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# RICO REFORM: "WEEDING OUT" GARDEN VARIETY DISPUTES UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

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## INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act ("RICO")<sup>1</sup> has been severely criticized in recent years.<sup>2</sup> In the early 1980's, the plaintiffs' bar began to use RICO as a weapon "against defendants who carried portfolios instead of pistols."<sup>3</sup> This prompted numerous attempts to reform RICO through legislative amendments.<sup>4</sup> These attempts were unsuccessful and have been characterized as either too severe or too lenient.<sup>5</sup> The focus has been on curtailing the statute as a weapon in "garden variety" lawsuits against legitimate businesses.<sup>6</sup> The courts have interpreted

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<sup>1</sup> 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990).

<sup>2</sup> See, e.g., Augustine, *Reforming RICO: If, Why and How?*, 43 VAND. L. REV. 621, 621 (1990) (increased use of RICO by both "prosecutors and private plaintiffs . . . has prompted a host of criticisms").

<sup>3</sup> Bridegam, *Business Targets Aim Back at Racketeering Law*, CONG. Q., Sept. 5, 1987, at 2130.

<sup>4</sup> See H.R. 5111, 101st Cong., 2d Sess. (1990); S. 438, 101st Cong., 2d Sess. (1989). Congressman William J. Hughes has commented: "RICO reform has been one of the most time-consuming and difficult issues in the 101st Congress." Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 639 (1990).

<sup>5</sup> See *RICO Reform Act of 1989: Hearings on H.R. 1046 Before the Subcomm. on Crime of the House of Representatives Comm. on the Judiciary*, 101st Cong., 1st Sess. 1-2 (1989) (statement of Congressman William J. Hughes); Bridegam, *supra* note 3.

<sup>6</sup> See S. REP. NO. 459, 100th Cong., 2d Sess. 2 (1988) [hereinafter Senate Report]; Bridegam, *supra* note 3. A garden variety lawsuit is one in which "corporate rivals . . . us[e]

the statute according to its plain meaning, leaving Congress to shoulder the responsibility of any necessary reform.<sup>7</sup> However, Congress has not passed any amendments to civil RICO since 1984.<sup>8</sup>

There have been competing legislative efforts, on the one hand to limit the statute's scope and remedies, and on the other hand to preserve it as a potent plaintiff's weapon.

## I. HISTORY OF CIVIL RICO

RICO was passed as Title IX of the Organized Crime Control Act of 1970.<sup>9</sup> When Congress enacted RICO, its declared intent was to provide "enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."<sup>10</sup> To facilitate these goals, government prosecutors were provided with an arsenal of new weapons to investigate, prosecute, and convict racketeers.<sup>11</sup> Civil remedies under the Act were not part of the legislation as it was originally introduced, nor were they part of the legislation passed by the Senate;<sup>12</sup> rather, it was an amendment by the House Judiciary Committee that established the civil cause of action.<sup>13</sup>

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the law . . . to turn their squabbles into federal cases." *Bridegam*, *supra* note 3; *see also* Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 679 (1990) (setting forth examples of "garden variety fraud").

<sup>7</sup> *See, e.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499-500 (1985) (any defect in RICO must be corrected by Congress not judiciary); *Bankers Trust Co. v. Feldesman*, 648 F. Supp. 17, 24 (S.D.N.Y. 1986) ("any change in the statute must come from Congress").

<sup>8</sup> *See generally* 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990) (legislative history accompanying RICO indicates that last amendment to civil RICO occurred in 1984).

<sup>9</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. 9, 84 Stat. 941 (1971) (codified at U.S.C. §§ 1961-1968 (1988)).

<sup>10</sup> H.R. REP. NO. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 1073.

<sup>11</sup> *See* 18 U.S.C. § 1963 (1988) (fines and imprisonment); *id.* § 1965 (federal jurisdiction); *id.* § 1968 (civil investigative demand).

<sup>12</sup> *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 152 (1987) (citing *Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 520 (1970)). The original RICO bill introduced by Senators McClellan and Hruska in 1969 did not contain a private civil enforcement provision. *Id.* at 151-52.

<sup>13</sup> *Id.* at 152. Representative Steiger of the House Judiciary Committee proposed the addition of a private treble damages remedy similar to that of the anti-trust laws. *Id.* His proposal, endorsed by the American Bar Association, was included in the final version of the bill. *Id.*

## II. CIVIL RICO: THE LANGUAGE OF THE ACT

Under section 1964(c) of RICO, a plaintiff aggrieved as a result of a section 1962 violation may bring a private civil action for treble damages and costs, including reasonable attorneys' fees.<sup>14</sup> Section 1962 lists four types of criminal conduct which provide the basis for civil recovery.<sup>15</sup> The basic thrust of this section prohibits a party or entity from engaging in racketeering activity while simultaneously engaging in an enterprise associated with interstate or foreign commerce. Section 1962(a)<sup>16</sup> sets forth the first category of prohibited conduct. That section prohibits a person<sup>17</sup> who has received any income derived, directly or indirectly, from a pattern of racketeering activity,<sup>18</sup> or through the collection of an unlawful debt<sup>19</sup> from using or investing, directly or indirectly, any part of

<sup>14</sup> 18 U.S.C. § 1964(c) (1988). Section 1964(c) states that: "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 threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.*

<sup>15</sup> *Id.* § 1962.

<sup>16</sup> *Id.* § 1962(a). Section 1962(a) provides:

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

*Id.*

<sup>17</sup> *Id.* § 1961(3). "[P]erson' includes any individual or entity capable of holding a legal or beneficial interest in property." *Id.*

<sup>18</sup> *Id.* § 1962(a). "[P]attern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.* § 1961(5).

