Land & Water Law Review

Volume 22
Issue 1 *Special Focus: Protecting the National Parks from External Threats*

Article 8

1987

Civil RICO after Sedima: An Exercise in Restraint

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COMMENT

Civil RICO After *Sedima:* An Exercise in Restraint

The Racketeer Influenced and Corrupt Organizations Act[1] was enacted as Title IX of the Organized Crime Control Act of 1970.[2] The Act's common name is RICO.[3] Its purpose is to eradicate organized crime in the United States.[4] The principal evil that RICO confronts is organized crime's infiltration of legitimate business.[5] RICO also seeks to remove the profit from illegal activity by "separating the racketeer from his dishonest gains."[6] RICO defines several racketeering activities including "any act or threat involving murder, kidnaping, gambling, arson, robbery, extortion," drug dealing, mail and wire fraud, and white slavery.[7] The list goes on. RICO defendants face stiff criminal penalties.[8] Civil remedies are also provided so that individuals, acting as private attorneys general, may seek treble damages for injury suffered to business or property by violations of RICO.[9]

The broad language necessary to reach organized criminals and the treble damage provision of civil RICO created a bonanza for the excessively litigious.[10] Some courts questioned the extraordinary uses plaintiffs were finding for civil RICO and began erecting extra-statutory barriers to limit those uses. Conflicts developed. In 1985, the Supreme Court decided

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1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985).

2. Organized Crime Control Act of 1970, Pub. L. No. 91-452, ch. 96, 84 Stat. 922, 941-48 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985)).

3. Webb & Roddy, *Some Practical Implications of Civil Rico Cases,* 7 CAMPBELL L. REV. 299, 300 (1985).

4. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

5. "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). "[T]he legislative history forcefully supports the view that the major purpose of Title IX is to address the infiltration of legitimate business by organized crime." United States v. Turkette, 452 U.S. 576, 591 (1980).

6. *Russello,* 464 U.S. at 28.

7. 18 U.S.C. § 1961(1) (Supp. III 1985). The federal mail fraud statute is found at 18 U.S.C. § 1341 (1982). The wire fraud statute is found at 18 U.S.C. § 1343 (1982).

8. 18 U.S.C. § 1963 (Supp. III 1985).

9. 18 U.S.C. § 1964 (1982 & Supp. III 1985). The concept of private litigation has, for some time, been considered one of the surest weapons for effective enforcement in antitrust law. Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965). The RICO civil remedy embodies a private attorney general concept similar to that used in antitrust statutes. This concept encourages private challenges to organized criminal activity. The treble damages language of RICO section 1964(c) is modeled after section 4 of the Clayton Antitrust Act. 15 U.S.C. § 15(a) (1982); *see also* Sedima, S.P.R.L. v. Imrex Co., Inc., 105 S. Ct. 3275, 3279 (1985). Congress created the treble-damages remedy "precisely for the purpose of encouraging *private* challenges to antitrust violations." Reiter v. Sontone Corp., 442 U.S. 330, 344 (1979) (emphasis in original). As in antitrust legislation, the treble-damages and attorney's fees provisions of RICO were included to encourage victims to pursue RICO violators in federal court. The private attorney general provisions of RICO "are in part designed to fill [the] prosecutorial gaps" inherent in using only a criminal remedy. *Sedima,* 105 S. Ct. at 3284.

10. Schacht v. Brown, 711 F.2d 1343, 1361 (7th Cir. 1983), *cert. denied,* 104 S. Ct. 508, 509 (1984).

Sedima, S.P.R.L. v. Imrex Co., Inc.,[11] to quell the growing conflicts among the circuit courts. *Sedima* has substantially altered civil RICO litigation. However, a number of uncertainties linger. The threshold question is whether a RICO claim is appropriate, that is, whether the elements of the action fit the spirit of RICO as well as the letter of the law. If a practitioner, after careful consideration, chooses to add a RICO claim he should recognize these three important issues that remain after *Sedima:* the "pattern requirement," the "enterprise versus person" distinction, and the application of a uniform statute of limitations.

THE RICO STATUTE

RICO delineates four separate criminal violations. First, no person may invest income received from a pattern of racketeering in an enterprise that affects interstate commerce.[12] For example, this provision is violated if a narcotics trafficker purchases a legitimate business with money acquired from multiple drug transactions.[13] Second, it is a crime to use illegitimate means or illegitimate funds to acquire or maintain an interest in a legitimate business.[14] For example, this provision is violated if an organized crime figure takes over a legitimate business by intimidating the owners, through a series of arsons or extortionate acts, into selling.[15] Third, it is an offense to conduct or operate a business through a pattern of racketeering or the collection of an unlawful debt.[16] An automobile dealer, for example, violates this section if he runs a stolen car ring from his car dealership.[17] Finally, it is criminal to conspire to commit any of the above substantive offenses.[18]

Section 1963 contains RICO's criminal penalties. These include 20 year prison terms, fines up to $25,000 or twice the offense's gross profits, forfeiture to the United States of the defendant's interest in an enterprise

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11. 105 S. Ct. 3275 (1985).

12. 18 U.S.C. § 1962(a) (1982). Under RICO, a "pattern" requires at least two predicate acts. *Id.* § 1961(5) (1982). Predicate acts are those federal and state crimes that RICO describes in detail as racketeering activity. Youmans v. Simon, 791 F.2d 341, 347 (5th Cir. 1986).

13. U.S. DEPT OF JUSTICE, RACKETEERING INFLUENCE AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 2 (1985) [hereinafter RICO MANUAL]. Congress made plain its concern about organized crime's influence in the business community. In the Organized Crime Control Act of 1970, Congress stated its findings and purpose:

> [T]his [illegally obtained] money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; . . . organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .

Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

14. 18 U.S.C. § 1962(b) (1982).

15. RICO MANUAL, *supra* note 13, at 2.

16. 18 U.S.C. § 1962(c) (1982).

