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CONCURRENT JURISDICTION OVER FEDERAL CIVIL RICO CLAIMS: IS IT WORKABLE? AN ANALYSIS OF *TAFFLIN v. LEVITT*

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INTRODUCTION

With its January 22, 1990 decision of *Tafflin v. Levitt*,[1] the Supreme Court of the United States put an end to the many years of debate between both federal and state courts as to whether state courts have concurrent jurisdiction over civil claims arising under the Racketeer Influenced and Corrupt Organizations Act ("RICO").[2] In a unanimous opinion by Justice O'Connor, the Court concluded that such jurisdiction on the part of the states was indeed permitted.[3] In reaching its decision, the majority examined both the statutory language of RICO[4] as well as its legislative history, and determined that Congress had failed to address the jurisdictional issue.[5] Moreover, the Court found that there would be no "clear incompatibility" between the exercise of state court jurisdiction over civil RICO actions and federal interests.[6]

This Article explores the implications of *Tafflin*, focusing on its probable effects and the jurisdictional problems associated with civil RICO claims. Part I provides the evolution and legislative history of the federal RICO statute. Part II illustrates the divergence of opinions between many of the federal and state courts on the

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[1] 110 S. Ct. 792 (1990).

[2] *See infra* notes 31-47 and accompanying text (setting forth debate among federal and state courts regarding jurisdiction over civil RICO claims).

[3] *Tafflin*, 110 S. Ct. at 794-99.

[4] *Id.* at 795-96.

[5] *Id.* at 796-97.

[6] *Id.* at 798.

issue of concurrent jurisdiction prior to the *Tafflin* decision. By examining the facts and procedural posture of *Tafflin*, Part III will explain how the Supreme Court resolved the jurisdictional dispute over civil RICO suits. Finally, Part IV analyzes the significance of *Tafflin*, while scrutinizing the negative implications of its directive.

I. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO): AN OVERVIEW

A. *The Evolution of RICO*

As a result of findings by the 1951 Special Committee to Investigate Organized Crime in Interstate Commerce (the "1951 Special Committee"), the American people became increasingly aware of the nation's organized crime problem.[7] The purpose of this committee was to expose the magnitude by which "criminals and racketeers [were] using the profits of organized crime to buy up and operate legitimate business enterprises."[8]

Although as early as 1965 Congress considered enacting legislation aimed at eradicating the infiltration of organized crime into legitimate business, it was not until several years later that the concerns about organized crime were seriously addressed.[9] In 1969, Senator John L. McClellan (D.-Ark.) described before the United States Senate, on the basis of information gathered by the President's Commission on Law Enforcement and Administration of Justice, the process by which organized crime institutions attempted to seize control over legitimate establishments.[10] Accord-

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[7] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 196 (1967) [hereinafter THE CHALLENGE OF CRIME]. The Commission studied a number of legislative proposals that were drafted to strengthen the existing organized crime law. *See Organized Crime Control, Hearings on S. 30 and Related Proposals Before Subcomm. on the Judiciary*, 91st Cong., 2d Sess. 538, 543-44 (1970) [hereinafter *Hearings on S. 30*].

[8] S. REP. No. 141, 82nd Cong., 1st Sess. 33 (1951). The 1951 Special Committee found that the following industries had been infiltrated by corrupt organized criminals:

> advertising, amusement, appliances, automobiles, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drug stores, electrical equipment, florists, food, football, garment, gas, hotels, import/export, insurance, jukebox, laundry, liquor, loans, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap, shipping, steel surplus, television, theatres, and transportation.

S. REP. No. 307, 82nd Cong., 1st Sess. 170-81 (1951).

[9] S. REP. No. 617, 91st Cong., 1st Sess. 76-78 (1969), 111 CONG. REC. 4277 (1965).

[10] 115 CONG. REC. 9567 (1969) (statement of Senator McClellan); *see* THE CHALLENGE

ing to Senator McClellan, infiltration could occur through the mere passive investment of illicit profits into lawful industry, or the more severe use of various forms of extortion as a means to facilitate organized crime activity.[11]

In that same year, Senator Roman L. Hruska (R.-Neb.) introduced, by way of two Senate bills, the first pieces of legislation aimed at eradicating corrupt business practices. The first, Senate bill 2048, sought to amend the Sherman Antitrust Act in order to prohibit the investment of unreported income into any business enterprise affecting interstate and foreign commerce.[12] It contained both criminal and civil enforcement mechanisms, and proposed the incorporation of various provisions of the antitrust laws.[13] The second, Senate bill 2049, sought to prohibit the investment of income derived from certain criminal activity into business enterprises affecting interstate and foreign commerce.[14] Although both bills were referred to the Senate Committee on the Judiciary, no further action was taken on either bill.[15] Approximately two years later, Senator McClellan introduced Senate bill 30, which, as first introduced, did not include comprehensive RICO provisions.[16] That same year, Senator Hruska introduced Senate bill 1623, which ef-

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OF CRIME, *supra* note 7. The control of legitimate business usually occurs through one of four ways: "(1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." *Id.* at 190.

[11] THE CHALLENGE OF CRIME, *supra* note 7, at 190.

[12] S. 2048, 90th Cong., 1st Sess., 113 CONG. REC. 17,999 (1967).

[13] 113 CONG. REC. 17,999 (1967). Senator Hruska supported the incorporation of antitrust mechanisms into anti-racketeering legislation:

> The antitrust laws now provide a well established vehicle for attacking anticompetitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinarily broad and flexible remedies ought to be used more extensively against the "legitimate" business activities of organized crime.

Id.

[14] S. 2049, 90th Cong., 1st Sess., 113 CONG. REC. 17,999 (1967).

[15] *See* 113 CONG. REC. 18,007 (1967). The bills, however, were studied by the American Bar Association ("ABA") which supported and endorsed the objectives of both bills, as well as similar legislation. 115 CONG. REC. 6994-95 (1969). The ABA also agreed with the general principle that "antitrust machinery possess[ed] certain advantages worthy of utilization." *Id.*

[16] S. 30, 91st Cong., 1st Sess. (1969). The bill sought to curb organized crime and covered the following areas: grand jury reporting on noncriminal misconduct; compelling witnesses to submit testimony; authorizing confinement without bail of recalcitrant witnesses; authorizing protected facilities for housing government witnesses; authorizing use of extrajudicial admissions of conspiracy; increasing punishment for habitual offenders; and, authorizing use of any evidence for sentencing purposes. *Id.*

fectively incorporated the principles and objectives of previous Senate bills 2048 and 2049.[17] Eventually, both senators introduced Senate bill 1861, which later evolved into the RICO statute that exists today.[18]

B. Legislative History of RICO

In its Statement of Findings and Purposes, Congress stated that the RICO statute was intended to halt organized crime's infiltration into legitimate business enterprises by "strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[19] The Act, which included both civil and criminal penalties, was added to Title 18 of the Organized Crime Control Act of 1970 (the "1970 Act").[20]

However, upon carefully examining the legislative history of RICO, as many courts have done, one finds no indication as to whether federal court jurisdiction over civil RICO claims is exclusive.[21] In fact, "[t]he legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction; indeed, as the principal draftsman of RICO has remarked, 'no one even thought of the issue.' "[22] Nonetheless, "courts can infer from the statute that if Congress had thought about it, they would have made [jurisdiction] exclusive . . . [since] the antitrust law is an exclusive-jurisdiction statute."[23]

According to the 1967 report of the President's Commission on Law Enforcement and Administration of Justice,[24] antitrust-type provisions were a suitable method of eradicating the infiltration of

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[17] 115 CONG. REC. 6993 (1969) (statement of Senator Hruska upon introduction of Senate bill 1623).

