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"[H]undreds of private RICO actions seeking treble damages have been filed in federal courts against legitimate businesses and individuals based on incidents bearing no relation to the kind of organized criminal activity RICO was intended to prevent . . . . Usually such cases involve nothing more than garden variety disputes over the interpretation of statutes or contracts.[1]"

"[A]lmost every day we read of trusted, credible and—if you will, "legitimate"—individuals and businesses who have betrayed that trust, credibility and legitimacy through fraudulent conduct. We do not mean Mafia-dominated unions or businesses. We mean the likes of a respected banker, a governor, a court system, industrial giants and securities brokerages [sic] firms of high stature. Their criminal conduct did not involve momentary lapses in judgment but carefully conceived programs, premeditated schemes to cheat, thieve and gain unfair economic and competitive advantage and benefit."[2]

Justice Frankfurter once said: "It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in."[3] So, too, with civil RICO, legal perspectives obviously reflect directional biases. The purpose of this article is

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1. Statement of the American Property and Casualty Insurance Industry Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 5 (July 24, 1985) (statement delivered by I. Nathan) [hereinafter cited as I. Nathan].

2. Statement of P. Feigin, Chairman, Special Projects Comm., Enforcement Section, North American Securities Administration Ass'n, Before the Senate Comm. on the Judiciary 12 (July 31, 1985) [hereinafter cited as P. Feigin].

3. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

to examine the different perspectives on RICO abuse and evaluate whether statutory reform is in order.

In recent years, federal courts have experienced an increase in civil suits seeking treble damages and attorney's fees pursuant to RICO, the federal statute enacted as title IX of the Organized Crime Control Act of 1970.[4] These actions, often alleging commercial fraud or related misconduct, have been filed against a broad spectrum of well-established commercial enterprises.[5] Since RICO was conceived as part of an overall attack against organized crime, its use against "legitimate" businesses has generated considerable controversy.[6]

Predictably, most of the business community maintains that Congress did not intend an anti-racketeering statute to apply to legitimate businesses—especially given RICO's potential for abuse of process.[7] In response, RICO advocates argue that other-

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4. Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1982)). "RICO" is an acronym for the heading of title IX, "Racketeer Influenced and Corrupt Organizations." RICO's civil remedy 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." 18 U.S.C. § 1964(c) (1982). For statistics on the increasing use of RICO, see *infra* notes 34 and 38.

5. Organizations sued under RICO include Shearson/American Express, Merrill Lynch, Price Waterhouse, American Broadcasting Company, Citibank, General Motors, Lloyd's of London, Allstate Insurance Company, Prudential Life Insurance Company of America, and State Farm Fire and Casualty Insurance Company. I. Nathan, *supra* note 1, at 6 & app.

6. *See infra* note 77 and accompanying text.

7. For example, Securities and Exchange Commission Member Charles L. Marinaccio testified that

> RICO was intended, in part, to protect law-abiding businessmen . . . from injuries caused by organized crime . . . .
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> . . . Subsequent events have shown, however, that the remedy has not been used solely, or even primarily, to neutralize the effects of organized crime. RICO charges have been made in a wide variety of . . . cases against legitimate businesses having nothing whatsoever to do with organized crime.
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> . . . RICO's civil liability provision has turned virtually every securities fraud claim into a potential RICO claim, with all the benefits that RICO confers on plaintiffs, including potential treble damages and attorneys' fees and access to federal courts even for state law claims.
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> . . . .
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> I do not believe that the Congress that enacted RICO was alerted to or intended the results that the statute's private civil remedy provision has wrought.

Statement of C. Marinaccio, Member of the Securities and Exchange Comm'n, Before the Senate Comm. on the Judiciary 2, 3, 7 (May 7, 1985) [hereinafter cited as C. Marinaccio].

wise legitimate businesses should not be immune from RICO suits if they engage in anti-social activity akin to racketeering.[8] This controversy intensified during the past year with the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, which removed two judicially imposed obstacles to the use of civil RICO—the racketeer injury limitation and the prior conviction requirement.[9] *Sedima* also signaled that, to the extent RICO reform may be appropriate, Congress, rather than the courts, is responsible for the task.[10] Both this impetus and the increased RICO filings since *Sedima* have stimulated a legislative reform movement.[11]

Given this climate, it is now appropriate to examine whether civil RICO has been abused and, if so, to determine whether statutory reform is in order. A careful review of civil RICO cases reported to date suggests that RICO's critics have seriously overstated the abuse argument and ignored the need for an effective remedy against fraud in the marketplace. Many so-called abuse cases, in fact, have raised serious allegations of

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8. For example, Philip A. Feigin, a representative of the North American Securities Administrators Association, while testifying in support of civil RICO, stated:

> Euphemisms like "commercial disputes," "commercial frauds," "garden variety frauds," and "technical violations" underscore the problem. These are sanitized phrases often used by "legitimate businesses and individuals" to distinguish their frauds from the "real" frauds perpetrated by the "real" crooks. Yet all willful fraudulent conduct has in common the elements of premeditation, planning, motivation, execution over time and injury to victims and commerce. And it is all crime.
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> . . . .
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> . . . [T]here can be little question that given time, private civil RICO, with its treble damages and attorneys' fees provisions, will enter the mainstream of white collar fraud litigation and serve as a significant deterrent to those who would contemplate such conduct.

P. Feigin, *supra* note 2, at 12, 13.

9. 105 S. Ct. 3275 (1985). The prior criminal conviction requirement, as imposed by the Second Circuit, barred a person from bringing a civil RICO suit unless the defendant had previously been convicted under RICO or its predicate offenses. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496-500 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985). The Second Circuit's definition of racketeering injury was unclear. It characterized racketeering injury as "something different" than the underlying predicate acts and more directly related to RICO's goal of attacking enterprise racketeering activity. *Id.* at 494; *see also* Bankers Trust Co. v. Rhodes, 741 F.2d 511, 516-17 (2d Cir. 1984), *vacated*, 105 S. Ct. 3550 (1985); *infra* note 46 and accompanying text. As the Supreme Court noted in *Sedima*, the definition of racketeering injury was never fully clarified. 105 S. Ct. at 3284. *See also* Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408, 413 (8th Cir. 1984) ("a slippery concept whose definition has eluded even the courts professing to recognize it").

10. 105 S. Ct. at 3287.

11. *See infra* notes 93, 179 and accompanying text.

fraud.[12] Moreover, to the extent RICO abuse occurs, federal judges are equipped to respond effectively and expeditiously.[13] Only recently, however, have some defense counsel begun to pursue anti-abuse remedies aggressively; often the remedies are overlooked. Accordingly, the thesis of this article is that RICO is an appropriate vehicle for remedying fraud in our society; moreover, RICO abuse is not rampant, and present legal procedures—properly understood—are adequately suited for handling those instances in which abuse occurs.

This article considers the question of RICO abuse in five sections. Section I provides context by setting forth the nature and structure of the RICO statute. Section II reviews RICO's reception in the business community and the courts. Section III analyzes the abuse issue and argues that using civil RICO against legitimate businesses engaged in enterprise criminality is not inappropriate. Section IV explores several existing methods for dealing with abusive RICO claims. Finally, section V articulates several proposals to further diminish RICO abuse.

I. The Nature and Structure of RICO

RICO was the product of an intensive effort to provide law enforcement with improved measures for combating organized crime.[14] It authorizes enhanced criminal sanctions and civil remedies against persons engaging in a variety of enterprise criminality. In essence, RICO proscribes three types of activity: (a) investing income derived from racketeering activity in an interstate enterprise;[15] (b) acquiring or maintaining an interest in

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12. *See infra* note 108 and accompanying text.

13. *See infra* notes 124-177 and accompanying text.

14. The "Statement of Findings and Purpose" of the Organized Crime Control Act of 1970 concludes:

> 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.

Pub. L. No. 91-452, 84 Stat. 922, 922-23; *see also* Russello v. United States, 464 U.S. 16, 26 (1983) (legislative history demonstrates that RICO "was intended to provide new weapons of unprecedented scope for an assault upon organized crime"); United States v. Turkette, 452 U.S. 576, 591 (1981) (RICO's major purpose was "to address the infiltration of legitimate business by organized crime").

15. 18 U.S.C. § 1962(a) (1982) states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collec-

such an enterprise through a pattern of racketeering activity;[16] and (c) conducting the affairs of an enterprise through a pattern of racketeering activity.[17] RICO broadly defines racketeering activity in terms of numerous predicate crimes.[18] The predicate offenses most common to civil RICO litigation include mail fraud, wire fraud, and securities fraud.[19] Racketeering activity alone, however, is not a RICO violation. In addition, there must be both a "*pattern* of racketeering activity" and the necessary nexus to an interstate enterprise.[20] The term "pattern" is minimally defined as "at least two acts of racketeering activity . . . within ten years,"[21] while "enterprise" is expansively defined to

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tion of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .

16. 18 U.S.C. § 1962(b) (1982) 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.

17. 18 U.S.C. § 1962(c) (1982) states:

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

18. 18 U.S.C. § 1961(1) (1982).

19. A 1985 ABA Civil RICO Task Force report indicates that 43% of civil RICO cases involve allegations of securities fraud, and another 37% allege other types of fraud in commercial settings. The remaining cases charge predicate crimes such as bribery, other frauds, theft, murder, arson, extortion, political corruption, antitrust, and labor related matters. AMERICAN BAR ASSOCIATION, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55-56 (1985). Under RICO, most frauds can easily be pled as mail or wire fraud. *See* I. Nathan, *supra* note 1, at 5-7 (because a RICO claim requires only two acts of mail or wire fraud, most commercial disputes can readily become "racketeering" cases).

20. The racketeering activity must relate in some way to the enterprise; the pattern of racketeering activity can be conducted against an enterprise, through an enterprise, or engaged in by an enterprise. *See supra* notes 15-17. Hence, the enterprise may be the victim or prize sought through the racketeering activity, the instrument through which the racketeering activity is conducted, or the perpetrator of the racketeering activity. *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME LAW. 237, 306-07 (1982), *cited with approval in* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400, 401, 402 n.20 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985).

21. 18 U.S.C. § 1961(5) (1982) defines "pattern of racketeering activity" as raquiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after commission of a prior act of racketeering activity."

include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[22] Notably missing is any requirement of an organized crime connection. Accordingly, RICO is violated whenever anyone—including otherwise legitimate businesses or individuals—conducts enterprise affairs through a pattern of racketeering activity.

RICO was intended to strike at the economic roots of enterprise criminality.[23] Its drafters recognized that traditional law enforcement efforts had concentrated on prosecuting individuals rather than eliminating the organizational networks that support large-scale criminal activity.[24] Individual convictions did not

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22. 18 U.S.C. § 1961(4) (1982). This definition is illustrative, not exhaustive. *See, e.g.*, United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). RICO enterprises have included corporations, United States v. Weisman, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980), groups of corporations, United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), foreign corporations, United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), partnerships, United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982), sole proprietorships, United States v. Melton, 689 F.2d 679 (7th Cir. 1982), unions, United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1969), estates, State Farm Fire and Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982), associations in fact, United States v. Turkette, 452 U.S. 576 (1981), and governmental entities, United States v. Thompson, 685 F.2d 993 (6th Cir.), *cert. denied*, 459 U.S. 1072 (1982) (office of governor); United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981) (court); United States v. Altomare, 625 F.2d 5 (4th Cir. 1980) (prosecutor).

23. *See infra* note 27.

24. For example, discussing the Justice Department's earlier failures to use RICO properly, Professor Blakey, a principal drafter of RICO, noted:

> The Department of Justice has had an organized crime program, which has been primarily focused on the LCN [La Cosa Nostra—the family structure through which organized crime often operates] since about 1960, yet it has not yet eliminated one family. All that has been accomplished has been to change the names of the players.
>
> A variety of factors has contributed to the failure to do more. One key problem has been that the agents and prosecutors have been chasing organized crime connected individuals at worst, or, at best, illicit enterprises. They have failed to attack the structure of the LCN syndicate itself. Second, is that although there have been some significant convictions, the sources of the LCN economic power have remained untouched. . . . In short, there has been no comprehensive strategy. Individuals may have been put into prison, illicit organizations may have been broken up, but the structure and power of La Cosa Nostra has endured.

R. Blakey, Techniques in the Investigation and Prosecution of Organized Crime 8-9 (Notre Dame Institute on Organized Crime, Sept. 1980) (footnotes omitted); *see also Turkette*, 452 U.S. at 586 ("The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions."). Significantly, in recent years RICO has been used effectively to strike directly at major organized crime

necessarily threaten the continued prosperity of underlying criminal enterprises.[25] RICO was conceived to change this trend by facilitating prosecution of all members of a criminal enterprise.[26] Moreover, RICO prosecutions are supplemented by economic sanctions—both criminal and civil—designed to diminish large-scale criminality by striking at the economic base that makes the enterprise profitable.[27]

Civil RICO, in particular, discourages enterprise criminality by providing racketeering victims with substantive and procedural incentives for litigation. Substantively, the major incentive

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groups. *See infra* note 36.

25. Former Attorney General John Mitchell has noted:

> While the prosecutions of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted.

Testimony of Attorney General Mitchell, *quoted with approval* in S. REP. No. 617, 91st Cong., 1st Sess. 78 (1969); *see also supra* note 24.

26. Senator John McClellan noted that RICO "attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains." 116 CONG. REC. 18,939 (1970) (statement of Sen. McClellan). Similarly, Professor Blakey argued that "RICO will permit a prosecution to focus on the [La Cosa Nostra] as the criminal enterprise and present it as an entity to the jury, describing its members, their corrupt objectives, and means for obtaining them." R. Blakey, *supra* note 24, at 11. The successful prosecution under RICO of all types of enterprise criminality suggests that the drafters' intent has been realized. *See infra* note 36.

27. A Senate committee report on RICO stated:

> What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969), *quoted in Turkette*, 452 U.S. at 591-92. The Supreme Court in *Russello* stated that "legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." 464 U.S. at 26. This was to be accomplished by removing "the profit from organized crime [and] separating the racketeer from his dishonest gains." *Id.* at 28.

Steven Twist, Chief Assistant Attorney General for Arizona, outlined the effectiveness of attacking the economic roots of enterprise criminality in his congressional testimony:

> Vice enterprises depend on their large influx of easy money to attract inside participants. Removal of a person does not disrupt the flow of money, so loyalty to the industry remains. Interruption of the money flow disorganizes the enterprise, or even the entire local industry. The balance of persuasion shifts radically in favor of cooperation with law enforcement.

Statement of S. Twist Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 9 (Oct. 9, 1985) [hereinafter cited as S. Twist].

is the availability of treble damages and attorney's fees.[28] Procedurally, RICO offers liberal rules for venue, joinder, and service of process, full recourse to civil discovery, and the possibility of collateral estoppel if the civil action is preceded by a criminal conviction.[29] In addition, civil litigants are not burdened by the criminal law's reasonable doubt standard[30] or the fifth amendment's privilege against self-incrimination.[31] These substantive and procedural benefits were intended to promote the creation of an army of private attorneys general akin to the force that has operated successfully in the antitrust context.[32]

Together, RICO's criminal and civil components were conceived to serve remedial goals: ridding society of enterprise criminality and compensating the victims of such illegality. As if to underscore this point, Congress inserted a statutory directive that RICO's "provisions . . . shall be liberally construed to effectuate its remedial purposes."[33]

II. RICO's Reception

Notwithstanding RICO's far-reaching design, prosecutors and the civil bar initially failed to recognize its potential. Though enacted in 1970, federal prosecutors used RICO sparingly until about 1980.[34] Since 1980, RICO's prosecutive

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28. 18 U.S.C. § 1964(a) & (c) (1982).

29. These advantages result from access to federal jurisdiction and from RICO's specific provisions. 18 U.S.C. § 1965 (1982). General rules of collateral estoppel apply in RICO litigation. *See* Anderson v. Janovich, 543 F. Supp. 1124 (W.D. Wash. 1982); State Farm Fire and Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982).