<sup>19</sup> *Id.* § 1961(6). Section 1961(6) defines "unlawful debt" as:

a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States,

such income, or the proceeds of such income, in acquiring any interest in or establishing or operating an enterprise. The enterprise must engage in, or affect interstate or foreign commerce.<sup>20</sup> A mere purchase of securities on the open market for the purpose of investment, without the intention of controlling or participating in the control of the issuer or of assisting another to do so, is not prohibited under certain circumstances.<sup>21</sup>

The second category of criminal conduct, found in section 1962(b),<sup>22</sup> prohibits any person, through a pattern of racketeering activity<sup>23</sup> or through collection of an unlawful debt, from acquiring

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a State or a political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

*Id.*

<sup>20</sup> *Id.* § 1962(a).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 1962(b). Section 1962(b) provides that "[i]t shall be unlawful for any person through a pattern of racketeering activity or through collection of unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce." *Id.*

<sup>23</sup> *Id.* § 1961(1). Section 1961 defines "racketeering activity" as:

any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321

or maintaining, 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.<sup>24</sup> Section 1962(c)<sup>25</sup> of RICO prohibits any person employed by or associated with any enterprise engaged in or involved with the activities which affect interstate or foreign commerce from conducting or participating, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or the collection of an unlawful debt.<sup>26</sup> Conspiracy to commit any of the above acts is a prohibited activity under section 1962(d).<sup>27</sup>

Many studies have been conducted regarding the use and effect of RICO in civil litigation.<sup>28</sup> While these studies vary slightly in their findings, they indicate that early in the statute's history,

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(relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act . . . .

*Id.*

<sup>24</sup> *Id.* § 1962(b).

<sup>25</sup> *Id.* § 1962(c). Section 1962(c) provides:

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

*Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 1962(d). Section 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." *Id.*

<sup>28</sup> See *Bridegam*, *supra* note 3, at 2132. A 1985 survey by the American Bar Association revealed that only nine percent of the civil RICO suits decided from 1970-1985 involved activity normally associated with professional criminal activity, that is, arson, bribery, extortion, and political corruption. *Id.* (citing *Report of the Ad Hoc Civil RICO Task Force* ABA SEC. CORP., BANKING & BUS. L. 55 (1985)); see also Irons, *RICO: Is It a Double-Edged Sword?*, Annual Joint Mid-Winter Meeting of the Life, Health, Public Regulation and Employee Benefits Committee (January 1986) (report by Department of Justice indicated there were approximately five hundred civil RICO cases reported between 1970 and 1985).

The 1985 Annual Report of the United States Attorney General estimated that white collar crime costs Americans \$200 billion annually. Senate Report, *supra* note 6. A congressional service report estimated that (i) defense procurement in fraud cases costs between \$23 to \$38 billion annually; (ii) bank fraud is the cause or contributing cause of at least one-half of bond failures; and (iii) health care fraud against the government may cost \$3.6 billion or five percent of the government's outlay for these programs. *Id.*

private plaintiffs were reluctant to initiate lawsuits under RICO. Plaintiffs very rarely included a RICO cause of action in a complaint, even if the facts appeared to have supported such a cause of action. This has changed drastically in recent years. Plaintiff's counsel became attuned to the broad language of the statute, the myriad of predicate offenses, including mail, wire, and securities fraud, as well as the jackpot of treble damages and costs. They have been further encouraged by the courts' liberal interpretations of the statute issued. A RICO claim is now virtually a *sine qua non* in most commercial litigation. The defendants, however, are no longer solely traditional organized crime participants. Rather, a whole new class of defendants has emerged, including estranged spouses, trespassers, lawyers, accountants, legatees, employers, securities brokers, insurers, landlords, manufacturers, and even the Federal Bureau of Investigation.<sup>29</sup> The statute has been both criticized and applauded for its expansion to common commercial litigation.

### III. PROPOSED AMENDMENTS

The United States Supreme Court has concluded that the extension of RICO to "garden variety" fraud cases is warranted given the statute's legislative history,<sup>30</sup> despite its recognition in *Sedima, S.P.R.L. v. Imrex, Co.*<sup>31</sup> of RICO's evolution into something different from that which was contemplated by its drafters.<sup>32</sup> RICO nonetheless has been and continues to be targeted for reform.<sup>33</sup> Recently, the Senate Judiciary Committee reported favorably on Senate Bill 438, which seeks to narrow RICO's application to defendants outside the sphere of organized crime.<sup>34</sup> The bill is pres-

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<sup>29</sup> See, e.g., 136 CONG. REC. E460 (daily ed. Feb. 22, 1989) (introduction of S. 438 by Congressman Rick Boucher); Bridgeham, *supra* note 3, at 2130-31 (common practice to add RICO counts to civil suit); *The Latest on RICO: Ruling Fans the Fire That Won't Go Out*, Legal Times, July 10, 1989, at 17-18 (citing Chief Justice Rehnquist's lamenting of RICO's "tremendous reach"); see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). In *Sedima*, the United States Supreme Court stated: "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach . . . but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes' . . . ." *Id.* at 497-98 (citations omitted).

<sup>30</sup> See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2896 (1989).

<sup>31</sup> 473 U.S. 479 (1985).

<sup>32</sup> *Id.* at 500.

<sup>33</sup> See *supra* note 4 and accompanying text.

<sup>34</sup> S. 438, 101st Cong., 1st Sess. 2 (1989). By a vote of 11-2, the Senate Judiciary Committee approved S. 438 on February 1, 1990, as modified by Senator Dennis DeConcini.

ently pending before the Senate. Amending RICO, however, is a precarious endeavor because too much reform could eviscerate the effectiveness of the statute. This Article will analyze and comment upon the most controversial proposals to amend RICO, with particular analysis of the pending Senate Bill.

#### A. Predicate Offenses

One of the most troublesome sections of RICO is section 1961,<sup>35</sup> which sets forth those predicate offenses which constitute "racketeering activity." Proposed amendments to this section purport both to narrow and widen the scope of predicate offenses. As Justice Marshall stated in his dissent in *Sedima*, "[t]he single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud."<sup>36</sup> Almost any "garden variety" commercial action can be brought under RICO,<sup>37</sup> if it is shown that the alleged wrongdoing was perpetrated through the use of the United States' mails or wires, the Act's predicate offense requirement is satisfied. Accordingly, in an attempt to narrow the application of RICO, the removal of these two "catch-all" predicate offenses has been proposed.

The inclusion of mail and wire fraud as predicate offenses facilitates the RICO actions that could not otherwise be brought because the alleged misconduct does not fall under one of the other rather narrowly-defined predicate offenses set forth in section 1961. Their removal effectively would eradicate one of the most salutary purposes of RICO—that of deterrence.<sup>38</sup> A potential civil or criminal RICO defendant would be much more secure in misconduct where the wrong perpetrated does not fall under the specified categories of offenses. In addition, the hands of many prosecu-

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Voting against S. 438 were Senators Edward Kennedy and Howard Metzenbaum.

<sup>35</sup> 18 U.S.C. § 1961 (1988).

<sup>36</sup> *Sedima*, 473 U.S. at 501 (Marshall, J., dissenting).