[18] S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568, 9571 (1969).

[19] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968).

[20] 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990).

[21] Chivas Prods. Ltd. v. Owen, 864 F.2d 1280, 1283 (6th Cir. 1988); Brandenburg v. Seidel, 859 F.2d 1179, 1193 (4th Cir. 1988); Lou v. Belzberg, 834 F.2d 730, 737-39 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); DuBroff v. DuBroff, 833 F.2d 557, 562 (5th Cir. 1987); *Hearings on S. 30*, *supra* note 7.

[22] *Brandenburg*, 859 F.2d at 1193 (citing Flaherty, *Two States Lay Claim to RICO*, Nat'l L.J., May 7, 1984, at 3, col. 1 (quoting Professor G. Robert Blakey)).

[23] Flaherty, *Two States Lay Claim to RICO*, Nat'l L.J., May 7, 1984, at 10, col. 2.

[24] *See supra* notes 7, 10-11, and accompanying text (discussing findings of commission).

organized crime into legitimate businesses.[25] This report became the origin of criminal and civil RICO.[26] Furthermore, in 1967, when Senator Hruska introduced Senate bills 2048 and 2049,[27] he argued during the floor debate that because the antitrust laws offer "a well established vehicle for attacking anticompetitive activity of all kinds," they should be used as a model for anti-racketeering legislation.[28] When the Senate bill which eventually evolved into the current RICO statute was introduced before the Senate, Senator McClellan remarked that the bill had borrowed many provisions and remedies from the antitrust statutes.[29]

Despite the exhaustively detailed provisions provided in the current federal RICO statute, there was no definitive directive regarding which courts had jurisdiction to hear suits based on RICO violations until the Supreme Court decided *Tafflin v. Levitt*. Prior to this decision, both the federal and state courts that had confronted this controversial question disagreed as to its answer.[30]

II. FEDERAL AND STATE COURT JURISDICTION OVER CIVIL RICO CLAIMS PRIOR TO *Tafflin v. Levitt*

Prior to *Tafflin*, the federal circuit courts were split on the issue of whether the civil RICO statute provided for exclusive federal jurisdiction. While the Sixth Circuit, in *Chivas Products Ltd. v. Owen*,[31] had held that jurisdiction over civil RICO claims was exclusively federal,[32] in *Brandenburg v. Seidel*[33] and *Lou v. Belzberg*,[34] the Fourth and Ninth Circuits, respectively, held that such actions could be maintained in both federal and state courts. Other circuits, while expressing some doubt as to whether civil RICO jurisdiction was exclusively federal, had yet to make an ulti-

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[25] THE CHALLENGE OF CRIME, *supra* note 7, at 208. In particular, the Commission suggested the use of Department of Justice antitrust theories that were successful in combatting racketeering in labor unions, and endorsed legislation aimed at allowing the United States Attorney to use antitrust theories against organized crime activities. *Id.* at 465-86.

[26] *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009, 1015 n.25 (1980).

[27] *See supra* notes 12-15 and accompanying text for further discussion.

[28] 113 CONG. REC. 17,999 (1967); *see supra* notes 12-15 and accompanying text (discussing Senate bills introduced by Senator Hruska).

[29] 115 CONG. REC. 9,567 (1969) (statement of Senator McClellan).

[30] *See infra* notes 31-47 and accompanying text.

[31] 864 F.2d 1280 (6th Cir. 1988).

[32] *Id.* at 1283-86.

[33] 859 F.2d 1179 (4th Cir. 1988).

[34] 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

mate determination.[35] Similarly, a sharp division existed between the various district courts confronted with the issue of concurrent jurisdiction over RICO suits.[36]

In *Chivas Products*, the Sixth Circuit held that only the federal courts could exercise jurisdiction over civil RICO actions.[37] In reaching its decision, the court noted that when Congress drafted RICO and provided for its private cause of action under section 1964(c), it had borrowed heavily from section 4 of the Clayton Act, which provides for exclusive federal jurisdiction.[38] Furthermore, the court determined that similar to section 4 of the Clayton Act, the legislative history of RICO clearly provides that the civil remedy of section 1964(c) was designed to assist "private attorneys general" in the "broad-front attack on organized crime."[39] Thus, the Sixth Circuit concluded that "features of the RICO structure are *incompatible* with concurrent state-court jurisdiction."[40]

Beginning their analysis with the presumption established by the Supreme Court in *Gulf Offshore Co. v. Mobil Oil Corp.*[41] that

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[35] Crotty v. City of Chicago Heights, 857 F.2d 1170, 1172 n.6 (7th Cir. 1988); DuBroff v. DuBroff, 833 F.2d 557, 562 (5th Cir. 1987); County of Cook v. MidCon Corp., 773 F.2d 892, 905 n.4 (7th Cir. 1985).

[36] *See* Hampton v. Long, 686 F. Supp. 1202, 1205-06 (E.D. Tex. 1988) (holding that civil RICO claims must be brought in federal courts and setting forth list of cases); *compare* Intel Corp. v. Hartford Accident & Indem. Co., 662 F. Supp. 1507, 1512 (N.D. Cal. 1987) (holding that federal courts enjoy exclusive jurisdiction over civil RICO claims); Massey v. City of Oklahoma City, 643 F. Supp. 81, 84 (W.D. Okla. 1986) (same); Broadway v. San Antonio Shoe, Inc., 643 F. Supp. 584, 587 (S.D. Tex. 1986) (same); Kinsey v. Nestor Exploration Ltd., 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985) (same); County of Cook v. MidCon Corp., 574 F. Supp. 902, 912 (N.D. Ill. 1983), *aff'd on other grounds*, 773 F.2d 892 (7th Cir. 1985) (same) *with* Gray v. Coomer, 706 F. Supp. 539, 541-42 (W.D. Ky. 1988) (holding that civil RICO claims may be brought in state courts); Brandenburg v. First Maryland Sav. & Loan, Inc., 660 F. Supp. 717, 731 (D. Md. 1987) (same), *aff'd sub nom.* Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988); Contemporary Servs. Corp. v. Universal City Studios, 655 F. Supp. 885, 893 (C.D. Cal. 1987) (same); Carman v. First Nat'l Bank, 642 F. Supp. 862, 864 (W.D. Ky. 1986) (same), *aff'd sub nom.* Twist v. First Nat'l Bank, 849 F.2d 1474 (6th Cir. 1988); HMK Corp. v. Walsey, 637 F. Supp. 710, 717-18 (E.D. Va. 1986) (same), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988); Karel v. Kroner, 635 F. Supp. 725, 729-31 (N.D. Ill. 1986) (same).

