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Civil RICO Reform: The Basis for Compromise

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The leading financial law firms who have been systematically carrying on a campaign against this Act have been seeking—now that they and their financial clients have come out of their storm cellar of fear—not to improve but to chloroform the Act. They evidently assume that the public is unaware of the sources of the issues that represent the baldest abuses of fiduciary responsibility and of the lawyers who, to their fat profit, "passed" on these issues.[1]

In the half-century since Felix Frankfurter criticized Wall Street's response to New Deal securities legislation, government protection of commercial markets has become an established aspect of modern society.[2] Antitrust and securities laws today are viewed as essential to maintaining free competition and marketplace integrity.[3] Few recall, however, that such

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1. Letter from Felix Frankfurter to Henry Stimson (Dec. 19, 1933), *reprinted in* J. SELIGMAN, THE TRANSFORMATION OF WALL STREET 79 (1982).

2. J. SELIGMAN, *supra* note 1, at 79.

3. For example, the Supreme Court has endorsed antitrust legislation in glowing terms: "Antitrust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). *See also* J. BURNS, A STUDY OF THE ANTITRUST LAWS 9-10 (1958) ("[T]he antitrust laws have been the distinctive American answer to the possibilities for abuse inherent in a system of free enterprise. . . . [The Sherman Antitrust Act of 1890] has become one of the fundamental elements of the American capitalistic system.").

Laws regulating securities transactions are equally fundamental. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SEC at XLV (Comm. Print 1977) (asserting that maintenance of public confidence in the integrity of securities markets requires "significant involvement of the federal government in establishing rules of disclosure and in the enforcement of them"); 1 L. LOSS, SECURITIES REGULATION 8 (2d ed. 1961) (The proscription of fraud is "the basic foundation of any system of investor protection."); *cf.* Co-

measures were initially opposed by the business community.[4]

More recently, civil RICO, another attempt to promote commercial integrity, has evoked institutional criticism and has been targeted for reform.[5] Enacted as part of the Organized Crime Control Act of 1970,[6] the Racketeer Influenced and Corrupt Organizations statute (RICO) was intended to provide enhanced criminal sanctions and novel civil remedies in order to attack organized crime.[7] RICO's civil provisions were specifically designed to deter enterprise criminality by authorizing treble damage awards and attorneys fees for successful plaintiffs.[8] Civil RICO has engendered controversy, however, be-

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hen, *"Truth in Securities" Revisited,* 79 HARV. L. REV. 1340, 1344 (1966) (noting that the Securities Act of 1933 "produces disclosures of amazing quantity and quality in the specific areas where its requirements apply"). *See generally* T. HAZEN, THE LAW OF SECURITIES REGULATION 3-8 (1985) (summarizing scope and coverage of pertinent legislation).

4. For example, securities legislation was attacked by corporate leaders as part of an overall effort to undermine the New Deal. *See* A. SCHLESINGER, THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 457 (1959) ("[B]usiness leaders condemned the [1934] bill in steady procession before [Congress]. . . . [T]he attack was along familiar lines: regulation of the exchanges was unnecessary, impractical, and dangerous; its only effect would be to deter investment."); J. SELIGMAN, *supra* note 1, at 77-79. Similarly, strong antitrust measures were opposed by large business interests. *See* T. COCHRAN & W. MILLER, THE AGE OF ENTERPRISE 171-72 (rev. ed. 1960) (suggesting that business perceived the Sherman Act as an empty gesture and attempted to have it repealed once its effect was understood); M. FAINSOD, L. GORDON & J. PALAMOUNTAIN, JR., GOVERNMENT AND THE AMERICAN ECONOMY 447-50 (3d ed. 1959) (noting influence of "big business" within Republican party and lack of early enforcement); *cf.* Letwin, *Congress and the Sherman Antitrust Law 1887-1890,* 23 U. CHI. L. REV. 221, 221 (1955) (stating that some maintained that Sherman Act was a fraud because Congress was dominated by " 'many of the . . . industrial magnates most vulnerable to real antitrust legislation' " (quoting M. FAINSOD & L. GORDON, GOVERNMENT AND THE AMERICAN ECONOMY 450 (1941)). *See generally* Cohen, *Civil RICO Under Fire: Will White Collar Criminals Be Exempted?,* 4 ANTIOCH L.J. 153, 170-71 (1986).

5. Cohen, *supra* note 4, at 168. Civil RICO has become a target for reform despite its widespread use by leading commercial enterprises. A sample listing of major corporations that have used RICO is contained in *Oversight on Civil RICO Suits: Hearings Before the Comm. on the Judiciary,* 99th Cong., 1st Sess. 411 (1986) [hereinafter *Senate RICO Hearings*] (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n). Of particular note is a civil RICO suit by IBM that resulted in a multimillion-dollar settlement. *Id.*

6. Pub. L. No. 91-452, §§ 901-902, 84 Stat. 922, 941-48 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985)).

7. The Statement of Findings and Purpose of the Organized Crime Control Act of 1970 states, in pertinent part, that "[i]t is the purpose of this Act to seek the eradication of organized crime . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.* at 922-23.

8. *See* 18 U.S.C. § 1964(c).

cause it has principally been applied against white collar institutions rather than against traditional organized crime.[9] The Supreme Court's 1985 decision in *Sedima, S.P.R.L. v. Imrex Co.*[10] sustained this application of civil RICO, but refrained from conferring complete legitimacy. Instead, Justice White's opinion, emphasizing the statute's breadth, expressly signaled to Congress that only legislative reform could modify RICO's scope.[11]

Since *Sedima*, numerous reform bills have been advanced.[12] Most stemmed from concerns that RICO suits against legitimate businesses both distorted the congressional intent underlying the statute and afforded undue opportunity for malicious prosecution.[13] Unfortunately, however, these bills generally have failed to provide tailored solutions to specific RICO problems. Instead, under the guise of reform, most have proposed amendments that would inevitably have emasculated

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9. *Senate RICO Hearings, supra* note 5, at 2-4 (statements of Senators Thurmond, Denton, McConnell, and Simon). *See* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3287 (1985) (noting that actions under RICO are aimed "almost solely" against respected business, "rather than against the archetypal, intimidating mobster"); *see also id.* at 3295 (Marshall, J., dissenting) (positing that Court's reading of the civil RICO provision as applying to "legitimate businesses" has caused "dislocations" of congressional purpose); *id.* at 3288 (Powell, J., dissenting) ("I write separately to emphasize my disagreement with the Court's conclusion that the statute must be applied to authorize the types of private civil actions now being brought frequently against respected businesses.").

10. 105 S. Ct. 3275 (1985).

11. Justice White concluded:

> "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." . . .
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> 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.

Id. at 3287 (footnote omitted) (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985)).

12. Reform bills considered by the 99th Congress are set forth in the Appendix.

13. Senator Orrin Hatch, for example, remarked in introducing S. 1521 into Congress that "[RICO's] authors did not want or intend RICO to be used to harass legitimate businesses. . . . The avowed purpose of RICO was to decrease the incidence of, and act as a deterrent to, organized crime. . . . In the context of civil RICO . . . the restraining influence of prosecutors is completely absent." 131 CONG. REC. S10,285-87 (daily ed. July 29, 1985). *See also* Lacovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provision of Private Civil RICO*, 21 NEW ENG. L. REV. 1, 2-3 (1985-1986).

the private civil RICO action.[14]

Because civil RICO is potentially an invaluable antifraud mechanism,[15] any reform attempt should be limited to demonstrated problems caused by the law.[16] This Article proposes such a reform program. Part I reviews the merits of civil RICO. Part II next evaluates the need for reform. Part III then critiques those reform proposals that would emasculate the statute. Finally, Part IV proposes a nine-point reform plan. The proposed plan is intended to provide Congress with a new basis for compromise of the present legislative debate.

I. THE MERITS OF CIVIL RICO

RICO prohibits three categories of activity specified in section 1962 of title 18: the investment of racketeering proceeds in an interstate enterprise (section 1962(a));[17] the acquisition or maintenance of an interest in an interstate enterprise through a pattern of racketeering activity (section 1962(b));[18] and the conducting of interstate enterprise affairs through a pattern of racketeering activity (section 1962(c)).[19] "Racketeering activ-

14. *See infra* notes 89-148 and accompanying text.

15. *See infra* notes 31 & 73-76 and accompanying text.

16. Moreover, Congress must not merely identify alleged problem areas. It is also necessary to examine the merits of anti-RICO arguments. For example, RICO abuse is purportedly a widespread phenomenon. Careful analysis, however, has revealed that the abuse issue has been grossly misrepresented. *See* Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 68-71.

17. Section 1962(a) states in part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) (1982).

18. Section 1962(b) states:

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

18 U.S.C. § 1962(b) (1982).

19. Section 1962(c) states:

> 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,

ity" is determined by reference to specified predicate acts;[20] "pattern" is minimally defined as "at least two acts of racketeering activity . . . within ten years."[21] Significantly, the term "enterprise" is not limited to traditional organized crime groups, but is broadly defined in neutral terms.[22]

Although principally concerned with the infiltration of legitimate businesses by organized crime,[23] Congress purposely drafted RICO to address a wide variety of problems.[24] Indeed, if infiltration had been the exclusive legislative concern, the third category, section 1962(c), would have been of limited utility.[25] Section 1962(c), however, has been the mainstay of crimi-

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in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1982).

20. *See* 18 U.S.C. § 1961(1) (Supp. III 1985).

21. 18 U.S.C. § 1961(5) (1982).

22. The term " '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." 18 U.S.C. § 1961(4) (1982).

23. United States v. Turkette, 452 U.S. 576, 591 (1981) ("[L]egislative history forcefully supports the view that the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime."). *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies,* 53 TEMP. L.Q. 1009, 1014-16 (1980) (reviewing emphasis on infiltration problem).

24. *See Turkette,* 452 U.S. at 591-93 (noting that RICO was intended to be both preventive and remedial). Senator McClellan, principal sponsor of RICO, rejected the proposition that reform ought to be limited to traditional organized crime. *See* 116 CONG. REC. 18,913-14 (1970). He acknowledged that problems occasioned by organized crime initially led to legislative inquiry, but maintained that "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." *Id.* at 18,914. *See also* Papai v. Cremosnik, 635 F. Supp. 1402, 1410-11 (N.D. Ill. 1986) (noting that Congress decided to include commercial frauds); 116 CONG. REC. 35,204 (1970) (statement of Rep. Poff indicating that "every effort was made to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with all who might be affected by this legislation—whether part of the crime syndicate or not"); *infra* note 157. Congress has often enacted laws capable of flexible application in a variety of contexts. *See* Goldsmith & Keith, *supra* note 16, at 73-74 & n.85 (explaining such use of racketeering, antitrust, and civil rights laws). Thus, RICO is not unusual in this respect.

25. Indeed, if infiltration were the sole legislative concern, § 1962(c) might even be unnecessary. Sections 1962(a) and (b) would effectively handle most infiltration problems. Section 1962(c) has an anti-infiltration purpose only in the sense that it may be used to attack racketeering activity at its source, thereby preventing racketeers from engaging in future infiltration activities. *See Turkette,* 452 U.S. at 591-93 (citing legislative history indicating congressional intent to strike at organized crime's "primary sources of revenue and power," *id.* at 591).

nal prosecution efforts against organized crime. Although extremely successful, these criminal cases generally have not involved charges of infiltration.[26] Nor have they been limited to Mafia prosecutions. A variety of white-collar criminal activities by so-called legitimate businesses has been prosecuted under section 1962(c) as well.[27] Given this record of criminal enforcement, RICO's civil provisions may afford comparable opportunities for actions against so-called legitimate businesses engaged in ongoing criminal activity.

Most civil RICO suits also have alleged violations of section 1962(c).[28] For the most part, these suits have been aimed at combating fraud;[29] relatively few have involved traditional organized crime groups.[30] To suggest, however, that civil RICO is therefore misdirected is to misconceive the nature and extent of fraud in our society. The Department of Justice recently

26. *Cf. Senate RICO Hearings, supra* note 5, at 107-11 (statement of Ass't Att'y Gen. Stephen S. Trott) (in commenting on the salutary effects of RICO, noting numerous RICO cases not involving infiltration-oriented predicates). *See also Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1983, Part 7: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 97th Cong., 2d Sess. 1050-51 (1982) (summarizing unprecedented success of RICO prosecutions of organized crime families); *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1982, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 97th Cong., 1st Sess. 49-61 (1981) (same).

27. *See, e.g.,* United States v. Jannotti, 729 F.2d 213, 226-27 (3d Cir. 1984) (lawyer involved in ABSCAM "front"); United States v. Thompson, 685 F.2d 993, 994-95 (6th Cir. 1982) (governor of Tennessee's office as enterprise); United States v. Stratton, 649 F.2d 1066, 1070, 1074-75 (5th Cir. 1981) (Florida's Third Judicial Circuit as enterprise); United States v. Marubeni Am. Corp., 611 F.2d 763, 769-70 (9th Cir. 1980) (corporation as enterprise). Today, such use of criminal RICO is well accepted. At first, however, it too was controversial. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery,* 49 FORDHAM L. REV. 165, 170, 176 (1980); *Are Prosecutors Going Wild Over RICO,* Legal Times of Wash., Oct. 8, 1971, at 32, col. 1, *cited in* Blakey & Gettings, *supra* note 23, at 1012 (quoting prominent Washington defense counsel William G. Hundley: "But they're using this [RICO] against all kinds of defendants. You know as well as I do that Congress never would have passed it if they ever thought they were going to use it against governors and people like that.").

28. AMERICAN BAR ASSOCIATION, SECTION OF CORPORATION, BANKING AND BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 57 (1985) [hereinafter TASK FORCE REPORT] (estimating that 97% of cases allege § 1962(c) violations).

29. *See* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3295 (1985) (Marshall, J., dissenting) (citing TASK FORCE REPORT statistics indicating 77% fraud cases).

30. *Id. See Senate RICO Hearings, supra* note 5, app. at 267-70 (appendix to statement of Ray J. Groves, Chairman, American Institute of Certified Public Accountants) (summarizing statistics).

reported that fraud accounts for losses exceeding $200 billion annually.[31] These losses represent a long-term

31. UNITED STATES DEPARTMENT OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL 42 (1984). All studies agree that fraud poses a profound national problem. *See, e.g.*, UNITED STATES CHAMBER OF COMMERCE, A HANDBOOK ON WHITE COLLAR CRIME: EVERYBODY'S PROBLEM, EVERYBODY'S LOSS 6 (1974) (economic cost of fraud exceeds $41 billion per year); Cole, *Cover Letter* to AMERICAN BAR ASSOCIATION, SECTION OF CRIMINAL JUSTICE, ECONOMIC OFFENSES (1977) (noting federal estimates that fraud is a $40 billion problem annually and likely to worsen). A detailed review of the impact of fraud in a variety of areas was recently prepared by the Congressional Research Service of the Library of Congress. *See* CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, AIRLINE TICKET FRAUD 1 (memorandum dated April 1, 1986 by Rita Ann Reimer, Legislative Attorney, American Law Division, noting losses of approximately $500 million each year); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, ARSON FOR PROFIT: TECHNIQUES, SCOPE AND IMPACT 1 (memorandum dated March 18, 1986 by Rita Ann Reimer, Legislative Attorney, American Law Division, noting that arson fraud "accounts for billions of dollars in property losses" each year); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, BANK FRAUD 1 (memorandum dated April 21, 1986 by Raymond Natter, Legislative Attorney, American Law Division, noting that "[b]ank fraud is often cited as the cause or contributing factor in at least one-half of all bank failures in the country [but that] the true extent and nature of the problem is difficult to determine with accuracy"); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, DRUG FRAUD 1 (memorandum dated May 7, 1986 by Cathy Gilmore, Legislative Attorney, American Law Division, noting estimates that "the cost of medical quackery [exceeds] $10 billion per year"); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, FRAUD BY INSURANCE COMPANIES 1-8 (memorandum dated April 11, 1986 by Henry Cohen, Legislative Attorney, American Law Division, surveying types of insurance fraud); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, FRAUD IN DEFENSE PROCUREMENT 2 (memorandum dated May 15, 1986 by Jack H. Maskell, Legislative Attorney, American Law Division, citing estimates from $23 billion to $38 billion); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, HEALTH CARE FRAUD AGAINST THE FEDERAL GOVERNMENT 3-4 (memorandum dated April 28, 1986 by Rita Ann Reimer, Legislative Attorney, American Law Division, noting estimates that 5% of total outlays of nearly $72 billion may be fraudulent); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, RECORD, TAPE AND FILM PIRACY AND COUNTERFEITING 1 (memorandum dated April 28, 1986 by Rita Ann Reimer, Legislative Attorney, American Law Division, noting losses of "several billion dollars annually"); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, SECURITIES AND COMMODITIES FRAUD 1 (memorandum dated April 17, 1986 by Michael V. Seitzinger, Legislative Attorney, American Law Division, noting that "various kinds of alleged securities and commodities fraud" have "in the opinion of many defrauded Americans of tremendous sums of money"); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, UPDATE OF CRS REPORT ENTITLED "WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE" 2 (memorandum dated April 10, 1986 from Suzanne Cavanagh and William Woldman, Analysts in American National Government, Intergovernmental Relations Section, Government Division, to Senator Joseph Biden, summarizing range of estimates from $27 billion annually in the 1970s to $200 billion in 1984). *See also* J. BOLOGNA, CORPORATE FRAUD 9 (1984) (noting a 1980 survey reporting

trend[32] that neither traditional criminal nor civil sanctions have been able to reverse.[33]

Civil RICO potentially provides an effective way to combat this fraud problem. Its treble damage and counsel fee provisions encourage remedial litigation by private plaintiffs.[34] Because complex fraud investigations often require resource commitments that prosecutive agencies are unable to make,[35] private attorneys general can serve a critical supplementary function. Private treble damage actions also promote deter-

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that 117 of America's largest corporations had been convicted of white-collar crimes during the 1970s).

Because of the fraud problem, state and local law enforcement organizations have aggressively supported civil RICO. *See, e.g., Senate RICO Hearings, supra* note 5, at 404, 408-09 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n voicing support for RICO). For similar reasons, a recent American Bar Association committee report endorsed the utility of fraud-based RICO predicates. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION 40-47 (1985) [hereinafter RICO LEGISLATION AND LITIGATION]. *See also* Cohen, *supra* note 4, at 171-73 (summarizing fraud problem).

32. *See* authorities cited *supra* note 31.

33. *See, e.g., Senate RICO Hearings, supra* note 5, at 415-17 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n) (noting inadequacies of existing remedies); RICO LEGISLATION AND LITIGATION, *supra* note 31, at 47 ("It can hardly be argued that current law has curtailed [fraud] adequately."). *See infra* notes 79-88 and accompanying text.

34. *See* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3284 (1985) (noting that both private attorney general provision and treble damages provision support a legislative purpose to encourage civil litigation); *see also infra* note 86.

35. For example, in 1970, one commentator observed:

> The increasing complexity of our society heightens vulnerability because it increases the difficulty of obtaining redress for losses suffered. Legal services are costly, prosecutors and investigators are overburdened, and court calendars are clogged.
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> . . . *The prevention, deterrence, investigation, and prosecution of white-collar crime must compete with other interests for allocation of law enforcement dollars, in an atmosphere in which every other national problem is made more serious and more costly of solution by the increasing complexities of our society.*

H. EDELHERTZ, THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME 8 (1970) (emphasis added). Today, of course, federal prosecutors face the unprecedented budgetary constraints of Gramm-Rudmann. *See Senate RICO Hearings, supra* note 5, at 538 (statement of Philip A. Feigin, Ass't Securities Comm'r, Colorado Division of Securities and Chairman, Special Projects Comm., Enforcement Section, North Am. Securities Adm'rs Ass'n) (noting that the "need for deterrence has never been greater" despite governmental budgetary pressures); Tarlow, *Criminal RICO Report,* 4 RICO L. REP. 341, 342 (1986) ("[F]ederal prosecutorial agencies are now crying poverty. In recent public statements, the U.S. Attorney for the Southern District of California has cautioned that no major investigations can be undertaken because of budgetary restrictions.").

rence.[36] Actual damages suits, in contrast, do little to promote deterrence. Few people are deterred by the prospect of merely having to part with ill-gotten gain, especially because litigation is rare when recovery is limited to actual damages.[37] In addition, treble damages serve a socially desirable compensatory function.[38] Moreover, because RICO offenders by definition have engaged in continuous criminal activity,[39] treble damages are especially appropriate.

RICO also affords victims of criminal activity critical procedural benefits that are unavailable under traditional fraud remedies. For example, its liberal venue and nationwide service of process provisions facilitate the joining of all defendants in a

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36. By analogy, the deterrent effect of treble damage litigation has been well established in the antitrust context. *See, e.g.*, Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429 (1981) (study shows that increased antitrust enforcement and the threat of large damages deter illegal activity in one market). *See also* Blue Shield v. McCready, 457 U.S. 465, 472 (1982) (noting deterrent effect of "private enforcement mechanism" in antitrust); Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (private suits for treble damages provide "significant supplement to the limited resources available to the [government]").

37. This point was clearly made in congressional testimony:

> If our society authorizes the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, it lets the perpetrator know that if he is caught, he need only return the misappropriated sums. If he is not caught, he may keep his ill-gotten gains, and even if he is caught and sued, he knows that he may be able to defeat part of the damages claims or at least compromise it. In short, the balance of risk under traditional simple damage recovery provides little disincentive to those who engage in such conduct.

Senate RICO Hearings, supra note 5, at 415 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n). Under cost-benefit analysis, the profitability of crime, discounted by the risk of apprehension and the likely sanction, will ordinarily encourage criminality. *Cf.* R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 223-24 (1976) (The conclusion that the penalty for an antitrust violation should be equal to the social cost is incorrect where the violation is concealable, because "the prospective violater will discount . . . the punishment cost by [the probability of being punished] in determining the expected punishment cost for the violation." *Id.* at 223.). Treble damages are needed to alter the cost-benefit calculation. *See infra* notes 79-86 and accompanying text.