30. *See Sedima*, 105 S. Ct. at 3283 (stating that there is "no indication that Congress sought to depart from" the preponderance standard followed in civil litigation, yet explicitly declining to resolve the question); United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (preponderance of evidence applicable in governmental civil suit).

31. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify.").

32. The National Association of Attorneys General, appearing before Congress to oppose the proposed amendments to civil RICO, testified that "if our markets are free, it is principally because of . . . [the antitrust] private enforcement mechanism. Indeed, between 1960 and 1980, of the 22,585 . . . antitrust cases, 84% were instituted by private plaintiffs." Statement of the National Ass'n of Attorneys General and National District Attorneys Ass'n Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 29 (Oct. 1985) [hereinafter cited as NAAG].

33. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 922, 947.

34. Department of Justice figures indicate that before 1980, only 250 criminal RICO cases had been brought, yet by the end of 1984, the number was more than 500. Requests for approval to initiate RICO prosecutions have also increased, from 71 requests in 1981,

strengths have become so well recognized that the Department of Justice had to adopt guidelines limiting its use to particularly meritorious cases.[35] Criminal RICO has now been used successfully against a wide array of criminal enterprises.[36]

On the civil side, there were a few early calls for resourceful application of the statute but,[37] for the most part, RICO was ignored. For example, as recently as 1978, there was only one published opinion based on a private civil RICO action. However, civil RICO filings eventually mushroomed as the private

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to 68 in 1982, to 109 in 1983, and to 123 in 1984. Statement of J. Keeney, United States Deputy Assistant Attorney General, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 3-4 (Sept. 18, 1985) [hereinafter cited as J. Keeney].

35. United States Attorneys' Manual, Title 9—Criminal Division (Sept. 1980). The Department of Justice (DOJ) guidelines limit the use of criminal RICO to certain types of cases. The guidelines are designed to

> (1) weed out the ill-advised RICO cases, (2) provide consistency in legal pleadings throughout all of the federal districts, and (3) encourage the teamwork between prosecutors and agents on the federal and state levels that the RICO approach to the "big case" invariably requires.

J. Keeney, *supra* note 34, at 9. To accomplish these goals, DOJ instituted a review process for possible RICO indictments or complaints. No RICO indictment or complaint is approved until a prosecution memo, articulating the prosecutor's justification for using RICO, has been approved. DOJ evaluates the memo to "assess the significance of the case and the sufficiency of the RICO count." *Id.* at 10. Special attention is given to the "pattern of racketeering activity" to ensure it involves two or more distinct criminal episodes. A RICO indictment is approved only when DOJ is satisfied that the evidence is sufficient to obtain a conviction, the indictment is in proper form, and state prosecutors are unwilling to proceed or are not amenable to a joint prosecutorial effort. *Id.; see also* United States Attorneys' Manual, Title 9—Criminal Division (March 1984).

36. Significant recent organized-crime prosecutions under RICO include the conviction of the entire Cleveland mob leadership, New Orleans mob boss Carlos Marcello, Los Angeles mob boss Dominic Brocklier, New York's Bonanno crime family, and a St. Louis group of union racketeers. RICO charges are pending against the heads of five New York mob families, against labor racketeers allegedly controlling the trucking at New York's John F. Kennedy Airport, and against 35 individuals who have allegedly imported hundreds of millions of dollars of heroin into the United States. J. Keeney, *supra* note 34, at 6-7.

RICO prosecutions have not been limited to traditional organized crime. For example, the statute has been used to convict terrorist groups, United States v. Bagaric, 706 F.2d 42 (2d Cir.), *cert. denied*, 104 S. Ct. 283 (1983) (Croatian terrorists), motorcycle gang members, United States v. Rubio, 727 F.2d 786 (9th Cir. 1984) (Hell's Angels), corrupt politicians, United Stetes v. Dozier, 672 F.2d 531 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982) (Louisiana commissioner of agriculture convicted for pattern of extortion); United States v. Mandel, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) (governor of Maryland), and white-collar criminals, United States v. Maruheni Am. Corp., 611 F.2d 763 (9th Cir. 1980) (Japanese electrical cable corporation).

37. *See* Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. L. REV. 1511, 1609 (1976); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 222 (1975).

bar recognized that commercial fraud could be pled as a RICO claim.[38]

Increasingly, these RICO suits met with judicial hostility. RICO's origins in the fight against organized crime left courts reluctant to apply the statute's broad language to cases involving legitimate businesses.[39] Rather than take RICO at face value, these courts sought to confine it to traditional organized crime by imposing a number of limitations on the statute.[40]

Despite these efforts, civil RICO claims received further momentum from a series of Supreme Court decisions. Two of these decisions involved criminal RICO actions, but the Court's strong endorsement of the statute transcended the issues under immediate consideration. In *United States v. Turkette*,[41] the Supreme Court noted both RICO's origins as a specially crafted response to a "problem . . . of national dimensions"[42] and the legislative directive for liberal construction to implement RICO's "remedial purposes."[43] The Court voiced similar respect for RICO's unique design as a law enforcement mechanism in *Russello v. United States*, a unanimous decision broadly construing

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38. Between 1978 and 1980, only nine opinions based on private civil RICO were published. Between 1981 and 1984, 223 opinions were published. J. Keeney, *supra* note 34, at 23.

39. One judge expressed a typical view in dismissing a RICO securities claim:

> It is clear that . . . [RICO] was aimed not at legitimate business organizations but at combating "a society of criminals who seek to operate outside of the control of the American people and their government." There is no question that defendant cannot be so characterized.
>
> Assuming that plaintiffs' allegations have merit, the most that can be said is that defendant's transactions, on this occasion, have been illegal.

Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

40. For example, courts have imposed a prior criminal conviction and a racketeering injury requirement, Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d. Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985), a requirement that defendants be linked to organized crime, Noonan v. Granville-Smith, 537 F. Supp. 23 (S.D.N.Y. 1981); Waterman Steamship Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E.D. La. 1981); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 746-48 (N.D. Ill. 1981), and a requirement that plaintiff suffer a "competitive injury" analogous to an injury under antitrust law, North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980). These limitations were subsequently judicially removed. *See infra* notes 45-46 and accompanying text.

41. 452 U.S. 576 (1981).

42. *Id.* at 586. The "problem . . . of national dimensions" was clearly organized crime. Nevertheless, even though the focus was on "organized crime," Congress prohibited "conduct," fully realizing that RICO might be used broadly to remedy criminal activity regardless of the perpetrator. *See infra* note 88.

43. 452 U.S. at 587. The question in *Turkette* was whether RICO applied to exclusively criminal (illegitimate) enterprises. Interestingly, both the Court and the parties assumed RICO's application to legitimate enterprises.

RICO's criminal forfeiture provision to reach the proceeds of criminal activity.[44] Although *Turkette* and *Russello* focused primarily on criminal RICO, in each case the Court's language strongly suggested that all RICO cases would receive expansive treatment.

This portent was ultimately fulfilled by the Court's *Sedima* decision.[45] At issue was the validity of two judicially imposed limitations that would have eviscerated civil RICO. Specifically, the Second Circuit had ruled that criminal conviction of underlying predicate offenses was prerequisite to a civil RICO proceeding. In addition, the court held that relief was available only to the extent that claimants alleged a distinct "racketeering injury . . . different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter."[46]

In rejecting these propositions, Justice White's majority opinion made a number of significant observations. First, the Court noted that in enacting RICO Congress "set out a far-reaching civil enforcement scheme."[47] Second, the private attorney general aspects of RICO, which were "in part designed to fill prosecutorial gaps . . ., would be largely defeated" by a prior conviction requirement.[48] Third, "RICO is to be read broadly" and its " 'remedial purposes' are nowhere more evident than in

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44. 464 U.S. 16 (1983).

45. 105 S. Ct. 3275 (1985).

46. 741 F.2d at 496. The meaning of "racketeering injury" has never been fully resolved. *See supra* note 9. The Second Circuit in Bankers Trust Co. v. Rhodes, 741 F.2d 511, 516 (2d Cir. 1984), *vacated*, 105 S. Ct. 3550 (1985), stated that a racketeering injury must occur from the "pattern of racketeering" and not simply from the predicata activity. The court used the example of a victim injured from multiple acts of arson. The victim could not recover under RICO for the damage caused by the fires because arson is one of the predicate acts. Instead, he would have to suffer a separate injury. Thus, if his insurance policy were cancelled because of the arson, he could recover under RICO for any losses incurred in a later accidental fire. This result follows because the loss of the insurance policy is separate from the predicate acts. *Id.* at 517. Obviously, under this interpretation, fraud victims would rarely receive full compensation under RICO. The prior criminal conviction prerequisite was satisfied only if the defendant had been convicted in a prior criminal proceeding of violating RICO or committing one of its predicate crimes. Since very few violators are criminally convicted, this requirement would make RICO useless in most cases. The Court in *Sedima* articulated further policy difficulties stemming from this requirement. 105 S. Ct. at 3283-84; *see also* AMERICAN BAR ASSOCIATION, MODEL STATE LEGISLATION ON SOPHISTICATED CRIMINAL ACTIVITY 99-105 (1985).

47. 105 S. Ct. at 3279.

48. *Id.* at 3284.

the provision of a private action for those injured by racketeering activity."[49] Fourth, the conduct of an enterprise through a statutorily defined pattern of racketeering activity is, in fact, "an activity which RICO was designed to deter."[50] Finally, the Court acknowledged that civil RICO has been applied predominantly against legitimate businesses "rather than against the archetypal, intimidating mobster."[51] Even so, the Court concluded, "this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."[52]

Since *Sedima*, the RICO controversy has largely shifted to the congressional forum. A number of measures have been introduced in the past year that would severely hamper—if not entirely eliminate—RICO's usefulness.[53] Not surprisingly, congressional hearings have focused principally on the question of RICO abuse. To facilitate such legislative review, it is now appropriate to examine this issue in greater depth.

III. RICO Abuse

Since federal prosecutors were the first to apply RICO aggressively, allegations of abuse initially arose in the criminal RICO context. Foreshadowing the civil RICO controversy, criminal defendants maintained that criminal RICO was being applied beyond its intended scope and that prosecutors were using the statute's resources unfairly. For the most part, the courts routinely rejected these arguments.[54] However, the judiciary's

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49. *Id.* at 3286.

50. *Id.* at 3287.

51. *Id.*

52. *Id.* The Court explained that "it is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications." *Id.*

53. Examples of proposals that would severely curtail the use of civil RICO include the prior criminal conviction proposal, H.R. 2943, 99th Cong., 1st Sess. (1985) (*see supra* note 46 and accompanying text), the proposals requiring predicate acts other than fraud alone to constitute the requisite pattern of racketeering activity, H.R. 2517, 99th Cong., 1st Sess. (1985); S. 1521, 99th Cong., 1st Sess. (1985), and the competitive injury proposal, S. 1521 (*see supra* note 40). Stephen S. Trott, Assistant Attorney General, testified before a Senate committee that "each of these amendments would have the effect of curtailing—if not virtually eliminating—private suits and . . . whatever deterrent potential private enforcement might otherwise add to the deterrence achieved by criminal prosecutions." He also noted that "most of these changes could also make it more difficult for the government to avail itself of civil RICO's equitable remedies." Statement of S. Trott, Assistant United States Attorney General, Before the Senate Comm. on the Judiciary 44-45 (May 20, 1985).

54. *See generally* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49

favorable disposition toward criminal RICO may have been influenced by Department of Justice guidelines limiting RICO's use to appropriate situations involving enterprise criminality.[55] Moreover, the need to obtain an indictment by presenting evidence to a grand jury and, ultimately, to satisfy the reasonable doubt standard at trial served as further institutional constraints against abuse of criminal RICO.

In contrast, civil litigants are not burdened by administrative guidelines, the grand jury process, nor the reasonable doubt standard.[56] RICO critics contend that the absence of these restraints, combined with the allure of treble damages and attorney's fees, makes civil RICO inherently prone to abuse.[57] Two types of abuse are most frequently alleged: (a) RICO as malicious prosecution[58] and (b) abuse of statutory scope.[59] Each category raises different issues and deserves separate treatment.

FORDHAM L. REV. 165 (1980); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983).

55. Justice Marshall implied in his *Sedima* dissent that the Supreme Court's willingness to interpret RICO provisions broadly was at least partially attributable to the presence of DOJ guidelines controlling the use of criminal RICO. 105 S. Ct. at 3294 (Marshall, J., dissenting); *see also infra* note 56. For an explanation of DOJ Guidelines, see *supra* note 35.

56. Justice Marshall contended in his *Sedima* dissent that

> Congress was well aware of the restraining influence of prosecutorial discretion when it enacted the criminal RICO provisions. It chose to confer broad statutory authority on the Executive fully expecting that this authority would be used only in cases in which its use was warranted . . . .
>
> In the context of civil RICO, however, the restraining influence of prosecutors is completely absent.

105 S. Ct. at 3294 (Marshall, J., dissenting).

57. Edward O'Brien, president of the Securities Industry Association, voiced the concern of many RICO critics:

> [B]ecause of the enticement of the possibility of treble damages and the recovery of attorney fees, [RICO] is now a boilerplate allegation used in every imaginable type of civil action, particularly common ordinary commercial disputes. . . . The most recent Supreme Court decision in the *Sedima* case has cleared the way for an unlimited number of such cases . . . .
>
> The Department of Justice, in its use of RICO in criminal prosecutions, has published very careful guidelines for its use . . . . Unfortunately, plaintiffs' counsel in civil RICO suits have no such guidelines. The use of the statute is indiscriminate . . . .

Statement of E. O'Brien, President, Securities Industries Ass'n, Before the Senate Comm. on the Judiciary 3-4 (Sept. 24, 1985) (footnotes omitted) [hereinafter cited as E. O'Brien]; *see also Sedima*, 105 S. Ct. at 3294-95 (Marshall, J., dissenting).

58. *See* Statement of N. Minow Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 17-18 (July 24, 1985) (no effective means exist for controlling frivolous litigation under RICO) [hereinafter cited as N. Minow]; I. Nathan, *supra* note 1, 21-22 (same); Statement of J. Shad, Chairman, Securities and Exchange Comm'n, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 6 (Oct. 2, 1985) (racketeering label increases settlement value of vexatious lawsuits)

A. RICO as Malicious Prosecution

In a civil context, malicious prosecution is the initiation of a groundless suit with malice.[60] Malice exists when a plaintiff files a suit he "does not believe . . . to be meritorious" or initiates litigation "for the purpose of forcing a settlement that has no relation to the merits of the claim."[61] Thus, RICO actions are malicious prosecutions if knowingly brought without a proper factual basis.

While RICO's broad remedial provisions arguably motivate such misconduct, the statute's characterization of predicate crimes as "racketeering activity"[62] may facilitate the abuse. The mere filing of a suit that alleges racketeering activity can adversely affect a defendant's reputation;[63] if the defendant is a publicly held corporation, the value of its stock may decline dramatically. No doubt some litigants are moved to settlement to avoid a court action labeling them as racketeers.[64]

[hereinafter cited as J. Shad]; Statement of the New York Clearing House Ass'n Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 13 (Oct. 9, 1985) (statement delivered by S. Shapiro and R. Salomon) (treble damages and attorney's fees increase risk of vexatious litigation under civil RICO) [hereinafter cited as S. Shapiro & R. Salomon].

59. *See supra* note 7; *see also* I. Nathan, *supra* note 1, at 5 (civil RICO suits bear no relation to intended scope of Congress); Statement of National Ass'n of Manufacturers Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 7-9 (Oct. 9, 1985) (statement delivered by J. Finch) (Congress's failure to define organized crime results in abusive use of RICO) [hereinafter cited as J. Finch].

60. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 4.8, at 328-29 (1956). The term "prosecution" in this context is said to be "something of a misnomer," since a civil—rather than criminal—action was originally brought. Nevertheless, "prosecution" is the term commonly used. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 892 (5th ed. 1984) [hereinafter cited as PROSSER].

61. RESTATEMENT (SECOND) OF TORTS § 676 comment c (1977); *see also* PROSSER, *supra* note 60, at 895.

62. *See* 18 U.S.C. § 1961(1) (1982).

63. Newton Minow, former chairman of the Public Review Board of Arthur Andersen & Co., has assessed the damage that may accompany the "racketeer" label in a civil RICO action:

> [A] defendant must face these lengthy proceedings under the dark shadow of the "racketeering" label which is placed on any RICO defendant. In addition to the fact that a RICO claim by definition alleges criminal conduct, the general public, and even many lawyers, view such a claim as an assertion of some connection to organized crime. The racketeering label thus can work severe damage on professional and business reputations.

N. Minow, *supra* note 58, at 23.

64. Thomas Watson, testifying on behalf of the Association of Black CPA Firms, recounted an instance in which a minority accounting firm settled a case—which would otherwise have been litigated—after the plaintiffs added a RICO claim. He stated "the added risk posed by civil RICO—the risk of treble damages, of an award of attorney's

Abuse of this kind does occasionally occur.[65] But this does not necessarily mean that RICO-type relief should not be available; malicious prosecutions may be on the rise generally, but there has not been a call for eliminating other causes of action outright.[66] Eliminating the remedy would be appropriate only if the abuse were so great that our legal system could not effectively deal with it. It is apparent, however, that the abuse issue has been exaggerated and that, to the extent abuse has occurred, the system has handled the problem effectively and expeditiously. For example, congressional witnesses have often broadly referred to "RICO horror stories" without providing supporting documentation.[67] And, to the extent specific examples of abuse have been provided, most, in fact, were dismissed at the pleadings stage.[68] The remainder were for the most part proper RICO

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fees, *and of being labelled 'racketeers' in a profession in which their livelihoods depended on their reputations in the community*—was too frightening." Statement of Ass'n of Black CPA Firms Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 3 (Oct. 24, 1985) (statement delivered by T. Watson) (emphasis added). *But see* Stetement of W. Bell, Senior Vice-President & Corporate Counsel, United Coal Co., Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 7 (Oct. 2, 1985) (United Coal Company executives opposed settlement of RICO claim "so as to completely vindicate" themselves at trial) [hereinafter cited as W. Bell].

65. *See, e.g.*, Gordon v. Heimann, 715 F.2d 531, 533, 539 (11th Cir. 1983) (finding that purely frivolous RICO action instituted against multiple defendants was in bad faith); King v. Lasber, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983) (concluding that inability to plead requisite elements under RICO indicated action was commenced in bad faith without adequate factual basis); *see also infra* notes 172-73 and accompanying text.

66. *See generally* Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625 (1982). The most common suggestions for handling problems from increased caseloads and high damage awards involve alternatives other than eliminating causes of action outright. *See* Church, *Sorry, Your Policy is Cancelled*, TIME, Mar. 24, 1986, at 25, 25-26.

67. Most congressional witnesses speak only generally of the abusive applications or effects of civil RICO without explicitly referring to any cases. Furthermore, while witnesses frequently assert that RICO's extortive qualities often force settlement of suits, even frivolous suits, very few have offered examples. *See, e.g.*, Statement of American Council of Life Insurance Before the Senate Comm. on the Judiciary 15-16, 22-23 (Sept. 24, 1985) (statement delivered by D. Albenda) [hereinafter cited as D. Albenda]; S. Shapiro & R. Solomon, *supra* note 58, at 11-13; I. Nathan, *supra* note 1, at 8-9.

68. Among the few witnesses citing cases were S. Shapiro & R. Salomon, *supra* note 58, at 4-6, app.; I. Nathan, *supra* note 1, at 10; Statement of R. Groves, Chairman, American Inst. of Certified Public Accountants, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, app. 20-24 (June 12, 1985); N. Minow, *supra* note 58, at 10-11.

Many of these cases are discussed at *infra* notes 133-36, 138 and accompanying text; *see also* Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983) (dismissing RICO claim involving religious dispute to allow prior disposition of first amendment question). Some cases were dismissed on pre-*Sedima* grounds for failure to show a

claims raising serious allegations of enterprise criminality and commercial fraud.[69]

Thus, it is apparent that abusive RICO claims are being properly handled. As such, they do not provide the basis for major reform. As Justice Stevens recently noted, "[f]rivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law . . . ."[70]

Finally, notwithstanding RICO's admitted allure, numerous pragmatic factors cut against using the statute as a basis for strike suits.[71] Admittedly, some defendants feel compelled to propose a settlement to avoid being labelled as racketeers. However, if an action is truly frivolous, most defendants will not offer attractive settlements in response to patently groundless allegations—*especially* if the "racketeer" label is used in the pleadings. In such situations, most defendants prefer to refute the allegation in court.[72] Furthermore, counsel are becoming increasingly aware of both the procedures by which a frivolous RICO claim may be dismissed and of their own potential liability for initiating malicious prosecutions.[73] Nor from the client's

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racketeering injury or prior criminal conviction. Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear Inc., 608 F. Supp. 1187 (S.D.N.Y. 1985) (plaintiff must show a RICO injury); Butler Mfg. Co. v. Convey-All, Inc., 605 F. Supp. 1203 (N.D. Ala. 1985) (plaintiff failed to allege a prior criminal conviction or a distinct RICO injury); Happy Dack Trading Co. v. Agro-Indus., Inc., 602 F. Supp. 986 (S.D.N.Y. 1984) (claimant failed to allege a prior criminal conviction or racketeering injury); Noland v. Gurley, 566 F. Supp. 210 (D. Colo. 1983) (plaintiff's injuries resulted from predicate acts alone and not distinct commercial injury); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp 1002 (C.D. Cal. 1982) (complaint did not allege a RICO injury). Whether cases decided on pre-*Sedima* grounds were abusive obviously cannot be determined at this time.

69. *See infra* note 108 and accompanying text.

70. Hoover v. Ronwin, 466 U.S. 558, 601 (1984) (Stevens, J., dissenting) (footnote omitted).

71. Strike suits are cases lacking a proper factual or legal basis brought with the hope of acquiring large settlements or attorney's fees. The term originated with shareholder derivative actions filed without an intent to benefit the corporation for which the suit is allegedly brought. *See generally* Marshall v. Spang & Co., 321 F. Supp. 1310 (W.D. Pa. 1971); Shapiro v. Magaziner, 418 Pa. 278, 284-85, 210 A.2d 890, 894-95 (1965).

72. NAAG, *supra* note 32, at 37 (businesses wrongfully accused of racketeering will not settle suits as long as racketeer label is used in the litigation); *see also* W. Bell, *supra* note 64, at 7 (company executives unwilling to settle RICO suit in order to vindicate being labeled "racketeer").

73. *See infra* notes 127-77 and accompanying text.

perspective do statutory attorney's fees provide automatic access to RICO counsel; since few lawyers will undertake a RICO action on a contingent fee basis,[74] the client will usually have to commit to paying counsel's costs. As costs can mount at a rapid rate, few litigants will be prepared to risk money on an obviously meritless claim.[75]

Thus, the threat of RICO abuse as malicious prosecutions is not very real. Even so, the argument remains that most civil RICO litigation is an abuse of statutory scope.[76] Here too, however, the proposition is largely without foundation.

B. Abuse of Statutory Scope

The abuse of statutory scope argument is that treble damage suits against legitimate businesses pervert Congress's intent in enacting RICO. Simply put, the contention is that Congress enacted RICO for use against the Mafia—not traditional business establishments.[77] RICO critics maintain that any other statutory interpretation effects a federalization of so-called garden variety fraud and ordinary commercial disputes. They argue that Congress could not have intended a result that both federalizes litigation traditionally left to the states and overlaps with established federal securities fraud and antitrust remedies.[78]

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74. Civil RICO cases are rarely taken on a contingent fee basis due to the time-consuming and complex nature of most RICO litigation.

75. Further disincentive against frivolous or marginal RICO litigation derives from the Second Circuit's holding in Aetna Casualty and Sur. Co. v. Liebowitz, 730 F.2d 905 (2d Cir. 1984), requiring a plaintiff to obtain a treble damage award at trial before be may recover attorney's fees in a RICO case. Hence, attorney's fees are not awardable on settlement. *But see* Gregory v. Atlantic Permanent Fed. Savings and Loan Ass'n, 2 RICO L. RPTR. 640 (E.D. Va. Sept. 25, 1985); McCarthy v. United Serv. Auto. Ass'n, 2 RICO L. RPTR. 324 (S.D. Ga. June 12, 1985).

76. Some civil RICO critics have recognized that frivolous litigation is not the major problem civil RICO presents. David Albenda, a congressional witness for the American Council of Life Insurance, testified that "[t]be problem created by civil RICO is not a frivolous litigation problem," since many civil RICO suits that have a foundation in a legitimate commercial dispute are within the ambit of the statute. D. Albenda, *supra* note 67, at 23. The problem, according to Mr. Albenda, is the breadth of the statute, which allows it to be properly used against legitimate businesses which RICO was supposed to protect. *Id.* at 26; N. Minow, *supra* note 58, at 10 (RICO claims are now asserted against legitimate businesses in cases in whicb the plaintiff makes no allegation of a connection to organized crime.).

77. *See supra* notes 1, 7; *see also* D. Albenda, *supra* note 67, at 7 (civil RICO suits are brought almost exclusively against legitimate businesses).

78. In bis *Sedima* dissent, Justice Marshall expressed the view, typical of most critics, that civil RICO unjustifiably alters the federal-stete balance of power and displaces important areas of federal law. 105 S. Ct. at 3294 (Marshall, J., dissenting). These points

Regardless of what Congress may have intended, however, *Sedima* displaced the foundation of this argument by recognizing that RICO—at least on its face—"requires no more than" allegations of business or property injury stemming from the conduct of an enterprise through a pattern of racketeering activity.[79] Accordingly, plaintiff's counsel does not abuse RICO by filing a claim in conformity with these statutory requirements. On the contrary, counsel may commit malpractice if a RICO claim is *not* made when the statutory elements have technically been satisfied.[80]Nevertheless, this analysis does not dispose of the statutory scope argument on its merits. Indeed, standing alone, it may support the need for RICO reform since only congressional action can rectify *Sedima*'s consequences.[81] However, the statutory scope argument fails on the merits as well. This is apparent from analysis of legislative intent and underlying policy considerations.

Given RICO's breadth, it is difficult to imagine that Congress did not intend its present application.[82] Nevertheless, be-

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are reiterated by Edward O'Brien testifying for the securities industry:

> The non-specific generalized remedies of RICO are certainly not needed when such specific remedies already exist under the federal securities laws. The carefully developed federal securities laws . . . would all but be supplanted by RICO as would the entire body of common law fraud and state legislated fraud in the field of securities law.
>
> . . . RICO has completely federalized what heretofore has been considered the province of state courts—that is the resolution of common garden variety disputes between the state's citizens.

E. O'Brien, *supra* note 57, at 5-6; *see also supra* notes 1 & 59 and accompanying text.

79. 105 S. Ct. at 3285-86.

80. *See* Block, Donovan, Reeves & Wilson, *What are the Ethical Considerations in Alleging Civil RICO?*, in 1 AMERICAN BAR ASSOCIATION, RICO: THE ULTIMATE WEAPON IN BUSINESS AND COMMERCIAL LITIGATION F-1, at 2-7 (1983). Ethical considerations dictate that "a lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1982). An attorney may not intentionally "[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law." *Id.* DR 7-101(A)(1). Furthermore, Donald Egan, a private attorney, while criticizing the current use of civil RICO, recognized that "an attorney is not 'abusing' civil RICO if he creatively applies the expansive language to circumstances which Congress did not contemplate." Statement of D. Egan Before the Senate Comm. on the Judiciary 4 (Sept. 24, 1985) [hereinafter cited as D. Egan].

81. Civil RICO critics are unanimous in their feelings that the burden is on Congress to remedy alleged abusa of RICO's statutory scope. *See, e.g.*, J. Finch, *supra* note 59, at 4-5 (responsibility for solving the problem on body that enacted RICO); D. Egan, *supra* note 80, at 5 (Congress must draft RICO so it cannot be misapplied); L. Nathan, *supra* note 1, at 14 (Court bas left to Congress the task of dealing with civil RICO); D. Albenda, *supra* note 67, at 29 (Congress must respond to tha invitation of the courts to limit private RICO).

82. *See infra* notes 83, 103 and accompanying text.

cause RICO was principally conceived as an instrument for combating organized crime, opponents contend that Congress did not intend its application to legitimate businesses. However, this argument unduly restricts the concept of legislative intent.[83] That Congress was primarily concerned with one evil does not mean that the laws it enacts must be incapable of addressing broader social concerns.[84] It is not uncommon for legislation passed in response to a specific problem to be effectively applied to a broader spectrum of issues. For example, legislation aimed at organized crime has been frequently applied in other contexts as well.[85] Broad application indicates legislative flexibility rather

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83. One well-established view of statutory interpretation suggests that it is not necessary to look beyond statutory language to understand and effectuate legislative intent. The Supreme Court in 1881 stated that "[w]hatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go no further . . . ." Merritt v. Walsh, 104 U.S. 694, 702 (1881). This approach may reflect skepticism toward legislative intent itself. One respected commentator, for example, states that

> it is unrealistic to try to divine legislative intent because the notion of "the lawmaker" is fictional; there is no such person. Nor is it realistic to talk about the intent of the heterogeneous collectivity known as "the legislature." In most cases, only one or two persons drafted the bill, many persons voted against it, and those who voted for it may have had differing ideas and beliefs. Even if the participating legislators had the same intent, we have no means of knowing it except "by the external utterances or behavior of these hundreds of men." Even if a unanimous legislative intent were knowable, it would be powerless to bind the courts because the legislators' function is not to impose their respective wills but to "pass statutes." Even if legislative intent had binding force, it could hardly control the final interpretation in advance, because the legislature could not have intended to cover a particular factual situation that did not yet exist.

R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 68 (1975) (summarizing the views of Professor Radin as set forth in Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930)).

84. *See infra* note 85.

85. The Supreme Court ordinarily has held that Congress intends to include all acts literally within the statutory language. For example, in United States v. Culbert, 435 U.S. 371, 374 (1978), the Court rejected defendant's contention that a statute applied only to "racketeering" even though the law's legislative history indicated that it was a successor to an anti-racketeering statute. The Court concluded that "Congress intended to make criminal all conduct within the reach of the statutory language." *Id.* at 380. Similarly, in United States v. Fabrizio, 385 U.S. 263 (1966), the Court rejected a non-organized crime defendant's assertion that the government must prove organized crime type elements in addition to the express language of 18 U.S.C. § 1953 (1982), which

than abuse of statutory scope.[86]

Moreover, from the standpoint of structural consistency, it is apparent that Congress contemplated civil suits against other-

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prohibits interstate transportation of gambling paraphenalia. The Court reasoned that "where Congress wished to restrict the applicability of a provision to a given set of individuals, it did so with clear language." *Id.* at 266-67; *see also* United States v. Roselli, 432 F.2d 879, 885 (9th Cir. 1970) ("Congress did not choose to direct the prohibitions of [18 U.S.C.] section 1952 [only] against those persons who could be shown to be members of an organized criminal group."), *cert. denied*, 401 U.S. 924 (1971).

