

The Civil RICO Racket: Fighting Back with Federal Rule of Procedure 11

Petra J. Rodrigues

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THE CIVIL RICO RACKET: FIGHTING BACK WITH FEDERAL RULE OF CIVIL PROCEDURE 11*

Rule 11 of the Federal Rules of Civil Procedure¹ is a powerful judicial weapon aimed at curbing frivolous litigation.² To maximize

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¹ FED. R. CIV. P. 11. Rule 11 provides, in pertinent part:

Every pleading, *motion, and other paper* of a party represented by an attorney shall be signed by at least one attorney of record in *the attorney's* individual name, whose address shall be stated. A party who is not represented by an attorney shall sign *the party's* pleading, *motion, or other paper* and state *the party's* address. . . . The signature of an attorney or party constitutes a certificate by *the signer* that *the signer* has read the pleading, *motion, or other paper*; that to the best of *the signer's* knowledge, information, and belief *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

Id. (emphasis added to indicate 1983 amendments).

² See FED. R. CIV. P. 11 advisory committee note, *reprinted in* 97 F.R.D. 165, 198 (1983) [hereinafter Rule 11 advisory committee note]. The primary purpose of Rule 11 is to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." *Id.*; see *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 21 (2d Cir. 1990) (citing drafters' main goal as deterrence of frivolous litigation in federal courts).

Leading commentators have praised Rule 11, including Arthur Miller, one of its draftsmen, who has aptly described Rule 11 as "a useful weapon against unnecessary litigation." See Lewin, *A Legal Curb Raises Hackles*, N.Y. Times, Oct. 2, 1986, at D8, col. 5. William W. Schwarzer, United States District Court Judge for the Northern District of California, has commented that "Rule 11 is like any other tool: properly used, it can be very effective." *Id.* at D8, col. 1; see Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. REV. 1023, 1033, 1052-61 (1989) (describing Rule 11 as part of federal rules' "pretrial interception/discouragement system," aimed at curbing frivolous pretrial litigation); Comment, *Courts Are No Place for Fun and Frivolity: A Warning to Vexatious Litigants and Over-Zealous Attorneys*, 20 WILLAMETTE L. REV. 441, 465 (1984) (Rule 11 described as "the centerpiece of judicial control over frivolous litigation") (quoting Figa, *Rule 11 as a Litigation Tool*, 12 COLO. LAW. 1242, 1242 (1983))).

its deterrent effect, Rule 11 was amended in 1983 to impose more stringent standards on both the federal courts and the attorneys who appear before them.³ The stricter standards embraced within the amended version of Rule 11 enable courts to implement their sanctioning power with greater frequency and severity.⁴ Rule 11 mandates that a court impose sanctions once a violation is found.⁵

Rule 11 also has its share of critics, who claim it is not an effective deterrent and is invoked too frequently. See Lewin, *supra*, at D8, col. 1 ("others say that Rule 11 motions themselves have become a tool for harassment"). In recent years, the controversy over Rule 11 has focused on the impact and effect of Rule 11, particularly the "satellite" litigation it stimulates. See Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1013 (1988). Most commentators agree, however, that Rule 11 is working just as intended. See Lewin, *supra*.

³ See Rule 11 advisory committee note, *supra* note 2, 97 F.R.D. at 198-200 (emphasizing deterrent effect of amended Rule 11). Rule 11, as originally enacted in 1938, was found to be inherently defective and, as a result, proved ineffective in deterring frivolous lawsuits. See *id.* at 198. This insufficiency was primarily due to judicial confusion surrounding the situations which triggered the rule, the professional standard of conduct to which attorneys were to be held, and the nature of available and appropriate sanctions. *Id.* "Widespread concern over frivolous litigation and abusive practices of attorneys led to the amendment in 1983 of Rule 11. . . ." Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 181 (1985); see also Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 630 (1987) ("[1983] amendments expand[ed] judges' authority to impose sanctions"). The language of Rule 11, as amended, was designed to cure such defects "by emphasizing the responsibilities of the attorney and reinforcing [sic] those obligations by the imposition of sanctions." Rule 11 advisory committee note, *supra* note 2; see also Schwarzer, *supra* ("new rule imposes much more specific and extensive obligations on attorneys"). The 1983 amendments impose an affirmative duty on attorneys to conduct "some prefiling inquiry into both the [relevant] facts and the law." Rule 11 advisory committee note, *supra* note 2. If an attorney or unrepresented party violates the amended rule, proper sanctions are mandated. *Id.* at 200. Despite this mandatory language, "[j]udges . . . have broad discretion in choosing the appropriate penalty." Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 501 (1986) (footnote omitted).

For a judicial interpretation of the distinctions between the original version and the amended version of Rule 11, see *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536-42 (9th Cir. 1986).

⁴ See P. BATISTA, *CIVIL RICO PRACTICE MANUAL* § 6.3, at 153-54 (1987); see also Rule 11 advisory committee note, *supra* note 2, 97 F.R.D. at 198-99 (new language of Rule 11 expected to increase number of violations). The advisory committee emphasized that, under amended Rule 11, courts should be less reluctant to impose sanctions. See *id.* at 198; see also Cavanagh, *supra* note 3, at 500 (amended rule "aimed at increasing a judge's willingness to hold attorneys accountable for their misconduct by encouraging courts to impose sanctions").

⁵ See FED. R. CIV. P. 11. "[T]he words 'shall impose' in the last sentence [of Rule 11] focus the court's attention on the need to impose sanctions for pleading and motion abuses." Rule 11 advisory committee note, *supra* note 2, 97 F.R.D. at 200. In *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987), the court reasoned that the drafters of the federal rules used the word "shall" to emphasize "the mandatory nature of the imposition of sanctions pursuant to the rule. . . . Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court

Despite this obligatory language, some federal courts have been reluctant to impose sanctions under Rule 11 for fear of chilling creative advocacy or encroaching on unsettled or developing areas of law.⁶ This judicial resistance to the imposition of Rule 11 sanctions is particularly prevalent in civil actions brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO").⁷ Recently, in *O'Malley v. New York City Transit Authority*,⁸ the United States Court of Appeals for the Second Circuit held that despite the uncertain state of existing RICO law, a trial court *must* impose Rule 11 sanctions when confronted with a baseless civil RICO claim.⁹

to fashion proper sanctions." *Id.* See generally Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1321 (1986) (discussing mandatory nature of Rule 11 sanctions). Some commentators have argued that it is not likely courts will consider themselves bound by the mandatory language of amended Rule 11. See, e.g., Schwarzer, *supra* note 3, at 200 (language of rule does not diminish critical role of judicial discretion).

⁶ See Cavanagh, *supra* note 3, at 530. Some courts have refused to impose sanctions in accordance with amended Rule 11's mandate, most notably when confronted with complex legal issues. *Id.* Such refusal has been seen in cases involving the Equal Access to Justice Act, see, e.g., *Mager v. Heckler*, 621 F. Supp. 1009, 1012 (D. Colo. 1985) (sanctions denied because law in "state of flux"); the Employee Retirement Income Security Act, see, e.g., *Laborers Health & Welfare Trust Fund v. Hess*, 594 F. Supp. 273, 282 (N.D. Cal. 1984) (attorney's fees denied because jurisdictional issue in question both "novel" and "difficult"); and personal jurisdiction, see, e.g., *Leema Enters., Inc. v. Willi*, 582 F. Supp. 255, 257 (S.D.N.Y. 1984) (sanctions denied in confusing and complex dispute over personal jurisdiction). Other courts have denied Rule 11 sanctions under the belief that such sanctions might inhibit innovative legal thinking. See, e.g., *Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987) (courts should not punish "arguments for legal evolution"), *cert. dismissed*, 485 U.S. 901 (1988); *Taylor v. Prudential-Bache Secs., Inc.*, 594 F. Supp. 226, 229 (N.D.N.Y.) (court reluctant to render such awards in light of "attendant potentially chilling effect"), *aff'd sub nom.* *Taylor v. Prudential Ins. Co.*, 751 F.2d 371 (2d Cir. 1984).

