsuit in different jurisdictions at the same time." *Id.* In the enhanced fairness test proposed below, these two considerations would be addressed in an added prong. *See infra* text accompanying note 303.

246. *Id.* at 203-04. Although not explicitly stated by the court, this element would include an examination of where the witnesses, documents, and other potentially-relevant evidence might be located.

247. *Id.* at 247

248. Duckworth v. Medical Electro-Therapeutics, Inc., 768 F. Supp. 822 (S.D. Ga. 1991).

249. *Id.*

250. *Id.* at 825.

251. *Id.* at 825-26.

252. *Id.* at 826.

253. 456 U.S. 694 (1982).

tacts test, the court developed its own test to determine whether it could properly exercise personal jurisdiction.[254] The test combined the national contacts approach and the fairness test articulated in *Oxford First*:[255]

> First, the Court must determine whether the defendant "purposefully availed" itself of the protection of the federal law. In other words, do the requisite national contacts exist? This test will be easily met in most cases. Then, the defendant will have the opportunity to establish a compelling case that exercising jurisdiction would not offend "notions of fair play or substantial justice."
>
> To determine whether the defendant has met his burden under the second prong of this test, the Court will consider those factors identified by the *Oxford First* court: the defendant's contacts with the forum, inconvenience to the defendant, judicial economy, probable situs of discovery proceedings, and the nature of the regulated activity. The *Oxford First* standard reflects the underlying rationale of personal jurisdiction: fundamental fairness.[256]

A third fairness-test case emphasized that the service-of-process analysis should be separate from the personal jurisdiction analysis.[257] In *Willingway Hospital, Inc. v. Blue Cross & Blue Shield of Ohio*,[258] a Georgia hospital sued an Ohio insurance company in a Georgia state court.[259] The defendant removed the case to the United States District Court for the Southern District of Georgia, asserting federal-question jurisdiction under the ERISA statute.[260] Acknowledging that due process is a primary concern in the personal jurisdiction analysis,[261] the court asserted that its purpose was to create a modified analysis "so that the distinction between personal jurisdiction and service of process is preserved and to ensure the due process requirements are met."[262]

The court explained that "[c]orrectly characterizing 'nationwide service of process' is at the heart of our inquiry."[263] Elaborating, the court observed:

> This concept is open to a multitude of interpretations. On one extreme, nationwide service simply connotes a party's amenability to be served with the judicial process or papers anywhere they might be found in the country. On

254. Duckworth v. Medical Electro-Therapeutics, Inc., 768 F. Supp. 822, 827-30 (S.D. Ga. 1991). The court also noted that "it seems unfair in many instances to require someone to defend in a distant forum merely because he is a United States citizen or corporation doing business in the United States." *Id.* at 830.

255. *Id.*

256. *Id.* (citations omitted).

257. Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F. Supp. 1102, 1104 (S.D. Ga. 1994).

258. *Id.*

259. *Id.* at 1103.

260. *Id.* (citing 29 U.S.C. §§ 1001-1461).

261. *Id.* at 1104-05 (reviewing Supreme Court, Eleventh Circuit, and Southern District of Georgia cases discussing limits on personal jurisdiction in federal-question cases).

262. *Id.* at 1106.

263. *Id.*

> the other extreme, this nationwide service of process incorporates personal jurisdiction. Under this latter interpretation some courts have melded the two concepts together. . . . If one is served under a nationwide service of process provision, under this interpretation of service of process, personal jurisdiction is automatically exercised.
>
> This latter approach, which divorces due process from personal jurisdiction inquiries, affords plaintiffs inordinate flexibility and does not provide enough due process protection for the defendants. As the Supreme Court held in *Ireland*[264] and reaffirmed in *Omni*,[265] personal jurisdiction has its origins in the Due Process Clause of the Fifth Amendment. To allow Congress to dictate personal jurisdiction through the enactment of nationwide service of process provisions, unquestioned by the judiciary is nonsensical. *"If due process is to have any application at all in federal cases—and the Fifth Amendment requires that it does—it seems impossible that Congress could empower a plaintiff to force a defendant to litigate any claim, no matter how trifling, in whatever forum the plaintiff chooses, regardless of the burden on the defendant."*[266]

The *Willingway Hospital* court then proceeded to apply an analysis similar to that applied in *Duckworth*.[267]

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264. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

265. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987).

266. Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F. Supp. 1102, 1106 (S.D. Ga. 1994)(citations omitted and emphasis added; quoting 4 WRIGHT & MILLER, *supra* note 23, § 1067.1, at 328-29 (1987)).

267. Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio, 870 F. Supp. 1102, 1107 (S.D. Ga. 1994). The court then explained that although courts in federal-question cases have most often conducted their due process inquiries under the Fifth Amendment, as opposed to the Fourteenth Amendment, "there is little agreement on the scope of the Fifth Amendment analysis that should be applied." *Id.* at 1107. Rejecting one line of cases holding that if proper notice of the lawsuit is given, due process for personal jurisdiction purposes is also established, the court stated that the opposing line of "fairness test" cases, such as *Oxford First*, offer "a far more palatable alternative" because they "acknowledge the full reach of the Fifth Amendment's Due-Process Clause and require that certain minimum contacts be present before personal jurisdiction is exercised." The court went on to observe that other courts adopting the fairness test tend to apply the *International Shoe* minimum contacts analysis, but not as rigorously as they should. *Id.*

The *Willingway Hospital* court then unveiled its own fairness test. First, the court should determine whether the governing statute authorizes nationwide service of process and, if so, whether the service provision also addresses personal jurisdiction. *Id.* If the statute does not expressly authorize nationwide service, then, under the Supreme Court's holding in *Omni Capital*, the court should apply the long-arm statute of the state in which it sits. *Id.* at 1107-08. However, if the statute does authorize nationwide service, then the court must next determine whether the process provision mentions personal jurisdiction. *Id.* at 1108. If the provision does address personal jurisdiction, then the provision should be followed. *Id.* If the service provision does not mention personal jurisdiction, then the appropriate long-arm statute should be used because "[t]his is the only outcome that acknowledges the distinction between personal jurisdiction and service of process." *Id.*

Finally, a fairness analysis, based in Fifth Amendment Due-Process principles, must be conducted. *Id.* This fairness test should comport with the *International Shoe* standards. *Id.* "This," explained the court, "adds one more layer to

Leading commentators also support applying a fairness test in federal-question cases, even when the federal statute at issue includes a nationwide service provision.[268] Professors Charles Alan Wright and Arthur R. Miller, for example, concluded that "[t]he better view . . . would require that the national contacts test be supplemented by some assurances that the particular choice of forum will be one that is fair to the defendant."[269] Acknowledging concerns that imposing a fairness test as part of the due-process inquiry when process is served under a federal statute that authorizes nationwide service may undercut the effectiveness of such statutes,[270] they concluded that such concerns "may be an over-reaction."[271] "The fairness test . . . takes account of a broad range of factors—most notably federal social policies and the interests of the judicial system in the efficient resolution of controversies—and thus can accommodate many, if not all, existing federal statutes."[272] Moreover, they emphasized that "Congress cannot legislate away a defendant's due process rights."[273] Professors Wright and Miller described their fairness approach to the national contacts test as follows:

> [A] court may exercise jurisdiction over a defendant served under a federal nationwide service statute if the defendant has minimum contacts with the United States *and* maintenance of the suit would not offend fair play and substantial justice. Thus, jurisdiction may be upheld whenever the combination of the federal interest in furthering fundamental social policies, the judicial system's interest in the efficient resolution of controversies, the particular forum's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief outweigh the burden on the defendant.[274]

Professor Maryellen Fullerton, in her frequently-cited 1984 article entitled *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*,[275] constructed a thorough fairness test with two primary parts. "First, the court should appraise the burden that the location of litigation imposes on the individual defendant."[276] This first factor includes two inquiries: inconvenience to the defendant and

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the subjective analysis that pervades any due process inquiry, but in doing so ensures through this tailoring that defendants' due process rights are not unnecessarily trammeled." *Id.*

268. *See, e.g.*, 4 WRIGHT & MILLER, *supra* note 23, § 1067.1, at 327-28 (1987); Fullerton, *supra* note 132; Lusardi, *supra* note 132; Stephens, *supra* note 132; Gregoire, *supra* note 129.