Another prominent example of legislation enacted for a specific purpose being applied to a broader spectrum of issues is 42 U.S.C. § 1983 (1982). The statute, which provides a civil action for deprivation of constitutional rights, was "originally called the Ku Klux Klan Act of 1871." It "was enacted to provide a measure of Federal control over state and territorial officials who were reluctant to enforce state laws against persons who violated the rights of newly freed slaves and union sympathizers." H.R. REP. No. 548, 96th Cong., 1st Sess., (1979) *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2609, 2609. After a detailed review of § 1983's legislative history, the Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961), held that "[a]lthough the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates." *Id.* at 183. Accordingly, § 1983 has been used not only to remedy discrimination against blacks under color of state law but to vindicate a pregnant schoolteacher's right not to be subject to arbitrary maternity leave policies, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), remedy discrimination against handicapped persons by an airline using a public airport, Nodleman v. Aero Mexico, 528 F. Supp. 475 (C.D. Cal. 1981), redress sex discrimination at a public university, Lyon v. Temple Univ., 543 F. Supp. 1372 (E.D. Pa. 1982), sue state prison officials for damages inflicted in an assault, Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975), vindicate a public employee's first amendment right to endorse a political candidate without retaliatory harassment, Bart v. Telford, 677 F.2d 622 (7th Cir. 1982), and sue a state official for imposing restraints violative of due process on a mental institution detainee, Houghton v. South, 743 F.2d 1438 (9th Cir. 1984).

The Sherman Antitrust Act is another example. Senators commenting during legislative debate in 1889-90 indicated that its purpose was to break up the large monopoly trusts then existing and subject them to competition. *See* W. THORNTON, COMBINATIONS IN RESTRAINT OF TRADE 1-31 (1928); 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 7-294 *passim* (E. Kinter ed. 1978). Since then, the Sherman Act's broad language has been applied to invalidate tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947), sue the National Football League for conspiring to blacklist a player, Radovich v. National Football League, 352 U.S. 445 (1957), entertain a suit by a professional golfer against a golf association, Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973), and enjoin the National Collegiate Athletic Association from restricting football game television contracts of member schools, National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984), and other modern restraint of trade problems, see Note, *Joint Research Ventures Under the Antitrust Laws*, 39 GEO. WASH. L. REV. 1112 (1971), and restrictive covenants in shopping center leases, Note, *Sherman Act Challenges to Shopping Center Leases: Restrictive Covenants as Restraints of Trade Under Section 1*, 7 GA. L. REV. 311 (1973).

86. *Sedima*, 105 S. Ct. at 3287 (" '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' ") (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985)).

wise legitimate businesses. RICO's language identifying prohibited conduct does not distinguish between types of enterprises.[87] Instead, the law prohibits certain conduct and sets forth criminal and civil sanctions that may be applied to violators.[88] Since the statute's criminal sanctions have been applied—largely without controversy—to a wide variety of enterprises, including many legitimate businesses, it is implausible to conclude that Congress intended to exclude such enterprises from RICO's civil scope.[89]

Contrary legislative intent is not indicated by RICO's overlap with well-established antitrust and securities remedies. First, this overlap is not complete. RICO applies only if the requisite enterprise and pattern requirements have been met.[90] In addition, and more significantly, RICO's criminal intent requirement serves to limit the overlap to criminal situations (in which treble

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87. *See supra* notes 18, 20 and accompanying text.

88. RICO drafters realized the difficulties, both constitutional and definitional, attendant to any effort to legislate against a discrete "class of persons"—even organized crime figures. During RICO enactment debates, Congressman Poff responded to a query concerning the lack of references in RICO to organized crime by stating:

> The gentleman inquired rhetorically as to why no effort was made to define organized crime in this bill. It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant? Would he not be the first to object to such a system?

116 CONG. REC. 35,204 (1970) (statement of Rep. Poff). Thus, rather than legislating against a "class," Congress proscribed patterned criminal activity; concededly its intent was to combat traditional organized crime, yet Congress clearly recognized that other persons may also violate the statute.

89. *See supra* note 22 and accompanying text. While the enterprise concept has generated some debate on the criminal side, *see supra* note 54, its application to legitimate enterprises is no longer an issue. Most of the debate concerning enterprises had to do with whether illegitimate groups could be enterprises; in other words, it was assumed that legitimate organizations could be enterprises. *See supra* note 43.

90. *See* Modern Settings Inc. v. Prudential-Bache Securities Inc., Fed. Sec. L. Rep. (CCH) ¶ 92,434 (S.D.N.Y. Jan. 8, 1986). The concept of a RICO enterprise is very broad. *See supra* note 22 and accompanying text. Significantly, RICO's pattern concept is apparently being tightened. *See infra* notes 187-89 and accompanying text.

damages would obviously be appropriate).[91] This is a point often overlooked or misstated.[92]

Second, when enterprise criminality is involved, RICO may be more appropriate than established remedies. For example, if economic control of an industry is obtained through extortion, RICO is a better fit than antitrust law. Similarly, an action alleging the purposeful sale of worthless securities as part of an ongoing criminal enterprise is ideally suited to be brought as a RICO proceeding.

Third, overlap is an accepted part of our legal system. In the securities context, for example, the Supreme Court has found that "[t]he fact that there may well be some overlap is neither unusual nor unfortunate."[93] On the contrary, since overlap may ensure victims relief of some kind, its existence is consistent with goals of remedial legislation.[94] Indeed, this seems to

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91. Mail and wire fraud both require fraudulent intent. *See, e.g.*, United States v. Fellas, 573 F. Supp. 615 (S.D.N.Y. 1983) (mail fraud requires specific intent to defraud); United States v. Camiel, Crim. No. 80-161 (E.D. Pa. Sept. 9, 1981) (mail fraud requires culpable participation by defendant in scheme to defraud). Similarly, only a knowing or intentional securities law violation will serve as a predicate racketeering activity under RICO. RICO, in relevant part, states that racketeering activity is any "offense" involving securities fraud that is "punishable" under federal law. 18 U.S.C. § 1961(1)(D) (1982). Clearly, criminal conduct is implied in the word "offense." An "offense" generally implies a felony or misdemeanor infringing public rights and punishable under the criminal laws. BLACK'S LAW DICTIONARY 975 (5th ed. 1979). Under the securities laws, misconduct is criminal only if it is "willful." *See* 15 U.S.C. § 77(x), (yyy) (1982); 15 U.S.C. § 78(ff)(a) (1982). Thus, in Dan River, Inc. v. Icahn, 701 F.2d 278, 289-91 (4th Cir. 1983), the court stated that "[c]riminal intent is, of course, necessary to either mail fraud or securities fraud." *Id.* at 291. Since defendant's conduct evidenced "good faith" by his reliance on counsel, the court thought it "extremely unlikely that . . . [plaintiff] will be able to prove the [RICO] predicate acts of mail or securities fraud." *Id.*

92. For example, the *Wall Street Journal* recently suggested that

> The law says that anyone involved in a "racketeering enterprise" that commits any two of several "predicate acts" associated with mobsters—murder and arson, for example—within ten years can be held liable even if the usual criminal requirements of individual intent to commit a crime aren't met.

The RICO Racket, Wall St. J., Jan. 26, 1986, at 26, col. 1. Furthermore, SEC Member Charles Marinaccio suggested in his congressional testimony that a civil RICO claim may be maintained even if allegations contain nothing more than "a misunderstanding with a broker or a challenge to an interest rate level charged by a bank." C. Marinaccio, *supra* note 7, at 7; *see also* E. O'Brien, *supra* note 57, at 5 & n.7 (mistakenly indicating that a broker may be liable for a false prospectus while acting in good faith). All these hypotheticals are misleading to the extent they suggest liability under RICO without criminal intent. *See supra* note 91. RICO is not a strict liability statute.

93. Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) (quoting SEC v. National Sec., Inc., 393 U.S. 453, 468 (1969)).

94. 459 U.S. at 386-87. Justice Marshall wrote the opinion for the Court in *Huddleston*. His *Sedima* dissent complaining of civil RICO's overlap with securities laws, 105 S. Ct. at 3294-95, failed to reconcile *Huddleston*.

be the purpose of "saving clauses" expressly indicating that statutory rights and remedies are cumulative. These clauses appear in both RICO and pertinent securities legislation.[95] Moreover, since the judiciary has long implied a private cause of action under section 10(b) of the Securities and Exchange Act of 1934, thereby creating cumulative private causes of action under that act,[96] it is paradoxical and illogical to contend that Congress's express recognition of cumulative causes of action does not reflect legislative intent.

Finally, the argument that Congress could not have intended to establish a remedy federalizing fraud litigation is also without merit. First, RICO's impact on federalism has been overstated. In fact, there has not been a flood of federal RICO cases. Although the number of federal claims has increased since *Sedima,* the total is not likely to exceed two percent of all filings,[97] far short of one recent estimate that ten percent of all federal court filings include RICO claims.[98] And even the two percent figure may be deceptive because many cases have independent bases of federal jurisdiction.[99] Furthermore, the legislative history indicates that Congress intended RICO's impact on federalism.[100] *Turkette* definitively addressed this point. Re-

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95. *Id.* at 383. Both RICO and the securities laws anticipate supplemental remedies. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, § 904(b), 84 Stat. 922, 947 ("Notbing in [this act] shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided in [this act]."); Securities Act of 1933, 15 U.S.C. § 77p (1982) ("The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."); Securities and Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1982) (same).

96. *See* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971).

97. NAAG, *supra* note 32, at 39 ("Even if civil RICO suits were to increase to a figure of 500 *annually,* and then be *multiplied* by 10, an unlikely prospect, they would constitute less than 2 percent of all federal filings (5,000 out of about 250,000).").

98. *RICO Racket, supra* note 87, at 26, col 1. Recently, the *National Law Journal* also indicated that 10% of newly filed federal claims contain RICO counts. This percentage, based on estimates of some judges, has not yet been documented statistically. *See* Lauter & Strasser, *The Year in Review, 1985—Civil RICO,* Nat'l L.J., Dec. 30, 1985/Jan. 6, 1986, at 5-9, col. 1.

99. Department of Justice figures reflect that 65% of all civil RICO cases have an independent basis for federal jurisdiction. J. Keeney, *supra* note 34, at 24.

100. Congress was apprised during the deliberations on RICO that federalism issues were involved. The statute was passed despite objections by Representative Mikva that "[w]hat we have done in one fell swoop—and the States-righters who may be in this room should listen—is to incorporate as a part of the Federal law all of the offenses which heretofore bave traditionally been treated as under State and local jurisdictions." 116 CONG. REC. 35,205 (1970) (statement of Rep. Mikva).

jecting the argument that including illegitimate groups within RICO's definition of enterprise would "substantially alter the balance between federal and state enforcement of criminal law," the Court reasoned "that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure."[101] This involvement, however, was viewed as necessary because previous federal and state enforcement efforts had been inadequate.[102] Although the Court's concern in *Turkette* was with criminal RICO, nothing indicates that Congress intended civil RICO to operate differently.[103]

Beyond legislative intent, federalization of fraud claims is desirable from a policy standpoint. Recent studies demonstrate that fraud is annually a problem of multi-billion dollar propor-

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101. 452 U.S. at 586. The Court continued:

> That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, *Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm."* In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law.

Id. at 586-87 (citations omitted) (emphasis added).

102. *Id.* at 586 ("Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions."). The "Statement of Findings and Purpose" of the Organized Crime Control Act of 1970, of which RICO is title IX, asserts, in pertinent part, 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.*

Pub. L. No. 91-452, 84 Stat. 922, 923 (emphasis added).

103. As the private treble damage action was a relatively late addition to RICO, it did not generate much legislative debate. Nevertheless, had Congress intended a different scope for civil RICO, it had ample opportunity to create such a distinction. Yet civil RICO was passed despite objections from some congressmen that it would "incorporate as a part of the Federal law all of the offenses which heretofore have traditionally been treated as under State and local jurisdictions," 116 CONG. REC. 35,205 (1970) (statement of Rep. Mikva), as well as objections that the trehle damage action would "provide invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce." H.R. REP. No. 1549, 91st Cong., 2d Sess. 187 (1970) (views of Reps. Conyers and Mikva).

tions.[104] Much of that fraud is committed by commercial enterprises traditionally regarded as "legitimate"—indeed, highly respected—by our society.[105] For this reason, the term "garden variety fraud" is problematic. The term itself remains undefined. Implicitly, it sanitizes fraudulent misconduct by suggesting its insignificance.[106] The national statistics on fraud, however, belie this suggestion.[107] Moreover, numerous RICO

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104. Estimates of fraud against American taxpayers and businesses range as high as $100 billion annually. Statement of A. Celebrezze Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 5 (Oct. 9, 1985); *see also* Blakey, *RICO: The Act Is Neither Anti-Business Nor Pro-Business, It's Pro-Victim*, Nat'l L.J., Aug. 26, 1985, at 27, cols. 1-3. This fraud includes movie piracy, insurance fraud, bank fraud, securities fraud, credit-card fraud, and fraud against the government—to name but a few. *Id.* Of course, not all of that fraud can be attributed to the Mafia. *See* P. Feigin, *supra* note 2, at 12 (every day legitimate businesses commit fraud).

Fraud against the government is estimated to be between $2.5 and $25 billion a year. NAAG, *supra* note 32, at 16. Again, a large proportion of that fraud is committed by legitimate businesses. The long list of legitimate businesses under investigation contains well-known names. *See* NAAG, *supra* note 32, at exhibit D. General Electric recently pled guilty to defrauding the government. General Dynamics has admitted to giving "gratuities" to government officials. Nine of the ten top defense contractors face allegations ranging from cost-mischarging to product substitution to kickbacks and bribery. *Id.* John Keeney, a Deputy Assistant Attorney General, noted in his testimony before Congress that "every federal agency is a potential victim—a very rich victim I need not add—of schemes that fit within one definition or another of fraud encompassed by the RICO statute." J. Keeney, *supra* note 34, at 15. This type of widespread fraud undermines public confidence.

105. *See supra* note 104.

106. Philip Feigin, a representative of the North American Securities Administrators Association, explains that "garden variety fraud" is a term often used by businessmen to separate their criminal acts from the crimes of the "real" criminals. *See* P. Feigin, *supra* note 2, at 13. However, an analysis of RICO cases that critics have labeled as garden variety fraud reveals that most allegedly involve sophisticated fraudulent schemes committed by businessmen, lawyers, and bankers. *See infra* note 108 and accompanying text. This pattern of conduct has traditionally been characterized as "white-collar crime":

> White-collar crimes are illegal acts characterized by guile, deceit, and concealment—and are not dependent upon the application of physical force or violence or threats thereof.
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> . . . [W]hite-collar crime can be committed by . . . [c]orporations, partnerships, professional firms, non-profit organizations and governmental units . . . their executives, principals, and employees . . . .

CHAMBER OF COMMERCE, WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS 3-4 (1974). As such, white collar offenders are very much "real criminals." Even so, lawyers have a tendency to view fraud as "garden variety" whenever one of their clients is targeted for litigation. On the other hand, the same lawyers view fraud as serious when representing victims. *See Recent Developments*, 3 RICO L. REPTR. 351 (March 1986) (summarizing statement of M. Goldsmith before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary).

107. *See supra* note 104.

cases, casually labeled by congressional witnesses as abusive or garden variety fraud, actually have raised serious allegations of continuing enterprise criminality.[108] A good example is *Maxwell v. Southwest National Bank*,[109] which has been criticized for applying RICO to an apparent probate dispute.[110] As the court recognized, however, *Maxwell* raised serious concerns:

> Plaintiff alleges an on-going enterprise consisting of a bank, bank officers, lawyers, and others . . . engaged in a pattern of racketeering activities including acts indictable under the mail and wire fraud statutes in an unlawful scheme whereby defendants identify and target elderly rich people for the purpose of defrauding them, their heirs, and legatees out of their estates . . . .[111]

Certainly, from the victim's standpoint in *Maxwell* and similar cases, losses are not less painful merely because the culprit is a legitimate business and not a mafioso.[112]

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108. *See supra* note 67. *See, e.g.*, Zap v. Frankel, 770 F.2d 24 (3d Cir. 1985) (allegations of major fraud in connection with a combined real estate venture and trucking merger); Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984) (holding that plaintiff adequately pled extortion and attempted extortion; in fact, defendants conceded extortion as to one RICO predicate act); Systems Research, Inc. v. Random, Inc., 614 F. Supp. 494 (N.D. Ill. 1985) (fraudulent and unauthorized procurement for profit of confidential information by defendant employment agency); Millonzi v. Bank of Hillside, 605 F. Supp. 140 (N.D. Ill. 1985) (RICO claim alleged defendant's fraud and extortion during a six-year period forced plaintiffs into bankruptcy and loss of their home); Estee Lauder, Inc. v. Harco Graphics, Inc., 558 F. Supp. 83 (S.D.N.Y. 1983) (sustaining the use of RICO against defendants who, through the use of false invoices and kickbacks, received $1.8 million in payments for which they performed no services); American Soc'y of Contemporary Medicine, Surgery & Opthalmology v. Murray Communications, Inc., 547 F. Supp. 462 (N.D. Ill. 1982) (RICO appropriate to remedy a $70,000 fraud perpetrated through concealment of revenues).