17. RICO MANUAL, *supra* note 13, at 2.

18. 18 U.S.C. § 1962(d) (1982).

connected to the offense, and forfeiture of any property acquired through racketeering activity.[19]

Section 1964 provides the various civil remedies.[20] The United States may seek to enjoin future violations, to dissolve an enterprise or divest a person of her interest in an enterprise, and other appropriate relief.[21] In addition, a person who has been injured in his business or property by a RICO violation may recover treble damages, the cost of the suit, and reasonable attorney's fees.[22]

When it enacted RICO, Congress provided stiff penalties and new remedies to deal with those engaged in organized criminal activities.[23] Though strict construction of criminal statutes is the general rule, Congress expressly dictated that RICO is to be "liberally construed to effectuate its remedial purposes."[24] Moreover, leniency has no part in the pursuit of RICO wrongdoers.[25] However, some feel that RICO's liberal criminal construction should not apply to its private civil provisions.[26] Thus, civil RICO has become the focus of increased judicial and academic comment in recent years.[27]

PRE-*SEDIMA* INTERPRETATIONS

An early judicial concern with civil RICO was its application to persons other than organized criminals. Plaintiffs, mesmerized by the prospect of treble damage awards, have sought to apply the RICO civil

19. *Id.* § 1963 (Supp. III 1985). It should also be noted that, in 1984, Congress increased the maximum fine for all federal felonies to $250,000 for individuals, $500,000 for organizations, or twice the offenses' proceeds. *Id.* § 3623 (Supp. III 1985).

20. 18 U.S.C. § 1964 (1982 & Supp. III 1985).

21. *Id.* § 1964(a).

22. *Id.* § 1964(c). "Person" is defined broadly as "any individual or entity capable of holding a legal or beneficial interest in property." *Id.* To bring a civil RICO action, the plaintiff must prove the same elements as the government in a criminal prosecution. Eaby v. Richmond, 561 F. Supp. 131, 134 (E.D. Pa. 1983). The civil plaintiff, however, will probably be held to a lesser standard of proof. *Id; see also Sedima,* 105 S. Ct. at 3275, 3282-83 (1985).

23. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

24. *Id.* at 947. Federal criminal law rarely contains such statements. The *Russello* Court was impressed with the directive's merits: "So far as we have been made aware, this is the only substantive federal criminal statute that contains such a directive; a similar provision, however, appears in the Criminal Appeals Act, 18 U.S.C. § 3731 . . . ." Russello v. United States, 464 U.S. 16, 27 (1983).

25. *Id.* at 29. The *Russello* Court cited United States v. Turkette, 452 U.S. 576 (1981):

> We find no occasion to apply the rule of lenity to this statute. "[T]hat 'rule,' as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress had expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Callanan v. United States, 364 U.S. 587, 596 . . . (1961) (footnote omitted). There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play. See United States v. Moore, 423 U.S. 122, 145 . . . (1975), quoting United States v. Brown, 333 U.S. 18, 25-26, 92 . . . (1948)."

Turkette, 452 U.S. at 587, n.10.

26. *Sedima,* 105 S. Ct. at 3288 (Powell, J., dissenting).

27. Webb & Roddy, *supra* note 3, at 300.

remedies to all kinds of cases,[28] including those involving "garden variety" business fraud.[29] Some courts, however, perceived this as a misuse of RICO's civil provisions[30] and erected extra-statutory judicial limitations to RICO's civil application.

One limitation was the racketeering or RICO injury requirement.[31] Courts held that the plaintiff must show an injury distinct from the predicate acts alone. Courts required that the injury be derived from the pattern of racketeering activity rather than from the underlying acts which combined to form that pattern.[32] Another limitation was the organized

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28. Though dormant through most of the 1970s, use of civil RICO has greatly increased since then. *Sedima*, 105 S. Ct. at 3277. The Court noted that of "270 district court RICO decisions prior to [1985], only 3% (nine cases) were decided throughout the 1970's, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983 and 43% in 1984." *Id.* at n.1. (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55 (1985).

29. Webb & Roddy, *supra* note 3, at 300; *see also* Sedima, S.P.R.L. v. Imrex, Co., Inc., 741 F.2d 482, 487-88 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

> The expression "garden-variety fraud" as used in RICO cases refers to "fraudulent" conduct in the market place that, without reliance upon RICO, is regularly subjected to regulation pursuant to statutory schemes or traditional common law doctrines. Myriad types of conduct have been described as falling into this "garden-variety fraud" category, including violations of the federal securities laws, bankruptcy fraud, violations of antitrust laws and anticompetitive practices generally, contract disputes, and fraud related to sales, financing, and other commercial arrangements.

RICO STRATEGIES 27 (J. Fricano ed. 1986).

30. *Sedima*, 105 S. Ct. at 3278.

31. Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240 (S.D.N.Y. 1983).

32. *Id.* at 1240-41. *See also Sedima*, 741 F.2d at 485. The Second Circuit provided a further explanation of the racketeering activity requirement:

> If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury. . . . [W]e can envision a number of circumstances in which injury could be attributable to a pattern but not to the individual predicate acts. For example, a plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts. Or, a plaintiff might be forced to incur an unwanted debt or to take on an unwanted business partner because an enterprise has placed his business in jeopardy by using felonious means to cause a number of his customers to withhold their custom. In each instance, the plaintiff would have suffered an injury to his business or property by reason of the defendants' use of a RICO enterprise and a pattern or racketeering acts; the individual racketeering acts, however, could not be said to have caused the same injury.

Bankers Trust Co. v. Rhoades, 741 F.2d 511, 517 (1984) (emphasis in original). This interpretation was analogous to a limitation developed in antitrust law:

> [J]ust as an antitrust plaintiff must allege an "antitrust injury," so a RICO plaintiff must allege a "racketeering injury"—an injury "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter."

Sedima, 105 S. Ct. at 3279 (quoting Sedima, S.P.R.L. v. Imrex, Co., Inc., 741 F.2d 482, 496 (2d Cir. 1984)).

crime nexus.[33] Under this limitation, a RICO action would lie only where a connection between the defendant and organized crime was alleged and proved.[34]

SEDIMA—THE SEMINAL CASE

In 1978, the Second Circuit announced another significant limitation. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*,[35] the court held that a criminal conviction on the underlying predicate offenses was necessary before a plaintiff could bring a private civil action.[36] This decision sharply limited the opportunity to bring a section 1964(c) action in the Second Circuit. Other courts which studied the issue specifically rejected the Second Circuit's prior conviction requirement.[37] Further, in *Haroco v. American National Bank & Trust of Chicago*,[38] the Seventh Circuit explicitly rejected the prior criminal racketeering injury requirement[39], which the Second Circuit had also endorsed.[40] To resolve these circuit conflicts, the Supreme Court granted certiorari, combining *Sedima* and *Haroco*.[41]

In *Sedima*, the Court expressly rejected the Second Circuit's prior conviction requirement saying a plain reading revealed that the word "conviction" did not appear in any relevant portion of the statute.[42] Further, the Court held that the relevant activities consisted "not of acts for which the defendant had been convicted, but of acts for which he could be."[43] The Court also rejected the Second Circuit's equation of "violation" with

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33. *See* Waterman Steamship Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981); Aldair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 746-48 (N.D. Ill. 1981); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

34. Bennet v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982) (rejected the organized crime nexus); *see also* Plains Resources, Inc. v. Gable, 782 F.2d 883, 887 (10th Cir. 1986) (using the Supreme Court's *Sedima* decision as grounds for rejecting the organized crime nexus).