⁷ See, e.g., *Beeman v. Fiester*, 852 F.2d 206, 212 (7th Cir. 1988) (affirming trial court's denial of Rule 11 sanctions after dismissing RICO claims because complaint involved "areas of law that were sufficiently hazy"), *overruled on other grounds by* *Mars Steel Corp. v. Continental Bank*, 880 F.2d 928 (7th Cir. 1989); *Davis v. A.G. Edwards & Sons*, 823 F.2d 105, 108 (5th Cir. 1987) (sanctions unwarranted due to unsettled nature of statutory period underlying civil RICO action). There has been an especially marked hesitation to impose Rule 11 sanctions in civil RICO cases among the federal district courts of New York. See, e.g., *Fustok v. Conticommodity Servs., Inc.*, 618 F. Supp. 1074, 1076 (S.D.N.Y. 1985) (fact that defendants could not simultaneously be both "enterprise" and "person" did not warrant Rule 11 sanctions due to complexities of RICO statute); *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.*, 591 F. Supp. 1408, 1415 (S.D.N.Y. 1984) (complexity and unclear status of RICO justified denial of Rule 11 sanctions); *Hudson v. Larouche*, 579 F. Supp. 623, 631 (S.D.N.Y. 1983) (issue of Rule 11 sanctions not entertained because state of authority under civil RICO deemed complex).

⁸ 896 F.2d 704 (2d Cir. 1990).

⁹ *Id.* at 705, 709. In *O'Malley*, the Transit Authority appealed from a judgment of the

This Note will explore Federal Rule of Civil Procedure 11 as an effective means of cleansing the federal dockets of frivolous and abusive civil RICO actions. Part One will examine RICO and the proliferation of recent private litigation under the Act. Part Two will discuss the general principles of Rule 11 and the criteria for determining whether a Rule 11 violation has been committed. Part Three will provide an analysis of Rule 11 violations in the context of civil RICO actions and suggest that federal courts adopt the rationale articulated by the Second Circuit in *O'Malley*. Finally, Part Four will propose that future baseless civil RICO claims be met with more severe sanctions pursuant to Rule 11.

I. CIVIL RICO

Twenty years ago, in an effort to combat organized crime,¹⁰ Congress enacted RICO.¹¹ Although its title bespeaks criminal ac-

United States District Court for the Eastern District of New York denying a motion for Rule 11 sanctions. *Id.* at 705. The Second Circuit reversed and held that Rule 11 sanctions were mandated "once a district court finds a complaint to be groundless." *Id.* The Second Circuit remanded the case to the district court for the determination of a proper sanction in accordance with Rule 11. *Id.* at 705, 710.

¹⁰ See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-33 (1970) (codified as amended in 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990)). The "Statement of Findings and Purpose" of the Organized Crime Control Act of 1970 noted:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Id.; see *Russello v. United States*, 464 U.S. 16, 26 (1983) (RICO "intended to provide new weapons of unprecedented scope for an assault upon organized crime"); *United States v. Turkette*, 452 U.S. 576, 591 (1981) (RICO's major purpose was "to address the infiltration of legitimate business by organized crime"). Although the legislative history indicates that RICO was aimed at organized crime, the statute is conspicuously void of any precise definition of organized crime or of any requirement of involvement in such activities. See Comment, *The Second Circuit Rubs Out Civil RICO: Sedima, S.P.R.L. v. Imrex Co.*, 59 ST. JOHN'S L. REV. 398, 407-08 (1985). G. Robert Blakey, Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures at the time the Organized Crime Control Act was passed, has stated that "[n]othing on the face of . . . [RICO] suggests a congressional intent to limit its coverage [to organized criminal activity]." Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 248 (1982) (quoting *United States v. Culbert*, 435 U.S. 371, 373 (1978)). See generally Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014-21 (1980) (in-depth discussion of RICO's legislative history).

¹¹ See 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1990).

tivity,¹² RICO is much more expansive than its name might suggest.¹³ Somewhat of an innovation, RICO aptly has been termed "the most sweeping criminal statute ever passed by Congress,"¹⁴ encompassing more than forty offenses under one federal umbrella.¹⁵ To supplement this breadth, the United States Supreme Court adopted a liberal reading of civil RICO in *Sedima, S.P.R.L. v. Imrex Co.*,¹⁶ furthering the statute's remedial purposes.¹⁷ Unlike most criminal statutes, however, RICO attempts to remedy the ill effects of racketeering activity by providing a broad private cause of action.¹⁸ In fact, the popularity of civil RICO can be attributed to its generous provision for recovery of treble damages and attorney's fees by "[a]ny person injured in his business or property by reason of a violation of section 1962."¹⁹

¹² See P. BATISTA, *supra* note 4, § 1.1, at 1. The word "RICO" has "sinister undertones" and "evokes images of shadowy underworld activities, bullet-immunized black limousines, and heavy-set men eating steaks in ornate restaurants in Brooklyn." *Id.* It is interesting to note that the statute's title has been linked to the first Hollywood gangster film, entitled "Little Caesar," which starred Edward G. Robinson as "Rico," the lead gangster. See Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982); see also DuVal, *A Trial Lawyer's Guide: Everything You Always Wanted to Know About RICO Before Your Case was Dismissed*, 12 WM. MITCHELL L. REV. 291, 293 (1986) (word "racketeer" implies act aimed at "gangsters, mafioso types, loan sharks, [and] professional arsonists").

¹³ See DuVal, *supra* note 12, at 293-95. RICO extends beyond organized crime to cover a "vast array of fraudulent activity." *Id.* at 293; see also Note, *Civil RICO: The Temptation and Impropriety of Judicial Restrictions*, 95 HARV. L. REV. 1101, 1102-03 (1982) (RICO's broad provisions not expressly limited to organized criminal activity).

¹⁴ Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: *Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 1 (1978); see also R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) (RICO's scope is breathtaking).

¹⁵ See 18 U.S.C. § 1961(1) (1988). Section 1961(1) of RICO defines "racketeering activity" in terms of more than forty state and federal offenses which qualify as requisite "predicate acts." See Blakey & Gettings, *supra* note 10, at 1030-31; see also Atkinson, *supra* note 14 (RICO groups wide array of existing state and federal offenses, creating no new "substantive law").

¹⁶ 473 U.S. 479 (1985).

¹⁷ *Id.* at 497. See generally Blakey & Gettings, *supra* note 10, at 1031-32 (discussing RICO's liberal construction clause).

¹⁸ See Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 828-29 (1987); Comment, *Adjudication of Civil RICO Actions—State Courts Get an Offer They Can't Refuse*: Lou v. Belzberg, 62 ST. JOHN'S L. REV. 301, 302 n.5 (1988).

¹⁹ 18 U.S.C. § 1964(c) (1988). Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.* This broad private remedy was modeled after the treble damages provision in the antitrust statutes. See Clayton Act, 15 U.S.C. § 15(a) (1988); see also Lou v. Belzberg, 834 F.2d 730, 736 n.5 (9th Cir. 1987) (original RICO statute virtually identical to Clayton Act), *cert. denied*, 485 U.S. 993 (1988).

Civil RICO has become a profitable business for lawyers over the past decade.²⁰ The prospect of treble damages combined with the statute's broad scope have proven irresistible for many attorneys.²¹ These magnetic qualities, however, make civil RICO inherently prone to abuse.²² Since it has become a matter of standard practice to add private RICO claims to most civil complaints,²³ traditional commercial disputes are often transformed into complicated federal RICO proceedings.²⁴ As a result, legitimate busi-

To state a cause of action under section 1962, a private litigant must allege the commission of two or more predicate acts by a person associated with an "enterprise" engaged in interstate commerce, which constitute a "pattern of racketeering." See 18 U.S.C. § 1962 (1988). In *Sedima*, the Court outlined the elements needed to state a claim under section 1962(c): "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496 (footnote omitted). The terms "enterprise," "racketeering activity," and "pattern of racketeering activity" are defined in section 1961. See 18 U.S.C. § 1961 (1988).

