Land & Water Law Review

Volume 25
Issue 1 *Special Focus: NEPA at Twenty*

Article 13

1990

Business and Commercial Applications of Civil RICO

Joe Micheal Cox

Business and Commercial Applications of Civil RICO

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO) was originally enacted as Title IX of twelve titles in an omnibus anti-crime package, the Organized Crime Control Act of 1969.[1] Congress stated that RICO's primary purpose was:

> [T]he eradication of organized crime in the United States 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 unlawful activities of those engaged in organized crime.[2]

The "enhanced sanctions and new remedies" included providing both criminal and civil penalties against those who engaged in what has been termed "enterprise criminality."[3] The civil penalties provided by the statute grew out of both public and private causes of action. Courts would find it significant that the private cause of action was rooted in what is, essentially, a criminal statute.[4]

In general, RICO targets three types of conduct. RICO makes it a crime (1) to invest funds derived from a pattern of racketeering activity, (2) to obtain an interest in or control of an enterprise through a pattern of racketeering activity, and (3) to conduct the affairs of an enterprise through a pattern of racketeering activity.[5] RICO also makes it a crime to conspire to commit any of these crimes.[6] The statute then provides a private cause of action for anyone injured commercially "in his business or property" by the proscribed conduct and allows treble damages plus attorney's fees and costs to the successful plaintiff.[7] In theory, RICO is a simple statute proscribing the infiltration of organized criminal elements into legitimate business and into the fabric of the nation's economy. In reality, the application of the statute is anything but simple. The Seventh Circuit in *Sutliff v. Donovan Companies, Inc.,* commented that it was created in the image of a treasure hunt.[8]

In reviewing the statute, it is useful to remember that its violation requires "a pattern of racketeering activity" affecting interstate commerce and an "enterprise" distinguishable from the defendant.[9] Both of these concepts derive from extremely broad statutory definitions. The "enterprise" consists of two or more "persons" who advance

---

1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987).
2. S. Rep. No. 617, 91st Cong., 1st Sess. 2 (1969).
3. Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies,* 53 TEMP. L.Q. 1009, 1013-14 (1980).
4. Saine v. A.I.A., Inc., 582 F. Supp. 1129 (D. Colo. 1984).
5. 18 U.S.C. § 1962 (1982).
6. *Id.*
7. *Id.* § 1964(c).
8. 727 F.2d 648, 652 (7th Cir. 1984).
9. 18 U.S.C. § 1962(c) (1982).

their affairs through a pattern of racketeering activities.[10] The "pattern of racketeering activity" requires "*at least two acts* of racketeering activity"[11] (emphasis added) occurring within ten years of one another. These four small words, "at least two acts," have caused much dissention among the circuits. While each concept has been the object of intense litigation, the "pattern" requirement has generated the most controversy. This is because Congress did not "so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern."[12]

This comment discusses the private cause of action under civil RICO. First it looks at the legislative history behind Title IX, concluding that the statute's breadth and scope are neither aberrations nor accidents of the law making process but a deliberate reflection of Congressional intent. Then the discussion turns to the courts in an effort to see the statute through the eyes of those responsible for interpreting and applying the title. The comment briefly surveys the wide range of applications the civil RICO remedy has found in the business community and examines the interpretations various circuits provide for the elements of a RICO cause of action.

The comment then examines the confusion in the circuits resulting from courts attempting to use these elements to limit the increasing scope of the statute. It looks closely at the most elusive of these elements, the pattern of racketeering activity, a source of continuing turbulence in the litigation surrounding civil RICO. The interrelated elements of the "person" and the "enterprise" are explored with respect to the way in which they can affect the availability of damages to the plaintiff. The comment examines the effort to contain the civil remedy through increasing use of sanctions based on Rule 11 of the Federal Rules of Civil Procedure.

The discussion then approaches civil RICO's relationship with the older private cause of action for securities fraud, SEC Rule 10b-5.[13] The comment analyzes the overlap between the two laws and Supreme Court treatment of the private cause of action under each approach. In this analysis, it reviews the Court's treatment of the wire and mail fraud predicate acts that give rise to a RICO claim.

Finally, the comment accesses the merits of civil RICO as the statute is being applied. RICO is a powerful tool for reducing the incentives to commit systemic fraud. RICO targets bad faith dealing in business transactions. While the statute is in need of some technical changes in order to protect its viability, civil RICO is seen as constructive, appropriate legislation that fills a long neglected gap in American law.

---

10. *Id.* §§ 1961(4), 1962(c).
11. *Id.* § 1961(5).
12. H.J. Inc., v. Northwestern Bell Tel. Co., 109 S. Ct. 2893, 2899 (1989).
13. 17 C.F.R. § 240.10b-5 (1988).

LEGISLATIVE HISTORY

The Congress that created civil RICO fully intended to create legislation that would fill existing gaps in American law. Civil RICO was created expressly for the purpose of expanding the remedies available to victims of organized criminality. Congress intended that the Organized Crime Control Act of 1969 create a new initiative in the drive against organized crime.[14] This initiative was to include elements of both formal law enforcement and private citizen involvement. The record contains strong statements that the substantive sections of RICO would be applicable in areas far removed from the traditional definition of organized crime.[15] Congress felt that a broad remedy was necessary for the statute to be effective.[16] RICO provides a private cause of action for injuries incurred from a wide variety of criminal acts, ranging from white slavery to fraud in the sale of securities. This breadth was carefully deliberated and intentionally written into the Act.[17] In vigorous and lengthy debate, Congress discussed proposals for limiting RICO's scope such that it could only reach the traditional "mobster" category of criminal. The legislators concluded that an effort to limit the statute in this way would functionally emasculate the Act.[18]

Senator McClellan, a sponsor of the Organized Crime Control Act of 1970, stated in his address to the Senate concerning title IX of the Act that:

> It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime.[19]

More on point, responding to bar committee complaints that the statute was overbroad, the Senator said:

> The Senate report does not claim . . . that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial exploitation . . . and experience has shown they are commonly committed by participants in organized crime. That is all the title IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.[20]

---

14. S. Rep. No 617, 91st Cong., 1st Sess. 2 (1969).

15. *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary,* 91st Cong., 1st Sess. 475 (1969) (statement of Mr. Lawrence Speiser, Director, Washington, D.C. office of the American Civil Liberties Union).

16. 116 CONG. REC. 18940 (1970) (statement of Senator McClellan on the Organized Crime Control Act of 1970).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

Senator McClellan concluded his remarks concerning the Senate Report on title IX with the observation that the title "offers the first major hope of beginning to eradicate the growing organized criminal influence in legitimate commerce."[21] It is notable that the Senator referred to "organized criminal influence in legitimate commerce", not to "racketeering" or "the Mafia." Senators McClellan and Hruska, RICO's co-sponsors in the Senate, had been involved in hearings related to organized criminality throughout the decade of the 1960's.[22] While the majority of their work focused on organized crime in its more traditional image, they were aware that the function of a legislature, unlike that of a court, is to devise broad remedies for whole classes of problems.[23]

The Senators intended to write legislation designed to protect legitimate commerce from harm by organized criminal influences from whatever source. Senator McClellan said:

> [Congress] has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.[24]

The thoroughness of the legislative hearings preceding RICO and the careful explanations of the statute offered by sponsors and committee members who crafted the bill have led courts to conclude that the statute's novelty and scope were not unintended.[25] Courts have reviewed the language of the statute against the backdrop of its legislative history and held that Congress fully intended to create a new area of federal involvement with RICO.[26]

Both lobbyists and legislators argued that RICO's coverage of white collar crime was too broad.[27] The houses of Congress focused on this concern and ultimately rejected it by overwhelming majorities. The first Senate vote on the Organized Crime Control Act favored the Act 73 to 1.[28] The House of Representatives passed the Act by a margin of 341 to 26.[29] Final approval came in the Senate by voice vote.[30] There is a

21. *Id.* at 18941.

22. Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch,* 88 COL. L. REV. 774, 780-81 (1988).

23. 116 CONG. REC. at 18914.

24. *Id.*

25. United States v. Turkette, 452 U.S. 576, 581 (1981); Haroco v. Am. Nat'l Bank and Trust Co. of Chicago, 747 F.2d 384, 390 (7th Cir. 1984); Schacht v. Brown, 711 F.2d 1343, 1353 (7th Cir. 1983), *cert. denied,* 464 U.S. 1002 (1983).

26. United States v. Turkette, 452 U.S. 576 (1981); *Haroco,* 747 F.2d 384, 390; Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983).

27. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 NOTRE DAME L. REV. 237, 264 n.78, 268-79 (1982) for a detailed review of these criticisms and responses to them.

28. 116 CONG. REC. at 972.

29. *Id.* at 35,363.

30. *Id.* at 36,296.

clear record of Congressional consideration of the issues involved in the Act's coverage of white collar crime and an extraordinary legislative mandate to implement the statute. The Supreme Court decision in *Sedima, S.P.R.L. v. Imrex Co.*,[31] that modifications restricting civil RICO should not come by judicial intervention but through legislative action was grounded on a solid record of legislative intent.