<sup>37</sup> See *id.* at 500.

<sup>38</sup> See, e.g., *RICO Reform Act of 1989: Hearings on H.R. 1046, and Private Civil RICO Before the Subcomm. on Crime, of the House of Representatives Comm. of the Judiciary*, 101st Cong., 1st Sess. 140 (1989) (statement of Philip A. Feigen); Senate Report, *supra* note 6, at 8 (predicate acts of mail and wire fraud in civil RICO is important remedy for consumers). In *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987), the Court stated: "[RICO brings] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective . . . is the carrot of treble damages." *Id.* at 151.



tors and private plaintiffs would be tied if RICO claims were limited to the remaining predicate offenses. The removal of mail and wire fraud from the scope of predicate offenses certainly would disserve the public interest by removing from the reach of RICO probably the most common means of criminal activity in the business and commercial world.

As a corollary to the removal of mail and wire fraud as predicate offenses, other proposals seek the addition of other, more specific crimes. Senate Bill 438, presently pending, proposes the addition of more than twenty-five additional predicate offenses.<sup>39</sup> These additional predicate offenses encompass a broad range of crimes including, *inter alia*, sexual exploitation of minors, destruction of aircraft or aircraft facilities, hostage taking, terrorist acts abroad, arson, acts against federal or foreign officials, computer fraud, forgery of government securities, all offenses under the Truth in Lending Act, and firearms control laws.<sup>40</sup> These additions were proposed so that RICO would be more effective in combatting patterns of terrorism, organized crime, illegal drug trafficking and white collar crime.<sup>41</sup> In any event, recent court decisions already reflect an extension of RICO beyond acts normally associated with organized crime.<sup>42</sup> Following suit, Congress now has, by the proposed amendments, officially extended RICO beyond conduct traditionally considered racketeer-related.

This is a healthy trend on the part of Congress, and one which should continue. Such an amendment does not detract from the original intent of the drafters of RICO. Rather, it acknowledges that racketeering activity and activity commonly associated with racketeering takes many forms. As this Article will establish, attempts at limiting the reach of RICO should concentrate on other aspects of the statute, without limiting the predicate offenses

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<sup>39</sup> S. 438, 101st Cong., 1st Sess. 2 (1989).

<sup>40</sup> *Id.*

<sup>41</sup> S. REP. NO. 269, 101st Cong., 2d Sess. 10 (1990) [hereinafter *Biden Report*].

<sup>42</sup> See, e.g., *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2896 (1989) (bribes given to public utilities commission members to approve unfair and unreasonable telephone rates); *McClendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1508-09 (D.N.J. 1985) (employment grievance); *White v. Fosco*, 599 F. Supp. 710, 715-16 (D.D.C. 1984) (attorney-client conflicts); *Congregation Beth Yitzhok v. Briskman*, 566 F. Supp. 555, 556-57 (E.D.N.Y. 1983) (dispute over entitlement to Hassidic Jewish leadership position); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 356 (E.D. Mich. 1983) (refusal to pay insurance claim); *Pit Pros, Inc. v. Wolf*, 554 F. Supp. 284, 285 (N.D. Ill. 1983) (dispute between landlord and tenant).

which fall under its purview.

### B. Section 1962 and the First Amendment

Senate Bill 438 seeks to exclude non-violent forms of public speech undertaken for reasons other than economic or commercial advantage from the prohibited activities of section 1962.<sup>43</sup> This amendment is in obvious response to those cases brought against public interest groups,<sup>44</sup> and is an effort to protect first amendment rights.<sup>45</sup> Actions under RICO to undermine constitutional protections are a clear misuse of RICO and an amendment to limit such actions is laudable. The amendment carefully limits such protection to speech unrelated to commercial gain or advantage, further clarifying the intent of this amendment.<sup>46</sup>

### C. Civil Remedies

The most sweeping modifications proposed in recent years involve section 1964 of RICO.<sup>47</sup> Senate Bill 438 proposes a complete revamping of the statute's civil remedies, including the addition of burdens of proof and punitive damages, as well as the removal of treble damages for the private civil plaintiff.<sup>48</sup>

Senate Bill 438 also permits a governmental entity, (excluding a unit of local government other than a unit of general local government), whose business or property is injured, or a department of insurance of a state that regulates distribution of a fund which is injured in connection with the insolvency or liquidation of an insurer, to bring a civil action for the violation of section 1962 in any appropriate United States District Court, and to recover, upon

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<sup>43</sup> S. 438, 101st Cong., 1st Sess. 3(e) (1989). Senate Bill 438 provides:

For purposes of this chapter, the term "racketeering activity" shall not include participation in, or the organization or support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage, and no action may be maintained under this chapter based on such activities.

*Id.*

<sup>44</sup> See, e.g., *Northeast Women's Center, Inc. v. McMonagle*, 689 F. Supp. 465, 467 (E.D. Pa. 1988) (RICO action brought against pro-life demonstrators), *aff'd*, 889 F.2d 466 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1788 (1990); *Congregation Beth Yitzhok*, 566 F. Supp. at 556 (dispute over Hassidic Jewish leadership).

<sup>45</sup> See Biden Report, *supra* note 41.

<sup>46</sup> S. 438, 101st Cong., 1st Sess. 3(e) (1989).

<sup>47</sup> 18 U.S.C. § 1964 (1988).

<sup>48</sup> S. 438, 101st Cong., 1st Sess. (2), (3) (1989).

proof by a preponderance of the evidence, treble damages and costs including reasonable attorneys' fees.<sup>49</sup> A private civil plaintiff is relegated to the actual damages suffered, which also are to be proven by a preponderance of the evidence.<sup>50</sup> The costs of an action, including reasonable attorneys' fees, are limited under the bill to units of local government (other than units of general local government), and natural persons or organizations as defined under various federal statutes who are injured by very narrowly defined conduct.<sup>51</sup> Treble damages and costs, including reasonable attorneys' fees, remain available to a plaintiff who brings an action against a defendant convicted of a federal or state offense regarding the same conduct upon which the plaintiff's civil action is based. The offense, however, must contain state of mind as a material element and be punishable by death or imprisonment for a term of more than one year.<sup>52</sup>

The removal of treble damages in a RICO action arising from a commercial transaction against defendants not convicted of predicate offenses is a reasonable curtailment of the scope of RICO. The treble damages remedy has been one of the primary incentives for inclusion of RICO claims in otherwise ordinary commercial litigation. Preservation of the remedy in the case of defendants convicted of criminal activity fulfills the statutory intent of deterring criminal conduct.