35. 741 F.2d 482 (2d Cir. 1984). Plaintiff Sedima was a Belgian corporation which conducted an import/export business in electronic, mechanical, and hydrolic parts. Imrex, an American corporation, exported aircraft related electronic parts. Sedima contracted with Imrex to provide electric component parts to a NATO subcontractor in Belgium. Imrex obtained parts and sent them to Europe pursuant to orders received from Sedima. Sedima became convinced that Imrex was submitting to Sedima fraudulent invoices containing overstated purchase prices, shipping costs, and financing charges. Sedima sued Imrex in federal district court, alleging, among other things, breach of contract and fiduciary duty, unjust enrichment, and conversion. In addition, Sedima alleged three RICO violations. Two counts charged that the fraudulent purchase orders, invoices, and credit memoranda constituted a pattern of racketeering activity, the predicate acts being wire and mail fraud. The third count charged a RICO conspiracy. Sedima sought treble damages and attorney's fees. *Id.* 484-85. The district court dismissed the RICO counts saying Sedima failed to allege a RICO-type injury. Sedima, S.P.R.L. v. Imrex, Co., Inc., 574 F. Supp. 963, 965 (E.D.N.Y. 1983).

36. *Sedima*, 741 F.2d at 496.

37. Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1286-87 (7th Cir. 1983); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982).

38. 747 F.2d 384 (7th Cir. 1984).

39. *Id.* at 393; *see also* Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408, 413 (8th Cir. 1984).

40. *Haroco*, 747 F.2d at 393-94; *see also* Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 494-96 (2d Cir. 1984).

41. 105 S. Ct. 901-02 (1984).

42. *Sedima*, 105 S. Ct. at 3281.

43. *Id.*

conviction under section 1964(c).[44] The Court said "violation" did not imply criminal conviction, but only a failure to adhere to legal requirements.[45] In sum, the court found no support in RICO's legislative history, language, or policy that a RICO civil remedy may proceed only after a defendant has been criminally convicted.[46]

The Court also rejected the "racketeering injury" requirement as "vague" and "amorphous."[47] Again, the Court found no such requirement in the statute.[48] Further, the Court said that this requirement was suspect because the lower courts were having difficulty defining it.[49] The Court declared that the compensible injury is the harm caused by the predicate acts, not some amorphous racketeering injury.[50] The Court also made clear that courts may apply RICO to any person—not just mobsters.[51] As written, RICO is not limited to organized criminal activity within the legitimate business community.[52]

The Court also examined the issue of standards of proof. In dicta, the Court stated:

> We are not convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. There is no indication that Congress sought to depart from this general principal here.[53]

This was obiter, however, and the Court left for another day the standard of proof issue.[54] In addition, the Court implicitly rejected the organized crime nexus. Two circuit courts have used *Sedima* to reject explicitly the organized crime connection.[55]

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44. *Id.; see also* Sedima, S.P.R.L. v. Imrex, Co., Inc., 741 F.2d 482, 498-99 (2d Cir. 1984).
45. *Sedima*, 105 S. Ct. at 3281.
46. *Id.* at 3284.
47. *Id.* at 3284-85.
48. *Id.* at 3284-87.
49. *Id.* at 3284. In Justice White's words "the court below is not alone in struggling to define 'racketeering injury' and the difficulty of that task itself cautions against imposing such a requirement." *Id.* He went on to say "the evident difficulty in discerning just what the racketeering injury requirement consists of would make it rather hard to apply in practice or explain to a jury." *Id.* at 3285 n.12.
50. *Id.* at 3285-86.
51. *Id.* at 3285.
52. *Id.* at 3287. This view is not new. The Court had made similar statements in earlier cases. "In view of the purposes[,] goals [and] language of the statute, we are unpersuaded that Congress . . . confined the reach of the law only to the narrow aspects of organized crime and, in particular, under RICO, *only* the infiltration of legitimate business." United States v. Turkette, 452 U.S. 576, 590 (1980) (emphasis in original).
53. *Sedima*, 105 S. Ct. at 3282-83 (citations omitted).
54. *Id. But see* Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481 (5th Cir. 1985) (citing *Sedima* as strongly suggesting that the preponderance standard applies).
55. Plains Resources, Inc. v. Gable, 782 F.2d 883, 887 (10th Cir. 1986); Gilbert v. Prudential-Bache Sec., 769 F.2d 940, 942 (3d Cir. 1985).

RICO ELEMENTS LEFT UNDECIDED BY *SEDIMA*

The Pattern Requirement

Proving a pattern of racketeering activity is a key element of each substantive RICO offense. Section 1961(5) does not "define" pattern. Rather, it "requires" that a racketeering pattern include "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering."[56]

The absence of a meaningful pattern definition has contributed much to the breadth of civil RICO.[57] In *Sedima,* the Supreme Court shed light on the pattern requirement, stating that "while two acts are necessary [to form a pattern], they may not be sufficient. Indeed, in common parlance, two of anything do not generally form a pattern."[58] This view is further supported by RICO's legislative history.[59] Senator McClellan, a leading proponent of the bill, stated that "proof of two acts of racketeering activity, without more, does not establish a pattern . . . ."[60] Justice White, writing for the majority in *Sedima,* further counseled that the definition of pattern at 18 U.S.C. § 3575(e) aids in interpreting RICO's pattern requirement.[61] Section 3575 states that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[62]

Since *Sedima,* the lower courts have dealt with the section 1962(c) pattern requirement in various ways. In *Bank of America v. Touche Ross*

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56. 18 U.S.C. § 1961(5) (1982).