CIVIL RICO, THE STATUTE AND THE COURTS

The controversy over RICO's breadth did not end in the halls of Congress. Although the statute was enacted by a wide margin after a thorough consideration of the issues involved, the focus in the preliminary Congressional hearings was on traditional "Mafia" style organized crime. The context in which civil RICO has been used, however, has often involved "garden variety" business frauds.[32] In one study, 40 percent of the cases involved allegations of securities fraud, and 37 percent alleged "common law fraud in a commercial or business setting."[33]

This pattern of litigation has led to a significant amount of hostility toward civil RICO among federal judges. The hostile judges have a distaste for branding what they see as ordinary commercial transactions as "racketeering."[34] Initially, courts allowed defenses like requiring proof of an organized crime link, a prior criminal conviction, a structured criminal enterprise, a competitive injury or a racketeering enterprise injury in their attempts to limit RICO suits to a more traditional "mafia" class of defendant.[35] The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.* cast all of these defenses into the fire.[36]

An understanding of *Sedima* is essential to any explanation of subsequent civil RICO litigation. This comment will return to *Sedima* many times in the following pages. The Second Circuit attempted to limit RICO in two ways in *Sedima.*[37] The case involved charges by a Belgian importer that a New York based exporter had fraudulently invoiced and received payment for services in excess of those actually provided.[38] First, the circuit court held that the defendant in a civil RICO action must have suffered a prior conviction.[39] Second, the court held that a plaintiff, to have standing to assert a RICO claim, must have suffered

31. 473 U.S. 479 (1985).
32. *Id.* at 492.
33. P. Batista, CIVIL RICO PRACTICE MANUAL 4-5 (1987).
34. Barr v. WUI/TAS. Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975); Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd,* 719 F.2d 5 (2d Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984). The common dictionary definition of "racketeer" is "one who extorts money or advantages by threats of violence, by blackmail, or by unlawful interference with business or employment." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 705 (1965).
35. *Sedima,* 473 U.S. at 493-99.
36. *Id.*
37. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984).
38. *Id.* at 484.
39. *Id.* at 496-504.

a "racketeering injury."[40] Neither of these limitations survived Supreme Court review.[41]

Acknowledging that RICO applied to a diverse range of commercial litigants, the Supreme Court reversed the Second Circuit. The Court conceded that civil RICO had evolved "into something quite different from the original conception."[42] But the Court held that amendments to civil RICO could not come through judicial activism. If civil RICO was to be curtailed, the burden lay with Congress.[43]

In light of the attempts by the lower courts to limit the scope of civil RICO, a surprising variety of claims have succeeded under the statute. Despite the disapproval of individual judges, the right of private action under RICO is clearly established.

> 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 the suit, including a reasonable attorney's fee.[44]

The clause giving individuals a right to sue is simple and straightforward. Two points stand out. First, damages are limited to business and property injuries. Second, damages are tripled. The first point limits the statute's scope while the second has prompted attorneys to be ever more creative in seeking novel applications.[45]

The application of civil RICO requires a comprehensive knowledge of the statutory sections involved. The provisions of 18 U.S.C. § 1961 through § 1964 must be read together to obtain an overview of civil RICO's requirements. The trigger in section 1964(c) is "a violation of section 1962."[46] Section 1962 involves four subsections, but it is section 1962(c) that has been the primary source of civil litigation:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's

---

40. *Id.* at 494-96.
41. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).
42. *Id.* at 500.
43. *Id.*
44. 18 U.S.C. § 1964(c) (1982).
45. Commerce Clearing House, RICO BUSINESS DISPUTES AND THE "RACKETEERING" LAWS at 53 (1984) (citing Hellerman v. Blank, No. 82 Civ. 3351 (E.D.N.Y. Nov. 9, 1983)). Increased incentive for bringing private actions under RICO may result where punitive damages are allowed in addition to treble compensatory damages, attorney fees and costs. Some early decisions rejected punitive damages in RICO claims, *Id. But see* Hocker v. First Commodity Corporation of Boston, No. C85- 0130-B (D. Wyo. May 22, 1986) where Judge Brimmer allowed $3,000,000 in punitive damages to be added to a compensatory judgment of $69,802 (before trebling). The case was settled out of court while pending appeal.
46. 18 U.S.C. § 1964(c) (1982).

affairs through a pattern of racketeering activity or collection of unlawful debt.[47]

Two key terms in this subsection are defined in section 1961:

(4) "enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;[48]

The predicate acts to a "pattern of racketeering activity" are defined in section 1961 under the term, "racketeering activity."[49] They include a broad range of specific acts and statutory crimes. Plaintiffs have typically relied on three particular "racketeering activities" to support civil RICO litigation. These predicate acts are violations of 18 U.S.C. § 1341 relating to mail fraud, violations of 18 U.S.C. § 1343 relating to wire fraud, and fraud in the sale of securities.[50] A characteristic of a RICO cause of action is that it requires the commission of two or more of the crimes defined in section 1961. RICO was intentionally designed to overlap other statutes.

RICO's overlap of other statutes, both federal and state, has been a source of criticism. Justice Marshall, dissenting in *Sedima*, complained

47. *Id.* § 1962(c).

48. *Id.* § 1961(4)-(5).

49. *Id.* § 1961 defines "racketeering activity" to include, among other things:

> 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 section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891- 894 (relating to extortionate credit transactions), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), 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 2314 and 2315 (relating to interstate transportation of stolen property), 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), or (D) any offense involving bankruptcy fraud, [or] fraud in the sale of securities.

Id.

50. Black, *Racketeer Influenced and Corrupt Organizations (RICO) — Securities and Commercial Fraud as Racketeering Crime after Sedima: What is a "Pattern of Racketeering Activity"?*, 6 PACE L. REV. 365, 367 (1986).

that civil RICO stretched the mail and wire fraud statutes "to their absolute limits" and brought important areas of tort law which had belonged to the states under federal jurisdiction.[51] The Justice added that:

> the broad reading of the civil RICO provision also displaces important areas of federal law. For example, one predicate offense under RICO is "fraud in the sale of securities." . . . By alleging two instances of such fraud, a plaintiff might be able to bring a case within the scope of the civil RICO provision.[52]

In his *Sedima* dissent, Justice Marshall cites *Blue Chip Stamps v. Manor Drug Stores*[53] for "decades of . . . development of private civil remedies under the federal securities laws."[54] The Justice fears the *Sedima* decision will eliminate precedents in areas such as "standing, culpability, causation, reliance, and materiality, as well as the definitions of 'securities' and 'fraud.' "[55] Justice Marshall continues his *Sedima* dissent citing *Santa Fe Industries, Inc. v. Green*[56] as an example of the Court's traditional reluctance to federalize state securities law.[57] He argues that the majority decision in *Sedima* will defeat the court's policy of leaving substantial areas of the law of securities regulation to the states.[58]

For his argument against the majority decision in *Sedima,* Justice Marshall chose not to refer to his own majority opinion approving overlap between securities laws in *Herman & MacLean v. Huddleston.*[59] The *Huddleston* opinion stated that " '[t]he fact that there may well be some overlap was neither unusual nor unfortunate.' "[60] In the context of RICO, the Justice felt that overlap was very unfortunate. The issue in *Huddleston* was whether the overlap is so complete as to entirely supplant the prior legislation.[61] The instances of overlap under RICO are not so complete. Congress' intent was that RICO not supplant but supplement prior legislation.[62]

This supplementation depends on a thorough understanding of the elements of a RICO private cause of action. The pattern of racketeering activity is a separate element, discrete from the fostering enterprise.[63] The enterprise element, in turn, is an assembly of "person"

---

51. *Sedima,* 473 U.S. at 504 (Marshall, J., dissenting).
52. *Id.*
53. 421 U.S. 723 (1975).
54. *Sedima,* 473 U.S. at 505 (Marshall, J., dissenting).
55. *Id.*
56. 430 U.S. 462 (1977).
57. *Sedima,* 473 U.S. at 507 (Marshall, J., dissenting).
58. *Id.*
59. 459 U.S. 375 (1983).
60. *Id.* at 383 (quoting United States v. Naftalin, 441 U.S. 768, 778 (1979) (quoting SEC v. National Sec., Inc., 393 U.S. 453, 468 (1969))).
61. *Huddleston,* 459 U.S. at 383.
62. *Sedima,* 473 U.S. at 498.
63. 18 U.S.C. § 1961(5) (1982).

elements.[64] For civil RICO to apply, a "person" must advance the affairs of the enterprise through a pattern of racketeering activity.[65] The plaintiff, in turn, must have been damaged by this pattern of racketeering activity.[66] The plaintiff must prove each of these elements if the cause of action is to survive. With this background in mind, we turn to an analysis of the various elements of a civil RICO claim.

PATTERN OF RACKETEERING ACTIVITY

Since *Sedima,* some courts have attempted to limit RICO actions by increasing the plaintiff's burden in proving the "pattern of racketeering activity" element. The broad language of the statute has given the courts significant latitude in structuring their definitions of a "pattern." The statutory definition of a "pattern of racketeering activity" is deceptively simple.[67] It "requires at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."[68] The plain language of the statute does not require the acts be related.