The rationale for permitting government agencies to continue recovery of treble damages is unclear, although it appears to be a revenue-producing device to redress wrongs that have squandered away taxpayer monies.<sup>53</sup> Further, there is an implication that the government will not abuse the remedy of treble damages, and, if it

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<sup>49</sup> *Id.* 5(c)(1)(A).

<sup>50</sup> *Id.* 5(3)(A)-(D).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* 5(5)(A)(i)-(iii).

<sup>53</sup> See Biden Report, *supra* note 41. The Biden Report states:

The Federal Deposit Insurance Corporation and the Resolution Trust Corporation have used civil RICO to recover losses sustained when an institution fails due to a pattern of criminal fraud. Such failures have cost the taxpayers millions of dollars and the availability of RICO will deter repetition of the acts that have caused such failures.

Local governments, too, have successfully used civil RICO to redress millions of dollars in losses sustained by the public treasury due to public assistance fraud, the bribery of public officials and arson-for-profit. . . . The Committee determined not to interfere with this type of activity by governmental entities.

*Id.*

does, it will do so only in isolated instances.<sup>54</sup> It appears that the bill accords special treatment to government plaintiffs for purposes of expediency. However, the harm to the private plaintiff is no less real than the harm to the public plaintiff. For this reason, the distinction between public and private plaintiffs is unwarranted.

Another concept introduced in the recently proposed bill is the recovery of damages for a plaintiff who has suffered serious bodily injury from a crime of violence which constitutes racketeering activity in violation of section 1962.<sup>55</sup> Such a plaintiff may recover, upon proof by a preponderance of the evidence, the costs of the action, including reasonable attorneys' fees, actual damages to business or property, actual damages as provided under applicable state law (excluding pain and suffering), and punitive damages if the plaintiff satisfies a clear and convincing evidence standard.<sup>56</sup>

The concept of punitive damages has, however, been introduced into RICO in an apparent attempt to fill the void left by the removal of the availability of treble damages for the average plaintiff.<sup>57</sup> These damages are limited to twice the amount of actual damages and are available only to plaintiffs who are entitled to collect costs and who prove by *clear and convincing evidence* that the defendant's actions were consciously malicious or so egregious and deliberate that malice may be implied.<sup>58</sup>

This proposal introduces a separate standard of conduct, similar to that required for punitive damages under state law. This type of remedy traditionally is imposed for the purpose of punishment rather than compensation.<sup>59</sup> The wisdom of introducing a novel federal remedy is questionable.

#### D. Statute of Limitations

RICO does not provide for a statute of limitations.<sup>60</sup> As a result, courts faced with a statute of limitations defense scrambled to

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<sup>54</sup> See *id.* (public opinion deters abusive government actions).

<sup>55</sup> S. 438, 101st Cong., 1st Sess. 5(3) (1989).

<sup>56</sup> *Id.* § 5(3)(A)-(D). Evidence as to the amount of punitive damages cannot be introduced until liability is established. *Id.* § 5(4). However, a court, in its discretion, may allow earlier introduction of such evidence upon motion of a party with good cause shown, in the absence of undue prejudice to the defendant. *Id.*

<sup>57</sup> *Id.* § 5(3).

<sup>58</sup> *Id.* § 5(3)(D).

<sup>59</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) (purpose of punitive damages is punishment).

<sup>60</sup> See 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990).

devise appropriate limitations periods by borrowing from analogous state and federal statutes.<sup>61</sup> It was not until the United States Supreme Court's decision in *Agency Holding Corp. v. Malley-Duff & Associates*<sup>62</sup> that a uniform statute of limitations was articulated. In *Agency Holding*, the Court concluded that the four-year statute of limitations applicable to civil actions under the Clayton Act was equally applicable to civil actions under RICO.<sup>63</sup>

Recent proposed amendments to RICO recommend codifying a statute of limitations containing various time periods.<sup>64</sup> The bill pending before the Senate appears to codify the statute of limitations set forth under *Agency Holding*,<sup>65</sup> but adds a two-year statute of limitations from the date of a defendant's criminal conviction.<sup>66</sup> The bill provides for a special six-year statute of limitations for actions commenced by attorney generals or other authorized legal officers.<sup>67</sup> In all cases, the statute of limitations does not run while a government or civil case relating to the conduct alleged is pending.<sup>68</sup>

The codification of the four-year statute of limitations, however, appears unnecessary in light of *Agency Holding*, although it is constructive in that it removes the mystery shrouding Congress' intent regarding the limitations period.<sup>69</sup> The inquiry nonetheless remains as to when a cause of action under RICO accrues. Absent a legislative directive on the subject, we must continue to look to case law in resolution of this issue.

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<sup>61</sup> See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); see also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987) (statute of limitations applicable to Clayton Act applies to RICO claims); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 656 F. Supp. 49, 73-74 (S.D. Ohio 1986) (look to analogous state statute); *McCarthy v. Pacific Loan, Inc.*, 629 F. Supp. 1102, 1105-06 (D. Haw. 1986) ("federal court must characterize the cause of action and look to an analogous state statute for a limitations period").

<sup>62</sup> 483 U.S. 143 (1987).

<sup>63</sup> *Id.* at 149.

<sup>64</sup> See S. 438, 101st Cong., 1st Sess. 5(6)(A)(i) (1989) (four years after date cause of action accrues); *id.* 5(6)(A)(ii) (two years after date of criminal conviction).

<sup>65</sup> Compare *id.* 5(6)(A) (statute of limitations includes period of four years after action accrues, two years after criminal conviction, and six years for certain civil actions) with *Agency Holding*, 483 U.S. at 155-56 (applicable statute of limitations is four years; five year statute applies to criminal prosecutions).

<sup>66</sup> S. 438, 101st Cong., 1st Sess. 5(6)(A)(ii) (1989).

<sup>67</sup> *Id.* § 5(6)(B).

<sup>68</sup> *Id.* § 5(6)(C).

<sup>69</sup> See *Agency Holding*, 483 U.S. at 154-55 (speculation exists as to congressional intent concerning statute of limitations period).