38. *Cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3359 (1985) (treble damages as compensatory in antitrust context); Deere & Co. v. International Harvester Co., 658 F.2d 1137, 1146 (7th Cir. 1981) (treble damages compensatory in patent context), *cert. denied*, 454 U.S. 969 (1981).

39. RICO liability is limited to persons who have engaged in a *pattern* of racketeering activity. *See supra* notes 17-21 and accompanying text. Since *Sedima*, the judiciary has emphasized that "continuity" is an integral aspect of the pattern element. *See infra* notes 68-69 and accompanying text.

single forum convenient to the plaintiff.[40] These benefits are crucial in complex cases when defendants and witnesses are scattered throughout the country.[41] Judicial economy is

40. RICO's liberal venue and service of process provisions are contained in § 1965:

> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
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> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.
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> (c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.
>
> (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. § 1965 (1982).

41. State RICO laws, often cited as viable alternatives to the federal statute, lack this capacity. Yet, in a complex fraud action, these provisions may be of critical importance. First, venue may be established in a forum convenient to plaintiff. Second, if the interests of justice permit, multiple defendants—located throughout the country—may be joined in the action. Finally, witnesses are potentially subject to nationwide service of process. An excellent example of the benefits of this procedure is provided by *In re* Alexander Grant & Co. Litig., 110 F.R.D. 528 (S.D. Fla. 1986). *Grant* was a RICO action filed in the aftermath of a massive fraud which resulted in the bankruptcy of E.S.M. Government Securities, Inc. (E.S.M.). Bankruptcy was effected when E.S.M. was unable to meet $300,000,000 in outstanding obligations. *Id.* at 530. The failure of E.S.M. obviously caused serious investor losses and eventually resulted in the insolvency of the Home State Savings Bank in Ohio, *id.* at 531, and the shutdown of 69 privately insured thrift institutions, *see* N.Y. Times, Sept. 17, 1986, at D6, col. 5. Other injured investors included a dozen municipalities throughout the country. *See id.* Alexander Grant & Co. was sued under RICO for its involvement in facilitating the fraud through fraudulent accounting practices. *Grant*, 110 F.R.D. at 541. Because 470 Grant partners—scattered throughout the country—were potentially liable, § 1965(b) served to consolidate the action. *See id.* at 532 (noting, however, problem effecting service of process). *See also* Schacht v. Brown, 711 F.2d 1343 (7th Cir.) (massive insurance fraud resulting in RICO action against multiple defendants), *cert. denied*, 464 U.S. 1002 (1983); *cf.* United States v. Persico, 621 F. Supp. 842, 854 (S.D.N.Y. 1985) ("To compel the government to attack this alleged organization through seriatim trials would frustrate the intent of RICO."). Aspects of the E.S.M. litigation were eventually settled for $72.5 million. N.Y. Times,

thereby promoted as the need for multiple trials is reduced. Furthermore, such consolidation facilitates the orderly presentation of proof and eliminates the risk of conflicting verdicts.

Critics of civil RICO argue that treble damages encourage extortionate claims and result in windfall recoveries.[42] The impact of abusive claims, however, has been grossly overstated.[43] Strike suits have not been a frequent phenomenon and, to the extent frivolous actions have occurred, most have been rejected at the pleadings stage.[44] In addition, no pattern of windfall benefits has developed.[45]

Sept. 17, 1986, at D6, col. 6. *See also infra* note 76 (describing RICO procedures vital to pursuit of action for nationwide credit card fraud).

42. *See* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3295 (1985) (Marshall, J., dissenting); Lacovara, Wright & Aronow, *Legislative Reform of Civil RICO: The Business Community's Perspective*, in LAW & BUSINESS, INC., CIVIL RICO LITIGATION 240-41 (1985) ("The mere threat of a private RICO suit produces settlements because of the risk of treble damages, attorney's fees, expensive discovery, and the public label 'racketeer.' "); *see infra* notes 49-50 & 205 and accompanying text.

43. A detailed analysis of the abuse controversy is contained in Goldsmith & Keith, *supra* note 16. That study noted:

> It is apparent . . . that the abuse issue has been exaggerated and that, to the extent abuse has occurred, the system has handled the problem effectively and expeditiously. For example, congressional witnesses have often broadly referred to "RICO horror stories" without providing supporting documentation. And, to the extent specific examples of abuse have been provided, most, in fact, were dismissed at the pleadings stage. The remainder were for the most part proper RICO claims raising serious allegations of enterprise criminality and commercial fraud.

Id. at 69-70 (footnotes omitted). *See also* Note, *Congress Responds to* Sedima*: Is There a Contract Out On Civil RICO?*, 19 LOY. L.A.L. REV. 851, 881 (1986) (summarizing arguments rejecting abuse issue).

44. *See* Goldsmith & Keith, *supra* note 16, at 88-97 (reviewing stringent pleading requirements for fraud-based RICO actions and providing examples of sanctions under FED. R. CIV. P. 11).

45. One commentator has observed that "[o]f the nearly three hundred [civil RICO] suits surveyed by the ABA Task Force, as of March, 1985, only nine had resulted in treble damage awards. Of the rest, the majority were dismissed." Note, *supra* note 43, at 859. The commentator concluded that "[i]t almost makes one wonder what the fuss is about." *Id.* at 859 n.35. The pertinent ABA survey, of course, was conducted pre-*Sedima*. Nevertheless, no pattern of windfall recoveries has been noted by any RICO reporting service. *See generally* cases reported RICO L. REP.; Civ. RICO Rep. (BNA).

Nor is such a pattern of windfall benefits likely to occur. Studies in other contexts have demonstrated that, given the vicissitudes of modern litigation, treble damages are needed merely to promote the recovery of *actual* damages. *See Senate RICO Hearings, supra* note 5, at 416 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n) ("[I]t may be necessary to authorize *treble* damages to assure that deserving victims receive *actual* damages."); STAFF OF COMM. ON THE JUDICIARY, STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY, 98TH CONG., 2D SESS. 13-15 (Comm. Print 1984) ("[Settlements]

RICO, of course, has been law since 1970. Since then, it has done little to quell fraud. Because its civil application is a relatively recent phenomenon, however, it should be given an opportunity to develop.[46]

II. THE ARGUMENTS FOR REFORM

Abuse has been the principal rallying point of civil RICO opponents. Their concern has been twofold: RICO's potential for malicious prosecution and its abuse of statutory scope.[47] The former concern involves the strike suit problem; the latter raises broader jurisprudential issues such as federalism. Critics also contend that RICO is unnecessary because fraud victims already have adequate legal remedies.[48]

A. THE POTENTIAL FOR MALICIOUS PROSECUTION

Some courts have suggested that the combination of RICO's treble damages with its labeling of defendants as "rack-

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even approaching alleged actual damages [are] unusual. The great majority of private antitrust suits are settled . . . for less than the actual damages alleged."); Vold, *Are Threefold Damages Under the Anti-trust Act Penal or Compensatory?*, 28 KY. L.J. 117, 128 (1939) ("Where the ordinarily recoverable legal damages are utterly inadequate in that they fall far below full compensation . . . , such twofold or threefold damage legislation provides a reasonable and practical method for awarding liquidated compensation.") At least one court has recognized this in a RICO context:

> The delays, expenses, and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399 n.16 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

46. *See Senate RICO Hearings, supra* note 5, at 537 (statement of Philip A. Feigin, Ass't Securities Comm'r, Colorado Division of Securities and Chairman, Special Projects Comm., Enforcement Section, North Am. Securities Adm'rs Ass'n) (noting that "not enough time has passed to allow private civil RICO to gain widespread acceptance and understanding").

47. *See* Goldsmith & Keith, *supra* note 16, at 57, 67; Lacovara, Wright & Aronow, *supra* note 42, at 240-42.

48. *See, e.g., Senate RICO Hearings, supra* note 5, at 632-33 (statement of Edward I. O'Brien, President of the Securities Indus. Ass'n) (arguing that "[t]he private right of action in RICO is not essential for redressing wrongs, since there are ample remedies existing in both federal and state law"); *id.* at 769 (statement of the American Property and Casualty Ins. Indus. delivered by Irvin B. Nathan) ("[T]hose with ordinary commercial disputes have no need for RICO's treble-damage remedy. State common law and statutory remedies are fully effective . . . .").

eteers" entices litigants to file frivolous claims.[49] The result, according to one congressional critic, is "a new form of extortion sweeping the country."[50] Federal courts allegedly have been flooded with abusive claims.[51]

Abuse, however, is a systemic problem.[52] In this respect, RICO is not unique; any legal remedy is vulnerable to abuse.[53] So, although RICO abuse may warrant concern, the issue has been grossly distorted. Those opposing RICO have broadly alleged abuse without carefully examining the seriousness of plaintiffs' allegations.[54] Moreover, under existing procedures, the judiciary has expeditiously disposed of most frivolous claims.[55] RICO critics have failed to recognize that because it is

49. *See, e.g.*, Wolin v. Hanley Dawson Cadillac, Inc., 636 F. Supp. 890, 891 (N.D. Ill. 1986) ("RICO's lure of treble damages and attorney's fees draws litigants and lawyers . . . like lemmings to the sea."); *see infra* note 205 and accompanying text.

50. Boucher, *Closing the RICO Floodgates in the Aftermath of* Sedima, 31 N.Y.L. SCH. L. REV. 133, 133 (1986).

51. *Id.* at 143; *see, e.g., Senate RICO Hearings, supra* note 5, at 766 (statement of the American Property and Casualty Ins. Indus. delivered by Irvin B. Nathan) ("[H]undreds of . . . civil RICO actions have been brought in circumstances that neither involve organized crime nor contain allegations of serious business misconduct."); *see also* Lacovara & Aronow, *supra* note 13, at 10 (extortion of legitimate businesses).

52. *See* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182 (1985) ("Resort to frivolous litigation, maintenance of baseless defenses, and harassment of one's opponent are practices that judges and lawyers engaged in civil litigation encounter regularly."). In fact, widespread abuse resulted in the 1983 amendment of Federal Rule of Civil Procedure 11 (instituting more stringent certification of pleadings and providing sanctions for noncompliance). *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983) (purpose of amendment was to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses"); Parness, *Groundless Pleadings and Certifying Attorneys in Federal Courts*, 1985 UTAH L. REV. 325, 329-30 ("[F]ederal rulemakers [in amending Rule 11] evidently realized that pleading related abuses . . . undermine 'the just, speedy, and inexpensive determination' of many civil actions." (quoting FED. R. CIV. P. 11)).

53. As one congressional witness observed, "There is scant evidence that RICO has created baseless litigation in any greater proportion than other causes of action. . . . [T]here is now no empirical data that shows RICO is more abused than an 'average' cause of action." *Senate RICO Hearings, supra* note 5, at 361-62 (statement of Steven Twist, Chief Ass't Att'y Gen., State of Arizona).

54. For example, "numerous RICO cases, casually labeled by congressional witnesses as abusive or garden variety fraud, actually have raised serious allegations of continuing enterprise criminality." Goldsmith & Keith, *supra* note 16, at 79-80 (providing several illustrations); *see supra* note 43. *See also* Cohen, *supra* note 4, at 157-58 (reviewing many important RICO actions).

55. Goldsmith & Keith, *supra* note 16, at 69, 86-92, 94-97 (reviewing the jurisprudence under the Federal Rules of Civil Procedure). *See Public Citi-*

far easier to file a suit than to win one,[56] many cases have been successfully resolved at the pleadings stage.[57] The critics' claims of flooded dockets lack documentation and ignore the fact that sixty-five percent of RICO claims already enjoy independent grounds for federal jurisdiction.[58]

B. ABUSE OF STATUTORY SCOPE

RICO's broad scope also has been criticized, especially because it arguably supplants other federal remedies.[59] This criti-

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zen, PIRG Tell Congress Civil RICO Is Indispensable as Consumer Protection Statute, 1 Civ. RICO Rep. (BNA) 2 (Oct. 30, 1985) (testimony of Priscilla Budeiri, Staff Attorney, Public Citizen's Congress Watch, October 29, 1985, before the Subcommittee on Criminal Justice, Committee on the Judiciary, United States House of Representatives, noting dismissal of frivolous cases); *see also* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 56 (1983) (existing means sufficient for reducing meritless litigation).

56. A Department of Justice survey of 163 civil RICO cases concluded that 61% were successfully resolved by defendants before trial. *Senate RICO Hearings, supra* note 5, at 127 (statement of Ass't Att'y Gen. Stephen S. Trott). Although this survey was pre-*Sedima*, a casual review of any RICO reporter service establishes that this trend has continued. *See Cumulative Decision Index,* 4 RICO L. REP. 24-51 (1986). *See also supra* note 45. Perhaps for this reason, RICO opponents rarely give concrete examples of successful extortive settlements. *See* Goldsmith & Keith, *supra* note 16, at 69 n.67.

57. For example, a recent law review article by Representative Frederick C. Boucher, a leading RICO critic, cited numerous cases of alleged abuse without explicitly mentioning their pretrial dismissal. Boucher, *supra* note 50, at 135 n.7, 140 nn.36-37 & 39. Each case cited was dismissed before trial. *See also* Lacovara & Aronow, *supra* note 13, at 2-3, 9.

58. *Senate RICO Hearings, supra* note 5, at 127 (statement of Ass't Att'y Gen. Stephen S. Trott summarizing a Department of Justice study). Although acknowledging that RICO's treble damage provision may have provided the lure for some of these cases, the study "suggests that the burden of private RICO suits on the judiciary is not a particularly heavy one." *Id.* at 136. Moreover, according to the Administrative Office of the United States Court, only 614 civil RICO cases were filed between September 1985 and June 1986. *614 Civil RICO Suits Filed Between September, 1985 and June 30, 1986,* 5 RICO L. REP. 246 (1987). This is a fraction of the 25,000 cases filed annually. *See id.*

59. This concern was emphasized in Justice Marshall's *Sedima* dissent:

> The civil RICO provision . . . stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the states.
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> In addition to altering fundamentally the federal/state balance in civil remedies, 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. It does not take great legal insight to realize that such a plaintiff would pursue his case under RICO rather than do so solely [under the securities laws] . . . .

cism, however, is misleading. RICO does overlap with other federal statutes, but the overlap is neither complete nor undesirable.[60] For example, not every securities or antitrust claim can be routinely converted into a RICO action.[61] Thus, RICO does not *supplant* such legislation; rather, it serves a useful *supplemental* function.[62] Such legislative gap-filling is a well-established aspect of our jurisprudence.[63]

> Indeed, the federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees. By invoking RICO, in contrast, a successful plaintiff will recover both treble damages and attorney's fees.
>
> More importantly, under the Court's interpretation, the civil RICO provision does far more than just increase the available damages. In fact, it virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws.

Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3294-95 (1985) (Marshall, J., dissenting). *See, e.g., Senate RICO Hearings, supra* note 5, at 651 (statement of Donald Egan, Esq.) ("[U]nless remedial steps are taken by Congress RICO may soon replace virtually every existing federal regulatory scheme insofar as private remedies are concerned."); *id.* at 129 (statement of Ass't Att'y Gen. Stephen S. Trott summarizing criticism that RICO's "use primarily as a remedy for fraud has resulted in the unnecessary and unwise federalization of an area of law that should be reserved to the states").

60. Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) (" 'The fact that there may well be some overlap is neither unusual nor unfortunate.' " (quoting United States v. Naftalin, 441 U.S. 768, 771 (1979) (quoting SEC v. National Sec., Inc., 393 U.S. 453, 468 (1969)))). Justice Marshall, in his *Sedima* dissent, *see supra* note 59, failed to acknowledge his *Huddleston* majority opinion in which overlap between securities laws was approved. Such overlap is quite common. For example, see Rosenberg v. United States, 346 U.S. 273, 294 (1953) (overlap of criminal laws); Edwards v. United States, 312 U.S. 473, 484 (1941) (same); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983) (overlap between arbitration provisions); Nilsen v. City of Moss Point, 701 F.2d 556, 561 (5th Cir. 1983) (overlap between civil rights laws).

61. RICO requires proof of certain elements that are not required in other contexts. For example, in the following securities cases, critical elements were deemed absent: Bennett v. United States Trust Co., 770 F.2d 308, 315 (2d Cir. 1985) (enterprise), *cert. denied*, 106 S. Ct. 800 (1986); Clodfelter v. Thuston, 637 F. Supp. 1034, 1040 (E.D. Mo. 1986) (pattern); Modern Settings, Inc. v. Prudential-Bache Sec., Inc., 629 F. Supp. 860, 862 (S.D.N.Y. 1986) (corporation cannot be both liable person and enterprise conducting racketeering activity); *cf.* Dan River, Inc. v. Icahn, 701 F.2d 278, 290-91 (4th Cir. 1983) (noting need for criminal intent). For this reason, it is often not practical to convert a securities case into a RICO claim. *See* Bertz, *Opinion*, 2 RICO L. REP. 353, 354 (1985). *Cf. generally* Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843 (2d Cir. 1986) (plaintiff unable to establish RICO, securities, or antitrust violations).

62. The recent Wall Street insider trading scandal demonstrates this point. Insider trading may injure many investors beyond the direct purchasers who may sue under the securities laws.

63. *See* cases cited *supra* note 60. Another example of such supplementation is in the area of labor relations. In considering whether civil RICO is applicable to the activities of a mob-dominated union, the Third Circuit Court of

RICO's breadth, however, has also triggered federalism objections. States have traditionally provided the forum for claims grounded in fraud or routine breach of contract. RICO arguably encroaches upon that domain[64] because it includes mail and wire fraud as predicate violations.[65] Because a "pattern of racketeering" ostensibly can be established by alleging the occurrence of two predicate violations within a ten-year period, critics contend that virtually every business dispute can be federalized into a racketeering claim.[66]

This perspective, however, misconceives both the current nature of RICO and the essence of federalism. RICO's pattern requirement was designed to bring continuing enterprise criminality within its scope.[67] In *Sedima*, the Supreme Court suggested that courts had been interpreting this requirement too

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Appeals ruled that RICO is not preempted by the Labor Management Reporting and Disclosure Act. United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 280 n.13 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986). The two laws were considered as serving different purposes and RICO, in particular, was viewed as supplementary. *Id.* The court also observed that any overlap between the two statutes was not complete. *Id.* at 282 n.16.

64. "[C]ivil RICO's opponents argue that Congress never explicitly considered the need for a federal fraud remedy and that no such remedy is necessary . . . given the fact that federal and state statutes make serious fraud a crime . . . ." *Senate RICO Hearings, supra* note 5, at 129 (statement of Ass't Att'y Gen. Stephen S. Trott); *id.* at 634 (statement of Edward I. O'Brien, President of the Securities Indus. Ass'n) (contending that "RICO has completely federalized what heretofore has been considered the province of state courts—that is the resolution of common garden variety disputes"). *See also supra* notes 48 & 59.

65. 18 U.S.C. § 1961(1) (Supp. III 1985).

66. The following commentary is typical of arguments presented to Congress: "Civil causes of action under RICO are only limited by the imagination of the plaintiff's attorneys. . . . [A]lmost any contractual situation involving communication via telephone or the mails—and we are here talking about essentially every contract—is fair game for a RICO action." *Senate RICO Hearings, supra* note 5, at 224 (statement of A. DiBuono, Senior Vice President and Gen. Counsel to Colt Indus., Inc.). *See, e.g.*, Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1535 (D. Mass. 1986) ("[I]t is the rare transaction that does not somehow rely on extensive use of the mails or the telephone."); Frankart Distribs., Inc. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1201 (S.D.N.Y. 1986) (noting that most business transactions involve mails).

67. "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective." S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969), *cited with approval in* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3285 n.14 (1985). *See* United States v. Turkette, 452 U.S. 576, 583 (1981) (noting that proof of an association-in-fact enterprise requires evidence that "associates function as a continuing unit"); TASK FORCE REPORT, *supra* note 28, at 72 ("The 'pattern' element . . . was designed to limit its appli-

loosely. Justice White stated that although two predicate acts are a statutory minimum, a pattern is not established absent sufficient allegations of predicate activity establishing "continuity plus relationship."[68] Since *Sedima*, most federal courts have adopted this formulation and have rejected RICO claims not involving multiple criminal episodes.[69] Thus, civil RICO no longer ensures easy access to a federal forum.[70] Most RICO

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cation to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.").

68. *Sedima*, 105 S. Ct. at 3285 n.14. "Indeed," Justice White observed, "in common parlance two of anything do not generally form a 'pattern.'" *Id.*

69. As one court aptly observed, "*Sedima* . . . clearly creates a whole new ballgame." Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 833 (N.D. Ill. 1985). For recent cases applying the *Sedima* pattern concept, see Torwest DBC, Inc. v. Dick, [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,106, at 95,438-39 (10th Cir. Jan. 20, 1987) (affirming dismissal for lack of continuing fraudulent activity); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398-99 (9th Cir. 1986) (finding plaintiff's allegations insufficient to establish *Sedima*'s requirement of "threat of continuing activity"). Most courts have held that pattern requires proof of either "multiple episodes" demonstrating a threat of continuity or "multiple schemes." *See* Lipin Enters., Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986) (reviewing case law); *compare, e.g.*, Papai v. Cremosnik, 635 F. Supp. 1402, 1407-13 (N.D. Ill. 1986) (reviewing case law and adopting modified multiple episode test); Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 121-25 (D. Md. 1986) (same) *with* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) (reviewing case law and adopting multiple scheme requirement); Small v. Goldman, 637 F. Supp. 1030, 1034 (D.N.J. 1986) (same); Professional Assets Management, Inc. v. Pann Square Bank, N.A., 616 F. Supp. 1418, 1423 (W.D. Okla. 1985) (same). *See generally* Steinhouse & Baker, *Post-*Sedima *"Pattern" Litigation—Perusing Acts, Episodes, Schemes and Patterns*, 2 Civ. RICO Rep. (BNA) pt. 2, at 1 (Nov. 5, 1986). Of these approaches, the latter is more stringent since it excludes single scheme situations consisting of multiple criminal episodes. This approach, however, is unduly restrictive. *See infra* notes 174-77 and accompanying text. On the other hand, a minority of courts have continued to allow two acts to constitute a pattern. *See, e.g.*, United States v. Ianniello, 808 F.2d 184, 192 (2d Cir. 1986); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1354-55 (5th Cir. 1985); Systems Research, Inc. v. Random, Inc., 614 F. Supp. 494, 497 (N.D. Ill. 1985).