The early courts, however, were usually required to interpret the statute in its criminal context. The courts were not comfortable interpreting two unrelated acts as a "pattern" where criminal penalties were to be imposed. In *United States v. Stofsky,* union officials and employees solicited bribes from officials of union-shop manufacturers to overlook bargaining agreement violations.[69] The Second Circuit upheld their RICO convictions[70] after the district court stated that "the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts."[71]

Other courts adopted a lower standard for determining continuity between the racketeering acts.[72] The Fifth Circuit held that the predicate acts "must be related to the affairs of the enterprise but need not otherwise be related to each other" in *United States v. Elliot.*[73] *Elliot* involved a loosely associated group of individuals (six defendants and 37 unindicted co-conspirators).[74] In varying combinations, these individuals advanced the affairs of their enterprise through engaging in 25 racketeering activities from arson to drug dealing.[75] The *Elliot* Court used a metaphor to describe how the acts of the enterprise were related.

---

64. *Id.* § 1961(4).
65. *Id.* § 1962(c).
66. *Id.* § 1964(c).
67. *Id.* § 1961(5).
68. *Id.*
69. 409 F. Supp 609 (S.D.N.Y. 1973).
70. United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975).
71. *Stofsky,* 409 F. Supp. at 614.
72. *See, e.g.,* United States v. Elliot, 571 F.2d 880 (5th Cir.), *cert denied,* 439 U.S. 953 (1978).
73. *Id.* at 899 (quoting 116 CONG. REC. at 18914).
74. *Id.* at 895.
75. *Id.*

> As in a firm with a real estate department and an insurance department, the fact that partners bring in two kinds of business on the basis of their different skills and connections does not affect the fact that they are partners in a more general business venture.[76]

The Court of Appeals for the Second Circuit rejected the *Stofsky* "common scheme, plan or motive" standard in favor of the lower Fifth Circuit standard in *United States v. Weisman.*[77] In *Weisman,* the predicate acts were associated with the affairs of an incorporated motion picture theatre. The Second Circuit Court found a pattern of racketeering activity was established in the securities and bankruptcy fraud criminal case where the theatre enterprise provided the link between the predicate acts.[78]

The Supreme Court addressed the issue of what constitutes a RICO pattern in dicta in *Sedima* when Justice White suggested the importance of "continuity plus relationship" to the pattern concept.[79] This referred to Senator McClellan's comments in the Senate Report accompanying RICO stating that it is "continuity plus relationship which combines to produce a pattern."[80] *Sedima* indicated that if a continuity of purpose could be found in the relationship between two acts, then a RICO pattern could be established.[81] The Fifth Circuit followed that reasoning in 1985 and gave a broad interpretation to the pattern requirement in *R.A.G.S. Couture v. Hyatt.*[82]

R.A.G.S., one of the first "pattern" cases to be decided after *Sedima,* involved two acts of mail fraud. The Fifth Circuit Court of Appeals held that two acts of mailing a fraudulent invoice were sufficient to create a pattern of racketeering activity.[83] The mailings issued from a close corporation. The pleadings, which were before the court on appeal of the granting of a Rule 12(b)(6)[84] motion alleged that one or both of the corporation's two shareholders had caused the mailings.[85] The Fifth Circuit found nothing in the Supreme Court's *Sedima* decision requiring that it narrow its broad construction of the pattern concept. The *R.A.G.S.* Court held that the statute required only that there be two acts and that these acts be related.[86] It read the *Sedima* decision to imply simply that two "isolated" acts could not create a pattern.[87]

---

76. *Id.* at 899.
77. 624 F.2d 1118, 1122 (2d Cir. 1980), *cert. denied,* 449 U.S. 871 (1981).
78. *Weisman,* 624 F.2d 1118, at 1124.
79. *Sedima,* 473 U.S. at 496 n.14.
80. Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969).
81. *Sedima* 473 U.S. at 496 n.14.
82. 774 F.2d 1350 (5th Cir. 1985).
83. *Id.* at 1351.
84. Fed. R. Civ. P. 12(b)(6).
85. *R.A.G.S.,* 774 F.2d at 1352.
86. *Id.* at 1355.
87. *Id.*

Another case, however, provided precedent to circuits eager to limit the growing power of RICO. About one month after *Sedima,* in what has been called the "ray-gun defense."[88] The court deciding *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.* made a startling observation:

> While the statutory definition makes clear that a pattern can consist of only two acts, [the court] would have thought the common sense interpretation of the word "pattern" implies acts occurring in *different criminal episodes,* episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity. (emphasis in the original)[89]

The *Northern Trust* court continued its analysis, citing footnote fourteen of *Sedima* where the Supreme Court said " '[t]he implication is that while two acts are necessary, they may not be sufficient,' "[90] before concluding:

> It merits observing that even if the three added kickback payments alleged in Complaint paragraph 15 involved the use of the mails, they still implemented the same fraudulent scheme as the first two mailings-and the single scheme does not appear to represent the necessary "pattern of racketeering activity."[91]

Thus the court manipulated its way to a determination that a statute which plainly required "two acts" on its face could not be satisfied by five related acts. Some of the circuits appeared to be determining the pattern requirement on an ad hoc basis.[92] A significant minority began requiring proof of multiple schemes, multiple episodes, or some other indicia of continuity beyond two acts and a scheme to establish the existence of a pattern of racketeering activity.[93]

The Tenth Circuit made itself one of the more difficult in which to establish the presence of a pattern. Where the directors of a corporation were involved in self dealing by secretly purchasing real estate and fraudulently reselling it to the company, the court ruled that no pattern existed although the frauds had occurred over a ten year period.[94] The Tenth Circuit, in *Torwest DBC, Inc. v. Dick,* rejected the Fifth Circuit's approach in *R.A.G.S. Courtier* and refused to find a pattern where "the single scheme at issue involved one victim."[95] The court elaborated:

88. The *Northern Trust* interpretation of the pattern requirement acquired the "ray-gun defense" label because of its ability to disintegrate civil RICO claims. P. Batista, *supra* note 33, at 41.

89. 615 F. Supp. 828, 832 (N.D. Ill. 1985).

90. *Id.* (quoting *Sedima,* 473 U.S. at 497 n.14).

91. *Inryco,* 615 F. Supp. at 833.

92. Beauford v. Helmsley, 865 F.2d 1386 (2d Cir. 1989); United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989); Smith v. Cooper/T. Smith Corp, 846 F.2d 325 (5th Cir. 1988); United Energy Owners Committee, Inc. v. United Energy Management Systems, Inc. 837 F.2d 356 (9th Cir. 1988).

93. *See* generally, Goldsmith, *supra* note 22.

94. Torwest DBC, Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987).

95. *Id.* at 929.

> A scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished.[96]

The "one" victim in *Torwest* was a corporation and the scheme ended when its directors were exposed.[97] The court tortured the statute beyond recognition in order to achieve its result. Under the Tenth Circuit construction, the perpetrators of a "single scheme" to take over U.S. West would be immune from liability once their scheme had succeeded. Inevitably, the multiple schemes requirement ripened for Supreme Court review.

VOID FOR VAGUENESS

The question of whether multiple schemes are required under RICO came squarely before the Supreme Court in *H. J., Inc. v. Northwestern Bell Telephone Company.*[98] At trial, the plaintiff claimed the defendant utility used a scheme to illegally influence several members of the state regulatory commission in the establishment of telephone rates.[99] Although the scheme continued over five years, the district court dismissed the RICO claim because the acts were "committed in furtherance of a single scheme . . .."[100] The Eighth Circuit Court of Appeals affirmed[101] and the Supreme Court granted certiorari.

The *Northwestern Bell* Supreme Court would approach the pattern requirement in a manner consistent with its prior constructions of the RICO statute. The Court has a history of rejecting narrow constructions of RICO. In past decisions the Court had construed RICO broadly, stating:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.[102]

The Court continued its expansive construction in the *Sedima* case, saying "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime."[103] The Court maintained its course in *Northwestern Bell,* unanimously reversing the Eighth Circuit. Justice Scalia, with whom three other Justices joined, filed a separate concurring opinion.[104] The Court followed its approach

96. *Id.*
97. *Id.* at 927.
98. 109 S. Ct. 2893 (1989).
99. H. J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419 (D.Minn 1986).
100. *Id.* at 425.
101. H. J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir 1987).
102. Russello v. United States, 464 U.S. 16, 20 (1983) (quoting *Turkette,* 452 U.S. at 580).
103. *Sedima,* 473 U.S. at 498.
104. *Northwestern Bell,* 109 S. Ct. at 2906.

in previous RICO decisions. It rejected the multiple schemes requirement of the Eighth Circuit.[105]

The Supreme Court's policy of construing civil RICO in the broadest possible terms would seemingly lead it to adopt a pattern definition approaching the one obtained by the Fifth Circuit in *Elliot* and *R.A.G.S.*[106] This definition states simply that the predicate acts must advance the affairs of the enterprise, "but need not otherwise be related to each other."[107] The Court, however, did not draw its lines so clearly. While it rejects the multiple scheme pattern definition, the majority opinion gives little more than a set of hypotheticals to demonstrate its concept of what constitutes a "pattern."[108]

The *Northwestern Bell* Court stated that the statute "places an outer limit on the concept of a pattern of racketeering activity that is broad indeed."[109] The Court reviewed the Congressional history behind RICO, concluding that the statute requires that the predicate acts "amount to or pose a threat of continued criminal activity."[110] This dual aspect of the continuity issue is a source of confusion. The Court attempted to define it by stating, "[w]hat a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat."[111]

The Supreme Court's conflict arises because it cannot find a simple definition of the pattern element. It cannot find the language to limit the continuity concept. By stating " '[c]ontinuity' is both a closed- and open-ended concept,"[112] the Court is saying that the threat of future criminal activity is not essential to the "pattern" requirement.[113] The "enterprise" may be disbanded and the episode ended, but if the related predicate acts manifested "continuity," the pattern requirement is met.