²⁰ See P. BATISTA, *supra* note 4, § 1.3, at 4; Christian Science Monitor, Feb. 12, 1986, col. 1. Although RICO was promulgated in 1970, civil RICO did not catch the attention of the legal community until 1980. See P. BATISTA, *supra* note 4, § 1.3, at 4. While only nine cases involving civil RICO were reported prior to 1980, see *Report of the Ad Hoc Civil RICO Task Force*, ABA SEC. ON CORP., BANKING & BUS. LAW 55 (March 20, 1985), the eighties have witnessed a virtual "explosion" of civil RICO. See *The Washington Post*, Jan. 15, 1985, at A4, col. 2. In 1988, there were 950 civil RICO cases filed in federal district courts; in 1989, this number increased to 1225. Telephone interview with Lorraine Briscoe, Administrative Office of the United States Courts, Statistical Analysis and Reports Division (Mar. 6, 1990). But see Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 77 (suggesting number of civil RICO cases filed in federal courts is exaggerated).

²¹ See *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting). "RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers." Christian Science Monitor, *supra* note 20; see *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.*, 591 F. Supp. 1408, 1413 (E.D.N.Y. 1984) (potential recovery under civil RICO is powerful and "irresistible temptation"). In fact, one court has questioned whether "any self-respecting plaintiffs' lawyer [would] omit a RICO charge these days." *Papagiannis v. Poutikis*, 108 F.R.D. 177, 179 n.1 (N.D. Ill. 1985). See generally Black, *Racketeer Influenced and Corrupt Organizations (RICO)—Securities and Commercial Fraud as Racketeering Crime After Sedima: What is a "Pattern of Racketeering Activity"?*, 6 PACE L. REV. 365, 366 (1986) (liberal remedial provisions frequently sought due to possibility of substantial monetary award).

²² See Goldsmith, *supra* note 18, at 838. RICO has been the target of two kinds of abuse: malicious prosecution and abuse of statutory scope. See *id.* at 838-48. Many private businessmen have expressed their concern over the proliferation of civil RICO abuse. See *Hearings on S. 1521 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 3-4 (1985) (statement of Edward I. O'Brien, President, Securities Industries Ass'n). At the time of the Act's passage, several members of Congress predicted the abuse of civil RICO. See H.R. REP. NO. 1549, 91st Cong., 2d Sess. 187 (1970), reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007.

²³ See DuVal, *supra* note 12, at 311.

²⁴ *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting). "RICO began to be used for run-

nesses, such as corporations, banks, and investment companies, are frequently the target of civil RICO claims involving predicate acts of mail, wire, and securities fraud.²⁵

RICO's breadth and diversity is further evidenced by the influx and variety of non-commercial private actions brought within its provisions.²⁶ Through innovative lawyering, civil RICO claims have centered on a myriad of subjects, including sexual harassment,²⁷ the 1986 United States air strike on Libya,²⁸ mismanagement of hazardous waste sites,²⁹ anti-abortion protest activities,³⁰ a parishioner's grievances against her former church,³¹ a strict products liability suit involving defective infant formula,³² and a wrong-

of-the-mill cases of misrepresentation and other alleged frauds committed by otherwise legitimate businesses a few years ago when lawyers discovered the broad wording of the statute and its lure of treble damages, lawyers' fees and court costs." Wall St. J., January 24, 1986, col. 1; see Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1513 (1983) (civil RICO is routine claim in civil suits, especially securities actions).

²⁵ See P. BATISTA, *supra* note 4, at 1-2. RICO ironically provides private rights of action against the very businesses the statute was designed to protect. See *Hearings on S. 1523 Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 4 (1987) (statement of M. David Hyman, Chairman, RICO Comm. of the Securities Industries Ass'n).

²⁶ See P. BATISTA, *supra* note 4, at 2 (civil RICO has experienced "exotic developments" outside business arena).

²⁷ See *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1483 (6th Cir. 1989). In *Puckett*, a female employee brought a civil RICO claim against her corporate employer based on sexual harassment. *Id.*; see also *Hunt v. Weatherbee*, 626 F. Supp. 1097, 1104 (D. Mass. 1986) (alleged acts of sexual harassment and discrimination may constitute pattern of racketeering under RICO).

²⁸ See *Saltany v. Reagan*, 886 F.2d 438, 439 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 2172 (1990). Fifty-five Libyan citizens sued former President Ronald Reagan and England's [now former] Prime Minister Margaret Thatcher under civil RICO to recover damages for personal injury and property loss resulting from the 1986 air strike. *Id.* It is interesting to note that the court subjected the plaintiffs to Rule 11 sanctions since the RICO claim had "no hope whatsoever of success." *Id.* at 440.

²⁹ See, e.g., *Huntsman-Christensen Corp. v. Mountain Fuel Supply Co.*, No. C86-0530G (D. Utah Nov. 24, 1986) (LEXIS, Genfed library, Dist file).

³⁰ See, e.g., *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 373 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990). In *West Hartford*, the town sought to prohibit anti-abortion activists from protesting at a local medical center. *Id.* The court held that civil RICO did not provide injunctive relief. *Id.* at 377-78. But see *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1357 (3d Cir.) (anti-abortion protesters liable under civil RICO), *cert. denied*, 110 S. Ct. 261 (1989).

³¹ See *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1135-39 (D. Mass. 1982). In *Van Schaick*, the plaintiff alleged that an agent of her former church had fraudulently induced her into becoming a church member in violation of civil RICO. *Id.* at 1131. The court held that because no business loss was suffered, the plaintiff failed to state a cause of action under section 1964(2). *Id.* at 1137.

³² See *Morrison v. Syntex Laboratories, Inc.*, 101 F.R.D. 743, 744-45 (D.D.C. 1984). The

ful discharge action.³³

As a result of the proliferation of civil RICO in recent years, fundamental concerns over the statute's scope and underlying policy have surfaced.³⁴ The Supreme Court has expressly acknowledged that the application of civil RICO has extended far beyond the congressional intent to eradicate organized crime's infiltration into legitimate business.³⁵ In an effort to curb this expansion, some courts have attempted to restrict the far-reaching scope of RICO by requiring either a special "competitive" or "racketeering-type" injury, or prior criminal activity by the defendant.³⁶ Judicial efforts

plaintiff in *Morrison* sought recovery under RICO for physical injuries sustained from consumption of defective infant formula. *Id.* The court rejected the plaintiff's claim since there was no injury to business or property as required under section 1964(c). *Id.* at 746.

³³ See *Callan v. State Chem. Mfg.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984). The *Callan* court held that a former employee could not recover treble damages under civil RICO for mental suffering, loss of self-esteem and confidence, or injury to professional reputation. *Id.*

³⁴ See *Sedima*, 473 U.S. at 500-23 (Marshall, J., dissenting). Justice Marshall, in his dissent in *Sedima*, argued that civil RICO improperly encroached on state law and displaced crucial areas of federal law. *Id.* at 501 (Marshall, J., dissenting). According to Justice Marshall, the Court's holding in *Sedima* would expand the reach of RICO unnecessarily into the mainstream of legitimate commercial enterprise and subject violators to severe penalties. *Id.* at 502 (Marshall, J., dissenting); see Note, *Sedima and Bankers Trust: Second Circuit Delivers a Mortal Blow to Private Civil RICO Actions*, 69 MINN. L. REV. 909, 911 (1985) (increasing use of civil RICO as private cause of action "accompanied by a growing judicial discomfort with the broad scope of the treble damages remedy" may destroy civil RICO remedy).

³⁵ See *Sedima*, 473 U.S. at 499-500 (civil RICO "evolving into something quite different from the original conception of its enactors").

³⁶ See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 494-96 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). In *Sedima*, the Second Circuit construed the section 1964(c) phrase "by reason of" as requiring a special racketeering injury. *Id.* The court defined "injury" as the kind of behavior RICO was intended to prevent, distinguishing it from the harm caused by acts of mail and wire fraud. *Id.* In addition, the Second Circuit interpreted the statute as requiring prior criminal conduct on the part of the particular defendant. *Id.* at 500-03. Some courts have asserted that a "competitive" injury is a prerequisite to recovery under section 1964(c), comparable to the requirement imposed under the antitrust laws. See, e.g., *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983) (requiring "competitive" injury), *rev'd*, 779 F.2d 36 (2d Cir. 1985).