57. *Sedima,* 105 S. Ct. at 3287. Justice White stated:

> The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern."

Id. Most frequently, business fraud cases are brought under section 1962(c) and will involve mail and wire fraud. Webb & Roddy, *supra* note 3, at 306.

58. *Sedima,* 105 S. Ct. at 3285 n.14.

59. S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969). The Senate Judicial Committee report stated:

> The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided . . . largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of Title IX is thus not 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 continuity plus relationship which combines to produce a pattern. The concept "pattern" is thought to provide no due process constitutional barrier to criminal sanctions, as a "racketeering activity" . . . must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute.

Id.; see also Sedima, 105 S. Ct. at 3285 n.14.

60. 116 CONG. REC. 18,940 (1970).

61. *Sedima,* 105 S. Ct. at 3285 n.14.

62. 18 U.S.C. § 3575(e) (1982).

& Co.,[63] the Eleventh Circuit held that nine acts of wire and mail fraud over a period of three years satisfied the *Sedima* pattern requirement.[64] The defendant in *Touche* argued that each predicate act had to occur in separate criminal episodes to be a pattern.[65] The court rejected this separate episode argument declaring that acts that are part of the same scheme or transaction are distinct predicate acts if each act violates RICO.[66]

The Seventh Circuit found a racketeering pattern in the mailing of nine fraudulent tax returns to the Illinois Department of Revenue over a nine month period.[67] The court did not discuss the impact of *Sedima* regarding the pattern requirement, but, rather, cited *United States v. Weatherspoon*[68] for the proposition that "each mailing in a scheme to defraud is a separate offense so that several separate acts of mail fraud constitute a pattern of racketeering activity."[69]

The Fifth Circuit rejected an argument that *Sedima* required *more* than two predicate acts of mail fraud in a civil RICO case which involved the mailing of fraudulent invoices.[70] The two acts of mail fraud formed a pattern because they were "related," while in *Sedima,* the Court had implied that two "isolated" acts would not constitute a pattern.[71]

In *Alexander Grout & Co. v. Tiffany Industries, Inc.*,[72] the Eighth Circuit declined to consider the pattern issue. The court noted, however, that 26 alleged acts of mail fraud and four alleged acts of wire fraud constituted a sufficient "continuity plus relationship" to satisfy the Supreme Court's concerns in *Sedima.* The court noted that its ruling would not extend RICO's reach to "sporadic activity."[73]

Finally, in *Superior Oil Co. v. Fulmer*,[74] the Eighth Circuit rejected a RICO verdict for insufficient proof of a racketeering activity pattern.[75] The defendants in *Fulmer* allegedly stole gas from the plaintiff's pipeline.[76] The plaintiff had proved the "relationship" prong of the pattern require-

63. 782 F.2d 966 (11th Cir. 1986).
64. *Id.* at 971.
65. *Id.*
66. *Id.* Quoting from an earlier case, the court said, "If distinct statutory violations are found, the predicate acts will be considered to be distinct irrespective of the circumstances under which they arose." *Id.* (quoting United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985)).
67. Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 313 (7th Cir. 1985).
68. 581 F.2d 595 (7th Cir. 1978).
69. *Phillips*, 771 F.2d at 313 (citing *Weatherspoon*, 581 F.2d at 602).
70. R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985).
71. *Id.* It is important to note, however, that conspiracy does not require commission of a predicate act. 18 U.S.C. § 1962(d) (1982). Rather, conspiracy is a distinct violation of the statute and will stand on its own merits. Onesti v. Thomson McKinnon Sec., Inc., 619 F. Supp. 1262, 1266 (N.D. Ill. 1985).
72. 770 F.2d 717 (8th Cir. 1985).
73. *Id.* at 718 & n.1.
74. 785 F.2d 252 (8th Cir. 1986).
75. *Id.* at 254-56.
76. *Id.* at 254.

ment by showing several related acts of mail and wire fraud.[77] The court found, however, that the plaintiff failed to show that the defendants had engaged in this type of activity in the past or that they were engaged in other criminal activities elsewhere.[78] The court concluded that it strained the legislative history[79] to speak of a single fraudulent effort, carried out by several fraudulent acts, as a pattern of racketeering activity.[80]

The practitioner must be careful not blindly to expect two predicate acts to meet the RICO pattern requirement. The statute requires two acts, but two acts may not be enough. Counsel should look for the threat of continuing activity and not just sporadic behavior.[81] Before pleading a civil RICO claim, the practitioner should consider whether the alleged predicate acts imply that the defendant regularly engages in the predicate crimes. Such an approach would be a significant step in reducing the unnecessarily excessive application of civil RICO.[82]

The Enterprise Element

RICO also has an "enterprise" requirement.[83] Under section 1962, it is illegal for a person (1) to acquire an interest in an "enterprise" with income derived from a pattern of racketeering activity,[84] (2) to acquire or maintain an "enterprise" through a pattern of racketeering activity,[85] or (3) to use a pattern of racketeering activity to conduct or participate in the affairs of an "enterprise."[86] RICO defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[87]

In *Turkette,* the Supreme Court clearly stated the RICO enterprise is not limited to legitimate enterprises but also includes associations with an exclusively criminal purpose.[88] The Court reached this conclusion after reviewing RICO's language and legislative history on the enterprise concept.[89] Despite the Congressional focus, the *Turkette* Court found "enterprise" to be broad enough to include associations with wholly unlawful purposes.[90] Using this broad definition, courts have applied RICO to

77. *Id.* at 257.
78. *Id.*
79. S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969); *see supra* note 59 and accompanying text.
80. *Fulmer,* 785 F.2d at 257 (quoting Northern Trust Bank/O'Hare N.A. v. Inryco, Inc., 615 F. Supp. 828, 832 (N.D. Ill. 1985)).
81. *Sedima,* 105 S. Ct. at 3285 n.14.
82. Weissman, *Reflections on RICO's Pattern Requirement after Sedima,* 2 RICO L. Rep. 201 (1985) (RICO Law Reporter, Inc.).
83. 18 U.S.C. § 1962 (1982).
84. *Id.* § 1962(a).
85. *Id.* § 1962(b).
86. *Id.* § 1962(c).
87. *Id.* § 1961(4).
88. United States v. Turkette, 452 U.S. 576, 580-81 (1980); *see also* Russello v. United States, 464 U.S. 16 (1983).
89. *Turkette,* 452 U.S. at 580-81, 586-87.
90. *Id.*

several types of associations, lawful and unlawful, including unions,[91] schools,[92] corporations,[93] law firms,[94] a state court,[95] and the office of a state governor.[96]