Despite the minority holdings, the impact of Justice White's suggestion has been profound. Every month, for example, the *RICO Law Reporter* updates RICO "pattern" cases. The vast majority reject single episode occurrences. *See, e.g., Recent Decisions*, 3 RICO L. REP. 355, 373-78, (1986) (March); *Recent Decisions*, 3 RICO L. REP. 499, 514-20 (1986) (April); *Recent Decisions*, 3 RICO L. REP. 660, 677-82 (1986) (May); *Recent Decisions*, 3 RICO L. REP. 819, 828-32 (1986) (June); *Recent Decisions*, 4 RICO L. REP. 69, 83-90 (1986) (July); *Recent Decisions*, 4 RICO L. REP. 215, 230-35 (1986) (August); *Recent Decisions*, 4 RICO L. REP. 344, 361-67 (1986) (September); *Recent Decisions*, 4 RICO L. REP. 502, 519-29 (1986) (October); *Recent Decisions*, 4 RICO L. REP. 667, 687-89 (1986) (November).

70. *See, e.g.*, Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 122 (D. Md. 1986) ("Prior to *Sedima*, some courts were willing to find the req-

critics fail to mention this development.[71]

Nor does RICO impinge on *legitimate* federalism concerns. Such concerns are properly raised when federal jurisdiction is artificially asserted to deprive states of authority to regulate their own affairs.[72] Given the multibillion-dollar impact of

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uisite pattern . . . in any case in which there were two predicate acts."); L. SAND, J. SIFFERT, W. LOUGHLIN & S. REISS, MODERN FEDERAL JURY INSTRUCTIONS ¶ 52.02, at 52-16 (1986) (noting pattern element was "easy" to establish pre-*Sedima*); Steinhouse & Baker, *supra* note 69, at 2 (noting that "the lower courts have not hesitated to accept the Supreme Court's challenge" and citing case law indicating that the pattern issue "has become a mountain overshadowing much of the RICO landscape").

71. For example, in arguing that *Sedima* "opened wide the gates of the federal courts," Boucher, *supra* note 50, at 134, Representative Boucher cited only pre-*Sedima* authority. *Id.* at 135 n.10, 140 nn.36-39. Furthermore, his claim that RICO may be alleged merely through "two telephone calls, two letters, or one of each," *id.* at 139, ignores the *Sedima* pattern guidelines. *See also Senate RICO Hearings, supra* note 5, at 760-68 (statement of the American Property and Casualty Ins. Indus. delivered by Irvin B. Nathan); *id.* at 648 (statement of Donald Egan, Esq.); *id.* at 622-25 (statement of John Marshall Finch, Esq., Arthur Young & Co., on behalf of the Nat'l Ass'n of Manufacturers); *id.* at 631 (statement of Edward I. O'Brien, President of the Securities Indus. Ass'n); Lacovara & Aronow, *supra* note 13, at 6.

Although a few courts have not followed this trend, *see supra* note 69, reduced federal jurisdiction may be ensured simply by codifying Justice White's pattern guidelines. In addition to stressing "continuity plus relationship," *Sedima,* 105 S. Ct. at 3285 n.14, Justice White observed that a useful definition of pattern is contained in another provision of the Organized Crime Control Act. Under this provision, " 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " *Id.* (quoting 18 U.S.C. § 3575(e) (1982)). The proper interpretation of this text is discussed *infra* notes 172-77 and accompanying text.

72. For example, the Supreme Court has held that "Congress may not exercise [the power to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." National League of Cities v. Usery, 426 U.S. 833, 855 (1976). Significantly, *Usery* was subsequently overruled in a manner that *broadened* the federal government's powers. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-51 (1985) (federal government may directly regulate state functions; the principal limit on its commerce power lies with Congress). Moreover, *Garcia* still recognized that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the states must be equally free to engage in any activity that their citizens choose for the common weal." *Id.* at 546. Accordingly, since RICO does not preempt the states in this area, federalism principles have not been violated. Indeed, RICO's constitutionality on this basis has not been seriously questioned. TASK FORCE REPORT, *supra* note 28, at 130-31 ("Nor does the statute appear to be subject to constitutional attack based upon . . . state sovereignty grounds pursuant to the Ninth and Tenth Amendments."); *cf.* United States v. Turkette, 452 U.S. 576, 586-87 (1981) (noting that

fraud in our society, no stretching of the commerce clause is required to recognize that this problem must be addressed from a national perspective.[73] Enterprises engaged in fraud frequently transcend state boundaries and produce victims throughout the country.[74] State laws are ill-equipped to handle such cases. To their credit, many jurisdictions have enacted state RICO laws,[75] but such measures often are incapable of handling complex claims.[76] Moreover, recovery should not depend on whether a

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RICO confers joint jurisdiction over certain state offenses and stating that "[t]here is no argument that Congress acted beyond its power in so doing"). On the contrary, RICO may be a classic example of "cooperative federalism" in action. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-57 (1964) (recognizing that ours is an "age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity"). *Accord* Heckler v. Turner, 470 U.S. 184, 189 (1985) (AFDC as cooperative federalism (citing King v. Smith, 392 U.S. 309, 316 (1968))); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981) (Surface Mining Act as cooperative federalism), *overruled on other grounds,* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Harris v. McRae, 448 U.S. 297, 308 (1980) (medicaid as cooperative federalism (citing King v. Smith, 392 U.S. 309, 316 (1968))). *See also* Corwin, *The Passing of Dual Federalism,* 36 VA. L. REV. 1, 19 (1950) (advocating joint approach to mutual problems); Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism,* 19 GA. L. REV. 861, 875 (1985) (federal and state sovereigns as a cooperating unit).

73. *See supra* note 31.

74. For an example of a complex nationwide fraud operation and its crippling effects, see *supra* note 41. Furthermore, the impact of fraud may transcend national borders. *See, e.g.,* J. CONKLIN, ILLEGAL BUT NOT CRIMINAL 8 (1977) (reporting loss of international trust occasioned by fraud).

75. Twenty states have enacted "little RICO" laws containing a private civil remedy. For a list of those states, see Cohen, *State RICO Statutes,* 4 RICO L. REP. 660, 660-62 (1986). Note, however, that not all of these laws adequately address fraud. Delaware has imposed a prior conviction requirement; Mississippi and Rhode Island do not include fraud predicates; North Carolina and Ohio include a "fraud plus" requirement; and Hawaii limits recovery to actual damages. *See id.*

76. Critical components to civil RICO are the availability of nationwide service of process and the potential for joinder of all target defendants. *See supra* notes 40-41. The utility of these provisions was demonstrated in a successful civil action initiated by VISA and MasterCard:

> The defendants used or attempted to use credit card . . . bank accounts in [seven states]. At the time of our lawsuit, key witnesses and defendants were spread throughout the country. It was only through RICO and the resulting availability of the federal courts and nationwide service of process and subpoena power that we were able to bring an effective lawsuit. By its nature, RICO allows the bringing of a lawsuit that presents a full picture of a criminal enterprise, in contrast to a state court fraud action encompassing only a segment of the overall scheme.

Senate RICO Hearings, supra note 5, at 709-10 (statement of Daniel H. Bookin, Esq.).

particular state has enacted a RICO law. Finally, because RICO does not preempt state jurisdiction, federalism is not properly called into question.[77] It is an illusory issue.[78]

RICO critics maintain that a federal racketeering remedy is superfluous and that other federal and state laws provide adequate relief.[79] Such arguments, however, ignore the deterrence and compensatory functions served by the availability of treble damages and attorneys fees.[80] By contrast, existing alternatives, which generally only authorize actual damages and do not provide for counsel fees,[81] are plainly inadequate. Counsel fees are essential because they encourage litigants to undertake complex cases[82] and discourage defendants from resisting valid

77. *See supra* note 72.

78. It is interesting to note that the same forces opposing RICO on federalism grounds have sought to enact preemptive national tort reform. For example, Senator Orrin Hatch has both criticized civil RICO, *see Senate RICO Hearings, supra* note 5, at 231 (statement of Sen. Orrin Hatch), and proposed national tort reform. *See* S. 1804, 99th Cong., 1st Sess. (1985) (providing for "Federal incentive grants to encourage State health care professional liability reform"). Tort law, however, has traditionally been within state domain. *See* Martinez v. California, 444 U.S. 277, 282 (1980); Note, *The Constitutionality of Statutes of Repose: Federalism Reigns,* 38 VAND. L. REV. 627, 654 (1985).

79. *See supra* note 48.

80. *See supra* notes 34-35 and accompanying text.

81. For example, recovery under the securities laws is limited to actual damages. *See, e.g.,* Randall v. Loftsgaarden, 106 S. Ct. 3143, 3153 (1986) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 (1975)); *supra* note 59 (quoting Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3294-95 (1985) (Marshall, J., dissenting)); Note, *supra* note 43, at 870-71.

82. For many fraud victims, " 'actual losses are less than the costs of a lawsuit.' " Note, *supra* note 43, at 875 (quoting testimony of Pamela Gilbert for the United States Public Interest Research Group). Because "[t]he realities of litigation today usually require a plaintiff to enter a one-third contingent fee arrangement with an attorney, [the recovery] is often not enough to pay counsel for bringing suit." Statement of Priscilla Budeiri, Staff Attorney, Public Citizen's Congress Watch, before the Subcommittee on Criminal Justice, Committee on the Judiciary, United States House of Representatives 9 (Oct. 24, 1985) (on file at University of Minnesota Law Review office). The case of Gregory v. Atlantic Permanent Fed. Sav. & Loan Ass'n, Civil No. 84-620-N (E.D. Va. 1984) provides a dramatic example of this point. *Gregory* involved allegations of a systematic scheme in which lower middle class victims suffered fraudulent mortgage foreclosures of their homes. Attorneys fees awarded for the complex action approximated $551,000, between four and one-half to five times the base settlement of the original nine plaintiffs combined. *Id.* at 2-9. Quite clearly, absent an attorneys fee provision, plaintiffs would not have been able to secure representation. Sadly, this is often the case with securities fraud victims who are unable to resort to civil RICO. *Cf.* Bertz, *Opinion,* 2 RICO L. REP. 353, 355 (1985) ("Step into the shoes of persons emotionally and economically decimated by fraudulent conduct who are then told that even if they go through the additional drain and risk of loss of a law-

claims with a barrage of motion practice.[83] Treble damages also are needed[84] because all complaints, even meritorious ones, involve a risk of loss. Because attorneys fees under RICO are only available to successful claimants, every plaintiff risks paying counsel costs if the case is lost or even settled.[85] Given this risk, many potential plaintiffs would forego suit if the ultimate recovery were limited to actual damages.[86] In addition, existing alternatives also lack RICO's procedural advantages.[87]

Ultimately, the historical record of failure of traditional remedies to combat widespread problems such as fraud may be the best response to these RICO critics.[88] If such remedies had

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suit, they cannot be made whole because the securities laws do not provide for recovery of attorney's fees.").

83. Corrigan, *Rolling Back RICO,* 18:5 NAT'L J. 2114, 2116 (1986) (noting statement of Mark P. Cohen, Managing Editor of *RICO Law Reporter,* that institutional defendants are "able to scare off less affluent claimants with the threat of a paper blizzard"). *See* Budeiri, *The Prior Conviction Requirement: Repeal of Private Civil RICO,* 4 RICO L. REP. 336, 337 (1986) ("Attorney's fees . . . also discourages [sic] unscrupulous defendants from conducting dilatory and unnecessarily expensive litigation in the hope of reducing or eliminating the value of the litigation for the plaintiff.").

84. *See supra* notes 34-35 and accompanying text.

85. *See* Aetna Casualty & Sur. Co. v. Liebowitz, 570 F. Supp. 908, 912-13 (E.D.N.Y. 1983) (no counsel fees for settled litigation), *aff'd,* 730 F.2d 905, 907-09 (2d Cir. 1984) (damage award prerequisite to receiving counsel fees).

86. This is especially true since emotional stress and other intangibles are not RICO compensable. RICO recovery is limited to "business and property" losses. 18 U.S.C. § 1964(c) (1982). *See, e.g.,* Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986) (denying RICO recovery for personal injury); Kouvakas v. Inland Steel Co., 646 F. Supp. 474, 476-77 (N.D. Ind. 1986) (requiring a "proprietary type of damage" for recovery under RICO); Van Schaik v. Church of Scientology, Inc., 535 F. Supp. 1125, 1137 (D. Mass. 1982) (stating that "courts should limit RICO recovery to business loss"). One commentator has observed that such relief under RICO advances a number of functions:

> Treble damages blend features of compensatory damages and deterrence to create an effective remedial tool. They compensate the victim, but unlike traditional damages, they also compensate for accumulative harm. By providing full compensation for all legal and accumulative harm, they further act as an incentive to private citizens to bring suit against RICO violators and, since they are mandatory, they create a strong deterrent.

Note, *Treble Damages Under RICO: Characterization and Computation,* 61 NOTRE DAME L. REV. 526, 533 n.38 (1986).

87. *See supra* notes 40 & 76 and accompanying text.

88. Representative John Conyers made this point eloquently during the RICO debates:

> [W]hen you say there are other equally effective remedies available to these plaintiffs, you are talking to the chairman who has heard this refuted at least a dozen times in the past year by prosecutors, scholars, law professors, plaintiffs, and consumer groups—15 separate times we've heard testimony refuting this incredible fallacy.

sufficed, a RICO controversy would not have developed. The law would have been shunned, not vigorously embraced. Properly viewed, then, RICO is neither a source of systemic abuse nor a redundant remedy. Some reform may nevertheless be warranted. Such reform should be narrowly tailored to address only legitimate concerns. Presently, there is a disingenuous aspect to RICO reform. For the most part, proposals advanced by RICO critics have sought to disembowel the statute rather than limit the reform to legitimate concerns.

III. CRITICAL "REFORM"

Sedima[89] spurred Congress to consider RICO reform. Because *Sedima* sustained civil RICO by rejecting the judicially imposed prior conviction and special damages requirements,[90] congressional critics initially responded with bills seeking to codify these limitations.[91] Another restrictive proposal suggested a so-called "fraud plus" requirement for civil RICO's pattern element; this meant that a pattern could not be established without proof of some nonfraud predicate.[92] Although less drastic measures were also advanced,[93] the more restrictive bills garnered the most support.[94]

When these initial reform bills failed to progress, RICO critics advanced a so-called "compromise" bill. The bill would have eliminated both civil RICO's racketeering label and, for private plaintiffs, the treble damages remedy; it would have severely curtailed respondeat superior liability; and it would have elevated the burden of proof and imposed a short limitations period.[95] To RICO advocates, however, this package was hardly

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House Subcommittee Approves Bill Eliminating RICO's Treble Damage Provision, 2 Civ. RICO Rep. (BNA) 2, 7 (Aug. 20, 1986).

89. Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985).

90. *Id.* at 3278.

91. S. 1521, 99th Cong., 1st Sess. (1985) (special injury requirement); H.R. 2943, 99th Cong., 1st Sess. (1985) (prior conviction requirement). *See infra* notes 99-125 and accompanying text.

92. S. 1521, 99th Cong., 1st Sess. (1985).

93. *E.g.*, H.R. 5391, 99th Cong., 2d Sess. (1986); H.R. 5290, 99th Cong., 2d Sess. (1986); H.R. 4892, 99th Cong., 2d Sess. (1986); H.R. 3985, 99th Cong., 1st Sess. (1985); H.R. 2517, 99th Cong., 1st Sess. (1985).

94. For example, H.R. 2943, the prior conviction bill advanced by Representative Boucher, had 158 cosponsors. 132 CONG. REC. H9371 (daily ed. Oct. 7, 1986). All of the proposed bills are set forth in the Appendix.

95. *See* H.R. 5445, 99th Cong., 2d Sess. (1986). Note that this version of H.R. 5445 was introduced on August 15, 1986. 132 CONG. REC. H6444 (daily ed. Aug. 15, 1986). It should not be confused with the substituted version of H.R. 5445 that passed the House of Representatives on October 7, 1986. *See* 132

a compromise.[96] As the Ninety-ninth Congress drew to a close, the House of Representatives substituted a more moderate text, but that version was tabled in the Senate.[97]

None of the RICO reform proposals became law. Because RICO critics have promised to renew reform efforts,[98] however, the relative impact of the proposals must still be fully understood. Part III thus surveys the leading anti-RICO reform proposals.

A. THE PRIOR CONVICTION REQUIREMENT

The first RICO reform bill proposed, H.R. 2943, would have imposed a prior conviction requirement for a civil RICO claim.[99] Under this amendment, claimants would have to establish that a defendant "was convicted of racketeering activity or of a violation of section 1962."[100] Because a prior conviction requirement expeditiously culls out unfounded claims, this proposal initially received widespread support.[101] Unfortunately, such "reform" would have emasculated civil RICO. Because the vast majority of crimes are never prosecuted, private enforcement would have been rendered useless.[102] For similar

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CONG. REC. H9365-66 (daily ed. Oct. 7, 1986). *See infra* notes 146-48 and accompanying text.

96. Budeiri, *Civil RICO Criticism Invalid Upon Inspection*, Nat'l L.J., Oct. 6, 1986, at 12, col. 2 (letter to the editor). *See infra* notes 132-45 and accompanying text.

97. 132 CONG. REC. H9365-66 (daily ed. Oct. 7, 1986); 132 CONG. REC. S16,704 (daily ed. Oct. 16, 1986).

98. *See, e.g.*, 132 CONG. REC. S16,699 (daily ed. Oct. 16, 1986) (statement of Sen. Hatch).

99. See Appendix.

100. H.R. 2943, 99th Cong., 1st Sess. (1985).

101. *See supra* note 94; *see* Boucher, *supra* note 50, at 144 (noting simplicity of the prior criminal conviction requirement as a solution).

102. For this reason, most prosecutors have opposed the prior conviction proposal:

> [T]he requirement of a prior criminal conviction would drastically restrict the private plaintiff's access to the courts. Requiring a prior criminal conviction reduces the RICO civil statute to a trivial remedy. This result is illustrated by considering the number of civil and criminal actions filed in federal court in the areas of antitrust and securities. . . . [I]n the antitrust area, 1200 civil actions are filed each year, while only 74 criminal cases are brought. Under securities and related laws, 3000 civil actions are filed each year, while only 26 criminal actions are brought. Requiring a prior criminal conviction in either of these areas would castrate the civil remedies available under these statutes. A similar result would obtain under RICO. Indeed, that is the not-too-well-hidden purpose of those who recommend the criminal conviction limitation. It would turn RICO's promise of reme-

reasons, the Supreme Court rejected a prior conviction requirement in the antitrust context.[103] In fact, the concept is unprecedented in civil law.[104] Moreover, because Congress intended civil RICO to supplement rather than be dependent upon law enforcement,[105] H.R. 2943 would have fundamentally undermined RICO's legislative design. With unprecedented budgetary constraints diminishing prosecutions,[106] eliminating the private enforcement mechanism is rather ill-timed.

The prior conviction approach also is arbitrary and artificially simplistic. The approach is arbitrary because recovery rights for similarly situated plaintiffs would depend on whether the defendant had a prior conviction. Moreover, even plaintiffs fortunate enough to qualify would not be compensated to the extent that convictions were not obtained for each act causing injury.[107] The reform is artificially simplistic because it fails to

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dial relief . . . into a sham. Congress ought not be a party to that kind of legislative fraud.

Senate RICO Hearings, supra note 5, at 437-38 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n). *See* Statement of John C. Keeney, Deputy Ass't Att'y Gen., Criminal Division, before the Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives 51-52 (Sept. 18, 1985) (noting that only a "fraction" of cases are prosecuted) (on file at University of Minnesota Law Review office). Note, however, that despite its detrimental effect on civil RICO and the private attorney general concept, the prior conviction proposal was subsequently endorsed by the Department of Justice. *See DOJ Urges Limits on Civil RICO, Says Adopt Prior Conviction Requirement*, 2 Civ. RICO Rep. (BNA) 1 (Aug. 6, 1986). This endorsement has been recently criticized. *See* Goldsmith & Maynes, *The Undermining of Civil RICO*, CRIM. JUST., Spring 1987, at 6.

103. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 52 (1912) (stating that such a requirement would "take from the statute a great deal of its power").

104. For example, although "[o]ur society knows no mark of shame more stigmatizing than that of Cain, yet homicide may be both murder and wrongful death," RICO LEGISLATION AND LITIGATION, *supra* note 31, at 100, a prior conviction has never been prerequisite to a wrongful death proceeding. *See id.* at 100-01.

105. *See supra* notes 34-35 and accompanying text.

106. *See supra* note 35 and accompanying text.

107. These were among the reasons that *Sedima* rejected the prior conviction concept:

> It is worth bearing in mind that the [prior conviction concept] is not without problematic consequences of its own. It arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive "pattern," or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The decision below would also create peculiar incentives for plea-bargain-

consider the deleterious impact it would have on the plea negotiation process, the complexity of factors affecting nolle prosequi decisions, and a host of other procedural difficulties. The prior conviction requirement ignores competing pressures prosecutors would encounter from victims seeking civil RICO relief and criminal defendants seeking civil RICO immunity.[108] Moreover, the proposal fails to recognize that nolle prosequi decisions often reflect factors unrelated to guilt or innocence; immunity grants, prosecutorial errors, and resource limitations often are determinative.[109] Finally, the proposal disregards the impact of appellate reversals. If plaintiffs are forced to await the exhaustion of appeals, the passage of time and dissipation of

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> ing to non-predicate-act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications.

Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3282 n.9 (1985). No member of the Court dissented from this portion of Justice White's opinion. This is not surprising. RICO should not be reformulated so that considerations "wholly unrelated to the merits of the plaintiff's RICO claim would determine who could recover, or even who could file a suit." *Senate RICO Hearings, supra* note 5, at 438 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n).