However, the Court cannot describe how the acts manifest "continuity." The Court can only offer examples. It "prefer[s] to deal with this issue in the context of concrete factual situations presented for decision . . . ."[114] Thus, an extortion scheme selling "insurance" to storekeepers is a "pattern."[115] Proof that predicate acts are an integral part of an entity's regular business practices establishes a pattern.[116] "The development of [more abstract] concepts must await future cases . . . ."[117]

---

105. *Id.* at 2898.
106. For an argument that *Sedima* was meant to preempt any attempt to limit civil RICO through the "pattern of racketeering activity" requirement, *see* Note, *Reconsideration of Pattern in Civil RICO Offenses,* 62 NOTRE DAME L. REV. 83, 92-93 (1986).
107. *Elliot,* 571 F.2d at 899 n.23. *See supra,* notes 71-75, 81-86 and accompanying text.
108. *Northwestern Bell,* 109 S. Ct. at 2902.
109. *Id.* at 2899.
110. *Id.* at 2900.
111. *Id.* at 2901.
112. *Id.* at 2902.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

Justice Scalia's concurrence terms the majority's "continuity plus relationship" definition "about as helpful as 'life is a fountain.' "[118] He labels the majority discussion "murky"[119] but admits that the concurring Justices "would be unable to [give] significantly more guidance."[120] The importance of the concurring opinion lies in the assertion that the Court's difficulty in delineating the pattern requirement "bodes ill for the day when a [constitutional] challenge is presented."[121]

While concurring in the instant opinion, the Justices are considering the constitutional standing of RICO's pattern requirement.[122] That issue was not before the Court in *Northwestern Bell.* The Court appears ready to hear a "void for vagueness" argument on the "pattern of racketeering activity."

THE ENTERPRISE

For the moment, however, all of the elements of civil RICO remain constitutional. Each has survived the stones hurled by those who would limit the statute. These stones have at times come in odd shapes and from strange directions. In *United States v. Turkette,* defendants made the rather novel argument that RICO was meant to apply only to "legitimate" enterprises.[123] They contended that it sought to proscribe only the infiltration of legitimate businesses by traditional organized crime.[124]

The *Turkette* defendants sought to avoid the application of the statute because nothing about their association was legitimate.[125] The court responded that there were no restrictions on the associations covered by the Act.[126] The Court observed that 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."[127] The message in *Turkette* was that the term "enterprise" encompassed both legitimate and illegitimate associations.[128]

The particular circumstances of each case determine whether facts beyond those establishing a "pattern" are required to prove an association amounting to an "enterprise."[129] Where a business entity is the enterprise there is no problem in establishing its identity "separate and apart" from the pattern in which it engages. The existence of an enterprise "is proved by evidence of an ongoing organization, formal

118. *Id.* at 2907 (Scalia, J. concurring).
119. *Id.* at 2908.
120. *Id.*
121. *Id.* at 2909.
122. *Id.*
123. *Turkette,* 452 U.S. at 579-80.
124. *Id.* at 580.
125. *Id.*
126. *Id.*
127. *Id.* at 583.
128. *Id.* at 587.
129. *Id.* at 583.

or informal, and by evidence that the various associates function as a continuing unit."[130] The definition seems simple enough at this point, but the *Turkette* Court goes on to distinguish between the "enterprise" and the "pattern of racketeering activity."

> The [pattern of racketeering activity] 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.[131]

Although the separate elements may "coalesce", the circuits do not. Two levels of proof have evolved from the language of *Turkette.* Three circuits have adopted a higher level of proof. The Third, Fourth and Eighth Circuits have held that an "enterprise" must have an identifiable existence apart from the commission of the predicate acts constituting the "pattern of racketeering activity."[132]

Other circuits have avoided this narrow construction and adopted a lower level of proof. The Second and Eleventh Circuits focused on the word "coalesce" to hold that RICO may apply "to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts."[133] The Tenth Circuit has yet to issue a ruling directly in point. It may follow the Eleventh Circuit on this issue. It followed the Eleventh Circuit on the issue of what connection or "nexus" must be found between the enterprise and the pattern of racketeering activity.

The nexus issue concerns the relationship between the "pattern" and the "enterprise." It arises out of the language of section 1962(c) making it unlawful for any person "associated with" the enterprise to "participate" in the conduct of its affairs "through a pattern of racketeering activity."[134] This language requires that some link be found between the predicate acts and the enterprise. In *United States v. Killip,* members of the Outlaws Motorcycle Club were convicted of RICO violations after committing offenses including drug dealing, kidnapping and arson.[135] The Tenth Circuit addressed the nexus issue in *Killip* by citing an Eleventh Circuit case, *United States v. Carter.*[136] The *Killip* court stated that "[i]n order to uphold the finding of a nexus between the illegal acts and the alleged RICO enterprise . . . we need

---

130. *Id.*
131. *Id.*
132. United States v. Tillett, 763 F.2d 628, 631 (4th Cir. 1985); United States v. Riccobene, 709 F.2d 214, 223-24 (3d Cir. 1983); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982).
133. United States v. Bargaric, 706 F.2d 42, 55 (2d Cir. 1983), *cert. denied,* 464 U.S. 840 (1983); *see also* United States v. Cagnina, 697 F.2d 915, 921 (11th Cir. 1983).
134. 18 U.S.C. § 1962(c) (1982).
135. 819 F.2d 1542, 1543 (10th Cir. 1987).
136. 721 F.2d 1514, 1527 (11th Cir. 1984), *cert. denied,* 469 U.S. 819 (1984). *Carter* was a drug smuggling and bribery case in which the unifying enterprise was an otherwise legitimate dairy farm.

only find a relation between the predicate offenses and the affairs of the enterprise."[137]

The relative ease with which the nexus can be established should not mask the complexity of the concepts it is connecting. Within a given set of facts, for example, an "enterprise" might be defined in a variety of ways. The RICO plaintiff may attempt a measure of control over the litigation by either including or excluding specific "persons" from the description of the enterprise in the pleadings.

ASSOCIATION IN FACT

How the "enterprise" is defined is important to the availability of damages in a RICO case. In some circuits no additional facts, beyond those needed to prove a pattern of racketeering activity, are required to establish a RICO enterprise.[138] Care must be taken, however, to place those facts in the proper perspective. The relationship between the enterprise and its constituent "persons" is crucial to the remedy. There is no remedy against the enterprise.[139] The plaintiff's remedy is against the entities that form the enterprise. For example, if the enterprise is a corporation, the remedy might only lie against the officers as individuals.

RICO applies when an "enterprise" engages in a pattern of racketeering activity.[140] The statute establishes two types of "enterprises," legal entities and associations in fact.[141] It clearly includes structured business entities. It reaches any "legal entity."[142] The legal entity need not be expressly listed in the statute. A city construction and building inspection agency in *Maryland v. Buzz Berg Wrecking Co. Inc.* satisfied the requirement.[143] An association in fact, however, is a more flexible concept.

Associations in fact may include any combination of persons or entities individually capable of holding an interest in property.[144] An association between a claims defense officer and attorneys representing claimants against the hospitals he represented satisfied the RICO enterprise element.[145] Three brokerage firms associating to offer and

137. *Killip,* 819 F.2d. at 1549.
138. *See supra* notes 129-133 and accompanying text.
139. 18 U.S.C. § 1962 (1982).
140. *Id.*
141. *Id.* § 1961(4) states:
(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.
142. *Id.*
143. 496 F. Supp 245 (D. Md. 1980).
144. 18 U.S.C. § 1961(3) (1982) defines "person":
(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property.
145. Beth Israel Medical Center v. Smith, 576 F. Supp. 1061, 1064, 1068 (S.D.N.Y. 1983).

sell securities satisfied the element.[146] A combination of legal entities and individuals comprised an association in fact in *United States v. Aimone.*[147] However the association in fact is designated, it appears that the only strict requirement is that it include more than one "person" as that term is defined in the Act.[148]

THE "PERSON"

It must be remembered that the "person" referred to in Section 1962(c) has an identity separate and apart from the "enterprise" with which the "person" is associated. It is this "person" against whom the remedy in section 1964(c) is directed. The "person" is prohibited from investing the proceeds of racketeering in the enterprise[149] and from using the pattern of racketeering activity to acquire or maintain the enterprise.[150] The "person" is prohibited from conspiring to accomplish any of these activities.[151] Thus, when delineating the offending enterprise, the civil RICO plaintiff must be cautious to isolate and identify the separate "person" against whom his remedy lies.