The RICO plaintiff may satisfy the enterprise element if he proves that the entity in question has a legal existence.[97] However, if the alleged enterprise is a group of individuals only associated in fact, the plaintiff must show "a group of persons associated together for a common purpose of engaging in a course of conduct."[98] Because the enterprise requirement and the racketeering pattern requirement are distinct elements of a RICO claim, an "association in fact" enterprise must be an entity that is separate from the pattern of racketeering in which it engages.[99] Therefore, while the plaintiff's evidence may prove both the enterprise's existence and the pattern of racketeering, proving one does not always prove the other.[100]

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91. United States v. Provenzano, 688 F.2d 194, 199-200 (3d Cir. 1982) (union operating by using pattern of unlawful payments), *cert. denied*, 459 U.S. 1071 (1982); United States v. Rubin, 559 F.2d 975, 978 (5th Cir. 1977) (union operating benefit fund via pattern of embezzlement) *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979).

92. United States v. Weatherspoon, 581 F.2d 595, 597-98 (7th Cir. 1978).

93. United States v. Weisman, 624 F.2d 1119, 1120 (2d Cir.) (theater operated through pattern of securities and bankruptcy fraud), *cert. denied*, 449 U.S. 871 (1980); United States v. Parness, 503 F.2d 430, 440-42 (2d Cir. 1974) (foreign corporation - "RICO's legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises" *cert. denied*, 429 U.S. 820 (1976).

94. United States v. Jannotti, 501 F. Supp. 1182, 1185-86 (E.D. Pa. 1980) (law firm operated through pattern of payment of bribes), *rev'd on other grounds and conviction reinstated*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982), *aff'd*, 729 F.2d 213 (3rd Cir. 1984), *cert. denied*, 105 S. Ct. 243 (1985).

95. United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (Judge convicted on RICO count and Florida's Third Judicial Circuit Court held to be the enterprise).

96. United States v. Thompson, 685 F.2d 993, 994-95 (6th Cir.), *cert. denied*, 459 U.S. 1072 (1982). The following cases also illustrate the broad application of the enterprise definition: United States v Dozier, 672 F.2d 531, 543 & n.8 (5th Cir.) (state agency—Louisiana Department of Agriculture), *cert. denied*, 459 U.S. 943 (1982); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir.) (co-operative—scheme of securities fraud), *cert. denied*, 459 U.S. 1040 (1982); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (police department).

97. United States v. Cauble, 706 F.2d 1322, 1340 (5th Cir. 1983); *see also* 18 U.S.C. § 1961(4) (1982).

98. United States v. Turkette, 452 U.S. 576, 583 (1980).

99. *Id.*

100. *Id.* In the words of the *Turkette* Court:

> [T]o secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, [i.e.], a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts . . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity;" it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved . . . .

Id.

Appellate courts often rely on *Turkette* for the proposition that the plaintiff must prove both the enterprise's existence and the connected pattern of racketeering activity. They take different positions, however, concerning the degree of proof required. After *Turkette,* the Eighth Circuit analyzed the enterprise issue in *United States v. Bledsoe,*[101] a criminal RICO case. According to *Bledsoe*, "enterprise" ordinarily means an activity by an organization established to perform an undertaking or project. Further, an enterprise cannot simply be the undertaking of the racketeering acts nor can it be the minimal association which surrounds those acts. Any two criminal acts will necessarily be surrounded by organization of some kind. No two people can jointly commit a crime without some association separate from the crime's commission. Hence, unless the enterprise element requires proof of some organization apart from the racketeering activity and separate from the organization necessary to the racketeering, RICO simply punishes the commission of two specified crimes committed within a ten-year period.[102]

According to the *Bledsoe* court, Congress never intended RICO be so applied.[103] Rather, the court concluded that a RICO enterprise must have "commonality of purpose," a "continuity of structure and personality," as well as an "ascertainable 'structure' distinct from that inherent in the conduct of a racketeering activity pattern."[104] The court stated that this 'structure' could be proved by showing that the group engaged in "a diverse pattern of crimes" or that the group's organization or authority went beyond that "necessary to perform the predicate acts."[105]

In *Bennett v. Berg,*[106] the Eighth Circuit applied *Bledsoe* to civil RICO, requiring proof of an enterprise by facts other than those required to prove the predicate acts of racketeering.[107] This is the strictest enterprise concept among the circuits.[108] It requires that the enterprise have an existence entirely distinct and independent from the racketeering activity.[109]

The Third Circuit has reached results similar to the Eighth Circuit. In *United States v. Riccobene,*[110] after examining *Turkette,* the Third Circuit provided a helpful analysis of the attributes of a RICO enterprise. First, there must be an ongoing organization exhibiting some decision making structure, whether or not that structure controls and directs the group's affairs on an ongoing, rather than ad hoc, basis.[111] Second, the various associates must operate as a controlling unit, that is, "each per-

101. 674 F.2d 647 (8th Cir. 1982).
102. *Id.* at 664.
103. *Id.*
104. *Id.* at 665.
105. *Id.*
106. 685 F.2d 1053 (8th Cir. 1982), *aff'd in part, rev'd in part,* 710 F.2d 1361 (en banc), *cert. denied,* 104 S. Ct. 527 (1983).
107. *Id.* at 1060-61 & n.9.
108. RICO MANUAL, *supra* note 13, at 33.
109. *Id.*
110. 709 F.2d 214 (3d Cir.), *cert. denied sub. nom.* Ciancaglini v. United States, 464 U.S. 849 (1983).
111. *Id.* at 222.

son [must] perform a role in the group consistent with the organizational structure . . . and which furthers the activities of the organization."[112] Finally, the organization must be:

> "an entity separate and apart from the pattern of activity in which it engages." . . . [I]t is not necessary to show the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.[113]

The Eighth Circuit's view is the minority, however.[114] In *United States v. Mazzei*,[115] the Second Circuit concluded that nothing in RICO's legislative history supports the Eighth Circuit's "distinctness" requirement.[116] Further, the court said that, under the Eighth Circuit's interpretation, if a large scale criminal organization engaged solely in heroin trafficking, it would not be subject to RICO, while small-time criminals engaged in occassional sales of drugs and handguns could be prosecuted under RICO. The statute never intended such anomalous results.[117] Moreover, the court found that the government need not prove that the alleged enterprise had engaged in activities separate and distinct from those specifically contemplated in a conspiracy.[118]

Three days prior to deciding *Mazzei*, however, the Second Circuit appeared to adopt a more guarded view of "enterprise." In *United States v. Ivie*,[119] Croatian terrorists were indicted under RICO. The Justice Department charged the group as an "association in fact" criminal enterprise, organized to use "terror, assassination, bombings, and violence . . . to foster [their] beliefs . . . and to eradicate and injure persons whom they

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112. *Id.* at 223.