108. *See Senate RICO Hearings, supra* note 5, at 439 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n). Not surprisingly, most prosecutors have recognized this problem:

> By requiring a conviction on the RICO count, a defendant's incentive to plea bargain to a non-RICO offense would be dramatically raised. By avoiding a RICO conviction, the defendant would shield himself against all civil claims, leaving the victim without RICO recourse. In addition, the victim as a potential civil plaintiff would be an interested witness at the criminal trial. His testimony would be subject to credibility attacks because he would have acquired an interest in the outcome.
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> . . . [R]equiring a prior . . . conviction would place unwarranted political pressure on the prosecutors, since the opportunity for a RICO victim to recover would depend on the institution and success of the government's case.

Id. at 438-39; *see also id.* at 105 (statement of Ass't Att'y Gen. Stephen S. Trott); *supra* note 107.

109. As Justice White recognized in *Sedima*, "A guilty party may escape conviction for any number of reasons . . . ." 105 S. Ct. at 3284. *See Senate RICO Hearings, supra* note 5, at 438 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n).

assets may be substantial.[110] If not, how may defense interests be protected and of what effect would be a reversal on purely procedural grounds? Thus, although purporting to deal expeditiously with abuse, the prior conviction proposal represents myopic overkill.

B. THE SPECIAL DAMAGES REQUIREMENT

Before *Sedima*, courts often resisted civil RICO by adopting damage requirements designed to limit plaintiffs' standing to sue, for example, by denying relief to litigants who could not establish the occurrence of a "competitive injury."[111] Derived from antitrust law, this principle limited compensation to RICO violations that put a victim at a competitive disadvantage.[112] Other courts, also borrowing from antitrust doctrine, required the occurrence of a "racketeering injury."[113] Just as antitrust plaintiffs must "prove . . . injury of the type the antitrust laws were intended to prevent,"[114] RICO plaintiffs were required to establish a specific RICO injury independent of the damages flowing from the predicate offenses.[115]

Although numerous variations of these concepts developed,[116] *Sedima* effectively repudiated the special damages principle.[117] The Court viewed the principle's limitations as

110. *See supra* note 107.

111. *See, e.g.*, Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (limiting recovery to plaintiffs with competitive injuries), *aff'd on other grounds sub nom.* Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984), *vacated*, 105 S. Ct. 3550 (1985); North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (imposing competitive injury requirement).

112. TASK FORCE REPORT, *supra* note 28, at 292. *See* cases cited *supra* note 111; Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1110-13 (1982).

113. *See, e.g.*, Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516 (2d Cir. 1984) (requiring allegation of " 'a distinct RICO injury' . . . caused by a RICO violation, not just . . . by some of the essential elements of a RICO violation"), *vacated*, 105 S. Ct. 3550 (1985); Willamette Sav. & Loan v. Blake & Neal Fin. Co., 577 F. Supp. 1415, 1430 (D. Ore. 1984) (requiring that a "racketeering enterprise injury" be alleged).

114. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

115. TASK FORCE REPORT, *supra* note 28, at 296-97.

116. *Id.* at 307-12. Perhaps because of these variations, the Supreme Court was unable even to define the special injury concept. *See* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3284 (1985).

117. At issue in *Sedima* was the racketeering injury limitation, but the Court's decision was more broadly based. *See* 105 S. Ct. at 3284-86. The clear import of *Sedima* was that "[w]here the plaintiff alleges each element of the violation, *the compensable injury necessarily is the harm caused by predicate acts* sufficiently related to constitute a pattern, for the essence of the violation

contrary to RICO's express language and purpose.[118] In particular, Justice White's opinion noted that the competitive injury doctrine would often compensate indirect victims while denying relief to persons directly harmed by racketeering activity.[119] Such deprivations would be routine because direct victims often incur neither competitive injury nor damages beyond those flowing from the predicate acts. For example, victims of large scale fraud—ranging from consumers to government agencies and most businesses—would regularly be denied RICO recovery. Similarly, a union pension fund looted by mob infiltration might be beyond RICO's civil ambit.[120] Justice White quite properly characterized this result as "topsy-turvy."[121]

After *Sedima*, however, Congress considered resurrecting this approach. Senate Bill 1521 would have limited RICO standing to persons "suffering competitive, investment, or other business injury as a result of a violation of section 1962 . . . involving a pattern of racketeering activity."[122] Although the bill's language appears to provide relief for investors and businesses, its legislative history indicates that standing is limited to persons suffering a racketeering injury distinct from damages caused by predicate acts.[123] S. 1521 thereby denies meaningful

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is the commission of those acts in connection with the conduct of an enterprise." *Id.* at 3286 (emphasis added).

118. *Id.* at 3284-87.

119. *See id.* at 3286 n.15. Indeed, each of the three "nonexclusive" examples of competitive injury offered by the *Sedima* dissent involved this very anomaly. *See id.* at 3303 (Marshall, J., dissenting). The first two—involving extortion to achieve market monopoly benefits—clearly contemplate recovery solely for competitive injury. The third example, involving a business takeover, apparently limits recovery to "infiltration injury"—that is, racketeering injury—and does not include damages flowing from the underlying predicate acts. *See id.*

120. Other illustrations abound. The pension fund loss obviously may not be considered a competitive injury. Whether it qualifies as a racketeering injury is problematic. As Justice White noted, "[W]e are somewhat hampered by the vagueness of that concept." *Id.* at 3284. Plaintiffs would have to argue that the pension loss is an infiltration, or racketeering, injury of the type contemplated by Justice Marshall. *See supra* note 119. However, since the looting will, no doubt, be effected through separate RICO predicates, how is plaintiff to establish a distinct racketeering injury? *See Sedima*, 105 S. Ct. at 3302 (Marshall, J., dissenting) (denying RICO coverage "for injuries incurred by reason of individual predicate acts"). Thus, in addition to limiting severely RICO's scope, this approach is likely to create a maze of interpretative difficulties.

121. *Id.* at 3286 n.15.

122. S. 1521, 99th Cong., 1st Sess. (1985). See Appendix for full reprint.

123. As Senator Hatch emphasized in introducing S. 1521, the bill is based on language in Justice Marshall's *Sedima* dissent stating that RICO requires

relief to most fraud victims. The amendment makes no attempt to avoid the "topsy-turvey" consequences noted in *Sedima*.[124] Finally, even the limited protection afforded to businesses and investors would be scant because S. 1521 also contained a provision requiring RICO's pattern of racketeering activity to consist of at least one nonfraud predicate.[125] This requirement would have essentially eviscerated the statute.

C. THE "FRAUD PLUS" REQUIREMENT

In rejecting a judicially created special damages requirement, the *Sedima* Court noted that "[t]he 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of . . . [its] breadth of . . . predicate offenses, in particular the inclusion of wire, mail, and securities fraud."[126] The Court observed that "amorphous standing requirement[s]" are not responsive to this problem.[127] By contrast, because the vast majority of civil RICO claims are based exclusively on fraud grounds,[128] the legislative imposition of a "fraud plus" requirement would dramatically reduce the volume of such litigation.[129]

As with the prior conviction approach, "fraud plus" reform is simply too inclusive. Fraud-based RICO claims would be precluded without regard to the seriousness of the underlying misconduct. Questions of abuse or undue scope would not be litigated. In effect, they would automatically be resolved in favor of the defense. Because less drastic reform is readily

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pleading and proof of "injury to . . . competitive, investment, or other business interests resulting from the defendant's conduct . . . through a pattern of racketeering activity." 131 CONG. REC. S10,287 (daily ed. July 29, 1985) (statement of Sen. Hatch) (quoting *Sedima*, 105 S. Ct. at 3302 (Marshall, J., dissenting)). This excerpt of Marshall's dissent clearly referred to both the competitive and racketeering injury concepts. *See Sedima*, 105 S. Ct. at 3302. Moreover, Senator Hatch stated that "[t]he status clearly contemplates recovery for injury resulting from the confluence of events described in section 1962 and not merely from the commission of a predicate act." 131 CONG. REC. S10,286 (daily ed. July 29, 1985) (statement of Sen. Hatch).

124. *See supra* note 121 and accompanying text.

125. See Appendix.

126. *Sedima*, 105 S. Ct. at 3287. *See, e.g.*, TASK FORCE REPORT, *supra* note 28, at 239 ("The perceived abuse of Civil RICO . . . results directly from inclusion of . . . fraud [predicates] . . . ."). Justice White also indicated that improper application of the pattern element was responsible for RICO's widespread use. *See Sedima*, 105 S. Ct. at 3287.

127. 105 S. Ct. at 3287.

128. *See supra* note 29 and accompanying text.

129. *See* 131 CONG. REC. S10,288 (daily ed. July 29, 1985) (statement of Sen. Hatch).

available,[130] no need exists for such a restrictive measure. White collar fraud is too serious a national problem to be given civil RICO immunity.[131] This may explain why the Ninety-ninth Congress did not enact "fraud plus" and other blatant efforts to destroy the remedy.

D. THE HOUSE JUDICIARY COMMITTEE'S PROPOSAL: H.R. 5445

Last July, the House Judiciary Committee's Subcommittee on Criminal Justice proposed a civil RICO reform bill.[132] A so-called compromise effort, H.R. 5445 would have severely restricted vicarious liability under RICO and denied treble damages to private claimants. The bill also would have established a three-year limitations period, increased the burden of proof for fraud claims, and eliminated RICO's racketeering label.[133]

Elimination of the racketeering designation is unobjectionable.[134] Similarly, raising RICO's burden of proof may be appropriate under certain circumstances.[135] Providing an explicit limitations period is certainly desirable.[136] Ultimately, however, RICO reform should not denigrate enhanced damages and vicarious liability. An enhanced remedy provision is essential to RICO's deterrence and compensation functions.[137] Respondeat superior liability is also a bulwark against institutional misconduct.

The doctrine of respondeat superior normally imposes liability upon principals for actual damages caused by agents acting within the scope of their employment.[138] The doctrine is

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130. *See infra* notes 149-267 and accompanying text.

131. *See supra* notes 31-33 and accompanying text.

132. *See House Subcommittee Approves Bill Eliminating RICO's Treble Damage Provision,* 2 Civ. RICO Rep. (BNA) 2 (Aug. 20, 1986).

133. See Appendix.

134. *See infra* notes 152-57 and accompanying text.

135. *See infra* notes 195-204 and accompanying text.

136. *See infra* notes 247-53 and accompanying text.

137. *See supra* notes 34-38 & 81-87 and accompanying text. Although H.R. 5445 would have retained treble damages for federal and state governmental units, this was more a political accommodation than an effort to further fraud control. State and local prosecutors strongly opposed the prior conviction requirement. *See Senate RICO Hearings, supra* note 5, at 437-39 (statement of the Nat'l Ass'n of Att'ys Gen. and Nat'l Dist. Att'ys Ass'n). H.R. 5445 was an attempt at appeasement. *See N.Y. Crime Task Force Director Defends RICO, Urges Subcomittee Not to Overburden Prosecutors,* 2 Civ. RICO Rep. (BNA) 5 (Aug. 6, 1986). Moreover, when combined with curtailment of respondeat superior, the actual damages provision constituted a corporate bailout.

138. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 83 (1964) (liability of a master for the torts of his servants); RESTATEMENT (SECOND) OF AGENCY

based on risk allocation principles and the desire to encourage commercial enterprises to supervise their employees closely.[139] As recently as 1982, the Supreme Court stated that " 'few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than [respondeat superior].' "[140] H.R. 5445, however, would have effectively eliminated this basis for liability. The bill proposed to limit enterprise liability to cases in which an executive officer or governing board authorized or ratified the criminal acts.[141] Because authorization of criminal violations is a basis for *direct* rather than *vicarious* liability, H.R. 5445 would have limited vicarious liability to the rare situations involving ratification.

Ironically, Congressman Boucher, the sponsor of H.R. 5445, maintained that its derivative liability provision actually expanded the exposure of principals for RICO violations committed by agents.[142] This perspective was based on the judiciary's general reluctance to apply respondeat superior to civil RICO.[143] Such reluctance, however, stems from both a hostility to RICO and concerns that respondeat superior ought not be a basis for treble damage liability.[144] There is less reason to be-

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§§ 217C, 257, 261, 262 (1958) (liability of a principal for criminal acts, loss from tortious representations, fraud, and misrepresentations of his servant or agent).

139. PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 501 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS]; TASK FORCE REPORT, *supra* note 28, at 348, 363-64. *See, e.g.*, American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) (vicarious liability under antitrust laws will put " 'pressure . . . on [the organization] to see to it that [its] agents abide by the law' " (quoting United States v. A&P Trucking Co., 358 U.S. 121, 126 (1958))).

140. *American Soc'y of Mechanical Eng'rs*, 456 U.S. at 568 (quoting Gleason v. Seabord Air Line Ry., 278 U.S. 349, 356 (1929)).

141. See Appendix. In addition, the bill required that the "conduct complained of" must have been "intended to benefit, and did benefit [the principal]." H.R. 5445, 99th Cong., 2d Sess., 132 CONG. REC. H9365-66 (daily ed. Oct. 7, 1986). This approach is unduly rigid. Traditionally, the question of intended benefit to the principal has been a factor in determining "scope of employment" rather than a per se prerequisite to liability. *See* RESTATEMENT (SECOND) OF AGENCY §§ 235-236 (1958); *see also* Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir.) ("We do not accept benefit as a touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact."), *cert. denied*, 326 U.S. 734 (1945).

142. Boucher, *Bill Curbing RICO's Use Advances*, Nat'l L.J., Sept. 1, 1986, at 15, col. 1; *id.* at 21, cols. 1 & 2.

143. Most courts have declined to apply respondeat superior to RICO. *See, e.g.*, Schofield v. First Commodity Corp., 793 F.2d 28, 32-34 (1st Cir. 1986) (noting majority view).

144. *See, e.g.*, Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 24 n.9 (N.D. Ill. 1982) ("[R]espondeat superior . . . , perhaps permissible to establish

lieve courts would apply the doctrine restrictively to an actual damages statute.[145]

When H.R. 5445, as originally drafted, failed to generate enthusiasm, its text was redrafted with more moderate language. The revised bill[146] retained treble damages for certain actions filed by governmental entities and for private suits following a criminal conviction. It authorized "punitive damages of up to twice the actual damages" for designated consumer actions in which "wanton disregard" could be established. In addition, the new text amended the law in four critical respects: it eliminated the racketeering label; it refined the pattern definition to eliminate single episode transactions; it created a specific limitations period; and it imposed more stringent civil pleading requirements.

In many respects, the revised bill was a true compromise. It narrowed RICO's scope and curtailed the likelihood of abuse. Although treble damages were severely restricted, the basic RICO remedy remained intact. Because this version of H.R. 5445 passed the House of Representatives[147] but was tabled in the Senate by a mere 47-44 vote,[148] the bill is likely to provide the initial framework for reform in the next congressional session. Accordingly, H.R. 5445 as revised merits careful consideration. An appropriate context for comparative analysis is

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ordinary civil liability, would be bizarre [under RICO] . . . . Under that theory malefactors at a low corporate level could thrust treble damage liability on a wholly unwitting corporate management and shareholders."); Dwyer & Kiely, *Vicarious Civil Liability Under the Racketeer Influenced and Corrupt Organizations Act*, 21 CAL. W.L. REV. 324, 342 (1985) (stating that the main concern of courts in refusing to impose vicarious liability "is whether it is appropriate to impose a treble damage remedy on a corporation which may not have benefited from the racketeering activity, and whose liability is wholly derivative").

145. In part, cases denying respondeat superior have been based on a desire to prevent plaintiffs from circumventing the person/enterprise pleading distinction. *See, e.g., Schofield*, 793 F.2d at 33 ("We think it inappropriate to use *respondeat superior* to accomplish indirectly what we have concluded the statute directly denies."); Rush v. Oppenheimer & Co., 628 F. Supp. 1188, 1194 (S.D.N.Y. 1985) ("[Plaintiff] cannot rely on theories of *respondeat superior* to accomplish an end-run around this required distinction between person and enterprise under section 1962."); Intre Sport Ltd. v. Kidder, Peabody & Co., 625 F. Supp. 1303, 1309 (S.D.N.Y. 1985) (same), *aff'd*, 795 F.2d 1004 (2d Cir. 1986). That distinction, however, reflects judicial hostility to RICO rather than principled analysis. *See infra* notes 228-35 and accompanying text. Presumably, a properly tailored reform statute would not encounter similar resistance.

146. See Appendix.

147. 132 CONG. REC. H9365-66 (daily ed. Oct. 7, 1986).

148. *See* 132 CONG. REC. S16,704 (daily ed. Oct. 16, 1986).

provided in Part IV, which proposes an alternative basis for compromise.

IV. A BASIS FOR COMPROMISE

RICO reform should seek to eliminate specific problem areas yet still preserve the remedy for meritorious cases.[149] If curtailing abuse and statutory breadth are the true purposes of reform, a series of relatively moderate amendments would expeditiously achieve this goal. Drawing upon both legislative and judicial insights, such reform should consist of the following elements: 1) eliminating the racketeering label; 2) making certain RICO claims subject to arbitration; 3) tightening the pattern requirement; 4) increasing the burden of proof; 5) reducing the remedy from treble to double damages; 6) establishing limited respondeat superior liability; 7) providing a specific limitations period; 8) imposing more stringent civil pleading requirements; and 9) providing special sanctions for frivolous suits.

Set forth below is a proposed bill with accompanying commentary. To promote prospects for compromise, the proposed bill adopts the language of H.R. 5445 when appropriate. Each provision also is compared to H.R. 5445 (as substituted). H.R. 5445 itself is rejected on somewhat anomalous grounds for several reasons. In some respects, the bill is too tolerant of white

149. In addition, reform should seek to strengthen the statute where appropriate. For example, ameliorative amendments would include the following reforms:

(1) Providing explicit parens patriae authority for state actions brought on behalf of private victims. This would reverse case law to the contrary. *See* Texas v. Enterprise Cos., 3 RICO L. REP. 606, 607 (S.D. Tex. Jan. 7, 1986) ("[T]o [bring suit as parens patriae], the state must have suffered an injury that is compensable under the law upon which its claim is based.").

(2) Authorizing recovery for personal injuries (except pain and suffering). Presently, relief is limited to business and property losses. *See* 18 U.S.C. § 1964(c) (1982).

(3) Adding new predicate offenses to reflect changes in federal law since 1970.

(4) Authorizing equitable relief for private parties. This would reverse case law to the contrary. *See* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1084 (9th Cir. 1986).

(5) Providing for international service of process.

(6) Authorizing counsel fees to a substantially prevailing plaintiff. This would overrule case law denying fees absent recovery of a money judgment. *See supra* note 85 and accompanying text.

Despite the utility of such reforms, however, the present anticivil RICO climate in Congress precludes their enactment. Consequently, they are not included as part of the proposed reform.

collar crime;[150] in others, it fails to adopt available remedies for curtailing abuse and statutory breadth.[151] The following proposal attempts to remedy these defects.

1. Eliminating the Racketeering Label

The heading for chapter 96 of title 18, United States Code, is amended by striking out RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS and inserting in lieu thereof PATTERN OF ILLICIT ACTIVITY. In the remainder of chapter 96, the terms racketeer and racketeering are deleted wherever they appear and are replaced as follows: section 1961(1)—insert *illicit*; section 1961(5)—insert *illicit*; section 1961(7)—insert *criminal*; section 1961(8)—insert *illicit activity* the first place "racketeering" presently appears; insert *criminal* the second place "racketeering" presently appears; sections 1962 & 1963—insert *illicit*; section 1968(a)—insert *an illicit activity*; section 1968(b) & (c)—insert *illicit activity*; section 1968(f)—insert *criminal* the first, second, and fifth place "racketeering" presently appears; insert *illicit activity* elsewhere.

COMMENT

Considerable criticism has been directed at RICO's application of a racketeering label to a wide variety of white collar crimes.[152] The term is potentially prejudicial and may provide undue leverage during settlement negotiations.[153] In contrast, the term "illicit" is neutral.[154] The new language also clarifies that RICO applies to white collar crime as well as to traditional racketeering activity. In addition, deletion of the racketeering label responds to claims of unfair prejudice under criminal RICO.[155]

Some reform proposals have sought to eliminate the racke-

150. *See infra* notes 213-16 & 241-46 and accompanying text.

151. *See infra* notes 158-64, 203-04 & 254-67 and accompanying text.

152. *See Senate RICO Hearings, supra* note 5, at 248 (statement of Ray J. Groves, Chairman, Am. Inst. of Certified Public Accountants); Note, *supra* note 43, at 868-71; *supra* notes 49-51. Significantly, many RICO critics, although acknowledging the "racketeering" label as a problem, have indicated that more fundamental reform is necessary. *See Senate RICO Hearings, supra* note 5, at 744 (statement of the Am. Council of Life Ins. delivered by David Albenda).

153. *See* sources cited *supra* note 152.

154. The term "criminal" is substituted where conforming language is required.

155. *See, e.g.*, RICO LEGISLATION AND LITIGATION, *supra* note 31, at 18 (rec-

teering label only for predicate offenses involving fraud.[156] Presumably, this approach regards crimes of violence or those associated with traditional organized crime as meriting the racketeering designation. The proposed amendment rejects this distinction for two reasons. First, it requires a series of complex distinctions throughout the statute. Second, it puts white collar crime on a separate plane from other illegality. By now, it is well established that white collar crime is neither less serious nor more deserving of special protections than other types of criminality.[157]

H.R. 5445 Comparison: The proposal essentially adopts the terminology of H.R. 5445. Although the text reads differently, this is attributable to matters of form and brevity rather than to substantive differences.

2. Arbitrating RICO Claims

Title 18 U.S.C. § 1964(c) is amended to read as follows: ***(1) All actions arising under this subsection, which are***

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ommending different label and noting 1982 ABA report criticizing use of term in prosecutions).

156. *See* H.R. 3985, 99th Cong., 1st Sess. § 2 (1985); H.R. 4892, 99th Cong., 2d Sess. §§ 4, 5 (1986).