Recently, some federal district courts have instituted a new approach to streamlining their dockets of civil RICO claims: the RICO case statement. See *Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674, 677 (6th Cir. 1988). This statement supplements a complaint and attempts to clarify the specific RICO allegations. See *Norris v. Wirtz*, 703 F. Supp. 1322, 1328 (N.D. Ill. 1989). It is also used to determine whether the RICO claim is sufficient to survive a motion to dismiss. See *Domestic Linen Supply & Laundry Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 722 F. Supp. 1472, 1474 (E.D. Mich. 1989) (RICO case statement together with amended complaint stated "colorable" RICO cause of action). Moreover, courts have utilized the RICO case statement approach to further the purposes of Rule 11. See *R.M. Perez & Assocs., Inc. v. Welch*, No. 85-3263 (E.D. La. May 14, 1987) (LEXIS, Genfed library, Dist file). As a result, these case statements have aided

to narrow the scope of civil RICO suits have been largely unsuccessful.³⁷ In *Sedima*, the Court suggested that the inherent problems of civil RICO should be resolved by the political process.³⁸ However, until Congress proposes a workable solution,³⁹ it appears that the federal judiciary is best situated to curb the abusive effects of civil RICO with Rule 11.

II. FEDERAL RULE OF CIVIL PROCEDURE 11

In 1983, Federal Rule of Civil Procedure 11 was amended as a result of its ineffectiveness in preventing abusive litigation practices within the federal courts.⁴⁰ Amended Rule 11 embraces higher standards and strengthens judicial authority⁴¹ by requiring that

judges in determining whether or not a reasonable inquiry has been performed as required by Rule 11, thereby minimizing the possibility of a motion for Rule 11 sanctions. *See Schwechter v. Estate of Berger*, No. 88-C-2688 (N.D. Ill. Apr. 4, 1988) (LEXIS, Genfed library, Dist file) (RICO case statement ordered to avoid Rule 11 motion).

³⁷ *See Sedima*, 473 U.S. at 499-500. The Supreme Court rejected the Second Circuit's requirements of a special racketeering-type injury and prior criminal activity. *Id.* Further, courts generally have rejected the concept of "competitive" injury in the context of civil RICO recovery. *See Callan*, 584 F. Supp. at 622 (civil RICO not restricted to plaintiffs suffering "competitive" injury). For a general discussion of judicial limitations on the scope of civil RICO and why they may contravene legislative intent, see Note, *supra* note 13, at 1105-15.

³⁸ *See Sedima*, 473 U.S. at 499-500. Since RICO's shortcomings are internal, Congress is in the best position to resolve the problems of civil RICO by legislating corrective measures. *Id.* at 499; see Note, *supra* note 13, at 1118-21.

³⁹ *See* H.R. 5111, 101st Cong., 2d Sess. (1990). A proposal to reform civil RICO was introduced to the 101st Congress in June, 1990. *See id.* The bill, aimed at clarifying the civil RICO provisions, emphasized that RICO was "an extraordinary civil remedy for certain occurrences of criminal activities and is available only when its use clearly serves the public interest and provides appropriate deterrence against the repetition of egregious criminal conduct." *Id.* § 3. The bill also proposed certain limitations on recovery under section 1964(c), including a specific reference to Rule 11: "If the court determines that a pleading, motion, or other paper filed . . . is in violation of Rule 11 of the Federal Rules of Civil Procedure, the court shall impose an appropriate sanction, which may include awarding as costs expenses incurred, including a reasonable attorney's fee." *Id.* § 5. It is asserted that this proposal would effectively remove the economic incentive for claims which do not fall into the "egregious" category, while allowing genuinely aggrieved plaintiffs to maintain a suit under civil RICO.

⁴⁰ *See* FED. R. CIV. P. 11; Rule 11 advisory committee note, *supra* note 2. The original Rule 11 was not a practical deterrent. *See id.*; see also Comment, *supra* note 2 (until 1983 amendments, Rule 11 was "impotent"). Rule 11, promulgated in 1938, required all parties to sign each pleading. *See* S.M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 2 (Federal Judicial Center 1985). The required signature certified that there was "good ground" to support the contents of the pleading. *Id.* In addition, former Rule 11 imposed disciplinary actions upon lawyers only for "willful" violations. *See* *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986).

⁴¹ *See* FED. R. CIV. P. 11, reprinted in 97 F.R.D. 165, 196-97 (1983) (indicating pro-

"the court, upon motion or upon its own initiative, *shall* impose . . . an appropriate sanction" upon the attorney, the parties, or both once a violation is found.⁴² This mandatory language places an affirmative obligation on the courts to impose some sanction once Rule 11 is offended.⁴³ Thus, while a court must invoke its sanctioning power when presented with a Rule 11 violation, it still retains the discretion to determine a sanction which it deems proper under the circumstances.⁴⁴

Amended Rule 11 imposes greater responsibilities upon attorneys and parties by requiring that a "reasonable inquiry" be made into the factual and legal bases of a "pleading, motion or other paper" before it is signed.⁴⁵ The signature of an attorney or party

posed changes in text to original rule). The impact of Rule 11 "stems as much from the drafters' decision to 'make the profession aware' of the rule and the obligations it imposes as it does from the amendments themselves." Nelken, *supra* note 5, at 1318 (footnote omitted). The language of amended Rule 11 "is clearly phrased as a directive." See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987); see also Note, *supra* note 3, at 630-34 (amended Rule 11 extends judicial authority and places affirmative duties on attorneys). See generally note 3 and accompanying text (discussing how 1983 amendments sought to increase rule's overall utility).

⁴² FED. R. CIV. P. 11 (emphasis added). In the language of amended Rule 11, it "appears clear that so long as a violation is apparent to the court, sanctions are mandatory even where no adversary has so moved." Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U.L. REV. 587, 590 (1987). According to the dictates of the rule, therefore, a court must sanction the attorney, the client, or both, under the proper circumstances. See *O'Malley*, 896 F.2d at 709-10; C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1336, at 102-04, 106-09 (1990).

⁴³ See, e.g., *O'Malley*, 896 F.2d at 709 (citing *Eastway*, 762 F.2d at 254 n.7); see also Nelken, *supra* note 5 (violation of rule's certification requirement mandates sanctions). Under the current Rule 11, a court does not have discretion to conclude that sanctions are unwarranted and thereby deny them. See Note, *supra* note 3, at 633 ("amended rule is stricter because it purports to remove judicial discretion whether to impose sanctions once the rule is violated").

⁴⁴ See *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); see also Schwarzer, *supra* note 3, at 204 (Rule 11 does not restrict choice of sanction). Under Rule 11, a district court has authority to select sanctions such as shifting costs, including attorney's fees, to the offending party. See *Cavanagh*, *supra* note 3, at 513. But cf. *Eastway*, 762 F.2d at 254 & n.7 (remanded Rule 11 case to district court with precise instructions to include expenses and attorney fees).

⁴⁵ See FED. R. CIV. P. 11; Rule 11 advisory committee note, *supra* note 2; see also Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 477 n.260 (1986) (new Rule 11 increases responsibility of bar members in order to lessen abusive litigation). Rule 11 makes it explicit that each attorney has an affirmative obligation to conduct a "reasonable inquiry" into the validity of a pleading before actually signing it. See *Eastway*, 762 F.2d at 253. A failure to perform a "reasonable inquiry" will subject the signer to Rule 11 sanctions. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66

serves as a certification that the signer has read the paper and performed the necessary legal research and factual investigation required under Rule 11.⁴⁶ In assessing the reasonableness of an inquiry, courts review the signer's conduct using an objective standard.⁴⁷ Consequently, an attorney's subjective good faith will no longer preclude Rule 11 sanctions;⁴⁸ nor will subjective bad faith be required to trigger the imposition of sanctions.⁴⁹

Given the more stringent requirements imposed under Rule 11, courts have a greater opportunity to implement their sanctioning power.⁵⁰ Although a lack of conformity exists in interpreting

JUDICATURE 363, 364 (1983).