[37] *Chivas Prods.*, 864 F.2d at 1283-86.

[38] 15 U.S.C. § 15(a) (1988). "[T]here is unmistakably clear evidence that Congress in 1970 closely patterned the civil RICO damages action on § 4 of the Clayton Act, which creates exclusively federal jurisdiction." *Chivas Products*, 864 F.2d at 1284.

[39] *Chivas Prods.*, 864 F.2d at 1284; *see* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 152 (1987) (given clear legislative intent to fashion RICO's section 1964(a) after Clayton Act, statute of limitations for RICO Act violations should be borrowed from analogous provisions of Clayton Act).

[40] *Chivas Prods.*, 864 F.2d at 1285 (emphasis added).

[41] 453 U.S. 473, 478 (1981).

state courts have subject-matter jurisdiction over cases arising under the federal laws of the United States, both the *Brandenburg* and *Belzberg* courts held that civil RICO claims enjoyed concurrent jurisdiction.[42] This presumption may be rebutted in any one of three ways: "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[43] After considering concurrent jurisdiction in civil RICO claims in accordance with these criteria, both circuits concluded that there was nothing preventing the exercise of concurrent jurisdiction over these types of claims.[44]

The state courts that have considered the issue also remained divided prior to *Tafflin*.[45] It is apparent, however, that many state courts preferred to defer jurisdiction to the federal court system rather than take it upon themselves to decide civil RICO claims.[46] Illustrative of this position is the stance taken by the Supreme Court of Iowa, which recently stated that "[n]otwithstanding some likelihood that concurrent state court jurisdiction exists under [civil RICO], we need not finally resolve that issue."[47]

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[42] *Brandenburg*, 859 F.2d at 1193; *Belzberg*, 834 F.2d at 735.

[43] *See Brandenburg*, 859 F.2d at 1193; *Belzberg*, 834 F.2d at 735-36 (quoting *Gulf Offshore*, 453 U.S. at 478).

[44] *Brandenburg*, 859 F.2d at 1193-94; *Belzberg*, 834 F.2d at 735-37.

[45] *Compare* Maplewood Bank & Trust Co. v. Acorn, Inc., 207 N.J. 590, 593-94 (N.J. Super. Ct. 1985) (holding that civil RICO actions are exclusive province of federal courts); Simpson Elec. Corp. v. Leucadia, Inc., 128 A.D.2d 339, 342-49, 515 N.Y.S.2d 794, 797-801 (2d Dep't 1985) (same); Belfon Sales Corp. v. Gruen Indus., 112 A.D.2d 96, 100, 491 N.Y.S.2d 652, 655 (1st Dep't 1985) (same); Greenview Trading Co. v. Hershman & Leicher, P.C., 108 A.D.2d 468, 473, 489 N.Y.S.2d 502, 506 (1st Dep't 1985) (same); Main Rusk Assocs. v. Interior Space Constructors, 699 S.W.2d 305, 307 (Tex. Ct. App. 1985) (same) *with* Cianci v. Superior Court, 40 Cal. 3d 903, 916-17, 710 P.2d 375, 382, 221 Cal. Rptr. 575, 581-82 (1985) (holding that civil RICO actions may be brought in both federal and state court system); Rice v. Janovich, 109 Wash. 2d 48, 56, 742 P.2d 1230, 1235 (Wash. 1987) (same).

[46] *See supra* note 45 (setting forth list of state court cases holding that federal courts have exclusive jurisdiction over civil RICO claims).

[47] United Central Bank v. Kruse, 439 N.W.2d 849, 854 (Iowa 1989).

III. *Tafflin v. Levitt*

A. *Facts and Procedural Posture*

Tafflin v. Levitt[48] arose out of the collapse of the Old Court Savings & Loan, Inc. ("Old Court"), a Maryland savings and loan institution.[49] The Maryland Saving-Share Insurance Corp. ("MSSIC"), a state-chartered non-profit corporation, created to insure funds in Maryland savings and loans, also failed, in part because the program was not federally insured.[50] The petitioners in *Tafflin* held certificates of deposit issued by Old Court which, together with the interest thereon, remained unpaid. Respondents were, inter alia, former officers and directors of Old Court and MSSIC; Venable, Baetjer & Howard, counsel to MSSIC and Old Court; and Old Court's accounting firm.[51]

In addition to various state law claims, the plaintiffs alleged causes of action arising under the Securities Exchange Act of 1934 ("1934 Act"),[52] as well as RICO.[53] The district court granted defendants' motion to dismiss with respect to the alleged securities violations, on the grounds that the plaintiffs had failed to allege a claim under the 1934 Act.[54] However, the court abstained from deciding the other causes of action, including the civil RICO claim, holding that those issues had been raised in litigation pending before the circuit court for Baltimore City.[55]

The United States Court of Appeals for the Fourth Circuit af-

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[48] 865 F.2d 595 (4th Cir. 1989), *rev'd*, 110 S. Ct. 792 (1990).

[49] *Id.* at 597. Old Court was one of the first savings and loan institutions to fold. It was placed into conservatorship on May 13, 1985, and withdrawals were limited to no more than $1,000 for each thirty-day period. *Id.*

The conservatorship proceeding was subsequently converted into a receivership proceeding, and the Maryland Deposit Insurance Fund ("MDIF") was appointed as the receiver. *Id.* at 597-98. MDIF stated that certificate of deposit holders would not be paid interest accruing on their certificates after November 8, 1985. *Id.* at 598. Furthermore, from the period beginning May 13 and ending November 8, 1985, only five and one-half percent per annum would be paid instead of the higher rates initially prescribed in the certificates. *Id.* at 598; *see Brandenburg*, 859 F.2d at 1181-83 (reviewing full history of Maryland savings and loan crisis).

[50] *Tafflin*, 110 S. Ct. at 794.

[51] *Id.*

[52] 15 U.S.C. § 78a (1989).

[53] 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990).

[54] *Tafflin*, 865 F.2d at 597.

[55] *Id.*

firmed the district court's decision on both points.[56] In reaching this decision, the court first found that certificates of deposit issued by state-chartered savings and loan institutions were not "securities" and therefore were not covered by the 1934 Act.[57] It then summarily upheld the district court's decision to abstain from examining the other claims by stating that "Maryland's 'comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations' . . . provided a proper basis for the district court to abstain."[58] The Supreme Court was faced with deciding whether state courts have concurrent jurisdiction over civil actions brought under the RICO statute.

B. The Supreme Court's Analysis

In a unanimous opinion written by Justice O'Connor, the Court held that state and federal courts have concurrent jurisdiction over civil actions arising under RICO.[59] The Court began its analysis by stating that when there is no statutory directive, either express or implied, granting exclusive jurisdiction to federal courts, then " 'the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.' " [60] Referring to its decision in *Charles Dowd Box Co. v. Courtney*,[61] the Court declared that "[c]oncurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."[62] Thus, the majority reasoned that the

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[56] *Id.* at 599-600.

[57] *Id.* at 599; *see* 15 U.S.C. § 78c(a)(10) (1988). Section 78c(a)(10) defines a security to include the following:

> [A]ny note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing. . . .