269. 4 WRIGHT & MILLER, *supra* note 23, § 1067.1, at 325 (1987).

270. *Id.* § 1067.1, at 327.

271. *Id.* § 1067.1, at 327-28.

272. *Id.* § 1067.1, at 328.

273. *Id.* § 1067.1, at 331.

274. *Id.* (footnote omitted).

275. 79 N.W. U. L. REV. 1 (1984).

276. *Id.* at 39.

the defendant's reasonable anticipation of litigation in the forum.[277]

According to Professor Fullerton, the following, nonexhaustive list of factors should be considered in determining inconvenience to the defendant:

- Distance between the defendant's home or business and the forum.[278]
- Place where most of the discovery is likely to occur.[279]
- Financial costs associated with long-distance litigation, including travel by parties, witnesses, attorneys, and staff to and from the forum for court appearances, discovery, and other trial preparation; lodging and meals for persons who must travel in connection with the litigation; transporting documents and witnesses; time the defendant and its staff must spend away from work due to time consumed by travel; missed business opportunities at home; and retaining local counsel.[280]
- Nonfinancial factors, such as witnesses outside of subpoena range who are not willing to travel to the forum to testify at trial and potential third-party defendants who are not subject to process in the forum.[281]
- Subjective factors, such as difficulty selecting attorneys in a distant community, emotional stress caused by travel, and the necessity of spending extended time away from home.[282]
- The defendant's financial resources. (However, "[t]he defendant's ability to shoulder the added costs of distant litigation should not be the sole criterion . . . in determining fairness.")[283]

In her discussion of reasonable anticipation of litigation in the forum, Fullerton rejected the national contacts test because "examining a defendant's connection with the United States would be too lax a measure for determining whether that defendant reasonably should have anticipated litigation anywhere in the country."[284] Instead, she suggested three alternatives: state contacts,[285] district contacts,[286] and regional contacts,[287] and concluded that the regional contacts

277. *Id.*
278. *Id.* at 41.
279. *Id.*
280. *Id.*
281. *Id.* at 41-42.
282. *Id.* at 42.
283. *Id.*
284. *Id.* at 44.
285. *Id.* at 44-49. This analysis focuses on the defendant's contacts within the state in which the forum is based. *Id.* at 44.
286. *Id.* at 49-51. This analysis focuses on the defendant's contacts within the boundaries of the judicial district in which the action is filed. *Id.* at 49.
287. *Id.* at 51-55. Fullerton explained:

> Under this approach, which takes a common sense view of the realities of contemporary society and recognizes the increase in widespread commercial activity and in personal mobility, courts would evaluate the extent of the defendant's activity in the general region where the federal court is located. Relying on public perception and economic and social realities to define the pertinent region, courts could decide on a case-by-case basis whether the nature and quality of the defendant's activity in a particular region make it reasonable to require a defendant to litigate there. A regional approach would allow federal courts situated in a megalopolis to exercise personal jurisdiction over defendants from the near-

analysis "may be the most satisfactory approach" because it ignores "artificial boundaries," but "accurately reflects the amount of contemporary interstate commerce and travel."[288]

Under Fullerton's second prong, "the court should consider the federal interests served by placing the suit at the site chosen by the plaintiff."[289] Agreeing with the position taken by Professors Wright and Miller,[290] Professor Fullerton acknowledged that "[d]espite the great inconvenience to a particular defendant and the fact that he could not have anticipated being sued in the place chosen by the plaintiff, significant government interests may be furthered by allowing the suit at the challenged location."[291] The government's interest might include:

- The desire to provide a forum for suits beyond the reach of any state or federal forum.[292]
- Judicial economy concerns, such as avoiding duplicative or piecemeal litigation.[293]
- Relations with other nations.[294]
- Other interests articulated by Congress in connection with specific legislation.[295]

Although these previously-constructed fairness tests provide a good foundation, they do not go far enough to be used "as is" in the RICO context. Instead, the various fairness tests must be enhanced before they can help solve the § 1965(b) "ends of justice" dilemma in the personal jurisdiction context.

b. Constructing a RICO fairness test

In RICO cases, a four-prong fairness test should be adopted to analyze whether a particular court can exercise personal jurisdiction over a particular defendant. The first prong of this new RICO fairness test is the first prong of the *Duckworth* test, the defendant's contacts with the United States.[296] "[W]hen Congress has undertaken to enact a nationwide service statute applicable to a certain class of disputes, that statute should be afforded substantial weight as a legislative ar-

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> est two or three states. In addition, it might yield rare situations in which a federal court could not exercise jurisdiction over a defendant located in the hinterlands of the state in which the court is located.

Id. at 52 (footnotes omitted).

288. *Id.* at 53.
289. *Id.* at 39.
290. *See supra* notes 269-74 and accompanying text.
291. Fullerton, *supra* note 132, at 56.
292. *Id.* at 58.
293. *Id.*
294. *Id.* at 59.
295. *Id.*
296. *See supra* note 256 and accompanying text.

ticulation of federal social policy."[297] Therefore, *Duckworth*'s first prong—an examination of the defendant's national contacts—although easily met in most cases, should be part of the analytical framework.[298]

The second prong of the RICO jurisdictional test is to apply the five *Oxford First* factors,[299] as augmented by Professor Fullerton.[300] Due process and fairness concerns are extremely important. Therefore, examining factors such as the defendant's contacts with the forum, inconvenience to the defendant, judicial economy, and probable situs of discovery proceedings is crucial.

The third prong involves a review of the RICO allegations in the complaint. Are the allegations sufficient to state a claim for relief under Rule 12(b)(6)? Is RICO the primary claim, or merely an "add on" designed to obtain jurisdiction in a forum inconvenient for the defendant? If a defendant contemporaneously files a Rule 12(b)(6) motion for failure to state a claim and a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the court should at least examine the assertions in the Rule 12(b)(6) motion and supporting papers.[301] Even if a Rule 12(b)(6) motion is not filed, the court may want to examine the RICO allegations.[302] If an essential element of a RICO claim is not pleaded, then the court should refuse to exercise jurisdiction if the only basis for jurisdiction in that federal forum is § 1965(b).[303] Examining the substantive RICO allegations during the personal jurisdiction analysis should not be deemed improper, because if jurisdiction can be conferred under § 1965(b) only when a RICO claim is included, the question of whether a RICO claim has actually been alleged is a pertinent inquiry.

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297. 4 WRIGHT & MILLER, *supra* note 23, § 1067.1, at 331 (1987).

298. This step also comports with *Willingway Hospital* because it separates jurisdiction from service of process. *See supra* text accompanying note 266.

299. *See supra* text accompanying notes 243-47. This prong would also be the second prong of the *Duckworth* test. *See supra* text accompanying note 266.

300. *See supra* notes 278-83 and accompanying text.

301. Precedent exists for this action. *See, e.g.*, Mulhern v. West Coast Video Enters., Inc., Nos. 90-C-0471 & 91-C-0711, 1992 U.S. Dist. LEXIS 8275 (N.D. Ill. June 15, 1992); Ginsburg v. Faragalli, 776 F. Supp. 806 (S.D.N.Y. 1991); Smith v. Mark Twain Bancshares, No. 84-4282-S (D. Kan. Aug. 11, 1986)(LEXIS, Genfed library, Courts file)(all addressing the Rule 12(b)(6) motion before ruling on the Rule 12(b)(2) motion).

302. Surveys have shown that many RICO claims are dismissed early on because they do not plead all required elements. *See, e.g., ABA Ad Hoc Report, supra* note 42, at 57-58 (indicating that 52% of reported decisions dismiss the RICO claim); Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 837-40 (1987)(indicating that growing numbers of civil RICO claims are resolved against claimants at the pleading stage).

303. As a practical matter, the court would not want to exercise jurisdiction, then be faced with an early motion to dismiss the RICO claim, grant the motion, and then be left without jurisdiction over other state-law claims.

