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Mark P. Cohen

CIVIL RICO UNDER FIRE: WILL WHITE COLLAR CRIMINALS BE EXEMPTED?

MARK P. COHEN*

I. INTRODUCTION

On October 3, 1985, representatives of a coalition of over twenty public interest and consumer groups[1] marched in front of the Washington, D.C. law offices of Wilmer, Cutler & Pickering[2] holding aloft a banner reading "Corporate Criminals Must Pay" and chanting "Put your clients away, let RICO stay." Wilmer, Cutler & Pickering was singled out as the spearhead of the business lobby seeking, in the coalition's view, to vitiate the effective civil provisions of the "Racketeer Influenced and Corrupt Organizations Act" ("RICO"),[3] in particular, its treble damage remedy. The goal of RICO, set out in the "Statement of Findings and Purpose" of the Organized Crime Control Act of 1970, is "to seek the eradication of organized crime by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the un-

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* J.D., 1985, Antioch School of Law; M.L.S., 1982, Antioch School of Law; B.A., 1974, University of Pittsburgh. Mr. Cohen is the Managing Editor of the *RICO Law Reporter*. He is a member of the Bars of the District of Columbia and Pennsylvania and is currently a candidate for a L.L.M. degree in International and Comparative law at the Georgetown University Law Center. The author wishes to thank the editors of the *Antioch Law Journal* for their invaluable assistance in researching portions of this article. In particular, thanks are due to Frederica Miller, Jim Bride, Janet Bossart, Dawn Miller, Adam Palmer, Anil Singh and Sue Wagner.

[1] The "Citizens Coalition to Support and Defend RICO" includes the following organizations: Americans for Democratic Action, Bank Watch, Center for Public Interest Law, Christic Institute, Citizen's Clearinghouse for Hazardous Wastes, Consumer Federation of America, Environmental Action, Environmental Policy Institute, Equal Justice Foundation, Farmworkers Justice Fund, Government Accountability Project, Gray Panthers, Motor Voters, National Citizens Coalition for Nursing Home Reform, National Council of Senior Citizens, National Organization for Women, National Insurance Consumer Organization, Pension Rights Center, Public Citizen, Rural Coalition, United States Public Interest Research Group (USPIRG), and Veterans Education Project. Specially active and effective are Priscilla Budeiri of Public Citizen and Pamela Gilbert of USPIRG.

[2] Two partners in Wilmer, Cutler & Pickering, Arthur F. Mathews and Andrew B. Weissman, served respectively as Chairman and Executive Director of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law which proposed a wide range of reforms to limit the reach of civil RICO. Nevertheless, Wilmer, Cutler & Pickering has not played an especially prominent role in lobbying on Capitol Hill to weaken civil RICO and, in fact, Mssrs. Mathews and Weissman oppose the major legislative initiative of business groups, the "prior conviction" requirement.

[3] 18 U.S.C. §§ 1961-1968 (1982), was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). RICO provides for both criminal penalties, § 1963, and civil sanctions, § 1964. The civil provisions are currently the more controversial.

lawful activities of those engaged in organized crime."[4]

The civil RICO controversy has generated numerous hearings in the House and Senate since 1984 and, at last count, five proposed amendments to RICO. Seldom has politics created such unlikely bedfellows. Arrayed against civil RICO are major industry and trade associations and several labor unions. RICO's key defenders, on the other hand, include Nader-mold public interest groups and law-and-order-minded state and local prosecutors. The clash over civil RICO prompted the *National Law Journal* to describe the statute as "the most controversial law of the last quarter century. . . ."[5]

Anti-RICO lobbyists complain that civil RICO is leaving the Mafia unscarred while it is having a ruinous effect on "legitimate business." They charge that RICO stigmatizes "respectable businessmen" as "racketeers," extorts unfair settlements by threatening innocent defendants with treble damage exposure, and imports into federal court what would otherwise be common state court tort actions. Because of RICO's broad language and liberal interpretation by the Supreme Court, critics predict a flood of RICO suits based on "garden-variety fraud" absent a legislative remedy.[6]

The "antis" seek legislative limitations to civil RICO, most notably, a requirement that before a civil RICO suit may even be filed, the defendant must first be convicted of a criminal offense prohibited by RICO.[7] The "antis" argue that this "prior conviction requirement" will re-focus the statute on its intended target, organized crime families, and leave "legitimate" businesses alone. Yet even the corporate-minded RICO specialists at Wilmer, Cutler & Pickering acknowledge that a "prior conviction requirement" "would so greatly eviscerate the private civil RICO remedy that it would preclude the statute's use in situations where 'private attorneys-general' can be held to achieve Congress' original objec-

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[4] Pub. L. No. 91-452, 84 Stat. 923 (1970); *see also* United States v. Turkette, 452 U.S. 576, 589 (1981).

[5] National Law Journal, August 13, 1984 at p. 1.

[6] The Wall Street Journal has raised the spectre that as many as ten percent of the civil cases filed in federal court in 1986 will include a civil RICO claim. Review Outlook—"*The RICO Racket*," Wall St. J., Jan. 24, 1986, at 24, col. 1.

At a conference on civil RICO sponsored by the Federal Bar Association held on June 13, 1986 in Washington, D.C., Roger E. Middleton, speaking on behalf of the United States Chamber of Commerce asserted, without providing proof, that a recent survey of Chamber members indicated that 95 percent of the lawsuits pending against the Chamber include RICO claims.

More believable is a survey of members of the National Association of Manufacturers (NAM) published in May 1986 showing that 33 of 120 companies responding had been sued under RICO a total of 164 times. The NAM survey had been mailed to the chief legal officers of 683 companies nationwide.

[7] See discussion of H.R. 2943, *infra* at 174.

tives" in enacting RICO.[8]

The "pro" side acknowledges that RICO was intended by Congress primarily to reach traditional organized crime families. It notes, however, that Congress recognized that RICO would reach beyond Mob families and that it proscribes specific criminal conduct, not membership in particular organizations.[9] The "pros" assert that if "legitimate" businessmen act like "racketeers," they should be treated as such. They argue that business fraud has become a national blight, perhaps even more injurious to the economy and social fabric than Mob activity.[10] The "pros" therefore oppose any amendments which would discourage RICO's enforcement by private attorneys general.

II. RICO'S PRIVATE RIGHT OF ACTION

Section 1962 establishes what constitutes a RICO violation.[11] It prohibits a "person" from investing in, acquiring or maintaining an inter-

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[8] Mathews & Weissman, "*Opinion*," 3 RICO L. Rptr. 1 (January 1986).

[9] Criminalizing mere membership in an organization, even an organized crime family, is violative of the First Amendment. Acts, not status, give rise to criminal sanctions.

[10] *Forbes* magazine, the self-described "capitalist tool," recently asserted that "the U.S. is in the grip of the most devastating epidemic of investment swindles and near swindles in its history." Forbes, May 20, 1985, at 36.

[11] Section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes or investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Section 1962(b) provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce.

Section 1962(c) provides:

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

Section 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

est in, or conducting or participating in the conduct of the affairs of an "enterprise" through a "pattern of racketeering," or conspiring to do so. A "person" "includes any individual or entity capable of holding a legal or beneficial interest in property."[12] An "enterprise" "includes any individual, partnership, corporation or association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[13] (The association-in-fact enterprise was intended by Congress to reach wholly criminal organizations but can consist of natural persons and/or a grouping of other enumerated legal "enterprises.") "Racketeering activity" (also known as "predicate acts") includes a long list of crimes indictable under federal law or chargeable under state law and punishable.[14] Notably, this list of predicate acts includes not only crimes typical of mobsters, such as arson, murder, gambling and drug offenses, but also mail fraud, wire fraud and securities fraud. A "pattern of racketeering" "requires *at least two acts* of racketeering activity. . . ." (Emphasis added.)[15] The "pattern" element focuses the statute on repeat

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[12] 18 U.S.C. § 1961(3).

[13] 18 U.S.C. § 1961(4).

[14] 18 U.S.C. § 1961(1) defines "racketeering activity as meaning:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

[15] 18 U.S.C. § 1961(5) states that a "pattern of racketeering":

requires at least two acts of racketeering activity, one of which occurred after the effec-

offenders; the "enterprise" element focuses it on criminal activity in connection with, or in the infiltration of, organizations.

Section 1964(c), RICO's private right of action, provides that:

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

Section 1964(c) is by far the most controversial section of the RICO statute. Particularly troublesome to the "antis" are its provisions for (1) mandatory treble damages and attorney's fees to a prevailing plaintiff and (2) a federal forum, even though the underlying violations would otherwise be adjudicated in state courts (or not be civilly actionable at all).

The "antis" charge that plaintiffs have put this organized crime control statute to a number of unintended and frivolous uses, including suits by an estranged marital partner against her former husband;[16] a Hassidic rabbinical faction contending for control of a congregation;[17] and a range of common law fraud and breach of contract actions recast as treble damage racketeering claims.

The "pros," however, point to other RICO actions in which plaintiffs are seeking to vindicate the public interest, including: the new Philippine government's suit for a trebled sum of $1.5 billion against deposed President Ferdinand Marcos and associates for theft of property in the U.S. belonging to the Philippine people;[18] a female carpenter who alleges that union officers committed acts of extortion and sexual harassment against her;[19] a class of poor, uneducated homeowners who alleged that a savings and loan association and a home improvement contractor fraudulently conspired to force them into foreclosure;[20] residents of a retirement community who alleged that self-dealing by the management of the community endangered their "life-care" contract;[21] an abortion clinic which alleges it was victimized by a pattern of criminal acts, including

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tive date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

[16] Erlbaum v. Erlbaum, [1982 Transfer binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. July 31, 1982).