Id.

[58] *Tafflin*, 865 F.2d at 600 (quoting *Brandenburg*, 859 F.2d at 1191).

[59] *Tafflin*, 110 S. Ct. at 799. Justice White concurred in the result, *id.* at 799-800 (White, J., concurring), and Justice Scalia, with whom Justice Kennedy joined, also concurred. *Id.* at 800-02 (Scalia, J., concurring).

[60] *Id.* at 795 (quoting Claflin v. Houseman, 93 U.S. 130, 136 (1876)).

[61] 368 U.S. 502 (1962).

[62] *Tafflin*, 110 S. Ct. at 795. Referring to its decision in *Gulf Offshore*, 453 U.S. at 473, the Court further noted that the presumption favoring concurrent state court jurisdiction

mere grant of jurisdiction to a federal court does not necessarily preclude the state courts from also exercising jurisdiction.[63]

The Court found that none of the three *Gulf Offshore* factors were present.[64] Consistent with this interpretation, the petitioners conceded that there is no explicit statutory directive suggesting that Congress divested the state courts of jurisdiction to decide civil RICO claims.[65] In fact, the express terms of section 1964(c) state that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . *may* sue therefore in any appropriate United States district court."[66] The Court asserted that the use of the word "may" as opposed to "shall," or a similar directive, indicates that the granting of federal jurisdiction in civil RICO claims is not, at least from the express language of the statute, exclusive.[67]

With regard to the second *Gulf Offshore* factor, the petitioners unsuccessfully argued that exclusive federal jurisdiction over civil RICO claims is established in "unmistakable implication" from the legislative history.[68] However, as many courts have held, there is no evidence that Congress even considered the issue of concurrent jurisdiction during its drafting of the RICO statute.[69]

An alternative argument set forth by the petitioners supporting their claim that Congress intended civil RICO claims to be brought solely in federal district courts was based upon section 4 of the Clayton Act.[70] Petitioners argued that the Court's decisions in *Sedima, S.P.R.L. v. Imrex Co.*,[71] and *Agency Holding Corp. v.*

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may be rebutted by either " 'an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.' " *Tafflin*, 110 S. Ct. at 795 (quoting *Gulf Offshore*, 453 U.S. at 478).

[63] *See Gulf Offshore*, 453 U.S. at 480; United States v. Bank of New York & Trust Co., 296 U.S. 463, 479 (1936).

[64] *Tafflin*, 110 S. Ct. at 797-99.

[65] *Id.* at 795-96.

[66] 18 U.S.C. § 1964(c) (1988) (emphasis added).

[67] *Tafflin*, 110 S. Ct. at 796.

[68] *Id.* at 796-99.

[69] *Id.* at 796; *Chivas Prods.*, 864 F.2d at 1283; *Brandenburg*, 859 F.2d at 1193; *Belzberg*, 834 F.2d at 736. For additional cases discussing congressional silence on the issue of concurrent jurisdiction, see Hampton v. Long, 686 F. Supp. 1202, 1205 n.3 (E.D. Tex. 1988); Intel Corp. v. Hartford Accident & Indem. Co., 662 F. Supp. 1507, 1509-10 (N.D. Cal. 1987).

[70] *Tafflin*, 110 S. Ct. at 796-97. The Clayton Act confers a private right of civil action to any person who has been injured in his business or property by reason of a violation of the antitrust laws. *See* 15 U.S.C. § 15(a) (1988). Private actions must be brought in any United States district court, and successful plaintiffs may receive treble damages. *Id.*

[71] 473 U.S. 479 (1985).

Malley-Duff & Associates, Inc.,[72] stated that section 1964(c) of the RICO Act was modeled after section 4 of the Clayton Act,[73] which the Supreme Court has interpreted as conferring exclusively federal jurisdiction. The petitioners therefore claimed that presumably, Congress was aware of this interpretation and incorporated it into the similarly phrased RICO statute,[74] thus impliedly granting the federal courts exclusive jurisdiction over civil RICO claims.[75]

The Court rejected this argument, stating that in order to effectively rebut the presumption of concurrent jurisdiction it is not a matter of "whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal."[76]

Furthermore, the Court noted with equal force that if it imputes to Congress knowledge of the judicial construction accorded the Clayton Act, then it also must impute to Congress knowledge of the Court's decisions in *Claflin v. Houseman*[77] and *Charles Dowd Box Co. v. Courtney*,[78] which held that there is a presumption of concurrent state jurisdiction over civil RICO claims.[79] Additionally, the Court asserted that if Congress had sought to confer exclusive jurisdiction upon the federal courts, then it could have expressly done so after those two decisions.[80]

The Court further declared that neither *Sedima* nor *Agency Holding* implied any intention to establish exclusive federal jurisdiction over civil RICO claims.[81] When examining *Sedima*, the Court noted that it had rejected any requirement of proving a specific "racketeering injury" parallel to the requisite "antitrust in-

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[72] 483 U.S. 143 (1987).

[73] *Tafflin*, 110 S. Ct. at 796-97; *Agency Holding Corp.*, 483 U.S. at 151-52; *Sedima*, 473 U.S. at 489.

[74] *Tafflin*, 110 S. Ct. at 796-97; *see Chivas Prods.*, 864 F.2d at 1283-84 (comparing exact language of both section 4 of Clayton Act and section 1964(c) of RICO as of 1970, and noting substantial similarities).

[75] *Tafflin*, 110 S. Ct. at 796-97.

[76] *Id.* at 797. The legislative history is lacking in any evidence that Congress assumed that the "baggage" of the Clayton Act would automatically attach to the RICO statute simply by virtue of borrowing its language. *Id.*; *Belzberg*, 834 F.2d at 737.

[77] 93 U.S. 130 (1876).

[78] 368 U.S. 502 (1962).

[79] *Tafflin*, 110 S. Ct. at 797; *see Charles Dowd*, 368 U.S. at 507-08; *Claflin*, 93 U.S. at 136-37.

[80] *Tafflin*, 110 S. Ct. at 797.

[81] *Id.*

jury" required in section 4 of the Clayton Act, because doing so would " 'creat[e] exactly the problems Congress sought to avoid.' "[82] *Agency Holding* presented the issue of whether the Court could borrow the statute of limitations period from an "analogous" statute[83] and in this instance, the Court found it appropriate to borrow the Clayton Act's statute of limitations.[84] In contrast, however, the Court held that it cannot add substantive content to a statute through interpretations of an analogous statute without some evidence of congressional intent.[85]

In a final attempt to sway the Court, the petitioners argued that the grant of state court jurisdiction over civil RICO actions would be "clearly incompatible with federal interests."[86] They proposed that *Gulf Offshore* provides the appropriate test for incompatibility.[87] In accordance with this view, the petitioners had stated in their Reply Brief that "[t]he factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims."[88] In particular, as the Court noted, the petitioners' primary contention was that the state courts cannot adequately interpret and construe federal crimes which constitute predicate offenses under sections 1961(1)(B), (C), and (D).[89] Petitioners contended that this will result in a loss of uniformity in interpreting federal criminal statutes, and will contribute to a loss of "control of the orderly and uniform development of federal criminal law."[90] The Court rejected this argument, relying on statutory authority[91] which states that federal

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[82] *Id.* (citing *Sedima*, 479 U.S. at 499).