The Supreme Court in *Agency Holding* intentionally left unresolved the issue of accrual under RICO.<sup>70</sup> Courts presented with the accrual issue subsequent to *Agency Holding* have not been uniform in their methods of determination.<sup>71</sup> Under the general federal rule of accrual of actions, the statute of limitations begins to run when a plaintiff knows, or reasonably should know, of the injury forming the basis of the action.<sup>72</sup> The problem with applying this rule to a RICO claim is that a plaintiff may have known about his or her injury prior to his or her right to bring the RICO claim. In order to allege a RICO violation, a plaintiff must show a pattern of racketeering activity which, under the statute, requires at least two acts of racketeering activity.<sup>73</sup> Therefore, under the federal rule of accrual based upon occurrence of injury, it appears that the statute of limitations will begin to run prior to the commission of the second act of racketeering activity.

Furthermore, the Supreme Court has declared that a plaintiff must prove continuity plus relationship.<sup>74</sup> Under federal law, where a plaintiff suffers multiple injuries from defendant's conduct, each injury is considered a separate claim, and the statute of limitations runs on each claim from the time the plaintiff knew or should have known of each injury.<sup>75</sup> An exception is, accordingly, permitted in cases of multiple injury; an action is timely as long as the last act of the continuing wrong falls within the statute of limitations period.<sup>76</sup>

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<sup>70</sup> See *id.* at 157. In *Agency Holding*, the Court stated, "we have no occasion to decide the appropriate time of accrual for a RICO claim." *Id.*

<sup>71</sup> See, e.g., *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) (accrual occurred when plaintiff had actual or constructive knowledge of fraud); *Bath v. Bushkin, Gaima, Gaines & Jonas*, 695 F. Supp. 1156, 1162-63 (D. Wyo. 1988) (accrual occurred when plaintiffs learned expectations of immediate, positive cash flow were not fulfilled), *aff'd in part, rev'd in part, vacated in part*, 913 F.2d 817 (4th Cir. 1990); *Davis v. A.G. Edwards & Sons, Inc.*, 687 F. Supp. 266, 269-70 (W.D. La. 1988) (statute of limitations runs when plaintiff knows or should have known of injury underlying RICO cause of action); *MHC, Inc. v. United Mine Workers*, 685 F. Supp. 1370, 1389-90 (E.D. Ky. 1988) (statute of limitations begins to run only when plaintiffs knew or had reason to know of injury which is basis of action).

<sup>72</sup> See *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

<sup>73</sup> 18 U.S.C. § 1961 (1988).

<sup>74</sup> See *H.J. Inc. v. Northwestern Bell Tel Co.*, 109 S. Ct. 2893, 2906 (1989).

<sup>75</sup> See, e.g., *Singleton*, 632 F.2d at 192-93 (cause of action does not accrue until separate injury apparent).

<sup>76</sup> See, e.g., *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982) (where continuing pattern of similar acts in limitations period, action may be brought even though some acts

Such an exception should likewise be applicable to RICO cases. Determination of the accrual point should take into account the necessity of two or more acts and the possibility of multiple injury. The statute of limitations should begin to run at the time the plaintiff knew or should have known of the last act of racketeering activity upon which the RICO claim is based. Any other date for accrual would lead to injustice given the elements and nature of a *prima facie* case under RICO.

#### *E. Affirmative Defenses*

Senate Bill 438 sets forth an affirmative defense that will exculpate a civil defendant "act[ing] in good faith and in reliance upon an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law."<sup>77</sup> The bill promulgates a procedure whereby a defendant may move for determination of the affirmative defense prior to commencement of full discovery, although discovery may be allowed as to the availability of the affirmative defense.<sup>78</sup> Full discovery of plaintiff's claim would be permitted where the defendant fails to raise an affirmative defense in his first responsive pleading or if the defendant fails to move for summary judgment within a specified period of time.<sup>79</sup>

The codification of the affirmative defense proposed in Senate Bill 438 should contribute measurably to the early dismissal of inappropriate RICO actions. It is unclear why this particular affirmative defense was chosen for inclusion in the pending bill, and why others were not also proposed.

#### *F. Particularity of Pleading*

Senate Bill 438 includes a provision which states that facts supporting a claim under section 1964 of the statute must be averred with particularity.<sup>80</sup> This requirement parallels that found in the Federal Rules of Civil Procedure governing allegations of fraud.<sup>81</sup> The theory behind the specificity requirement in the case

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occurred out of limitations period).

<sup>77</sup> S. 438, 101st Cong., 1st Sess. 4 (1989).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The court may extend the time for filing the affirmative defense or the motion for summary judgment by agreement of the parties or for good cause shown. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See FED. R. CIV. P. 9(b).

of a fraud claim is equally applicable to RICO claims, in that it is a serious matter to charge a defendant with conduct actionable under RICO. Thus, a court should not permit such allegations unless a plaintiff is forthcoming with the specifics of the alleged wrongful conduct.<sup>82</sup> This particularity requirement furthers a praise worthy goal of eliminating baseless RICO claims. Accordingly, this amendment is a positive development which would narrow the scope of RICO against unfounded claims.

### G. Civil RICO Case Statement and Preliminary Hearing

Akin to the requirement of pleading with particularity<sup>83</sup> is the civil RICO case statement<sup>84</sup> used by some courts, and the preliminary hearing.<sup>85</sup> The purpose of these two devices is to screen out improper RICO claims.<sup>86</sup> The Federal Procedures Committee recently endorsed the "statement as a valuable aid to courts in making an early determination of whether a valid RICO claim had been alleged."<sup>87</sup>

The RICO case statement must be submitted to the court within a certain period of time after the claim is filed. The case statement is similar to a bill of particulars, except that it is requested by the court rather than by the adverse party. It is intended to supplement and amplify the pleading with written answers to a series of questions designed to elicit the factual basis and legal theory underlying the RICO claim.<sup>88</sup> The statement also is used to "assist[ ] in the early identification, clarification, and narrowing of [factual and legal] issues."<sup>89</sup> Often, a court will treat the case statement as a supplement to the complaint and will consider it when deciding motions to dismiss under Federal Rule of

<sup>82</sup> See, e.g., *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972) (conspiracy claims not particularized).

<sup>83</sup> See FED. R. CIV. P. 9(b).

<sup>84</sup> See, e.g., *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674, 679-80 (6th Cir. 1988) (sufficiently detailed case statement required to satisfy notice); *Norris v. Wirtz*, 703 F. Supp. 1322, 1328-29 (N.D. Ill. 1989) (case statement includes names, dates, and contents of fraud acts).