The final prong involves considering (a) whether an alternative forum exists in which all defendants would be subject to personal jurisdiction and (b) the number of other RICO defendants amenable to jurisdiction in the forum. This prong is necessary to preserve Congress's intent that at least one federal district court should have the ability to exercise jurisdiction over each defendant in a single RICO action.[304] If another court could exercise jurisdiction over all the RICO defendants, the case should be transferred. If an alternative forum does not exist, then the number of defendants amenable to venue should be examined. The "ends of justice" may require the court to exercise jurisdiction if most of the other RICO defendants are amenable to jurisdiction in the forum. If, however, another forum would have jurisdiction over more defendants, then the case should be transferred to that forum.

This four-prong test is better than ones currently being used because it protects defendants' due process rights, gives credence to the actual language of § 1965(b), adheres to Congress' intent when enacting RICO, brings some degree of uniformity and consistency to jurisdictional determinations under civil RICO, and should discourage attorneys from adding RICO claims merely to gain a jurisdictional advantage. It balances all competing concerns and, if applied, will solve the major problems currently associated with personal jurisdiction under § 1965(b).

2. *Venue*

If personal jurisdiction is not challenged by the defendant, or is established under the preceding test, the court should then consider any venue challenges.[305] "Venue" concerns the place where the lawsuit should be heard.[306] The keys to venue are that it is purely statutory[307] and is primarily a matter of "convenience of litigants and witnesses."[308] Although occasionally confused with jurisdiction, the two concepts are different.[309] As the United States Supreme Court explained:

> The jurisdiction of the federal courts—their power to adjudicate—is a grant of

304. *See* Shuton, Inc. v. Optel Corp. No. CIV.A. 85-2925, 1996 WL 15617, at *4 (D.N.J. Sept. 29, 1986).

305. A court can choose to consider venue challenges before jurisdictional challenges when that issue is "unambiguous and dispositive." *See, e.g.,* Eastman v. Initial Inv., Inc., 827 F. Supp. 336, 337-38 (E.D. Pa. 1993). *See also infra* note 385 and accompanying text (discussing courts deciding Rule 12(b) motions out of the normal order).

306. *See, e.g.,* Neirbo Co. v. Bethlehem Shipbldg. Corp., 308 U.S. 165, 167-68 (1939).

307. *See* Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979).

308. 15 WRIGHT & MILLER, *supra* note 23, § 3801, at 3-4 (1985)(quoting Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 560 (1967)).

309. *Id.*

> authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts.[310]

Thus, even though the court may have jurisdiction over the defendants, if statutory venue rules are not followed and the defendant objects to venue, the action cannot be heard in that district.[311] If a court determines that venue in its district is improper, it may either dismiss the action[312] or transfer the action to a district in which venue would be proper.[313]

Venue in a civil RICO case is like venue in other cases. As explained in Section III(A), venue over a RICO defendant can be established under the general venue provision, § 1391,[314] or under § 1965(a) in the place where the defendant is found, resides, transacts her affairs, or has an agent.[315] Although some concerns exist about courts' application of these two statutes,[316] the more significant problem lies with courts' inconsistent and incomplete inquiry when a plaintiff attempts to establish venue under § 1965(b).[317] In other words, when do the "ends of justice" require a court to subject a defendant to its venue?

Courts faced with this question should employ a two-step test. First, as has been acknowledged by many courts, § 1965(b) should not be invoked as a venue statute unless at least one RICO defendant is amenable to venue in the forum under § 1965(a) or § 1391.[318] Thus, this two-step test would be applied only in multiple-defendant cases. If only one defendant is sued under RICO, venue must be proper under § 1391 or § 1965(a); if it is not, the case should be dismissed or transferred to another district.[319]

The second step is to engage in a balancing test that weighs the following factors.[320] First, could another federal district court exer-

310. Neirbo Co. v. Bethlehem Shipbldg. Corp., 308 U.S. 165, 167-68 (1939). *Accord* Delta Air Lines, Inc. v. Western Conference of Teamsters, 722 F. Supp. 725, 727 (N.D. Ga. 1989)(explaining that "the fundamental and historical purpose of venue . . . is that there is a particular court or courts in which an action 'should be brought' for the convenience of the parties, particularly that of the defendant")(quoting 15 WRIGHT & MILLER, *supra* note 23, § 3802, at 7 (1985)).
311. *See* 15 WRIGHT & MILLER, *supra* note 23, § 3801, at 7 (1986).
312. FED. R. CIV. P. 12(b)(3).
313. 28 U.S.C. § 1406(a) (1994)(described in *infra* note 380).
314. *See supra* notes 111-17 and accompanying text.
315. *See supra* notes 103-07 and accompanying text.
316. *See supra* notes 103-07 and accompanying text.
317. *See supra* section IV.B.
318. *See supra* note 192 and accompanying text.
319. *See supra* notes 113-15 and accompanying text.
320. Although some of these factors overlap with those included in the proposed juris-

cise venue over all the RICO defendants?[321] If no other federal district would have venue over all the defendants, then this factor weighs heavily in favor of maintaining venue in the plaintiff's choice of forum.[322] However, the analysis should not end there.

Next, how many other RICO defendants are subject to venue in the forum under either § 1391 or § 1965(a)?[323] As an example, assume that six defendants are named in the RICO count. If one or two are amenable to venue in the district under § 1391 or § 1965(a), and venue must be obtained over all others under the "ends of justice" test in § 1965(b), then this factor weighs in favor of dismissing or transferring the case. On the other hand, if four or five are amenable to venue in the district under § 1391 or § 1965(a), and only one or two defendants must be subjected to venue under § 1965(b), then this factor weighs in favor of maintaining venue.[324] Although no bright-line exists to implement this factor, as a general rule, if another forum would have venue over more than half the defendants under § 1391 or § 1965(a), dismissal or transfer should be seriously considered. But again, the analysis should not end here; the remaining factors should also be considered.

Has a RICO claim been stated sufficiently to survive a motion to dismiss under Rule 12(b)(6)?[325] Just as in the jurisdictional context, if an essential element of a RICO claim is not pleaded, then the court should not exercise venue if the only basis for venue is § 1965(b).

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dictional test, they are relevant to both analyses.

321. *See supra* note 304 and accompanying text.

322. As the court in Shulton, Inc. v. Optel Corp., No. CIV.A. 85-2925, 1986 WL 15617, at *26 n.3 (D.N.J. Sept. 29, 1986), explained:

> [T]he interest of fairness to each defendant, which presumably most underlies the "ends of justice" requirement, is not furthered by requiring the plaintiff to proceed in the single most convenient forum, where there exists no single forum in which venue could be properly laid as to all defendants. Each individual defendant's interest is to have the action proceed in a forum most convenient to it, that is, where it "resides, is found, has an agent or transacts its affairs." 28 U.S.C. § 1965(a). If there is no forum in which this interest may be accommodated for every defendant, then section 1965(b) authorizes the sacrificing of the individual defendant's interest in convenience in favor of the goal of dispensing with related RICO claims in a single proceeding. Once the defendant's interest in a forum convenient to it is thus necessarily sacrificed, the defendant would ordinarily have little interest in which of two other, inconvenient forums is selected for prosecution of the action.

See also 28 U.S.C. § 1391(b)(3) (1994)(now providing that, in a federal-question case involving multiple defendants, if no district exists in which the action may otherwise be brought, the suit may be placed in a district "in which any defendant may be found").

323. *See supra* note 204.

324. *See supra* note 304.

325. *See supra* text accompanying note 205. *See also* text accompanying *supra* notes 301-03.

Otherwise, a defendant may be subject to venue in a far-away forum simply because the plaintiff lists § 1965(b) as a basis for venue but does little else to plead, much less establish, a RICO claim. If the court does not look at—and maybe even behind—the allegations, plaintiffs will continue to seek a forum advantage with the § 1965(b) "ends of justice" test.