In determining whether an inquiry is reasonable within the meaning of Rule 11, the court may consider numerous factors. See *O'Malley*, 896 F.2d at 706. These considerations include: time provided for the inquiry; whether the signer relied on the client for factual information; whether the argument represents a plausible view of the law; and whether the signer relied on other counsel. See Rule 11 advisory committee note, *supra* note 2, 97 F.R.D. at 199. Exactly what constitutes a reasonable inquiry is still not well defined by the courts. See Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L.J. 751, 760 (1985). One commentator on Rule 11 has suggested "bright line rules" that would allow courts to recognize a reasonable inquiry with greater facility by characterizing the reasonableness of the investigation in terms of "clearly reasonable" to "clearly unreasonable." See Cavanagh, *supra* note 3, at 536-43.

⁴⁶ See Schwarzer, *supra* note 3, at 185. A signature of an attorney or party certifies that the pleading meets the strict standards of amended Rule 11. *Id.* Since the signer also certifies that he has read the document, he may not properly invoke ignorance of its contents as a defense to a Rule 11 violation. *Id.* at 186-87.

⁴⁷ See *Norris v. Grosvenor Mktg. Ltd.*, 803 F.2d 1281, 1288 (2d Cir. 1986); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986); see also Note, *supra* note 3 (Rule 11's revisions enlarge scope of judicial authority to sanction attorneys who submit "objectively unreasonable papers"). The standard of review is one of objective "reasonableness under the circumstances." Rule 11 advisory committee note, *supra* note 2, at 198-99. This standard is intended to be stricter than the original "good-faith formula." *Id.* Under the new Rule 11 objective test, a pleading may be subject to challenge by the court even though the signer honestly believed it was well grounded in fact and law when signed. See Note, *supra* note 45, at 761. Accordingly, a "pure heart, empty head" will not preclude a Rule 11 violation. See Schwarzer, *supra* note 3, at 186-87. In sum, the signer, whether a party or attorney, must demonstrate that the inquiry was objectively reasonable at the time it was signed. See S.M. KASSIN, *supra* note 40, at 5.

⁴⁸ See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987). The drafters made it perfectly clear that subjective good faith would no longer pass muster under the revised rule. *Id.* An attorney is no longer excused from sanctions even if "he personally was unaware of the groundless nature of an argument or claim." *Id.*

⁴⁹ See *id.* at 253-34; see also *Norris*, 803 F.2d at 1288 (objective inquiry does not look to bad faith); *Golden Eagle*, 801 F.2d at 1536 (sanctions appropriate even where no willful violation).

⁵⁰ See Rule 11 advisory committee note, *supra* note 2, 97 F.R.D. at 198-89; see also Cavanagh, *supra* note 3, at 513 ("heightened emphasis on sanctions [employed] as a mechanism for deterring abusive litigation tactics").

and applying amended Rule 11,⁵¹ it is clear that sanctions are mandated in the following instances: (1) where a competent attorney could not have reasonably believed the pleading or motion to be warranted by present law or supported by the facts after making the necessary inquiry; (2) where a bad faith argument "for the extension, modification, or reversal of existing law" is advanced;⁵²

The federal courts are empowered to review the issue of Rule 11 sanctions on appeal. See, e.g., *Norris*, 803 F.2d at 1288 n.8 (appellate courts conduct own review to determine if sanctions mandated); *Eastway*, 762 F.2d at 254 n.7 (Rule 11 broadens "scope of review by Court of Appeals"). According to the *Eastway* court, the policy underlying this delegation is that the appellate courts are "in as good a position to determine" a Rule 11 violation and should not give deference to the opinion of the court below. *Id.* In reviewing the imposition of Rule 11 sanctions, appellate courts have traditionally applied a three-tiered analysis. See *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). *De novo* review has been used when a legal question exists as to whether the conduct violated Rule 11 as a matter of law. See *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 49 (2d Cir. 1989); *Zaldivar*, 780 F.2d at 728. Where there is a factual dispute concerning the violative conduct, a clearly erroneous standard has been utilized by reviewing courts. *Id.* And where the district court's order of a particular sanction is reviewed, an abuse of discretion standard has typically been applied since lower courts are accorded broad latitude in selecting sanctions under Rule 11. See *id.*; *Westmoreland v. CBS*, 770 F.2d 1168, 1175 (D.C. Cir. 1985). The United States Supreme Court, in addressing the appropriate standard to be applied by appellate courts when reviewing a district court's imposition of Rule 11 sanctions, has determined the standard to be one of deference. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2450-51 (1990). In *Cooter*, the Court held that "all aspects of a district court's decision in a Rule 11 proceeding" should be reviewed under an abuse-of-discretion standard. *Id.* at 2450 (emphasis added). The Court explicitly rejected the "three-tiered standard of review," which was set forth in *Zaldivar*, 780 F.2d at 728, and applied consistently by appellate courts reviewing Rule 11 determinations. See *Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664, 669 n.1 (2d Cir. 1989). In applying the deference standard enunciated by the Court in *Cooter*, it is contended that a failure to impose sanctions in the face of a clear Rule 11 violation would constitute an abuse-of-discretion on the part of the district court.

⁵¹ See S.M. KASSIN, *supra* note 40, at ix-xi. The Federal Judicial Center conducted a study of how federal judges interpret and apply amended Rule 11. *Id.* at ix. The results indicated a strong lack of consensus among the 292 judges surveyed regarding what conduct constituted a violation of the rule. *Id.* Moreover, many judges were inclined to analyze specific conduct under the rule's prior subjective standards of willfulness and bad faith. *Id.* at ix-x. The lack of judicial conformity in recognizing a Rule 11 violation has been attributed, in part, to vague areas of the rule, including the "undefined scope of the prefiling inquiry requirement" and the precise "standards for determining when a pleading is 'well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.'" Cavanagh, *supra* note 3, at 516-17.

⁵² FED. R. CIV. P. 11; see *Norris v. Grosvenor Mktg. Ltd.*, 803 F.2d 1281, 1288 (2d Cir. 1986). This Rule 11 provision can be broken down into a legal component and a factual component. See *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1435 (7th Cir. 1987). Rule 11 can be violated where the complaint evidences a failure to make a reasonable inquiry into the factual foundation underlying it. See, e.g., *Medical Emergency Serv. Assocs. S.C. v. Foulke*, 633 F. Supp. 156, 158 (N.D. Ill. 1986) (sanctions imposed where RICO complaint erroneously alleged three physicians were employees of medical corporation), *aff'd*, 844 F.2d 391 (7th Cir. 1988). A violation of Rule 11 can also exist when the complaint is

and (3) where the pleading or motion is asserted for an "improper purpose, such as to harass or to cause unnecessary delay or need-less increase in the cost of litigation."⁵³ While courts are instructed to impose Rule 11 sanctions when it is "patently clear" that a claim had no chance to succeed at the time of filing,⁵⁴ courts traditionally have ruled in favor of the pleader where the validity of the claim has been doubtful.⁵⁵

III. RULE 11 AND CIVIL RICO

A. *Second Circuit's Approach in O'Malley v. New York City Transit Authority*

Despite the advisory committee note to amended Rule 11 emphasizing that the revised "language is intended to reduce the reluctance of courts to impose sanctions,"⁵⁶ many federal courts have demonstrated a marked resistance to the imposition of Rule 11 sanctions in civil RICO cases.⁵⁷ This judicial reluctance has cen-

without legal foundation, *see, e.g.*, *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986) (conspiracy action barred by Supreme Court decision represented lack of reasonable inquiry into law), or where the allegations evidence an unreasonable argument to extend or modify the existing law, *see, e.g.*, *Heimbaugh v. City & County of San Francisco*, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984) (claim that prohibition against playing softball in park violated plaintiff's constitutional rights was unwarranted by existing law and lacked good faith argument for extension).

