Civil RICO and "Garden Variety" Fraud–A Suggested Analysis

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NOTE

CIVIL RICO AND "GARDEN VARIETY" FRAUD—A SUGGESTED ANALYSIS

Title 18, section 1964(c) of the United States Code,\(^1\) enacted as part of the Racketeer Influenced and Corrupt Organizations Act (RICO),\(^2\) provides for a private right of action for treble damages for any person injured in his business or property by reason of a violation of section 1962 of the Code,\(^3\) the substantive provision of RICO.\(^4\) Liability under section 1962 is based on two novel concepts in criminal jurisprudence: "a pattern of racketeering activity" and "an enterprise."\(^5\) A pattern of racketeering activity requires the

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\(^1\) 18 U.S.C. § 1964(c) (1982). Section 1964(c) provides:
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

\(^2\) Id. § 1964(c). In addition to treble damages, a plaintiff may recover reasonable attorney's fees. The treble damage and attorney's fee provisions of RICO were modeled after similar provisions in the antitrust laws. See 15 U.S.C. § 15 (1982). In the antitrust context, the private right of action for treble damages has been said to encourage plaintiffs to act "as private attorneys general" in protecting the public interest." Data Digests, Inc. v. Standard & Poor's Corp., 57 F.R.D. 42, 44 (S.D.N.Y. 1972) (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring)).

\(^3\) Id. § 1964(c). In addition to treble damages, a plaintiff may recover reasonable attorney's fees. The treble damage and attorney's fee provisions of RICO were modeled after similar provisions in the antitrust laws. See 15 U.S.C. § 15 (1982). In the antitrust context, the private right of action for treble damages has been said to encourage plaintiffs to act "as private attorneys general" in protecting the public interest." Data Digests, Inc. v. Standard & Poor's Corp., 57 F.R.D. 42, 44 (S.D.N.Y. 1972) (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring)).

\(^4\) Id. § 1964(c). In addition to treble damages, a plaintiff may recover reasonable attorney's fees. The treble damage and attorney's fee provisions of RICO were modeled after similar provisions in the antitrust laws. See 15 U.S.C. § 15 (1982). In the antitrust context, the private right of action for treble damages has been said to encourage plaintiffs to act "as private attorneys general" in protecting the public interest." Data Digests, Inc. v. Standard & Poor's Corp., 57 F.R.D. 42, 44 (S.D.N.Y. 1972) (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring)).

\(^5\) 18 U.S.C. § 1962 (1982); see infra notes 6-10 and accompanying text.
commission of any two predicate violations enumerated in the statute within a 10-year period. Among the predicate offenses triggering the statute are mail fraud, wire fraud, and "fraud in the sale of securities." An enterprise can be any individual, legal entity, or group associated in fact that affects interstate commerce. Section

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6 18 U.S.C. § 1961(5) (1982). One of the predicate acts must have occurred after the effective date of RICO, which was October 15, 1970. Id. Any period of imprisonment is excluded when computing the 10-year period. Id. Section 1961(1) enumerates the predicate acts that constitute racketeering activity. Id. § 1961(1). Included are any state law felonies involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in dangerous drugs. Id. § 1961(1)(A). Over 20 federal crimes under title 18 and title 29 of the United States Code are listed. Id. § 1961(1)(B), (C). Bankruptcy fraud and felonies under the drug laws are also included. Id. § 1961(1)(D). Congress intended to include those offenses that are characteristically committed by organized criminals. See McClellan, The Organized Crime Act (S. 30) or its Critics: Which threatens Civil Liberties?, 46 Notre Dame Law. 55, 142-43 (1970); infra note 35 and accompanying text.

There is some dispute concerning the degree of relationship necessary to establish a pattern of racketeering activity. It is clear, however, that Congress did not intend to target sporadic criminal acts. S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969). The Senate Report states:

The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

1962 prohibits the investment of funds acquired from a pattern of racketeering activity in an enterprise, the acquisition or maintenance of an interest in, or control of, an enterprise through a pattern of racketeering activity, and the conduct or participation in


For liability to attach under RICO, there must be some nexus between the enterprise and the pattern of racketeering activity. Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982); United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). This nexus is established if the defendant is able “to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or . . . the predicate offenses are related to the activities of that enterprise.” 641 F.2d at 54. However, the enterprise must have a distinct existence apart from the pattern of racketeering activity. United States v. Turkette, 452 U.S. 576, 583 (1981). The existence of the enterprise, therefore, is a separate and essential element which must be proved. Id.

The enterprise can be a legitimate organization or an illegitimate entity, such as a drug or gambling ring, whose purpose and functions are totally criminal. See id. at 587; United States v. Aleman, 609 F.2d 298, 303-04 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980). In addition, the enterprise, rather than the pattern of racketeering activities, must affect interstate commerce. United States v. Vignola, 464 F. Supp. at 1097; see also United States v. Fineman, 434 F. Supp. 189, 195 (E.D. Pa. 1977); United States v. Frumento, 426 F. Supp. 797, 802-03 & n.6 (E.D. Pa. 1976), aff'd, 563 F.2d 1083 (3d Cir. 1977), cert. denied sub nom. 434 U.S. 1072 (1978). For commentaries advocating a conservative approach to the enterprise element, see Note, The Enterprise Element in RICO: A Proposed Interpretation, 49 Geo. Wash. L. Rev. 123, 139-42 (1980) (advocating a mens rea standard in proving enterprise element); Comment, supra note 2, at 104-25.

18 U.S.C. § 1962(a) (1982). Section 1962(a) provides, in pertinent part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id. Section 1962(a) excepts securities purchases made in the open market for the purpose of investment only, if the aggregate purchases of the defendant and his family and associates amount to less than one percent of the securities of any one class and do not confer the power to elect any directors. Id. Some courts have interpreted section 1962(a) liberally, holding that the funds acquired through the pattern of racketeering activity only need to have “allowed or facilitated” the defendant’s investment. See United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1980); Spencer Cos. v. Agency Rent-A-Car, Inc., 1981-1982 Fed. Sec. L. Rep. (CCH) ¶ 98,361, at 92,215-16 (D. Mass. 1981). See generally Note, Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970, 83 Yale L.J. 1491, 1491-94 (1974). Enforcement of section 1962(a) has proven difficult, however, because of the problems inherent in tracing funds. See id. at 1492-94.

18 U.S.C. § 1962(b) (1982). Section 1962(b) states:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
the affairs of an enterprise through a pattern of racketeering activity.\textsuperscript{13} RICO, then, provides enhanced criminal and civil penalties and remedies\textsuperscript{14} for violations of existing law when such violations combine to form a pattern of racketeering activity in connection with an enterprise.\textsuperscript{15}

Although the purpose of RICO is to eradicate organized crime by attacking its financial base and deterring its infiltration into legitimate businesses,\textsuperscript{16} an increasing number of resourceful plain-

\textsuperscript{13} Id. § 1962(c). Section 1962(c) provides:

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

\textsuperscript{14} See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose). The enhanced criminal penalties for a violation of section 1962 are maximum fines of $25,000, imprisonment for a maximum of 20 years, and forfeiture of any interests or rights acquired or maintained through a pattern of racketeering activity. 18 U.S.C. § 1963(a) (1982). In addition to the criminal penalties and the private treble damages actions, RICO permits the Attorney General to institute civil proceedings against violators. Id. § 1964(b). The possible civil remedies include divestiture, permanent or temporary injunctions against violators, and dissolution or reorganization of the enterprise. Id. § 1964(d). A criminal conviction under RICO will estop a defendant from denying the allegations in a later civil action brought by the Attorney General. Id. A criminal conviction also may be given collateral estoppel effect in a suit brought by a private plaintiff. See Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 644 (D. Ala. 1982); Anderson v. Janovich, 543 F. Supp. 1124, 1128-29 (W.D. Wash. 1982); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 682-83 (N.D. Ind. 1982). For a discussion of the availability of private equitable relief under RICO, see infra note 129 and accompanying text.

\textsuperscript{15} See United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983); Salisbury v. Chapman, 527 F. Supp. 577, 579 (N.D. Ill. 1981). It has been said that RICO "does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of 'racketeering activity' that violates an independent criminal statute." Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies, 53 Temp. L.Q. 1009, 1021 n.71 (1980); see Atkinson, supra note 2, at 1.

tiffs have taken advantage of its civil damage provisions to attack defendants whose activities seem far removed from any traditional notions of organized crime. These actions have occasioned a great deal of controversy in the courts and among commentators, since the apparently unlimited sweep of the statutory language presents a potential for federalizing state common-law fraud claims and radically disrupting existing securities law. Consequently, judicially created restrictions have been developed to circumscribe the scope of the RICO cause of action. Courts have focused on the character of the defendant as well as on the nature of the injury in an attempt to limit the reach of the Act. The majority of courts, however, have adopted a broad approach. Refusing to superimpose restrictive judicial glosses onto the plain language of the statute, these courts have allowed plaintiffs to state a RICO cause of action based on allegations of damages inflicted by two or more predicate acts.


See infra notes 97-116, 122-29 & 140-51 and accompanying text.

See infra notes 41-57 and accompanying text.

See infra notes 58-92 and accompanying text.

See infra notes 23, 98 & 141 and accompanying text.

character as a valuable means of deterrence to, and redress for victims of, organized crime. At the outset, this Note will present a brief review of the legislative history and purpose of RICO. The Note then will examine the various judicial and academic approaches to evaluating a RICO claim. The latter part of the Note will suggest a limitation on RICO actions predicated on allegations of securities fraud, including the use of RICO in the context of a tender offer. A similar analysis is used to suggest a restriction on civil RICO complaints predicated on mail or wire fraud.