Additionally, the court should also consider several "fairness factors," such as the distance between the current forum and any proposed alternative forum;[326] where the majority of witnesses and evidence are located; where discovery will be conducted;[327] and whether the prejudice to the defendant in having to defend in the forum is outweighed by the prejudice to the plaintiff in having the case dismissed or transferred.[328] These are factors similar to those that would be examined when the forum non conveniens[329] doctrine is invoked or 28 U.S.C. § 1404(a) is invoked.[330]

A landmark decision on forum non conveniens is *Gulf Oil Corp. v. Gilbert*,[331] in which the Court's statement of factors to be considered is relevant to the "ends of justice" venue test being constructed in this Article:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.[332]

This list of factors is not exclusive; the court may and should exercise its discretion in determining which fairness factors to consider and

326. *See supra* note 206 and accompanying text.

327. *See supra* note 210 and accompanying text.

328. *See supra* note 213 and accompanying text.

329. Under the doctrine of forum non conveniens, a court may dismiss an action because the chosen forum, although a proper venue, is inconvenient. 15 WRIGHT & MILLER, *supra* note 23, § 3828, at 278 (1986). Forum non conveniens is rarely used today because 28 U.S.C. § 1404(a) permits a court to transfer the case to the more convenient forum. 15 WRIGHT & MILLER, *supra* note 23, § 3828, at 278-80.

330. 28 U.S.C. § 1404(a) provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1994). *See also* 15 WRIGHT & MILLER, *supra* note 23, §§ 3847-54 (1986)(examining § 1404(a) and factors considered by courts when determining whether a venue transfer is necessary and proper; the broad categories considered are plaintiff's privilege in choosing the forum; convenience of the parties; convenience of witnesses; expert witnesses; location of books and records; and "interest of justice").

331. 330 U.S. 501 (1947).

332. *Id.* at 508-09.

how much weight they should be afforded.[333]

Finally, the court should consider additional factors relating to judicial economy,[334] including whether the defendants are subject to venue on other causes of action alleged in the same lawsuit;[335] where factually similar or related cases are pending;[336] and which state's law will govern any supplemental claims.[337] These factors, although not the most critical, can be used to tip the balance in close cases.

Factors that should not be considered in the venue analysis include those rejected by the courts in *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*,[338] and *Walters v. Beavers*.[339] In addition, the amount of time already spent litigating in the forum[340] should not be considered unless the court specifically finds that the delay is attributable to the defendant and was caused to avoid or postpone a ruling on preliminary issues or on the merits. If the delay is attributable to the plaintiff or the court, the defendant should not be forced to continue litigating in an inconvenient forum merely because preliminary matters took weeks or months to resolve.

Moreover, the court need not worry about which district might have the greatest contacts with the lawsuit.[341] As one court explained, "Requiring a plaintiff to anticipate a court's view of the one, most convenient forum in which to pursue a RICO claim, particularly in the case of a complex, nationwide conspiracy, prior to any discovery of the defendant, will inevitably result in a number of wrong guesses and an uneconomical overuse of the case transferring mechanism pro-

333. *Cf.* 15 WRIGHT & MILLER, *supra* note 23, § 3847, at 368-70 (1986)(noting that few cases have limited a court's discretion in determining whether venue should be transferred under 28 U.S.C. § 1404(a)).

334. Some factors listed under other prongs of this test could also be characterized as "judicial economy" concerns. *See supra* text accompanying notes 208, 211-12.

335. *See supra* note 208 and accompanying text.

336. *See supra* note 211 and accompanying text.

337. *See supra* note 212 and accompanying text.

338. 784 F. Supp. 306, 311 (D.S.C. 1992)(rejecting the plaintiffs' four-part argument that (1) the defendants would experience no substantial hardship in defending the case in the forum, (2) the defendants would have to come to the forum to testify anyway, (3) the defendants were "horrible people who have committed horrible acts in violation of the RICO statute," and (4) the plaintiffs should not be forced to pursue their action outside their home state). *See supra* text accompanying notes 215-16 (discussing Magic Toyota, Inc. v. Southeast Toyota Distrib., Inc., 784 F. Supp. 306 (D.S.C. 1992)).

339. No. 89-696-JJF, 1991 U.S. Dist. LEXIS 1432 at *17 (D. Del. Feb. 6, 1991)(rejecting plaintiffs' argument that "they would be unable to receive a fair trial in North Dakota because of the popularity of some of the people who will necessarily be implicated by this litigation"). *See* text accompanying *supra* notes 217-20 (discussing Walters v. Beavers).

340. *See supra* note 200 and accompanying text.

341. *See supra* note 207 and accompanying text.

vided in 28 U.S.C. § 1404."[342]

Finally, considering where the allegedly improper conduct occurred;[343] whether alleged co-conspirators committed acts on behalf of the defendant within the forum;[344] and whether the defendant has any general or specific contacts with the forum[345] should not be considered under § 1965(b). These considerations are expressly made part of the venue analysis either under § 1391 or § 1965(a). Thus, if they exist, they should be considered well before a court reaches the § 1965(b) "ends of justice" test.

By adopting this two-part venue test, and by ignoring irrelevant factors, courts will separate the venue analysis from the personal jurisdiction analysis under § 1965(b); ensure all parties a fair forum; discourage plaintiffs from adding RICO claims merely to gain a forum advantage; abide by the legislative intent; and bring some degree of uniformity and consistency to venue determinations under civil RICO.

V. PRACTICAL ADVICE FOR ATTORNEYS

Attorneys can help courts reach just results concerning venue and jurisdiction in civil RICO cases. When a plaintiff includes a RICO cause of action in a lawsuit, the attorney should first ensure that all essential elements of a RICO cause of action have been pleaded.[346] RICO claims designed merely to intimidate defendants or gain an advantage in forum should not be filed. Attorneys must not cave in to pressure from clients to "throw in the kitchen sink" if the "kitchen sink" does not fit.[347]

Even though all facts may not be readily available at the start of a lawsuit, Federal Rule of Civil Procedure 11(b) now allows the plaintiff

342. Shulton, Inc. v. Optel Corp., No. CIV. A. 85-2925, 1986 WL 15617, at *26 n.3 (D.N.J. Sept. 29, 1986).

343. *See supra* note 209 and accompanying text.

344. *See supra* note 203 and accompanying text.

345. Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985)(noting that it need not reach the § 1965(b) analysis because all RICO defendants were subject to venue under 1965(a), but commenting that "[w]hile this fact militates against making an 'ends of justice' finding under § 1965(b), the Court opines that it should not be the sole consideration, especially where transferring the case would result in extraordinary delay or some other extreme prejudice against the plaintiff's interests"); *accord* Preway Inc. v. Touche Ross & Co., No. 85-C-645-C (W.D. Wis. Feb. 26, 1986)(LEXIS, Genfed library, Courts file).

346. *See* 18 U.S.C.A. §§ 1961-1962 (West 1994 & Supp. 1996)(listing the substantive elements of a RICO claims). *See generally* ABRAMS, *supra* note 36, chs. 2-5; SMITH & REED, *supra* note 102, ¶ 7.02 (both discussing pleadings in a RICO action).

347. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995)(providing that "[a] lawyer shall not bring . . . a proceeding . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"). *See also supra* notes 74 & 83 (concerning Rule 11 sanctions in the RICO context).

to include allegations that, "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"; however, the rule still requires attorneys to certify that the claim "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[348] Regardless, plaintiff's counsel should be ready to respond early on to a RICO case statement that requires information on matters such as the identity of each RICO defendant and the role each defendant allegedly played in the RICO enterprise; the identity of the RICO enterprise; facts supporting each predicate act alleged; acts constituting a "pattern of racketeering activity"; and evidence of any conspiracy, if conspiracy is alleged.[349]

In addition to properly pleading the substantive elements of a RICO claim, the plaintiff's attorney should state the basis upon which the court may exercise both personal jurisdiction and venue over each RICO defendant. Not only should the statutory sections relied on be cited, but some factual information should be included. In other words, if venue is based on § 1965(b), the pleading should indicate why the "ends of justice" require the court to exercise venue.

Even if a plaintiff's attorney elects not to expressly state the basis for the court's exercise of personal jurisdiction and venue,[350] the attorney should, when the complaint is filed or shortly after it is filed, begin to think about challenges that might be filed by the defendant. Section 1965(b) should not be invoked unless at least one RICO defendant is subject to jurisdiction or venue in the district under another provision.[351]

If a jurisdictional or venue fight is likely[352]—and it will be unless suit is filed in the defendant's place of residence or business—the plaintiff's attorney should begin gathering information[353] that can be

348. FED. R. CIV. P. 11(b).

349. *See supra* note 78 (concerning RICO case statements).