[17] Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983).

[18] Republic of the Philippines v. Marcos, C86-0037E (S.D. Tex. filed March 20, 1986).

[19] Hunt v. Weatherbee, No. 84-3001-Y (D. Mass., January 23, 1986).

[20] Gregory v. Atlantic Permanent Federal Savings and Loan Association, No. 84-620-N (E.D. Va. settled July 16, 1985).

[21] Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) (claim against Prudential Insurance Company was recently settled for $62.8 million).

robbery, extortion and violence committed by anti-abortion activists;[22] a class of Vietnam veterans who allege that they were defrauded by mobile-home dealers, manufacturers and financing firms in the sale of mobile homes;[23] a class of employees of a St. Louis daily newspaper who allege that their pay checks "bounced" because of the "looting" of the company by the publishers for their personal benefits;[24] a class of steelworkers who claim they were defrauded out of pay benefits due them when their employer shutdown their plant;[25] and a homeowners association which alleges that the developer fraudulently misrepresented that it would maintain the development roads and sewer system.[26]

Just how wide a net Congress was attempting to cast with RICO is a matter of considerable controversy. RICO critics argue that the treble damages private right of action was an afterthought that Congress, especially the Senate, never adequately considered.[27] Although earlier crime bills pending before the Senate had provided for a treble damages private civil remedy,[28] the bill adopted by the Senate, S. 30, limited civil relief to injunctive actions by the United States. By contrast, during House Judiciary Committee hearings on S. 30, Representative Steiger proposed inclusion of a private treble damages remedy modeled after the antitrust laws to "enhance the effectiveness of title IX's prohibitions."[29] Three members of the House Committee dissented, fearing that RICO might be used to harass business competitors.[30] Nevertheless, the Committee approved the Steiger amendment.[31] The full House considered several proposed amendments to S. 30, adopting the amendment proposed by Rep. Steiger[32] while rejecting one which provided treble damages to defendants injured by malicious RICO suits.[33] The resulting bill was RICO. It included mail, wire and securities fraud among the predicate acts, expressly contemplating that crime typical of "legitimate business" would

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[22] Northeast Women's Center, Inc. v. McMonagle, No. 85-4845 (E.D. Pa., October 25, 1985).

[23] Vietnam Veterans of Americas, Inc. v. Guerdon Industries, Inc., No. 85-244 (MMS) (D. Del.).

[24] Madden v. Gluck, No. 85-2703-C-6 (E.D. Mo. filed Nov. 14, 1985).

[25] Lumpkin v. Int'l Harvester Co., No. 81 C 6674 (N.D. Ill. Feb. 10, 1986) (allowing amendment to include RICO claim).

[26] Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., No. 84-22962, 2 RICO L. Rptr. 577 (8th Cir. 1985).

[27] *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 1 RICO L. Rptr. No. 2, Appendix A at 5-8.

[28] S. 1623, § 4(a), 91st Cong., 1st Sess., (1969); S. 2048, S. 2049, 90th Cong., 1st Sess. (1967).

[29] Hearings on S. 30 and related proposals before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970).

[30] See Sedima, S.P.R.L. v. Imrex Co., Inc., — U.S. —, 2 RICO L. Rptr. 68, 72 (1985).

[31] H.R. Rep. No. 91-1549, 91 Cong., 2nd Sess. pp. 58, 187 (1970).

[32] 116 Cong. Rec. 35363-35364 (1970).

[33] *Id.* at 35342.

fall within the net. Congress further spread the net by providing that RICO "shall be liberally construed to effectuate its remedial purposes."[34] With the enthusiastic endorsement of Senator John McClellan, the sponsor of S. 30,[35] the Senate adopted the House bill as amended without seeking conference.[36] Thus, although the legislative history is somewhat unclear, Congress intended a broad construction of RICO.

III. THE *SEDIMA* DECISION

Sedima, S.P.R.L. v. Imrex Co., Inc.,[37] and its companion case, *American National Bank & Trust Company of Chicago v. Haroco*,[38] are the only civil RICO actions yet to have been considered by the Supreme Court.

Sedima concerned a joint business venture between two companies, Sedima and Imrex, to provide electronic components to a Belgian firm. Sedima accused Imrex of submitting inflated invoices, thereby cheating Sedima out of its fair share of the joint venture proceeds. Sedima sued Imrex and two of its officers under a number of theories, including § 1962(c) of RICO, which prohibits a "person" from associating with an "enterprise" through a pattern of racketeering. In affirming the district court's dismissal of the RICO claim, a divided panel of the Second Circuit held that absent defendant's prior conviction for a predicate act or criminal RICO, no civil RICO action could lie. In addition, the Second Circuit ruled that to state a civil RICO claim a plaintiff must allege more than simply injuries flowing from the individual predicate criminal violations; rather, a distinct injury must result from the *pattern* of racketeering.[39] Underlying the Second Circuit's decision was a thinly veiled hostility toward RICO common among judges.[40] Judge Oakes wrote for the majority that:

> Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Mer-

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[34] Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).

[35] *Supra*, note 34 at 25190.

[36] *Supra* note 34 at 36296.

[37] — U.S. —, 105 S. Ct. 3275, 2 RICO L. Rptr. 68 (1985).

[38] — U.S. —, No. 84-822, 2 RICO L. Rptr. 95 (1985).

[39] 741 F.2d 482, 1 RICO L. Rptr. No. 2, Appendix A (2d Cir. 1984).

[40] Jed. S. Rakoff, a partner in the New York law firm of Mudge, Rose, Guthrie and Alexander, speaking on the topic, "Defending Civil RICO Actions," at a conference on civil RICO in Washington, D.C. on June 19, 1986, recommended that defense counsel engage in extensive motions practice in civil RICO actions because courts are ordinarily searching for an excuse to dismiss civil RICO claims.

> rill Lynch, to name just a few defendants labeled as "racketeers. . . ."[41]

The Supreme Court majority agreed with Judge Oakes that "RICO is evolving into something quite different from the original conception of its enactors" and hinted that Congress might wish to revisit the statute.[42] Nevertheless, the Court rejected the two standing limitations on civil RICO invoked by the Second Circuit—the prior criminal conviction and the distinct racketeering-type injury—as unsupported by either the language or the legislative history of the statute.

At oral argument Justice Marshall had expressed irritation with civil RICO's breadth, asking counsel for Sedima if he was "familiar with the list of respected businesses cited by Judge Oakes . . . which were subject to RICO suits."[43] In his dissent in *Sedima*, joined by Justices Brennan, Blackmun and Powell, Marshall expressed alarm that "[t]he Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation. . . ."[44] He noted that a study conducted by the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business law found that only 9 percent of the reported civil RICO cases involved allegations of criminal activity typical of organized crime families, whereas 40 percent of the cases involved allegations of securities fraud, and another 37 percent involved common law business or commercial fraud. According to Justice Marshall, RICO creates a private right of action for mail fraud and wire fraud where none previously existed; it displaces carefully crafted standing requirements under securities, commodities and antitrust law; it federalizes common law tort actions; and it subjects legitimate businessmen to the pejorative label of "racketeer" and treble damage liability. Justice Powell, in a separate dissent, warned of a flood of litigation in federal courts as plaintiffs discover that what they once thought of as simple breach of contract and fraud actions were henceforth treble damage civil racketeering cases. Both Justice Marshall and Justice Powell supported a special "racketeer-

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[41] 1 RICO L. Rptr. at A-4. In fact the Second Circuit's selection of "respected and legitimate" businesses purportedly victimized by RICO might better have been chosen by proponents of the statute. One of the Second Circuit's "respected" businesses, American Express, was accused in 1979 by Citicorp, in full-page newspaper ads, of false and deceptive advertising about the relative merits of the two companies' travelers checks. Everybody's Business 483 (M. Moscowitz, M. Katz & R. Levering 1980). Another one of the Second Circuit's "legitimate" businesses, Merrill Lynch, was fined $1.6 million in 1977 for disseminating "false and misleading" reports to approximately 4,000 customers about Scientific Control, a Texas computer company which had gone bankrupt in 1969. Everybody's Business, at 489.

[42] Sedima, *supra* at 78.

[43] See 1 RICO L. Rptr. 917 (May 1985).

[44] Sedima, *supra* at 79.

ing injury" requirement; both were conspicuously silent about the Second Circuit's prior conviction requirement.

Justice White, writing for the majority, did not share the dissenters' and Judge Oakes' incredulity that the RICO net caught white collar criminals:

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.' " Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. [quoting *United States v. Turkette*, 453 U.S. 576 (1981).] The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. it demonstrates breadth."[45]

IV. CIVIL RICO LITIGATION AFTER *SEDIMA*

Although the Supreme Court has stamped its imprimature on a broad construction of civil RICO, defendants are not helpless in the post-*Sedima* era. A talented "RICO bar" has fashioned a number of defenses which often receive a warm reception from a generally RICO-hostile judiciary. That only a handful of judgments actually has been awarded RICO plaintiffs to date suggests the effectiveness of these defenses.[46]

The Supreme Court's "pattern" dicta in *Sedima* footnote 14, in particular, has emerged as an effective limitation on civil RICO actions. Prior to *Sedima* most of the case law interpreting the "pattern of racketeering" requirement had developed in criminal prosecutions. The criminal precedent typically held that two related racketeering acts in a ten

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[45] *Id.* at 78 (quoting Haroco, Inc. v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 398).