<sup>85</sup> S. 438, 101st Cong., 1st Sess. 4 (1989).

<sup>86</sup> See, e.g., Biden Report, *supra* note 41, at 9; *Federal Procedures Comm. Rep., The Civil RICO Case Statement* 8 (1989) [hereinafter *Procedures Committee Report*] ("most valuable" function of case statement may be in "educating" plaintiffs as to RICO pleading requirements).

<sup>87</sup> See *Procedures Committee Report*, *supra* note 86, at 1.

<sup>88</sup> See *id.* at 3.

<sup>89</sup> *Id.*



Civil Procedure 12(b)(6) or 9(b).<sup>90</sup> If either the complaint, or the case statement, or both, "allege the necessary elements of a RICO claim, [then] the court will not dismiss the action."<sup>91</sup> If the complaint and case statement together do not make out a RICO claim, then dismissal may result.<sup>92</sup>

"Some courts have required that RICO case statements be filed in response to motions for a more definite statement under Rule 12(e)."<sup>93</sup> The case statement may also define areas in which limited discovery may facilitate early resolution of issues raised by the pleadings.<sup>94</sup> Finally, the case statement serves to educate plaintiffs as to the requirements for pleading civil RICO claims.<sup>95</sup>

While RICO case statements appear to have some value in identifying improper RICO actions, their use can be questioned on several grounds. Despite the use of case statements by some courts, RICO does not require them. None of the cited authorities<sup>96</sup> mandate that a plaintiff lay bare all of her available proof prior to trial and provide the specificity generally discoverable through a motion for summary judgment. Additionally, case statements must be drafted soon after the pleading stage without the benefit of discovery, although many courts are willing to dismiss an action on the pleadings alone.<sup>97</sup> Furthermore, the use of an extrinsic unsworn statement which could not properly be considered proof at trial as an aid to a court's determination of a motion to dismiss is contrary to the principle that the material allegations of a plaintiff's complaint, as well as reasonable inferences drawn therefrom, must be taken as admitted.<sup>98</sup> Procedures exist, including motions for dis-

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<sup>90</sup> *Id.* at 4.

<sup>91</sup> *Id.* at 5.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 6.

<sup>95</sup> *Id.* at 8.

<sup>96</sup> See *id.* at 4-8. In support of the RICO case statement, the Federal Procedures Committee has cited at 4-8. Rules 11, 12(e), 16 and 83 of the Federal Rules of Civil Procedure. *Id.* at 9-10.

<sup>97</sup> See, e.g., *FDIC v. Kerr*, 637 F. Supp. 828, 835 (W.D.N.C. 1986) (without discovery, court cannot determine that plaintiff's claim not factually supported); *Micro-Medical Indus. v. Hatton*, 607 F. Supp. 931, 937 (D.P.R. 1985) (complaint withstands motion to dismiss); *Rich-Taubman Assoc. v. Stamford Restaurant Operating Co.*, 587 F. Supp. 875, 880 (S.D.N.Y. 1984) (same).

<sup>98</sup> See, e.g., *Murray v. City of Milford*, 380 F.2d 468, 470 (2d Cir. 1967) (in determining dismissal motion, court must accept plaintiff's pleading and reasonable inferences drawn therefrom as true); *Carlucci v. Owens-Corning Fiberglas Corp.*, 646 F. Supp. 1486, 1488 (E.D.N.Y. 1986) (same).

missal and summary judgment, which enable a court to take a closer look early in an action. A case statement is therefore largely unnecessary to serve this function. Finally, the pleading with particularity requirement<sup>99</sup> eliminates the need for a case statement in RICO actions where fraud is alleged. Moreover, since Senate Bill 438 contains such a requirement, if the bill is passed, case statements would be superfluous in all RICO actions.

Senate Bill 438 also mandates a preliminary hearing. The requirement of a preliminary hearing prior to discovery, during which an action may be dismissed, merits the same criticisms discussed above in reference to case statements, plus some additional ones. For one, the judge will be deciding cases on the basis of oral argument alone (absent a formal opportunity to submit written proof). Furthermore, there is no occasion to develop a full record for appeal, which makes the process somewhat arbitrary. The argument that a preliminary hearing provides a broader basis for courts to dismiss inappropriate RICO suits does not outweigh its negative consequences.

#### *H. Pattern of Racketeering Activity*

One of the most widely criticized provisions of RICO is the pattern of racketeering requirement.<sup>100</sup> Many amendments have been proposed to change this requirement,<sup>101</sup> although Senate Bill 438 does not contain any such amendment.<sup>102</sup>

Since the enactment of RICO, courts have expressed a variety of views on what constitutes a pattern of racketeering activity.<sup>103</sup> Courts and commentators have opined that a principal reason for inappropriate RICO claims is the inability of Congress or the courts to develop a "meaningful concept of pattern."<sup>104</sup> Courts have misinterpreted RICO's legislative history in determining what

<sup>99</sup> See FED. R. CIV. P. 9(b).

<sup>100</sup> See, e.g., *Sedima*, 473 U.S. at 500. Justice White noted that Congress and the courts have failed "to develop a meaningful concept of 'pattern.'" *Id.*

<sup>101</sup> See, e.g., H.R. 5111, 101st Cong., 2d Sess. (1990) (clarifies "pattern of racketeering activity").

<sup>102</sup> See S. 438, 101st Cong., 1st Sess. 2 (1989).

<sup>103</sup> See, e.g., *Frankart Distribs., Inc. v. RMR Advertising, Inc.*, 632 F. Supp. 1198, 1200 (S.D.N.Y. 1986) ("pattern" requires multiple criminal episodes or transactions sufficiently unconnected in time yet not isolated or sporadic).