[83] *Id.*; *Agency Holding*, 483 U.S. at 146.

[84] *Tafflin*, 110 S. Ct. at 797; *Agency Holding*, 483 U.S. at 152. The Court further stated that in both *Sedima* and *Agency Holding*, there was no underlying judicial presumption that controlled. *Tafflin*, 110 S. Ct. at 797. The Court stated that it merely looked to an analogous statute in an attempt to close the gaps in the RICO statute. *Id.* In the instant case, there clearly is a forceful, yet rebuttable, presumption of concurrent jurisdiction, that does not allow such analogies to be freely drawn. *Id.*

[85] *Tafflin*, 110 S. Ct. at 797. "Under *Gulf Offshore*, legislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction." *Id.*

[86] *Id.*

[87] Reply Brief of Petitioners, Tafflin v. Levitt, 110 S. Ct. 792 (1990) (No. 88-1650) LEXIS, Genfed library, Briefs file).

[88] *Id.* These factors are enumerated in *Gulf Offshore*, 453 U.S. at 483-84.

[89] *Tafflin*, 110 S. Ct. at 797-98.

[90] *Id.* at 798.

[91] 18 U.S.C. § 3231 (1988). This section states:

courts retain full authority and responsibility for the interpretation and application of federal criminal statutes.[92]

These federal court interpretations will serve to guide the state courts in adjudicating civil RICO claims.[93] In the event a state court improperly construes federal criminal law, the decision will be subject to direct review by the Supreme Court.[94] Moreover, since many RICO cases involve violations of state law over which state court judges have more knowledge, experience, and expertise, the presumably state courts should have the ability to handle even complex RICO cases.[95]

As further evidence of incompatibility, the petitioners pointed to RICO's "procedural mechanisms," which include extended venue and service of process provisions that apply only when the action is brought in federal court.[96] Although this may "tend to suggest" that Congress intended to confer exclusive federal jurisdiction, on the Court held that it does not, in and of itself, create a "clear incompatibility" with any federal interests.[97] Furthermore, as a final justification for granting state courts concurrent jurisdiction over federal civil RICO claims, the Court noted that doing so would facilitate the broad remedial purposes of the statute.[98]

> The district courts of the United States *shall have original jurisdiction, exclusive of the courts of the States*, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

Id. (emphasis added).

[92] *Tafflin*, 110 S. Ct. at 798.

[93] *Id.*

[94] *Id.*

[95] *Id.*; *see Gulf Offshore*, 453 U.S. at 484. "Indeed," the Court stated further, "it would seem anomalous to rule that state courts are incompetent to adjudicate civil RICO suits when we have recently found no inconsistency in subjecting civil RICO claims to adjudication by arbitration." *Tafflin*, 110 S. Ct. at 799.

[96] *Tafflin*, 110 S. Ct. at 799.

[97] *Id.* As further support for its holding, the Court noted that there were previous instances in which a federal statute provided for special procedural mechanisms similar to those found in the RICO statute, and nevertheless, the Court found concurrent jurisdiction. *See, e.g.*, Hathorn v. Lovorn, 457 U.S. 255, 269 (1982) (involving section 5 of Voting Rights Act of 1965); Martinez v. California, 444 U.S. 277, 283-84 n.4 (1980) (involving section 1983 of Civil Rights Act); *Dowd Box*, 368 U.S. at 506 (involving section 301(a) of Labor Management Relations Act).

[98] *Tafflin*, 110 S. Ct. at 799. The Court noted that "[c]oncurrent state court jurisdiction over civil RICO claims will advance rather than jeopardize federal policies underlying the statute." *Id.*; *see* Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970).

IV. THE PROBLEMS AND POSSIBLE RAMIFICATIONS OF *Tafflin v. Levitt*: THE ARGUMENTS AGAINST CONCURRENT JURISDICTION

A. Section 4 of the Clayton Act Mandates Exclusive Federal Jurisdiction over Civil RICO Claims

In reviewing the language of the civil provisions of the RICO statute, it is clear that there is no express statutory directive granting exclusive federal jurisdiction to the federal courts.[99] The relevant legislative history clearly proves, however, that the language in section 1964(c) was taken from the Clayton Act,[100] which consistently has been interpreted to confer exclusive jurisdiction over antitrust claims upon the federal courts.[101] Moreover, the borrowed language is virtually identical to that of civil RICO's jurisdictional section; "[w]hat little nonidentical language exists consists of necessary substitutions, simplifications, and trivial inversions."[102] Thus, it is likely that the "close similarity of the two provisions is no accident."[103]

The Supreme Court itself, in *Agency Holding*, has stated that there was "clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act,"[104] and it thereby determined that the statute of limitations period should be borrowed from the Clayton Act. The Court reached this conclusion, "despite the lack of *an express intent* by Congress to so incorporate" the statute of limitations period of the Clayton Act into the RICO legislation.[105]

There is no valid reason why the Court should not incorporate the jurisdictional provisions of the Clayton Act into civil RICO actions.[106] The *Tafflin* Court provided no indication that Congress

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[99] *Tafflin*, 110 S. Ct. at 795-96; *Belzberg*, 834 F.2d at 736; Contemporary Servs. Corp. v. Universal Studios, Inc., 655 F. Supp. 885, 893 (C.D. Cal. 1987).

[100] *Sedima*, 473 U.S. at 489; *Chivas Prods.*, 864 F.2d at 1283. The Sixth Circuit in *Chivas Prods.* set forth the exact statutory language of section 4 of the Clayton Act:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may* sue therefor in any district court of the United States . . . and shall recover three-fold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

Id. at 1283 (quoting 15 U.S.C. § 15(a) (1988)) (emphasis added).

[101] McCarter v. Mitcham, 883 F.2d 196, 206 (3d Cir. 1989) (Sloviter, J., dissenting); Intel Corp. v. Hartford Accident & Indem. Co., 662 F. Supp 1507, 1511 (N.D. Cal. 1987).

[102] *Chivas Prods.*, 864 F.2d at 1283.

[103] *Agency Holding*, 483 U.S. at 151 (1987).

[104] *Id.* at 152.

[105] *McCarter*, 883 F.2d at 207 (Sloviter, J., dissenting) (emphasis added).

[106] Criminal RICO actions must be brought in federal courts under title 18, sections

intended civil RICO actions to enjoy concurrent jurisdiction, while antitrust suits were to remain within the province of the federal courts. Furthermore, in *Sedima*, the Court looked to the Clayton Act to interpret the term "violation" as it appears in section 1964(c), and found that it could not require a civil RICO plaintiff to prove a distinct "racketeering injury" because to do so would create the kinds of problems that Congress sought to avoid.[107]

Therefore, it can be concluded that construing RICO by analogy to the Clayton Act is proper, in light of *Sedima*, where there is no indication that Congress had any intent other than to incorporate the civil enforcement provisions of each by reference. It would be inappropriate to do so where the statutes differ with respect to their underlying goals. Hence, in *Sedima*, incorporating by reference a "distinct injury" requirement into civil RICO actions, such as that required in antitrust claims, would be inconsistent with the goals set forth by Congress.[108] In borrowing the language from antitrust principles, Congress expressed its concern regarding the issues of standing and causation.[109] However, it would be suitable to borrow the Clayton Act's jurisdictional requirements because doing so would not frustrate congressional intent, but instead, it would further RICO's purposes.