113. *Id.* at 223-24 (citation omitted). This approach was reiterated in Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786 (3d Cir. 1984). In *Seville*, the Third Circuit noted that the enterprise element pleading requirements are less demanding than the ultimate proof requirements. *Id.* at 790. The Fourth Circuit also appears to be following the lead of the Eighth and Third Circuits. United States v. Tillett, 763 F.2d 628 (4th Cir. 1985). The *Tillett* court cited both *Bledsoe* and *Riccobene* in affirming a RICO conviction. *Id.* at 632. The court noted that this organization had a continuity of structure which had existed beyond that necessary to commit the predicate crimes. *Id.*

114. RICO MANUAL, *supra* note 13, at 34; *see also* United States v. Hewes, 729 F.2d 1302, 1310 (11th Cir. 1984); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), *cert. denied*, 105 S. Ct. 156, 165 (1984); United States v. Mazzei, 700 F.2d 85, 89-90 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); United States v. Elliot, 571 F.2d 880, 898 (5th Cir. 1973) (an enterprise can be any group of individuals "whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes").

115. 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983).

116. *Id.* at 89-90.

117. *Id.*

118. *Id.* at 89.

119. 700 F.2d 51 (2d Cir. 1983).

perceived as in opposition to their beliefs."[120] While the court upheld the criminal convictions, it reversed the RICO convictions, saying the enterprise or the predicate acts had to have a "financial purpose."[121] The court ruled that the "enterprise" in question was beyond RICO's scope because the defendants were advancing a political cause in a nonfinancial, albeit criminal, way.[122]

The *Ivie* approach was moderated somewhat in *United States v. Bagarie,*[123] another Croatian terrorist case. In *Bagarie,* the Second Circuit upheld the RICO convictions, finding that using extortion to finance the group's terrorist activities was among the predicate racketeering acts.[124] Later that same year, the Second Circuit applied the *Bagarie* and *Mazzei* holdings to civil RICO in *Moss v. Morgan Stanley, Inc.*[125] In *Moss,* the defendants ran a continuing partnership to engage in securities laws violations through insider trading. The appellate court rejected the trial court's view that an enterprise must have an economic significance separate from the racketeering activity.[126]

These Second Circuit cases correctly reflect RICO's language and legislative history. In requiring a financial purpose, either the pattern of racketeering activity or the RICO enterprise must have an economic goal. It is not necessary that the plaintiff prove a separate economic purpose for each. Also, courts should not require that the evidence used to establish an enterprise's existence be distinct from the evidence used to establish the racketeering pattern. The Supreme Court, in *Turkette,* clearly stated that even though the pattern of racketeering activity and the enterprise requirement were separate elements of a RICO violation, different proof need not be adduced for each requirement.[127] Even the Eighth Circuit, which required separate proof to establish enterprise and pattern in *Bennett v. Berg,*[128] admitted that in particular cases, proof of these two elements may coalesce.[129] Still, the Eighth Circuit's attempt to restrain the indiscriminate application of RICO to the commission of two offenses that also happen to be predicate offenses under RICO is noteworthy.[130] Plaintiffs and their attorneys should resist "reaching for the brass ring in every case"[131] and give heed to the Eighth Circuit's counsel.[132]

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120. *Id.* at 58. The alleged predicate acts were conspiracy to commit murder and attempted arson. *Id.*

121. *Id.* at 65. "[T]he term 'enterprise' quite clearly refers to the sort of entity in which funds can be invested and a property interest . . . acquired . . . ." *Id.* at 60.

122. *Id.* at 61-62, 65.

123. 706 F.2d 42 (2d Cir.), *cert. denied,* 104 S. Ct. 133 (1983).

124. *Id.* at 58.

125. 719 F.2d 5 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1280 (1984).

126. *Id.* at 21-23.

127. United States v. Turkette, 452 U.S. 576, 583 (1980).

128. 685 F.2d 1053 (8th Cir. 1982).

129. United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982), *cert. denied,* 103 S. Ct. 823 (1983).

130. RICO MANUAL, *supra* note 13, at 36.

131. Cashco Oil Co. v. Moses, 605 F. Supp. 70, 71 n.3 (N.D. Ill. 1985).

132. RICO MANUAL, *supra* note 13, at 36.

Another issue that has split the circuits is whether the "person," that is, the RICO defendant, must be distinct from the "enterprise." In *Haroco,* the Supreme Court resolved that a RICO plaintiff need not show a "racketeering injury" in addition to the injury caused by the predicate acts.[133] The Court did not address the issue of whether a corporation may constitute both the defendant and the enterprise in a section 1962(c) action. RICO defines person separately from the enterprise. Under section 1962, it is the person's actions in connection with the enterprise that are proscribed, not the actions of the enterprise. Hence the question: When may the enterprise itself be liable as the person-defendant?