350. *See, e.g.*, Carbo v. United States, 314 F.2d 718, 733 (9th Cir. 1963).

351. *See supra* note 192 and accompanying text.

352. Attorneys should also explain to their clients the costs involved with litigating jurisdiction and venue disputes. See DAVID HITTNER, FEDERAL CIVIL PROCEDURE BEFORE TRIAL ¶ 9:182.1 (5th Cir. ed. 1994)(warning that "[r]esearch and preparation of major motions is expensive" and "[u]nless you are likely to win the motion or gain some distinct advantage, the large cost involved is likely to be wasted").

353. *See, e.g.*, Paternostro v. Dow Furnace Co., 848 F. Supp. 706, 709-10 (S.D. Miss. 1994)(cautioning that bald allegations of personal jurisdiction are not sufficient to discharge the plaintiff's burden in overcoming a Rule 12(b)(6) motion); Catrone v. Ogden Suffolk Downs, Inc., 647 F. Supp. 850, 857 (D. Mass. 1986)(instructing that in the context of a Rule 12(b)(2) motion to dismiss, the plaintiff must go beyond the pleadings and make an affirmative showing by affidavits or other evidence that the court has jurisdiction); Replas, Inc. v. Wall, 516 F. Supp. 59, 62 (S.D. Ind. 1980)(explaining that when a Rule 12(b)(2) "motion to dismiss is supported by affidavit, the nonmoving party may not rest upon allegations in his pleadings but must set forth specific facts showing that the court has

used to counter affidavits submitted by a defendant[354] to support motions to dismiss for lack of personal jurisdiction,[355] venue,[356] or sufficiency of service.[357] A plaintiff's attorney should try to determine the defendant's contacts with their forum by talking to the client and other friendly witnesses;[358] reviewing documents in the client's possession; researching public records[359] (such as SEC filings,[360] Secretary of State filings, and property records); and locating articles, press releases, and other public information[361] about the defendant by running searches on LEXIS/NEXIS[362] and WESTLAW[363] databases, In-

jurisdiction").

354. *See infra* notes 391-98 and accompanying text.

355. *See infra* note 374.

356. *See infra* note 375.

357. *See supra* note 376; 5A WRIGHT & MILLER, *supra* note 23, § 1353, at 284 (1990)(noting that "when defendant supports a motion to quash service with an affidavit denying the validity of service, plaintiff may present counter-affidavits, depositions, or oral testimony" (footnote omitted)).

358. *See* James W. McElhaney, *Informal Investigation*, LITIG., Spring 1982, at 51.

359. In addition to obtaining records from a local recorder or clerk, some public records information is also available electronically. For example, LEXIS and WESTLAW each maintain databases containing individual state corporate and limited partnership records; UCC filings, liens, and judgments; real property asset locators; real property asset transfer information; personal property locators; name trackers; business finders; bankruptcy records; lawsuit filings for certain states, cities, and counties; company relation information. *See* STEVEN L. EMANUEL, LEXIS-NEXIS FOR LAW STUDENTS ch. 8 (2d ed. 1995-96); WESTLAW DATABASE LIST 75-78 (Winter/Spring 1996). *See also infra* notes 362-63 (describing some materials available on the computer services).

360. To assure public availability of adequate information about companies with publicly-traded stocks, the SEC requires each publicly-traded company to file an annual report on Form 10-K, quarterly reports on Form 10-Q, and current reports on Form 8-K for any month in which certain, specified events occur. *See* DAVID L. RATNER, SECURITIES REGULATION 96-97 (5th ed. 1996). *See also infra* notes 362 (describing the availability of SEC filings on LEXIS and WESTLAW).

361. *See generally* Teresa Pritchard & Susan Hutchens, *Remote Access to Corporate Public Records: Scanning the Field*, DATABASE, Apr. 1991, at 24.

362. The LEXIS/NEXIS NEWS database contains over 3000 full-text publications, including about 130 newspapers such as the *Atlanta Journal and Constitution*, *Christian Science Monitor*, *Newsday*, *New York Times*, *San Francisco Chronicle*, *USA Today*, and *Washington Post*; special-purpose newspapers such as *Advertising Age*, *Financial Times*, and *Investors Business Daily*; about 320 magazines such as *Business Week*, *Forbes*, *Money*, *Newsweek*, *Time*, and *U.S. News & World Report*; wire-service information from services such as the AP, Reuters, Gannett News Services, TASS, and UPI; many newsletters and television transcripts; and several abstract files. EMANUEL, *supra* note 359, ch. 8. Public documents, such as property records, court docket sheets, state corporation, limited partnership, and DBA filings, UCC filings, liens, judgments, and some verdicts and settlements are available from the eight libraries in the LEXIS Public Records Online Service database. *Id.* ch. 8; Jean A. Newland & Michael Halperin, *The INCORP Files: Extracting Company Information from State Filings*, 14 DATABASE, Apr. 1991, at 28 (discussing the INCORP database, which contains information about corporations incorporated in, or registered to business in over 40 states and the District

formation America,[364] and the Internet,[365] and sources such as Dun & Bradstreet[366] and Standard & Poor's[367] publications.[368] If informa-

of Columbia). In addition, company information is available in the COMPNY library in the NEXIS database. EMANUEL, *supra* note 359, ch. 8, at 8-12 & 8-13. This library includes reports by investment banks and brokerage houses about whole industries and individual companies; filings by corporations and individuals with the SEC, including 10-K, 10-Q, Annual Reports to Shareholders, Proxy Statements, Tender Offers, Acquisitions, and Registration Statements. *Id.* (also indicating that the most inclusive files for SEC filings are EDGARP and SECOL). In addition, the different court databases will permit a researcher to discover some cases in which the other party was involved. Remember, however, that not all cases are published and that not all cases proceed to trial. Some courts now have computerized databases that permit a researcher to locate unpublished or pending cases if the researcher knows the party's name. Of course, these databases are not consolidated; thus, searches must be conducted on a court-by-court, or worse yet, division-by-division basis.

363. WESTLAW's various news and factual information databases, including DIALOG and the Dow Jones News/Retrieval, contain information from thousands of sources including Dow Jones magazines, journals, and newsletters; major newspapers such as the *Washington Post*, *Atlanta Journal and Constitution*, *Boston Herald*, *Philadelphia Inquirer*, and *New York Times*; international news sources such as the *Wall Street Journal Europe*, *South China Morning Post*, *Financial Times*, and several Canadian newspapers; regional and local newspapers such as the *Baltimore Sun*, *Cincinnati Post*, *Fort Worth Star-Telegram*, *New Orleans Times-Picayune*, *St. Petersburg Times*, *Tucson Citizen*, and *Wichita Eagle*; legal newspapers such as the *Chicago Daily Law Bulletin*, *Massachusetts Lawyer Weekly*, *New Jersey Law Journal*, *New York Law Journal*, and *Texas Lawyer*; general interest magazines and journals such as *Barron's*, *Business Week*, *Consumer Reports*, *Fortune*, *Inc.*, *Money*, *Time*, and *U.S. News & World Report*; trade publications such as *Advertising Age*, *Environment Business*, *Industry Week*, *Shopper Report*, *Supermarket News*, and *Defense Daily*; banking and financial services publications such as *ABA Banking Journal*, *Investor's Business Daily*, and *United States Banker*; business news sources such as *Business America*, *Quarterly Review of Economics and Business*, and many state and regional business journals; transcripts from programs such as *Today* and *Technology Edge*; abstracts and indexes such as *National Newspaper Index* and *Journal of Commerce Abstracts*; newswires such as PR Newswire, AP News, Business Wire, Reuters, and UPI News; and *Marquis Who's Who*. DISCOVERING WESTLAW ch. 11 (5th ed. 1995); WESTLAW DATABASE LIST 69-116 (Winter/Spring 1996). *See also supra* note 359 (indicating that the court databases also should be checked).