BACKGROUND

RICO was enacted as Title IX of the Organized Crime Control Act of 1970 (the Act). The purpose of the Act was to seek to eradicate the growing influence of organized crime in American society. Of particular concern was the infiltration of legitimate business by organized crime. Congress had found that existing law enforcement methods and sanctions had proven inadequate in controlling the growth and economic power of this particular criminal


25 See supra note 16 and accompanying text.

26 See S. Rep. No. 617, 91st Cong., 1st Sess. 76-77 (1969); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("title IX is aimed at removing organized crime from our legitimate organizations"); 116 Cong. Rec. 602 (remarks of Sen. Hruska) (RICO is designed to remove the influence of organized crime from legitimate business); 116 Cong. Rec. 607 (remarks of Sen. Byrd) ("recent studies of... organized crime... have identified its alarming expansion into the field of legitimate business as a major threat to our institutions"); 116 Cong. Rec. 953 (remarks of Sen. Thurmond) ("[t]his legislation provides an effective way to destroy [organized crime's] legitimate business fronts").

Congress had been concerned with the infiltration of legitimate organizations by organized crime since the early 1950's. The Special Committee to Investigate Organized Crime in Interstate Commerce (the Kefauver Committee) found that "[o]ne of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises." S. Rep. No. 141, 82d Cong., 1st Sess. 33 (1951). Thereafter, Congress made a number of attempts to focus on the problem. See, e.g., S. Rep. No. 72, 89th Cong., 1st Sess. 1 (1965) (confronting problem of a national criminal syndicate); S. Rep. No. 1784, 87th Cong., 2d Sess. 1-40 (1962) (influence of organized crime on labor); S. Rep. No. 621, 86th Cong., 1st Sess. at v (1960) (labor); S. Rep. No. 1417, 85th Cong., 2d Sess. 1 (1958) (labor). In 1967, the President's Commission on Law Enforcement and Administration of Justice suggested the possibility of civil remedies similar to those existing under the antitrust laws for use against organized crime infiltration. President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 208 (1967).
Indeed, principals in organized crime had demonstrated an uncanny ability to avoid conviction and punishment under existing state and federal laws. Congress hoped, therefore, to establish a comprehensive system of additional penalties and remedies to aid in the eradication of organized crime. Essential to this purpose were enhanced methods of eroding the financial foundation of organized crime. Drawing on one of the most effective tools of antitrust enforcement, the House of Representatives added to the original Senate bill a provision for a private right of action for treble damages and attorney's fees. An award of treble damages

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27 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose). Congress found that: [Organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.]


29 See S. Rep. No. 617, 91st Cong., 1st Sess. 78 (1969). The Senate Report stated that "not a single one of the 'families' of La Cosa Nostra has been destroyed through criminal prosecutions." Id.

30 See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose). The purpose clause states: 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.

31 See, e.g., S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969). The Senate Report described Congress' goal in enacting RICO: "What is needed... are new approaches that will deal not only with individuals, but also with the economic base... In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." Id.; 116 Cong. Rec. 35,193 (1970) (remarks of Rep. Poff).

and attorney's fees, it was believed, would strike a more forceful blow against organized crime's economic interests and would serve to offset the presumed dangers involved in suing "the syndicate."  

A more controversial issue debated during the legislative consideration of RICO was defining the concept of organized crime. A narrow, specific definition of organized crime was rejected in favor of a behavior-oriented scheme predicated on the commission of proscribed offenses in connection with an enterprise. In formu-
lating the roster of proscribed acts, the drafters attempted to include those offenses that lend themselves to "organized commercial exploitation," and are characteristically committed by participants in organized crime.

The breadth of the proposed statutory scheme was acknowledged but accepted as the only effective means of reaching organized crime.

Clearly, Congress recognized that RICO would envelop more than traditional organized crime figures.

Indeed, Congress included an explicit directive that RICO

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55 McClellan, supra note 6, at 142-43. Non-commercial offenses such as rape were not included in section 1961(1), id., because "the purpose of Title IX is economic, [and] it would be pointless surplusage for it to cover crimes which are not adapted to commercial exploitation," id. at 161-62. Congressman Poff explained the reasoning behind the structure of the statutes: "[Organized crime] is a functional or sociological concept like white-collar crime or street crime, serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances." 116 Cong. Rec. 35,344 (1970) (statement of Rep. Poff); see id. at 18,913-14 (remarks of Sen. McClellan).

56 See, e.g., Wilson, The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law, 46 Notre Dame Law. 41, 48 (1970). Assistant Attorney General Wilson noted that "[a]rganization is not a word whose time has come. Today, a word whose time has gone." 46 Notre Dame Law. 41, 48 (1970). Assistant Attorney General Wilson noted that "[a]lso, if ever, would one expect to be able to draft an acceptable provision which would apply exclusively to the Syndicate. Certainly no provision in S. 30 purports to be so narrowly limited." Id. (emphasis in original); accord House Hearings, supra note 31, at 185-86 (statement of Att'y Gen. Mitchell). Attorney General Mitchell, referring to title X, which deals with special offender sentencing, described the difficulties of delineating organized crime: "We have provisions which do not relate solely to organized crime. . . . [T]he categories of 'general crime' and 'organized crime' frequently overlap. . . . The criminal activities of those engaged in organized crime do not always fall into neat categories." House Hearings, supra note 31, at 185-86 (statement of Att'y Gen. Mitchell).

It might be suggested that Congress was implicitly relying on prosecutorial discretion in enacting such a broad statute. See 116 Cong. Rec. 35,302 (1970) (remarks of Rep. Celler). Representative Celler, one of the House sponsors, replying to a question about a definition of organized crime, stated: "That particular matter was left flexible so that there would be no difficulty in enabling the Attorney General to attack this very horrendous evil that besets our Nation." Id. This would seem to indicate that Congress wanted to provide a broad framework within which the Attorney General could attack serious violators. See United States v. Anderson, 626 F.2d 1358, 1369 (8th Cir. 1980) (Congress did not intend for prosecutors to use RICO to prosecute minor offenses), cert. denied, 450 U.S. 912 (1981); United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979) (advocating prosecutorial restraint), cert. denied, 445 U.S. 927 (1980). No element of prosecutorial discretion exists, of course, in civil actions in which the plaintiff senses a large recovery.

57 See United States v. Turkette, 452 U.S. 576, 593 (1981); United States v. Thordar- son, 646 F.2d 1233, 1238 n.10 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975); McClellan, supra note 6, at 142; see also Note, supra note 18, at 1109 (Congress "chose to risk the imposition of liability on defendants not tied to organized crime in order to cast a sufficiently wide net").
“shall be liberally construed to effectuate its remedial purpose.”

While it is apparent that Congress intended a broad reach for RICO, there is no indication in the legislative history that Congress intended to alter the securities laws in any fundamental way. Nor is there any hint that Congress, contrary to well-established case law, intended to provide a private right of action in the federal courts for violations of the mail or wire fraud statutes. The courts are placed, therefore, in the position of attempting to effectuate congressional intent without disregarding the plain language of the statute.

JUDICIAL RESTRICTIONS ON THE SCOPE OF CIVIL RICO

The Requirement of a Connection to Organized Crime

The first judicially imposed restriction on the wide ambit of civil RICO was promulgated in Barr v. WUI/TAS, Inc., wherein the District Court for the Southern District of New York held that the defendant must be connected in some way to organized crime for a plaintiff to state a claim under RICO. The plaintiffs in Barr alleged, inter alia, that the defendant, the largest telephone answering service in the United States, had engaged in a pattern of Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. No other federal criminal statute contains a liberal construction clause. See Note, RICO and the Liberal Construction Clause, 66 CORNELL L. REV. 167, 168 & n.6, 184-90 (1980). This liberal construction directive runs counter to the maxim that criminal statutes are to be construed strictly. See, e.g., Rewis v. United States, 401 U.S. 808, 812 (1971) (“ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”); Bell v. United States, 349 U.S. 81, 84 (1955). At least one court has held that liberal construction applies only to the civil provisions of RICO, not to the criminal penalties. See United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), aff’d in part, vacated and remanded in part, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980).


See, e.g., Moss v. Morgan Stanley Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y.), aff’d on other grounds, 719 F.2d 5 (2d Cir. 1983). The Moss court found not “a single mention of such a revolutionary consequence anywhere in the legislative history.” Id.


Id. at 113.

Id.
racketeering activity by mailing fraudulent bills to its subscribers.\textsuperscript{44} The \textit{Barr} court refused to allow the plaintiffs to include a RICO claim because the defendant was not alleged to be a member of "a society of criminals operating outside of the law."\textsuperscript{46} After examining the legislative history of RICO, the court concluded that the Act was not intended to be applied to "perfectly legitimate" businesses.\textsuperscript{46} The court then noted the pejorative element of allowing a "racketeering" claim against a legitimate business, a factor which continues to influence courts and attorneys considering RICO claims.\textsuperscript{47} The court provided little guidance as to how organized crime might be defined or proved.\textsuperscript{48}

This approach has found some support among certain district courts,\textsuperscript{49} although it has been rejected by every circuit court that

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\textsuperscript{44} \textit{Id.} at 112. The plaintiffs claimed that the defendant fraudulently increased the number of message units billed to subscribers by at least 20\% on each subscriber's monthly bill. \textit{Id.} The original complaint alleged that arbitrary price increases amounted to violations of the Sherman Antitrust Act and various Executive orders and price controls. \textit{Id.} Subsequent to the filing of the action, the plaintiffs sought leave to amend the complaint pursuant to rule 15(a) of the Federal Rules of Civil Procedure to include the RICO claim. \textit{Id.}

\textsuperscript{45} \textit{Id.} at 113. The court made no effort to reconcile its decision with the actual language of the statute, admitting that, "[w]hen read literally," RICO seemed to encompass the facts alleged. \textit{Id.} at 112. Instead, the court based its decision solely on the legislative history. \textit{Id.} at 113.