In *United States v. Hartley,*[134] the Eleventh Circuit provided several reasons why the enterprise/person distinction is not required.[135] First, the statute and case law call for a broad application of RICO.[136] Second, the plaintiff must still prove a separate corporate identity. This duality would not read the enterprise element out of the statute.[137] Next, counsel may pierce the corporate veil to show that the corporation is a separate legal entity and also an association of it's officers, agents, and employees.[138] Finally, the *Hartley* court reasoned, a contrary ruling would offend common sense. Requiring a person/enterprise distinction could result in an individual who was an enterprise not being prosecuted, while his associates in the commission of the predicate acts were.[139]

Several courts have reached the opposite result. The Third,[140] Fourth,[141] Seventh,[142] Eighth,[143] and Ninth[144] Circuits have concluded that section 1962(c) requires a person be separate from the enterprise. The Seventh Circuit analyzed the issue in *Haroco v. American National Bank and Trust.*[145] First, the court reasoned that a person and an enterprise must be distinguished, because section 1962(c) requires the liable person be employed by, or associated with, an enterprise that affects interstate commerce.[146] Second, under the Eleventh Circuit analysis, a corporation could be subject to liability not only when the corporation is the criminal

133. Haroco, Inc. v. American Nat'l Bank & Trust Co., 105 S. Ct. 3291, 3292 (1985).
134. 678 F.2d 961 (11th Cir. 1982).
135. *Id.* at 986-989.
136. *Id.* at 988.
137. *Id.*
138. *Id.* at 989.
139. *Id.*
140. B.F. Hirsch, Inc. v. Enright Ref. Co., 751 F.2d 628, 633 (3d Cir. 1984).
141. United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied,* 459 U.S. 1105 (1983).
142. Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400-02 (7th Cir. 1984), *aff'd on other grounds,* 105 S. Ct. 3291 (1985).
143. Bennett v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *rev'd in part, aff'd in part, en banc,* 710 F.2d 1361, *cert. denied,* 104 S. Ct. 527 (1983).
144. Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984).
145. 747 F.2d 384, 400-02 (7th Cir. 1984), *aff'd on other grounds,* 105 S. Ct. 3291 (1985). The Supreme Court granted certiorari in *Haroco* to resolve the issue of whether a RICO plaintiff had to show a "racketeering injury" in addition to the injury caused by the predicate acts. The Court did not address the issue of whether a corporation may constitute both the defendant and the enterprise in a section 1962(c) action.
146. *Id.* at 400.

perpetrator, but also where the corporation was the passive instrument or victim of the lower level employee's racketeering activity.[147] Finally, the corporation may still be liable in section 1962(c) actions when it is the criminal perpetrator.[148] Further, section 1962(a) allows a suit where the corporation directly benefits from the racketeering pattern.[149] Such reasoning, the *Haroco* court concluded, is in accordance with the "primary purpose of RICO, which . . . is to reach those who ultimately benefit from racketeering, not those who are victimized by it."[150]

The Seventh Circuit analysis is correct. "Person" is defined as an individual or legal entity.[151] The "enterprise" definition also includes individuals as well as legal entities and associations in fact.[152] The definitions must be incorporated into the language of section 1962. Under section 1962(a), the individual person or a corporate-enterprise may receive income from racketeering activity and invest that income in an enterprise affecting commerce. It is also possible under section 1962(b) to substitute corporation for person and not do violence to the statute. A corporation or an individual can engage in racketeering behavior to acquire, maintain, or control an interest in a corporation.

Subsection 1962(c) presents the problem. As the *Haroco* court posited, a corporation cannot be "employed by or associated with" itself.[153] The very use of the phrase a "person employed by or associated with any enterprise" to run that enterprise through racketeering contemplates a distinction between the person acting and the enterprise acted upon.[154] The person acting may be a corporate-enterprise, but it may not be the same enterprise acted upon.

The Eleventh Circuit equated corporation with "association in fact" when it defined enterprise.[155] The statutory language permits this. As the Seventh Circuit pointed out, the corporation and the association in fact are substantially different with respect to the RICO person element.[156] The "person" definition includes individuals and legal entities. The definition does not include the "association in fact." The association in fact cannot hold an interest in property nor can it be haled into court.[157] Without question, a corporation is subject to RICO liability by virtue of the "person" definition. Also, each individual participant in the association in fact is liable under the same definition. The nebulous association itself, however, cannot be.[158]

147. *Id.* at 401.
148. *Id.* at 402.
149. *Id.* Note that unlike section 1962(c), section 1962(a) does not contain language suggesting that the liable person and the enterprise must be separate.
150. *Id.*
151. 18 U.S.C. § 1961(3) (1982).
152. *Id.* § 1961(4).
153. *Haroco*, 747 F.2d at 400.
154. *Id.*
155. United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982).
156. *Haroco*, 747 F.2d at 401.
157. *Id.*
158. *Id.*

Under section 1962, a corporation may play four roles: the victim, the prize, the instrument, or the perpetrator.[159] The enterprise's liability should depend on whether it is the perpetrator in the RICO scenario.[160] Thus, under this analysis, the corporate-enterprise may be liable as the RICO defendant when it is the perpetrator or beneficiary of a racketeering activity pattern. The enterprise should not be the defendant when it is merely the "prize, victim, or passive instrument of racketeering."[161]

Civil RICO Statute of Limitations

RICO has no statute of limitations.[162] Therefore, courts apply the more analogous state limitations statutes in civil RICO actions.[163] A problem, however, is whether the court should choose the state statute that is most analogous to RICO's statutory scheme or most closely akin to the alleged predicate acts.

The best approach is to choose the statute most analogous to RICO as a whole. Under this approach, all RICO claims in a forum would have the same statute of limitations. The alternative is a confusing array of varying periods depending on the nature of the alleged predicate acts.[164] Even though several courts have adopted one limitations statute for RICO actions, results vary from state to state.[165] In Wyoming, for example, three statutes of limitations might apply to civil RICO actions: four years where fraud is alleged,[166] two years under the "liability imposed by federal statute" limitations statute,[167] and one year under the forfeiture statute.[168]

Defense counsel would probably want the shorter state forfeiture statute to apply, arguing that RICO is a penalty statute. The Federal District Court for the Eastern District of New York has adopted this ap-

159. Blakey, *The Rico Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 307 (1982).

160. *Haroco*, 747 F.2d at 401.

161. *Id.* at 402.

162. A.J. Cunningham Packing v. Congress Fin. Corp., 792 F.2d 330, 337 (3d Cir. 1986) (Sloviter, J., concurring).

163. Johnson v. Railway Expressway Agency, 421 U.S. 454, 462 (1975).

164. Wyoming law provides an excellent example of the confusing results inherent in using the limitations statute attached to the alleged predicate acts. If the alleged predicate acts include wire fraud and violations of Wyoming's securities laws, the court must decide which limitations statute to apply, that is, the four-year period for fraud, WYO. STAT. § 1-3-105(a)(iv)(D) (1977), or the 2 year period provided for in the securities law, WYO. STAT. § 17-4-122(e) (1977).