157. *See supra* notes 31-32 and accompanying text. In 1967, the President's Crime Commission emphasized the dangers of white collar crime in terms of economic impact and its tendency to encourage criminality generally. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 32-34, 47-48 (1967). Some jurists have recognized that this is why RICO was intended to reach white collar crime:

> Despite the clarity of congress's language [in drafting RICO], defendants argue that, since RICO's primary purpose is to eradicate organized crime, it is [not] directed . . . against businessmen engaged in "garden variety fraud" . . . . While RICO's primary focus may have been on organized crime, when considering the statute congress also recognized that fraud is a pervasive problem throughout our society which causes billions of dollars in economic loss each year. Congress further acknowledged that existing state and federal law was not capable of dealing with this problem.
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> . . . When congress provided severe sanctions, both civil and criminal, for conducting the affairs of an "enterprise" through a "pattern of racketeering activity," it provided no exception for businessmen, for white collar workers, for bankers, or for stock brokers. If conduct of such people can sometimes fairly be characterized as "garden variety fraud," we can only conclude that by the RICO statute congress has provided an additional means to weed that "garden" of its fraud.

Furman v. Cirrito, 741 F.2d 524, 528-29 (2d Cir. 1984) (citations omitted); *see supra* note 24 and accompanying text.

grounded in fraud, are subject to arbitration under Title 9, United States Code.

COMMENT

RICO has been criticized for allowing ordinary commercial disputes to be routinely federalized into racketeering cases based on fraud.[158] Although this criticism may be overstated,[159] the problem could be substantially reduced by subjecting contract-based RICO claims to arbitration.[160] For example, about one third of the RICO cases filed are securities cases.[161] Because most brokerage contracts contain arbitration clauses, the adoption of this proposal would potentially curtail federal RICO litigation dramatically.[162] In addition, because most other commercial contracts already contain arbitration clauses,

158. *See Senate RICO Hearings, supra* note 5, at 761 (statement of the Am. Property and Casualty Ins. Indus. delivered by Irvin B. Nathan) ("Most frequently, treble-damage civil RICO claims have been added to ordinary commercial lawsuits."); Boucher, *supra* note 50, at 140 (noting that it has been relatively simple to allege a fraud-based RICO claim in any commercial transaction); *supra* notes 59 & 66 and accompanying text.

159. *See supra* notes 67-71 and accompanying text.

160. Presently, the federal courts are divided over the arbitrability of contract-based RICO claims. *Compare, e.g.,* Jacobson v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197, 1199, 1202-03 (3d Cir. 1986) (allowing arbitration if predicates are arbitrable and summarizing judicial conflict) *with* McMahon v. Shearson/American Express, Inc., 788 F.2d 94, 98-99 (2d Cir.) (prohibiting arbitration of RICO claims due to strong public policy considerations), *cert. granted,* 107 S. Ct. 60 (1986).

161. TASK FORCE REPORT, *supra* note 28, at 57. Although this estimate is derived from pre-*Sedima* litigation, it is consistent with present trends. *See also Senate RICO Hearings, supra* note 5, at 176 (statement of Charles L. Marinaccio, Member of the Securities and Exchange Comm'n) (noting RICO's profound impact on securities litigation).

162. Because federal securities claims are ordinarily not subject to arbitration, T. HAZEN, *supra* note 3, at 531, the exact impact of the proposed amendment is difficult to gauge. "The general rule is that when a complaint states both arbitrable and nonarbitrable claims, the arbitrable claims should be severed and judicial proceedings stayed as to such claims." *Id.* at 532 (footnote omitted). In the past, courts have differed over application of the general rule when the different claims "are so factually related or so 'inextricably intertwined' that severance is 'impractical, if not impossible.' " *Id.* at 533 (quoting Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 (11th Cir. 1982) (quoting Merrill Lynch, Pierce, Fenner & Smith v. Haydu, 675 F.2d 1169, 1172 (11th Cir. 1982)). In part, courts declining severance were motivated by the desire "to protect the exclusive federal jurisdiction over securities actions and to avoid possible preclusive effects that arbitration proceedings may have on subsequent federal litigation." *Id.* The Supreme Court, however, has recently held that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims." Dean Witter Reynolds Inc. v. Byrd, 470

adoption of this amendment would likely increase this practice. Thus, accounting firms, banks, and insurance companies may routinely resort to this procedure.

Because judicial review of arbitration decisions is narrowly limited,[163] this amendment would allow most contract-based RICO disputes alleging fraud to be privately resolved. Parties would further benefit by being able to select an experienced arbitrator who would be sensitive to the application of RICO to such disputes. Finally, arbitration would be less time consuming and less costly than litigation.[164]

H.R. 5445 Comparison: Unfortunately, there is no comparable provision in H.R. 5445. Thus, a major opportunity to remove contract-based RICO claims from the federal courts has been neglected. Presumably, H.R. 5445 achieves a broader effect by eliminating treble damages, thereby reducing the incentive for litigation generally. Because contract-based RICO claims have been a principal source of concern, however, arbitrability is a narrowly tailored remedy that leaves appropriate RICO applications intact. Merely because *some* RICO applica-

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U.S. 213, 217 (1985). In doing so, the Court noted that the preclusive effect of arbitration proceedings was not yet established. *Id.* at 222.

Accordingly, even securities-based RICO claims may be subject to arbitration. Since securities claims are entitled to a federal forum, courts may effect severances when appropriate. The preclusive effect of any arbitration proceedings should be left to judicial development. *Id.* at 222-23. As the Supreme Court has recently granted certiorari on the arbitrability of RICO claims, *supra* note 160, further guidance on preclusion issues is likely.

163. *See* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 764 (1983) (as long as an arbitration award is based on an agreement, a court is bound to enforce the award and may not review the merits even if the basis for the award is ambiguous); E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Assoc., 790 F.2d 611, 614 (7th Cir.) (noting that review of arbitration awards is limited), *cert. denied,* 107 S. Ct. 186 (1986); Federal Arbitration Act, 9 U.S.C. § 10 (1982) (A United States court may vacate an arbitration award only by a showing that the award was procured by fraud or corruption or the arbitrator exceeded his power or is guilty of misconduct.).

164. For example, former Chief Justice Burger has stated: "My own experience persuades me that in terms of cost, time and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases." Burger, *Using Arbitration to Achieve Justice,* ARB. J., Dec. 1985, at 3, 6. *See* S. LAZARUS, RESOLVING BUSINESS DISPUTES: THE POTENTIAL OF COMMERCIAL ARBITRATION 48-49 (1965) (discussing studies that indicate that arbitration is less time consuming than is commercial litigation); Kritzer & Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts,* 8 JUST. SYS. J. 6, 18-19 (1983) (summarizing study indicating that arbitration is faster than litigation and less expensive than "the cost of full adjudication").

tions have proved troublesome does not warrant eliminating treble damages in *most* cases.

3. Tightening the Pattern Requirement

Title 18 U.S.C. § 1961(5) is amended to read as follows: *"Pattern of illicit activity" means at least three illicit activity violations within a five-year period (excluding any period of imprisonment). Taken together, the violations must demonstrate continuing illicit conduct and be related either to each other or to the enterprise; provided, however, that if any violation is based on fraud, each violation must also constitute a separate criminal episode.*

COMMENT

This amendment is intended to ensure that civil RICO actions are limited to serious disputes involving enterprises engaged in continuous criminal activity. *Sedima*[165] suggested that defining the pattern element more restrictively would reduce opportunities to convert ordinary business disputes into RICO claims.[166] Relying on legislative history, the Court emphasized that *"continuity plus relationship"* are needed to constitute a RICO pattern.[167] Most courts have since abided by this principle.[168] Some, however, have continued to apply pre-*Sedima* authority that two predicates may constitute a pattern.[169] Others have gone to the opposite extreme by holding that multiple schemes are required to establish the requisite pattern.[170] A middle ground also has developed. It holds that multiple episodes rather than multiple schemes are sufficient.[171] Given

165. Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985).

166. *See supra* notes 67-68 and accompanying text.

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

168. Prior to *Sedima*, the Department of Justice had observed that 42% of pre-*Sedima* cases involved "a single episode having only one victim." *Senate RICO Hearings*, *supra* note 5, at 126-27 (statement of Ass't Att'y Gen. Stephen S. Trott). Since *Sedima*, most courts have embraced Justice White's formulation to reject single episode occurrences. *See supra* notes 69-70 and accompanying text; *infra* note 172.

169. *See supra* note 69.

170. *See id.* This test is criticized *infra* notes 174-77 and accompanying text.

171. *See supra* note 69. The episode test is more flexible than the multiple scheme requirement because under it a single scheme, consisting of distinct multiple episodes, would ordinarily satisfy the pattern element. *See, e.g.*, Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 122-24 (D. Md. 1986) (citing case law); Soper v. Simmons Int'l, Ltd., 632 F. Supp. 244, 253 (S.D.N.Y. 1986) (scheme may include multiple episodes). As yet, no clear defi-

such diversity, legislative direction is now appropriate.

The proposed amendment attempts to codify Justice White's suggestion in *Sedima*. Accordingly, it explicitly rejects the possibility of a two-predicate pattern. Furthermore, the relevant time period is reduced from ten to five years. The most important feature of this proposal is its emphasis on continuity and relationship. To maintain flexibility, however, these concepts are not specifically defined but instead left to judicial interpretation.

The continuity principle is intended to ensure that persons engaged in isolated violations are not subject to RICO liability.[172] Unless the crime itself evinces a threat of continuity,[173] the passage of substantial time will ordinarily be necessary to satisfy this element.

The relationship concept should be interpreted in light of RICO's remedial purpose. As stated in *Sedima*, factors such as similarity of purposes, results, participants, victims, methods of commission, or other distinguishing characteristics should be considered.[174] Because both continuity and relationship may be

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nition of episode has emerged. Some courts have emphasized that each violation must be " 'somewhat separated in time and place.' " *Id.* at 253 (quoting Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985)); *see, e.g.*, Morgan v. Bank of Waukegan, 804 F.2d 970, 975-76 (7th Cir. 1986) (noting that "[t]he doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative"). Others have viewed episode in terms of independent harmful events. *See, e.g.*, Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986) (ongoing acts with "independent and . . . harmful significance"); Ghouth v. Conticommodity Servs., Inc., 642 F. Supp. 1325, 1336-38 (N.D. Ill. 1986) (same, citing case law). Thus, each event causing separate harm constitutes a separate episode. Some courts have also required the multiple episodes to project a threat of continuity. *See, e.g., Ghouth*, 642 F. Supp. at 1337.

172. *See supra* note 67 and accompanying text. As one court recently observed, "The continuity requirement is aimed at curtailing use of RICO for charges involving one transaction sliced into a series of acts which occur over a short period of time, are not ongoing, and are not indicative of an open-ended scheme." United States v. Freshie Co., 639 F. Supp. 442, 444 (E.D. Pa. 1986). Many claims have been properly rejected on this basis. *See, e.g.*, Schaafsma v. Marriner, 641 F. Supp. 576, 581 (D. Vt. 1986) (single sale of realty not pattern); Meadow Ltd. Partnership v. Heritage Sav. & Loan, 639 F. Supp. 643, 650-51 (E.D. Va. 1986) (single real estate transaction not pattern); Ichiyasu v. Christie, Manson & Woods Int'l, Inc., 637 F. Supp. 187, 188, 190 (N.D. Ill. 1986) (single theft of three art works not pattern); Grant v. Union Bank, 629 F. Supp. 570, 577-79 (D. Utah 1986) (single bank transaction not pattern).

173. *See infra* note 181 and accompanying text.

174. *Sedima*, 105 S. Ct. at 3285 n.14 (quoting 18 U.S.C. § 3575(e) (1982)). These factors were offered by Justice White as "useful" guidelines. *Id.* Ac-

present in single-scheme situations, proof of multiple schemes obviously should not be required.[175] Nor should a relationship

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cordingly, they should not be converted into prerequisites. *See, e.g., infra* note 176 and accompanying text.

175. The point is that a single scheme may occur over a long time period, consist of distinct criminal episodes causing independent harm, and evince a threat of continuity. This has been the principal justification advanced by courts adopting the multiple episode test and rejecting a multiple scheme requirement. *See, e.g., Morgan,* 804 F.2d at 975 (rejecting multiple scheme requirement because "[o]therwise defendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts, an untenable result"); Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1986) ("Certainly, a two year practice of embezzling funds from a company through otherwise separate transactions constitutes a 'pattern . . .' notwithstanding the fact that the numerous acts arguably comprise a single criminal scheme."); *Temporaries, Inc.,* 638 F. Supp. at 123 (multiple scheme requirement "unnecessarily restrictive approach because there may have been alternative indicia of continuity"); Papai v. Cremosnik, 635 F. Supp. 1402, 1412 (N.D. Ill. 1986) (requiring proof of multiple schemes constitutes a loophole for "clever defendants"). Thus, pattern may even be established in appropriate situations involving single victims. *See, e.g.,* Paul S. Mullin & Assocs., Inc. v. Bassett, 632 F. Supp. 532, 541 (D. Del. 1986) (criticizing multiple scheme requirement since "an attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts . . . . One could argue, however, that . . . [no pattern was] involved because only one company was subverted. Under this view, a 'pattern' would come into existence only after the same enterprise began to infiltrate Chrysler or Ford."). Indeed, any other interpretation would threaten to make § 1962(b) a nullity, because that provision is usually limited to single victims. United States v. Ianniello, 808 F.2d 184, 192 & n.16 (2d Cir. 1986).

The multiple scheme requirement also creates an absurd pleading bind for RICO plaintiffs. The bind occurs because proof of multiple schemes is often inconsistent with proof of relationship. Thus, if plaintiff alleges multiple schemes, defendant will argue lack of relationship because the schemes may not involve similar "purposes, results, participants, [or] victims." *Sedima,* 105 S. Ct. at 3285 n.14 (quoting 18 U.S.C. § 3575(e) (1982)). *See supra* note 174 and accompanying text. Alternatively, allegations establishing sufficient relationship may encounter the defense that pattern has not been satisfied because only a single scheme has been alleged. Several courts have recognized this anomaly. *See, e.g., Morgan,* 804 F.2d at 975 ("[T]erms 'continuity' and 'relationship' are somewhat at odds with one another. Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims."); Lewis v. Sporck, 646 F. Supp. 574, 581 n.7 (N.D. Cal. 1986) (forces "plaintiff to steer between the Scylla of pleading multiple 'fraudulent efforts' and the Charybdis of pleading 'related, non-isolated' . . . acts"); *Freshie Co.,* 639 F. Supp. at 445 ("as the acts become more related, the same transactions lose some of their separateness"); Heritage Ins. Co. of Am. v. First Nat'l Bank, 629 F. Supp. 1412, 1416 (N.D. Ill. 1986) (noting possibility of single victim pattern because "[o]therwise, the requirement that criminal acts be 'related' as well as 'continuous' would be meaningless, since relationship in most circumstances would vitiate a finding of continuity").

between predicate offenses be a prerequisite to finding a pattern of illicit activity. If it were, enterprises engaging in diversified criminality would be excluded from the scope of the statute's reach.[176] It should be sufficient that predicate acts are related either to each other or to the same enterprise.[177]

The proposed amendment distinguishes between actions based on fraud and all other RICO situations. As to fraud actions, the concern is that purely jurisdictional predicate offenses may be aggregated into multiple violations even though only a single criminal episode is involved.[178] This was a common civil RICO problem before *Sedima* modified the pattern requirement.[179] Accordingly, the proposed amendment explicitly requires proof of multiple episodes in fraud situations. In

176. RICO, of course, was designed to attack enterprise criminality. Because criminal enterprises often engage in diversified crimes, it would be inappropriate to require predicate violations to be related to each other. It is sufficient if they are related *either* to each other *or* to the same enterprise. This point was recognized by an American Bar Association committee that engaged in an extensive study of RICO:

> Confining the statute's application to those patterns where a direct relationship existed between each of the predicate offenses would limit the application of RICO to a single offenses pattern, including a narrow range of cognate or subservient offenses. For example, it might only be possible to combine into a single pattern drug offenses and violent or corruption offenses, where the violence or corruption was used to advance the drug activity. The Committee felt that confining the statute in this fashion would be unwise. Modern criminal organizations that are, in effect, conglomerates of crime [are] involve[d] in a wide range of offenses; they should not be beyond the reach of the statute. Indeed, such prosecutions might be precluded as that upheld by the Supreme Court in *United States v. Turkette*, 452 U.S. 576 (1981) (drugs, arson, insurance fraud, and bribery).

RICO LEGISLATION AND LITIGATION, *supra* note 31, at 37.

177. *See, e.g.*, United States v. Weisman, 624 F.2d 1118, 1121-23 (2d Cir.) (acts need only be related to enterprise), *cert. denied*, 449 U.S. 871 (1980); United States v. Elliot, 571 F.2d 880, 899 n.23 (5th Cir.) (acts may be related to the enterprise without relation to each other), *cert. denied*, 439 U.S. 953 (1978). As one court has noted, "In this sense, the acts are related to each other by having a common purpose, namely . . . conducting the enterprise's affairs." *Papai*, 635 F. Supp. at 1407.

178. "For example, if a scheme to defraud a single victim involves two telephone conversations and the mailing of five letters, these seven incidents should ordinarily be considered a single episode rather than seven racketeering acts constituting a pattern." Goldsmith & Keith, *supra* note 16, at 100. *See, e.g., Temporaries, Inc.*, 638 F. Supp. at 125 (phone calls and mailings "essentially one set of negotiations"); Frankart Distribs., Inc. v. RMR Advertising, Inc., 632 F. Supp. 1198, 1201 (S.D.N.Y. 1986) (multiple mailings "merely part of . . . single transaction"); Allington v. Carpenter, 619 F. Supp. 474, 478 (D.C. Cal. 1985) ("Together the acts [of wire fraud] comprise a single criminal episode. . . .").

179. *See supra* notes 66 & 70 and accompanying text.

contrast, multiple episodes should not be automatically required in nonfraud situations because RICO abuse has not been a major issue in such contexts.[180] Moreover, single episode crimes are sometimes motivated by some other illegality or inherently give rise to a threat of continuity.[181] The threat of continuity, rather than number of episodes, ought to be determinative. The proposed amendment therefore retains flexibility in nonfraud cases.[182] The vast majority of civil RICO claims would still be subject to a multiple episode requirement.[183]

Significantly, Department of Justice guidelines provide that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity

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180. The principal concern has been the ease with which fraud predicates can be pleaded as RICO violations. *See supra* note 66 and accompanying text. For example, one critical study noted that "most of the abuse occurs in 'commercial fraud' cases. . . . [This] results directly from inclusion of mail fraud, . . . wire fraud, . . . and 'fraud in the sale of securities' as predicate offenses." TASK FORCE REPORT, *supra* note 28, at 239. Recently, the distinction between fraud and nonfraud predicates has been recognized by perceptive jurists. In Lipin Enters. Inc. v. Lee, 803 F.2d 322, 323 (7th Cir. 1986), the court held that twelve acts of mail fraud did not constitute pattern in the context of a single commercial transaction. Concurring, Judge Cudahy offered the following observation:

> I agree that plaintiff has not alleged a "pattern . . . ." I think it is important to note, however, that we are dealing here with mail fraud. Mail fraud and wire fraud are perhaps unique among the various sorts of "racketeering activity" possible under RICO in that the existence of a multiplicity of predicate acts. . . may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate directly into a "pattern" . . . . It is not clear that the same analysis would be appropriate in cases involving other kinds of predicate acts (like . . . arson).

Id. at 325 (Cudahy, J., concurring).

181. *See* United States v. Watchmaker, 761 F.2d 1459, 1474-76 (11th Cir. 1985) (homicides occurring in single episode committed to facilitate other crimes); United States v. Brooklier, 685 F.2d 1208, 1217 (9th Cir. 1982) (extortion as part of ongoing scheme), *cert. denied,* 459 U.S. 1206 (1983). *See generally* Morgan v. Bank of Waukegan, 804 F.2d 970, 976 (7th Cir. 1986) ("The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative.").

182. Note also that the proposed amendment defines pattern for both criminal and civil cases. A definition limited to civil cases would unwisely preclude collateral estoppel, since the pattern element would have different criminal and civil applications. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (collateral estoppel requires identity of issues). *See also infra* text accompanying note 189.

183. Because the vast majority of civil RICO actions are based on fraud, *see supra* note 29, most pleadings will have to satisfy the multiple episode requirement.

growing out of a single criminal episode or transaction."[184] Such prosecutorial restraints have been said to provide protection against abusive RICO prosecutions.[185] The proposed amendment, by codifying a stringent pattern definition, should achieve the same result in civil litigation.

H.R. 5445 Comparison: Refining the pattern element was also a critical ingredient of H.R. 5445.[186] Under the bill, a special definition of pattern was adopted only for civil cases. To form a pattern under the bill, at least two acts of illicit activity must have occurred within a five-year period. Furthermore, the violations could not be "so closely related in time and place that together the acts constitute a single episode."[187] In 1962(c) cases, the acts were also required to be "related to the affairs of the enterprise."[188]

Although this definition is a pronounced improvement over present law, it is nevertheless troublesome in some respects. First, it creates a distinction between the pattern requirement in criminal and civil contexts. If "continuity plus relationship" was originally viewed as critical to the establishment of pattern, however, there is no reason to exclude it now from criminal cases. This is especially true because, under H.R. 5445, a conviction provides an automatic basis for treble damages. Because Department of Justice guidelines already define pattern in terms of multiple episodes, the prosecution function should not be impeded by a uniform definition.[189] Second, by requiring proof of multiple episodes in *all* civil cases, the definition overlooks the possibility that single episode conduct may sometimes evince a threat of continuity sufficient to constitute a pattern.[190] In contrast, the proposed reform plan limits its multiple-episode requirement to the area of principal controversy: fraud-based RICO claims. Third, because "in common parlance two of anything do not generally form a 'pattern,' "[191] the two-

184. UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 110.340 (1985).

185. *See* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3294 (1985) (Marshall, J., dissenting) ("[P]rosecutors simply do not invoke the mail and wire fraud provision in every case in which a violation of the relevant statute can be proved."); TASK FORCE REPORT, *supra* note 28, at 20-23.

186. For reprint of H.R. 5445, see Appendix.

187. *Id.*

188. *Id.*

189. *See supra* note 184 and accompanying text.

190. *See supra* notes 181-82 and accompanying text.

191. Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3285 n.14 (1985); *see also supra* note 68 and accompanying text.

predicate minimum of H.R. 5445 is problematic. For this reason, the proposed reform plan adopts a three-predicate-offense minimum.