B. Gulf Offshore *"Incompatibility" Factors Support a Finding of Exclusive Jurisdiction*

The Court, in *Gulf Offshore Co. v. Mobil Oil Corp.*,[110] set forth three factors which would support a finding of exclusive federal jurisdiction over an area of federal law.[111] These "include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts

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1963 (criminal RICO provision) and 3231 (exclusive federal court jurisdictional grant over all federal criminal cases).

[107] *Sedima*, 473 U.S. at 498-99.

[108] *See supra* notes 7-30 and accompanying text (discussing evolution and legislative history of RICO statute).

[109] *See* 115 CONG. REC. 6995 (1969) (statement issued by the ABA indicating existence of previous proposal to add similar RICO provisions to the Sherman Act). Ultimately, this proposal did not pass because of concern that a "private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.' " *Id.*

[110] 453 U.S. 473 (1981).

[111] *Id.* at 483-85.

to peculiarly federal claims."[112]

1. Need for Uniform Interpretation

There are many problems currently inherent in the interpretation of the civil RICO statute. One need only look at the extreme and wide disparity of case law in determining issues of pattern,[113] enterprise,[114] and injury.[115] Granting jurisdiction to state courts

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[112] *Id.*

[113] *See, e.g.*, Flip Mortgage Corp. v. McElhone, 841 F.2d 531, 538 (4th Cir. 1988) (RICO reserved for schemes whose scope and persistence set them above routine); Barticheck v. Fidelity Union Bank, 832 F.2d 36, 39 (3d Cir. 1987) (pattern doesn't necessarily require more than one scheme); Allright Missouri, Inc. v. Billeter, 829 F.2d 631, 641 (8th Cir. 1987) (more than "single scheme" required); Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1267 (3d Cir. 1987) (two separate acts needed, but not necessarily sufficient to constitute "pattern"); Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 194 (9th Cir. 1987) (not necessary to show more than one fraudulent scheme); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928 (10th Cir. 1987) (threat of continuing activity needed to establish pattern). The Supreme Court in H.J. Inc. v. Northwestern Bell Tel. Co., 109 S. Ct. 2893 (1989), provided a great deal of guidance on the pattern requirement. *See id.* at 2899-905. In doing so, it narrowed the scope of the pattern in the District of Columbia, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits, while reversing the Eighth Circuit's "multiple scheme" requirement. *Id.*

[114] The circuits are currently split as to whether the "enterprise" itself must be a separate, ongoing entity, in and of itself, or whether evidence of a pattern is sufficient to establish the existence of an enterprise. *See* Mathews, Buffone & Weissman, *Seminar on Civil RICO Litigation*, AM. U.L. REV. 51-90 (1990) (discussion of relevant cases involving "enterprise" requirement). The Third, Fourth, Eighth, and Ninth Circuits require proof of an ongoing, structured criminal enterprise, separate from the pattern of racketeering activity. *See* United States v. Zauber, 857 F.2d 137, 150 (3d Cir. 1988) (stating that target of RICO statute is criminal activity posing threat of series of injuries over significant period of time), *cert. denied*, 109 S. Ct. 1340 (1989); United States v. Washington, 782 F.2d 807, 822 (9th Cir. 1986) (pattern of racketeering does not constitute enterprise and enterprise must be distinct from racketeering activity); United States v. Tillett, 763 F.2d 628, 630 (4th Cir. 1985) (concluding that enterprise existed and that defendants participated in that enterprise through pattern of racketeering activity); United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir.) ("enterprise" element requires structure separate from racketeering activity itself), *cert. denied*, 459 U.S. 1040 (1982). The Second, Eleventh, and District of Columbia Circuits do not require evidence of a structured criminal enterprise. If pattern is alleged and proved, then the enterprise requirement is satisfied. *See* United States v. Indelicato, 865 F.2d 1370, 1381-84 (2d Cir.) (concluding that relatedness and continuity are characteristics of activity not of enterprise and that if there is evidence of threat of continuation of racketeering activity, such acts may constitute RICO pattern), *cert. denied*, 110 S. Ct. 56 (1989); United States v. Weinstein, 762 F.2d 1522, 1536-37 (11th Cir.) (definitive factor in identifying RICO enterprise is whether there are associations of individuals, even if loose or informal, who engage in pattern of RICO activity), *modified*, 778 F.2d 673 (11th Cir. 1985), *cert. denied*, 475 U.S. 110 (1986); United States v. Perholtz, 842 F.2d 343, 352-54 (D.C. Cir.) (there is no restriction upon type of associations which fall under definition of "enterprise"), *cert. denied*, 488 U.S. 821 (1988). The Fifth, Sixth, and Seventh Circuits have issued conflicting opinions on this enterprise issue.

over civil RICO actions will only exacerbate the myriad of interpretational and applicational problems that have arisen in the federal courts.[116] These problems are further compounded by the fact that a RICO Act violation is labeled a federal crime under section 1963, and various other provisions in the statute call for exclusive federal remedies and procedures.[117] "[B]ifurcation of civil RICO from its exclusively federal provisions would fail to reflect a reasonable intent of Congress."[118] All RICO's provisions must be read and utilized together in order to effectuate the purposes of the statute.[119] Once this is accepted as true, it becomes apparent that Congress could not have intended to create a new cause of action in the state courts while at the same time mandating that substan-

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[115] The Third, Fifth, and Eleventh Circuits require the plaintiff to prove that he was the direct target of the underlying predicate acts, and that he was injured by those targeted acts. *See* Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1214-15 (5th Cir. 1988) (person may only recover to the extent injured by conduct which constitutes RICO violation); Diamond v. Reynolds, 853 F.2d 917 (3d Cir.) (unpublished opinion), *cert. denied*, 488 U.S. 955 (1988); Morast v. Lance, 631 F. Supp. 474, 481 (N.D. Ga. 1986) (requiring plaintiff to show that his injuries were direct result of predicate acts constituting RICO offense), *aff'd*, 807 F.2d 926 (11th Cir. 1987). The Eighth Circuit has held that the plaintiff need not be the direct target of the predicate acts in order to prove proximate causation of their injuries. *See* Terre du-Lac Ass'n, Inc. v. Terre duLac, Inc., 772 F.2d 467, 473 (8th Cir. 1985) (reasoning that since such acts are within activity RICO is designed to deter, any recoverable damages from RICO violation support standing) (citing *Sedima*, 473 U.S. at 497), *cert. denied*, 475 U.S. 1082 (1986). The First and Second Circuits have issued conflicting opinions on the issue of targeting. *Compare* Burdick v. American Express Co., 865 F.2d 527, 529 (2d Cir. 1989) (denying recovery to plaintiff who failed to show his injury occurred "as a result of" illegal scheme under RICO) *and* Pujol v. Shearson/American Express, Inc., 829 F.2d 1201, 1206 (1st Cir. 1987) (holding that plaintiffs did not have standing under RICO because they failed to establish requisite connection between injuries alleged and predicate acts) *with* Sperber v. Boesky, 849 F.2d 60, 64 (2d Cir. 1988) (recognizing cause of action exists for indirect injury) *and* Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29-30 (1st Cir. 1987) (recovery under RICO not limited to direct victims).