[46] Among the few RICO cases which have gone to judgment are: B.F. Hirsch v. Enright Refining Co., 2 RICO L. Rptr. 453, (D.N.J. 1985); Aetna Casualty & Surety Co. of Ill. v. Levy, 2 RICO L. Rptr. 598 (N.D. Ill. 1985); Commonwealth of Pa. v. Cianfrani, 1 RICO L. Rptr. 974 (E.D. Pa. 1985); Horn v. Dittmer, No. 81-5154 (W.D. Ark. 1984), *reversed sub nom*, Norn v. Ray E. Friedman & Co., 3 RICO L. Rptr. 82 (8th Cir. 1985); Armco Industrial Credit Corp. v. SLT Warehouse Co., No. 3-82-1271-H (N.D. Tex. 1984), *reversed*, 3 RICO L. Rptr. 547 (5th Cir. 1986); Donovan v. Goldstein, C.A. Nos. 83-0940, 83-0780 (D.D.C. 1984); Callan v. State Chemical Manufacturing Co., Civ. A. No. 83-4317 (E.D. Pa. 1984).

year period satisfied the "pattern" requirement.[47] The *Sedima* Court noted, however, that the statutory language requires "*at least* two acts of racketeering activity";[48] thus two acts are necessary but may not be sufficient to satisfy the "pattern" requirement. (Emphasis added.) The Court suggested that a "pattern" connotes some relationship between the acts and their repetition or threat of repetition. It referred to a Senate Report which stated that RICO was not intended to reach "sporadic activity": "the infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." (Emphasis added by Supreme Court.)[49]

The *Sedima* "pattern" dicta has been interpreted in a variety of ways by lower courts. A few have virtually ignored it;[50] some say that the predicate acts simply must be related to one another;[51] others require some continuity and relationship among the acts;[52] another says the predicate acts need only be related to the "enterprise", not to each other;[53] others require multiple criminal transactions or episodes, not simply a multiplicity of predicate acts;[54] and yet others require multiple fraudulent schemes.[55] The clear trend is that separate episodes or schemes are required. As a leading RICO practitioner/commentator has

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[47] United States v. Watchmaker, 761 F.2d 1459, 1474-75 (11th Cir. 1985) (two related acts are sufficient); United States v. Weisman, 624 F.2d 1118, 1121-23 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980) (two acts related to the enterprise are sufficient); *but see*, United States v. Stofsky, 409 F. Supp. 609, 612-14 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) ("pattern" connotes "some common scheme, plan or motive . . . and not simply a series of disconnected acts"; United States v. Computer Sciences Corporation, 689 F.2d 1181, 1189-90 (4th Cir. 1982) (dicta questioning whether multiple offenses in a single criminal episode could constitute a pattern).

[48] 18 U.S.C. § 1961(5).

[49] S. Rep. No. 91-617, 91 Cong. 2nd Sess., p. 158 (1969).

[50] Illinois Dept. of Revenue v. Phillips, 771 F.2d 312, 2 RICO L. Rptr. 434 (7th Cir. August 27, 1985); Aetna Casualty & Surety Co. of Ill. v. Levy, 2 RICO L. Rptr. 598 (N.D. Ill. 1985).

[51] R.A.G.S. Coutre, Inc. v. Hyatt, 774 F.2d 1350, 2 RICO L. Rptr. 743 (5th Cir. 1985) (*but see* Armco Industrial Credit Corp. v. SLT Warehouse Co., 3 RICO L. Rptr. 547 (5th Cir. 1986), suggesting that "pattern" remains an open issue in the Fifth Circuit).

[52] Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co., 3 RICO L. Rptr. 535 (11th Cir. 1986); Trak Microcomputer Corp. v. Wearne Bros., 3 RICO L. Rptr. 324 (N.D. Ill. 1985); Kredietbank, N.V. v. Joyce Morris, Inc., 3 RICO L. Rptr. 280 (D.N.J. 1986).

[53] U.S. v. Qaoud, 3 RICO L. Rptr. 250 (6th Cir. 1985).

[54] Allington v. Carpenter, 619 F. Supp. 474, 2 RICO L. Rptr. 788 (C.D. Cal. 1985); Medallion TV Enterprises, Inc. v. SelecTV of California, Inc., 3 RICO L. Rptr. 310 (C.D. Cal. 1985).

[55] Superior Oil Co. v. Fulmer, 3 RICO L. Rptr. 539 (8th Cir. 1986) (*but see*, Alexander Grant & Co. v. Tiffany Industries, Inc., 770 F.2d 717 (8th Cir. 1985), stating in dicta that thirty related acts of mail or wire fraud "bespeak a sufficient 'continuity plus relationship' " to satisfy the pattern requirement); Fleet Management Systems, Inc. v. Archer-Daniels-Midland Co., 3 RICO L. Rptr. 386 (C.D. Ill. 1986); Fye v. First National Bank of Niles, No. 85 C. 0700 (N.D. Ill. December 6, 1985); Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 2 RICO L. Rptr. 456 (N.D. Ill. 1985).

noted, the post-*Sedima* "pattern" decisions tend to be "result-oriented", often giving vent to judicial hostility to civil RICO.[56] (Three of the proposed legislative amendments to RICO, H.R. 2517, H.R. 3985, and H.R. 4892, discussed *infra*, would clarify what must be proven to show a racketeering "pattern".)

A number of other procedural and substantive motions have been effective in dismissing RICO claims. Because most RICO claims are based on underlying mail, wire or securities fraud allegations,[57] the requirement that fraud be pleaded with particularity[58] has been litigated extensively in civil RICO actions. Rule 9(b) is intended to ensure that a defendant is sufficiently apprised of the allegations to fashion an answer and that the complaint is not used as a pretext to conduct discovery. It also seeks to protect a defendant from unfounded allegations of wrongdoing.[59] Some courts, emphasizing the gravity of a racketeering allegation, have required that all predicate acts, not just those sounding in fraud, must be pleaded with particularity,[60] or even that the civil complaint meet a criminal "probable cause to indict" test.[61] A few courts have required that each element of the RICO claim, not just fraud or the alleged predicate acts, be pleaded with particularity.[62]

Courts are also modifying the received body of criminal law precedent regarding what must be alleged and proved to establish that the defendant committed the underlying predicate acts of mail and wire fraud. Some courts, including the Eighth Circuit, seem to be importing a justifiable reliance element into statutory mail and wire fraud law in civil

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[56] Comment of Irvin B. Nathan, partner in the Washington, D.C. firm of Arnold & Porter, at the conference, "Civil RICO: A Guide to Practice and Strategy", held in Washington, D.C. on June 19, 1986. Mr. Nathan served as Program Chairman of the conference.

[57] Report of the Ad Hoc Civil RICO Task Force of the ABA Section on Corporation, Banking and Business Law (March 28, 1985).

[58] Fed. R. Civ. P. 9(b).

[59] *See* Bisceglie, "The Importance of Pleading Fraud With Particularity in Civil RICO Actions," 2 RICO L. Rptr. 20 (1985).

Given the liberal pleading policy underlying the Federal Rules of Civil Procedure and Rule 8's requirement of merely "a short and plain statement of the claim showing that the pleader is entitled to relief," courts are ordinarily reluctant to dismiss with prejudice on Rule 9(b) grounds. Typically, Rule 9(b) is satisfied by alleging the time, place and general contents of the alleged misrepresentation, and the identity of each defendant. *See, e.g.*, Mitchell Energy Corporation v. Martin, 616 F. Supp. 924 (S.D. Tex. 1985); Onesti v. Thomson McKinnon Securities, Inc., 3 RICO L. Rptr. 103 (N.D. Ill. 1985); *but see*, Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791, 1 RICO L. Rptr. 566 (3d Cir. 1984) (date, place and time of alleged fraud need not be pleaded).

[60] Allington v. Carpenter, 619 F. Supp. 474, 2 RICO L. Rptr. 788 (C.D. Cal. 1985); Bache Halsey Stuart Shields v. Tracy Collins Bank, 558 F. Supp. 1042, 1046 (D. Utah 1983).

[61] Bennett v. E.F. Hutton Co., Inc., 597 F. Supp. 1547 (N.D. Ohio 1984).

[62] Doxie v. Ford Motor Credit Co., 603 F. Supp. 624, 2 RICO L. Rptr. 141 (S.D. Ga. 1984); Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983).