Finally, the definition of pattern under H.R. 5445 is in one respect seriously misleading. Three days after the House of Representatives voted on this bill, Congressman Boucher, the bill's sponsor, filed an "extension of remarks" in the Congressional Record. In these remarks, he suggested that the compromise bill may contemplate a multiple-scheme requirement in order to establish a pattern.[192] Under this approach, long-term single scheme activity would be excluded from RICO. Thus, for example, the systematic embezzlement of corporate funds during a period of many years might not qualify as a pattern.[193] In fact, however, the compromise did not intend this result. The text's choice of the term "episode" rather than "multiple scheme" demonstrates this point.[194] Given Congressman Boucher's unfortunate comments, however, the bill's definition of pattern requires further clarification.

4. Raising the Burden of Proof

Title 18 U.S.C. § 1964(c) is amended to read as follows: ***(2) In all actions arising under this subsection, the burden of proof shall be clear and convincing evidence.***

COMMENT

Civil RICO is presently governed by the traditional preponderance standard.[195] Although the Supreme Court declined to

192. Representative Boucher stated:

> Rather than attempt to freeze the judicial decisions on this subject, the compromise substitute allows the courts to continue to develop appropriate standards for deciding whether individual . . . violations are sufficiently related but distinct [enough] that they ought to be considered part of a "pattern" . . . rather than simply parts of what is essentially the same *scheme* or episode.

132 CONG. REC. E3533 (daily ed. Oct. 10, 1986) (emphasis added) (statement of Rep. Boucher). Boucher's inclusion of the term "scheme" both here and in a subsequent context, *id.* ("a single episode of criminality or criminal scheme"), suggests the potential continuation of the discredited multiple scheme doctrine. *See supra* note 175 & *infra* note 194 and accompanying text.

193. *See supra* note 175 and accompanying text.

194. For this reason, Senator Metzenbaum stated that "[t]he word 'episode' in the statute was specifically selected and should not be confused with 'scheme'." 132 CONG. REC. S16,698-99 (daily ed. Oct. 16, 1986) (statement of Sen. Metzenbaum).

195. *See, e.g.*, United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985) ("[T]he appropriate burden of proof for the gov-

address this issue in *Sedima*,[196] it has indicated that clear and convincing proof should be required "where particularly important interests or rights are at stake."[197] Historically, this higher standard of proof has been applied to matters such as termination of parental rights or involuntary commitment.[198] In contrast, the preponderance standard has governed most civil proceedings, including those involving the imposition of serious civil sanctions.[199]

Several policy considerations justify a heavier burden of proof in civil RICO cases. First, the higher standard promotes quality control over RICO litigation. Because Rule 11 of the Federal Rules of Civil Procedure already requires counsel to certify the propriety of all complaints,[200] the higher standard would compel parties to exercise more caution before filing a complaint based on RICO—especially as the imposition of sanctions may later be at stake. Second, because many state fraud proceedings require clear and convincing proof,[201] establishing an identical standard for civil RICO restores the balance between the federal and state systems. Finally, the higher standard is a suitable counterbalance to the enhanced remedy potentially available to plaintiffs.[202]

H.R. 5445 Comparison: There is no comparable provision in H.R. 5445. Because the House bill eliminates treble damages

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ernment in a civil action under the RICO Act . . . is the 'preponderance of the evidence' standard and not . . . the 'beyond a reasonable doubt' or 'clear and convincing evidence' standard."); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) ("Whether equitable relief is appropriate depends, as it does in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future . . . ."); TASK FORCE REPORT, *supra* note 28, at 378 ("As a civil action, the ordinary expectation is that proof of all necessary elements for a recovery need only be by a preponderance of the evidence.").

196. Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3282-83 (1985). The Court intimated, however, that the preponderance standard was permissible. *Id.*

197. Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983).

198. *Id. See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 758 (1982) (proceeding to terminate parental rights); Addington v. Texas, 441 U.S. 418, 423 (1979) (involuntary commitment proceedings).

199. *Huddleston*, 459 U.S. at 389-90.

200. FED. R. CIV. P. 11. *See infra* notes 264-67 and accompanying text.

201. *See, e.g., Addington*, 441 U.S. at 424; Pyne v. Jamaica Nutrition Holdings Ltd., 497 A.2d 118, 131 (D.C. 1985); Price v. Grimes, 677 P.2d 969, 973 (Kan. 1984); Gardner v. Jones, 464 So. 2d 1144, 1148-49 (Miss. 1985); D.G. Porter, Inc. v. Fridley, 373 N.W.2d 917, 921 (N.D. 1985).

202. Thus, enhanced damages may not be as threatening when plaintiff has to adduce clear and convincing evidence.

in most civil RICO suits,[203] however, there is less need for a higher burden of proof. The elimination of treble damages reduces the incentive to use civil RICO and removes a source of leverage during settlement negotiations. The "clear and convincing" counterbalance is thus no longer required. Admittedly, RICO claims under H.R. 5445 would enjoy a lower burden of proof than many state fraud actions, but this benefit is offset by the complexity of RICO's unique pleading and proof requirements.[204]

5. Reducing the Remedy to Double Damages

Title 18 U.S.C. § 1964(c) is amended to read as follows: ***Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover double the damages he sustains and the cost of suit, including a reasonable attorneys fee.***

COMMENT

The criticism aimed at RICO's treble damages provision[205] disregards the deterrent and compensatory functions traditionally served by treble damages.[206] In this respect, RICO is not unique; it is merely one of numerous federal statutes providing this remedy.[207] Indeed, the Ninety-ninth Congress increased

203. See Appendix.

204. Because of the complexity of RICO elements such as pattern, enterprise, and conduct, RICO motion practice is exceedingly intricate. *See, e.g.,* Duval, *A Trial Lawyer's Guide: Everything You Always Wanted to Know About RICO Before Your Case Was Dismissed,* 12 WM. MITCHELL L. REV. 291, 311 (1986) ("A RICO complaint must be carefully crafted and well-tailored to the facts of each case. Sloppy and ill-conceived pleading will subject the plaintiff to swift retribution in the form of a motion to dismiss from defense counsel."); Goldstein, *Aggressive Motions Key to Defense,* Nat'l L.J., Sept. 1, 1986, at 15, col. 4.

205. *See supra* notes 42 & 49-50 and accompanying text; *see also* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3302 (1985) (Marshall, J., dissenting) ("uncalled-for punitive bills"); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399 n.16 (7th Cir. 1984) (noting judicial commentary regarding "in terrorem settlement value that the threat of treble damages may add to spurious claims"), *aff'd on other grounds,* 105 S. Ct. 3291 (1985).

206. *See supra* notes 34-39 & 84-86 and accompanying text.

207. *See, e.g.,* 12 U.S.C. § 1464(q)(3) (1982) (Home Owners' Loan Act of 1933); 12 U.S.C. § 1975 (1982) (Bank Holding Company Act); 12 U.S.C. § 2607(d)(2) (Supp. III 1985) (Real Estate Settlement Act of 1974); 15 U.S.C. § 15c(a)(2) (1982) (Clayton Act: Antitrust); 15 U.S.C. § 72 (1982) (Revenue Act of 1916: Restraints on Import Trade); 15 U.S.C. § 1117 (Supp. III 1985) (Trademark Act of 1946); 15 U.S.C. § 1693f(e) (1982) (Electronic Fund Transfer Act);

the civil penalty for false claims from double to triple damages.[208] Even so, the proposed amendment reduces the authorized remedy under RICO to double damages. This measure is purely a compromise.[209] It is designed to operate in tandem with a proposed modification of respondeat superior liability.[210] Although threefold damages may be viewed by some as excessive, double damages seem immune from such criticism. For example, in *United States v. Bornstein*,[211] the Supreme Court stated that imposition of double damages under the False Claims Act is compensatory to make the government whole for "costs, delays, and inconveniences occasioned by fraudulent claims."[212]

H.R. 5445 Comparison: Under H.R. 5445, treble damages are available only to certain governmental entities and to plaintiffs who sue following a criminal conviction. Limited punitive damages are available to designated consumers who can establish "wanton disregard."[213] Unfortunately, this approach is fundamentally inconsistent with the private attorney general principle. Absent treble damages, relatively few claimants would undertake the complexities of a RICO action.[214] Consequently, both deterrence and compensatory functions would be undermined. Reduction to double damages would not be so deleterious. The potential for compensation and deterrence would be moderated but still preserved.

The limited treble damages authorized under H.R. 5445 would not achieve the same result. Given the extent of public sector fraud, governmental entities obviously should be able to sue for treble damages.[215] But other victims deserve the same

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15 U.S.C. § 1989(a) (1982) (Motor Vehicle Information and Cost Savings Act); 22 U.S.C. § 4209 (1982) (Consular Officers: Penalty for exacting excessive fees); 30 U.S.C. § 689(b) (1982) (Lead and Zinc Stabilization Program) 35 U.S.C. § 284 (1982) (Patents); 42 U.S.C. § 9607(c)(3) (1982) (CERCLA); 45 U.S.C. § 83 (1982) (Government Aided Railroads); 46 U.S.C. § 1227 (1982 & Supp. III 1985) (Merchant Marine Act of 1970).

208. 132 CONG. REC. H9383 (daily ed. Oct. 8, 1986).

209. Perhaps for similar reasons, Wisconsin's state RICO law provides for double damages. *See* WIS. STAT. § 946.86(4) (1985-1986).

210. *See infra* notes 221-46 and accompanying text.

211. 423 U.S. 303 (1976).

212. *Id.* at 315.

213. See Appendix.

214. *See supra* notes 34-39 & 84-86 and accompanying text.

215. *See supra* notes 29-31 and accompanying text. H.R. 5445 does resolve an important issue by explicitly authorizing the federal government and the states to sue as RICO victims. *See Senate RICO Hearings, supra* note 5, at 119 (statement of Ass't Att'y Gen. Stephen S. Trott). This conferral of authority

remedy, especially because most fraud is not against the government. By distinguishing between the two, H.R. 5445 may implicitly redirect illicit activity away from the public sector to the private sphere. Nor does authorization of treble damages in prior conviction cases remedy this problem. The provision suffers from the same arbitrariness and artificial simplicity as did the original prior conviction proposal.[216]

There is another troublesome feature to H.R. 5445. Its creation of a limited consumer exception was critical to the compromise. Although not applicable to certain securities transactions, the exception apparently authorizes "punitive damages of up to twice the actual damages" upon sufficient proof of "wanton disregard."[217] Because RICO requires proof of *criminality*, wanton disregard would seemingly encompass many situations involving knowing or intentional conduct. The legislative history developed by Congressman Boucher's "extension of remarks," however, suggests that such damages are to be reserved for exceptional circumstances involving "extreme . . . misconduct."[218] Because this restrictive viewpoint was not part of the intended compromise,[219] further clarifica-

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quite properly extends to trustees appointed pursuant to governmental suits for equitable relief. *See generally* United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir. 1986) (civil action to eliminate corrupt union leadership in which government acted in the interest of labor organizations). At the same time, however, H.R. 5445 precludes local government units from suing absent specific state statutory authority. Because local government fraud is a pervasive problem, there is no reason to impose such a limitation.

216. *See supra* notes 107-10 and accompanying text.

217. See Appendix.

218. *See* 132 CONG. REC. E3532 (daily ed. Oct. 10, 1986) (statement of Rep. Boucher). Unfortunately, Representative Boucher's remarks also served to confuse the meaning of punitive damages. For example, he stated that, in evaluating a defendant's "degree of culpability," the fact finder must conclude "that the defendant's culpability went significantly beyond what was required simply to trigger punitive damages ('wanton' disregard), let alone what was sufficient to justify a finding of liability." *Id.* At best, the meaning of this statement is unclear; at worst it incorrectly states the law of punitive damages. *See* PROSSER & KEETON ON TORTS, *supra* note 139, § 2, at 9-11; S. SPEISER, C. KRAUSE & A. GENS, THE AMERICAN LAW OF TORTS § 8:45, at 805-13 (1985).

Representative Boucher also chose to expand the securities exception to punitive damage claims by stating that such damages are unavailable "[a]s long as the securities laws regulate the conduct, whether or not the plaintiff himself would have standing to press the claim." 132 CONG. REC. E3533 (daily ed. Oct. 10, 1986) (statement of Rep. Boucher). Significantly, Senator Metzenbaum, cosponsor of the bill on the Senate side, rejected this interpretation. 132 CONG. REC. S16,698 (daily ed. Oct. 16, 1986) (punitive damages unavailable only if plaintiff is eligible under securities laws).

219. For this reason, Senator Metzenbaum rejected Boucher's formulation:

tion is now required.

Finally, there is an anomalous aspect to this consumer exception. Because it is limited to "natural person[s],"[220] the provision denies the opportunity for punitive damages to business institutions. As a result, although banks, insurance companies, and similar institutions may be sued for punitive damages, this same relief is not available to them as plaintiffs. Thus, in the course of compromising on treble damages, H.R. 5445 ultimately creates a series of irrational distinctions that fail to maintain RICO's deterrence and compensatory value. By comparison, the double damages proposal offers a simple and effective alternative to treble damages. The impact of the suggested reform should also be considered in light of the proposed modification of respondeat superior liability.

6. Modifying Respondeat Superior Liability

Title 18 U.S.C. § 1964(c) is amended to read as follows:
(6) In all actions arising under this subsection, a principal is liable for actual damages for harm caused by an agent acting within the scope of either his employment or apparent authority. A principal is liable for double damages only if the pattern of illicit activity was authorized, ratified, or recklessly tolerated by the board of directors, a partner, or a high managerial agent acting within the scope of employment.

COMMENT

This proposal is intended to resolve a split of authority by providing a definite standard for applying respondeat superior principles to civil RICO. Most courts have declined to apply

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Behavior is done in "wanton" disregard of the plaintiff's rights if it is done in reckless or callous disregard of the rights of the plaintiff. The term is intended to be applied as it is traditionally applied and is not intended to require a different standard of proof than in traditional cases . . . .

A plaintiff . . . need not prove viciousness or egregiousness in order to recover punitive damages. Nor is it the intent of the amendments that substantial punitive damages should be reserved only for the most extreme cases of misconduct because all wanton and willful conduct is extreme, vicious, and egregious.

132 CONG. REC. S16,698 (daily ed. Oct. 16, 1986) (statement of Sen. Metzenbaum).

220. See Appendix.

the doctrine to civil RICO cases.[221] This refusal reflects two factors: a reluctance to impose treble damage liability on principals for low-level employee misconduct[222] and a concern that the doctrine improperly circumvents the distinction between a RICO defendant and an enterprise.[223] Neither factor, however, warrants outright rejection of respondeat superior liability.

Although some authority rejects respondeat superior liability for punitive damages, this is a minority view.[224] Moreover, even the Second Restatement of Agency, which generally disavows the doctrine in a punitive context, recognizes that it has potential application to "special statutes such as those giving triple damages."[225] RICO is such a special statute. Because its purpose is remedial rather than punitive,[226] respondeat superior should ordinarily apply.[227]

Nor does respondeat superior improperly circumvent the distinction between a RICO defendant and enterprise. The vast majority of courts have held that the statutory language and the policies underlying RICO mandate this distinction in section 1962(c) cases.[228] These decisions hold that a legal entity as

221. *See, e.g.,* Schofield v. First Commodity Corp., 793 F.2d 28, 32 (1st Cir. 1986) (majority rejecting vicarious liability).

222. *See supra* note 144 and accompanying text.

223. *See supra* note 145; *see infra* notes 228-34 and accompanying text.

224. PROSSER & KEETON ON TORTS, *supra* note 139, § 2, at 13 (noting potential deterrent effect and tendency to encourage closer supervision of employees).

225. RESTATEMENT (SECOND) OF AGENCY § 217C comment c (1958).

226. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (statement of findings noting remedial purpose). *See* Note, *supra* note 86, at 529-34 (discussing Congress's "remedial scheme").

227. Of course, if the agent is victimizing rather than benefiting the principal, liability would not lie. This is because intent to benefit the principal is an important fact in determining respondeat superior liability. RESTATEMENT (SECOND) OF AGENCY §§ 228, 235-36 (1958). The more difficult question is whether liability should lie when the principal is being used to commit the crime (for example, when the principal is the instrumentality rather than the victim of a crime). This may be a difficult question where treble damages are at stake, *see* Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Burg, 58 NOTRE DAME L. REV. 237, 324 (1982); Dwyer & Kiely, *supra* note 144, at 340, but not under an actual damages statute. *See* RESTATEMENT (SECOND) OF AGENCY § 236 comment b, at 523-24 (1958) (noting agent within scope of employment so long as motivated "to any appreciable extent" by principal's business purpose).

228. *See, e.g.,* Schofield v. First Commodity Corp., 793 F.2d 28, 29-30 (1st Cir. 1986) (noting majority view and citing substantial case law); Bennett v. United States Trust Co., 770 F.2d 308, 315 (2d Cir. 1985) ("[R]equiring a complaint to distinguish between the enterprise and the person conducting the affairs of that enterprise . . . is supported by the plain language of section

a RICO "person" may not associate with itself as an "enterprise."[229] The person/enterprise distinction is deemed necessary to preclude liability when the enterprise is a victim of racketeering activity.[230] Whether this distinction is also applicable to other RICO sections is presently unresolved.[231] The distinction is, however, ill-advised. It reflects a general animosity to RICO rather than a careful analysis of the problem. For example, the distinction is not needed to protect victim enterprises. Because RICO requires criminal intent,[232] such enterprises obviously face no liability. Moreover, the distinction would logically preclude both criminal sanctions and the imposition of equitable sanctions against perpetrator corporations engaged in a pattern of illicit activity.[233] The rule is also inconsistent with the "association-in-fact" theory of enterprise commonly used in organized crime prosecutions.[234] Finally, the distinction is vulnerable to clever pleading tactics by plain-

1962(c), which clearly envisions two entities [and such a distinction] comports with legislative intent and policy.").

229. *Bennett*, 770 F.2d at 315.

230. *Id.* ("Such a distinction focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity.").

231. *See Schofield*, 793 F.2d at 31 (noting judicial split as to § 1962(a)). *Compare* Medallion T.V. Enters. v. SelecTV, 627 F. Supp. 1290, 1294-95 (C.D. Cal. 1986) (requiring distinction for § 1962(b)) *with* Commonwealth v. Derry Constr., 617 F. Supp. 940, 942-44 (W.D. Pa. 1985) (rejecting distinction for § 1962(b)).

232. *See* Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984) (discussing elements of fraud and stressing intent requirement); Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1434 (N.D. Ill. 1986) ("[w]illfulness" an important element in RICO action); Kronfeld v. First Jersey Nat'l Bank, 638 F. Supp. 1454, 1470 (D.N.J. 1986) (requisite mens rea is specific intent to defraud).

233. *See* TASK FORCE REPORT, *supra* note 28, at 374-77. Logically, for example, if a corporation is engaged in massive fraud, it would be immune to *both civil* and *criminal* RICO proceedings. *See* United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1292-94 (E.D.N.Y. 1985) (corporation cannot be defendant and one of a group constituting enterprise). This may explain why the distinction has been occasionally rejected in the criminal context—notwithstanding identical statutory language for both criminal and civil violations. *See* United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *see also* Fustok v. Conticommodity Servs., Inc., 618 F. Supp. 1074, 1075-76 (S.D.N.Y. 1985) (corporate defendant part of association-in-fact enterprise).

234. *See supra* note 22 (quoting 18 U.S.C. § 1961(4) (1982)). Virtually every Mafia prosecution involves an association-in-fact enterprise. *See* United States v. Salerno, 794 F.2d 64 (2d Cir. 1986) (RICO prosecution of New York Mafia bosses); United States v. Brooklier, 685 F.2d 1208, 1222 (9th Cir. 1982) (RICO prosecution against members of La Cosa Nostra); United States v. Gotti, 641 F. Supp. 283, 286 (E.D.N.Y. 1986) (prosecution of Gambino crime family); *Senate RICO Hearings, supra* note 5, at 109-10 (summary of recent mob prosecutions).

tiffs.[235] It is, therefore, not a distinction that could have been intended.

The application of respondeat superior principles to civil RICO also is sound policy. The Supreme Court has recognized that the possibility of respondeat superior liability motivates principals to supervise their agents more rigorously.[236] Deterrence is thus advanced. The concern that victim enterprises may then be exposed to undeserved liability[237] is fundamentally misplaced. Absent an intent to benefit the principal, respondeat superior liability is not imposed.[238] Furthermore, as between innocent victims and a principal with supervisory responsibility, fairness mandates imposing the risk of loss on the latter.[239] Finally, given the proposed reduction to double damage liability, concern about overly harsh, punitive results should be dismissed.

Despite the propriety of applying respondeat superior to civil RICO, the proposed amendment adopts a limited remedy. This, too, is purely a compromise designed to make RICO less threatening to institutional businesses. Under the proposal, respondeat superior liability is preserved for actual damages. Liability for double damages is limited to situations in which the principal is *directly*, rather than vicariously, at fault. Because the proposal was derived from the Model Penal Code's standard for corporate criminality,[240] it should easily suffice for civil liability.

H.R. 5445 Comparison: H.R. 5445 contains no comparable respondeat superior provision. The matter is covered, however, by Congressman Boucher's "extension of remarks."[241] Once again, the effect of his statement is disingenuous. Congressman Boucher first reviews and endorses prevailing case law rejecting respondeat superior liability for civil RICO.[242] He then indicates that, rather than address this issue legislatively, the drafters were "content . . . to allow the current trend in the law

235. *See* Bennett v. Berg, 685 F.2d 1053, 1059-60 (8th Cir. 1982) (noting how to plead around distinction); *Cumulative Decision Index,* 4 RICO L. REP. 24, 31 (1986) (citing cases pleading around distinction).

236. *See supra* notes 138-40 and accompanying text.

237. *See supra* notes 144 & 230 and accompanying text.

238. *See supra* note 227.

239. *See supra* notes 138-40 and accompanying text.

240. *See* MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962).

241. *See supra* text accompanying note 192.