\textsuperscript{46} \textit{Id.} at 113. The court's rather cursory and selective discussion of the legislative history focused on the frequent references to "racketeers," "organized crime," "syndicate," "Mafia," and "Cosa Nostra," and concluded that these groups were the sole objects of the legislation. \textit{Id.} Somewhat ironically, the court stated, "the most that can be said is that defendant's transactions, on this occasion, have been illegal." \textit{Id.}

\textsuperscript{47} \textit{Id.} The \textit{Barr} court believed that it would be "patently unfair" to allow the plaintiff to file a RICO claim because such an allegation "would add credence to an inference that defendant is somehow involved in organized crime." \textit{Id.}; see Moss v. Morgan Stanley Inc., 553 F. Supp. 1347, 1359 (S.D.N.Y.) ("such a charge infects the fundamental fairness of civil litigation"), aff'd, 719 F.2d 5 (2d Cir. 1983); Lewin, \textit{Racketeering Law's Fallout}, N.Y. Times, June 27, 1983, at D1, col. 1 (RICO charge carries "emotional . . . wallop"); see also H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (dissenting views of Reps. Conyers, Mikva and Ryan), \textit{reprinted in 1970 U.S. Code Cong. & Ad. News} 4007, 4083. "What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the rival's business." \textit{Id. But cf. Note, supra note 18, at 1107 (stigma of RICO claim attaches only if applied solely to proven organized crime figures).}

\textsuperscript{48} See 66 F.R.D. at 113. Although the court repeatedly alluded to membership in "a society of criminals" as a requisite for a cause of action, the court failed to expound on what conduct would be necessary to constitute "organized crime." \textit{Id.}

has directly considered it and is subject to attack on several grounds. First, there is nothing in the language of the statute that requires a connection with organized crime. Indeed, Congress rejected such an approach in favor of a statute based on the commission of enumerated criminal acts in connection with an enterprise. Congress, wary of possible constitutional difficulties, did not intend to create a status offense. Moreover, the concept of organized crime is vague and difficult to define. Even more difficult is proving such an allegation.

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60 See, e.g., Schacht v. Brown, 711 F.2d 1343, 1353-56 (7th Cir. 1983) (organized crime theory is "already discredited"); see Moss v. Morgan Stanley Inc., 719 F.2d 5, 21 (2d Cir. 1983); Bennett v. Berg, 685 F.2d 1053, 1063-64 (8th Cir. 1982), aff'd on rehearing, 710 F.2d 1361 (8th Cir. 1983) (en banc).


62 See supra notes 33-38 and accompanying text.


In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25. Thus, to be subject to criminal penalties, the defendant must in some way actively support a criminal endeavor or objective. See id. at 222.

64 See, e.g., Kimmel v. Peterson, 565 F. Supp. 476, 491 (E.D. Pa. 1983) (Congress recognized that defining organized crime was "a difficult task which would be of dubious benefit").


It would usually be difficult, if not impossible, to prove that an individual or business was associated with or controlled by a clandestine criminal organization . . . such a restriction upon the statute's coverage would provide an easy avenue for evasion through adoption of new forms and techniques of illicit trafficking.

432 F.2d at 885. Indeed, it was the difficulty inherent in proving organized crime ties that spurred Congress to enact RICO. See Kimmel v. Peterson, 565 F. Supp. 476, 492 (E.D. Pa. 1983) ("RICO would probably not have been necessary in the first instance" had organized
ment with organized crime would permit the targets of the legislation to circumvent sanctions under RICO as they had circumvented previous attempts to constrain their activities. It is suggested that judicial attempts to discern the presence of organized crime on a case-by-case basis, especially at the pleading stage, could easily lead to inequitable and uneven results. Such a subjective approach would reward criminals sophisticated enough to maintain a more polished appearance of legitimacy, precisely the criminals whose corruption is most insidious to our institutions and who were the original objects of this legislation.

Racketeering Enterprise Injury

Other courts attempting to delimit the broad scope of RICO have imposed more sophisticated standing restrictions which may be classified under the rubric “racketeering enterprise injury.” The first such restriction was articulated in North Barrington Development, Inc. v. Fanslow, in which the District Court for the Northern District of Illinois held that a plaintiff must allege some type of competitive injury to his business in order to state a claim under RICO. The court reasoned that Congress’ purpose was to prevent interference with free competition by organized crime and to reduce crime’s burden on interstate commerce. Accordingly, the North Barrington court held that one is only injured in his “business or property” within the meaning of the statute if his business is injured as a result of direct competition with a business engaged in racketeering activity.

The North Barrington theory was refined further in

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See supra notes 27-28 & 55 and accompanying text.

See supra notes 27-28 & 55 and accompanying text.

See McClellan, supra note 6, at 142; Note, supra note 18, at 1109. Senator McClellan noted that racketeers controlled national “industries with known and respected brand names.” McClellan, supra note 6, at 142. In addition, the syndicate was found to control a national hotel chain and a large bank. Id. As one court has noted, any definition of organized crime would permit some RICO targets to “slip through the cracks because [they] might not fit comfortably into some artificial definition . . . .” Kimmel v. Peterson, 547 F. Supp. 476, 492-93 (E.D. Pa. 1983); see Mauriber v. Shearson/American Express, Inc., 546 F. Supp. 391, 396 (S.D.N.Y. 1982).

547 F. Supp. 207 (N.D. Ill. 1980).

Id. at 211.

Id. at 210-11.

Id.
Landmark Savings & Loan v. Rhoades,\(^6\) in which the District Court for the Eastern District of Michigan refused to allow a plaintiff alleging securities fraud to amend his complaint to include a RICO claim.\(^3\) The Landmark court took the North Barrington decision a step further, holding that a plaintiff must have suffered a "racketeering enterprise injury" to have standing to sue under RICO.\(^4\) Although the court asserted that a "racketeering enterprise injury" could differ from a competitive injury, little guidance was provided as to the contours of this injury.\(^5\) The court employed the similarity of section 1964(c) with section 4 of the Clayton Act\(^6\) to argue that standing under RICO, like standing under the antitrust laws, should be limited to the distinctive injury that RICO was designed to prevent, which is that type which could only be inflicted by a racketeering enterprise.\(^6\)

In Van Schaick v. Church of Scientology,\(^6\) the District Court for the District of Massachusetts rejected a strict competitive injury standard. Instead, the court held that in order to state a claim under RICO, the plaintiff must allege that she suffered commercial


\(^{63}\) Id. at 209. The securities counts in Landmark were based on allegations of fraud, churning, and unsuitability. Id. at 207.

\(^{64}\) Id. at 208.

\(^{65}\) See id. at 208-09. The court noted that "[c]ompetitive injuries and racketeering enterprise injuries [c]ould frequently overlap." Id. As an example of a racketeering enterprise injury, the court posited the situation in which the "defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise." Id. at 209. In short, the injury must be "something more or different than injury from predicate acts." Id. at 208; see infra note 73 and accompanying text; see also Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir.), cert. denied, 103 S. Ct. 177 (1982). In Cenco, the Seventh Circuit held that auditors who were subjected to civil liability for failure to detect massive fraud by corporate managers had no standing to assert a RICO claim against the corporation. 686 F.2d at 457. The court reasoned that civil RICO damages were provided for the benefit of the owners, customers, and competitors of businesses infiltrated by criminals, and not for the benefit of those used as "witting or unwitting tools" of the offenders. Id.; see Alexander Grant & Co. v. Tiffany Indus., 563 F. Supp. 35, 36-37 (E.D. Mo. 1982).


\(^{67}\) Landmark Sav. & Loan v. Rhoades, 527 F. Supp. 206, 208 (E.D. Mich. 1981); see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir.), cert. denied, 454 U.S. 893 (1981). The Landmark court noted that "[t]he victims of predicate crimes almost always have a cause of action for direct damages under federal or state law." 527 F. Supp. at 209. For an argument in favor of the competitive injury standard, see Comment, supra note 2, at 125-32.

injury.\textsuperscript{69} Thus, the court interpreted the phrase “injured in his business or property” to restrict the plaintiff class to those injured in their business activities.\textsuperscript{70} Since the plaintiff’s allegations in Van Schaick were in the nature of consumer fraud, the complaint was dismissed for failure to state a claim.\textsuperscript{71}

Other courts have employed similar theories of standing based on a “racketeering enterprise injury” to exclude RICO plaintiffs.\textsuperscript{72} The common denominator in these opinions is the rationale that Congress did not intend to provide a federal cause of action for state law violations or to preempt the securities laws; thus, RICO should provide a remedy only to those distinctively injured by a racketeering enterprise.\textsuperscript{73} Unfortunately, the cases do not make clear how this distinction is to be drawn.\textsuperscript{74}

It is submitted that these judicial glosses—the “racketeering enterprise injury,” “competitive injury,” and “commercial injury”

\textsuperscript{69} Id. at 1137. Noting that the primary purpose of RICO was to protect legitimate businesses from infiltration by organized crime, the court stated that the judiciary “should be sensitive to the statute’s commercial orientation . . . .” Id.