RICO actions.[63] The federal mail fraud[64] and wire fraud[65] statutes require a scheme to defraud and use of the mails or wire in furtherance of the scheme, but neither statute has been interpreted in criminal prosecutions to require proof of justifiable reliance, a common law tort element.[66]

A number of RICO cases have been dismissed for failing to name a defendant who is different from the "enterprise" alleged. The great weight of authority is that for actions alleging violations of § 1962(c), the most often used subsection of RICO, the liable "person" must be distinct from the "enterprise" whose affairs he or she allegedly was "employed by or associated with."[67] The effect of requiring a distinct "person" and "enterprise" is to immunize the enterprise from liability—regardless whether the corporation was the perpetrator or beneficiary of the racketeering activity on the one hand, or the mere instrument or victim on the other. Courts reason that the language of § 1962(c), which applies to "any person employed by or associated with" an "enterprise", suggests that the "person" and "enterprise" are not one and the same. Such a reading, these courts say, is consistent with Congress' intent to protect enterprises from infiltration by organized crime elements. A number of courts similarly require a distinct "person" and "enterprise" under the other subsections of § 1962.[68] Creative pleading of a distinct association-

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[63] C.M. Flowers v. Continental Grain Company, 775 F.2d 1051, 3 RICO L. Rptr. 70, 72 (8th Cir. 1985); Hennessey v. Connecticut, 3 RICO L. Rptr. 420 (N.D. Ill. 1985); *but see*, Armco Industrial Credit Corp. v. SLT Warehouse Co., 3 RICO L. Rptr. 547 (5th Cir. 1986).

[64] 18 U.S.C. § 1341.

[65] 18 U.S.C. § 1343.

[66] The criminal precedent has held that use of the mails or interstate wire must merely be reasonably foreseeable to the defendant, Pereira v. United States, 347 U.S. 1 (1954), and be closely related to the fraudulent scheme. United States v. Maze, 414 U.S. 395 (1974).

[67] Bennett v. United States Trust Co. of New York, 770 F.2d 308, 2 RICO L. Rptr. 440 (2d Cir. 1985); B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 634, 1 RICO L. Rptr. 799 (3d Cir. 1984); Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 400, 1 RICO L. Rptr. Appendix No. 3 (7th Cir. 1984), *aff'd on other grounds*, 2 RICO L. Rptr. 95 (1985); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982); Bennett v. Berg, 685 F.2d 1053, 1061 (8th Cir. 1982), *aff'd in pertinent part in banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 52 U.S.L.W. 3440 (Dec. 5, 1983); Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984); *but see*, United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

[68] More analysis has focused on claims under subsection (a) than (b) or (d). Courts requiring that the "person" and "enterprise" be distinct under § 1962(a) include: Rush v. Oppenheimer & Co., Inc., 3 RICO L. Rptr. 472 (S.D.N.Y. 1985); Wilcox Development Co. v. First Interstate Bank of Oregon, No. 81-1127-RE, 1 RICO L. Rptr. 513 (D. Or. 1984); Kredietbank, N.V. v. Joyce Morris, Inc., 3 RICO L. Rptr. 264 (D.N.J. 1985) *but see*, Masi v. Ford City Bank and Trust Co., 779 F.2d 397, 3 RICO L. Rptr. 248 (7th Cir. 1985); Conan Properties, Inc. v. Mattel, Inc., 3 RICO L. Rptr. 329 (S.D.N.Y. 1985); Ark Travel, Inc. v. Travellers Inter. Tour Operators, Inc., 2 RICO L. Rptr. 283, 291 (D.N.J. 1985); B.F. Hirsch v. Enright Refining Co., 2 RICO L. Rptr. 453 (D.N.J. 1985); Commonwealth of Pennsylvania v. Derry Construction Co., Inc., 2 RICO L. Rptr. 762 (W.D. Pa. 1985).

in-fact enterprise or efforts to impute liability have met with mixed results.[69]

Some courts, focusing on the language in § 1962(c) that the "person" must "*conduct* or participate, directly or indirectly, in the conduct of such enterprise's affairs", have rejected claims under this subsection absent an allegation or proof that the defendant played some role in the *management* of the "enterprise" through a "pattern or racketeering."[70] (Emphasis added.) The required depth of participation in the enterprise is a critical issue in RICO claims against outside professionals, especially accountants and lawyers. As the Eighth Circuit wrote in dicta:

> Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient, to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.[71]

Courts have also held that under § 1962(a), which prohibits the in-

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[69] Naming the corporate "deep pocket" as the liable "person" and the corporation and the actual wrongdoer as an association-in-fact "enterprise" has been rejected by some courts. Atkinson v. Anadarko Bank & Trust Co., 3 RICO L. Rptr. 451 (N.D. Tex. 1986); Tarasi v. Dravo Corporation, 2 RICO L. Rptr. 596, (W.D. Pa. 1985); *but see*, Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2 RICO L. Rptr. 304 (D. Md. 1985). A plaintiff might also reach a "deep pocket" under the theory of *respondeat superior*, which holds a principal civilly liable for an agent's acts committed within the scope of his or her employment and apparent authority. However, whether traditional agency principles apply—given RICO's treble damage remedy, its quasi-criminal chracter and the requirement of a distinct "person" and "enterprise" under § 1962—is itself a hotly contested litigation issue. Courts stating that *respondeat superior* does not apply under RICO include: Parnes v. Heinhold Commodities, Inc., 548 F. Supp. 20, 24 n.9 (N.D. Ill. 1982); O'Brien v. Dean Witter Reynolds, Inc., 1 RICO L. Rptr. 153 (D. Ariz. 1984); Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 2 RICO L. Rptr. 456 (N.D. Ill. 1985); Kredietbank, N.V. v. Joyce Morris, Inc., 3 RICO L. Rptr. 264 (D.N.J. 1985); Rush v. Oppenheimer & Co., Inc., Fed. Sec. L. Rep. (CCH) ¶ 92,444 (S.D.N.Y. Dec. 24, 1985); Intre Sport, Ltd. v. Kidder, Peabody & Co., Inc., Fed. Sec. L. Rep. (CCH) ¶ 92,439 (S.D.N.Y. Dec. 23, 1985); *but see*, Fye v. First Nat'l Bank of Niles, No. 85 C 700 (N.D. Ill. Dec. 3, 1985); Wagman v. FSC Securities Corp., Fed. Sec. L. Rep. (CCH) ¶ 92,445 (N.D. Ill. July 22, 1985); Morley v. Cohen, 610 F. Supp. 798, 811, 2 RICO L. Rptr. 162, 173, (D. Md. 1985); *In re Olympia Brewing Company Securities Litigation*, 1 RICO L. Rptr. 823, 837-38 (N.D. Ill. 1984); Bernstein v. IDT Corporation, 582 F. Supp. 1079, 1082-85, 1 RICO L. Rptr. 159, 162-63 (D. Del. 1984).

[70] John Peterson Motors, Inc. v. General Motors Corporation, 2 RICO L. Rptr. 500 (D. Minn. 1985); *see also*, United States v. Mandel, 591 F.2d 1347, *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979); United States v. ladmer, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977).

[71] Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1983). Most courts, however, do not require such a central, management role in the enterprise, noting that liability attaches under § 1962(c) to those who "*participate*, directly or *indirectly*" in the enterprise. (Emphasis supplied.) Bank of America Nat'l Trust & Savings Assn. v. Touche Ross & Co., 3 RICO L. Rptr. 535 (11th Cir. 1986); U.S. v. Scotto, 641 F.2d 47, 57 (2d Cir.); U.S. v. Cauble, 706 F.2d 1322, 1332 (5th Cir. 1983); Schact v. Brown, 711 F.2d 1343, 1360 (7th Cir. 1983); Ahern v. Gaussoin, 2 RICO L. Rptr. 339 (D. Or. 1985); Virden v. Graphics One, 2 RICO L. Rptr. 768 (C.D. Cal. 1985).

vestment of racketeering income in an enterprise, that a "RICO injury" must result not from the racketeering acts but from the investment of the racketeering income.[72] These courts reason that § 1964(c), the private right of action, requires that the injury be "by reason of the violation of section 1962," that is, by reason of the investment of the racketeering income. This ruling functionally limits the universe of potential plaintiffs under § 1962(a) to businesses injured by the infusion of racketeering income into the coffers of a business competitor.[73]

A number of courts require that an association-in-fact "enterprise" have a purpose or structure beyond that which is necessary to commit the pattern of racketeering.[74] These courts reason that were the "enterprise" element satisfied by alleging an entity which had no existence other than an association to commit the predicate acts, the "enterprise" and "pattern" elements would merge.

Because the civil RICO statute does not include a statute of limitations, RICO-hostile trial judges hold considerable discretion in selecting a limitations period. Where an express limitation period is not provided in a federal statute, courts typically "borrow" what they characterize as the most analogous state law, as long as it is not inconsistent with federal policy.[75] As a result courts have applied a variety of limitations periods in civil RICO actions, ranging from one to six years (two or three years are most common), based on state law limitations periods for fraud;[76] general statutory limitations periods;[77] antitrust law;[78] securities law;[79]

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[72] Heritage Insurance Co. v. First Nat'l Bank, 3 RICO L. Rptr. 574 (N.D. Ill. 1986); Waldschmidt v. Crosa, 4 RICO L. Rptr. 202 (Ga. Ct. App. 1986).

[73] A plausible, alternative interpretation is that § 1962(a) is concerned with money "laundering"; hence a violation is completed by the mere receipt and investment of the racketeering income. B.F. Hirsch v. Enright Refining Co., 2 RICO L. Rptr. 453 (D.N.J. 1985). Even under this broad interpretation, however, plaintiffs still face the difficult task of tracing and identifying the specific racketeering income which was invested.