In 18 U.S.C. § 1961(3) a "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property."[152] The courts have allowed a liberal construction of this section by analogy to antitrust law.[153] The legislative history of RICO reveals that Congress modeled the section on the antitrust statutes.[154] The private treble damage action, like a similar action under the Clayton Act, requires proof that the plaintiff was "injured in his business or property."[155] The definition of "person" under the antitrust statutes is "any natural person, partnership, corporation, association or other legal entity, including any person acting under color or authority of State law."[156]

Courts have rejected constructions which attempt to limit the scope of the "person" definition under RICO. In *Schacht v. Brown* a state director of insurance, as liquidator of an insurance company, brought an action against officers, directors and the parent corporation.[157] The

146. Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp 667, 669 (W.D. Mich. 1983).

147. 715 F.2d 822, 828 (3d Cir. 1983).

148. D & G Enter. v. Continental Illinois Nat. Bank, 574 F. Supp. 263, 270 (N.D. Ill. 1983).

149. 18 U.S.C. § 1962(a) (1982).

150. *Id.* § (b).

151. *Id.* § (d).

152. *Id.* § 1961(3).

153. State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 679 (N.D. Ind. 1982).

154. *Sedima,* 473 U.S. at 489. The Court adopted the four year statute of limitations from the Clayton Act, 15 U.S.C. § 15 (1982), for civil RICO actions because "it is a federal statute that offers the closest analogy to civil RICO" in Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 150 (1987). The *Agency* Court cited *Sedima* to state that "the 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.' " *Id.* at 151 (quoting *Sedima,* 473 U.S. at 489).

155. 15 U.S.C. § 15(b) (1988).

156. *Id.* § 1311(f).

157. Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983).

defendants were charged with continuing the insurance company in business past the point of insolvency and looting the company of its most profitable and least risky business.[158] The defendant argued that the terms "he" and "his" in certain sections of RICO limited the statute's scope such that only biological individuals could violate section 1962(c).[159] The court responded:

> We must reject this contention, as 1961(3) plainly states that a violating "person" may be "any individual or entity capable of holding a legal or beneficial interest in property."[160]

The *Schacht* Court concluded that this broad definition applies to both plaintiff and defendant. The court stated that "[t]he statute . . . does not speak ambiguously, and Congress . . . was alerted to the far-reaching implications of its enactment."[161]

While the statute does not speak ambiguously, it does speak very broadly. The very breadth with which it defines the elements of the private cause of action allows room for courts to vary their construction. It is crucial to discover the specific precedents that apply in the court where an action is to be filed. A lack of diligence in uncovering these precedents could lead to the loss of more than a cause of action. Courts have also found that the rule governing sanctions against attorneys for the frivolous use of civil RICO does not speak ambiguously. Courts do not welcome claims that lightly brand legitimate business enterprises with the racketeering label.

RULE 11

Courts have added the increased threat of sanctions to the burden of pleading the various elements of a civil RICO claim. Recognizing that the threat of complex litigation and triple damages has been abused in attempts to extort extravagant settlements, judges have attempted to discourage this misconduct.[162] These sanctions are based on Rule 11 of the Federal Rules of Civil Procedure.[163] The rule states that an individual's signature on a court document is certification that the individual has made "reasonable" inquiry into the law and the facts supporting the document.[164] The signature further certifies that this

158. *Id.*
159. *Id.* at 1361.
160. *Id.*
161. *Id.*
162. *See, e.g.,* Unioil v. E. F. Hutton & Co., 809 F.2d 548 (9th Cir. 1986); Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983); Cashco Oil Co. v. Moses, 605 F. Supp. 70 (N.D. Ill. 1985); Aetna Casualty and Surety Co. v. Current Components, Inc., 616 F. Supp. 862 (E.D. Mo. 1985); Taylor v. Bear Sterns & Co., 572 F. Supp. 667 (N.D. Ga. 1983).
163. *Id.*
164. FED. R. CIV. P. 11 (as amended in 1983) reads in pertinent part:
> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his 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

inquiry has brought the individual to believe that the document is well grounded in fact and warranted by law.[165] Any breach of the rule, whether to harass or for "any improper purpose," can lead to sanctions in the amount of damages incurred, including legal fees, because of the filing of the document.[166]

The rationale behind the use of these sanctions is included in the words of the United States District Court for the District of Colorado:

> Because [RICO] is a complicated statute . . . a defendant needs a substantial amount of information to prepare a response. A RICO defendant . . . needs to be protected from unscrupulous claimants lured by the prospect of treble damages, and it should be the policy of the law, within the procedural constraints of our system, to provide this protection. A charge of racketeering, with its implication of links to organized crime, should not be easier to make than accusations of fraud. RICO should not be construed to give a pleader license to bully and intimidate nor to fire salvos from a loose cannon. Irresponsible or inadequately considered allegations should be met with severe sanctions pursuant to Rule 11, F.R.Civ.P.[167]

While Colorado District Court Judge Kane's reasoning is sound, the public is left to ponder whether Congress might have written a more effective statute had it left the word "racketeer" out of the title. Indeed, the use of the word "racketeer" has led courts to note that a RICO charge against a "legitimate" business is somehow a "patently unfair" implication that the business is involved in organized crime.[168] But the statute could not constitutionally require that defendants be members of a class of organized mobsters; it could only require that they be organized and have committed or conspired to commit unlawful acts. Whatever the public concludes about Congress' choice of titles, this increased use of sanctions should cause plaintiffs to exercise care and plead with particularity, especially in defining the pattern of racketeering activity.[169] Careful civil RICO litigants have found standing to argue their claims in a variety of business situations.

> 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 . . . 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, motion, or other paper, including a reasonable attorney's fee.

165. *Id.*
166. *Id.*
167. Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984).
168. *Barr,* 66 F.R.D. at 113; *Moss,* 553 F. Supp. at 1361.
169. The "pattern jurisprudence" has been characterized as a "mess," a "cacophony," and "sheer bedlam." Furman v. Cirrito, 828 F.2d 898, 908-10 (2d Cir. 1987) (Pratt, J., dissenting). Other Second Circuit judges have recognized the inconsistency among the courts in applying civil RICO. Another Second Circuit judge wrote "courts generally, and courts in the Second Circuit in particular, remain confused (and

APPLICATIONS OF CIVIL RICO

The broad scope of RICO's jurisdiction has covered many of the fiduciary relationships in modern business. Plaintiffs established a RICO violation by a developer whose corporation issued them worthless bonds in a debtor-creditor relationship.[170] The court found a cause of action between franchisee and franchiser in *Virden v. Graphics One.*[171] Investor-broker relationships are a common focus of litigation.[172] Accounting firms and their clients can contest RICO claims.[173] A liquidator brought an action against officers, directors and parent of a bankrupt corporation for looting in *Schact v. Brown.*[174]

Small business sees its share of civil litigation under RICO. Shareholder, partnership and master-servant relationships are each the source of suits. In *Odesser v. Vogel* the court found a RICO cause of action between shareholders in a close corporation.[175] A former shareholder of a target corporation brought an action against the target corporation, the acquiring corporation and other defendants alleging fraud in the acquisition of the target company in *Barkman v. Wabash,* Inc.[176] Self-dealing was the source of predicate acts between partners in *Tucker Anthony Realty Corp. v. Schlesinger.*[177] An employer implemented layoffs in order to deprive employees of benefits under the Employee Retirement Income Security Act and a RICO cause of action was found in *McLendon v. Continental Group, Inc.*[178]

Reputable lawyers, accountants, businessmen and an insurance company became defendants in *Bennett v. Berg.*[179] They were alleged to have created an elaborate fraudulent scheme to induce the elderly to invest in a retirement village.[180] The complaint alleged that the retirement village project was then led into bankruptcy by their fraudulent self-dealing and mismanagement.[181]

Banks are increasingly becoming the defendants in RICO actions since *Haroco, Inc. v. American National Bank and Trust Company of*

---

certainly confusing) in their construction of the statutes governing so-called civil RICO . . . ." Beauford v. Helmsley, 843 F.2d 103, 104 (2d Cir. 1988). A civil RICO action may be brought in any federal district where the defendant "resides, is found, has an agent, or transacts . . . affairs." 18 U.S.C. § 1965(a) (1982). Considering the broad venue of the statute and the state of the law, forum shopping is definitely in order for the plaintiff considering a RICO claim.

170. Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988).

171. 623 F. Supp. 1417 (C.D.Cal. 1985).

172. Lazzaro v. Manber, 701 F. Supp. 353 (E.D.N.Y. 1988).

173. Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408 (8th Cir. 1984).

174. 711 F.2d 1343 (7th Cir. 1983).