165. Teltronics Serv., Inc. v. Anaconda Ericsson, Inc., 587 F. Supp. 724, 733 (E.D.N.Y. 1984); *see also* Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985) (construing Alabama fraud statute of limitations); Durante Brothers & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239, 248-49 (2d Cir. 1985) (a New York action to recover upon a liability, penalty or forfeiture created by statute); Morley v. Cohen, 610 F. Supp. 798, 807-10 (D. Md. 1985) (applied Maryland statute applicable to a civil action at law); Electronic Relays (India) Pvt. Ltd. v. Pascente, 610 F. Supp. 648, 652 (N.D. Ill. 1985) (applied Illinois statute applicable to treble damages actions stating the treble damages provision is the most distinctive provision of RICO).

166. WYO. STAT. § 1-3-105(a)(iv)(D) (1977).

167. *Id.* § 1-3-115.

168. *Id.* § 1-3-105(a)(v)(D).

proach.[169] On the other hand, plaintiff's counsel would seek the longer fraud limitations statute,[170] arguing that the longer statute comports with RICO's remedial purpose.[171] The federal district court in Utah recently applied Utah's three-year fraud limitations statute in a RICO case.[172] The court rejected the defendant's claim that Utah's penalty or forfeiture limitations statute should apply. Rather, the court concluded that RICO does not create a new liability, but only a new remedy.[173] Thus, the fraud statute was the most analogous state statute to RICO.

The third applicable Wyoming statute provides a two-year limitations period for liability created by federal statute.[174] The statutes reads: "All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which no period of limitations is provided in such statute, shall be commenced within two (2) years after the cause of action has accrued."[175] This statute is unhelpful because of the phrase "other than a forfeiture or penalty."[176] In *Victoria Oil Co. v. Lancaster Corp.*,[177] the federal district court in Colorado declined to apply a virtually identical statute to civil RICO claims brought in Colorado.[178] Rather, that court chose Colorado's residuary limitations statute, stating no other Colorado statute was appropriate.[179]

Until Congress adds a statute of limitations to RICO, courts must decide which state limitations statute to apply to civil RICO actions. However, such claims should not be subject to different statutes of limitations merely because of factual distinctions. Congress has expressly decreed that RICO, being a remedial statute, is to be liberally construed. Courts should apply a liberal limitations statute to RICO civil actions to effectuate this remedial purpose.

Wyoming has a residuary statute. It provides a ten-year limitations period in actions for which no other provision is made.[180] This statute

169. Teltronics Serv., Inc. v. Anaconda Ericsson, Inc., 587 F. Supp. 724, 733 (E.D.N.Y. 1984).

170. The Sixth Circuit has recently adopted the statute of limitations for fraud as the appropriate limitations statute for a RICO claim. Silverbery v. Thomson McKinnon Sec., Inc., 787 F.2d 1079, 1083 (6th Cir. 1986). Other cases adopting the state fraud statute of limitations for RICO claims include: Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985); A.B. Alexander v. Perkins Elmer Corp., 729 F.2d 576, 577 (8th Cir. 1984).

171. Lawson v. Nationwide Mortgage Corp., 628 F. Supp. 804, 807 (D.D.C. 1986).

172. Argosy 1981-B, Ltd. v. Bradley, 628 F. Supp. 1359, 1361 (D. Utah 1986).

173. *Id.* (citing *Sedima*, 105 S. Ct. 3275, and Steven Operating, Inc. v. Home State Savings, 105 F.R.D. 7 (S.D. Ohio 1984)).

174. WYO. STAT. § 1-3-115 (1977).

175. *Id.*

176. Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239, 248-49 (2d Cir. 1985) (holding a RICO claim should be brought under 3 year limitations statute for an action to recover upon liablity, *penalty or forfeiture* created or implied by statute), *see* N.Y. CIV. PRAC. L. & P. § 214(2) (McKinney Supp. 1986); *see also* Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984). Some courts, however, have held that RICO actions are remedial rather than penal. *See* D'Iorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982); State Farm Fire and Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 682, 683-85 (N.D. Ind. 1982).

177. 587 F. Supp. 429 (D. Colo. 1984).

178. *Id.* at 431-32.

179. *Id.* at 432.

180. WYO. STAT. § 1-3-109 (1977).

should be used for civil RICO actions brought in Wyoming. Civil RICO claims are not limited to fraud actions. Rather, actionable conduct varies. Hence, the fraud limitations statute may not be the most analogous to the predicate acts upon which the civil claim is based. Choosing the residuary statute provides a uniform limitation period and frees trial courts from the task of analyzing each case's predicate acts to decide which limitations statute to apply. Further, choosing the longer limitation period is harmonious with the Supreme Court's admonition that the RICO statute be read broadly[181] and with Congress' mandate that RICO be "liberally construed to effectuate its remedial purposes."[182]

CONCLUSION

RICO has evolved into something quite different from what Congress conceived.[183] Its drafters envisioned a statute providing weapons for an all-out assault on organized crime.[184] Even though courts may question the extraordinary uses to which civil RICO has been put, Congress has spoken. And what Congress has created, Congress must modify. Courts should not amend statutes.

Congress should clarify civil RICO in several ways. Specifically, it should better define "pattern," clarify the person versus enterprise duality question, and state a specific statute of limitations. The Supreme Court has concluded that, as worded, civil RICO is applicable to individuals and enterprises outside the grip of organized crime. The practioner, however, should not "throw-in" a RICO claim to cases involving "garden variety" business fraud. Such claims unduly complicate what may already be complex litigation. Plaintiffs may face judicial hostility to what many judges still perceive is misuse of RICO. In addition, some juries may be reluctant to brand an otherwise respected businessman as a "racketeer." Indiscriminate RICO claims may have extortive results. To avoid ruinous exposure, the prudent defendant may choose to settle a meritless case. Wisdom must be exercised lest abuse of RICO give rise to the very mischief that Congress intended to deter.[185] Civil RICO is a powerful weapon in the commercial litigation arsenal. Counsel must carefully balance RICO's benefits and disadvantages before deciding to employ it.

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181. *Sedima*, 105 S. Ct. at 3286.
182. Organized Crime Control Act of 1970, Pub. L. No. 91-452, ch. 96, § 904(a), 84 Stat. 922, 947 (1970).
183. *Sedima*, 105 S. Ct. at 3287.
184. Russello v. United States, 464 U.S. 16, 26 (1983).
185. *Sedima*, 105 S. Ct. at 3295 (Marshall, J., dissenting).