Each of these cases survived dismissal motions. That some of their allegations may later be proven false is not the point. Once serious charges have been filed, it is not enough simply to deny the allegations as untrue. As Justice Brandeis once noted, "lawsuits . . . often prove to . . . [be] groundless; but no way has been discovered for relieving a defendant from the necessity of a trial to establish the fact." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52 (1938). Of course, the system does provide means for quick disposition. *See infra* notes 132-77 and accompanying text. Also, if the charges are ultimately groundless, defendant has adequate remedies. *See infra* notes 124-28, 162-75 and accompanying text.

109. 593 F. Supp. 250 (D. Kan. 1984).

110. *See* S. Shapiro & R. Salomon, *supra* note 58, at 4 & app. ("RICO has been invoked in commercial cases never dreamt of by the most far-sighted legislator.").

111. 593 F. Supp. at 256.

112. *NAAG*, supra note 32, at 43. Juries and some courts have had no difficulty imposing RICO's penalties on legitimate businesses. *See, e.g.*, B.F. Hirsch, Inc. v. Enright Refining Co., 617 F. Supp. 49 (D.N.J. 1985) (treble damages awarded to victim of a metal refining company that misrepresented its refining fees and wrongfully retained plaintiff's

As fraud is a significant national problem, federalization is necessary to develop a comprehensive remedy capable of handling the problem. Traditional fraud remedies are inadequate to deal with complex fraud schemes.[113] Moreover, common law fraud is difficult to prove because of its high burden of proof—clear and convincing evidence.[114] In fact, the inadequacies of common law fraud originally motivated Congress's passage of the federal securities laws.[115] Like securities fraud, enterprise criminality is a national problem demanding a federal response.

The question thus becomes whether RICO is an appropriate response. The reasons for an affirmative answer are compelling. First, once the extent of fraud in our society has been recognized, providing victims with treble damages seems neither drastic nor inappropriate.[116] Second, victims rarely obtain full com-

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gold); Callan v. State Chem. Mfg. Co., Civ. A. No. 83-4317 (E.D. Pa. June 8, 1984) (awarding damages to employees who were dismissed for refusing to follow an alleged corporate policy of commercial bribery); Donovan v. Goldstein, Nos. 83-0940 & 83-0780 (D.D.C. July 6, 1984) (awarding damages against employer who embezzled from ERISA fund; trebled damages amounted to $4 million).

In addition, many legitimate businesses and major corporations have themselves successfully used civil RICO, including IBM, Crocker National Bank, and Standard Oil of Indiana, to name but a few. Blakey, *supra* note 104, at 25, col. 2.

113. From a procedural standpoint, state courts handling common law fraud actions lack the resources to deal effectively with the complexity of enterprise fraud. Mastercard and Visa's recent successful RICO actions against organizations perpetrating massive credit card fraud provide an example of the importance of RICO's procedural provisions in overcoming the deficiencies of the state court remedy. Daniel Bookin, the attorney who represented Mastercard and Visa, testified:

> In each of those actions, access to the federal courts, nationwide service of process and subpoenas, treble damages, attorney fee awards, and the availability of injunctive relief have been critical, if not determinative, factors in the decision to file suit. Indeed, none of the actions would have been brought at all if RICO did not exist.

Statement of D. Bookin Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 4-5 (Feb. 27, 1986).

114. Herman & MacClean v. Huddleston, 459 U.S. 375, 383 n.27 (1983).

115. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30-31 (1959) (securities laws enacted in response to a system "that had failed miserably in imposing . . . essential fiduciary standards."). *See* M. BUDD & N. WOLFSON, SECURITIES REGULATION 17 (1984) (quoting Message of President Franklin D. Roosevelt on March 33, 1933):

> I recommend to the Congress legislation for Federal supervision of traffic in investment securities in interstate commerce. In spite of many State statutes the public in the past has sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities.

See also infra note 180 (citing early opposition to federal securities legislation).

116. Indeed, at least 15 other federal statutes authorize treble damages and several

pensation when suing for actual damages.[117] For example, attorney's fees often consume significant portions of victims' awards. Third, treble damages deter further fraudulent conduct, while in contrast, no deterrent effect is attained by a remedy that merely takes away what a wrongdoer was never entitled to have in the first place.[118] Finally, civil RICO furnishes an impor-

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others authorize double damages. *See, e.g.*, Lanham Act, 15 U.S.C. § 1117 (1982); Pacific Railroad Acts, 45 U.S.C. § 83 (1982); Real Estate Settlement Act of 1974, 12 U.S.C. § 2607(d)(2) (1982); Clayton Act, 15 U.S.C. § 15(a) (1982). Moreover, punitive damages are already available in fraud litigation generally, and, on occasion, large verdicts have been returned. For example, the Ninth Circuit awarded $2.70 punitive damages for every $1.00 actual damages against a defendant found liable of churning and breach of fiduciary duty. Mihara v. Dean Witter & Co., 619 F.2d 814, 825-26 (9th Cir. 1980); *see also* Miley v. Oppenheimer & Co., 637 F.2d 318, 329-30 (5th Cir. 1981) (awarding $2.00 in punitive damages for every $1.00 actual damages for claim of churning and common law fraud). Viewed in this light, treble damages simply codify punitive damages to ensure both full compensation and deterrence.

117. Punitive damages are not automatically given under the common law; yet, ironically, without them the plaintiff rarely is fully compensated. Many valid fraud cases require years to litigate and, after deducting costs and attorney's fees, the plaintiff may regain only a fraction of what was fraudulently taken. *See* Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384, 399 n.16 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985) ("[D]elays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value."). Thus, civil RICO's provisions for treble damages and attorney's fees are necessary to adequately redress the harm victims have suffered.

118. "Since money is apparently an extremely important possession of those who engage in financial crime, they will best be deterred by the sure prospect of being fined in multiples of the amount they hope to steal." Statement of P. Budeiri, Staff Attorney, Public Citizen's Congress Watch, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 8-9 (Oct. 24, 1985).

John Keeney, Assistant Deputy Attorney General, testified before Congress on civil RICO's deterrence value:

> [I]n gauging the overall deterrent value of auxiliary enforcement by private plaintiffs, the deterrence provided by the mere threat of private suits must be added to the deterrence supplied by the suits that are actually filed. Furthermore, as the federal government's enforcement efforts continue to weaken organized crime and dispel the myth of invulnerability that has long surrounded and protected its members, private plaintiffs may become more willing to pursue RICO's attractive civil remedies in an organized crime contexts. [*sic*] It should be remembered, too, that civil RICO has significant deterrent potential when used by institutional and governmental plaintiffs, which are not likely intimidated at the prospect of suing organized crime members. Finally, civil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in [the] area of the organized criminality may have had a greater deterrent impact than is commonly recognized, and that both the threat and the actuality of private enforcement might be expected to produce even greater deterrence in the future.

J. Keeney, *supra* note 34, at 62.

Larry Parrish, an attorney with considerable RICO experience, expressed his views

tant supplemental function to both federal and state prosecutorial resources.[119]

These benefits can be obtained without unduly congesting the federal courts. Contrary to frequent suggestion, RICO does not federalize all commercial disputes since its predicate offenses reach only knowing and intentional crimes.[120] Moreover, RICO has not "flooded" the federal system. If anything, several recent developments suggest that filings may decrease. For example, recent decisions holding RICO claims to be arbitrable

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on the value of civil RICO in a letter to Senator Strom Thurmond:

> Before the civil RICO provision, the risk inherent in less than fair dealings and less than absolute honesty in business had been reduced to a point that the rewards to be gained by such conduct made the risk worth taking. Over time . . . a certain level of unfairness and a certain level of dishonesty had become accepted as a standard of conduct in the business world with a calculable low risk of loss . . . "When so many people have been doing it for so long, it don't seem like sin no more."
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> What the civil RICO provisions have done is upset the unwritten actuarial table and increased the risk of loss, caused by deviating from the standard of absolute honesty and absolute fairness, to a level where the risk is no longer worth taking. In other words, the civil provisions of RICO represent a resounding statement . . . that anything less than absolute honesty and absolute fairness in business dealings . . . is intolerable and will exact from the deviator a heavy toll.
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> . . . The civil RICO provisions make the needed correction in the business world.

Letter from Larry Parrish to Senator Strom Thurmond (July 16, 1985); *see also* Statement of J. Hermann Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 3 (July 24, 1985) ("RICO provides a unique and highly effective remedy to those who are victims of fraud and other economic crimes and should be preserved."); S. Twist, *supra* note 27, at 1 (RICO is citizens' "only effective resource for protection against fraud.").

To the extent, however, that courts are beginning to award fraud victims damages based on a benefit of the bargain theory, some added deterrence may be achieved. Yet these decisions represent a newly emerging view. *See* PROSSER, *supra* note 60, at 765-70.

119. The ability of federal investigators and prosecutors to control the growing fraud problem is limited. A study by the General Accounting Office concluded that "[m]ost fraud [against the government] is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the government often does pay." General Accounting Office, Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled? iii (1980), *quoted by* Blakey, *supra* note 104, at 27, col. 1. The Department of Justice has noted that "[o]nly a small percentage of suspected [criminal] activities can be investigated thoroughly, and only a fraction of those investigated can be effectively prosecuted. It was in recognition of these practical limitations that Congress elected to augment governmental efforts against organized crime by encouraging private initiatives." J. Keeney, *supra* note 34, at 33. This development parallels the importance of private suits in antitrust enforcement. *See supra* note 32.

120. *See supra* note 91 and accompanying text.

will substantially reduce the number of filings.[121] In addition, the trend of recent authority narrowly interpreting RICO's pattern requirement will discourage inappropriate litigation.[122] Ultimately, however, widespread appreciation that expeditious means are available for disposing of meritless claims and sanctioning abusive counsel may provide the best protection against excessive litigation. Fortunately, a number of effective remedies are available.[123]

IV. HANDLING RICO ABUSE

RICO abuse occurs when an action is knowingly filed without foundation in fact.[124] Thus defined, RICO abuse is no different from civil litigation abuse generally, and, consequently, should be approached essentially the same way. Significantly, a 1983 study of the United States Judicial Conference concluded that existing methods for remedying abusive civil litigation were

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121. District courts are divided on whether RICO claims are arbitrable, but significant recent decisions have allowed arbitration. *See, e.g.*, Stone & Assocs. v. Drexel Burnham Lambert, Inc., No. 85 C. 6972 (N.D. Ill. Nov. 15, 1985) (compelling arbitration of claims based on violations of the Securities and Exchange Act of 1934); Sacks v. Dean Witter Reynolds, Inc., 627 F. Supp. 377 (C.D. Cal. 1985) (holding that the strong policy in favor of arbitration requires the arbitration of RICO securities claims); Brener v. Becker Paribas, Inc., FED. SEC. L. REP. (CCH) ¶ 92,441 (S.D.N.Y. Dec. 31, 1985) (same). Furthermore, the Eleventh Circuit in Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985), held that findings of fact in arbitration will be given collateral estoppel effect when the federal interest in deterring crime is not offended, the issue is within the scope of the agreement and experience of the arbitrator, and there are adequate procedural safeguards. Thus, since most commercial contracts contain arbitration agreements, many commercial disputes that heretofore reached the federal courts can be resolved in arbitration with the findings binding in subsequent litigation.

122. *See infra* notes 188-91 and accompanying text. It must also be noted that increased litigation is not undesirable if it is substantially justified. As civil RICO has produced, for the most part, meaningful and justified litigation, *see supra* note 108, and since it will continue to be an important supplement to existing fraud remedies, *see supra* notes 113, 119, the concern that RICO may increase the caseload of our federal courts should not be a determinative factor in amending the statute. *See also* Specter, *President's Page*, TRIAL, Aug. 1982, at 6 (methods for limiting and expediting litigation should not detract from individual rights).

123. *See infra* notes 124-77 and accompanying text. In the unlikely event that RICO litigation increases so drastically that it places an intolerable burden on federal courts, Congress can then impose limits on RICO's use. Unobtrusive procedural limits such as a minimum jurisdictional amount, a provision for concurrent state court jurisdiction, or a requirement of posting a bond may all serve to limit RICO's burden on the courts. Alternatively, Congress may choose to further tighten the pattern requirement. *See infra* note 186-94 and accompanying text.

124. *See supra* notes 60-61 and accompanying text.

"sufficient [although] not fully understood."[125] Since curtailing abuse is best accomplished through systemic controls rather than by eliminating "substantive rights," counsel must understand the means available for addressing abuse.[126] Ethical constraints and tort law furnish some basis for relief, but the Federal Rules of Civil Procedure provide the most complete protection.

A. Ethical Constraints and Tort Law

All attorneys are bound by ethical principles prohibiting initiation of baseless litigation.[127] Violation of this precept may be the basis for disciplinary sanctions. Furthermore, both counsel and client face potential exposure to malicious prosecution suits for such misconduct.[128] Candidly, however, neither of these alternatives affords adequate solutions. Disciplinary proceedings are difficult to initiate and generally are reserved for extremely egregious violations. Moreover, even if successful, they ordinarily do not result in compensation to the victims of wrongful litigation.

A malicious prosecution suit also has serious shortcomings. First, many states prohibit this action unless plaintiff has in-

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125. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 56 (1983).

126. Hoover v. Ronwin, 466 U.S. 558, 681 (1984) (Stevens, J., dissenting) (footnote omitted).

127. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1982) (attorney subject to discipline for suit intended to harass or maliciously injure another); *id.* DR 7-102(A)(2) (attorney may not knowingly advance a claim or defense unwarranted by existing law, unless there exists a good faith argument for extension, modification, or reversal); *cf.* FED. R. CIV. P. 11; *infra* notes 162-66 and accompanying text.

128. A person is liable for wrongful civil proceedings when

> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

RESTATEMENT (SECOND) OF TORTS § 674 (1977); *see also* PROSSER, *supra* note 60, at 889; 1 F. HARPER & F. JAMES, *supra* note 60, at § 4.8. Improper purpose can be equated with malice. Prosser explains that

> "[M]alice" may consist of a primary motive of ill will, or a lack of belief in any possible success of the action; but neither is necessary to it. It has been found where the proceeding was begun primarily for a purpose other than the adjudication of the claim in suit . . . . [T]he jury may infer an improper purpose from the lack of probable cause, although the converse inference may not be drawn.

PROSSER, *supra* note 60, at 895 (footnotes omitted).

curred some "special injury" from the original civil suit.[129] Second, the malicious prosecution suit necessitates filing a new court action and relitigating much of the original proceeding.[130] Third, plaintiff would have to establish all elements of the claim by a preponderance of the evidence; this may be especially difficult with respect to malice. Fourth, plaintiff would incur additional legal fees in bringing the malicious prosecution suit; such fees would generally not be compensable.[131] Finally, disposition of the malicious prosecution claim would inevitably be a time-consuming process.

Accordingly, neither ethical constraints nor tort law offer bright prospects for ameliorating abuse. Nevertheless, the Federal Rules of Civil Procedure provide adequate means for addressing the problem.