175. 1986 WL 12769, *5 (E.D. Pa. Nov. 7, 1986) (Civ. A. No. 85-6931, not reported in F. Supp.).

176. 674 F. Supp. 623, 632 (N.D. Ill. 1987).

177. 1989 WL 8138 (E.D.N.Y. Jan. 30, 1989) (No. CV-88-0868, order granting preliminary injunction).

178. 602 F. Supp. 1492, 1506 (D.N.J. 1985).

179. 685 F.2d 1053, 1057 (8th Cir. 1982).

180. *Id.*

181. *Id.*

Chicago.[182] *Haroco* was an action by a number of small business against the bank. They alleged that it defrauded them through the intentional miscalculation of their variable interest rates.[183] While *Haroco* relied on the fraud statutes and proving a pattern of racketeering activity, banks should be particularly wary of the language of § 1962(c) which waives the necessity of proving a "pattern" when the predicate act involves "collection of unlawful debt."

The potential breadth of civil RICO's scope is limited only by the tortfeasor's creativity in developing new ways to commit patterns of racketeering activity. Where a fiduciary relationship exists, the potential for a pattern of predicate acts follows. Although Congress enacted RICO twenty years ago and the statute has found a broad range of applications, it remains in some respects very unsettled law. The imbalance between the circuits on the issues of what constitutes a pattern or an enterprise guarantees further litigation. Presently the pattern is the focal point of much of the civil RICO litigation.[184] This may change in the unlikely event that the law is sufficiently clarified with the decision in *Northwestern Bell* but, considering the turbulent jurisprudence surrounding RICO, the effect would only be to shift the focus to another issue.

RICO, FRAUD AND SECURITIES LAW

One possible focus for future litigation relates to the mail and wire fraud predicate acts. The mail/wire fraud statutes have long and extensive histories as "catch-all" provisions used to cope with creative new frauds as they develop. Congress drafted the mail fraud statute in 1872.[185] Originally a response to frauds by lottery swindlers,[186] the statute found applications in a wide variety of situations. As Chief Justice Burger explained, use of the mail fraud statute became broad and expansive.

> When a 'new' fraud develops—as constantly happens-the mail fraud statute becomes a stopgap device to deal on a temporary

---

182. 747 F.2d 384 (7th Cir. 1984).

183. *Id.* at 385.

184. *See* Note, *Clarifying a "Pattern" of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement,* 86 MICH. L. REV. 1745, 1747 n.16 (1988). Failure to allege a sufficient pattern is a frequent basis for Fed. R. Civ. P. 12(b)(6) motions to dismiss that are filed in over 90% of RICO cases and granted in 51% of the filings. *Id.*

185. Act of June 8, 1872, Ch. 335 § 301, 17 Stat. 283, 323. The current version, codified at 18 U.S.C. § 1341 (1982) provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

186. Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth, sponsor).

basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.[187]

The similar crimes of mail fraud and wire fraud[188] involve using the wires/mails in furtherance of a scheme to defraud. Any use of the mails or electronic common carrier facilities is the basis for interstate commerce jurisdiction. It is irrelevant whether the communications themselves are fraudulent. "To prove a violation of 18 U.S.C.A. § 1343, the government must prove that the defendant was a knowing participant in a fraudulent scheme that was furthered by the use of interstate transmission facilities."[189]

A more tightly focused fraud on which civil RICO claims can be based is fraud in the sale of securities. It is here that RICO invades the territory of Rule 10b-5,[190] the SEC rule that provides plaintiffs injured by fraud in the sale of securities with a private cause of action. It was the RICO invasion of Rule 10b-5's domain that fueled much of Justice Marshall's dissent in *Sedima*.[191] The RICO statute and the securities rule enter the courtroom through different doors. The Supreme Court maintains that Congress clearly intended a private cause of action under the RICO statute[192] but was silent on that issue with respect to section 10(b) of the Securities Exchange Act of 1934.[193] The Court stated in *Santa Fe Industries, Inc. v. Green* that "[n]either the intended scope

187. United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).

188. 18 U.S.C. § 1343 (1982) provides:
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

189. United States v. Abrams, 539 F. Supp. 378, 383 (S.D.N.Y. 1982).

190. 17 C.F.R. § 240.10b-5 (1988) provides:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
(a) to employ any device, scheme, or artifice to defraud,
(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

191. *See supra* notes 51-58 and accompanying text.

192. *Russello,* 464 U.S. at 19.

193. 15 U.S.C. § 78j (1988), which provides in pertinent part:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

of § 10(b) nor the reasons for the changes in its operative language are revealed explicitly in the legislative history of the 1934 Act . . .."[194] Consequently the Court has limited the application of Rule 10b-5,[195] while it has welcomed the RICO statute with expansive interpretations.[196]

One perspective on the Court's behavior might be that it sees RICO applying to activities posing a greater threat to society than do the activities to which Rule 10b-5 applies. While RICO and Rule 10b-5 overlap, RICO can only apply where the injury resulted from multiple acts involving group activity.[197] The presence of an enterprise is necessary to every RICO case, one person acting alone without more is insufficient to establish a RICO violation.[198] Once this hurdle is cleared, RICO may impact a much broader field of business relationships and strike with tripled force.

The scope of RICO is in large part defined by the scope of its predicate acts. Civil RICO rises and falls on the indictability of defendants for violation of the acts defined in section 1961. Since *Sedima* a prior conviction is not required for a civil RICO claim.[199] The threshold requirement for a civil RICO action does not involve convictions, but probable cause sufficient to produce indictments.[200]

Against this threshold requirement, the recent case of *Carpenter v. United States* may have created the possibility of an entire new class of RICO claims.[201] In *Carpenter* the defendant, a co-author of the *Wall Street Journal* column, *Heard on the Street,* was a party to a stock trading scheme that used insider information about the contents of future columns to anticipate the market. The Court sustained his convictions for mail fraud, for wire fraud and for violating section 10(b) of the Securities Exchange Act of 1934 through its derivative, Rule 10b-5 governing fraud in the sale of securities.[202] The perpetrators of the scheme

194. 430 U.S. 462, 473 n.13 (1977). Expanding on this statement, the Court said: "Neither the intended scope of § 10(b) nor the reasons for the changes in its operative language are revealed explicitly in the legislative history of the 1934 Act, which deals primarily with other aspects of the legislation." [citing] *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 202 (1976). The only specific reference to § 10 in the Senate Report on the 1934 Act merely states that the section was "aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful function." [citing] S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934).

Id.

195. Chiarella v. United States, 445 U.S. 222, 247 (1980) (Blackmun, J. dissenting).

196. *See, e.g.,* T. Hazen, THE LAW OF SECURITIES REGULATION 649 (Supp. 1988).

197. Goldsmith, *supra* note 22, at 789.

198. *Sedima,* 473 U.S. at 497. The Court stated that violation of RICO "requires . . . an enterprise, . . . the essence of the violation is the commission of [a pattern of racketeering activity] in connection with the conduct of an enterprise." *Id.*

199. *Id.* at 493.

200. *Id.*

201. 484 U.S. 19 (1987); *see* L. Loss, FUNDAMENTALS OF SECURITIES REGULATION, 758 n.107 (1988). *See also,* Aldave, *The Misappropriation Theory: Carpenter and Its Aftermath,* 49 OHIO ST. L.J. 373 (1988).

202. Carpenter v. United States, 108 S. Ct. 316, 320 (1987).

in *Carpenter* were not charged under RICO's criminal provisions, presumably because conviction was more clearly assured by charging the particular predicate acts. But every element of a violation of RICO's section 1962(c) was present in the *Carpenter* scheme. Thus, any "person" who could prove business or property damage flowing from the scheme could establish a cause of action against the *Carpenter* defendants under section 1964(c).

RICO, FRAUD AND SECURITIES LAW AFTER CARPENTER

Commentators have noted the civil RICO liability available under the wire fraud holding in *Carpenter.*[203] It should be remembered that the securities fraud count for which the *Carpenter* defendant was convicted was also a predicate act under section 1961. After the *Northwestern Bell* holding that a single scheme can establish a pattern of racketeering activity, RICO could provide a cause of action to anyone damaged in his business or property[204] by inside trading activities like those of the enterprise in *Carpenter.* Moreover, the damaged parties would have a civil cause of action against "any person . . . associated with . . . [the] enterprise."[205] This could lead to rather sensational RICO triple damages class action suits against inside traders with pockets deep enough to absorb the burden.

That four Justices in *Carpenter* voted to reverse the conviction under Rule 10b-5 is consistent with the Court's recent treatment of the rule.[206] The trial court based the conviction under section 10(b) and Rule 10b-5 on the misappropriation theory; the principle that a person is in violation of Rule 10b-5 when he uses material nonpublic information misappropriated from another to buy and sell securities.[207] While the scheme in *Carpenter* involved the purchase and sale of securities, the fraud was committed against the newspaper and the newspaper was not a party to the stock transactions.