364. *See* Cary Griffith, *Information America: Access to Public Records and a Whole Lot More*, INFO. TODAY, Dec. 1990, at 10.

365. *See generally* DON MACLEOD, THE INTERNET GUIDE FOR THE LEGAL RESEARCHER (1995); G. Burgess Allison, *A Bestiary of Internet Services*, L. PRAC. MGMT., Mar. 1995, at 28; Genie Tyburski, *In Search of the Gold: A Primer for Mining the Net*, TRIAL, Mar. 1996, at 62.

366. *See generally* MICHAEL R. LAVIN, BUSINESS INFORMATION chs. 6, 8 (2d ed. 1992)(describing Dun's many publications about U.S. companies); Linda S. Begue & Melissa B. Mickey, *Dun's Legal Search: What Is It?*, LEGAL INFO. ALERT, Mar. 1992, at 1 (describing DLA, Dun's "menu-driven method of accessing D&B's proprietary corporate information"); Melissa B. Mickey, *Dun & Bradstreet: An Essential Source of Information on U.S. Companies*, BUS. INFO. ALERT, Jan. 1990, at 1. WESTLAW has a Dun & Bradstreet Business Records file.

367. *See* STANDARD & POOR'S REGISTER (continually published since 1928, the register

tion needed to establish jurisdiction, venue, and sufficiency of nationwide process is not available through these sources, the attorney should consider requesting permission[369] to serve early discovery requests limited to the issues of jurisdiction,[370] venue,[371] and sufficiency of service.[372]

Counsel representing defendants sued under RICO should consider filing motions to dismiss[373] under Rule 12(b)(2),[374] (3),[375] (4),[376]

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contains listings on over 55,000 U.S. and Canadian companies; all publicly-traded companies are eligible for inclusion, as are private companies whose annual sales exceed one million dollars). *See generally* LAVIN, *supra* note 366, at 117-19 (also noting that an online version of the *Register* is available on WESTLAW DIALOG and LEXIS/NEXIS).

368. Other useful publications might include *U.S. Manufacturers Directory* (listing more than 120,000 manufacturers and containing information about headquarters and branch locations), *Best's Insurance Reports* (profiling virtually every insurance company doing business in the U.S.), state and local business directories, and telephone directories. *See* LAVIN, *supra* note 366, chs. 7-8.

369. Under Federal Rule of Civil Procedure 26(d), as amended effective December 1, 1993, a plaintiff may no longer serve discovery requests with the complaint. Instead, "a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f)" unless authorized "by local rule, order, or agreement of the parties." FED. R. CIV. P. 26(d).

370. *See, e.g.,* Data Disc, Inc. v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1285 n.1 (9th Cir. 1977)(indicating that the court has discretion to allow discovery limited to the jurisdictional issues and to prevent the plaintiff from conducting discovery on the substantive claims); Stratagem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 547(S.D.N.Y. 1994)(holding that the court has discretion to order discovery on the jurisdictional issue, provided that the plaintiff makes a threshold showing of jurisdiction and establishes that its position is not frivolous). *But see* Collins v. New York Cent. Sys., 327 F.2d 880, 887 (D.C. Cir. 1963)(Miller, J., dissenting)(criticizing discovery on the jurisdictional issue because "[t]he interrogatories amounted to nothing more than a fishing expedition in which the appellants hoped to induce the appellee to contradict its own affidavits"). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1351, at 256, 259 (1990)(noting that "it may be desirable to hold in abeyance [under Rule 12(d)] a decision on a motion to dismiss for lack of personal jurisdiction" because "[d]oing so will enable the parties to employ discovery on the jurisdictional issue, which might lead to a more accurate judgment than one made solely on the basis of affidavits"). If discovery is required, the request should be made as early as possible. *See* Empresa Nacional Siderurgica, S.A. v. Glazer Steel Co., 503 F. Supp. 1064, 1066 (S.D.N.Y. 1980)(denying plaintiff's request for discovery on the jurisdictional issue when plaintiff waited over seven weeks after defendant's motion to dismiss for lack of jurisdiction).

371. *See, e.g.,* Home Ins. Co. v. Thomas Indus., Inc., 896 F.2d 1352, 1358 (11th Cir. 1990); Hayashi v. Red Wing Peat Corp., 396 F.2d 13, 14 (9th Cir. 1968). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1352, at 265 & n.9 (1990).

372. *See, e.g.,* Collins v. New York Cent. Sys., 327 F.2d 880, 883 (D.C. Cir. 1963); General Indus. Co. v. Birmingham Sound Reproducers, Ltd., 26 F.R.D. 559, 560-61 (E.D.N.Y. 1961).

373. *See, e.g.,* Combs v. Bakker, 886 F.2d 673, 674 (4th Cir. 1989)(noting that defendants in this RICO case "raised across-the board objections to the action, challenging the court's subject matter jurisdiction, venue, and jurisdiction over their persons, the sufficiency of process and the service of process, the sufficiency of the

(5),[377] and (6).[378] They should also consider filing motions to transfer under 28 U.S.C. § 1404(a)[379] or § 1406(a),[380] and possibly under the doctrine of forum non conveniens.[381] A Rule 12(b)(1)[382] motion to dismiss for lack of subject-matter jurisdiction may be filed, but results have been mixed. Some courts hold that a failure to properly state a particular federal cause of action is not equivalent to lack of federal subject-matter jurisdiction.[383] However, some courts have dismissed

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complaint to state a claim, and the failure to join [a party]").

374. FED. R. CIV. P. 12(b)(2)(providing the defense of "lack of jurisdiction over the person"). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1351 (discussing procedures for filing a Rule 12(b)(2) motion).

375. Fed. R. Civ. P. 12(b)(3)(allowing complaint to be dismissed for improper venue). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1352 (discussing procedures for filing a Rule 12(b)(3) motion).

376. Fed. R. Civ. P. 12(b)(4)(listing "insufficiency of process" as one basis for dismissing a complaint). Since § 1965(b) is considered a service of process provision, defendants would be wise to include this Rule 12(b) motion in their initial defensive arsenal. *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1353 (discussing procedures for filing a Rule 12(b)(4) motion).

377. Fed. R. Civ. P. 12(b)(5)(listing "insufficiency of service of process" as one basis for dismissing a complaint). Since § 1965(b) is considered a service of process provision, defendants would be wise to include this Rule 12(b) motion in their initial defensive arsenal. *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1353 (discussing procedures for filing a Rule 12(b)(5) motion). A Rule 12(b)(4) motion is proper only to challenge noncompliance with the provisions of Rule 4 or any provision incorporated by Rule 4 that deals specifically with the content of the summons. *Id.* § 1353, at 276. A Rule 12(b)(5) motion is used to challenge the delivery of the summons and complaint. *Id.*

378. Fed. R. Civ. P. 12(b)(6)(allowing complaint to be dismissed for "failure to state a claim upon which relief can be granted"). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1357 (discussing procedures for filing a Rule 12(b)(6) motion).

379. *See supra* notes 115 & 330 (discussing § 1404(a)). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1352 (discussing venue dismissals and transfers).

380. This statute provides that "[t]he district court . . . in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1352 (discussing venue dismissals and transfers).

381. *See supra* notes 329-32 and accompanying text.

382. FED. R. CIV. P. 12(b)(1)(permitting dismissal for lack of subject-matter jurisdiction). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1350.