B. The Federal Rules of Civil Procedure

Two avenues of attack are potentially available to anyone confronted with abusive litigation: procedural mechanisms for facilitating speedy resolution and substantive sanctions against opposing counsel. Each avenue has been successfully utilized in a RICO context. At times, they have operated in tandem.[132] As yet, however neither has received consistent application.

From a procedural standpoint, Rule 12(b)(6), which authorizes dismissal motions for "failure to state a claim upon which relief can be granted," offers an obvious opportunity to effect early termination of inappropriate suits. RICO complaints have been summarily disposed of on this basis for failure to allege the required enterprise,[133] predicate crime,[134] pattern of racketeering

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129. "Special injury" generally consists of a grievance other than the wrongful litigation itself, such as interference with person or property caused by the wrongful litigation. *See* PROSSER, *supra* note 60, at 889-92.

130. Although the malicious prosecution suit would focus on the original plaintiff's purpose for bringing the action, evidentiary overlap would be inevitable.

131. PROSSER, *supra* note 60, at 895.

132. *See infra* note 176.

133. *See, e.g.*, John Peterson Motors, Inc. v. General Motors Corp., 613 F. Supp. 887 (D. Minn. 1985) (dismissal for failing to adequately plead the existance of an enterprise and pattern of racketeering activity); Griffin v. O'Neal, Jones & Feldman, Inc., 604 F. Supp. 717 (S.D. Ohio 1985) (dismissing RICO claim because enterprise element was absent).

134. I.S. Joseph Co. Inc. v. Lauritzen, 751 F.2d 265 (8th Cir. 1984) (holding alleged conduct not to be extortion within meaning of the RICO predicate offenses); Taylor v. Mondale, Civ. No. 84-3149 (D.D.C. May 7, 1985) (alleged bribery was not predicate crime under RICO statute); Martin-Trigona v. D'Amato & Lynch, 559 F. Supp. 533 (S.D.N.Y.

activity,[135] as well as other statutory requisites.[136] Inappropriate RICO filings should also be met with a Rule 16 request for a pre-trial conference geared toward "elimination of frivolous claims,"[137] or by a timely motion for summary judgment under Rule 56.[138] These mechanisms, of course, are available in any civil case. In RICO litigation, however, they may be expected to have considerably greater impact because of the unique effect of two other rules in this context.

Rules 9(b) and 11, especially if used together, may place severe pressure on abusive counsel.[139] Rule 9(b) provides, in pertinent part, that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . *shall* be stated *with particularity*."[140] Notwithstanding the federal rules' general preference for notice pleading,[141] Rule 9(b) was adopted as a means of

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1983) (dismissing RICO claim because plaintiff's allegations, even if true, did not amount to predicate offense of fraud); Van Schaick v. Church of Scientology, 535 F. Supp. 1125 (D. Mass. 1982) (dismissing claim due to plaintiff's inability to identify any specific predicate acts of fraud).

135. Exeter Towers Assocs. v. Bowditch, 604 F. Supp. 1547, 1554 (D. Mass. 1985) ("[T]he connotations of a 'pattern of racketeering activity,' as that phrase is used in the RICO, are not satisfied by proof that, in effectuating the purchase of a single mortgage, the defendants committed two or more predicate acts of mail fraud."); Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983).

136. Warner Communications Inc. v. Murdoch, 581 F. Supp. 1482 (D. Del. 1984) (dismissing defendant's RICO counterclaim for failure to allege an injury cognizable under RICO); Campbell v. A.H. Robbins Co., 2 RICO L. RPTR. 432 (W.D. Wis. Aug. 16, 1985) (dismissing RICO claim on ground that alleged personal injuries were inadequate; RICO compensates only injuries to business or property).

137. FED. R. CIV. P. 16(c)(1). The advisory committee note to the 1983 amendments to Rule 16 states that the rule

> is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial . . . . The notion is emphasized by expressly authorizing the elimination of frivolous claims . . . . There is no reason to require that this await a formal motion for summary judgment.

Id. advisory committee note, *reprinted in* 97 F.R.D. 165, 209-10 (1983).

138. FED. R. CIV. P. 56(c) ("[Summary] judgment shall be rendered . . . if . . . there is no genuine issue as to any material fact and . . . on the established facts the moving party is entitled to a judgment as a matter of law."). Unlike a Rule 12(b)(6) dismissal, which is on the pleadings, summary judgment is granted on the merits. Summary judgment has been granted when, usually after discovery, claimant was unable to offer any factual evidence supporting the RICO claim. *See, e.g.*, Peckarsky v. American Broadcasting Co., 603 F. Supp. 688 (D.D.C. 1984); Continental Data Sys. v. Exxon, 2 RICO L. RPTR. 614 (E.D. Pa. Jan. 10, 1986).

139. *See infra* note 176 and accompanying text.

140. FED. R. CIV. P. 9(b). The remainder of the rule provides: "Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

141. *See infra* note 150 and accompanying text.

ensuring the propriety of actions alleging fraudulent conduct.[142] In contrast to most other actions, fraud was perceived as posing undue potential for malicious prosecution.[143] Moreover, given the seriousness of most fraud allegations, defendants were deemed deserving of sufficient particularity to facilitate preparation of their response.[144]

In effect, Rule 9(b) puts plaintiffs to their proof at the very onset of the proceedings. RICO cases have applied the particularity requirement to at least the time, place, and content of the alleged fraud.[145] For example, in *Bender v. Southland Corp.*, the Sixth Circuit dismissed a complaint on a Rule 9(b) ground because the pleadings "at best" alleged the breach of a franchise agreement rather than fraud.[146] Moreover, in a multiple defendant case, the particularity requirement has inhered to the benefit of each defendant.[147] Finally, while plaintiffs may be given

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142. "[A]ctions . . . based on fraud have been "disfavored and are scrutinized by the courts with great care." 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, at 400 (1969). For this reason, the common law practice under English court rules promulgated in 1832 required " 'all matters in confession and avoidance,' including fraud . . . to be specially pleaded." *Id.* at 399 n.47. Rule 9(b) evolved from this background and has frequently been invoked in defense to common law fraud claims. Recently, as litigation has rapidly increased under § 10(b) of the Securities and Exchange Act of 1934, Rule 9(b) has been invoked by defendants in securities fraud actions. Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432 (1984).

143. The particularity requirement has been justified by the need to protect the reputations of innocent parties from claims involving moral turpitude, to protect against fraud actions that in reality are strike suits, and to sufficiently apprise defendants of the nature of the claims to allow them to adequately respond. 5 C. WRIGHT & A. MILLER, *supra* note 142, § 1296, at 399-400.

144. *See supra* note 143; Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984) ("Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of . . . fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.").

145. Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984); *see also* Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982) (complaint must state the "time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby"); McKee v. Pope Ballard Shepard & Fowle, Ltd., 604 F. Supp. 927, 930 (N.D. Ill. 1985) ("All [courts] agree[] that at the least, a plaintiff pleading fraud must 'specify the time, place and contents of any alleged false representations, and the full nature of the transaction.' ") (quoting Lincoln Nat'l Bank v. Lampe, 414 F. Supp. 1270, 1279 (N.D. Ill. 1976)).

146. 749 F.2d 1205, 1216 (6th Cir. 1984).

147. RICO claims against multiple defendants must plead the participation of each with particularity. The purpose is to alert each defendant to his alleged individual involvement. For example, in Otto v. Variable Annuity Life Ins. Co., 611 F. Supp. 83 (N.D. Ill. 1985), a RICO complaint was dismissed because it failed to plead sufficiently each defendant's activity. The court held that "the complaint's conclusory allegations, which

leave to amend deficient complaints, they usually may not resort to the discovery process to acquire requisite additional information.[148]

Some courts have declined to enforce Rule 9(b) aggressively because it is ostensibly inconsistent with federal notice pleading procedures.[149] On its face, Rule 9(b) does seem to contradict Rule 8's directive that a complaint need be only "a short and plain statement of the claim showing that the pleader is entitled

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merely attribute fraudulent representations to thirty-five defendants collectively, are not specific enough to satisfy Rule 9(b)." *Id.* at 90; *see also* Pacific Gas and Elec. Co. v. Howard P. Foley Co., 3 RICO L. RPTR. 334 (N.D. Cal. Dec. 16, 1985) (plaintiffs need not plead massive amounts of evidentiary detail, but must provide each defendant with notice of his alleged role); Bruss Co. v. Allnet Communications Servs., Inc., 606 F. Supp. 401 (N.D. Ill. 1985) (dismissing claim with prejudice against individual defendants due to failure to allege fraudulent acts of each defendant). Some courts have not applied Rule 9(b) to all defendants when only defendants know or have access to relevant facts. *See* Banowitz v. State Exch. Bank, 600 F. Supp. 1466 (N.D. Ill. 1985) (plaintiff need not allege the involvement of each defendant when, as is the case with corporate insiders, facts and details as to their own involvement are in their exclusive possession); Onesti v. Thomson McKinnon Secs., Inc., 619 F. Supp. 1262, 1265 (N.D. Ill 1985). Given the purpose of Rule 9(b), this approach should be strictly limited. The court in McKee v. Pope Ballard Shepard & Fowle, Ltd., 604 F. Supp. 927, 932 (N.D. Ill. 1985), provided ample reason for declining to waive Rule 9(b) in multiparty suits:

> To say that a defendant knows the nature of the alleged fraud by having been involved in the underlying transaction proves far too much; any defendant with individual contacts to a plaintiff would have such knowledge. To allow a plaintiff to plead simply, "defendants know what they did," would render superfluous even the liberal requirements of Rule 8.

148. A Rule 9(b) motion generally prohibits a plaintiff from engaging in discovery to discover a fraud. McKee v. Pope Ballard Shepard & Fowle, Ltd., 604 F. Supp. 927, 932 (N.D. Ill. 1985) ("The requirements of Rule 9(b) are directed in part to preventing use of the liberal discovery procedures as a method for determining whether a fraud occurred at all."); Taylor v. Bear Stearne & Co., 572 F. Supp. 667, 682 (N.D. Ga. 1983) ("A complaint alleging RICO, like a complaint alleging fraud, should be filed only after a wrong is reasonably believed to have occurred. It should be a vehicle to right a wrong, not to find one."). A few courts have allowed discovery in complex RICO cases after a Rule 9(b) challenge. *See In re* Cantanella and E.F. Hutton Co. Sec. Litig., 583 F. Supp. 1388 (E.D. Pa. 1984). This, of course, is a matter of judicial discretion. Since every RICO case, however, is potentially complex, courts should ordinarily not circumvent Rule 9(b) under this rationale. Indeed, the Supreme Court has indicated that complexity may be a good reason to deny discovery. *See* Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983) ("[I]n a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

149. *See* Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 790 (3d Cir. 1984) ("Under the modern federal rules, it is enough that a complaint put the defendant on notice of the claims against him."); *In re* Longhorn Secs. Litig., 573 F. Supp. 255, 264 (W.D. Okla. 1983) (complaint specific enough to permit responsive pleadings by giving defendants ample notice).

to relief."[150] Properly understood, however, the two rules do not conflict. Rather, Rule 9(b) is a specialized exception to the notice pleading concept. While plaintiff may plead other aspects of his case generally, specificity in fraud allegations is essential to protect against frivolous litigation and to provide the defense with an adequate basis for framing a response.[151] Fortunately, most courts have recognized this distinction.[152]

Significantly, a number of decisions have recognized that RICO is especially deserving of Rule 9(b) protection, for, among other reasons, RICO potentially stigmatizes defendants racketeers.[153] Moreover, its pattern and enterprise components would seem to require plaintiff to particularize the fraud specifically in terms of continuing enterprise criminality; otherwise the nature of the RICO fraud would not be made clear.[154]

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150. FED. R. CIV. P. 8(a)(2). Furthermore, Rule 8(e)(1) states that "[e]ach averment of a pleading shall he simple, concise, and direct. No technical forms of pleading or motions are required." The court in Friedlander v. Nims, 755 F.2d 810 (11th Cir. 1985), stated:

> We are well aware of the potential conflict that exists between the concept of "notice pleading" which is embodied in Fed.R.Civ.P. 8 and the particularity requirement of Fed.R.Civ.P. 9(b). The federal rules governing pleading were designed to "reject the approach that pleading is a game of skill . . . ." [Rule 9(b) seemingly contradicts this rule.] The particularity rule serves several purposes. Its clear intent is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed. Rule 9(b) must not be read to abrogate rule 8, however, and a court considering a motion to dismiss [under rule 9(b)] should always be careful to harmonize the directives of rule 9(b) with the broader policy of notice pleading.

Id. at 813 n.3 (citations omitted).

151. *See supra* notes 143-44 and accompanying text.

152. *See infra* notes 153 and 155.

153. For example, the court in Saine v. A.I.A., Inc., 582 F. Supp. 1299 (D. Colo. 1984), noted:

> The reasons underlying [Rule 9(b) justify its application in RICO cases].
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> Rule 9(b) has been justified on the ground that fraud embraces a wide variety of potential conduct, so that a defendant needs a substantial amount of particularized information in order to prepare a response. Fraud claims also offer the claimant an extra negotiating point that may help force a settlement. Finally, a charge of fraud is a serious matter with attendant consequences to a person's reputation and goodwill. No one should be subject to such harm unless the accuser makes specific allegations.

Id. at 1306 n.5 (citations omitted); *see also* Somerville v. Major Exploration, Inc., 576 F. Supp. 902, 909 (S.D.N.Y. 1983) ("The irreparable damage to reputations and goodwill, which inevitably results from charges of fraud, and tha threat of baseless strike suits ara ample reasons for careful judicial review of claims alleging fraud."); D & G Enters. v. Continental Ill. Nat'l Bank and Trust Co., 574 F. Supp. 263, 267 (N.D. Ill. 1983) ("[D]efendants must be protected from the harm that results from charges of serious wrongdoing . . . .").

154. The Supreme Court in *Sedima* emphasized the concept of "pattern" as ensur-

Numerous cases have been dismissed on Rule 9(b) grounds.[155] Thus, since most civil RICO cases allege fraudulent

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ing continuing enterprise criminality. 105 S. Ct. at 32 n.14. Furthermore, both the concepts of pattern and enterprise are necessarily part of the fraudulent scheme in RICO fraud claims. Hence, extending the Rule 9(b) particularity requirements to these concepts would further the goals of the rule without overly burdening plaintiffs in their pleadings. For example, in Elliott v. Chicago Motor Club Ins., No. 85C 03180 (N.D. Ill. Feb. 27, 1986), the court dismissed a RICO count for, at least in part, the failure of the complaint to establish "any specific acts" which constituted the pattern of racketeering activity. However, the judiciary has not fully understood that Rule 9(b) ought to extend to the enterprise and pattern elements. *See* Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 790-91 (3d Cir. 1984) (enterprise need not be pled with particularity). The court in Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983), required that every element in the RICO claim be pled with particularity. *Id.* at 682. Although *Taylor* required enterprise and pattern to be pled with particularity in fraud cases, its holding improperly requires all elements of RICO, including non-fraudulent predicate offenses, to be pled with particularity. As Professors Wright and Miller point out, since Rule 9(b) is an exception to the general approach of simplified notice pleading created to protect against abuses peculiar to fraud, it should not be extended to other legal theories or defenses. 5 C. WRIGHT & A. MILLER, *supra* note 142, at 405.

155. For example, in Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981), the court dismissed plaintiff's RICO complaint for failing to plead the "circumstances with particularity." The RICO claim was brought by a shipping company against various persons allegedly engaged in a kickback scheme using false invoices and other fraud. Plaintiff's complaint did set forth the alleged fraud with some particularity, identifying how the fraudulent scheme operated through use of the false invoices, yet the complaint was dismissed for inadequately identifying which specific invoices were involved and in what amounts they were rendered fraudulent. *Id.* at 249; *see also* cases cited *infra* note 156-60; Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982); Chambers Dev. Co., v. Browning-Ferris, Indus., 590 F. Supp. 1528, 1537-38 (W.D. Pa. 1984); Eaby v. Richmond, 561 F. Supp. 131, 136 (E.D. Pa. 1983); Mauriber v. Shearson/American Express, Inc., 546 F. Supp. 391, 397 (S.D.N.Y. 1982); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352, 356 (E.D. Mich. 1983).