[116] *See* Intel Corp. v. Hartford Accident & Indem. Co., 662 F. Supp. 1507, 1510 (N.D. Cal. 1987); Spence v. Flynt, 647 F. Supp. 1266, 1270 (D. Wyo. 1986); Kinsey v. Nestor Exploration, Ltd., 604 F. Supp. 1365, 1371 (E.D. Wash. 1985); Levinson v. American Accident Reinsurance Group, 503 A.2d 632, 635 (Del. Ch. 1985).

In *Kinsey*, the court reasoned that:

> Congress could not have intended the untoward result of creating a wholly new cause of action triable in state courts across the country, while at the same time mandating that federal substantive law governs such actions and at the same time reserving exclusively to the federal government the procedural power necessary to implement the underlying objective.

Kinsey, 604 F. Supp. at 1371.

[117] *See* 18 U.S.C. § 1963 (Supp. 1990) (providing federal criminal penalties for RICO offenses).

[118] *Intel Corp.*, 662 F. Supp. at 1511.

[119] *See Kinsey*, 604 F. Supp. at 1371 n.3.

tive federal law govern these actions, and reserving for the federal government exclusive procedural power to implement RICO's underlying objectives.[120]

In the past, many commentators have proposed changes to the current structure of the federal system because conflict among the circuit courts has resulted in a lack of uniformity.[121] Uniformity is desirable for two reasons: first, similarly situated individuals ought to be treated similarly;[122] and second, uniformity tends to correct and minimize the occurrence of error.[123]

2. The Expertise of Federal Judges

Very few state law offenses are listed as predicate offenses under section 1961(1)(A).[124] Furthermore, the vast number of enumerated acts in this statute are federal crimes involving extremely specialized areas of the law.[125] In theory, federal judges possess greater expertise in adjudicating federal disputes.[126] In the same vein, state court judges are more adept and possess greater expertise over state law issues.[127] The majority of civil RICO predicate offenses constitute federal criminal acts, the adjudication of which are exclusively federal.[128] It would seem, then, that, by virtue of their experience and familiarity with federal criminal law, federal

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[120] *See id.* at 1371; *Intel Corp.*, 662 F. Supp. at 1510.

[121] *See, e.g.*, Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does not Do*, 60 CORNELL L. REV. 335, 341-43 (1975) (identifying non-uniform treatment of similarly-situated litigants as one of the undesirable consequences of the circuit system); Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123, 176 (1977) (proposing alternative methods of establishing uniformity among federal courts).

[122] *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 601 (1969) (identifying non-uniform treatment as undesirable aspect of the circuit system).

[123] *See* Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1085 (1984) (reasoning that if there is one uniform interpretation of federal law, a conflict between two courts would mean that one is in error).

[124] *See* 18 U.S.C. § 1961(1)(A) (Supp. 1990). This section 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 . . . ." *Id.*

[125] *See id.* § 1961(1)(B)-(E).

[126] *See* Levinson v. American Accident Reinsurance Group, 503 A.2d 632, 635 (Del. Ch. 1985).

[127] *See Gulf Offshore*, 453 U.S. at 484.

[128] *See* 18 U.S.C. § 1961 (1)(B)-(E) (Supp. 1990); *cf. id* § 1963; *supra* note 92 and accompanying text.

judges would be better equipped to decide civil RICO issues than state court judges.[129]

Adding to this confusion is the fact that many states have adopted their own "little RICO" statutes.[130] Generally, these statutes allow private citizens to recover civil damage remedies. Many of these statutes are pro-plaintiff, and the standard of proof for the various elements comprising a civil RICO claim is less stringent than the burden imposed under the federal civil RICO provisions.[131]

The fact that more than half of our nation's states have enacted their own "little RICO" statutes is significant; it reflects the decisions of individual states to allocate as much of their judicial resources to combatting RICO as they deem appropriate. The theory that "[t]he state courts [should be] free to focus on the inter-

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[129] *See Levinson*, 503 A.2d at 635. *But see* HMK Corp. v. Walsey, 637 F. Supp. 710, 717 (E.D. Va. 1986) (holding that states are unlikely to determine underlying federal law because "[v]ast majority of RICO cases involve garden variety state law fraud"), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988); *cf. Sedima*, 473 U.S. at 499 n.16 (stating ABA Task Force found 40% of all known civil RICO trial cases involved securities fraud, 37% constituted common-law fraud, and only 9% constituted professional criminal activity); *Chivas Prods.*, 864 F.2d at 1285 (stating that approximately 80% of civil RICO claims were based solely or primarily upon mail, wire, or securities fraud—all federal crimes).

[130] As of the writing of this Article, the following states have enacted "little RICO" legislation: Arizona [ARIZ. REV. STAT. ANN. §§ 13-2301 to -2317 (1989 & Supp. 1990)]; California [CAL. PENAL CODE §§ 11400- 11402 (West 1982 & Supp. 1990)]; Colorado [COLO. REV. STAT. §§ 18-17-101 to -109 (1986 & Supp. 1990)]; Connecticut [CONN. GEN. STAT. ANN. §§ 29-162 to -188 (West 1975 & Supp. 1990)]; Delaware [DEL. CODE ANN. tit. 11 §§ 1501-1511 (1974 & Supp. 1988)]; Florida [FLA. STAT. ANN. §§ 895.01-895.09 (West Supp. 1989)]; Georgia [GA. CODE ANN. §§ 26-3401 to -3414 (1990)]; Hawaii [HAW. REV. STAT. §§ 842-1 to -12 (1988 & Supp. 1990)]; Idaho [IDAHO CODE §§ 18-7801 to -7805 (1987 & Supp. 1989)]; Indiana [IND. CODE ANN. §§ 35-45-6-1 to -2 (West 1986 & Supp. 1990)]; Mississippi [MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1990)]; Nevada [NEV. REV. STAT. §§ 207.350-207.520 (1986 & Supp. 1989)]; New Jersey [N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982 & Supp. 1990)]; New Mexico [N.M. STAT. ANN. §§ 30-42-1 to -6 (1984 & Supp. 1989)]; New York [N.Y. PENAL LAW §§ 460.00-460.80 (McKinney Supp. 1989)]; North Carolina [N.C. GEN. STAT. §§ 75D-1 to -14 (1987 & Supp. 1989)]; North Dakota [N.D. CENT. CODE §§ 12.1-06.1-01 to -08 (1985 & Supp. 1989)]; Ohio [OHIO REV. CODE ANN. §§ 2923.31-2923.36 (Anderson 1987 & Supp. 1989)]; Oklahoma [OKLA. STAT. ANN. tit. 22, §§ 1401-1419 (West Supp. 1991)]; Oregon [OR. REV. STAT. §§ 166.715-166.735 (1985 & Supp. 1990)]; Pennsylvania [18 PA. CONS. STAT. ANN. §911 (Purdon 1983 & Supp. 1990)]; Rhode Island [R.I. GEN. LAWS §§ 7-15-1 to -11 (1985 & Supp. 1990)]; Tennessee [TENN. CODE ANN. §§ 39-12-201 to -210 (Supp. 1989)]; Utah [UTAH CODE ANN. §§ 76-10-1601 to -1609 (1990 & Supp. 1990)]; Washington [WASH. REV. CODE ANN. §§ 9A.82.001-9A.82.904 (1988 & Supp. 1990)]; Wisconsin [WIS. STAT. ANN. §§ 946.80-946.88 (West Supp. 1990)]. Additionally, "little RICO" statutes are currently pending in Alaska, Massachusetts, and Minnesota.