\textsuperscript{70} Id.

\textsuperscript{71} Id. at 1138. In a vaguely worded complaint, the plaintiff claimed treble damages for money and property which allegedly was turned over to the Church of Scientology as a result of fraud. Id. at 1136. The action was brought as a class action on behalf of all those similarly defrauded. Id. at 1135.


standing requirements—are no more appropriate than the require-
ment of proving a tie to organized crime. If such standards are ap-
plied, the direct victims of the predicate offenses may be precluded
from recovery under RICO, since they may not be engaged in busi-
nesses that are in competition with racketeer influenced business.75
An indirect victim of a pattern of racketeering activity is no more
distinctively injured by the pattern than is the direct victim.76 The
adoption of a standard that precludes direct victims from stating a
cause of action under RICO places a RICO plaintiff in a unique
position in the jurisprudence of causation in that the more indirect
his injury, the more likely he is to recover.77

Moreover, interpretation of the phrase “injured in his business
or property” to exclude consumer injuries is in contradiction to the
Supreme Court’s holding in Reiter v. Sonotone Corp.,78 in which
the Court interpreted the same phrase in section 4 of the Clayton
Act to include consumer injury.79 Indeed, there seems to be no
principled reason to read the disjunctive “or” out of the statute.80

75 See, e.g., Blakey, supra note 18, at 325-30. Professor Blakey and others have cor-
correctly noted that the direct victims of organized crime were clearly within the intended class
of beneficiaries under RICO. Id. at 348; see Strafer, Massumi & Skolnick, supra note 18, at
701-02; Note, supra note 18, at 1113-14.
1982). In Crocker, the defendants argued that the racketeering enterprise theory “does not
withstand analysis,” id. at 49, and that there is “no reasoned way to determine . . . what
type of injuries are distinct to RICO,” id. at 50.
discussion of usefulness of causation theory as liability-limiting mechanism; Pollock, The
“Injury” and “Causation” Elements of a Treble-Damage Antitrust Action, 57 Nw. U.L.
Rev. 691, 700 (1983) (indirect injury not compensable under antitrust laws); Ryu, Causation
cause and criteria necessary to establish a functional system of causation).
79 Id. at 339. The plaintiff in Reiter brought a class action on behalf of herself and all
others in the United States who had purchased hearing aids from the defendants. Id. at 335.
She alleged that her class was injured by having to pay prices artificially inflated as a result
of antitrust violations. Id. The Court held that consumer injury fell within the purview of
the Clayton Act as an injury to property. Id. at 339; see Chattanooga Foundry & Pipe
Works v. City of Atlanta, 203 U.S. 390, 396 (1906). The Chattanooga Court stated that “[a]
person whose property is diminished by a payment of money wrongfully induced is injured
in his property.” 203 U.S. at 396 (interpreting Clayton Act).
cussing the proposed interpretation of “business or property,” which would preclude con-
sumer actions as outside an intended commercial context, explained:
That strained construction would have us ignore the disjunctive “or” and rob
the term “property” of its independent and ordinary significance; moreover, it
would convert the noun “business” into an adjective. In construing a statute we
are obliged to give effect, if possible, to every word Congress used. Canons of con-
The use of the antitrust analogy to support a restrictive standing requirement also is weak. Senator McClellan, a sponsor of RICO, explicitly rejected any intention to import the complexity of antitrust law to RICO. Whereas the purpose of the antitrust laws is to protect free competition in the economy, the purpose of RICO is to eradicate organized crime. Any reservations that may be held about severely damaging an otherwise legitimate business guilty of an antitrust violation would not be relevant to the destruction of racketeering interests. RICO draws on an antitrust remedy to address a different, and indeed graver, problem. The goal of RICO is not so purely utilitarian as that of the antitrust laws. Although interference with free competition certainly is one of the problems the drafters intended to attack, it was simply a

struction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not. Congress' use of the word "or" makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business." Id. (citations omitted).

See Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir. 1983). Overreliance on the antitrust analogy is misplaced in that it confuses the methods of the statute with the objectives of the statute. By incorporating the treble damage provision, Congress "did no more than adapt an antitrust tool to the attack on organized crime." Note, supra note 18, at 1112; see infra notes 83-87 and accompanying text.


See supra notes 16 & 25-32 and accompanying text.

Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982), aff'd on rehearing, 710 F.2d 1361, 1364 (8th Cir. 1983) (en banc); Blakey & Gettings, supra note 15, at 1042; Strafer, Massumi & Skolnick, supra note 18, at 694-95. Bankrupting an antitrust violator usually would reduce competition in an industry or market, thus frustrating the purpose of the antitrust laws. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 YALE L.J. 809, 850-52 (1977); Blakey & Gettings, supra note 15, at 1042. Bankrupting a RICO violator, on the other hand, would be "completely consonant with statutory goals," Strafer, Massumi & Skolnick, supra note 16, at 695, in that it would deprive racketeers of their assets, id. Strafer, Massumi and Skolnick have aptly described the goals of RICO as purgative, as opposed to the preservative goals of the antitrust laws. Id. at 694.
part of the overall menace posed by organized crime. The objective of RICO is to rid the economy of a moral corruption that not only interferes with the free flow of goods and services, but also taints the climate of justice in our society. Nor was the objective of RICO solely to prevent the infiltration of legitimate business. While subsections (a) and (b) of section 1962 are designed to outlaw the infiltration, acquisition, and control of enterprises by criminal money or criminal methods, section 1962(c) prohibits the conduct or participation in such enterprises through criminal methods. Thus, section 1962(c) would be superfluous if RICO were limited merely to infiltration of legitimate businesses.

The examples given by courts and commentators advocating the competitive or racketeering enterprise injury theory are tenuous, and no proponent of the theory has ever explained in concrete terms the precise nature of this injury. These artificial standing requirements, it is submitted, are without adequate foundation in the statutory language or the congressional intent. Indeed, precluding the direct victims of arson, bribery, extortion, and other serious organized crime offenses would effectively emasculate the private cause of action and actively subvert congressional intent.

See, e.g., Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir. 1983). In Schacht, the Seventh Circuit correctly noted that the exercise of power by organized crime must be considered "malum in se." Id. (citation omitted). There can be no question that Congress' concern was with the effect of organized crime on society as a whole, not merely on the mob's business competition. See, e.g., Senate Hearings, supra note 33, at 278 (remarks of Sen. Pepper) (expressing concern over effects of organized crime on the poor); see id. at 445 (message from President Nixon) ("most tragic victims [of organized crime] . . . are the poor"); 116 Cong. Rec. 602 (1970) (remarks of Sen. Yarborough) (organized crime "preys primarily on the poor and the uneducated and adds further oppression to the social and economic disadvantages already borne by these people"). Indeed, after a thorough examination of the legislative history, the following conclusion seems inescapable:

Because Congress accurately perceived that workers, consumers, and poor people, as well as business competitors, are primary victims of racketeering, it would be absurd to construe RICO's civil provisions so as to deny them the ability to utilize those provisions to redress their injuries. . . . Congress . . . having so broadly defined the class of RICO victims, it is inconceivable that the legislators meant to deny civil relief for all victims but that sub-class which can show "competitive injury" in the antitrust sense.

See supra notes 11-12 and accompanying text.

See supra note 13 and accompanying text.


See, e.g., Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir. 1983); Windsor Assocs. v. Greenfeld, 564 F. Supp. 273, 279 (D. Md. 1983); D'Iorio v. Adonizio, 564 F. Supp. 222, 230-
Problems arise not when RICO is used to deliver a forceful economic blow against racketeers, but rather when RICO enters the gray areas of questionable, unethical or fraudulent business practices and transactions gone sour. In these situations, RICO conflicts with established principles of law which were carefully developed to deal with subtle and complex problems and has the potential to create disequilibrium in a manner never contemplated by Congress.

**Securities Fraud**

Since RICO includes “fraud in the sale of securities” as a predicate offense, most violations of the antifraud provisions of the securities laws can be pleaded to fall within the parameters of the statute. The commercial issuance, purchase, or sale of a security invariably will entail the use of an enterprise. In addition, if the mails or wires are used in furtherance of the fraudulent scheme, violations of the mail or wire statutes can be alleged as predicate offenses. As long as two predicate offenses and a related enterprise can be alleged, the complaint will fall within the technical
language of RICO. Accordingly, some courts have allowed plaintiffs to state claims based on sets of operative facts which essentially amount to multiple violations of the securities laws. It is submitted, however, that the wholesale escalation of ordinary securities fraud violations into RICO claims was not within the contemplation of Congress in enacting RICO. The analysis that follows illustrates the disruption that could accompany RICO's intrusion into the securities field and suggests a means of limiting RICO actions to those situations targeted by the Act and of relegating other claims to more appropriate existing remedies.