383. *See, e.g.*, Brock v. Writers Guild of Am., W., Inc., 762 F.2d 1349, 1352 n.3 (9th Cir. 1985). *See also* Ridenour v. Andrews Fed. Credit Union, 897 F.2d 715, 719 (4th Cir. 1990)(explaining that if federal subject-matter jurisdiction fails because no federal claim exists, the proper disposition is to dismiss on the merits for failure to state a claim, rather than for want of subject-matter jurisdiction); Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989)(concluding that dismissal for lack of subject-matter jurisdiction is not appropriate merely because the legal theory alleged is probably false); Banco de Ponce v. Hinsdale Supermarket Corp., 663 F. Supp. 813, 820 (E.D.N.Y. 1987)(cautioning that courts should be slow to dismiss for lack of personal jurisdiction when the claim is purportedly based on federal law and suggesting that the wiser practice is to accept jurisdiction and dismiss for failure to state a claim).

actions under Rule 12(b)(1) when the federal claim was patently unsound and without merit.[384]

If the strongest argument is improper venue, defense counsel should also consider requesting the court to decide the motions out of the normal order[385] and address the venue question first.[386] At a minimum, defense attorneys should incorporate by reference any Rule 12(b)(6) motion and supporting papers into the Rule 12(b)(2) motion, thus increasing the chances that the court will examine the sufficiency of the RICO pleadings.[387]

Defense counsel must realize that when they file Rule 12(b) motions, courts may require each defendant to overcome the plaintiff's

384. *See, e.g.,* Town of West Hartford v. Operation Rescue, 915 F.2d 92, 100 (2d Cir. 1990)(holding that claim alleging federal subject-matter jurisdiction may be dismissed if claim is patently without merit); Sassower v. Dosal, 744 F. Supp. 908, 909 (D. Minn. 1990)(explaining that subject-matter jurisdiction will not lie when the federal question asserted is immaterial, insubstantial, or frivolous), *aff'd,* 930 F.2d 583 (8th Cir. 1991); Jonak v. John Hancock Mut. Life Ins. Co., 629 F. Supp. 90, 92 (D. Neb. 1985)(ruling that claim may be dismissed for lack of subject-matter jurisdiction, rather than for failure to state a claim, when the allegations in the complaint are frivolous and when the statute provides the basis for both subject-matter jurisdiction and the plaintiff's substantive claim); Roberts v. Clark, 615 F. Supp. 1554, 1556 (D. Colo. 1985)(noting that if a "claim is patently unsound and without merit, the court may be justified in dismissing the complaint for want of [subject-matter] jurisdiction").

385. Jurisdiction is typically considered the threshold issue. *See In re* DES Cases, 789 F. Supp. 552, 560 (E.D.N.Y. 1992)(explaining that "[o]n the theory that a court ought to first determine whether a party is properly present before considering substantive issues, the normal practice is to consider 12(b)(2) motions prior to 12(b)(6) motions"); 5A WRIGHT & MILLER, *supra* note 23, § 1351, at 244. If a court does not have jurisdiction, it typically can do no more than dismiss or transfer the action. *See, e.g.,* Arrowsmith v. United Press Int'l, 320 F.2d 219, 221 (2d Cir. 1963).

386. *See, e.g.,* Eastman v. Initial Inv., Inc., 827 F. Supp. 336, 337-38 (E.D. Pa. 1993)(indicating that "[b]ecause the venue issue is unambiguous and dispositive, I shall reverse the 'normal order' of consideration and address venue first"). *See also In re* DES Cases, 789 F. Supp. 552, 560 (E.D.N.Y. 1992)(allowing order of motions to be inverted and agreeing to address a Rule 12(b)(6) motion before a Rule 12(b)(2) motion when the jurisdictional problem "cannot be appreciated except against the backdrop of substantive . . . law").

387. Challenges to personal jurisdiction, venue, and process can be waived by the defendant. FED. R. CIV. P. 12(h)(indicating that "[a] defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g) [consolidation of defenses], or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course"). *See also* 28 U.S.C. § 1406(b)(warning that "[n]othing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objections to the venue"). Therefore, defendants must take care not to inadvertently waive venue and jurisdictional challenges. *See infra* notes 399-407 and accompanying text.

prima facie showing that venue,[388] personal jurisdiction,[389] and service[390] are proper. Therefore, defense counsel should be prepared to submit affidavits that both rebut the venue and jurisdictional statements in the complaint and that show each defendant's lack of contacts with the forum.[391] Because affidavits are evidence,[392] counsel should take care to abide by the Federal Rules of Evidence, especially those rules concerning opinion evidence,[393] hearsay,[394] and authentication.[395] In addition, affidavits must be based on the affiant's per-

388. *Compare* Preway Inc. v. Touche Ross & Co., No. 85-C-645-C, at *21 (W.D. Wis. Feb. 26, 1986)(LEXIS, Genfed library, Courts file)(stating that "when the issue is presented by motion under Rule 12(b)(3) it would appear to be the better practice to place the burden on the moving party to show that some such jurisdiction does, in fact, exist. Otherwise, plaintiffs will be left with the unenviable, if not impossible, task of proving a negative proposition. Since any rule will have to be applied with equal force to cases with many defendants and cases with only a few, a plaintiff in a complex, multiple-defendant RICO case may expend as much energy and effort in disproving venue elsewhere as in proving the merits of its case. I adopt that allocation of the burden of proof and conclude that venue also exists under the alternative forum test.") *with* Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 490 (D. Del. 1991)(indicating that although defendants moving to dismiss under Rule 12(b)(3) bear the burden of proof, under the RICO statute, the plaintiff must show that the ends of justice require the court to invoke 1965(b)). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1352, at 263-65 (observing that "[a] number of courts have concluded that the burden [of proving improper venue] is on defendant, since venue is a 'personal privilege' and a lack of venue should be established by the party asserting it," but that "several courts have imposed the burden on plaintiff in keeping with the rule applied in the context of jurisdiction defenses," and concluding that "[t]he latter view seems correct" (footnotes omitted)).

389. *See* 5A WRIGHT & MILLER, *supra* note 23, § 1351, at 101 (Supp. 1996)(explaining that "[t]he most common formulation is that the plaintiff bears the ultimate burden of demonstrating that personal jurisdiction over the defendant exists by a preponderance of the evidence, but need only make a prima facie showing when the court restricts its review of the Rule 12(b)(2) motion solely to affidavits and other written evidence and without the benefit of an evidentiary hearing").

390. *See* 5A WRIGHT & MILLER, *supra* note 23, § 1353, at 283-84 (explaining that "[t]he party on whose behalf service is made has the burden of establishing its validity" and that "[n]ormally the process server's return will provide a prima facie case as to the facts of service but if defendant introduces uncontroverted affidavits in support of a motion to quash service, the content of those affidavits will be deemed admitted for purposes of the motion" (footnotes omitted)).

391. *See, e.g.*, Thompson Trading Ltd. v. Allied Lyons PLC, 123 F.R.D. 417, 421-22 (D.R.I. 1989)(indicating that the court may examine affidavits and other extra-pleading materials that contradict the complaint). For types of information to include in the affidavits, see *supra* notes 278-83 and accompanying text.

392. *See, e.g.*, Wagner v. Department of Agric., 28 F.3d 279, 282-83 (3d Cir. 1994).

393. FED. R. EVID. 701 (providing that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue").

394. FED. R. EVID. 801-806.

395. FED. R. EVID. 901-903.

sonal knowledge and should not include rumors, speculation, and unsupported conclusions.[396] The affidavits will be important because, although the court may hold an evidentiary hearing,[397] these hearings are rare in some districts.[398]

A defendant who wishes to challenge venue, jurisdiction, or sufficiency of process or service of process must be careful not to waive these defenses.[399] These defenses can be waived when the defendant files a Rule 12 motion raising some other matter, the defense was available at the time the other Rule 12 motion was filed, and the defendant fails to assert the available defenses as part of the Rule 12 motion or in a simultaneously filed Rule 12 motion.[400]

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396. *See, e.g.*, Boyle v. Turnage, 798 F.2d 549, 551 n.4 (1st Cir. 1986)(ruling affidavits were admissible because affiant was a person with personal knowledge of the matters included therein); Fredericks v. Shapiro, 160 F.R.D. 26, 28 (S.D.N.Y. 1995)(concluding that statements in a reply affidavit that many of a potential party's affidavits were "bogus, improper, and false," were not factual but were conclusory statements that the affiant could not certify under oath); *In re* Hanford Nuclear Reservation Litig., 894 F. Supp. 1436, 1439 n.4 (E.D. Wash. 1995)(indicating that legal argument and conclusion are not proper matters for affidavit testimony); Malek v. Martin Marrietta Corp., 859 F. Supp. 458, 460 (D. Kan. 1994)(holding that it is the affiant's personal knowledge, and not his beliefs, opinions, rumors, or speculation, that is admissible at trial and the proper subject of any affidavit); Mid-State Elec., Inc. v. H.L. Libby Corp., 787 F. Supp. 494, 498 (W.D. Pa. 1992)(rejecting affidavit that set forth opinions and conclusions rather than facts).