The Court is struggling with the intent behind section 10(b). Some Justices have determined that it was never intended to apply to litigants other than actual buyers and sellers of securities who transact directly with one another, arguments that Congress intended a more expansive remedy notwithstanding.[208] The Court has revealed no similar conflict in applying the wire/mail fraud statutes or RICO.

The Court's conflict with Rule 10b-5 began with *Blue Chip Stamps v. Manor Drug Stores.*[209] The retail merchants who had been users of Blue Chip trading stamps were offered stock in the stamp company

203. Aldave, *supra* note 201, at 382; Loss, *supra* note 201.
204. 18 U.S.C. § 1964(c) (1982).
205. *Id.* § 1962(c).
206. *Carpenter,* 484 U.S. at 24. The convictions under the securities laws were affirmed without comment by an evenly divided court. *Id.*
207. United States v. Carpenter, 791 F.2d 1024, 1026 (2d Cir. 1986).
208. *Chiarella,* 445 U.S. at 247 (Blackmun, J. dissenting).
209. 421 U.S. 723 (1975).

pursuant to an antitrust consent decree. They failed to purchase the stock because of Blue Chip Stamps' intentional distortion of the prospectus.[210] The *Blue Chip* Court denied them standing and limited private actions under Rule 10b-5 to actions between those who were victims of fraud and actually purchased or sold the securities involved in the fraud.[211]

That no private plaintiffs may have a claim against insider traders under the securities laws, however, does not eliminate the existence of fraud or the presence of victims. The problem lies in the Court's current construction of Rule 10b-5. In *Carpenter* the fraud victim was the Journal. The investors (who, in reality, were also victims)[212] merely purchased and sold securities.

This void in the law may soon be filled. Under RICO's section 1964(c) the only privity required is that the plaintiff "be injured in his business or property by reason of a violation of section 1962."[213] Threefold damages would make this a remedy with a vengeance.

The issue of convictions and therefore indictments for misappropriation of insider information under Rule 10b-5 face an uncertain future. Petitioner's conviction in *Carpenter* was affirmed without comment by an evenly divided court.[214] The record awaits another case to determine that issue.[215] The heavier significance of *Carpenter* for RICO lies in the impact of the decision on the scope of the wire and mail fraud statutes. Rico's scope is largely defined by the scope of its predicate acts.

In a case decided a few months prior to *Carpenter* the Court held that the mail fraud statute did not prohibit schemes to defraud vic-

---

210. *Id.* at 726.

211. *Id.* at 756-60 (Powell, J., concurring).

212. Aldave, *supra* note 201. As one commentator stated:

> The inside trade could induce opposite trade transactions that otherwise would not have occurred, or preempt trades of the same type that otherwise would have occurred. Thus, there are at least two categories of people harmed by an inside trade: those who would not have made bad purchases or sales but for the inside trade; and those who would have made good purchases or sales but for the inside trade.

Aldave, *supra* note 201, at 379 n.46 (quoting Wang, Trading on Material Nonpublic Information on Impersonal Stock Markets: Who is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?, 54 S. CAL. L. REV. 1217 (1981)). Expanding on Professor Wang's language, the inside trade distorts the market. It provides people with incorrect information affecting their trading. A buyer might purchase due to a price dip caused by an insider's sale, not knowing that stock would soon plummet in value. A seller might sell due to an increase in price occasioned by an insider's purchases, unaware that the security's value would soon see a more significant increase when certain information became public. Conversely, market participants might be inhibited from making advantageous purchases or sales while they evaluate dissonant price and volume of trading information generated by insider trades.

213. 18 U.S.C. § 1964(c) (1982).

214. 484 U.S. at 24.

215. If the members of the Court who voted to reverse did so out of hostility for the misappropriation theory of Rule 10b-5 and if the new Justice Anthony M. Kennedy also proves hostile to the theory, then the remedies of section 10(b) and Rule 10b-5 would lose much of their scope. Aldave, *supra* note 201, at 380.

tims of certain "intangible rights" and was limited in scope to the protection of property rights.[216] In *McNally v. United States,* a former state official was involved in a scheme to require that an insurance agent, selected to provide policies for the state, share premiums with an agency in which the official had an interest.[217] The *McNally* Court refused to extend the scope of the mail fraud statute to protect the right "to honest and impartial government."[218]

The petitioner in *Carpenter* argued that *McNally* removed intangible property rights from the scope of the mail and wire fraud statutes. The Court's reply was that the *Carpenter* petitioner read *McNally* too broadly, the mail fraud statute did indeed protect the newspaper's "confidential business information."[219] The *Carpenter* Court stated that the holding in "*McNally* was a narrow one that did not limit the scope of section 1341 to tangible as distinguished from intangible property rights."[220] The *Carpenter* Court concluded that it was immaterial that petitioners "did not interfere with the Journal's use of the information or did not publicize it . . . . It is sufficient that the Journal has been deprived of its right to exclusive use of the information."[221]

The *Carpenter* petitioners also argued that the *Wall Street Journal*'s use of the wires and the mail in distributing its newspaper did not satisfy the requirements of the fraud statutes. The Court rejected this argument as well, holding that "circulation of the *Heard* column was not only anticipated but an essential part of the scheme."[222] Had the newspaper not been distributed, the petitioner could not have profited from leaking the information.

The broad implications of this holding bear reflection. Few communications in the business world today lack involvement with the mail or the wires in some manner. If the Court's holding on the Rule 10b-5 issue was a further effort to restrict security law remedies to parties who are immediate buyers and sellers of the securities at issue,[223] why would the court vote so expansively on the mail/wire fraud issue? Before *Carpenter,* commentators voiced doubt that misappropriating an employer's confidential information constituted "deception" or "fraud."[224] Now, it is not only fraud but, potentially, a RICO predicate act. In the wake of *Carpenter,* it would seem that any scheme involving misappropriation of confidential inside information could be construed as fraud. Further, if the scheme requires the posting of a letter

216. McNally v. United States, 483 U.S. 350, 358-59 (1987).
217. *Id.* at 352.
218. *Id.* at 355.
219. *Carpenter,* 484 U.S. at 24.
220. *Id.*
221. *Id.* at 326.
222. *Id.* at 328.
223. This is the most plausible explanation. The holding involved a fraud on the Journal. The Journal was neither a buyer nor a seller of securities and some members of the Court felt it error to construe rule 10b-5 to protect such a party. Aldave, *supra* note 201, at 377.
224. *Id.*

or the use of a telephone, it rises to the level of mail/wire fraud. This is a step beyond the more traditional position that fraud consists of misrepresentation of material facts or withholding material information that the fiduciary has a duty to disclose.[225] It creates a third category of fraud. Fraud in *Carpenter* is the disclosure or use of information one has a duty to withhold or abstain from using.[226] If the *Carpenter* Court stands behind its decision, this would provide a civil cause of action for those injured in their "business or property" by insider trading schemes. Because of the difficulty of conducting business without using some means of common carrier communications, it seems inevitable that the decision will lead to an expanded use of RICO.

The Court has indicated that while there may be a need for more expansive federal securities legislation to allow a private cause of action for breach of fiduciary duty or fraud in the sale of securities, Congress has not chosen to supply it and it "should not be supplied by judicial extension."[227] In a line of cases following *Blue Chip Stamps,* the Court has increasingly limited the scope of Rule 10b-5.[228] In the words of Justice Blackmun, Rule 10b-5 is being transformed "from an intentionally elastic 'catchall' provision to one that catches relatively little."[229]

The Court has taken an opposite approach with RICO, saying that Congress intended to enact a broad, expansive statute, that the stat-

225. Glazewski v. Allstate Ins. Co., 466 N.E.2d 1151 (Ill. App. 1 Dist. 1984).

226. 484 U.S. at 23-28. The Court determined that the employee had intentionally violated a duty to his employer:

> The District Court found, and the Court of Appeals agreed, that Winans had knowingly breached a duty of confidentiality by misappropriating prepublication information regarding the timing and contents of the "Heard" column, information that had been gained in the course of his employment under the understanding that it would not be revealed in advance of publication and that if it were, he would report it to his employer. It was this appropriation of confidential information that underlay both the securities laws and mail and wire fraud counts.

Id. at 23-24. The Court noted:

> the similar prohibitions of the common law, that "even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment." As the New York courts have recognized, "It is well established, as a general proposition, that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom." *Diamond v. Oreamuno,* 24 N.Y.2d 494, 497, 301 N.Y.S.2d 78, 80, 248 N.E.2d 910, 912 (1969; *See also* Restatement (Second) of Agency §§ 388, Comment c, 396 (c) (1958).

Id. at 27-28. The Court concluded:

> We have little trouble in holding that the conspiracy here to trade on the Journal's confidential information is not outside the reach of the mail and wire fraud statutes, provided the other elements of the offenses are satisfied.

Id. at 28.

227. *Santa Fe Indus.,* 430 U.S. at 480.

228. *See* Dirks v. SEC, 463 U.S. 646 (1983); *Chiarella,* 445 U.S. 222; *Santa Fe Indus.,* 430 U.S. 462; Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

229. *Chiarella,* 445 U.S. at 246 (Blackmun, J. dissenting).

ute is not ambiguous and that "in the absence of clearly expressed legislative intent to the contrary,"[230] the Court is loath to limit it.