Rule 10b-5, promulgated by the Securities and Exchange Commission in 1942 under the authority of section 10(b) of the Securities and Exchange Act of 1934 (the 1934 Act), is the broadest “catch-all” antifraud provision in the securities laws and the provision most frequently utilized by civil plaintiffs. The

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97 See supra notes 6-13 and accompanying text.
99 17 C.F.R. § 240.10b-5 (1983). Rule 10b-5 provides:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
Id.
102 See, e.g., Herman & MacLean v. Huddleston, 103 S. Ct. 683, 687 (1983); Chiarella v. United States, 445 U.S. 222, 234-35 (1980); Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972). Rule 10b-5 has been the most widely litigated SEC regulation. See SEC v. National Sec., Inc., 393 U.S. 453, 465 (1969). Although the 1934 Act did not create an express right of action under section 10(b), courts have implied a private cause of action for over 35 years. See Kardon v. National Gypsum Co., 69 F. Supp. 512, 514-15 (E.D. Pa. 1946). Indeed, the Supreme Court recently has affirmed the existence of an implied cause of action under section 10(b) for conduct subject to other express civil remedies under the Securities Act of 1933 (the 1933 Act) and the 1934 Act. Herman & MacLean, 103 S. Ct. at 690.
1934 Act limits recovery to actual damages. Yet, the application of RICO to multiple violations of rule 10b-5 would automatically triple the recovery available to a plaintiff without any indication that Congress intended to supersede the securities laws. It is significant to note that when Congress extensively amended the federal securities laws in 1975, after the enactment of RICO but before its implications in the civil sphere were generally recognized, it made only minor changes in the antifraud provisions.

Some commentators have advocated that RICO be employed to circumvent limitations on private 10b-5 actions imposed by the

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104 See supra note 39 and accompanying text. Congress is currently considering a proposal that would provide treble damages for insider trading. See Insider Trading Sanctions Act of 1983, H.R. 559, 98th Cong., 1st Sess. § 2 (1983). This bill, however, expressly provides for treble damages only in actions brought by the SEC. Id. § 2(A). Moreover, the imposition of treble damages would be within the discretion of the court “in light of the facts and circumstances,” unlike the automatic treble damages available under RICO. Id.


107 Sections 15(c)(1) and 15(c)(2) of the 1934 Act (applying to broker-dealers) were amended to include municipal securities dealers, in addition to some other minor alterations. Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, 125-26 (codified at 15 U.S.C. § 78o (1982)). No alterations of the damages provisions were made. In holding that a private action under section 10(b) was not displaced by the existence of express remedies in the 1933 Act, the Supreme Court in Herman & MacLean v. Huddleston, 103 S. Ct. 683 (1983), inferred congressional approval of existing case law interpretation from Congress' decision to leave section 10(b) intact. Id. at 686-87. Similarly, in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), the Supreme Court found that Congress' failure to reject the purchaser/seller rule "argues significantly in favor of [the rule's] acceptance . . . ." Id. at 753; see also Blau v. Lehman, 368 U.S. 403, 413 (1962).
In particular, they have argued that RICO may be employed by plaintiffs who otherwise would be denied standing by the purchaser-seller rule.\textsuperscript{108} In denying a challenge to the purchaser-seller rule in \textit{Blue Chip Stamps v. Manor Drug Stores},\textsuperscript{110} the Supreme Court considered the problem of vexatious litigation in the securities field.\textsuperscript{111} Expansion of the plaintiff class, the Court found, would greatly increase the risk of strike suits instituted only for their settlement value.\textsuperscript{112} The Court determined that the danger of vexatious litigation in rule 10b-5 actions was “different in degree and in kind”\textsuperscript{113} from that in ordinary litigation, and that relaxation of the rule would encourage plaintiffs to seek “largely conjectural and speculative” awards.\textsuperscript{114} These dangers could only be enhanced if RICO’s treble damages and liberal standing features were available for violations of 10b-5.\textsuperscript{115} Furthermore, insincere plaintiffs hoping to coerce settlement through a strike suit will have the additional unwarranted advantage of being able to label the defendant publicly as a racketeer.\textsuperscript{116}

\begin{footnotes}
\footnotetext[108]{\textsuperscript{ See, e.g., Long, supra note 13, at 205-06; Note, supra note 18, at 1115-18; Comment, supra note 18, at 942-43. At least one commentator has pointed out that using mail or wire fraud as the predicate offenses will allow a plaintiff to avoid fitting the basis of the suit within the technical definition of security. See Long, supra note 13, at 205 n.31.}

\footnotetext[109]{\textsuperscript{ See Long, supra note 13, at 204-05; Note, supra note 18, at 1115; Comment, supra note 18, at 943-44. The purchaser/seller rule limits standing under rule 10b-5 to those plaintiffs who actually purchased or sold the security during the relevant time period. Comment, supra note 18, at 943-44.}

\footnotetext[110]{\textsuperscript{ 421 U.S. 723, 731, 755 (1975). The purchaser/seller rule was first enunciated in Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir.), cert. denied, 343 U.S. 956 (1952).}}

\footnotetext[111]{\textsuperscript{ 421 U.S. at 737-49. The Court noted that expanded civil liability “will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers . . . .” Id. at 739 (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring), cert. denied, 404 U.S. 1005 (1971)).}}

\footnotetext[112]{\textsuperscript{ See supra note 47 and accompanying text.}}

\footnotetext[113]{\textsuperscript{ Id. at 739.}}

\footnotetext[114]{\textsuperscript{ Id. at 734-35.}}

\footnotetext[115]{\textsuperscript{ In \textit{Blue Chip Stamps}, the Supreme Court emphasized the idea of balance in the securities field, quoting Judge Hufstedler’s dissent in the court of appeals: “The purchaser-seller rule has maintained the balances built into the congressional scheme by permitting damage actions to be brought only by those persons whose active participation in the marketing transaction promises enforcement of the statute without undue risk of abuse of the litigation process and without distorting the securities market.” Id. at 739 (quoting Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136, 147 (9th Cir. 1973) (Hufstedler, J., dissenting), rev’d, 421 U.S. 723 (1975)). It is submitted that these balances could be severely disrupted by the wholesale incorporation of RICO treble damages and liberal standing features into the securities field.}}
\end{footnotes}
Much emphasis is placed on interpreting RICO in a manner consistent with its plain language. If, however, a literal interpretation of a statute would lead to absurd results, the judiciary is not compelled to afford it a literal interpretation.\textsuperscript{117} Indeed, the Supreme Court has recognized that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."\textsuperscript{118} This maxim is particularly appropriate where there is extant a body of law designed specifically to deal with fraud in the sale of securities.\textsuperscript{119}

\textsuperscript{117} R. Dickerson, The Interpretation and Application of Statutes 232 (1975); see United States v. Turkette, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided" in interpreting RICO). In Guseppi v. Walling, 144 F.2d 608 (2d Cir. 1944), aff'd sub nom. Gemsco, Inc. v. Walling, 324 U.S. 244 (1945), Judge Learned Hand explained the necessity of examining the spirit of the statute:

There is no surer way to misread any document than to read it literally . . . . As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

\textit{Id.} at 624 (Hand, J., concurring).

\textsuperscript{118} Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892), quoted in United Steelworkers v. Weber, 443 U.S. 193, 201 (1979). In Church of the Holy Trinity, an ordained minister from England contracted with an American church to serve as its rector and pastor. 143 U.S. at 457-58. This contract was in apparent violation of a statute that prohibited the importation of aliens under contract "to perform labor or service of any kind . . . ." \textit{Id.} at 458. Although the minister clearly fell within the statutory language and without any of the statutory exceptions, the Supreme Court held that this type of contract was not within the contemplation of Congress in enacting the statute and thus the act could not be enforced against the church. \textit{Id.} at 472; see United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940). The American Trucking Court stated: "Frequently,. . . even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the] Court has followed that purpose, rather than the literal words." 310 U.S. at 543 (footnote omitted) (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)). See generally Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 COLUM. L. REV. 1299, 1301-02 (1975).

\textsuperscript{119} See Marine Bank v. Weaver, 455 U.S. 551, 558-59 (1982). In Marine Bank, the Supreme Court held that a certificate of deposit with a 6-year maturity was not a "security" within the meaning of the federal securities laws. \textit{Id.} at 559; see 15 U.S.C. §§ 77b(1), 78c(a)(1) (1982). The presence of extensive federal banking regulation was an important factor considered in declining to afford the plaintiff the protection of the federal securities laws. See 455 U.S. at 558-59. Indeed, the Court stated: "It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws." \textit{Id.} at 559.

In Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1 (1976), the Supreme Court considered the issue of whether the Environmental Protection Agency (EPA) had authority under the Federal Water Pollution Control Act (FWPCA) to regulate the discharge of certain types of radioactive materials into navigable waters. \textit{Id.} at 3-4. Although
Therefore, it is suggested, a complaint which purports to state a claim under RICO but alleges only multiple acts of securities violations as the predicate offenses, should be governed solely by the securities laws, and, in accordance with congressional intent, a plaintiff should be limited to the appropriate remedies under that body of law. Consistent with this analysis, a complaint which couples a securities violation with a different predicate offense, for example, bribery or extortion, should survive a motion to dismiss. The latter complaint, it is suggested, indicates the type of racketeering activity with which Congress was concerned when RICO was passed, while the former merely allows plaintiffs to circumvent a jurisprudential system constructed specifically for the purpose of regulating the sale of securities. Moreover, the requirement that a securities violation be accompanied by a different predicate offense in order to state a claim under RICO can be applied to future factual settings without the subjectivity associated with the existing judicial restrictions and without the same risks of contradictory and inequitable results.

The present federal securities laws are the product of 50 years of thoughtful judicial, legislative, and administrative development.