[74] Seville Ind. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 1 RICO L. Rptr. 566, 569 n.5 (3d Cir. 1984); United States v. Riccobene, 709 F.2d 214, 222-23 (3d Cir. 1983) (enterprise requires: (1) an ongoing organization with some sort of decision-making structure; (2) participants function as a continuing unit; and (3) an existence beyond that necessary to commit the racketeering acts); United States v. Bledsoe, 674 F.2d 647, 664-65 (8th Cir. 1982) (enterprise must have "commonality of purpose," "continuity of . . . structure and personality and a structure "distinct from that inherent in the conduct of a pattern of racketeering"; *but see*, United States v. Mazzei, 700 F.2d 85 (2d Cir. 1983) (no "distinctness" requirement); *see also* United States v. Elliot, 571 F.2d 880 (5th Cir. 1978).

[75] *See* Wilson v. Garcia, 105 S. Ct. 1938, 1942 & n.12 (1985).

[76] Alexander v. Perkin Elmer Corp., 729 F.2d 576, 577 (8th Cir. 1984); Fustok v. Conticommodity Services, Inc., 618 F. Supp. 1076, 1080-81 (S.D.N.Y. 1985); Thomas J. Lipton, Inc. v. Osborn, 1 RICO L. Rptr. 998, 1000 (D.N.J. 1984); D'Iorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982); State Farm Fire & Cas. Co. v. Estate of Caton, 540 F. Supp. 673, 683-85 (N.D. Ind. 1982).

[77] *See* Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239, 249 (2d Cir.), *cert. denied*, 105 S. Ct. 3530 (1985); Compton v. Ide, 732 P.2d 1429, 1433 (9th Cir. 1984); Teltronics

actions for treble damages;[80] injury to real or personal property;[81] and residuary limitations period.[82]

Where a contract provides for compulsory arbitration of a dispute between the parties, a growing number of courts have held that a RICO claim may be subject to a motion to compel arbitration.[83] There is little doubt, based on securities[84] and antitrust[85] precedent, that courts will give effect to arbitration clauses in RICO claims arising out of international contract disputes. Even if a court concludes that the important national interest in crime control renders a RICO claim non-arbitrable, an arbitrator's findings on the underlying predicate acts may nevertheless collaterally estop a RICO suit in federal court.[86]

Finally, attorney's fees and costs may be assessed under Rule 11 of the Federal Rules of Civil Procedure[87] against parties or their counsel

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Services, Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724, 733 (E.D.N.Y. 1984), *aff'd on other grounds*, 762 F.2d 185 (2d Cir. 1985); Seawell v. Miller Brewing Co., 576 F. Supp. 424, 427 (M.D.N.C. 1983).

[78] *See* Ingram Corp. v. J Ray DeDermott & Co., 495 F. Supp. 1321, 1324 n.4 (E.D. La. 1980).

[79] *See* Burns v. Ersek, 591 F. Supp. 837, 843-44 (D. Minn. 1984); *see also*, Clute v. Davenport Co., 584 F. Supp. 1562, 1577 (D. Conn. 1984); Gilbert v. Bagley, Fed. Sec. L. Rep. (CCH) ¶ 99,483 (N.D.N.C. 1982).

[80] *See* Electronic Relays (India) Pvt. Ltd. v. Pascente, 2 RICO L. Rptr. 332, 333-38 (N.D. Ill. 1985); Caldarone v. Brown, 2 RICO L. Rptr. 58 (N.D. Ill. 1983).

[81] Middle States Knowlton Corp. v. Esic Capital, Inc., No. 82-1911, 3 RICO L. Rptr. 142, 145 (D.D.C. 1985).

[82] *See* Morley v. Cohen, 610 F. Supp. 798, 2 RICO L. Rptr. 162, 170 (D. Md. 1985); Victoria Oil Co. v. Lancaster Corp., 587 F. Supp. 429, 431 (D. Colo. 1984).

[83] Courts ordering RICO claims to arbitration include: Brener v. Becker Paribas Inc., No. 84 Civ. 5872 (CHT) (S.D.N.Y. Jan. 2, 1986); Stone & Associates v. Drexel Burnham Lambert, Inc., No. 85 C 6972 (N.D. Ill. Nov. 15, 1985); Ross v. Mathis, 3 RICO L. Rptr. 126 (N.D. Ga. 1985); Development Bank of the Philippines v. Chemtex Fibers Inc., 2 RICO L. Rptr. 758 (S.D.N.Y. 1985); West v. Drexel Burnahm Lambert, Inc., 623 F. Supp. 26, 2 RICO L. Rptr. 470 (W.D. Wash. 1985); Finn v. Davis, 2 RICO L. Rptr. 293 (S.D. Fla. 1985); Chapman v. Arthur Murray Int'l Inc., No. 82-2345 CIV-CA (S.D. Fla. Sept. 15, 1983); *but see* McMahon v. Shearson/American Express, 3 RICO L. Rptr. 848 (2d Cir. 1986); Weizman v. Adornato, 3 RICO L. Rptr. 441 (E.D.N.Y. 1985); McMahon v. Shearson/American Express, 2 RICO L. Rptr. 751 (S.D.N.Y. 1985); Webb v. R. Rowland & Co., Inc., 613 F. Supp. 1123 (E.D. 1985); Blumenthal v. Dean Witter Reynolds, 2 RICO L. Rptr. 275 (1985); Witt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Fed. Sec. 1 Rep. (CCH) ¶ 91,970 (W.D. Pa. 1985); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 605 F. Supp. 510 (W.D. Pa. 1984); Universal Marine Ins. Co., Ltd. v. Beacon Ins. Co., 588 F. Supp. 735 (W.D.N.C. 1984); Wilcox v. Ho-Wing Sit, 585 F. Supp. 23 (N.D. Cal. 1984); S.A. Mineracao Da Trindade-Samitri v. Utah Int'l Inc., 576 F. Supp. 566 (S.D.N.Y. 1983). The Fifth Circuit initially held RICO claims to be non-arbitrable but has since modified its ruling and remanded the issue to the district court for further consideration. Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 3 RICO L. Rptr., 693 (5th Cir. 1986), *modified and remanded*, 4 RICO L. Rptr. 131 (5th Cir. 1986).

[84] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

[85] Mitsubishi Motors Corporation v. Soler-Chrysler Plymouth, 105 S. Ct. 3346 (1985).

[86] Greenblatt v. Drexel Burnham Lambert, 763 F.2d 1352, 1361-62, 2 RICO L. Rptr. 250 (11th Cir. 1985); Gainesville v. Island Creek Coal Sales, RICO L. Rptr. 134 (N.D. Fla. Nov. 16, 1984).

[87] Rule 11, Fed. R. Civ. P., provides that:

who interpose frivolous pleadings. A number of courts have already imposed sanctions against RICO plaintiffs[88] and, given the hostility of many judges to civil RICO, the imposition of sanctions will likely become a more common occurrence in RICO litigation.

Thus, the mere filing of a RICO claim has neither brought corporate defendants to their knees nor proven to be an automatic bonanza for plaintiffs. Nevertheless, business interests have turned their attention to Capitol Hill in hopes of removing the treble damage RICO threat altogether.

V. Corporate Lobby Mobilizes for Legislative Relief

Although only a handful of judgments has yet been awarded in civil RICO suits, business interests—with some assistance from organized labor—have appealed to Congress for a substantial overhall of the RICO statute. Among those who have testified before the Senate Judiciary Committee and the House Subcommittee on Criminal Justice are representatives of the National Association of Manufacturers, the U.S. Chamber of Commerce, the Securities Industry Association, the American Bankers Association, the American Property and Casualty Insurance Industry, the American Council of Life Insurance and the American Institute of Certified Public Accountants. Also participating in the anti-RICO coalition, as junior partners, are the AFL-CIO and several of its affiliated unions.[89]

> Every pleading . . . of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading . . .; that to his best knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading . . . is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading . . . , including a reasonable attorney's fee.

[88] Financial Federation, Inc. v. Ashkenazy, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,489 (C.D. Cal. 1983) (imposing $500,000 in sanctions, of which $150,000 was attributable to the RICO claim); Rand v. Anaconda-Ericsson, Inc., 2 RICO L. Rptr. 806 (E.D.N.Y. 1985); Aetna Cas. & Surety Co. v. Current Components, 2 RICO L. Rptr. 812 (E.D. Mo. 1985); *but see*, Fustok v. Conticommodity Services, Inc., 2 RICO L. Rptr. 605 (S.D.N.Y. 1985); Martinez, Inc. v. H. Landau & Co., 3 RICO L. Rptr. 117 (N.D. Ind. 1985); Flaherty v. Torquato, 623 F. Supp. 55 (W.D. Pa. 1985).

[89] Whereas business interests are most threatened by the inclusion of predicate acts sounding in fraud, organized labor's opposition to RICO focuses on the inclusion of predicate acts for violating 29 U.S.C. §§ 186 and 501(c), which relate to payments and loans to labor organizations and the embezzlement of union funds.

"Establishment" interests are understandably disturbed by RICO's enhanced remedies: They help to even the litigation contest between the have-nots and the haves. Under the "American Rule," prevailing parties pay their own litigation expenses. Attorney's fees and costs are subtracted from an actual damage award, often leaving a prevailing plaintiff with a Pyrrhic victory. As a consequence, well-heeled institutions are able to scare off less affluent claimants with the threat of a paper blizzard and exorbitant litigation costs. RICO's triple damages and attorney's fees restore the litigation balance, providing plaintiffs and their counsel with the incentive to pursue claims against wealthy defendants.