Some courts have required RICO pleadings to resemble a bill of particulars establishing probable cause to support the claim. *See, e.g.*, Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1046-47 (D. Utah 1983); Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983). This approach, however, is unduly stringent. Nothing in RICO's language suggests that RICO plaintiffs should be burdened with a probable cause requirement, comparable to an indictment, at the pleadings stage—especially since civil litigants do not have recourse to an investigative body such as a grand jury. Furthermore, such particularity is not necessary to provide defendants with adequate notice and, if anything, is inconsistent with the requirement that pleadings be limited to a "short and plain statement of the grounds upon which the court's jurisdiction depends." FED. R. CIV. P. 8(a). *See* Hosie, *A RICO Complaint as a Criminal Indictment: Pleading Fraud with Probable Cause Specificity*, 1 RICO L. REPTR. 38 (July 1984). It is important to note that probable cause pleading as set forth in *Bache-Halsey* was not based on Rule 9(b). Probable cause pleading was rejected in Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384, 403-04 (7th Cir. 1984), *aff'd on other grounds*, 105 S. Ct. 3291 (1985). For reasons similar to the criticism of *Bache-Halsey*, a recent proposal requiring plaintiffs to establish probable cause at a pretrial hearing ought to be rejected. *See* Statement of D. Gentile Before the Senate Comm. on the Judiciary 11-12 (July 31, 1985).

misconduct, Rule 9(b) adds potential bite to most RICO defense motions for dismissal and summary judgment. Simply put, whenever faced with a frivolous claim, defendant should counter with a motion alleging failure to comply with Rule 9(b). If successful, defendant may benefit in a number of ways. At best, plaintiff's claim may be dismissed with prejudice, though this alternative is rare and is granted only in conjunction with other major defects.[156] More often, plaintiff will be given leave to amend,[157] but dismissal may still result if the amended complaint continues to be defective.[158] Furthermore, even if plaintiff's amended pleading satisfies Rule 9(b), the additional specificity may furnish new grounds for attacking the pleadings or ultimately securing summary judgment.[159] Summary judgment may be facilitated because the defense can now focus on plaintiff's particularized allegations during the discovery process. If plaintiff obviously is unable to provide evidentiary support for these allegations, summary judgment will be appropriate.[160] Finally, if dismissal or summary judgment is achieved, defendant should make a request for substantive sanctions under Rule 11.[161]

Rule 11 requires pleadings to be signed by counsel of record.

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156. For example, in Burke v. FBI, 2 RICO L. RPTR. 131, 136 (N.D. Ohio June 4, 1985), the court dismissed the plaintiffs claim with prejudice. However, Rule 9(b) was only one of several alternative grounds for the dismissal. *See also* Rand v. Anaconda-Ericsson, Inc., 623 F. Supp. 176, 181-82 (E.D.N.Y. 1985) (dismissing with prejudice and imposing sanctions based in part on Rule 9(b).

157. Ray v. Karris, 780 F.2d 636, 645 (7th Cir. 1985) ("[C]omplaints are to be read liberally as required by the notice pleading theory . . . . For this reason alone plaintiffs should be entitled to amend their pleadings."); Pacific Gas and Elec. Co. v. Howard P. Foley Co., 3 RICO L. RPTR. 334, 336 (N.D. Cal. Dec. 18, 1985); Bruss Co. v. Allnet Communications Servs., Inc., 606 F. Supp. 401, 407 (N.D. Ill. 1985).

158. Harris Trust and Savings Bank v. Ellis, 609 F. Supp. 1118, 1122-23 (N.D. Ill. 1985) (dismissing RICO claim in part because amended complaint did not satisfy requirement of particularity); Sellers v. General Motors Corp., 590 F. Supp. 502, 503 (E.D. Pa. 1984) (dismissing with prejudice plaintiff's first RICO count because plaintiff had not pled pattern of racketeering activity with sufficient particularity; amended complaint failed to rectify the deficiency); Carbone, Inc. v. Proctor Ellison Co., 102 F.R.D. 951, 953-54 (D. Mass. 1984) (RICO count dismissed with prejudice for failure to describe fraud with particularity on amended complaint).

159. Sheftelman v. Jones, 605 F. Supp. 549, 553-54 (N.D. Ga. 1984) (plaintiff's amended RICO complaint revealed "two glaring and fatal defects" leading to dismissal with prejudice).

160. Harris Trust and Savings Bank v. Ellis, 609 F. Supp. 1118, 1122-23 (N.D. Ill. 1985) (dismissing RICO claim in part because amended complaint revealed jurisdictional deficiency); *see also supra* note 138 and accompanying text.

161. *See infra* note 176.

Counsel's signature constitutes certification that, based upon "reasonable inquiry," the complaint is "well grounded in fact and is warranted by existing law or a good faith argument for the extension . . . of existing law, and that it is not interposed for any improper purpose, such as to harass."[162] Moreover, the provision authorizes imposition of sanctions, including reasonable attorney's fees, for violation of this mandate.[163] As originally enacted, Rule 11 sought to discourage frivolous litigation simply by requiring attorneys to furnish good faith certification of the merits of their position. This remedy, however, proved inadequate, as too many possibilities existed for circumvention.[164] Consequently, in 1983 the provision was amended to impose an affirmative duty of "reasonable inquiry" upon counsel.[165] Both the factual and legal basis for the claim now have to be carefully considered; mere good faith belief is no longer sufficient. At the same time, the amendment explicitly authorized judicial imposition of monetary sanctions.[166]

These modifications to Rule 11 greatly enhanced its poten-

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162. FED. R. CIV. P. 11.

163. *Id.*

164. Professors Wright and Miller explain that former Rule 11 was enacted to prevent wasteful or frivolous litigation by imposing a "good faith" standard on attorneys in filing and responding to pleadings. It required an attorney when signing a pleading to certify "that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay." Any signature executed with the intent to defeat the rule could be stricken as sham or subject the attorney to "appropriate disciplinary action." The rule, however, was largely ineffective. It was not clear that the attorney had to conduct any investigation of his client's case prior to signing. Also, the good faith standard required only that a reasonable lawyer could have concluded that facts supporting the claim might be established and that the complaint was not entirely without merit. Thus, the good faith standard did little to prevent unprincipled counsel from filing false pleadings, and courts rarely imposed sanctions under the rule. 5 C. WRIGHT & A. MILLER, *supra* note 142, at 153-55 (Supp. 1985).

165. The advisory committee notes to Rule 11 indicate it was amended in 1983 to correct the shortcomings of the former rule by expanding the certification requirement and allowing judges more freedom in sanctioning lawyers who sign frivolous or false pleadings. The new rule places an affirmative duty on an attorney to investigate both the law and the facts of a case before signing the pleadings. The inquiry the attorney must make is determined by what is reasonable under the circumstances. The advisory committee indicated that good faith is no longer enough to satisfy the standard that the pleading be "well grounded in fact and warranted by existing law." Rule 11 sanctions are imposed to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." FED. R. CIV. P. 11 advisory committee note, *reprinted in* 97 F.R.D. 165, 198 (1983).

166. Rule 11 sanctions include costs due to the filing of the pleading, including attorney's fees. Furthermore, under the rule, the court may impose sanctions, even on its own initiative; the sanctions may be imposed on the attorney, the client, or both. FED. R. CIV. P. 11.

tial impact. From the standpoint of a RICO defendant, the provision offers an expeditious means of securing relief. For example, in contrast to the malicious prosecution remedy, Rule 11 sanctions are available without filing a separate court action and thereby incurring additional time delays and legal fees. Instead, sanctions are ordinarily requested during the proceeding at issue and from the same judge who considered the RICO claim.[167] Indeed, the court may impose sanctions "on its own initiative."[168] Thus, Rule 11 serves as a constant deterrent against abuse and a direct means for obtaining immediate substantive relief against its violators.

Although Rule 11 has been used frequently,[169] courts and defense counsel have rarely appied it to frivolous RICO cases. On occasion, its potential application has not been recognized;[170] other times courts failed to apply the amended Rule 11 standard properly.[171] Nevertheless, the provision has been used successfully in a RICO context.[172] The most dramatic example is *Finan-*

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167. Moreover, since the court can impose sanctions on its own initiative, there is no formal burden of persuasion on the victim of a frivolous suit to show the other litigant's failure to meet Rule 11 standards.

168. *See supra* note 162.

169. *See* Eastway Const. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (imposing sanctions upon a construction company and its counsel for maintaining an antitrust claim in which "a competent attorney, after reasonable inquiry, would have had to reach the . . . conclusion" that the claim was "destined to fail"); Lepucki v. Van Wormer, 765 F.2d 86, 88 (7th Cir. 1985) (imposing sanctions and stating the action was " 'instituted not for the . . . reparation of an actual wrong but, rather, as a device for asserting certain philosophical beliefs' " regarding the tax laws) (citation omitted), *cert. denied*, 106 S. Ct. 86 (1985); *see also* Dore v. Schultz, 582 F. Supp. 154 (S.D.N.Y. 1984); Wold v. Minerals Eng'g Co., 575 F. Supp. 166 (D. Colo. 1983).

170. Courts should be less reluctant to impose sanctions when pleadings are clearly deficient in violation of Rule 11. For example, in Sheftleman v. Jones, 605 F. Supp. 549, 553-54 (N.D. Ga. 1984), the court indicated that plaintiffs, even after opportunity to amend, were "so far from providing sufficient allegations of the elements of a RICO cause of action that" the case should be dismissed on the merits. *Id.* Such inadequate pleadings merit sanction. *See infra* notes 175-76 and accompanying text. Also, in Bender v. Southland Corp., 749 F.2d 1216, 1216 (6th Cir. 1984), the court realized the complaint was "deficient in several respects" and accordingly dismissed it for lack of particularity under Rule 9(b). *Id.* Yet, although the plaintiffs had failed to allege *any* intent to defraud by defendants, the possibility of Rule 11 sanctions was not even discussed.

171. For example, in Rand v. Anaconda-Ericsson, Inc., 623 F. Supp. 176 (E.D.N.Y. 1985), the court quoted language indicating that " '[a]n essential requirement underlying fee shifting . . . is a finding of bad faith on the part of the unsuccessful litigant,' " *id.* at 184 (quoting Tedeschi v. Smith Barney, Harris Upham & Co., 579 F. Supp. 657, 661 (S.D.N.Y. 1984)), and, consequently, imposed sanctions after determining plaintiffs acted in bad faith. Although it is not wrong to look for bad faith, it is unnecessary under amended Rule 11. *See supra* note 165 and accompanying text.

172. Courts have recognized that Rule 11 may be used to protect against RICO

cial Federation, Inc. v. Ashkenazy, in which $150,000 in attorney's fees were levied against litigants who had initiated a groundless RICO claim.[173] Based on such cases, further application of Rule 11 can be expected as both counsel and the courts become familiar with its revised scope.[174] Significantly, Rule 11 may also be used to caution RICO claimants that sanctions may be imposed if the action is ultimately demonstrated to be frivolous.[175] Warnings of this kind obviously discourage litigants from

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abuses. In Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984), the court identified the potential usefulness of Rule 11 in dealing with abusive RICO litigation:

> Because . . . [RICO] is a complicated statute that covers conduct ranging from sports bribery to white slave traffic, a defendant needs a substantial amount of information to prepare a response. A RICO defendant also needs to be protected from unscrupulous claimants lured by the prospect of treble damages, and it should be the policy of the law, within the procedural constraints of our system, to provide this protection . . . . RICO should not be construed to give a pleader license to bully and intimidate nor to fire salvos from a loose cannon. Irresponsible or inadequately considered allegations should be met with severe sanctions pursuant to Rule 11 F.R.Civ.P.

Accordingly, claims have been dismissed with sanctions pursuant to Rule 11. In WSB Elec. Co. v. Rank & File Comm. To Stop the 2-Gate Sys., 103 F.R.D. 417 (N.D. Cal. 1984), the employer-plaintiff brought an action seeking relief from mass picketing and alleging a RICO violation by the defendants. The court found that the RICO claims did not have a factual basis, *id.* at 420, and that the plaintiff's actions in instituting the suit raised a strong inference "that plaintiff's purpose was to harass the [defendants], presumably to disrupt or discourage its advocacy of hostile views." *Id.* at 421. Defendants were awarded $6,125 in attorney's fees. *Id.; see also* Glick v. Gutbroad, Civ. No. 85-1708 (7th Cir. Jan. 30, 1986) (sanctions imposed for frivolous appeal of a dismissed RICO claim); Rand v. Anaconda-Ericsson, Inc., 623 F. Supp. 176 (E.D.N.Y. 1985) (imposing sanctions when plaintiff's counsel should have known RICO claim lacked merit); Bush v. Rewald, 619 F. Supp. 585 (D. Hawaii 1985) (failure to investigate RICO facts warrants counsel fees); Aetna Casualty & Sur. Co. v. Current Components, Inc., 616 F. Supp. 862 (E.D. Mo. 1985) (sanctioning plaintiff since time-barred RICO claim constituted an abuse of the judicial system).

173. No. CV 82-0885-WPG (C.D. Cal. Apr. 15, 1985).

174. Unfortunately, courts have not always recognized the applicability of Rule 11. *See supra* note 170 and accompanying text. Rule 11 sanctions should be considered whenever there has been a dismissal on the pleadings or summary judgment. Some courts have cited the unsettled development of RICO case law as reason not to impose sanctions in RICO suits. *See* Van Dorn Co. v. Howington, 623 F. Supp. 1548, 1560 (N.D. Ohio 1985); Hudson v. Larouche, 579 F. Supp. 623, 631 (S.D.N.Y. 1983). However, in *Van Dorn* plaintiffs were not applying any creative theory. So, while *Van Dorn* states a valid principle, uncertainty of the law ought not preclude sanctions when the requisite investigation is obviously lacking. Moreover, while RICO claims often raise complex issues, judicial explication and refinement of RICO concepts should serve to resolve previously unsettled areas. *See, e.g., Turkette,* 452 U.S. 675; *Sedima,* 105 S. Ct. 3275; *see also infra* note 190 and accompanying text.

175. *See, e.g.,* Trak Microcomputer Corp., v. Wearne Bros., 3 RICO L. Rptr. 324, 328 (N.D. Ill. Oct. 25, 1985) (emphasis added):

> Plaintiffs have pled a cause of action under RICO. This court recognizes, however, the ease with which one can state a cause of action under the liberal

continuing frivolous claims. Moreover, if Rule 11 is used attendant to Rule 9(b) motions, the potential for both expeditious and effective deterrence is apparent.[176] Thus, aggressively used, Rules 9(b) and 11 provide an important means for curtailing RICO abuse. In fact, at least one court issues an order in every case containing a RICO claim requiring submission of a detailed "RICO statement" demonstrating compliance with Rules 9(b) and 11.[177]

Other remedies may also be available.[178] For the most part,

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pleading rules in federal court. *In the event plaintiffs' cause of action is subsequently found to be not well-grounded in fact, this court will impose appropriate sanctions.*

Obviously, a warning of this kind would motivate claimants to discontinue frivolous actions, as Rule 11 sanctions may be imposed at any time. *See also*, Laterza v. American Broadcasting Co., 581 F. Supp. 408 (S.D.N.Y. 1984) (if complaint dismissed under Rule 9(b) is deficient after amendment, Rule 11 sanctions will be entertained).

A defendant may also, at the outset of a patently frivolous RICO suit, request that plaintiff's discovery be stayed pending discovery by defendant to determine whether Rule 11 has been satisfied.