⁵³ FED. R. CIV. P. 11. This "improper purpose" clause is aimed at curtailing abusive and vexatious lawyering. *See Beeman v. Fiester*, 852 F.2d 206, 209 (7th Cir. 1988), *overruled on other grounds by Mars Steel Corp. v. Continental Bank*, 880 F.2d 928 (7th Cir. 1989). This clause encompasses actions brought for any improper purpose, including: intentional delay of proceedings, *see, e.g.*, *McLaughlin v. Western Cas. & Sur. Co.*, 603 F. Supp. 978, 982 (S.D. Ala. 1985) (insurer's untimely petition filed to delay trial); harassment of opponent, *see, e.g.*, *Zaldivar*, 780 F.2d at 832 ("successive complaints based upon propositions of law previously rejected may constitute harassment"); and abuse of the judicial process, *see, e.g.*, *Silverman v. Center*, 603 F. Supp. 430, 432 (E.D.N.Y. 1985) (action barred by doctrine of claim preclusion indicated bad faith and abuse of process).

⁵⁴ *See Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).

⁵⁵ *See Norris*, 803 F.2d at 1288; *Eastway*, 762 F.2d at 254. This construction of Rule 11 "serves to punish only those who would manipulate the federal court system for ends inimicable to those for which it was created." *Id.*

⁵⁶ Rule 11 advisory committee note, *supra* note 2. The revised language of Rule 11 encourages judges to "detect and punish violations of the certification requirement." C. WRIGHT & A. MILLER, *supra* note 42, at 101. *See generally supra* note 4 and accompanying text (1983 amendments aimed at reducing reluctance of courts in imposing sanctions).

⁵⁷ *See, e.g.*, *Brantley v. E.F. Hutton & Co.*, 710 F. Supp. 135, 142-43 (E.D. Pa. 1989) (sanctions not imposed where civil RICO complaint made factually misleading allegations and contained unwarranted misstatements); *Gramercy 222 Residents Corp. v. Gramercy Re-*

tered primarily around the complexity and confusing nature of civil RICO litigation.⁵⁸ Nevertheless, as recently articulated by the Second Circuit in *O'Malley*, the mere uncertain state of existing RICO law is not dispositive in determining whether a Rule 11 violation exists.⁵⁹

In *O'Malley*, the plaintiff's RICO claim alleged that his employer, the New York City Transit Authority ("NYCTA"), had engaged in a pattern of racketeering activity by committing acts of extortion, mail fraud, and obstruction of justice.⁶⁰ The allegations of extortion and mail fraud were based on various letters from the NYCTA to O'Malley that were sent via the mails.⁶¹ These letters, which were used in the ordinary course of the defendant's business, were found to be deficient of any extortionate or fraudulent purpose.⁶² Failing in all respects to establish a pattern of racketeering activity, the complaint was characterized by the United States District Court for the Eastern District of New York as "perhaps the most 'baseless' RICO claim ever encountered."⁶³ Despite

alty Assocs., 591 F. Supp. 1408, 1415 (S.D.N.Y. 1984) (although plaintiff's complaint contained "factual defects," court refused to impose sanctions); see also Goldsmith & Keith, *supra* note 20, at 94 (courts generally hesitant to impose sanctions in RICO cases).

⁵⁸ See *O'Malley*, 896 F.2d at 709. In *O'Malley*, Judge Pratt acknowledged that courts within the Second Circuit have toiled over the RICO terms "enterprise" and "pattern." *Id.*

⁵⁹ See *id.* Although "some aspects of the law under RICO may still be somewhat unclear . . . this alone is not a justification for refusing to impose a sanction for . . . [a] 'baseless' [RICO] complaint." *Id.*

⁶⁰ *Id.* at 705-09. The civil RICO claim, an outgrowth of plaintiff's work-related injury and subsequent termination of employment from the Transit Authority, alleged predicate acts in violation of 18 U.S.C. section 1341 (mail fraud), 18 U.S.C. section 1951 (extortion) and 18 U.S.C. section 1503 (obstruction of justice). *Id.* Also, it should be noted that at the time the RICO action was initiated, the Workers' Compensation Board had already reinstated the plaintiff and granted him \$76,000 in back pay. *Id.* at 705.

⁶¹ *Id.* at 706-09. O'Malley's RICO claim alleged that five letters sent by employees of the Transit Authority constituted extortion and a scheme to defraud. *Id.* However, this correspondence merely consisted of an informal handwritten note from the plaintiff's supervisor, a standard "denial of medical benefits" form, a letter denying sick pay, a termination of employment letter, and a letter requesting the return of \$540 in Workers' Compensation benefits that was mistakenly paid to the plaintiff during his period of illness. *Id.*

⁶² *Id.* at 707, 708-09. Four of the five letters were typical of those written from an employer to an employee in the ordinary course of business affairs. *Id.* The district court found that there was "no mail fraud or anything which would even remotely resemble mail fraud." *Id.* at 707. On appeal, the Second Circuit stated that if plaintiff's claim were successful, "every employer who sent a similar form letter to an employee in error, could be subject to a possible RICO suit." *Id.* at 709.

⁶³ *Id.* Judge Glasser of the District Court for the Eastern District of New York found the plaintiff's RICO claim to be "nothing more than 'a simple claim by an employee that he was wrongfully terminated.'" *Id.* at 705.

this characterization, the district court declined to grant the defendant's motion for Rule 11 sanctions because of "subtle nuances in second circuit learning" concerning civil RICO.⁶⁴

Writing for the Second Circuit, Judge Pratt held that "[m]ere lack of clarity in the general state of some areas of RICO law cannot shield every baseless RICO claim from rule 11 sanctions."⁶⁵ The court reasoned that following the district court's position would merely serve to inspire frivolous civil RICO claims "in direct contravention of both the language and purpose of amended rule 11."⁶⁶ While the Second Circuit's view has yet to be adopted by other circuits, the *O'Malley* decision does represent a willingness on the part of the federal judiciary to deal more aggressively with meritless private RICO suits. Although not every civil RICO claim warrants the imposition of sanctions,⁶⁷ the breadth of civil RICO and the enhanced standards set forth in amended Rule 11 invite close judicial scrutiny.⁶⁸

B. Application of O'Malley to Enumerated Rule 11 Violations

1. The "Frivolous" Civil RICO Claim

While a district court is required to impose sanctions if a complaint is substantively groundless within the meaning of Rule 11,⁶⁹ some courts have refrained from imposing sanctions in the face of clearly "frivolous" civil RICO claims.⁷⁰ An example of this was demonstrated by the district court's decision in *O'Malley*, which

⁶⁴ *Id.* Interestingly, the district court concluded that no genuine issues of material fact existed concerning the alleged racketeering activity, and granted summary judgment for the defendant. *Id.*

⁶⁵ *Id.* at 709. Using a *de novo* standard of review, the Second Circuit held that plaintiff's civil RICO claim violated Rule 11 as a matter of law. *Id.*

⁶⁶ *Id.*

⁶⁷ See, e.g., *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 22 (2d Cir. 1990) (Rule 11 sanctions not imposed where civil RICO claim represented plausible interpretation of law).

⁶⁸ See P. BATISTA, *supra* note 4, at 152-55. The procedural aspects involved in a civil RICO claim should be analyzed and developed with a sensitivity to Rule 11. *Id.*

⁶⁹ See, e.g., *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1435 (7th Cir. 1987) (failure to make reasonable inquiry into law or facts violates frivolous clause of Rule 11); see also *supra* note 52 and accompanying text (discussing violations of Rule 11's frivolous clause).

⁷⁰ See *supra* note 7 and accompanying text. But see *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 210-11 (4th Cir. 1988) (imposing Rule 11 sanctions for frivolous civil RICO action).

rejected the imposition of Rule 11 sanctions despite finding a Rule 11 violation based on an absence of reasonable inquiry into the foundation of plaintiff's civil RICO claim.⁷¹ This judicial hesitancy to invoke Rule 11 also was present in *Beeman v. Fiester*,⁷² where the Seventh Circuit was presented with a civil RICO claim clearly devoid of any factual or legal foundation.⁷³ Although the frivolous nature of the private RICO action was apparent from the record, the Seventh Circuit declined to impose sanctions since the case dealt with "areas of [RICO] law that were sufficiently hazy."⁷⁴ Thus, based on the Second Circuit's holding in *O'Malley*, it appears that to allow such frivolous claims to go unsanctioned, might create, in effect, a safe harbor for baseless civil RICO actions within the federal court system.