RICO likely has encouraged suits against "Big Eight" accounting firms in which plaintiffs have alleged that the defendants certified financial statements which they knew to be fraudulent. Plaintiffs allegedly relied on the accountants' certifications, invested in or did business with the accountants' clients and were injured as a result.[90] With the prospect of recovering treble damages and attorney's fees, the "little guy" can seriously contemplate suit against accounting giants such as Price Waterhouse and Touche Ross & Company.

Not surprisingly, the American Institute of Certified Public Accountants (AICPA) has been especially generous in funding the campaign to dull the civil RICO sword. Between the fourth quarter of 1983 and the fourth quarter of 1985, the AICPA spent $179,610 on lobbying activities.[91] Although the amount devoted specifically to lobbying on RICO cannot be determined from the AICPA's quarterly reports, the relative frequency of RICO's mention in these reports suggests that a substantial portion, perhaps most, of the AICPA's dollars went to RICO lobbying. In particular the AICPA has not been niggardly in bestowing campaign contributions on choice Members of Congress. The principal beneficiary in the House of Representatives of the AICPA's Political Action Committee's (PAC) largesse for 1985-86 was Rep. Frederic Boucher (D-Va.), the driving force behind the amendment to require a prior criminal conviction before a civil RICO suit may lie. The AICPA PAC contributed $3,000 directly to Boucher's campaign chest.[92] That, of course, is only the tip of the CPA financial iceberg. It does not include contributions from individual CPA's who were inspired by favorable publicity

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[90] Among the CPA firms which have been sued under RICO are: Alexander Grant & Co.; Arthur Andersen & Co.; Coopers & Lybrand; Ernst & Whinney; Laventhol & Horwath; Peat Marwick Mitchell & Co.; Price Waterhouse; and Touche Ross & Co.

[91] Included in Quarterly Reports filed with the Clerks of the House and Senate pursuant to the Federal Regulation of Lobbying Act.

[92] A Political Action Committee is permitted to spend up to $5,000 per primary and $5,000 per general election.

and prompting from the AICPA to contribute to Rep. Boucher's campaign.

The anti-RICO crusade has been able to inspire not only substantial financial support,[93] but also some noteworthy personalities to carry its torch in the Halls of Congress, including former Federal Communications Commission Chairman Newton N. Minnow, who was on retainer with the "Big Eight" accounting firm of Arthur Anderson & Co.;[94] Securities and Exchange Commissioner Charles L. Marinaccio, who reminded members of the Senate Judiciary Committee that Vice President Bush's "Blue Ribbon" Task Group on Regulation of Financing Services endorsed amending RICO to preclude its use in "nuisance" suits against financial institutions;[95] and former Senator Roman Hruska (R-Neb.), who is now an attorney in private practice in Nebraska representing banks, securities dealers, insurers and large corporations.[96]

The cries that RICO is having a ruinous effect on business recall similar charges levelled against the antitrust and securities laws at their birth. Leaders of the business community then claimed that passage of the Clayton Antitrust Act "[would] wantonly harass business,"[97] "will be of disastrous consequence to the banks,"[98] will "demoralize . . . business . . . in all lines,"[99] and would result in "dangerous steps toward paternalism, centralization, and socialism. . . ."[100] Instead, of course, the Clayton Act has become, in the words of the Supreme Court, "the Magna Carta of free enterprise."[101]

Business interests and their hired legal guns also sought to disarm the Securities Act of 1933, once the popular outrage over the collapse of

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[93] Among other Members of the House Subcommittee on Criminal Justice to receive contributions from business groups lobbying against RICO is John Bryant (D-Tex.), who has received a total of $2,200 since 1983 from the AICPA, the Securities Industry PAC, the American Insurance Association, the Alliance of American Insurers Federal PAC and Colt Industries, Inc.'s PAC. Subcommittee Chairman John Conyers (D-Mich.), who supports civil RICO, received nothing from any of the above groups during the same time period. As for the Senate Judiciary Committee, Chairman Strom Thurmond (R-S.C.) has received $13,500 in combined contributions since 1983 from the American Bankers Association, Colt Industries, the AICPA and the Alliance of American Insurers. Campaign spending reports filed with the Federal Election Commission.

[94] *Hearings on civil RICO before the Subcommittee on Criminal Justice of the House Judiciary Committee*, 99th Cong., 1st Sess., July 24, 1985.

[95] *Hearings on civil RICO before the Senate Judiciary Commiittee*, 99th Cong., 1st Sess., May 6, 1985.

[96] *Hearings on civil RICO before the Senate Judiciary Committee*, 99th Cong., 1st Sess., May 20, 1985.

[97] Cong. Rec. 9406 (1914).

[98] *Id.* at 9412.

[99] *Id.* at 9183.

[100] *Id.* at 14604.

[101] United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

Wall Street had subsided. As soon-to-be Supreme Court Justice Felix Frankfurther then noted:

> The leading financial law firms who have been systematically carrying on a campaign against the Act have been seeking—now that they and their financial clients have come out of the storm cellar of fear—not to improve but to chloroform the Act. They evidently assume that the public is unaware of the sources of the issues that represent the baldest abuses of fiduciary responsibility and of the lawyers who, to their fat profit, "passed" on those issues.[102]

One would be hard-pressed today to find even a single voice on Wall Street to speak ill in public about the 1933 Securities Act. Nor, however, would one easily find a single voice speaking kindly of RICO.

On Main Street, however, prosecutors and public interest groups seeking effective enforcement measures against white collar crime have mounted a counter-lobby in defense of civil RICO. They argue that RICO provides an effective anti-fraud deterrent and remedy.

Crime committed by "legitimate" businesspersons and professionals has reached staggering proportions.[103] A Justice Department sponsored study of 582 publicly owned corporations found that these businesses violated the law 1,554 during 1975 and 1976.[104] A 1982 study of major corporations by *U.S. News and World Report* found that 115 corporations either had been convicted of at least one major crime or had incurred civil penalties for serious misconduct.[105]

A study of bank failures during the 1980-81 period reveals that the criminal activities of insiders were major factors in approximately one-half of the bank failures and one-quarter of the savings and loan collapses.[106] Allegations are pending against nine of the ten largest defense contractors for an array of fraudulent practices, including overcharges, subcontractor kickbacks, product substitution, false claims, bid rigging and bribery.[107]

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[102] J. SELIGMAN, THE TRANSFORMATION OF WALL STREET, p. 79 (1982).

[103] The first systematic survey of corporate crime, E. SUTHERLAND, WHITE COLLAR CRIME (1949), found each of seventy major non-financial corporations studied had at least one substantial law violation. Together, the seventy companies committed a total of 980 violations, an average of fourteen per company. Violations included financial fraud and misrepresentation in advertising.

[104] M. CLINNARD & P. YEAGER, ILLEGAL CORPORATE BEHAVIOR (1979).

[105] *Supra* note 101.

[106] *Supra* at 19.

[107] *Testimony submitted by National Association of Attorneys General and the National District Attorneys Association to the Subcommittee on Criminal Justice of the House Judiciary Committee*, 99th Cong., 1st Sess., October 9, 1985, page 16.

In all 45 defense contractors were under investigation, of which 36 were named in the *New York Times*, June 22, 1985 at 25. The allegations were as follows:

1) McDonnell Douglas Corporation, cost mischarging.

Medicaid provider and beneficiary fraud amounts to close to two billion dollars a year. Medicare fraud totals another $1.5 billion.[108] Securities theft and fraud cost $8 billion.[109] Commodities investment fraud adds another $200 million.[110] Fraud in the sale of mobile homes costs

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2) Rockwell International Corporation, cost and labor mischarging.
3) General Dynamics Corporation, cost mischarging, subcontractor kickbacks, labor mischarging, product substitution, security compromise, defective pricing, cost duplication, false claims.
4) Lockheed Corporation, labor mischarging.
5) Boeing Company, cost mischarging, supply accountability, labor micharging.
6) General Electric Company, false claims, defective pricing, labor cost mischarging, product substitution.
7) United Technologies Corporation, gratuities, subcontractor kickbacks, cost mischarging, bribery, defective pricing.
8) Raytheon Company, labor mischarging, product substitution.
9) Litton Industries, bribery and subcontractors kickbacks, labor mischarging, false claims, bid-rigging, cost mischarging.
10) Grumman Corporation, cost mischarging.
11) Martin Marietta Corporation, subcontractor kickbacks, cost mischarging.
12) Westinghouse Electric Corporation, cost mischarging.
13) Sperry Corporation, labor mischarging, cost mischarging, defective pricing.
14) Honeywell, Inc., diversion of Government property, bid rigging.
15) Ford Motor Company, defective pricing, labor mischarging, falsification of performance records.
16) Eaton Corporation, conflict-of-interest gratuities, cost mischarging.
17) TRW, Inc., defective pricing, cost mischarging.
18) Texas Instruments, Inc., product substitution.
19) Northrop Corporation, labor mischarging, false progress payments.
20) Avco Corporation, subcontractor kickbacks, cost mischarging.
21) Textron, Inc., cost mischarging.
22) Allied Corporation, conflict of interest.
23) Tenneco, Inc., cost mischarging.
24) GTE Corporation, unauthorized acquisition and utilization of classified data, labor micharging.
25) Sanders Associates, Inc., unauthorized release of contract information.
26) Motorola, Inc., labor mischarging.
27) Congoleum Corporation, mischarging, gratuities theft.
28) Harris Corporation, defective pricing.
29) Gould, Inc., cost mischarging.
30) Emerson Electric Company, cost mischarging, gratuities cost mischarging.
31) Johns Hopkins University, fraud of civilian health and medical program of the uniformed services.
32) Tracor, Inc., product substitution.
33) Lear Siegler, Inc., product substitution.
34) Fairchild Industries, gratuities, product substitution, cost mischarging, false statements.
35) Dynalectron Corporation, cost mischarging.
36) Todd Shipyard Corporation, noncompliance with contract.