> It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications. . . . [The Court] recognize[s] that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors . . . .[231]

In the aftermath of the *Carpenter* holding that misappropriation is a fraud, and is wire fraud (a RICO predicate act) in conjunction with the use of common carrier media,[232] we may see the triple damages "racketeering" remedy replace Rule 10b-5 in the plaintiff's pleadings where an "enterprise" and a "pattern" can be found.

A QUESTION OF VALUES

Whether this would be a positive development in the law merits consideration. Civil RICO has spearheaded recent attempts to promote business integrity.[233] Its critics have echoed the arguments of another time when critics of the New Deal lined up to attack earlier securities legislation.[234] They argue that the law is unnecessary, impractical and dangerous.[235] They argue that its effect is anti-business.[236] They argue that its application is not what Congress intended.[237]

A law is unnecessary where there is another equal or better remedy or where no injury can be found and the law serves no reasonable purpose. The cost of business litigation has inhibited prospective plaintiffs from bringing any but the most injurious wrongs into court. Wrongdoers have committed tortuous acts knowing that if their victims could discover the facts and bring suit, the most they could forfeit would be their unjust profit and attorney fees.[238] They have known, as well, that if the victim's recovery would not exceed his cost of legal counsel and court fees, the victim would be financially discouraged from bringing suit.[239] RICO shifts the weight of the law to the victim's side. With civil RICO, the swindler must pay the victim's expenses in obtaining justice and return damages threefold. No better remedy is available. In compensating the victim while deterring the criminal, civil RICO serves a reasonable purpose.

---

230. *Id.*
231. *Sedima,* 473 U.S. at 499-500.
232. *Carpenter,* 108 S. Ct. at 322.
233. Goldsmith, *Civil RICO Reform: The Basis for Compromise,* 71 MINN. L. REV. 827, 828 (1987).
234. *Id.* at 828 n.4.
235. Cohen, *Civil RICO Under Fire: Will White Collar Criminals Be Exempted?,* 4 ANTIOCH L.J. 153, 157 (1986).
236. *Id.* at 154.
237. *Id.* at 158.
238. Goldsmith, *supra* note 233, at 835.
239. *Id.* at 846-47.

A law is impractical when it interrupts commerce or is inordinately expensive to administrate. Civil RICO has seen widespread use by leading commercial interests.[240] Civil RICO apparently does not threaten commerce enough to prevent its use by major corporate plaintiffs like IBM.[241] The threat of fraud, a perennial threat to commerce in our society has led one commentator to assert that "civil RICO is a tool of critical importance" to society.[242] Civil RICO costs the government nothing to implement. RICO's propriety may be in debate, but its practicality is well established.[243]

Civil RICO is dangerous. It is dangerous in the same way any powerful weapon is dangerous. The issue is who is endangered? The predicate acts listed in section 1961 would imply that RICO is dangerous to certain lawless elements in our society. The statute lists no exemptions keyed to the color of an individual's collar. The sanctions courts are imposing under Rule 11 serve to limit any frivolous use of RICO and the Constitution maintains its protection. With these safeguards in mind, RICO is no more dangerous than the patrolman's handgun or the SEC's subpoena.

Whether civil RICO is the law Congress intended may be a more debatable issue. Justice White observed that:

> [t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth. . . .
>
> It is true that private civil actions under the statute are being brought almost solely against [respected businesses], rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress.[244]

Despite the numerous post-*Sedima* reform bills that have been advanced, Congress has refused to limit RICO.[245] Perhaps the appropriate question is whether civil RICO is what Congress currently intends, now that it can accurately measure the statute's reach. Congress could narrow RICO's scope at will, yet it refuses to restrict the statute.

Congress has not ignored the Court's deference. RICO reform bills have been introduced in every session of Congress since *Sedima*.[246] These bills have failed because their advocates have not developed particular solutions to specific RICO problems.[247] Most would have resulted in destroying the private civil RICO action under the rubric of reform.[248]

240. Cohen, *supra* note 235, at 168.
241. Goldsmith, *supra* note 233, at 828 n.5.
242. Goldsmith, *supra* note 22, at 790.
243. *Id.*
244. *Sedima*, 473 U.S. at 499.
245. Goldsmith, *supra* note 233, at 848.
246. *Id.* at 829.
247. Note, *supra* note 184, at 1783-84.
248. Goldsmith, *supra* note 233, at 829-30.

The majority of Congress are aware that reports of widespread RICO abuse are greatly exaggerated.[249] Commentators have argued that because civil RICO provides both an effective deterrent and an adequate remedy to the problem of commercial fraud in our society, its value is potentially inestimable.[250] It appears that Congress agrees.

Legislation pending in January of 1989[251] follows the mode of earlier failed attempts to eviscerate civil RICO. These bills would restrict the triple damage remedy to actions where a criminal conviction had been obtained or insider trading was involved.[252] It seems unlikely and inappropriate that they will succeed. Recent figures from the Department of Justice indicate that annual losses from fraud in the United States exceed $200 billion.[253] With the public suffering losses of this magnitude, Congress cannot justify withdrawing a remedy as powerful as RICO.

Legislation is needed, however, to better define the "pattern of racketeering activity" criterion which is causing so much confusion in the courts. A significant minority of the Supreme Court in *Northwestern Bell* expressed concern over the constitutional adequacy of the pattern requirement as it is currently written.[254] The present disarray among the circuits as to how the requirement should be interpreted certainly indicates that some Congressional assistance may be in order.

Congress should amend the "pattern" definition to include both a minimum and a maximum durational time limit. It should require that the acts constituting a pattern occur over a minimum one month period, retaining the current ten year maximum. It should increase the number of requisite predicate acts from two to three and expressly reject the ambiguous "at least two acts" definition. While this approach might allow some individuals who are appropriate targets of RICO to slip through the net, it would provide the desirable advantage of giving the courts a more substantial statutory frame on which to structure their decisions.

The largest obstacle to the statute's implementation in the courts is judicial resistance to labeling "ordinary businessmen" as "racketeers."

---

249. *See* Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 68-71.

250. *See* Goldsmith, *supra* note 233, at 830.

251. S. 1523, 100th Cong., 2d Sess., 134 CONG. REC. S11102 (daily ed. Aug. 8, 1988); A Bill to Amend Chapter 96 of Title 18, United States Code: Hearings on S. 1523 before the Senate Committee on the Judiciary, 100th Cong. 2d Sess. 928 (1987); H.B. 4923, 100th Cong., 2d Sess., 134 Cong. Rec. H4833 (daily ed. June 28, 1988). One analysis of recent Congressional activity surrounding proposals to amend civil RICO concludes with the observation that S. 1523 would itself provide a private cause of action against inside traders convicted of felonies like Ivan Boesky. *Advocates of RICO Revision Gird for Third Try,* CONG. Q. WEEKLY REP., Feb. 18, 1989, at 322.

252. Spiotto & Green, *Rico: A Primer for Indentured Trustees and Bondholders,* 323 PLI/REAL 513 (Practicing Law Institute No. N4-4504, 1989).

253. Goldsmith, *supra* note 233, at 833 n.31.

254. 109 S. Ct. at 2909.

The legislators should remove this impediment by simply deleting the word "racketeer" from the statute. Following this approach the "pattern of racketeering activity" would become a "pattern of enterprise criminality," "racketeering activity" would become "enterprise crime," and the title would be reduced to simply, "Corrupt Organizations Act." Admittedly, this amendment would only be a semantic change, but semantics have played a large role in generating judicial resistance toward this statute. The remedy would be preserved and courts would no longer encounter the conflict of branding "legitimate" business as "racketeers" when implementing it.

CONCLUSION

Although civil RICO was created primarily as a measure to check the infiltration of organized crime into legitimate business, its Congressional authors were aware of the breadth and potential of the 1970 Act. They sought to fill a gap that had long remained open in American jurisprudence and enacted a statute to that end. Fraud and acts of bad faith are evils that work to inhibit the free flow of commerce. With RICO, Congress sought the most effective statute possible within the Constitution to eradicate these evils.

When Congress drafted the rules for dealing with enterprises that conduct their affairs through patterns of racketeering activity, it created no exceptions for businessmen, bankers, stockbrokers, or shareholders. Fraud is fraud whether it is committed by a banker or by a Mafia don. If RICO reaches what the *Sedima* Court characterized as "garden variety" fraud, it is because Congress created more effective remedy. Insider trading scandals are occurring among the most powerful firms on Wall Street. The fraud crisis among the savings and loans threatens to bankrupt the Federal Reserve System. These scandals and the Justice Department figures reveal that civil RICO focuses on a tremendous problem of national proportions.

Civil RICO is an effective remedy against those who engage in commercial fraud. Arguments that prior laws adequately deterred fraud in the business community are insupportable. Civil RICO could benefit from some constructive legislative action, but overzealous reform that could neutralize the statute should be avoided. The statute should be allowed to prevail against those critics who feel they would profit from its demise.

JOE MICHEAL COX