242. *See* 132 CONG. REC. E3533-34 (daily ed. Oct. 10, 1986) (statement of Rep. Boucher).

to continue without congressional action."[243] Because present RICO law generally rejects respondeat superior,[244] Congressman Boucher obviously seeks to legislate indirectly a result he could not achieve directly. The original version of H.R. 5445 contained restrictive respondeat superior language that was severely criticized.[245] That approach, which was not adopted in the substitute bill, should not be resurrected. Although Congressman Boucher's legislative history accurately cites case law, the judiciary is likely to view respondeat superior more sensibly once RICO has been moderated.[246]

7. Providing a Limitations Period

Title 18 U.S.C. § 1964(c) is amended to read as follows:
(3) All actions arising under this subsection must be filed within three years of either accrual of the cause of action or the last act causing injury, whichever is later; provided, however, that the limitations period is tolled during the pendency of any related government civil action or criminal prosecution.

COMMENT

RICO presently lacks a specified limitations period. To avoid the prospect of litigating stale claims, an express limitations period is proposed. This provision also adds an important element of certainty to RICO litigation. Absent a specified period, federal courts generally resolve this issue by selecting the closest analogous state limitations statute.[247] Courts have differed widely, however, in their statutory selections.[248] Moreover, because state limitations periods also vary widely, similarity of conduct does not necessarily ensure similar limitations treatment in different states.[249] The proposed amend-

243. *Id.* at E3534.

244. *See supra* notes 143 & 221 and accompanying text.

245. See Appendix; *see also* Celebrezze, *Keep RICO Intact: It's Working Well,* Legal Times, Oct. 6, 1986, at 17, col. 1 (criticizing the original H.R. 5445).

246. *See supra* notes 144-45 and accompanying text.

247. *See, e.g.,* Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984) ("[F]ederal courts have looked to the law of their forum state for an appropriate civil limitation period."); A.B. Alexander v. Perkin Elmer Corp., 729 F.2d 576, 577 (8th Cir. 1984) ("When a federal statute creates a cause of action, but fails to include a statute of limitations, the federal courts usually apply the most analogous state statute of limitations."); Note, *A Uniform Limitations Period for Civil RICO,* 61 NOTRE DAME L. REV. 495, 495 (1986).

248. Note, *supra* note 247, at 495-97.

249. For example, if a state RICO law contains a limitations period, it is

ment therefore promotes uniformity as well as certainty.

A three-year limitations period is proposed. This is one year less than the period presently authorized in analogous enforcement areas such as antitrust.[250] Note that the period does not begin to run until termination of the last act causing injury. Because a potential plaintiff has not been injured under RICO until the pattern element has been satisfied, it is inappropriate to start the limitations period before the pattern is fully developed. The amendment rejects both case law and legislative proposals to the contrary.[251]

Accrual of an action is left undefined in the proposed amendment. Established federal time bar principles are, however, applicable. Sometimes, an action may not accrue until well after the last act causing injury. For example, a fraud action does not accrue until the actor knows or has reason to know of his injury.[252] The limitations period should not be triggered before this occurrence.

The proposal also allows for flexibility during the pendency of related government actions. When a criminal action has been filed, procedural complexities often preclude concomitant civil proceedings.[253] Governmental civil action may also make private litigation impractical. Accordingly, the limitations period is expressly tolled during such periods. Other tolling principles also are generally applicable.

H.R. 5445 Comparison: The proposed reform essentially

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the most analogous state statute. *See* Delta Coal Program v. Libman, 554 F. Supp. 684, 690 n.2 (N.D. Ga. 1982). Not all state RICO laws, however, contain limitations periods, and those that do vary considerably. *See* ARIZ. REV. STAT. ANN. § 13-2314(H) (Supp. 1985) (7 years); FLA. STAT. § 895.05(10) (Supp. 1986) (5 years); N.J. STAT. ANN. § 2C:41-4 (West 1982) (unspecified).

250. *See* 15 U.S.C. § 15(b) (1982).

251. *See* Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985) (RICO claim time barred without inquiry as to whether plaintiff had knowledge of pattern); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984) (limitations period begins to run when plaintiff knows of injury, not end of defendant's conduct); *supra* note 95 and accompanying text (citing bill proposing restrictive limitations period). *But see* County of Cook v. Berger, 648 F. Supp. 433, 434-35 (N.D. Ill. 1986) (applying "last overt act" conspiracy doctrine, reasoning that "it would be incongruous to bar, on statute of limitations grounds, recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations periods." *Id.* at 435).

252. *See* United States v. Kubrick, 444 U.S. 111, 122 (1979); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349-50 (1874); *Bowling*, 773 F.2d at 1178.

253. *See generally* Project, *White-Collar Crime: Third Annual Survey of Law*, 22 AM. CRIM. L. REV. 279, 613-30 (reviewing procedural complexities of parallel criminal and civil proceedings).

adopts the approach suggested in H.R. 5445. Although the House bill provided for a two-year postconviction limitations period, the absence of a prior conviction component to the proposed reform negates the need for such a provision.

8. Pleading Requirements

Title 18 U.S.C. § 1964(c) is amended to read as follows: ***(4) In all actions arising under this subsection, the elements of each claim must be averred with particularity against each defendant.***

COMMENT

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity."[254] This provision is intended to guard against strike suits and ensure adequate notice of a claim.[255] It frequently has been used to dismiss fraud-based RICO claims lacking factual foundation.[256] The rule, however, has significant limitations. First, because the particularity principle is inconsistent with the prevailing doctrine of "notice pleading," some courts have been reluctant to require specificity in fraud pleadings.[257] As a result, particularity as to each defendant has not always been required.[258] Second, the rule generally is not extended to each element of a RICO claim. For example, notwithstanding the centrality of the enterprise concept to every RICO claim, Rule 9(b) does not apply to this element.[259] Finally, the rule does not apply to

254. FED. R. CIV. P. 9(b).

255. *See* United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1385 (D.C. Cir. 1981) ("The rule serves to discourage the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude." (footnotes omitted)); Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972) (discussing policies underlying the Rule); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1296, at 399-400 (1969).

256. Goldsmith & Keith, *supra* note 16, at 88-92 (citing case law).

257. *See, e.g.*, Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984) (admonishing against applying "too strict a scrutiny" to pleadings alleging fraud); *In re* Longhorn Sec. Litig., 573 F. Supp. 255, 264 (W.D. Okla. 1983) (pleadings need not be extremely specific because the number of suits filed demonstrates that they are not frivolous and that the defendant had ample notice).

258. *See* cases cited *supra* note 257.

259. Many courts have thus held that the structure of the RICO enterprise need not be delineated. *See Seville Indus. Mach.*, 742 F.2d at 790 (federal rules

nonfraud RICO cases.[260]

The proposed amendment addresses each of these concerns. It overrides the doctrine of "notice pleading," explicitly applies to each element and each defendant, and includes nonfraud predicates within its scope. Absent highly unusual circumstances, exceptions to this requirement should be disfavored. The amendment will thus provide defendants with further protection against groundless suits.

H.R. 5445 Comparison: The proposal is based on a comparable provision contained in H.R. 5445, which amends Rule 9(b) to provide that "[i]n an action under 18 U.S.C. § 1964(c), facts supporting the claim against each defendant shall be averred with particularity."[261] This provision is, however, ambiguous in two critical respects. First, it is unclear whether it is limited to fraud predicates. Because Rule 9(b) is principally concerned with fraud claims, nonfraud predicates appear to be excluded. Congressman Boucher's legislative history, however, suggests a contrary intention.[262] Second, it is unclear whether the requirement extends to every RICO element. The text does not definitively answer this question but Congressman Boucher's remarks once again suggest an affirmative response.[263] To facilitate compromise, the proposed amendment resolves these issues in favor of RICO defendants.

9. Enhanced Sanctions for Frivolous Suits

Title 18 U.S.C. § 1964(c) is amended to read as follows: ***(5) In any action arising under this subsection, the court may impose a double damage penalty for counsel fees and costs incurred as a result of litigation filed in violation of Federal Rule of Civil Procedure 11. In any proceeding resulting in dismissal or summary judgment against a RICO claimant, the court shall require affidavits or conduct a hearing to determine compliance with Rule 11.***

COMMENT

In 1983, Rule 11 of the Federal Rules of Civil Procedure

designed to allow liberal pleadings and this much specificity not needed); Schnitzer v. Oppenheimer & Co., 633 F. Supp. 92, 97-98 (D. Or. 1985).

260. By its terms, Rule 9(b) only applies to fraud. *See* FED. R. CIV. P. 9(b).

261. See Appendix.

262. *See* 132 CONG. REC. E3533 (daily ed. Oct. 10, 1986) (statement of Rep. Boucher).

263. *Id.*

was amended to impose on claimant's counsel an affirmative duty of "reasonable inquiry."[264] Monetary sanctions were specifically authorized for noncompliance with the rule.[265] Recently, Rule 11 has been used aggressively to penalize RICO litigants pursuing claims that lack factual or legal basis.[266] The proposed amendment seeks to strengthen the application of this rule in RICO cases by authorizing imposition of double counsel fees and costs against violators. The possibility of severe sanctions, coupled with the proposed procedural changes that would make RICO claims more difficult to assert,[267] should serve as an adequate disincentive against frivolous filings.

The imposition of double damages is, however, discretionary. Should the court decide that less severe sanctions are appropriate, its order may be modified accordingly. This discretionary feature is adopted because of concern that a severe mandatory sanction might deter findings of Rule 11 violations.

The second sentence of this provision mandates Rule 11 affidavits or a hearing whenever a RICO claim has been either dismissed or eliminated through summary judgment. The intended purpose is to direct the court to serve a policing function in such circumstances. Because plaintiffs will be on notice that failure to establish a prima facie case will effect an automatic Rule 11 inquiry, frivolous filings should diminish. Indeed, the proposed amendment should prompt conscientious counsel to document compliance before initiating litigation.

H.R. 5445 Comparison: There is no comparable provision in H.R. 5445. The proposed text, therefore, provides an added safeguard against inappropriate filings.

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264. FED. R. CIV. P. 11.

265. *See supra* note 52. The developments leading to the 1983 amendments are reviewed in 5 C. WRIGHT & A. MILLER, *supra* note 255, § 1332, at 164-66 (Supp. 1986).

266. *See* Farguson v. MBank Houston, N.A., 808 F.2d 358, 359-60 (5th Cir. 1986) (plaintiff's pro se status no shield against sanctions for manifestly and patently frivolous claims); Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 787-89 (5th Cir. 1986) (reasonable inquiry would have discovered that plaintiff's complaint was barred by res judicata); Ginther v. Texas Commerce Bank, 111 F.R.D. 615, 627-28 (S.D. Tex. 1986) (sanctions imposed where frivolous complaint prosecuted in bad faith and in violation of court order); Thiel v. First Fed. Sav. & Loan Ass'n, 646 F. Supp. 592, 597-98 (N.D. Ind. 1986) (sanctions warranted where plaintiffs brought frivolous action); Goldsmith & Keith, *supra* note 16, at 94-96 (citing case law).

267. *See supra* notes 165-85 & 195-204 and accompanying text.

CONCLUSION

The legislative debate over civil RICO has produced proposals designed to eviscerate the remedy rather than rectify specific problem areas. Because such proposals would broadly protect white collar institutions from deserved civil liability for criminal wrongs, this result should not be tolerated. As our antitrust and securities laws have prevailed against institutional critics, civil RICO should also be permitted to thrive. H.R. 5445, although a compromise of sorts, barely permits survival. Civil RICO reform responsively tailored to legitimate criticism is, however, possible. Whether it will be accomplished depends on Congress's willingness to alter the terms of the present debate.

APPENDIX

99th Congress, 1st Session: S.1521

IN THE SENATE OF THE UNITED STATES

JULY 29 (legislative day, JULY 16), 1985

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A Bill

To clarify the intent of the Racketeer Influenced and Corrupt Organizations Act with respect to private civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1) Any person suffering competitive, investment, or other business injury as a result of a violation of section 1962 of this chapter involving a pattern of racketeering activity 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 reasonable attorney's fees.

"(2) For purposes of this subsection, 'pattern of racketeering activity' shall require that at least one act of racketeering activity shall be an act of racketeering activity other than—

"(i) an act indictable under section 1341 of title 18, United States Code;

"(ii) an act indictable under section 1343 of title 18, United States Code; or

"(iii) an act which is an offense involving fraud in the sale of securities.

"(3) If the court determines that a suit brought under this subsection was frivolous and without merit, the court may, at its discretion, award the cost of the suit including reasonable attorney's fees to the defendant.".

99th Congress, 1st Session: H.R. 2517

IN THE HOUSE OF REPRESENTATIVES

MAY 15, 1985

Mr. CONYERS introduced the following bill; which was referred to the Committee on the Judiciary

A Bill

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. DEFINITIONAL AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out "racketeering" and inserting "predicate criminal" in lieu thereof;

(2) so that paragraph (4) reads as follows:

"(4) 'enterprise' means a business or other similar business-like undertaking by an association of persons, whether organized for legitimate or illegitimate purposes, and includes a government or government agency;";

(3) so that paragraph (5) reads as follows:

"(5) 'pattern of criminal activity' means two or more acts of predicate criminal activity, separate in time and place—

"(A) each of which occurred not more than five years before the indictment is found, or information is instituted, that names such acts as predicate criminal activity;

"(B) all of which are not violations of the same provision of law, if that provision of law is—

"(i) the second undesignated paragraph of section 2314 (relating to the transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting) of this title;

"(ii) section 1341 (relating to mail fraud) of this title; or

"(iii) section 1342 (relating to wire fraud) of this title; and

"(C) that are interrelated by a common scheme, plan, or motive, and are not isolated events;";

(4) by striking out "and" at the end of paragraph (9);

(5) by striking out the period at the end of paragraph (10) and inserting "; and" in lieu thereof; and

(6) by adding at the end the following:

"(11) 'criminal syndicate' means an enterprise of five or more persons, a significant purpose of which is to engage on a continuing basis in a pattern of criminal activity, other than a pattern of criminal activity consisting solely of conduct constituting a felony under section 1084 of this title or under the law of a State relating to engaging in a gambling business.".

SEC. 2. OFFENSE AMENDMENTS.

Section 1962 of title 18, United States Code, is amended—

(1) by inserting after the heading of such section the following new subsection:

"(a) It shall be unlawful for any person knowingly to organize, own, control, finance, or otherwise participate in a supervisory capacity in a criminal syndicate.";

(2) by redesignating subsections (a), (b), and (c) as subsections (b), (c), and (d), respectively;

(3) in the subsection redesignated as subsection (b) by paragraph (2)—

(A) by striking out "racketeering activity" each place it appears and inserting "criminal activity" in lieu thereof; and

(B) by inserting "knowingly" before "to use or invest";

(4) in the subsection redesignated as subsection (c) by paragraph (2)—

(A) by striking out "racketeering activity" and inserting "criminal activity" in lieu thereof; and

(B) by inserting "knowingly" before "to acquire or maintain";

(5) in the subsection redesignated as subsection (d) by paragraph (2)—

(A) by striking out "racketeering activity" and inserting "criminal activity" in lieu thereof; and

(B) by inserting "knowingly" before "to conduct or participate"; and

(6) by striking out the subsection designated (d) without regard to the redesignations made by paragraph (2).

SEC. 3. SECTION 1963 AMENDMENTS.

Section 1963(a) of title 18, United States Code, is amended—

(1) by striking out "any provision of section 1962 of this chapter" and inserting "section 1962" in lieu thereof;

(2) by inserting "in the case of a violation of a subsection other than subsection (a) of such section" after "shall" the first place it appears; and

(3) by inserting "and in the case of a violation of subsection (a) of such section be fined not more than $250,000 or imprisoned not more than 30 years, or both," after "or both,".

SEC. 4. CLERICAL AMENDMENTS.

(a) HEADING FOR CHAPTER.—The heading of chapter 96 of title 18, United States Code, is amended by striking out "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS" and inserting "CRIMINAL ENTERPRISES AND CORRUPTION OF ENTERPRISES" in lieu thereof.

(b) TABLE OF CHAPTERS.—The table of chapters at the beginning of part I of title 18, United States Code, is amended so that the item relating to chapter 96 is amended to read as follows:

"96. Criminal enterprises and corruption of enterprises . . . 1961".

99th Congress, 1st Session: H.R. 2943

IN THE HOUSE OF THE REPRESENTATIVES

JULY 10, 1985

Mr. BOUCHER (for himself, Mr. Fish, Mr. Gekas, and Mr. Hyde) introduced the following bill; which was referred to the Committee on the Judiciary

A Bill

To amend section 1964 of title 18, United States Code, with respect to certain civil remedies for persons injured by racketeering activity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1964(c) of title 18, United States Code, is amended—

(1) by striking out "a violation" and inserting "conduct in violation" in lieu thereof;

(2) by striking out "therefor" and inserting "any person who engaged in that conduct and, with respect to such conduct, was convicted of racketeering activity or of a violation of section 1962" in lieu thereof;

(3) by inserting a comma after "district court"; and

(4) by adding at the end the following: "A civil action under this subsection may not be commenced against a defendant later than one year after the entry of the latest judgment of conviction against the defendant for racketeering activity or a violation of section 1962 with respect to the conduct out of which such action arises.".

99th Congress, 1st Session: H.R. 3985

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 18, 1985

Mr. CONYERS introduced the following bill; which was referred to the Committee on the Judiciary

A Bill

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "RICO Amendments Act of 1985".

SEC. 2. DEFINITIONAL AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1)(B)—

(A) by striking out "section 1341" and all that follows through "wire fraud)"; and

(B) by striking out "sections 2134 and" and inserting "section" in lieu thereof;

(2) in paragraph (1)(D), by striking out ", fraud in the sale of securities,"; and

(3) in paragraph (5)—

(A) by inserting "or fraudulent" after "racketeering" each place it appears;

(B) by inserting before the semicolon at the end the following: "that—

"(A) are related to the affairs of an enterprise;

"(B) are not isolated; and

"(C) are not so closely related to each other and connected in point of time and place that, while having multiple bases of jurisdiction, including use of the mails, wire communications, or interstate travel or transportation, they constitute a single transaction, involving only one victim, not evincing continuity of activity;

(4) in each of paragraphs (7) and (8), by inserting "or fraud" after "racketeering" each place it appears;

(5) by striking out "and" at the end of paragraph (9);

(6) by striking out the period at the end of paragraph (10) and inserting "; and" in lieu thereof; and

(7) by adding at the end the following:

"(11) 'fraudulent activity' means—

(A) any act which is indictable under any of sections 1341 (relating to mail fraud), 1343 (relating to wire fraud) and 2314 (relating to interstate transportation of stolen property) of this title; or

"(B) any offense involving fraud under section 24 of the Securities Act of 1933 (15 U.S.C. 77x), section 32 of the Securities Exchange Act of 1934 (15 U.S.C. 78ff), section 29 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-3), section 325 of the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a-48), section 217 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-17) or section 9 of the Commodity Exchange Act (7 U.S.C. 13).".

SEC. 3. PROHIBITED ACTIVITIES AMENDMENTS.

Section 1962 of title 18, United States Code, is amended—

(1) by inserting "or fraudulent" after "racketeering" each place it appears;

(2) in subsection (a), by inserting "knowingly" before "to use or invest";

(3) in subsection (b), by inserting "knowingly" before "to acquire or maintain"; and

(4) in subsection (c), by inserting "knowingly" before "to conduct or participate".

SEC. 4. CRIMINAL PENALTIES AMENDMENT.

Section 1963(a)(3) of title 18, United States Code, is amended by inserting "or fraudulent" after "racketeering".

SEC. 5. CIVIL INVESTIGATIVE DEMAND AMENDMENT.

Section 1968 of title 18, United States Code, is amended by inserting "or fraud" after "racketeering" each place it appears.

99th Congress, 2d Session: H.R. 4892

IN THE HOUSE OF REPRESENTATIVES

MAY 22, 1986

Mr. FRANK introduced the following bill; which was referred to the Committee on the Judiciary

A Bill

To amend title 9 and 18 of the United States Code with respect to certain civil proceedings arising under chapter 96 of title 18 of the United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil RICO Amendments Act of 1986".

SEC. 2. ARBITRATION AMENDMENT.

Section 2 of title 9, United States Code, is amended by adding at the end "Any claim arising under section 1964(c) of title 18 and based solely upon fraudulent activity of the party against whom the claim is made is subject to settlement by arbitration under this chapter, and a substantially prevailing claimant in such arbitration or in a prior or later related judicial proceeding on such claim shall be awarded costs of the proceeding, including a reasonable attorney's fee.".

SEC. 3. SECTION 1961 AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1)(A), by inserting after "obscene matter," the following: "prostitution involving minors,";

(2) in paragraph (1)(B)—

(A) by striking out "section 1341" and all that follows through "wire fraud)";

(B) by striking out "sections 2314 and" and inserting "section" in lieu thereof; and

(C) by inserting after "white slave traffic)" the following: "chapter 51 (relating to homicide), chapter 73 (relating to obstruction of justice), chapter 110 (relating to sexual exploitation of children), section 32 (relating to destruction of aircraft or aircraft facilities),

section 112 (relating to protection of foreign officials), section 115 (relating to assaults against a Federal official's family), section 215 (relating to bank bribery), section 373 (relating to solicitation to commit a crime of violence), section 510 (relating to fraud on Treasury paper or other United States securities), section 511 (relating to forgery of State and other securities), section 666 (relating to theft or bribery in benefit programs), section 844 (relating to explosive materials), sections 1029 and 1030 (relating to fraud in connection with access devices and computers), section 1203 (relating to hostage taking), section 1344 (relating to bank fraud), section 1952A (relating to murder-for-hire), section 1952B (relating to violent crime in aid of racketeering), and sections 2318 and 2320 (relating to counterfeit materials);";

(3) in paragraph (1), by adding at the end of the paragraph the following:

"(F) a criminal violation of the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Commodity Exchange Act, or (G) an offense under the Controlled Substances Act or the Controlled Substances Import and Export Act;";

(4) in paragraph (5)—

(A) by inserting "or fraudulent" after "racketeering" each place it appears; and

(B) by inserting before the semicolon at the end the following: "that—

"(A) are related to the affairs of an enterprise;

"(B) are not isolated; and

"(C) are not so closely related to each other and connected in point of time and place that, while having multiple bases of jurisdiction, including use of the mails, wire communications, or interstate travel or transportation, they constitute a single transaction, involving only one victim, not evincing continuity of activity;

(5) in each of paragraphs (7) and (8), by inserting "or fraud" after "racketeering" each place it appears;

(6) by striking out "and" at the end of paragraph (9);

(7) by striking out the period at the end of paragraph (10) and inserting "; and" in lieu thereof; and

(8) by adding at the end the following:

"(11) 'fraudulent activity' means—

(A) any act which is indictable under any of sections 1341 (relating to mail fraud), 1343 (relating to wire fraud), and 2314 (relating to interstate transportation of stolen property) of this title; or

"(B) an offense involving fraud connected with a case under title 11 or fraud in the sale of securities.".