[108] *Testimony submitted by National Association of Attorneys General and the National District Attorneys Association to the Subcommittee on Criminal Justice of the House Judiciary Committee* 99th Cong., 1st Sess., Oct. 9, 1985 at 17.

[109] *Id.* at 18.

[110] *Id.* at 18.

upwards of $100 million.[111] These figures just scratch the surface. A 1980 General Accounting Office study concluded that most fraud, even that committed against the federal government with all of its investigatory and prosecutorial resources, goes undetected and unpunished.[112]

In his testimony before a House subcommittee, Russell Mokhiber, representing the "Citizens Coalition to Support and Defend RICO," challenged the assumptions of those, like the Second Circuit in its *Sedima* opinion, and Justice Marshall, who assert that a bright line separates "illegitimate" businesses, such as loan-sharking operations, from "legitimate" businesses, such as brokerage houses.

> Why did the Second Circuit assume that E.F. Hutton was a legitimate business? Because it was a corporation? Because it was a large corporation employing thousands of citizens? Because it was on Wall Street? Should we still refer to Hutton as a "legitimate" corporation after its recent guilty pleas and recent revelations of its fraudulent behavior?[113]

Whereas the average robbery nets approximately $338, the average convicted white collar criminal nets roughtly $300,000.[114] Nevertheless, the efforts and resources of public law enforcement agencies are directed primarily at street crime, according to Ohio Attorney General Anthony J. Celebreeze, Jr. Mr. Celebreeze, in defense of civil RICO, testified before a House subcommittee that " [b]usiness crime is best fought by those most familiar with it—the businessmen, employees and private consumers who have been its victims."[115] Thus, the efficacy of RICO's treble damages and attorney's fees as incentives to private enforcement against business crime.

Steven J. Twist, the Chief Assistant Attorney General of Arizona, put the case for civil RICO in stark terms to the Senate Judiciary Committee: "RICO stands at the very center of this country's efforts to control criminal, organized fraud; it is the single best weapon yet developed to . . . protect the integrity of our free market."[116]

Nevertheless, the "antis"—with their enormous financial resources and battery of high-priced lawyers and lobbyists—have generally succeeded in defining the terms of the RICO legislation debate.

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[111] *Id.* at 19.

[112] *Id.* at 17.

[113] *Hearings on civil RICO before the Subcommittee on Criminal Justice of the House Judiciary Committee*, 99th Cong., 1st Sess., October 29, 1985.

[114] S. SHAPIRO, WAYWARD CAPITALISTS (1984).

[115] *Hearings on civil RICO before the Subcommittee on Criminal Justice, House Judiciary Committee*, 99th Cong., 1st Sess., October 9, 1985.

[116] *Hearings on civil RICO before the Senate Judiciary Committee*, 99th Cong., 1st Sess., July 31, 1985.

VI. Proposed Legislative Amendments

At this writing five amendments to RICO have been introduced, four in the House and one in the Senate.[117] H.R. 2943,[118] introduced in 1985 by Rep. Frederic Boucher (D-Va.), has the backing of most of the business groups and the bi-partisan co-sponsorship of approximately 150 members of the House. H.R. 2943, as compared to the other proposed amendments, has the virtue of simplicity. It would impose a "prior conviction" requirement before a defendant would be subject to suit under civil RICO—the very standing requirement rejected by the Supreme Court in *Sedima*. H.R. 2943 also includes a one year statute of limitations period.

Simplicity and good law are not synonymous, however. In *Sedima*, Justice White pointed out that a prior conviction requirement would pose numerous jurisprudential problems and contravene Congressional intent:

> Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons—not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. Cf. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). This purpose would largely be defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice.[119]

The Court further pointed out that a prior conviction requirement encourages plea-bargaining to non-predicate offenses in order to immunize the defendant against civil exposure to RICO; it "could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof";[120] and it would pose problems if convictions were subsequently reversed.[121] If enacted by Congress, a prior conviction requirement would also pose issues regarding retroactivity. Would, for example, RICO claims already in court be affected?

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[117] Senator Joseph Biden (D-Del.) was expected to introduced a comprehensive amendment in the Senate, generally reflecting the views of RICO supporters. At this writing, however, the bill had not yet been introduced.

[118] H.R. 2943, 99th Cong., 1st Sess. (1985).

[119] *Sedima* at 75.

[120] When the prior conviction requirement was controlling law in the Second Circuit, one plaintiff successfully brought a mandamus action seeking to force the government to institute criminal proceedings against the defendant. Plaintiff argued that the government was obligated to prosecute so that plaintiff would not be automatically precluded from bringing a civil suit under RICO. *In re Grand Jury Application*, No. — (S.D.N.Y. April 26, 1985).

[121] *Sedima*, at 73 n.9.

Despite these problems, H.R. 2943 has been endorsed by the AICPA, the Securities Industry Association, the American Property and Casualty Insurance Industry, the American Council for Life Insurance, the National Association of Manufacturers, Merrill Lynch, Pierce, Fenner & Smith, the Paine Webber Group, the American Bankers Association, the New York Clearing House Association of twelve major New York banks, the United States Chamber of Commerce, the AFL-CIO, the United Auto Workers of America, the United Steelworkers of America and the International Association of Machinists.

AICPA Chairman Ray Groves testified before the Senate Judiciary Committee that a prior conviction requirement would "screen those people who may fairly be charged with real criminal activity [organized crime families] from those who should not be subject to accusations of racketeering."[122] Absent such a screening criterion, Groves raised the spectre that private plaintiffs' counsel, unconstrained by Department of Justice guidelines limiting use of RICO by federal prosecutors, will include a civil RICO claim in nearly every run-of-the-mill business dispute.

Prosecutors, state agency officials and consumer group representatives, on the other hand, have all testified before Congress that a prior conviction standing requirement would, in the words of Oregon Attorney General David B. Frohmayer, "drastically curtail" the effectiveness of RICO in controlling organized criminality.[123] Philip A. Feigin, Chairman of National Association of Securities Administrators Association's Enforcement Section Special Projects Committee, testified that the government lacks the resources to bring all the necessary actions; between 1977 and 1983, inquiries and complaints to the Securities and Exchange Commission's Enforcement Division increased by 341 percent while Enforcement Division staffing actually dropped.[124] A private attorney, Jeffrey W. Herrmann, noted a Justice Department study finding that of the 22,585 civil and criminal cases filed under federal antitrust provisions which also provide for treble damages, 84 percent were brought by private plaintiffs rather than the U.S. government.[125] Another private attorney, Nicholas Gilman, offered a practical example of the effect of a "prior conviction" requirement. Gilman represents, *pro bono*, Vietnam veterans who are alleging a three million dollar scheme by four mobile home manufacturers to defraud the veterans and Veterans Administration's Guaranteed Home Loan Program. The four manufacturers have

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[122] *Hearings on civil RICO before the Senate Judiciary Committee*, 99th Cong., 1st Sess., July 31, 1985.

[123] *Hearings on civil RICO before the Senate Judiciary Committee*, 99th Cong., 1st Sess., August 31, 1985.

[124] *Id.*

[125] *Id.*

already pleaded guilty to 18 U.S.C. § 1001, which criminalizes making false statements to the United States. However, since § 1001 is not among the enumerated predicate acts in § 1961 of RICO, these prior convictions would not satisfy the civil standing requirement proposed in H.R. 2943.[126] By contrast, as the statute is currently written, the veterans can state a RICO claim by alleging mail fraud offenses committed by the manufacturers for which no convictions have been entered.

S. 1521,[127] introduced by Sen. Orrin Hatch, is itself expected to be amended to incorporate a "prior conviction requirement." As currently written, S. 1521 would: (1) limit civil RICO plaintiffs to those persons who suffer "competitive, investment, or other business injury as a result of a violation of section 1962 . . ."; (2) require that at least one of the predicate acts alleged be other than mail, wire or securities fraud; and (3) allow for the award of attorney's fees to defendants if a court finds that the RICO claim is "frivolous and without merit."

The rationale for the "competitive" or "business" injury requirement is that RICO was intended to protect legitimate business from criminal infiltration; therefore, RICO should compensate only persons suffering a business injury caused by a "pattern of racketeering." But as New Mexico Attorney General Paul Bardacke warned in a written submission to the House Subcommittee on Criminal Justice, a "competitive" or "business" injury requirement "would make the civil RICO statute a statute only for businessmen and not for consumers."[128] Limiting plaintiffs to private businesses and investors might also preclude civil suits—both direct and *parens patriae* actions—by the federal and state governments.

Including a provision for the award of attorney's fees to defendants for frivolous claims would add nothing since Rule 11 of the Federal Rules of Civil Procedure, already allows for such a sanction without further statutory authorization. The rationale for requiring that the plaintiff allege at least one predicate act other than fraud—known as the "fraud-plus" requirement—is that this will ensure that some "real mobster-type" involvement is present, a requirement which the Supreme Court rejected in *Sedima*. It would also go a long way toward immunizing the business community against civil RICO liability, since most civil RICO claims are founded on fraud.