"radioactive materials" were specifically included within the definition of "pollutants" in the FWPCA, see 33 U.S.C. § 1362(6) (1976), the Court held that Congress had intended that the regulation of the discharge of these radioactive materials be left with the Nuclear Regulatory Commission (NRC), 426 U.S. at 25. Thus, the Court exempted from EPA regulation under the FWPCA the discharge of those types of radioactive materials regulated by the NRC. 426 U.S. at 25. To have adopted the apparent "plain meaning" of the statute to include [radioactive] materials under the FWPCA would have marked a significant alteration of the pervasive regulatory scheme . . . . Far from containing the clear indication of legislative intent that we might expect before recognizing such a change in policy, . . . the legislative history reflects, on balance, an intention to preserve the pre-existing regulatory plan.

Id. at 24 (citations omitted). The Court also noted that the House had rejected an amendment that would have accomplished the same result as a literal reading of the statute. Id. at 23 n.19; see 119 Cong. Rec. 42,615-16 (1973); supra note 105-07 and accompanying text.

The proposed analysis is to be based on an examination of the operative facts alleged in the complaint. Thus, a plaintiff who alleges predicate acts of mail or wire fraud based on the same fraudulent securities scheme will not be permitted to bootstrap his securities claim to a RICO claim on the basis of the mail or wire fraud allegation. See infra notes 140-60 and accompanying text. However, nothing suggested here would preclude a plaintiff from including a state common-law fraud claim under the pendent jurisdiction of the court and recovering punitive damages therefor if the state law so provides. See, e.g., Nye v. Blyth Eastman Dillon & Co., 588 F.2d 1189, 1200 (8th Cir. 1978); Coffee v. Permian Corp., 474 F.2d 1040, 1044 (5th Cir.), cert. denied, 412 U.S. 920 (1973); Evans v. Kerbs & Co., 411 F. Supp. 616, 624 (S.D.N.Y. 1976).
Allowing treble damages and expanding the class of potential plaintiffs through RICO would frustrate carefully considered policy decisions in direct contravention of legislative intent without any corresponding impact on the targeted activity, organized crime.\textsuperscript{121} Therefore, unless elements which go beyond securities violations can be alleged, the courts should restrict a plaintiff’s claim to the appropriate securities doctrines and remedies, and decline to consider a RICO claim.

An issue related to the use of RICO in conventional securities fraud cases is the employment of RICO in the context of a hostile tender offer. Since one of the primary objectives of RICO is to prevent the infiltration of legitimate businesses by organized crime, many legitimate businessmen who find themselves managing a corporation whose stock is being acquired by a hostile entity have responded by filing RICO actions in an attempt to stave off a takeover.\textsuperscript{122} If a plaintiff can prove that the funds used to finance the

\textsuperscript{121} See supra notes 24-40 and accompanying text. It is submitted that a statute explicitly designed to curb the ravages of organized crime is ill-equipped for the complex and often facially ambiguous fact situations that typically fall under Rule 10b-5. Indeed, Rule 10b-5 has been interpreted “so loosely that it is closer to unfairness than to what either lawyers or laymen usually think of as fraud.” 1 A. Bromberg & L. Lowenfels, Securities Fraud & Commodities Fraud § 1.1, at 1:5 (1983); see also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 744-45 (“the typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable”). It may be suggested that insider trading, for example, seldom rises to a level of perniciousness equivalent to that of murder, arson, extortion, or drug trafficking.


Illustrative of the use of RICO in a takeover battle is Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983). In Dan River, Icahn, a prominent arbitrageur, had acquired more than 5% of Dan River’s stock and had accordingly filed the schedule 13D disclosure statement required by section 13(d) of the 1934 Act, 15 U.S.C. § 78m(d)(1) (1982). 701 F.2d at 280. Icahn’s 13D statement indicated that he intended to obtain control of Dan River or to sell the shares if he received an acceptable offer. Id. at 280-81. Dan River countered by filing suit, basing its complaint on securities violations and a RICO claim, in addition to pendent state claims. Id. at 281-82. The gravamen of the RICO complaint was Icahn’s use of funds obtained from the Bayswater Realty & Capital Corporation. Id. at 289. The plaintiff alleged that Bayswater fraudulently and unlawfully failed to register as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-8 (1982), see 701 F.2d at 289-90, and, thus, Bayswater’s employment by Icahn in the acquisition was unlawful, id. at 289. Consequently, according to Dan River, the funds derived from Bayswater were obtained as the result of a pattern of racketeering activity. Id. at 290. Dan River also alleged that Icahn’s statement in his 13D filing that he would sell at an acceptable price or propose a
stock purchases were acquired through a pattern of racketeering activity, he will be able to state a claim under RICO. The funds need not be traced directly to the alleged racketeering activity, but, it has been held, need only have “allowed or facilitated” the defendant's proposed acquisition. In addition, if a plaintiff is able to allege that the would-be acquirer committed two or more predicate acts of securities or mail fraud in connection with the offer, for example, two allegedly fraudulent misstatements in SEC filings, he may be able to state a RICO claim.

The usefulness of alleging a RICO claim in the midst of a battle for corporate control cannot be underestimated. The ability to label a would-be acquirer publicly as a racketeer can prove to be a potent defensive tactic. Perhaps more importantly, a RICO charge has the potential to expand greatly the scope of discovery available to a plaintiff. Since the underlying predicate offenses may have occurred as early as 10 years prior to the litigation, a defendant may be required to reveal to its adversary every aspect of its business within that 10-year period. Moreover, although

tender offer was extortionate. Id. Dan River moved for a preliminary injunction, which the district court granted in part, sterilizing Icahn’s stock in the plaintiff. See id. at 282. On appeal, the Fourth Circuit Court of Appeals reversed, holding that Dan River had not demonstrated the likelihood of success on the underlying securities counts or the RICO claims. Id. at 290.


See supra note 47 and accompanying text. It may be suggested that, although securities lawyers and arbitrageurs may be worldly enough to ignore the pejorative aspects of a “racketeering” charge, the investing public may not be so sophisticated. It also may be argued that the ease with which a public racketeering charge can be made undermines one of the major objectives of the securities laws: public confidence in the capital markets.


Id; see 18 U.S.C. § 1961(5) (1982); supra note 6 and accompanying text. Under the liberal discovery philosophy of the Federal Rules of Civil Procedure, a party generally may obtain discovery of all non-privileged information that “appears reasonably calculated to
the law still is unsettled as to the availability of equitable relief under RICO, a plaintiff also may be able to obtain a preliminary

lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1); see 4 J. Moore & J. Lucas, Moore’s Federal Practice ¶ 26.56[1] (2d ed. 1983). Thus, in the case of a large, publicly held corporation, RICO presents the possibility for the discovery of enormous amounts of material relating to almost all of a defendant’s business activities over a 10-year period. Clearly, the potential for vexation inherent in such an endeavor can in itself serve as an additional weapon with which to threaten a defendant.

See, e.g., Trane Co. v. O’Connor Sec., 718 F.2d 26, 29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983). There is no express mention of private injunctive relief in RICO. Section 1964(a) of title 18 provides the federal courts with jurisdiction to grant equitable relief. 18 U.S.C. § 1964(a) (1982). Section 1964(b) authorizes the Attorney General to institute proceedings under section 1964. Id. § 1964(b). Section 1964(c), however, speaks only of a private right of action for treble damages. Id. § 1964(c).


Professor Blakey has asserted that private equitable relief is available, citing the proposition that a grant of a right to sue conveys the availability of “all necessary and appropriate relief.” Blakey & Gettings, supra note 15, at 1037-38 & n.133 (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969), and Bell v. Hood, 327 U.S. 678, 684 (1946)); see also Blakey, supra note 18, at 330-41. He also found significant the fact that the damages clause was preceded by “and,” rather than “to.” Blakey, supra note 18, at 332. However, in the only published opinion to date to decide the issue directly, Kausal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983), the District Court for the Northern District of Illinois forcefully rejected the possibility of private injunctive relief. Id. at 581-84. Describing Professor Blakey’s argument as “bizarre and wholly unconvincing as a matter of plain English,” the court declined to imply a private equitable remedy. Id. at 582. Noting that jurisdiction, cause of action, and relief are distinct concepts, the court determined that, by negative implication of the statute, private parties were not granted the power to invoke the court’s equitable jurisdiction. Id. at 582-84. It is submitted that this holding is a correct interpretation of the statute. Although the analogous antitrust laws provide a specific grant of equitable remedies, see 15 U.S.C. § 26 (1982), Congress rejected amendments that would have explicitly granted this right, see, e.g., S. 13, 93rd Cong., 1st Sess. § 1(a)(4), 119 Cong. Rec. 10,319-21 (1973); S. 1623, 91st Cong., 1st Sess. § 3(c), 115 Cong. Rec. 6996 (1969). In addition, recent Supreme Court decisions militate against implying a remedy in a complex statutory system in the absence of “strong indicia” of congressional intent. See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1, 14-15 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979). For an examination of the legislative history regarding private equitable relief, see Strafer, Massumi & Skolnick, supra note 18, at 712-13. Strafer, Massumi and Skolnick conclude that the legislative history “does not shed much light on whether Congress intended to provide broad, equitable relief for private plaintiffs.” Id. at 712.
or permanent RICO injunction forestalling the takeover attempt. Thus, the temptation to file a RICO claim in response to a hostile tender offer or stock acquisition is apparent.

While it is recognized that RICO may have some application in certain corporate takeovers,\(^\text{130}\) it is submitted that the use of RICO in a typical hostile stock acquisition should be carefully circumscribed because of the potential for conflict within the existing body of securities law and regulation. Indeed, the argument that Congress had no intention of significantly altering the existing securities laws when it enacted RICO\(^\text{131}\) is even more compelling in the context of tender offers. Just 2 years before the enactment of RICO, Congress passed comprehensive legislation, the Williams Act,\(^\text{132}\) designed specifically to deal with abuses in corporate tender offers.\(^\text{133}\) In enacting RICO, “Congress was out to attack the prob-

\(^{130}\) See infra note 138 and accompanying text.