SEC. 4. SECTION 1962 AMENDMENT.

Section 1962 of title 189, United States Code, is amended by inserting "or fraudulent" after "racketeering" each place it appears.

SEC. 5. SECTION 1963 AMENDMENT.

Section 1963(a)(3) of title 18, United States Code, is amended by inserting "or fraudulent" after "racketeering".

SEC. 6. SECTION 1964 AMENDMENTS.

(a) Section 1964(a) of title 18, United States Code, is amended—

(1) by striking out "(a)" and inserting in lieu thereof "(a)(1)"; and

(2) by adding at the end the following:

"(2) Any person may institute proceedings under this subsection. In any proceeding brought by any person under this subsection relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases, including the possibility that any judgment for money damages might be difficult to execute, but no showing of special or irreparable injury shall have to be made. Upon the execution of such bond against damages for an injunction improvidently granted as the court determines proper a temporary restraining order and a preliminary injunction may be issued in any action or proceeding before a final determination thereof upon its merits. Such undertaking shall not be required when the applicant is a State or territory of the United States. Recovery if the person substantially prevails shall include the costs of the action, including a reasonable attorney's fee in the trial and appellate courts.".

(b) Section 1964(c) of title 18, United States Code, is amended to read as follows:

"(c)(1) Any person who is, directly or indirectly, injured, by reason of any violation of section 1962 of this chapter may bring a civil action in an appropriate district court of the United States and shall recover threefold the actual damages sustained by him, and if the person substantially prevails, the costs of the action, including a reasonable attorney's fee in the trial and appellate courts. Damage shall not include pain and suffering.

"(2) If the court determines that the filing of any pleading, motion, or paper under this subsection is frivolous or that any action or proceeding is brought or continued under this subsection in bad faith, vexatiously, wantonly, or for an improper or oppressive reason, the court shall award actual costs of the action or proceeding, including attorney's fees, unless the court finds that special circumstances, including the relative economic position of the parties, make such an award unjust.

"(3) Whenever the United States is, directly or indirectly, injured in its business or property by reason of any violation of section 1962 of this chapter, the Attorney General may bring a civil action in an appropriate district court of the United States and shall recover threefold the actual damages sustained by it, and the cost, including investigations and litigation, of the action.

"(4) Any attorney general of a State may bring an action or proceeding under this subsection in the name of the State, as parens patriae on behalf of individuals residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such individuals by reason of any violation of section 1962 of this title. The court shall exclude from the amount of monetary relief awarded in the action or proceeding any amount of monetary relief that duplicates amounts which have been awarded for the same claim or which is properly allocable to individuals who have excluded their claims pursuant to this paragraph and to any business entity. The court shall award the State as monetary relief threefold the total damage sustained as described in this paragraph, and the cost of suit, including a reasonable attorney's fee. In any action or proceeding brought under this paragraph, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice of such action or proceeding to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person, the court may direct further notice to such person

according to the circumstances of the case. Any person on whose behalf an action or proceeding is brought under this paragraph may elect to exclude from adjudication the portion of the State claim for monetary or other relief attributable to such person by filing notice of such election with the court within such time as specified in the notice given under this paragraph. An action or proceeding under this paragraph shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs. In any action or proceeding under this subsection—

"(A) the amount of the plaintiff's attorney's fee, if any, shall be determined by the court; and

"(B) the court may in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, frivolously, vexatiously, wantonly, or for an improper or oppressive reason.

"(5) Notwithstanding any other provision of law providing a shorter period of limitation, any civil action or proceeding under this subsection may be commenced at any time within four years after the unlawful conduct terminates or the cause of action accrues, whichever is later. Whenever any civil, criminal, or other action or proceeding is brought or intervened in by the United States to prevent, restrain, or punish any violation of section 1962 of this chapter, the running of the period of limitation prescribed by this paragraph with respect to any cause of action arising under this subsection which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.".

99th Congress, 2d Session: H.R. 5290

IN THE HOUSE OF REPRESENTATIVES

JULY 30, 1986

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A Bill

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CHAPTER 96 HEADING AMENDMENT.

The heading for chapter 96 of title 18, United States Code, is amended by striking out "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS" and inserting in lieu thereof "PATTERN OF ILLICIT ACTIVITY".

SEC. 2. SECTION 1961 AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out "racketeering" the first place it appears and inserting "illicit" in lieu thereof;

(2) in paragraph (5), by striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof;

(3) in paragraph (7), by striking out "racketeering" each place it appears and inserting "criminal" in lieu thereof; and

(4) in paragraph (8)—

(A) by striking out "racketeering" the first place it appears and inserting "illicit activity" in lieu thereof; and

(B) by striking out "racketeering" the second place it appears and inserting "criminal" in lieu thereof.

SEC. 3. SECTION 1962 AMENDMENTS.

Section 1962 of title 18, United States Code, is amended by striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof.

SEC. 4. SECTION 1963 AMENDMENT.

Paragraph (3) of section 1963(a) of title 18, United States Code, is amended by striking out "racketeering" and inserting "illicit" in lieu thereof.

SEC. 5. SECTION 1964 AMENDMENT.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1) Any person or government whose business or property is injured by conduct in violation of section 1962 of this title may bring a civil action for the recoverable damages such person or government sustains, against—

"(A) an individual; or

"(B) a person other than an individual, if such conduct is—

"(i) authorized by an individual with the policy-making authority to determine the manner in which the essential functions of such person other than an individual are conducted, and

"(ii) intended materially to benefit such person other than an individual.

"(2) As used in paragraph (1) of this subsection, the term 'recoverable damages' means—

"(A) actual damages; and

"(B) if the court finds actual malice on the part of the defendant, punitive damages in an amount not to exceed twice the actual damages.

"(3) An action under this subsection must be commenced not later than two years after the accrual of the cause of action.

"(4) In an action under this subsection—

"(A) the court shall award a prevailing plaintiff a reasonable attorney's fee; and

"(B) the plaintiff must establish that the acts of illicit activity constituting the pattern of illicit activity—

"(i) are related to the affairs of the organization;

"(ii) are not isolated acts;

"(iii) are not so closely related to each other and connected in time and place that they constitute a single transaction; and

"(iv) all occurred within five years of the most

recent act of illicit activity that is part of the pattern of illicit activity.

"(5)(A) The Court may award in a civil action under this subsection, upon a motion promptly made by a prevailing plaintiff, simple interest on the actual damages for the period beginning on the date of service of such plaintiff's complaint alleging a cause of action under this subsection and ending on the date of judgment, or for any shorter period therein, if the court finds that such award is just in the circumstances.

"(B) In determining whether such award is just in the circumstances, the court shall consider only whether in the course of the action such plaintiff or the opposing party, or a representative of either—

"(i) made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(ii) violated any applicable statute, rule, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(iii) engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

"(6) The United States district courts shall have exclusive original jurisdiction of civil actions under this subsection."

SEC. 6. SECTION 1968 AMENDMENT.

Section 1968 of title 18, United States Code, is amended—

(1) in subsection (a), by striking out "a racketeering investigation" and inserting "an illicit activity investigation" in lieu thereof;

(2) in subsection (b), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof;

(3) in subsection (c), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof; and

(4) in subsection (f)—

(A) by striking out "racketeering" the first and fifth place it appears and inserting "criminal" in lieu thereof; and

(B) by striking out "racketeering" each other

place it appears and inserting "illicit activity" in lieu thereof.

99th Congress, 2d Session: H.R. 5391

IN THE HOUSE OF REPRESENTATIVES

AUGUST 12, 1986

Mr. CONYERS introduced the following bill; which was referred to the Committee on the Judiciary

A Bill

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CHAPTER 96 HEADING AMENDMENT.

The heading for chapter 96 of title 18, United States Code, is amended by striking out "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS" and inserting in lieu thereof "PATTERN OF ILLICIT ACTIVITY".

SEC. 2. SECTION 1961 AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out "racketeering" the first place it appears and inserting "illicit" in lieu thereof;

(2) in paragraph (5), by striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof;

(3) in paragraph (7), by striking out "racketeering" each place it appears and inserting "criminal" in lieu thereof; and

(4) in paragraph (8)—

(A) by striking out "racketeering" the first place it appears and inserting "illicit activity" in lieu thereof; and

(B) by striking out "racketeering" the second place it appears and inserting "criminal" in lieu thereof.

SEC. 3. SECTION 1962 AMENDMENTS.

Section 1962 of title 18, United States Code, is amended by striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof.

SEC. 4. SECTION 1963 AMENDMENT.

Paragraph (3) of section 1963(a) of title 18, United States Code, is amended by striking out "racketeering" and inserting "illicit" in lieu thereof.

SEC. 5. SECTION 1964 AMENDMENT.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1) Any person or government whose business or property is injured by conduct in violation of section 1962 of this title may obtain the recoverable damages such person or government sustains in a civil action against—

"(A) an individual; or

"(B) a person other than an individual, if such conduct is authorized, ratified, performed, or recklessly tolerated by the board of directors, a high management agent, or a similar individual or agent.

"(2) As used in paragraph (1) of this subsection—

"(A) the term 'high management agent', with respect to a person other than an individual, includes—

"(i) an executive officer or other officer or agent in a position of comparable authority with respect to the formulation of such person's policy or the supervision in a managerial capacity of subordinate employees or agents;

"(ii) any individual, whether or not an officer of such person, who controls such person or is responsibly involved in formulating such person's policy; and

"(iii) any other individual for whose conduct a law exists that provides such person is responsible; and

"(B) the term 'recoverable damages' means—

"(i) in the case of a civil action commenced by a government to obtain damages sustained by that government, threefold the damages sustained; and

"(ii) in any other case—

"(I) actual damages; and

"(II) if the finder of fact finds actual malice on the part of the defendant, punitive damages in an amount not to exceed twice the actual damages.

"(3) An action under this subsection must be com-

menced not later than four years after the conduct out of which the action arose.

"(4) In an action under this subsection—

"(A) the court shall award a prevailing plaintiff a reasonable attorney's fee; and

"(B) the plaintiff must establish that the acts of illicit activity constituting the pattern of illicit activity—

"(i) are not isolated acts;

"(ii) are not so closely related to each other and connected in time and place that they constitute a single transaction; and

"(iii) each occurred within five years after a previous act of illicit activity that is part of such pattern.

"(5)(A) The Court may award in a civil action under this subsection, upon a motion promptly made by a prevailing plaintiff, simple interest on the actual damages for the period beginning on the date of service of such plaintiff's complaint alleging a cause of action under this subsection and ending on the date of judgment, or for any shorter period therein, if the court finds that such award is just in the circumstances.

"(B) In determining whether such award is just in the circumstances, the court shall consider only whether in the course of the action such plaintiff or the opposing party, or a representative of either—

"(i) made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(ii) violated any applicable statute, rule, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(iii) engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

"(6) The United States district courts shall have exclusive original jurisdiction of civil actions under this subsection."

SEC. 6. SECTION 1968 AMENDMENT.

Section 1968 of title 18, United States Code, is amended—

(1) in subsection (a), by striking out "a racketeering

investigation" and inserting "an illicit activity investigation" in lieu thereof;

(2) in subsection (b), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof;

(3) in subsection (c), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof; and

(4) in subsection (f)—

(A) by striking out "racketeering" the first and fifth place it appears and inserting "criminal" in lieu thereof; and

(B) by striking out "racketeering" each other place it appears and inserting "illicit activity" in lieu thereof.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall not apply to any civil action pending on the date of the enactment of this Act that was commenced 30 days or more before such date.

99th Congress, 2d Session: H.R. 5445

IN THE HOUSE OF REPRESENTATIVES

AUGUST 15, 1986

Mr. BOUCHER (for himself, Mr. Bryant, Mr. Gekas, Mr. Coble, and Mr. Swindall) introduced the following bill; which was referred to the Committee on the Judiciary.

A Bill

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CHAPTER 96 HEADING AMENDMENT.

The heading for chapter 96 of title 18, United States Code, is amended by striking out "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS" and inserting in lieu thereof "PATTERN OF ILLICIT ACTIVITY".

SEC. 2. SECTION 1961 AMENDMENTS.

Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out "racketeering" the first place it appears and inserting "illicit" in lieu thereof;

(2) in paragraph (5), by striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof;

(3) in paragraph (7), by striking out "racketeering" each place it appears and inserting "criminal" in lieu thereof; and

(4) in paragraph (8)—

(A) by striking out "racketeering" the first place it appears and inserting "illicit activity" in lieu thereof; and

(B) by striking out "racketeering" the second place it appears and inserting "criminal" in lieu thereof.

SEC. 3. SECTION 1962 AMENDMENTS.

Section 1962 of title 18, United States Code, is amended by

striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof.

SEC. 4 SECTION 1963 AMENDMENT.

Paragraph (3) of section 1963(a) of title 18, United States Code, is amended by striking out "racketeering" and inserting "illicit" in lieu thereof.

SEC. 5. SECTION 1964 AMENDMENT.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1) Any person whose business or property is injured by conduct in violation of section 1962 of this title may in a civil action against a person who knowingly engaged in such conduct recover the actual damages that the person whose business or property was injured sustained by reason of such injury.

"(2) If the business or property of the United States or a State, including any department, agency, or government corporation of the United States or a State, is injured by conduct in violation of section 1962 of this title, the Attorney General of the United States or the chief legal officer of such State, as the case may be, may in a civil action against a person who knowingly engaged in such conduct recover threefold the actual damages that the government sustained by reason of such injury.

"(3) A person other than an individual is liable under this subsection for the conduct of another to the extent that the conduct complained of is—

"(A) knowingly engaged in by an officer, director, partner, or employee of such person, acting as such officer, director, partner, or employee;

"(B) authorized or ratified by—

"(i) an executive officer; or

"(ii) the governing board;

possessing the authority to determine the manner in which such person conducts its essential functions; and

"(C) intended to benefit, and did benefit, such person materially.

"(4) An action under this subsection must be commenced not later than three years after the plaintiff first knew or should have known of the existence of conduct giving rise to the cause of action under this subsection.

"(5) In an action under this subsection alleging illicit activity based on fraud, the plaintiff must establish the existence of that fraud by clear and convincing evidence.

"(6) In an action under this subsection the court shall award a prevailing plaintiff a reasonable attorney's fee.".

SEC. 6. SECTION 1968 AMENDMENT.

Section 1968 of title 18, United States Code, is amended—

(1) in subsection (a), by striking out "a racketeering investigation" and inserting "an illicit activity investigation" in lieu thereof;

(2) in subsection (b), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof;

(3) in subsection (c), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof; and

(4) in subsection (f)—

(A) by striking out "racketeering" the first and fifth place it appears and inserting "criminal" in lieu thereof; and

(B) by striking out "racketeering" each other place it appears and inserting "illicit activity" in lieu thereof.

99th Congress, 2d Session: H.R. 5445

IN THE SENATE OF THE UNITED STATES

OCTOBER 9 (legislative day, OCTOBER 6), 1986

Received; read twice and referred to the Committee on the Judiciary

An Act

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PATTERN OF ILLICIT ACTIVITY.

(a) CHAPTER 96 HEADING.—The heading for chapter 96 of title 18, United States Code, is amended by striking out "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS" and inserting in lieu thereof "PATTERN OF ILLICIT ACTIVITY".

(b) SECTION 1961.—Section 1961 of title 18, United States Code, is amended—

(1) in paragraph (1), by striking out "racketeering" the first place it appears and inserting "illicit" in lieu thereof;

(2) in paragraph (5), by striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof;

(3) in paragraph (7), by striking out "racketeering" each place it appears and inserting "criminal" in lieu thereof; and

(4) in paragraph (8)—

(A) by striking out "racketeering" the first place it appears and inserting "illicit activity" in lieu thereof; and

(B) by striking out "racketeering" the second place it appears and inserting "criminal" in lieu thereof.

(c) SECTION 1962.—Section 1962 of title 18, United States Code, is amended by striking out "racketeering" each place it appears and inserting "illicit" in lieu thereof.

(d) SECTION 1963.—Paragraph (3) of section 1963(a) of title 18, United States Code, is amended by striking out "racketeering" and inserting "illicit" in lieu thereof.

(e) SECTION 1968.—Section 1968 of title 18, United States Code, is amended—

(1) in subsection (a), by striking out "a racketeering investigation" and inserting "an illicit activity investigation" in lieu thereof;

(2) in subsection (b), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof;

(3) in subsection (c), by striking out "racketeering" each place it appears and inserting "illicit activity" in lieu thereof; and

(4) in subsection (f)—

(A) by striking out "racketeering" the first, second, and fifth places it appears and inserting "criminal" in lieu thereof;

(B) by striking out "racketeering" each other place it appears and inserting "illicit activity" in lieu thereof; and

(C) by striking out "racketeer" and inserting "illicit activity" in lieu thereof.

SEC. 2. CIVIL RECOVERY.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A governmental entity whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action against the person who engaged in such conduct and shall recover threefold the actual damages that the governmental entity sustained by reason of such injury, and the costs of the civil action, including a reasonable attorney's fee.

"(B) A civil action under subparagraph (A) of this paragraph must be brought by—

"(i) the Attorney General, if the injury is to the business or property of a governmental entity of the United States;

"(ii) the chief legal officer of the State, if the injury is to the business or property of a governmental entity of the State; or

"(iii) the chief legal officer of a subdivision of a State, if the injury is to the business or prop-

erty of the subdivision and if such officer is specifically authorized by statute of that State to bring actions under this subsection.

"(2) A person, other than a governmental entity, whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action against the person who engaged in the conduct and shall recover—

"(A) threefold the actual damages that such person whose property or business is injured sustained by reason of such injury, and the costs of the civil action, including a reasonable attorney's fee, if the person who engaged in the conduct was, with respect to such conduct, convicted of an illicit activity or of a violation of section 1962 of this title; or

"(B)(i) the actual damages that such person whose property or business is injured sustained by reason of such injury, and the costs of the civil action including a reasonable attorney's fee, and

"(ii) punitive damages of up to twice the actual damages, if—

"(I) the person whose business or property is injured is a natural person and the injury occurred in connection with a purchase or lease, for personal or household use or investment, of a product, service, investment, or other property; or a contract for personal or household use or investment;

"(II) neither State nor Federal securities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based; and

"(III) the defendant acted in wanton disregard of plaintiff's rights (but conduct of the defendant in good faith and in reliance upon a directly applicable regulatory action, approval, or interpretation of law by an authorized State agency is not in wanton disregard of plaintiff's rights for the purposes of this subclause).

"(3) In a civil action involving a claim for punitive damages under paragraph (2)(B) of this subsection, the trier of fact, in determining the amount of punitive damages, shall consider—

"(A) the degree of culpability of the defendant;

"(B) the degree of disparity in the bargaining positions of the plaintiff and the defendant;

"(C) any history of similar conduct by the defendant;

"(D) the benefits derived from the unlawful conduct by the defendant;

"(E) the number of persons victimized;

"(F) any prior decision by a court or State or Federal agency as to whether the defendant violated applicable law or acted in bad faith; and

"(G) any other factor the court deems to be an equitable consideration bearing on the appropriate amount of punitive damages.

"(4) For a civil action under paragraph (2) of this subsection seeking damages under subparagraph (B) of such paragraph (2), the term 'pattern of illicit activity' requires at least two acts of illicit activity—

"(A) one of which occurred not more than five years after the prior act of illicit activity;

"(B) that are not so closely related in time and place that together the acts constitute a single episode; and

"(C) (for actions based on a violation of section 1962(c) of this title) each of which is related to the affairs of the enterprise.

"(5)(A) A civil action under this subsection may not be commenced after the latest of—

"(i) three years after the date the cause of action accrues;

"(ii) three years after the conduct causing injury to the plaintiff terminates; or

"(iii) two years after the date of the criminal conviction required for an action under paragraph (2)(A) of this subsection.

"(B) The period of limitation provided in subparagraph (A) of this paragraph on a cause of action does not run during the pendency of a government civil action or criminal case relating to the conduct upon which such cause of action is based.

"(6) As used in this subsection, the term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the

United States or a State, any political subdivision of a State, and any enterprise for which a trustee has been appointed by a United States district court under section 1964(a) of this title (but only during the tenure of such trustee).".

SEC. 3. FEDERAL RULES OF CIVIL PROCEDURE AMENDMENTS.

Rule 9(b) of the Federal Rules of Civil Procedure is amended—

(1) in the caption, by inserting ", and Suits under 18 U.S.C. 1964(c)" after "Mind"; and

(2) by inserting after the first sentence the following: "In an action under 18 U.S.C. 1964(c), facts supporting the claim against each defendant shall be averred with particularity.".

SEC. 4. EFFECTIVE DATE.

(a) GENERAL RULE.—The amendments made by this Act shall apply to any civil action commenced after the date of enactment.

(b) EXCEPTION.—In any pending action under section 1964(c) of title 18, United States Code, in which a person would be eligible to recover only under paragraph (2)(B)(i) of section 1964(c) as amended by this Act, if this Act had been enacted before the commencement of that action, the recovery of that person shall be limited to the recovery provided under such paragraph (2)(B)(i), unless in the pending action—

(1) there has been a jury verdict or district court judgment, establishing the defendant's liability, or settlement has occurred; or

(2) the court determines that, in light of all the circumstances, such limitation of recovery would be clearly unjust.

Passed the House of Representatives October 7, 1986.

Attest: BENJAMIN J. GUTHRIE,

Clerk.