<sup>104</sup> See *Sedima*, 473 U.S. at 500; Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. Rev. 57, 80 (1973) (pattern element enhances complexity of statute which raises risk of error in finding defendant guilty).

constitutes a pattern of racketeering activity. According to the legislative history, RICO is not aimed at sporadic activity, but rather, more than one incident with the threat of continuing activity.<sup>105</sup> The requirement of a prior conviction<sup>106</sup> has been abandoned in favor of combining the factors of continuity and relationship to produce a pattern.<sup>107</sup>

The most recent pronouncement on the subject by the Supreme Court is *H.J. Inc. v. Northwestern Bell Telephone Co.*<sup>108</sup> In *Northwestern Bell* the Court acknowledged its prior statement in *Sedima* that RICO's expansive use could be attributed, in part, to "the failure of Congress and the courts to develop a meaningful concept of 'pattern.'"<sup>109</sup> The Court stated that because Congress had done nothing since the *Sedima* decision to further define "pattern of racketeering," the Court itself was compelled to do so.<sup>110</sup>

In reviewing the text and the legislative history of RICO, the Court failed to find support for the propositions that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes, and that a pattern is established merely by proving two predicate acts.<sup>111</sup> The Court similarly did not find support for the proposition that "'pattern' refers only to predicates that are indicative of a perpetrator involved in organized crime or its functional equivalent."<sup>112</sup> Rather, the Court stated that Congress had intended a more "natural and commonsense approach,"<sup>113</sup> that is, a requirement more stringent than proof of two predicates yet broad enough to encompass multiple predicates within a single scheme relating and amounting to, or threatening the likelihood of, criminal activity.<sup>114</sup> The *Northwestern Bell* Court determined that it was Congress' intent that "a plaintiff or prosecutor . . . show that the racketeering predicates are related, and

<sup>105</sup> See S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969).

<sup>106</sup> See *Bridgman*, *supra* note 3; *Irons*, *supra* note 28.

<sup>107</sup> *Sedima*, 473 U.S. at 496 n.14; *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2900 (1989).

<sup>108</sup> 109 S. Ct. 2893 (1989). The *Northwestern Bell* decision appeared to be a troubling one to the Court. It was the oldest undecided case on the calendar and there was evidence that it might be rescheduled. See N.Y. Times, June 27, 1989, at A1, col. 6.

<sup>109</sup> *Northwestern Bell*, 109 S. Ct. at 2899 (quoting *Sedima*, 473 U.S. at 500).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; cf. *United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988) (pattern established by proving two predicate acts).

<sup>112</sup> *Northwestern Bell*, 109 S. Ct. at 2899.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

that they amount to or pose a threat of continuing criminal activity," in order to prove a pattern of racketeering activity.<sup>115</sup>

The Court stated that the concomitant concepts of relatedness and continuity, "must be stated separately, though in practice their proof will often overlap."<sup>116</sup> "Relation" is satisfied when the racketeering activities 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."<sup>117</sup> "Continuity" was not defined, but the Court stated that this concept "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."<sup>118</sup>

"A party alleging a RICO violation may demonstrate continuity . . . by proving a series of related predicates extending over a substantial period of time."<sup>119</sup> "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement."<sup>120</sup> If an action is brought before continuity can be established in this manner, then "liability depends on whether the *threat* of continuity is demonstrated."<sup>121</sup>

The Supreme Court in *Northwestern Bell* invited Congress to provide clearer guidance as to RICO's intended scope.<sup>122</sup> An amendment to RICO which codifies the relatedness and continuity requirements is necessary. The Court's conclusion that "continuity" is a *sui generis* inquiry will lead to a host of cases requesting interpretation of this concept. "Continuity" should be defined as a series of related predicate acts which extend over a substantial period of time or which threaten similar future predicate acts.<sup>123</sup>

<sup>115</sup> *Id.* at 2900 (emphasis in original).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2901 (citing 18 U.S.C. § 3575(e)).

<sup>118</sup> *Id.* at 2902.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (emphasis in original). The Court further stated that the threat of continuity may be either implicit or explicit. *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969). The proposed definition of continuity is in accordance with RICO's legislative history:

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided . . . largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of [RICO] is thus not sporadic activity.

## I. *Survivability*

Senate Bill 438 includes a clause which states that an action under RICO will survive the death of a party<sup>124</sup> and may be enforceable against a receiver in bankruptcy to the extent of actual damages.<sup>125</sup> In accordance with the statute's objective of deterrence, survivability should be adopted.

## J. *"Racketeer" Label*

Senate Bill 438 bars a civil plaintiff from using the words "racketeer" or "organized crime" in any pleading or other written document, argument, hearing, trial, or other oral presentation before a court.<sup>126</sup> The terms "racketeering activity" and "pattern of racketeering activity" would be changed to "unlawful activity" and "pattern of unlawful activity," respectively, unless a crime of violence is involved.<sup>127</sup> It should be noted that a great majority of the predicate activities listed in section 1961 are crimes of violence.<sup>128</sup>

The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is the factor of continuity plus relationship which combines to produce a pattern.

*Id.*

<sup>124</sup> S. 438, 101st Cong., 1st Sess. 4 (1989).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* The bill defines "crime of violence" as an offense involving:

(i) when chargeable under State law the following: murder, kidnapping, arson, robbery, or dealing in narcotic or other dangerous drugs;

(ii) when indictable under title 18, United States Code, and when accompanied by serious bodily injury the following: destruction of air-craft facilities as defined by section 32; arson as defined by section 81; acts against foreign officials and other persons as defined by section 112 (a), (c) through (f); acts against Federal officials and other persons as defined by section 115; threats and extortion as defined by section 878; loansharking and other extortionate credit transactions as defined by sections 891-894; homicide as defined by section 1111-1112, 1114, 1116-1117; hostage taking as defined in section 1203; obstruction of justice as defined in sections 1501-1506, 1508-1513, and 1515; extortion as defined by section 1951; murder-for-hire as defined by section 1958; sexual exploitation of children as defined in sections 2251-2252 and 2256; explosives or dangerous weapons aboard vessels as defined in section 2277; or terrorist acts abroad as defined in section 2331; or

(iii) the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

*Id.*

<sup>128</sup> See 18 U.S.C. § 1961 (1988).

This pending amendment is unnecessary in light of the Supreme Court's statement in *Northwestern Bell* that RICO extends well beyond parties and activities historically embraced by the phrase "organized crime."<sup>129</sup> Such a restriction, according to the Court, has no support in the text of the Act and is at odds with the tenor of its legislative history.<sup>130</sup>

This amendment is cosmetic and is of no substantive significance. Moreover, limiting one's speech in a courtroom or forbidding certain language in a pleading offends first amendment principles, and should be rejected.

#### K. *International Service of Process*

Under RICO, service of process must take place within the United States.<sup>131</sup> International service of process has been proposed as a means to facilitate the use of RICO against defendants who have fled the country, and to obtain jurisdiction over international terrorists.<sup>132</sup> Such a provision is endorsed as it will further RICO's deterrent effect.