\(^{131}\) See supra note 39 and accompanying text.


\(^{133}\) 15 U.S.C. §§ 78m(d)(E), 78n(d)-(f) (1982); see H.R. REP. No. 1711, 90th Cong., 2d Sess. 1, reprinted in 1968 U.S. Code Cong. & Ad. News 2811, 2811. Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e) (1982), prohibits any misstatement or omission of material fact, and the use of any fraudulent or manipulative act or practice in connection with any tender offer. Id. Like other provisions of the 1933 and 1934 Acts, the Williams Act seeks to protect investors and shareholders through a policy of full disclosure. See H.R. REP. No. 1711, 90th Cong., 2d Sess. 1, reprinted in 1968 U.S. Code Cong. & Ad. News 2811, 2811. In order to ensure investor protection against the myriad of potential abusive tactics that would be developed, Congress instructed the SEC to adopt rules and regulations to “define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.” 15 U.S.C. § 78n(e). Thus, Congress envisioned that the SEC would develop a comprehensive regulatory scheme to ensure investor protection in connection with tender offers. The SEC has accordingly promulgated regulations that go far beyond the prevention of what would be considered criminal schemes to defraud. See, e.g., 17 C.F.R. § 240.14e-1(a) (1983) (time limitation on withdrawal of offer); id. § 240.14e-1(b) (restricting increases in consideration); id. § 240.14e-2(a) (requiring that target company take public position on offer); 1976-1977 Fed. Sec. L. Rep. (CCH) ¶ 80,659, at 86,692 (1976) (proposal that failure to provide shareholder list on demand would constitute a “fraudulent, deceptive and manipulative act or practice”). Moreover, in some cases, the Williams Act has been construed so broadly that one court has expressed the fear that “virtually every defensive action by an offeror or a target company, or their lawyers, in connection with a tender offer, could conceivably satisfy [a] broad test of ‘manipulative’ conduct . . . .” Data Probe Acquisition Corp. v. Datatab, Inc., 568 F. Supp. 1538, 1550 (S.D.N.Y.) (citing Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982)), rev’d, 722 F.2d 1 (2d Cir. 1983).

Although the proper scope of the Williams Act is still a subject of some controversy, compare Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 377 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982) (granting of lock-up options held to be violative of the Act) with Buffalo Forge, Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir. 1983) (Marathon found to be an unwarranted extension of the Act), it is clear that much of the conduct deemed unlawful
lem of organized crime, not the problems of corporate control and risk arbitrage.”134 Therefore, it is urged that an analysis similar to that suggested above135 be employed by the courts in assessing the validity of a RICO infiltration claim. This analysis should focus on the underlying predicate offenses alleged to constitute the pattern of racketeering activity that was employed to acquire a corporate interest or from which the allegedly “tainted” funds were derived.136 If the pattern consists of no more than securities violations, the relevant securities remedies should be the plaintiff’s sole redress.137 If, on the other hand, the pattern of racketeering activity includes offenses that go beyond the scope of the securities laws, the RICO claim should stand.138 This approach would aid in deterring the potential abuse of RICO as yet another reflexive defensive tactic in a battle for corporate control by confining RICO’s sanctions to the type of infiltration targeted by Congress,139 while

under the Williams Act is quite far removed from the pernicious, organized criminal conduct targeted by RICO, see, e.g., Mobil, 669 F.2d at 371-73; Data Probe, 568 F. Supp. at 1547-48 (Williams Act protects investors not only against “devices designed to defraud or misleadingly to manipulate prices,” but also against “strategies that unduly pressure the stockholder or impede the tender offer process”).


135 See supra notes 120-21 and accompanying text.

136 See supra notes 11-13 & 120-21 and accompanying text.

137 See supra notes 120-21 and accompanying text. One commentator has noted the danger of allowing takeover targets to state a RICO claim whenever two misstatements in an SEC filing can be alleged:

There probably has not been a single instance of a hostile tender offer case in which the target company could not have made a . . . claim of alleged false statements arising from S.E.C. filings, and if the reporting requirements of the S.E.C. can be bootstrapped into “racketeering activity,” then the board rooms of corporate America will be peopled with more “racketeers” than Las Vegas and Atlantic City combined or than in Chicago in its heyday.

Weinberg, Mother of God, is this the end of Rico?, 69 A.B.A. J. 130, 130 (1983).

138 If a plaintiff were able to allege that the defendant engaged in extortion or bribery in connection with the offer, a RICO claim would stand. See infra notes 156-60 and accompanying text.

139 Illustrative of the abusive employment of RICO in the framework of a hostile tender offer is Hanna Mining Co. v. Norcen Energy Resources Ltd., 1982 Fed. Sec. L. Rep. (CCH) ¶ 98,742, at 93,733 (N.D. Ohio 1982). Faced with a hostile tender offer by Norcen Energy Resources Ltd. (Norcen), Hanna Mining Company (Hanna) filed an action to enjoin the tender offer based on, inter alia, a RICO claim predicated on alleged securities fraud. Id. A preliminary injunction was granted but, while the appeal to the Sixth Circuit was pending, the parties entered into a settlement agreement on substantially the same terms as those
allowing the statute to retain its vitality as a shield against criminal infiltration.

**COMMON LAW FRAUD**

Until the enactment of RICO, there was no private cause of action under the federal mail or wire fraud statutes.\(^{146}\) Victims of common-law frauds committed through the use of the mails or wires, in the absence of some other jurisdictional predicate, were limited to state remedies. In recent years, however, as a result of the growing awareness of the ease with which common-law frauds could be transformed into RICO actions, plaintiffs in increasing numbers have opted to pursue a treble damages remedy in federal court on the basis of predicate allegations of mail or wire fraud.\(^{144}\) The analysis that follows rejects an interpretation of RICO that would encompass virtually all commercial fraud in favor of a narrower approach more consistent with accepted principles of federal-state balance.

The mail and wire fraud statutes are *in pari materia*, so the cases interpreting each apply to the other.\(^{142}\) Two elements are necessary to state a violation of the federal mail fraud statute: a scheme to defraud,\(^{4}\) and the use of the mails to carry out the

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\(^{144}\) See, e.g., Morosani v. First Nat'l Bank, 703 F.2d 1220, 1221-22 (11th Cir. 1983); Bennett v. Berg, 686 F.2d 1053, 1052 (8th Cir. 1982), aff'd on rehearing, 710 F.2d 1361 (8th Cir. 1983) (en banc); Kaushal v. State Bank of India, 556 F. Supp. 576, 580 (N.D. Ill. 1983).


\(^{4}\) United States v. Lebovitz, 669 F.2d 894, 895-96 (3d Cir.), cert. denied, 456 U.S. 929 (1982); DeMier v. United States, 616 F.2d 366, 369 (6th Cir. 1980). A scheme to defraud requires a specific intent to defraud. See United States v. Keane, 522 F.2d 534, 544 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); see also United States v. Dixon, 536 F.2d 1388, 1399 n.11 (2d Cir. 1976) (some harm or injury must be intended). The scheme to defraud element, however, has been construed expansively, see, e.g., Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958) (scheme to defraud is measured by standard "of moral uprightness, of fundamental honesty, fair play
Each use of the mails is a separate violation, even if there is only one scheme to defraud. Therefore, as long as a related enterprise can properly be pleaded, two mailings incident to any essential element of the scheme should be sufficient to bring the scheme under section 1962(c). The potential is obvious, then, for RICO to swallow up state common-law fraud, thereby placing a substantially greater burden on the federal courts. It is suggested that Congress had no intention of usurping the states' traditional role in this area by providing federal jurisdiction for "garden variety" claims.

The fact that Congress' primary target in enacting RICO was organized crime is beyond question. The fact that fraud is a recognized technique in the operations of organized crime is equally clear. However, from these facts and from the legislative history, it cannot be inferred that Congress intended to allow into federal court nearly every business dispute in which two acts of deceit can be alleged. Such a consequence, it is suggested, is revolutionary and right dealing"), and includes schemes designed to deprive their victims of intangible interests, see, e.g., United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir.) (loss of right to honest services), cert. denied, 447 U.S. 928 (1980); United States v. Louderman, 576 F.2d 1383, 1387-88 (9th Cir.) (loss of right to privacy), cert. denied, 439 U.S. 896 (1978). The broad reading given the wire fraud statute has moved one dissenter to assert that the statute was being read "to embody a federal law of fiduciary obligations, including an undefined duty of yet further disclosure, enforceable by the sanctions of the criminal law." United States v. Siegel, 717 F.2d 9, 24 (2d Cir. 1983) (Winters, J., dissenting in part, concurring in part); cf. United States v. Vona Barta, 635 F.2d 999, 1001 (2d Cir. 1980) (describing mail and wire fraud statutes as "seemingly limitless"), cert. denied, 450 U.S. 998 (1981).

See, e.g., Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Lebovitz, 669 F.2d 894, 896 (3d Cir.), cert. denied, 456 U.S. 929 (1982). It is sufficient for mail fraud if "the use of the mails merely furthers the scheme," United States v. Adamo, 534 F.2d 31, 36 (3d Cir.) (credit card fraud), cert. denied, 429 U.S. 841 (1976); see United States v. Giovengo, 637 F.2d 941, 944-45 (3d Cir. 1980) (wire fraud), cert. denied, 450 U.S. 1032 (1981), and that such use was reasonably foreseeable, Pereira, 347 U.S. at 8-9.