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[126] *Hearings on civil RICO before the Subcommittee on Criminal Justice of the House Judiciary Committee*, 99th Cong., 1st Sess., October 9, 1985.

[127] S. 1521, 99th Cong., 1st Sess. (1985).

[128] *Hearings on civil RICO before the Subcommittee on Criminal Justice, House Judiciary Committee*, 99th Cong., 2d Sess. (written statement submitted on February 27, 1986).

A "fraud-plus" requirement is also included in H.R. 2517.[129] The first of two amendments introduced by Rep. Conyers. His more recent bill, H.R. 3985,[130] does not include a "fraud-plus" requirement.

H.R. 2517 is directed primarily at RICO's criminal provisions but would have a significant "spill-over" effect on the civil side. H.R. 2517 would: (1) require that each predicate act occur within five years of an indictment. The current act allows the government or a private plaintiff to allege predicate acts within ten years of the previous act; (2) delete the RICO conspiracy provision, § 1962(d). Since conspiring to commit a predicate act may itself be a predicate act,[131] deleting the conspiracy provision would avoid the anomalous situation of liability under § 1962(d) for "conspiring to conspire"; (3) clarify that a natural person cannot constitute an "enterprise"; and 4) change the name of the statute to the "Criminal Enterprises and Corruption of Enterprises Act" and delete all references to the (arguably pejorative) term "racketeering activity."

The two pending bills preferred by the pro-RICO side are H.R. 3985[132] and H.R. 4892.[133] H.R. 3985 strengthens RICO's anti-fraud provisions while it seeks to allay the business community's concern over being charged with "racketeering." It removes from the "racketeering activity" definitional section, § 1961(1), the predicate acts of mail and wire fraud, and interstate transport of stolen property and it adds a new subsection, § 1961(11), entitled "fraudulent activity." This new category incorporates the current fraud predicates plus several additional ones.[134]

H.R. 3985 also differs from H.R. 2517 in how a "pattern of racketeering" activity is defined. H.R. 2517 requires that predicate acts occur in transactions separate in time and place but which are interrelated by a common scheme, plan or motive; by contrast, H.R. 3985 requires separate transactions but the predicate acts need not be related to one another but only to the "enterprise." (Typically in civil RICO, where most claims are founded on fraud, the necessary relatedness among the acts is present. The broader language of H.R. 3985, however, allows a prosecutor to tackle wholly criminal conglomerates in which, for example, drug

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[129] H.R. 2517, 99th Cong., 1st Sess. (1985).

[130] H.R. 3985, 99th Cong., 2d Sess. (1986).

[131] United States v. Manzella, No. 85-3050, 3 RICO L. Rptr. 568 (5th Cir. Feb. 13, 1986); United States v. Weisman, 624 F.2d 1118, 1123-24 (2d Cir. 1980), *cert. denied*, 449 U.S. 871 (1980).

[132] H.R. 3985, 99th Cong., 2d Sess. (1986).

[133] H.R. 4892, 99th Cong., 2d Sess. (1986).

[134] Section 29 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79z-3; Section 325 of the Trust Indenture Act of 1939, 15 U.S.C. 77yyy; Section 49 of the Investment Company Act of 1940, 15 U.S.C. 80a-48; Section 217 of the Investment Advisers Acts of 1940, 15 U.S.C. 80b-17; and Section 9 of the Commodity Exchange Act, 7 U.S.C. 13.

and gambling offenses may not be related to one another but are related to the same criminal organization.)

H.R. 3985, like H.R. 2517, provides that a violation of § 1962 must be a "knowing" one to be actionable under RICO. This is intended to clarify that a mere negligent violation of § 1962 does not give rise to liability. Since all RICO predicate acts are offenses requiring criminal intent, adding a specific intent requirement could be viewed as surplusage. Nevertheless, addition of an express *mens rea* or *scienter* requirement could be interpreted as requiring that a defendant intend to commit each element of a § 1962 violation, not simply the predicate acts. This would also lend weight in litigation to defense arguments that *respondeat superior* liability cannot attach under RICO because actual, not imputed, knowledge is required to violate § 1962.

H.R. 4892, introduced by Rep. Barney Frank (D-Mass.), adopts the same broad "pattern" definition as in H.R. 3985. The "racketeering activity" section is expanded to incorporate a number of additional predicate acts beyond those included even in H.R. 3985.[135] An express statute of limitations period is fixed at four years. In addition, the Frank amendment would permit recovery not only for injuries to "business or property" but also for personal injuries (but not pain and suffering). Private injunctive relief, without a showing of irreparable injury, would be made expressly available, as would attorney's fees to a plaintiff who "substantially" prevails either through settlement or by the award of injunctive relief. State attorneys general would be authorized to bring *parens patriae* suits under RICO.

Although H.R. 4892 generally expands civil RICO's reach, it offers several concessions to business opponents of RICO. Most significantly, H.R. 4892 makes private RICO claims expressly subject to agreements to arbitrate, unless a "broad societal or public interest", or a contract of adhesion is involved. Also, like H.R. 3985, H.R. 4892 moves fraud-based predicate acts to a separate, less stigmatizing, "fraudulent activity" section. Finally, H.R. 4892, like S. 1521, provides for the award of attor-

[135] Prostitution involving minors; under Title 18, chapter 51 (homicide); chapter 73 (obstruction of justice); chapter 110 (sexual exploitation of children); section 32 (destruction of aircraft or aircraft facilities; section 112 (relating to protection of foreign officials); section 115 (assaults against a federal official's family); section 215 (bank bribery); section 373 (solicitation to commit a crime of violence); section 510 (fraud on Treasury paper or other U.S. securities); section 511 (forgery of state and other securities); section 566 (theft or bribery in benefit programs); section 844 (explosive materials); sections 1029 and 1039 (fraud in connection with access devices and computers); section 1203 (hostage taking); section 1344 (bank fraud); section 1952A (murder-for-hire); section 1952B (violent crime in aid of racketeering); sections 2318 and 2320 (counterfeit materials); section 1029 (the Credit Card Fraud Act of 1984); and any offense under the Controlled Substance Act of the Controlled Substances Import and Export Act.

ney's fees to defendants against whom frivolous or abusive suits have been filed.

Other proposals have been advanced in Congressional hearings and various articles to amend RICO which have not yet found their way into a bill, including: adopting a "prior conviction requirement" but with exemptions for the federal government and perhaps state governments as well; deleting mail and wire fraud as predicate acts in civil RICO altogether; eliminating treble damages; making treble damages discretionary rather than mandatory; capping the amount of attorney's fees available to a prevailing plaintiff; exempting the banking and securities industry from treble damage RICO liability on the ground that these industries are already subject to a pervasive scheme of federal regulation; assessing trebled costs and attorney's fees against plaintiffs or their counsel who bring frivolous RICO claims; defining "pattern of racketeering" as requiring not only at least two related acts but also a threat that more racketeering acts will follow unless relief is granted; limiting the availability of *respondeat superior* under RICO; awarding attorney's fees to the prevailing party, not only to a prevailing plaintiff; and repealing RICO's liberal construction clause.

It is not clear just when Congress will take action on RICO. The "antis" have several times thought that a vote on the "prior conviction requirement" was imminent in the House Subcommittee on Criminal Justice, where a majority of the members are co-sponsors of the measure, but thus far Chairman Conyers has deferred any action. The introduction of the Frank bill has at least temporarily slowed the anti-RICO coalition's momentum toward gaining passage of a prior conviction requirement. Whether the "antis" ultimately will settle for less than a full bottle will depend on whether the Frank bill in the House the expected Biden bill in the Senate significantly erode support for the "prior conviction requirement."

VII. Conclusion

The small number of judgments for plaintiffs to date demonstrates that a RICO claim, like any other, can be successfully defended on the merits. Practically speaking, white collar RICO defendants enter litigation with significant advantages: the best and most expensive legal talent available, substantial resources enabling extensive and expensive motions practice, and a judiciary which is generally hostile to civil RICO. Therefore, RICO's treble damage and attorney's fees provisions simply help restore the litigation balance, encouraging plaintiffs and their counsel to pursue meritorious claims which would otherwise not be cost effective.

A 1985 CBS-*New York Times* poll revealed that 55 percent of the

America people believe that most corporate executives are dishonest and yet go unpunished.[136] Slaps on the wrist for the likes of E.F. Hutton do little to inspire public confidence that all, regardless of economic class, are equal in the sight of the law. Instead, such selective enforcement fosters public cynicism that ours is a two-tier system of justice, one for the "haves" and another for the "have-nots".

Gutting civil RICO's encouragement of private attorneys general by imposing a "prior conviction" or "fraud-plus" requirement, or eliminating the treble damages provision, would undermine enforcement efforts against white collar crime and deprive injured parties of a valuable remedy. It would also further the popular suspicion that the rich and powerful—society's leaders and role models—are held to a lesser standard of conduct than are average citizens. That is not the message Congress should be sending to the American people.

As Judge George C. Pratt of the Second Circuit wrote in *Furman v. Cirrito*, "[i]t seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm."[137]

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[136] Rothschild, *No Place for Scruples*, The Progressive, November 1985, at 28.

[137] Furman v. Cirrito, 1 RICO L. Rptr. No. 2, C-1, C-6 (2d Cir. 1984), *reversed on other grounds*, 53 U.S.L.W. 2063 (1985).