2. The "Extension of Civil RICO" Argument

Under Rule 11, the presentation of a claim is proper if it represents a "good faith argument for the extension, modification, or reversal of existing law."⁷⁵ Given RICO's breadth and liberal judicial construction, it is evident that the "extension" clause is particularly prone to abuse. In *O'Malley*, the plaintiff alleged four counts of obstruction of justice,⁷⁶ and although obstruction of justice is expressly limited to federal court proceedings, the plaintiff argued for its extension to state courts and administrative hearings based on a broad reading of RICO.⁷⁷ In response, the *O'Malley* court characterized this argument as a "lame attempt" to fit within Rule

⁷¹ See *O'Malley*, 896 F.2d at 709. Based on its reference to the plaintiff's civil RICO action as "baseless" and "outrageous," it is apparent that the district court in *O'Malley* found the complaint to be objectively frivolous. See *id.* at 705, 709.

⁷² 852 F.2d 206 (7th Cir. 1988), *overruled on other grounds by* *Mars Steel Corp. v. Continental Bank*, 880 F.2d 928 (7th Cir. 1989).

⁷³ *Id.* at 208. In *Beeman*, the district court concluded that the plaintiff's complaint failed to state a cause of action under civil RICO. *Id.* In a memorandum opinion, the trial court noted that the "'plaintiff ha[d] not alleged an enterprise . . . [nor] a pattern of racketeering. . . [nor] predicate acts.'" *Id.* The court summed up its view by stating that "[t]he complaint is really nothing other than a nightmare." *Id.* (emphasis added).

⁷⁴ *Id.* at 212. Despite the obvious frivolity of the claim, both the district and appellate courts rejected as inappropriate the defendant's motion for Rule 11 sanctions. *Id.*

⁷⁵ FED. R. CIV. P. 11; *supra* notes 1 & 52 and accompanying text; see also *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) ("good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry'").

⁷⁶ See *O'Malley*, 896 F.2d at 707-08.

⁷⁷ See *id.*

11's extension clause.⁷⁸

A proposal for the modification of the existing "two predicate acts" requirement under civil RICO was advanced in *Calica v. Independent Mortgage Bankers, Ltd.*⁷⁹ The *Calica* court expressly acknowledged that the complaint directly contravened the current state of the law within the Second Circuit, yet declined to impose sanctions pursuant to Rule 11.⁸⁰ Because the argument to modify the core elements of a civil RICO claim was objectively unreasonable in view of the statute's express mandate and existing precedent, it would seem that, based on the position of the Second Circuit in *O'Malley*, the commencement of the action in *Calica* warranted Rule 11 sanctions.

3. The "Improper" Civil RICO Claim

If a meritless claim is asserted for "any improper purpose," Rule 11 sanctions are in order.⁸¹ Civil RICO claims are extremely susceptible to the impropriety embraced within this Rule 11 clause since, by their very nature, they invoke both economic and social concerns, including the possibility of complicated and expensive legal proceedings and the fear of being labeled a "racketeer."⁸² As a result of the solicitude they instill in defendants, civil RICO claims serve as powerful strategic litigation devices⁸³ and are, therefore, often improperly "bootstrapped" onto complaints to increase costs, delay proceedings, and coerce settlements.⁸⁴

⁷⁸ *Id.* at 708. The *O'Malley* court acknowledged that the Supreme Court encouraged a broad interpretation of the statute, yet declined to "go so far as to abrogate the plain meaning of the statute." *Id.*

⁷⁹ RICO Bus. Disputes Guide (CCH) ¶ 7325 (E.D.N.Y. Sept. 28, 1989). In *Calica*, the plaintiff acknowledged that the established law within the Second Circuit required at least two predicate acts of racketeering to state a cause of action under RICO. *Id.*

⁸⁰ *See id.*

⁸¹ FED. R. CIV. P. 11. *See generally* Schwarzer, *supra* note 3, at 195-96 (discussion of improper purpose clause).

⁸² *See* DuVal, *supra* note 12, at 311. A RICO cause of action is considered a "powerful weapon in terms of both monetary and reputational damage," *id.* at 342, since it "instills fear in many defense-oriented civil litigators" and consistently "provokes controversy." *Id.* at 292. Moreover, the issues involved in a RICO action are perplexing to jurors. *See id.* at 340.

⁸³ *See Sedima*, 473 U.S. at 504 (1985) (Marshall, J., dissenting). A defendant in a civil RICO action faces "tremendous financial exposure in addition to the threat of being labeled a 'racketeer.'" *Id.* As a result, RICO defendants would rather settle the dispute than face the embarrassment of such a social stigma. *Id.* *See generally* P. BATISTA, *supra* note 4, *passim* (discussing offensive strategies of civil racketeering litigation).

⁸⁴ *See, e.g.,* Chapman & Cole v. ITEL Containers Int'l, 865 F.2d 676, 684-85 (5th Cir.)

In light of the many improper motives for bringing such actions, civil RICO complaints are deserving of prudent judicial review at the district court level. As demonstrated in *O'Malley*, an objective analysis of the surrounding circumstances may uncover the impropriety of a private RICO action.⁸⁵ In *O'Malley*, the plaintiff's persistence regarding his RICO claim, even after being advised of its obvious fallaciousness at a pre-trial hearing, was, in the opinion of the reviewing court, an indication of bad faith and vexatiousness.⁸⁶

Several federal courts, in defiance of Rule 11's mandate, have failed to penalize civil RICO actions of obvious impropriety.⁸⁷ For example, in *Beeman*, the Seventh Circuit affirmed the district court's denial of Rule 11 sanctions despite a finding that the lawsuit "was brought in retaliation for some bareknuckle union infighting."⁸⁸ Similarly, in *Mortell v. Mortell Co.*,⁸⁹ the Seventh Circuit declined to order Rule 11 sanctions in a civil RICO action notwithstanding its depiction of the case as a "weak grudge litigation."⁹⁰ Since Rule 11's "improper" clause was designed to prevent abusive and harassing lawyering of this type, it is suggested that the presence of any improper purpose underlying a civil RICO

(RICO counterclaim used as part of defensive strategy to increase litigation costs in hopes of plaintiff's withdrawal), *cert. denied*, 110 S. Ct. 201 (1989); see also *Sedima*, 473 U.S. at 506 (Marshall, J., dissenting) (RICO wrongfully used for "extortive purposes" resulting in perpetuation of "evils that it was designed to combat").

⁸⁵ See *O'Malley*, 896 F.2d at 709. Although an "improper purpose" necessarily involves a subjective element, courts are discouraged from delving into a party's subjective state. See Schwarzer, *supra* note 3, at 195; see also *Beeman*, 852 F.2d at 209 (improper purpose should be determined from examination of records and circumstances surrounding case); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1436 (7th Cir. 1986) (test of improper purpose similar to standard used to judge frivolousness in that both are objective).

⁸⁶ See *O'Malley*, 896 F.2d at 709. In *O'Malley*, the plaintiff was given advice to withdraw his baseless RICO complaint early in the action and was warned that Rule 11 sanctions would be pursued if the RICO claim were not withdrawn. *Id.* Although it was not within the power of the reviewing court to make a factual finding as to the improper purpose of plaintiff's RICO claim, the court inferred bad faith based on an objective view of the circumstances. *Id.*

⁸⁷ See *infra* notes 88-91 & accompanying text (decisions denying Rule 11 sanctions despite finding of improper purpose).

⁸⁸ See *Beeman*, 852 F.2d at 208 (quoting *Beeman v. Fiester*, No. 86C-3861 (N.D. Ill. July 21, 1987)). The district court characterized the plaintiff's complaint as "a good old-fashioned local union fight" and a "paroxysm of RICO rage." *Id.* (quoting *Beeman v. Fiester*, No. 86C-3831, mem. op. at 1, 2 (N.D. Ill., Feb. 6, 1987)).