See, e.g., Tarlow, supra note 18, at 304. Tarlow states that "since virtually all business transactions involve the use of the mails or telephones, a combination of RICO and mail fraud could federalize all torts involving business transactions." Id.

See supra notes 24-40 and accompanying text.

See supra notes 24-32 and accompanying text.

See Blakey, supra note 18, at 341 & n.233.

Although fraud was mentioned in the legislative history, it always was referred to in
and unintended. The courts have always been wary of extending federal jurisdiction in the absence of an express congressional directive.152 Indeed, the Supreme Court has stated that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."153 Courts have on

the context of organized crime, and usually in conjunction with other offenses. See, e.g., Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970) (Statement of Findings and Purpose); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) (describing fraudulent use by organized crime of stolen securities to obtain loans). Professor Blakey implicitly acknowledges that a broad reading of RICO will encompass nearly all commercial fraud but avers that this result was Congress' intent. See Blakey, supra note 18, at 341. To support this argument, Blakey cites to the addition of fraud to the statute, id. at 268, the overruling of objections to RICO's breadth, see id. at 271-73, 276-79, and the proposition that the absence of specific legislative history should not negate the general language of the statute, id. at 248 n.33 (citing Albernaz v. United States, 450 U.S. 333, 341 (1981), and Standefer v. United States, 447 U.S. 10, 20 n.12 (1980)). However, while it is clear that Congress intended a greater federal involvement in traditional state police functions, see supra notes 27-30 and accompanying text, and was well aware that RICO would affect more than traditional organized crime, see supra notes 33-37 and accompanying text, there is absolutely no indication that Congress recognized that they were allowing virtually all civil fraud claims into federal courts, see Moss v. Morgan Stanley Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y.), aff'd on other grounds, 719 F.2d 5 (2d Cir. 1983). This conclusion is supported by the fact that the bar at large did not seem to recognize the implications of RICO until the late 1970's, several years after the enactment of RICO. See supra note 108 and accompanying text. It is suggested that to effect such a radical change in federal jurisprudence, a more specific and positive manifestation of legislative intent should be required.


153 United States v. Bass, 404 U.S. 336, 349 (1971); see also Rewis v. United States, 401 U.S. 808, 812 (1971). Although Bass was decided in the criminal context, the same principle also has been applied in civil cases. See, e.g., Santa Fe Indus. v. Green, 430 U.S. 462, 479
more than one occasion interpreted statutes in apparent contradiction to their plain language in order more closely to effectuate congressional intent. Although Congress realized that RICO would prompt more federal involvement in areas that traditionally had been within the state's police power, there is no indication in the legislative history that they intended to provide a private right of action for mail or wire fraud violations.

(1977); Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940). The Apex Court stated that "[a]n intention to disturb the [federal-state] balance is not lightly to be imputed to Congress." 310 U.S. at 513 (interpreting Sherman Act).

See, e.g., United Steelworkers v. Weber, 443 U.S. 193, 201 (1979); Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 10 (1976); United States v. Enmons, 410 U.S. 396, 399-400 (1973); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). In United Steelworkers, the Supreme Court considered whether the prohibition against "discrimination . . . because of . . . race" contained in subsections (a) and (d) of section 703, title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (d) (1976), applied to voluntary, private affirmative action programs that discriminate in favor of minorities. 443 U.S. at 201. Despite the absence of any qualifying language in the statute, Justice Brennan, writing for the majority, concluded that, when "read against the background of the legislative history . . . and the historical context from which the Act arose," it was clear that the prohibition against discrimination on the basis of "race" did not apply in this instance. Id. at 201-02. Justice Blackmun, in his concurrence, acknowledged that the legislative history did not clearly support this holding, but concurred in the Court's result on the basis of "practical and equitable" considerations that Congress might not have perceived. Id. at 209, 213 (Blackmun, J., concurring); see also supra notes 117-19 and accompanying text.

See supra note 40 and accompanying text; cf. Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud") (citing Great W. Bank & Trust v. Kotz, 532 F.2d 1252, 1253 (9th Cir. 1976), and Bellah v. First Nat'l Bank, 495 F.2d 1109, 1114 (5th Cir. 1974)). In addition to the added burden on the federal judiciary, there are policy reasons in favor of allowing business disputes to be governed by state law. State fraud law has greater flexibility than a strict treble damages formula. See, e.g., Hunter Contracting Co. v. Sanner Contracting Co., 16 Ariz. App. 239, 245-46, 492 P.2d 735, 741-42 (1972) (punitive damages not necessarily available simply because action sounds in fraud; there must be gross fraud or malice); Boise Dodge, Inc. v. Clark, 92 Idaho 902, 907, 453 P.2d 551, 556 (1969) (liability for punitive damages does not hinge on whether action sounded in tort or in contract); Wedeman v. City Chevrolet Co., 278 Md. 524, 533, 366 A.2d 7, 13 (1976) (if aggravated circumstances evincing wanton or reckless disregard for the rights of others are present, then jury has discretion to award punitive damages). Generally, punitive damages are available only for gross fraud involving high moral culpability or as a means of deterrence for frauds aimed at the general public. Axelrod v. CBS Publications, 185 N.J. Super. 359, 370-71, 448 A.2d 1029, 1029 (App. Div. 1982); see Bryan Constr. Co. v. Thad Ryan Cadillac, Inc., 300 So. 2d 444, 449 (Miss. 1974) (punitive damages allowed if fraud grossly unjustifiable); Walker v. Sheldon, 10 N.Y.2d 401, 405, 179 N.E.2d 497, 498-99, 223 N.Y.S.2d 488, 491 (1961). Rigid mathematic formulas are seldom employed. See, e.g., Dodge City Motors, Inc. v. Rogers, 16 Ariz. App. 24, 27, 490 P.2d 853, 854-56 (1971) ($500 actual, $10,000 punitive); Fox v. Wilson, 211 Kan. 563, 565-68, 507 P.2d 252, 263, 268 (1973) ($176,269.78 actual damages, $5000 punitive damages); Bowen v. Johnson, 252 S.C. 423, 424-25, 166 S.E.2d 766, 767 (1969) ($35000 in punitive damages awarded for fraud in connection with $135.24 bill). In some jurisdictions, evidence of the defendant's financial worth may be considered. See, e.g.,
It is urged, therefore, that courts considering RICO claims examine the operative facts alleged in a RICO complaint for predicate acts which go beyond violations of the mail or wire fraud statutes. Plaintiffs who can prove no more than predicate violations of these statutes should be relegated to existing remedies under state law. If, however, a plaintiff is able to prove predicate offenses other than simple fraud, for example, arson or extortion, he would be able to recover on his RICO claim. Under this approach, RICO would still provide a federal remedy for frauds in which violence was used or threatened, frauds connected with labor racketeering, frauds connected with bribery, and other types of frauds connected with RICO predicate offenses. Such an approach, it is submitted, would exclude from the ambit of RICO only those ordinary business frauds which, although unquestionably reprehensible, were not within the realm of legislative contemplation when RICO was enacted.

CONCLUSION

Courts have imposed certain restrictive judicial glosses on claims brought under section 1964(c) which run contrary to the Legislature's intent and the purpose of the statute, and which in-

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166 The American Bar Association has recommended a restriction on RICO actions similar to that suggested herein. See ABA: REPORT TO THE HOUSE OF DELEGATES, SECTION ON CRIMINAL JUSTICE 7-9 (1982). The ABA recommended that to find a pattern of racketeering activity, at least one offense other than mail or wire fraud, interstate transportation of stolen goods, or the sale or receipt of stolen goods must exist. Id. at 8.

167 Among the possible violent predicate offenses sufficient to state a RICO claim would be "any act or threat involving murder, kidnaping, . . . arson, robbery, [or] extortion" that is punishable under state law by imprisonment for more than 1 year. 18 U.S.C. § 1961 (1)(A) (1982). In addition, violent federal offenses under 18 U.S.C. § 1951 (1982) (relating to interference with commerce through actual or attempted robbery, extortion or physical violence), would be covered.


169 State law bribery offenses punishable by 1 year or more in prison serve as predicate violations under RICO, see 18 U.S.C. § 1961(1)(A) (1982), as do federal offenses indictable under sections 201 (bribery of public officials and witnesses) and 224 (sports bribery), see id. § 1961(1)(B) (1982).

170 Other possible predicate acts include, inter alia, narcotics dealing, see 18 U.S.C. §§ 1961(1)(A), (D) (1982), counterfeiting, id. §§ 471-473, and gambling offenses, id. §§ 1084, 1085, 1953, 1955; see id. § 1961(1).
correctly preclude recovery to large segments of the class intended to be benefitted by RICO. These restrictions should be rejected. Congress' intent was not drastically to change existing securities law nor to preempt state common-law fraud. Thus, actions which fall within the technical scope of RICO, but in essence state nothing more than securities violations, should be governed solely by the relevant securities laws. Similarly, suits which rely merely on two or more common-law frauds conducted through an enterprise, albeit with the use of the mails or the wires, should be dismissed as outside the scope of the statute. If, however, other acts proscribed by section 1961(1) are included in the complaint, the complaint should stand because it exhibits a pattern of racketeering activity as intended by the statute. This approach would ensure that existing statutory, regulatory, and common-law systems concerning fraud retain their validity, while preserving an avenue of redress for those Congress intended to protect, the direct victims of professional criminals.

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