#### L. *Federal Jurisdiction*

In the recent decision of *Tafflin v. Levitt*,<sup>133</sup> the Supreme Court stated that there is concurrent state and federal jurisdiction over RICO actions.<sup>134</sup> The concept of federalism provides that the fifty states have concurrent sovereignty with the federal government subject only to the supremacy clause.<sup>135</sup> Accordingly, the Court reasoned that states have the inherent authority to adjudicate claims arising under the laws of the United States unless Congress specifically directs otherwise.<sup>136</sup>

Congress currently is considering whether to limit RICO juris-

<sup>129</sup> *Northwestern Bell*, 109 S. Ct. at 2902. The Court noted that "Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime." *Id.* at 2904.

<sup>130</sup> *Id.* at 2905. In *Northwestern Bell*, the Court stated, "[i]t would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus." *Id.*

<sup>131</sup> 18 U.S.C. § 1965 (1988).

<sup>132</sup> See S. 438, 101st Cong., 1st Sess. 5 (1989); see also Biden Report, *supra* note 41 (proposing such procedure); S. REP. NO. 459, 100th Cong., 2nd Sess. 7 (1988).

<sup>133</sup> 110 S. Ct. 792 (1990).

<sup>134</sup> *Id.* at 794.

<sup>135</sup> *Id.* at 795.

<sup>136</sup> *Id.*

diction exclusively to federal courts.<sup>137</sup> This restriction would alter the apparent import of current section 1964, which states that a RICO action *may* be brought in a United States District Court.<sup>138</sup> Reasons given in support of such an amendment include the belief that it is appropriate for the federal courts to develop the body of RICO law, and the fact that many states already have a RICO statute or are presently considering adopting one.<sup>139</sup>

Notwithstanding the *Tafflin* decision, federal courts should have exclusive jurisdiction over RICO claims to foster federal interests. Given the breadth and ambiguity of the statute, uniform interpretation of the statute is desirable. If states are permitted to interpret RICO, federal courts will lose control over the development of this relatively unsettled area of federal law. It is also possible that federal courts will afford greater hospitality to RICO claims as the statute is a creature of federal legislation. Furthermore, the federal procedural devices under RICO<sup>140</sup> are of greater value in the federal forum.

#### M. Retroactivity

Senate Bill 438, as it presently reads, applies only to cases filed after the date of the enactment of the statute,<sup>141</sup> in contrast to prior amendments which call for retroactivity.<sup>142</sup> It is arguable, that if a party is entitled to bring a certain cause of action, regardless of when the statute was enacted, he or she should have the right to take advantage of it. However, the patent unfairness of retroactively applying any amendment overrides this argument.

#### N. Small Investor Protection

Senator Metzenbaum, and more recently Senator Kennedy, have supported a small investor protection provision<sup>143</sup> which

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<sup>137</sup> S. 438, 101st Cong., 1st Sess. 6 (1989).

<sup>138</sup> See 18 U.S.C. § 1964 (1988).

<sup>139</sup> See Biden Report, *supra* note 41.

<sup>140</sup> See 18 U.S.C. § 1964 (1988).

<sup>141</sup> S. 438, 101st Cong., 1st Sess. 8 (1989).

<sup>142</sup> H.R. 4923, 100th Cong., 2nd Sess. 7 (1988) (provides circumstances where retroactive effect); H.R. 2983, 100th Cong., 1st Sess. 3 (1987) (same).

<sup>143</sup> See Biden Report, *supra* note 41, at 31 (minority views of Senators Metzenbaum and Kennedy). The Senators defined a "small investor" as "anyone who owned securities valued at less than or equal to the median portfolio value of all U.S. securities holders or who was a member of a household with an annual income of less than or equal to the U.S. median household income." *Id.*

would allow consumer plaintiffs who have been victimized by criminal fraud schemes to recover treble damages, costs, and fees.<sup>144</sup> Rampant acts of fraud involving the purchase and sale of securities and commodities have been offered in support of this provision.<sup>145</sup> Proponents of this provision maintain that such plaintiffs, usually the elderly living on inflexible incomes and lower middle class individuals with limited incomes, are least likely to protect themselves and therefore require special treatment under RICO.<sup>146</sup> They also contend that a small investor provision would further the deterrent effect of the statute and would allow these victims to be made whole.<sup>147</sup> The bill presently pending before Congress does not contain a small investor provision, in keeping with the limitation of treble damages to all private plaintiffs.<sup>148</sup>

There is no reason why consumers should be afforded greater protection than other plaintiffs who have been victimized by fraudulent criminal schemes, particularly since the federal securities laws contain a considerable degree of protection for investor plaintiffs.

#### *O. Fees for the Prevailing Party*

Also proposed in Senate Bill 438, although not yet contained in the full version of the bill, is the availability of fees for the prevailing party.<sup>149</sup> If the amendments to section 1964 eliminating treble damages in many cases<sup>150</sup> are enacted, then such a fee shifting provision is advisable to make whole a plaintiff who has likely expended significant funds prosecuting a RICO action. Conversely, such a provision is necessary to make whole a defendant who has been unjustifiably accused of a RICO violation. This provision would also deter unfounded RICO claims without impeding the goals of the statute.

#### *P. Sanctions*

Past proposed amendments to RICO have included a special

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See S. 438, 101st Cong., 1st Sess. 4 (1989).

<sup>149</sup> See *id.*

<sup>150</sup> See *supra* notes 47-60 and accompanying text.



sanctions provision.<sup>151</sup> A provision of this sort is unnecessary due to the availability of rule 11 of the Federal Rules of Civil Procedure.<sup>152</sup> Rule 11 permits a court to order sanctions if it deems a suit frivolous.<sup>153</sup> As such, a sanctions provision does not enhance a court's power in a pending RICO action, and therefore, would be unnecessary.

#### CONCLUSION

Attempts, such as Senate Bill 438, have been made to curtail the extensive use of civil RICO by "weeding out" garden variety law suits which were not contemplated by its enactors, despite the Supreme Court's recent recognition to the contrary. The statute, however, fills an apparent void as evidenced by the significant number of suits brought under RICO. Congress, however, should proceed with caution in efforts to limit the application of the statute, so as not to eviscerate the intended purpose as well as the spirit of RICO.

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<sup>151</sup> See, e.g., H.R. 2983, 100th Cong., 1st Sess. 2 (1987) (authorizes award of attorney's fees as sanction).

<sup>152</sup> FED. R. CIV. P. 11.

<sup>153</sup> *Id.*