[131] For more information on state "little RICO" statutes, see Note, *"A RICO You Can't Refuse": New York's Organized Crime Control Act*, 53 BROOKLYN L. REV. 979, 982 (1988).

pretation and application of their own anti-racketeering laws" has received judicial support.[132] Moreover, the state legislatures would not have deemed it necessary to enact "little RICO" statutes if they believed they had jurisdiction over the federal statute.[133]

3. Greater Hospitality of Federal Courts to Federal Claims

Typically, state courts display an unsympathetic attitude toward many federal claims when their local interests differ from federal interests.[134] This is particularly true in civil rights cases, where the statute is designed to enforce federal rights against state action.[135] In fact, two state courts, New York and Texas, had refused to accept jurisdiction over civil RICO claims.[136] In both instances, the federal courts respected state court determinations regarding jurisdiction, thus expressing that they did not want to force RICO causes of action on unwilling state courts.[137] Specifically, the United States District Court for the Eastern District of Texas recognized that it is not beneficial for the entire judicial system to "foist RICO causes of action on unwilling . . . courts."[138]

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[132] McCarter v. Mitcham, 883 F.2d 196, 208 (3d Cir. 1989) (Sloviter, J., dissenting in part, concurring in part).

[133] Kinsey v. Nestor Exploration Ltd., 604 F. Supp. 1365, 1370 (E.D. Wash. 1985); *cf.* Cianci v. Superior Ct., 40 Cal. 3d 903, 916, 710 P.2d 375, 381-82, 221 Cal. Rptr. 574, 581 (1985) (holding that enactment of state "little RICO" statutes demonstrates states' hospitality toward statute).

[134] *See* A.L.I., *Study of the Division of Jurisdiction Between State and Federal Courts* 167 (1969). "Where the difficulty is not misunderstanding of federal law, but lack of sympathy—or even hostility—toward it, there is a marked advantage in providing an initial federal forum. Such attitudes are perhaps less common among federal judges, chosen and paid by the national government, and enjoying the protection of life tenure, than they are in the state judiciary." *Id. But see Gulf Offshore*, 453 U.S. at 484 (state judges cannot be thought to be "unsympathetic to a claim only because it is labeled federal rather than state law").

[135] *See, e.g.*, Alabama v. Rogers, 187 F. Supp. 848, 852 (M.D. Ala. 1960) (state court injunction on ground that Civil Rights Act of 1960 was unconstitutional cannot be tolerated without frustration of national purpose), *aff'd per curiam sub nom.* Dinkens v. Rogers, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961).

[136] *See* Cullen v. Margiotta, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); Main Rusk Assocs. v. Interior Space Constrs., 699 S.W.2d 305, 307 (Tex. Ct. App. 1985); Hampton v. Long, 686 F. Supp. 1202, 1206 (E.D. Tex. 1988); *see also* Broadway v. San Antonio Shoes, Inc., 643 F. Supp. 584, 586-87 (S.D. Tex. 1986) (adopting *Main Rusk* holding).

[137] *Cullen*, 811 F.2d at 732; *Hampton*, 686 F. Supp. at 1206.

[138] *Hampton*, 686 F. Supp. at 1206.

C. *Concurrent Jurisdiction Will Encourage Forum Shopping or "Precedent Shopping"*

Litigants will often bring a suit in a court which is most favorable to its claim.[139] Even though the defendant has certain avenues he may pursue,[140] courts generally will grant deference to the plaintiff's choice of forum, even if it is clear that the plaintiff has "shopped" for the forum most favorable to its cause of action.[141] The *Tafflin* Court's decision to grant concurrent jurisdiction will only encourage litigants to participate in this practice.

This is unfortunate, since forum shopping "demeans the entire judicial process"[142] of adjudication. Additionally, there are substantial costs associated with forum shopping because "plaintiffs may deliberately bring actions in circuits that have not ruled on the relevant issues in order to avoid certain defeat in a circuit that has ruled unfavorably."[143] Furthermore, planning is difficult, especially for corporations and partnerships operating in two separate jurisdictions, for the entity cannot know which interpretation of federal law will apply and which interpretation the state court will apply in adjudicating its claim.[144]

CONCLUSION

Although Congress did not explicitly address the issue of jurisdiction in its hearings on the RICO legislation, there is clear intent on its part to fashion civil RICO's private remedy after section 4 of the Clayton Act. The Court "borrowed" procedural provisions from the Clayton Act for use in RICO interpretation involving the statute of limitations period. At the same time, jurisdiction over claims arising under the Clayton Act is exclusively federal. Fur-

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[139] *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 2.7, at 38 (1985). For instance, an example of this is the evidency of litigants to prefer a federal forum over a state forum for certain tactical reasons and vice versa. *Id.* Attorneys may choose the preferred forum if concurrent state and federal jurisdiction exists in a particular case. *Id.*

[140] *See* Van Dusen v. Barrack, 376 U.S. 612, 643-46 (1964) (stating test for transferring venue involves looking at convenience of parties and witnesses).

[141] Note, *Choice of Law in Federal Courts After Transfer of Venue*, 63 CORNELL L. REV. 149, 155 (1977).

[142] *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 220 (1975).

[143] Note, *supra* note 123, at 1083.

[144] *See* Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881, 887-88 (1975) (stating that function of appellate courts is to plainly set forth law so that people may know how to conduct their affairs).

thermore, the *Gulf Offshore* incompatibility factors support a finding of exclusive federal jurisdiction. There is need for uniform interpretation of cvil RICO provisions and federal judges are naturally the most qualified to make those determinations based upon their expertise in adjudicating federal disputes. Moreover, by allowing civil RICO actions to be brought in state courts as well as in federal courts, the Court is encouraging forum shopping.

Nevertheless, the Supreme Court has declared in *Tafflin v. Levitt* that states have concurrent jurisdiction over civil RICO claims. Although the Court has finally spoken on this issue, in the interests of uniformity, equitable treatment of claimants, and judicial economy, Congress should insert a provision in the RICO statute that would grant exclusive jurisdiction to the federal courts. By expressly mandating exclusive federal jurisdiction, the purposes underlying the enactment of RICO would best be served.