397. *See, e.g.*, Bruce v. Fairchild Indus., Inc., 413 F. Supp. 914, 916 (W.D. Okla. 1975)(indicating that because disputed facts were at issue, the court could properly hold an evidentiary hearing before ruling on the Rule 12(b)(2) motion to dismiss).

398. *See generally* 27 FED. PROC. L. ED. *Pleadings and Motions* § 62:370 (1984)(explaining that "[i]n the judicial administration of the heavy dockets of the federal courts, litigants are not entitled as a matter of right to an oral hearing on every motion" and that "courts vary in their willingness to grant oral argument on a motion"). If a hearing is ordered, the matter may well be referred to a U.S. Magistrate Judge, who will prepare a Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(B)(1994).

399. *See* HITTNER, *supra* note 352, ¶ 9:26 (indicating that all four defenses can be waived if not timely raised).

400. *See* Fed. R. Civ. P. 12(h); Brunswick Bowling & Billiards Corp. v. Mendes, Inc., No. 1:94-CV-868, 1995 U.S. Dist. LEXIS 13175, at *3-4 (W.D. Mich. Aug. 14, 1995); HITTNER, *supra* note 352, ¶ 9:28. In *Brunswick*, the defendant filed a Rule 12(b)(6) motion to dismiss for failure to state a claim but did not file a Rule 12(b)(2) motion for lack of personal jurisdiction. 1995 U.S. Dist. LEXIS, at *3-4. The plaintiff claimed the defendant waived its right to challenge jurisdiction by filing one Rule 12(b) motion but failing to file a Rule 12(b)(2) motion. *Id.* at *4. The defendant claimed it had not intended to waive its jurisdictional challenge and requested the court to construe its Rule 12(b)(6) motion as a Rule 12(b)(2) motion. *Id.* The court agreed to do so, explaining that "[t]he court is required to construe all pleadings so as to do substantial justice. The substance of [the defendant's] motion clearly challenges the lack of personal jurisdiction. Although it should technically have been brought under Rule 12(b)(2) rather than Rule 12(b)(6), the erroneous designation has not prejudiced [p]laintiff." *Id.* (citation

The defenses can also be impliedly waived if the defendant acknowledges the court's power.[401] Implied waiver can occur if the defendant moves for summary judgment without raising the defenses;[402] stipulates to a preliminary injunction that restrains both parties;[403] or joins in a motion for change of venue based on forum non conveniens without first asserting improper venue.[404] In some instances, filing a counterclaim may also impliedly waive the defenses.[405]

Finally, the defenses can be waived if not asserted "seasonably."[406] In determining whether threshold defenses have been seasonably asserted, courts consider factors such as whether the opposing party had notice of the defendant's intent to assert the defense, whether the defendant acted with due diligence to pursue discovery related to the defense, and the prejudice, if any, to the opposing party as a result of the delay.[407]

Once defense counsel files Rule 12(b) motions to dismiss, the plaintiff's attorney must be poised to respond with affidavits that rebut the allegations in the evidence submitted by the defendants.[408] As noted earlier, plaintiff's counsel may have to request leave to serve discovery on the venue and jurisdiction issues,[409] because frequently information concerning these two matters lie largely, if not exclusively, within the defendants' control. The plaintiff's affidavit should also conform to the Federal Rules of Evidence and any other materials, such as documents, should be properly authenticated.[410] If necessary, plaintiff's counsel should file written objections to the defendants' evidence.[411]

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omitted).

401. *See, e.g.,* Neirbo Co. v. Bethlehem Shipbldg. Corp., 308 U.S. 165, 168 (1939).

402. *See, e.g.,* Thompson v. United States, 312 F.2d 516, 519-20 (10th Cir. 1962), *cert. denied,* 373 U.S. 912 (1963).

403. *See, e.g.,* Marquest Medical Prods., Inc. v. EMDE Corp., 496 F. Supp. 1242, 1246 (D. Colo. 1980).

404. *See, e.g.,* Altman v. Liberty Equities Corp., 322 F. Supp. 377, 379 (S.D.N.Y. 1971).

405. *Compare* Reliable Tire Distrib., Inc. v. Kelly Springfield Tire Co., 623 F. Supp. 153, 155 (E.D. Pa. 1985)(finding waiver) *with* Media Duplication Servs., Ltd. v. HDG Software, Inc., 928 F.2d 1228, 1233 n.2 (1st Cir. 1991)(finding no waiver).

406. *See, e.g.,* Commercial Cas. Ins. Co. v. Consolidated Stone Co., 278 U.S. 177, 179-80 (1929)(venue); Marcial UCIN, S.A. v. SS Galicia, 723 F.2d 994, 997 (1st Cir. 1983)(jurisdiction).

407. *See* HITTNER, *supra* note 352, ¶ 9:40.

408. *See, e.g.,* Zecco v. Solaris Hotel & Resorts, Inc., 820 F. Supp. 962, 963 (E.D. Pa. 1993)(dismissing complaint when plaintiff did not counter affidavits submitted by defendant, but merely rested on allegations in the complaint). *See generally* 5A WRIGHT & MILLER, *supra* note 23, § 1351, 248-50 & nn.27-31.

409. *See supra* notes 352-57 and accompanying text.

410. *See supra* notes 392-96 and accompanying text.

411. *See* Yamashita v. Guam, 59 F.3d 114, 117 (9th Cir. 1995)(indicating that in the absence of a motion to strike affidavits that accompanied brief, any issue as to their admissibility was waived).

After the plaintiff's responses and evidence have been submitted, defense counsel should, if permitted by local rule, file a reply brief and, if necessary, objections to the plaintiff's evidence.[412]

VI. CONCLUSION

Plaintiffs must not be permitted to use civil RICO's broad venue and jurisdictional provisions to forum shop and violate defendants' Fifth Amendment Due-Process rights. If courts adopt the jurisdictional and venue tests outlined in this Article, not only will they weed out "garden variety" commercial claims disguised as RICO claims, but they will also bring some degree of uniformity, consistency, and certainty to jurisdictional and venue analyses in civil RICO actions. In other words, civil RICO's long reach will be shortened just a bit.

412. *See supra* note 411 and accompanying text.

VII. APPENDIX 1: TEST FOR DETERMINING PERSONAL JURISDICTION UNDER CIVIL RICO

STEP ONE:	Determine whether the defendant has contacts with the United States as a whole.
STEP TWO:	Consider fairness factors, including the defendant's contacts with the forum, the inconvenience to the defendant, the location of witnesses and evidence, the probable situs of discovery proceedings, and judicial economy.
STEP THREE:	Review sufficiency of RICO allegations to determine whether a claim has been stated.
STEP FOUR:	Consider (a) whether an alternative forum exists in which all defendants would be subject to personal jurisdiction and (b) the number of other RICO defendants amenable to jurisdiction in the forum.

VIII. APPENDIX 2: TEST FOR DETERMINING VENUE UNDER CIVIL RICO

STEP ONE: Determine whether at least one RICO defendant is amenable to venue in the forum under § 1965(a) or § 1391.

STEP TWO: Conduct a balancing test that weighs the following factors:

- Whether another federal district court may exercise venue over all the RICO defendants.
- Whether more than half the RICO defendants are amenable to venue in the forum under § 1391 or § 1965(a).
- Whether a RICO claim has been stated sufficient to survive a motion to dismiss under Rule 12(b)(6).
- Whether the plaintiff has selected a fair forum, which would be determined by examining matters such as the distance between the current forum and any proposed alternative forum; where the majority of witnesses and evidence are located; where discovery will be conducted; and whether the prejudice to the defendant in having to defend in the forum is outweighed by the prejudice to the plaintiff in having the case dismissed or transferred.
- Whether judicial economy requires the court to exercise venue, which determination would be made by examining matters such as whether the defendants are subject to venue on other causes of action alleged in the same lawsuit; where factually similar or related cases are pending; and which state's law will govern any supplemental claims.