⁸⁹ 887 F.2d 1322 (7th Cir. 1989).

⁹⁰ *Id.* at 1337. Despite the *Mortell* court's characterization of the plaintiff's civil RICO claim as "conspicuously deficient" in all respects, it had no power to order Rule 11 sanctions *sua sponte*. *Id.* at 1327-28.

claim, even in connection with an otherwise meritorious cause of action, is in strict violation of Rule 11.⁹¹

IV. CURBING CIVIL RICO WITH "APPROPRIATE SANCTIONS"

Rule 11 affords federal district courts wide discretion in fashioning an "appropriate" sanction in the event of a Rule 11 violation.⁹² In view of the high stakes involved in a frivolous civil RICO claim, courts should tailor the specific sanction in accordance with the severity and nature of the violation.⁹³ In many cases, the imposition of compensatory sanctions alone may not effectively discourage litigants from bringing baseless RICO claims.⁹⁴ By adopting a discretionary "double-sanction" approach for clearly meritless civil

⁹¹ Cf. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986) (left question open whether RICO claim sanctionable if well grounded in fact and law but filed solely for improper purpose). *But see* *Carlton v. Jolly*, 125 F.R.D. 423, 427-28 (E.D. Va. 1989) (found Rule 11 sanctions inappropriate where RICO claim was grounded in fact and law but brought solely for improper purpose), *aff'd sub nom.* *Carlton v. Franklin*, 911 F.2d 721 (4th Cir. 1990).

⁹² See *O'Malley*, 896 F.2d at 709; *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987); *see also* *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985) ("district court has tasted the flavor of the litigation and is in the best position" to select sanction).

The ability to determine sanctions is not within the power of the reviewing appellate court. See *O'Malley*, 896 F.2d at 709 ("appellate court is ill-suited for the delicate, fact-intensive analysis and judgment needed to fashion a proper sanction").

District courts may choose from a wide array of appropriate sanctions. See Schwarzer, *supra* note 3, at 200-04. Some courts have determined "appropriate" sanctions to include not only the costs and expenses involved in the litigation, but also sanctions characterized as punitive in nature. See, e.g., *Burger v. Health Ins. Plan of Greater New York*, 684 F. Supp. 46, 56 (S.D.N.Y. 1988) (\$2,500 punitive damages plus expenditures in connection with unnecessary reply brief); *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96, 106 (D.N.J. 1985) (\$5,000 sanction to vindicate dignity of judicial process).

⁹³ See Rule 11 advisory committee note, *supra* note 2, at 200. "[I]n considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed." *Id.* Courts should also consider other mitigating factors, including, *inter alia*, "the seriousness of the violation . . . [and] the appropriateness of punishment." C. WRIGHT & A. MILLER, *supra* note 42, at 109 (footnotes omitted).

⁹⁴ See *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984). The *Saine* court emphasized that frivolous RICO complaints should be met with appropriately severe sanctions:

A RICO defendant also needs to be protected from unscrupulous claimants lured by the prospect of treble damages, and it should be the policy of the law, within the procedural constraints of our system, to provide this protection. . . . Irresponsible or inadequately considered [civil RICO] allegations should be met with severe sanctions pursuant to Rule 11.

Id.

RICO claims, district courts could further the primary objectives of Rule 11, and at the same time, provide adequate protection for the defendants of such inappropriate actions.⁹⁵ It is proposed that this method, implemented by awarding twice the amount of actual litigation costs, would serve to fully compensate the party offended by the claim, effectively punish the principal offender, and deter future frivolous RICO actions in fulfillment of Rule 11's goals.⁹⁶ In addition, it is encouraged that courts adhere to the plain language of amended Rule 11 and initiate their sanctioning power *sua sponte* in order to deter future violations of the rule.⁹⁷

Although it is customary judicial practice to do otherwise, it is further advised that courts sanction on the record;⁹⁸ a published order would serve as a permanent record of the extent of the courts' sanctioning powers under Rule 11.⁹⁹ Moreover, an on-the-record sanction would give proper notice to potential litigants of the severe consequences involved in pursuing frivolous civil RICO actions.¹⁰⁰

Although Rule 11 sanctions are unpleasant for all parties involved, their imposition is encouraged to guard the judicial system against abusive civil RICO litigation.¹⁰¹ Increasing the frequency

⁹⁵ See Goldsmith, *supra* note 18, at 881 (suggesting revision of § 1964(c) incorporating Rule 11 cautionary language and calling for double damage penalty); cf. Goldsmith & Keith, *supra* note 20, at 103 (proposing discretionary award of treble attorney's fees to litigants defending baseless RICO suits).

⁹⁶ See Taylor v. Belger Cartage Serv., Inc., 102 F.R.D. 172, 181 (N.D. Mo. 1984).

⁹⁷ See C. WRIGHT & A. MILLER, *supra* note 42, § 1336, at 101; see also Sanko S.S. Co. v. Galin, 835 F.2d 51, 53 (2d Cir. 1987) (as long as due process afforded, judge entitled to raise issue of Rule 11 and award sanctions on own motion).

⁹⁸ See Lewin, *supra* note 2, at col. 1. Recent statistics have shown that courts frequently impose Rule 11 sanctions without writing opinions. *Id.* Consequently, it is estimated that many more Rule 11 cases have been decided than actually appear in the official reporters. *Id.*

⁹⁹ See Schwarzer, *supra* note 3, at 199.

¹⁰⁰ *Id.* A written opinion addressing the imposition of Rule 11 sanctions serves several important functions. *Id.* In particular, a public record of sanctions "enhances the deterrent effect of the ruling." *Id.* Furthermore, written opinions provide the added benefit of establishing standards for determining actionable conduct. See generally Cavanagh, *supra* note 3, at 536-46 (suggesting necessity of clear standards for Rule 11 determination).

¹⁰¹ See Schwarzer, *supra* note 3, at 205. Judge Schwarzer emphasized the critical role that Rule 11 sanctions play in the litigation process:

Of all the duties of the judge, imposing sanctions on lawyers is perhaps the most unpleasant. A desire to avoid doing so is understandable. But if judges turn from Rule 11 and let it fall into disuse, the message to those inclined to abuse or misuse the litigation process will be clear. Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.

and severity of Rule 11 sanctions in civil RICO litigation will not stifle creative advocacy under RICO, nor will it judicially abrogate the private RICO cause of action.¹⁰² It is suggested that a more assertive application of the federal courts' sanctioning power would curb the endless mass of civil RICO pleadings, and weed out only improper claims. If adequately implemented and in accordance with the approach set forth herein, it is asserted that Rule 11 can effectively deter frivolous civil RICO claimants from having their day in court, while retaining a private RICO cause of action for those truly deserving of its rich remedy.

CONCLUSION

Frivolous RICO claims constitute a needless waste of judicial resources by cluttering the federal courts with meritless and unnecessary litigation. This Note has suggested that courts need not be blinded by the complexity or unsettled nature of civil RICO in lieu of their obligations under amended Rule 11. To prevent the federal judiciary from becoming a mere sanctuary for baseless private RICO claims, courts must abide by the mandatory nature of Rule 11. Accordingly, courts are encouraged to impose appropriately severe sanctions when confronted with civil RICO claims that are clearly violative of Rule 11. In sum, Federal Rule of Civil Procedure 11 provides an effective and efficient method of judicial gatekeeping and is ideally suited to fight off the recurring abuses of civil RICO in the federal courts.

Petra J. Rodrigues

Id.; see also *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986) (issue of sanctions "distasteful" but necessary), *cert. denied*, 480 U.S. 918 (1987).

¹⁰² See *Goldsmith & Keith*, *supra* note 20, at 103. Since Rule 11 sanctions are imposed against frivolous claimants only, and not those who have failed on the merits, such sanctions "will not serve as an *in terrorem* deterrent to RICO litigation generally." *Id.* The imposition of enhanced sanctions would effectively serve to protect the remedial purposes of civil RICO and render its abuse "a statutory nullity." *Id.*