176. The purposes of Rule 9(b) and Rule 11 are closely allied and serve to complement each other. Working together, they serve to place an added burden on plaintiff to be specific and accurate in his allegations.

> The combined effect of Rules 9(b) and 11 is that an attorney before commencing any action involving fraud or mistake must have more specific information reasonably believed to be trustworthy than would be required if . . . [the attorney] were commencing any other kind of action. By so requiring, these rules seek "to assure that a complaint is being filed to redress a wrong which is reasonably believed to have occurred rather than as a mere pretext for discovery [in search] of unknown wrongs."

In re Ramanda Inns Secs. Litig., 550 F. Supp. 1127, 1132 (D. Del. 1982) (citation omitted); *See also* Laterza v. American Broadcasting Co., 581 F. Supp. 408, 415 (S.D.N.Y. 1984) (if complaint dismissed under Rule 9(b) is deficient after amendment Rule 11 sanctions will be entertained); Freidlander v. Nims, 571 F. Supp. 1188, 1195 (N.D. Ga. 1983) (dismissing a complaint under Rule 9(b) and indicating that "the strictest compliance with Rule 11 . . . will be expected if amendment is made"). For practical reasons, however, counsel may choose not to raise the Rule 11 issue until the Rule 9(b) motion has been resolved.

177. This order is reproduced in the appendix to this article.

178. Another option potentially available to parties maliciously sued under RICO is the possibility of bringing a RICO action against those who inititiated the wrongful claim. For example, assume that the members of a law firm continuously file abusive RICO suits against defendants in an effort to coerce favorable settlements of groundless claims. Arguably, the attorneys are conducting the law firm as an enterprise engaged in racketeering actitivity—with extortion as the underlying predicate offense constituting the pattern. Whether filing groundless litigation may constitute extortion is an open question. Numerous courts have implicitly recognized that malicious prosecutions or abuse of process may constitute extortion. *See* White Lighting Co. v. Wolfson, 68 Cal. 2d 336, 347, 438 P.2d 345, 351, 66 Cal. Rptr. 697, 703 (1968); Bothmann v. Harrington, 458 So. 2d 1163, 1169 (Fla. Dist. Ct. App. 1984); Montgomery GMC Trucks, Inc. v. Nunn, 657 S.W.2d 334, 336 (Mo. Ct. App. 1983); Board of Educ. v. Farmingdale Classroom

however, Rules 9(b) and 11 provide protection sufficient to render major RICO reform unnecessary. Even so, recognizing that RICO abuse can be effectively controlled does not mean that some reform is not in order. Several significant measures may further diminish inappropriate RICO litigation.

V. RICO Reform

Two of the bills presently pending before Congress would emasculate civil RICO.[179] Ironically, much of the opposition to civil RICO resembles earlier movements critical of antitrust and securities legislation.[180] Rather than undercut those laws, however,

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Teachers Ass'n, 38 N.Y.2d 397, 404, 343 N.E.2d 278, 283, 380 N.Y.S.2d 635, 643 (1975); *see also* Prosser, *supra* note 60, at 898. *But see* I.S. Joseph Co. v. Lauritzen, 751 F.2d 265 (8th Cir. 1984); Park South Assocs. v. Fischbein, 626 F. Supp. 1108 (S.D.N.Y. 1986). Since most extortion under RICO involves the application of state law, 18 U.S.C. § 1961(1)(A) (1982), interpretation of state extortion statutes will ultimately be required. The Model Penal Code's definition of extortion—which has served as the basis for considerable state legislation—contains a catchall provision that may be broad enough to include malicious prosecution. Model Penal Code § 223.4(7) annot. (1980). Moreover, numerous states consider extortion to encompass conduct that injures business, credit, or reputation interests. *See id.* § 223.4, at 221 n.65 (survey of state statutes). Since RICO suits obviously affect such interests, the possibility that malicious use of the RICO statute constitutes extortion ought to be considered.

Another significant development in controlling frivolous litigation stems from the Supreme Court's recent decision in Marek v. Chesny, 105 S. Ct. 3012 (1985). *Marek* was a civil rights action in which plaintiff received a jury verdict substantially below defendants' prior settlement offer. The Court held that under Federal Rule of Civil Procedure 68, which provides that if a timely pretrial offer is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer," Fed. R. Civ. P. 68, "costs" in certain cases include attorney's fees. As a result, Marek was not entitled to post-settlement offer attorney's fees. The RICO consequences of this decision may be inferred from Justice Brennan's dissent, which notes that the Court's expansive definition of Rule 68 costs could serve to shift post-settlement attorney's fees to the party that previously declined a favorable settlement offer. *Id.* at 3020 (Brennan, J., dissenting); *see also id.* app. at 3036 (listing RICO as a statute potentially subject to this interpretation). Under Justice Brennan's analysis—which, admittedly, he found distressing—*Marek* provides a basis to conclude that RICO plaintiffs who fail to achieve a judgment surpassing defendant's settlement offer may be liable for their opponent's attorney's fees. Thus, RICO plaintiffs maintaining a meritless claim should be reluctant to continue that claim after even a minimal settlement offer has been made.

179. H.R. 2943, 99th Cong., 1st Sess. (1985) (introduced by Congressman Boucher); S. 1521, 99th Cong., 1st Sess. (1985) (introduced by Senator Hatch). The most deleterious aspects of each bill are discussed *supra* note 53.

180. For a summary of the historical parallels between early opposition to the antitrust and securities laws, led primarily by business groups, and current opposition to RICO, see NAAG, *supra* note 32, at 28-33. *See generally* M. Horowitz, The Transformation of American Law (1977).

Congress merely finetuned their operation.[181] Today, the antitrust and securities laws are widely viewed as vital to the integrity of the American marketplace. If civil RICO receives similar treatment, it, too, may one day be widely recognized for its role in promoting marketplace integrity.

Finetuning civil RICO to curtail abuse can be easily accomplished. Four areas of reform warrant attention: (a) establishing an explicit statute of limitation; (b) tightening the pattern requirement; (c) eliminating the term "racketeering;" and (d) providing enhanced sanctions for frivolous suits.[182]

A. Statute of Limitation

Statutes of limitation serve a variety of institutional functions, one of which is to ensure that stale claims will not be filed.[183] However, because RICO contains no explicit limitations period, this institutional function is not adequately fulfilled. Federal courts typically attempt to fill the gap by applying the closest analagous state statute, but this approach suffers from lack of uniformity and predictability.[184] As a result, RICO may

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181. *See generally id.;* Securities Acts Amendments of 1975, Pub. L. No. 29, 89 Stat. 97.

182. A fifth area of reform not within the scope of this article is a *parens patriae* provision. RICO does not explicitly authorize *parens patriae* suits, yet such a provision would be desirable for several reasons. First, *parens patriae* suits further RICO's remedial goals; currently victims lacking resources to investigate and litigate a RICO claim are left without a remedy. Second, stete officials are more likely to initiate suits consistent with Congress's original goal of controlling organized crime. Finally, *parens patriae* authority may help to prevent abusive private suits, as occasional prior review by a state agency may discourage meritless claims. *See generally* Statement of J. Hightower, First Assistant of the Texas Attorney General, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary (Feb. 27, 1986); Statement of P. Bardacke, New Mexico Attorney General, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary (Feb. 27, 1986).

183. *See, e.g.*, Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) (statutes of limitations are "wise and beneficial" laws designed "to afford security against stale demands"); Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1014-15 (1980); Note, *Civil RICO: Searching for the Appropriate Statute of Limitations in Actions Under Section 1964(c)*, 14 LOY. U. CHI. L.J. 765, 772-81 (1983).

184. *See* Aronchick, *Statutes of Limitations in Civil RICO Actions*, 3 RICO L. REPTR. 174 (1986). Obviously, if a state has its own RICO statute, it would be referred to for statute of limitation purposes. Absent a state RICO statute, courts have referred to other analogous atate statutes. This approach has produced inconsistent results. *See, e.g.*, Compton v. Ide 732 F.2d 1429, 1433 (9th Cir. 1984) (applying three-year state period for statutory claims to RICO); Durante Bros. & Sons v. Flushing Nat'l Bank, 571 F. Supp. 489, 492 (E.D.N.Y. 1983) (applying general state statute of limitations period in RICO unlawful debt action), *aff'd in part, vacated in part*, 755 F.2d 239 (2d Cir.), *cert.*

encourage stale claim litigation. Such claims are particularly susceptible to abuse because the passage of time facilitates fabrication.

The obvious solution is to provide an explicit limitation period for civil RICO. The four-year antitrust period would seem to work equally well in this context and is logically applicable given RICO's roots in antitrust law.[185] Four years would afford plaintiffs a reasonable opportunity to litigate their claims without subjecting defendants to undue risk of exposure.

While an explicit limitation period would serve to diminish RICO abuse, further protection could be attained by modifying RICO's pattern requirement.

B. The Pattern Requirement

Prior to *Sedima*, federal courts loosely interpreted RICO's definition of pattern. In most cases, two predicate acts within ten years—somehow related either to each other or to the enterprise—were considered sufficient.[186] Moreover, each telephone call or mailing of a letter counted as a separate predicate act of racketeering activity.[187] When applied to civil RICO litigation,

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denied, 105 S. Ct. 3530 (1985). Courts also vary on how the allegedly analogous state statute is selected:

> Two approaches to making this determination are available: an analogy based on a generic characterization of all claims arising under the federal statute, and an analogy based on a characterization of the nature of the specific federal claim, based on the circumstances presented in an individual case. The former approach will result in a determination of a uniform limitations period applicable to all civil RICO claims within the state; the lattar approach will result in an ad hoc determination in each case of the appropriate limitations period based on the nature of the claim presented therein.

Aronchick, *supra*, at 174.

Moreover, the Supreme Court recently stated that federal courts will use federal statutes of limitation if "federal law clearly provides a closer analogy than available state statutes" and "the federal policies at stake and the practicalities of litigation make [the federal] rule a significantly more appropriate vehicle for interstitial lawmaking." Del Costello v. International Brò. of Teamsters, 462 U.S. 151, 172 (1983); *see also* Wilson v. Garcia, 105 S. Ct. 1938, 1943-44 (1985) (expressing general policy in favor of uniformity). The impact of these decisions may be that federal courts will differ on whether RICO requires application of the closest analogous state or federal statute of limitations.

185. 15 U.S.C. § 15(b) (1982) (antitrust statute of limitations); *see also* 115 CONG. REC. 9567 (1969) (statement of Sen. McClellan) ("[S. 1861] . . . drawa heavily upon the remedies developed in the field of antitrust.").

186. *See, e.g.*, Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648 (7th Cir. 1984); Callan v. State Chem. Mfg. Co., 584 F. Supp. 619 (E.D. Pa. 1984); Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983).

187. *See supra* note 186.

this interpretation made pattern a fairly meaningless requirement—easily satisfied by alleging the occurrence of two mailings or telephone conversations (or one of each). Since two mailings could often occur in connection with a single criminal episode, this interpretation of pattern was unsatisfactory because it did not properly focus on RICO's principal concern: continuing enterprise criminality. Even worse, it encouraged RICO litigation arguably beyond the statute's original scope.

Sedima implicitly recognized this defect. Citing RICO's legislative history, the Court suggested that, properly understood, "two isolated acts of racketeering activity do not constitute a pattern."[188] Instead, some showing of "continuity plus relationship" is necessary.[189] Many federal courts have since seized upon the Court's observation as the basis for more restrictively interpreting RICO's pattern requirement.[190] This development is encouraging, as it will help confine RICO litigation to Congress's original focus on continuing enterprise criminality. Nevertheless, legislative action is now appropriate to ensure that the pattern concept does not become diluted in the future.[191]

The most significant modification of the pattern requirement could be achieved by eliminating repetitive inclusion of jurisdictional acts for counting purposes. For example, if a scheme to defraud a single victim involves two telephone conversations and the mailing of five letters, these seven incidents should ordinarily be considered a single episode rather than seven racketeering acts constituting a pattern.[192] Each episode—in terms of

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188. 105 S. Ct. at 3285 n.14.

189. *Id.*

190. *See, e.g.*, Allington v. Carpenter, 619 F. Supp. 474, 478 (C.D. Cal. 1985) (pattern is established only by showing of multiple criminal episodes and common perpetrators); Professional Assets Management, Inc., v. Penn Square Bank, 616 F. Supp. 1418, 1421-22 (W.D. Okla. 1985) (multiple criminal episodes required to satisfy pattern requirement); Northern Trust Bank/O'Hare v. Inryco, 615 F. Supp. 828, 831 (N.D. Ill. 1985) (multiple criminal episodes required).

191. Some courts have continued to apply the pre-*Sedima* approach to pattern. *See, e.g.*, R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1354-55 (5th Cir. 1985) (holding that two related acts of mail fraud in furtherance of one scheme to defraud can constitute a pattern); Pennsylvania v. Derry Constr. Co., 617 F. Supp. 940 (W.D. Pa. Sept. 18, 1985) (several acts of mail fraud in furtherance of one antitrust conspiracy constitutes pattern); Miller Brewing Co. v. Landau, 616 F. Supp. 1285 (E.D. Wis. 1985) (four acts of mail and wire fraud by defendants in furtherance of one scheme constitutes a pattern).

192. On occasion, however, multiple mailings (or wires) may properly constitute pattern. Suppose, for example, that a would-be racketeer sends multiple mailings to a victim one day, and the next day sends another group of mailings to another victim. This type of fraud could become pervasive and damaging. Since, under such circumstances, the

time and place of occurrence—may be counted separately toward pattern, but no episode, standing alone, could satisfy the pattern requirement.[193] Thus, pattern would require proof of multiple criminal episodes.[194] Finally, pattern, as a limiting concept, could be made more meaningful by reducing the time period to five years from the present ten; two acts within ten years is not much of an obstacle to a RICO suit.

By eliminating repetitive inclusion of jurisdictional components, analyzing pattern as a multiplicity of criminal episodes, and reducing the time period to five years, RICO's pattern requirement would more appropriately focus on continuing enterprise criminality. Even so, while tightening RICO's pattern re-

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separate mailings to each victim could be considered as distinct criminal episodes (although arguably in furtherance of one scheme), the pattern requirement could still be satisfied. *See infra* note 74. Senate Bill 1521, 99th Cong., 1st Sess. (1985), fails to recognize this possibility as it would require one of the predicate acts to be other than mail fraud or wire fraud. It is therefore unduly restrictive.

193. A criminal episode occurs at a single time and place. Thus, if a gang robs a convenience store, kidnaps a customer, and murders the owner, there are three separate racketeering acts, but only one episode. Even though three predicate RICO activities occurred, a requirement of multiple criminal episodes would prevent the perpetrators from being tried under RICO. On the other hand, a single scheme to defraud may consist of numerous underlying criminal episodes and thereby constitute a pattern. For example, fraudulent mailings sent to multiple victims over a period of time should satisfy the pattern requirement. *See supra* note 192. Nor would this result be different if the mailings were sent to multiple victims instantaneously—since the fraud would usually occur later at different times and places. The more difficult characterization concerns the single victim. Usually, multiple mailings to one victim would not meet the RICO pattern requirement because essentially one criminal episode—comprised of multiple jurisdictional elements—is involved. Yet, systematic fraud perpetrated on a victim over time may constitute pattern if multiple cash sums or properties are involved. In addition, an ostensibly single episode may involve the requisite continuity for pattern purposes by virtue of the type of crime committed, its underlying motive, or the persons committing it. For example, the nature of extortion necessarily involves the threat of continuity transcending any single episode (e.g., threat of future harm for present failure to pay an outstanding debt; attendant threat of harm if victim goes to police). Alternatively, a single episode involving two homicides may properly constitute pattern if committed by gang members motivated by the need to facilitate other crime. *See* United States v. Watchmaker, 761 F.2d 1459, 1474-76 (11th Cir. 1985). The congressional definition of pattern should be sufficiently flexible to accommodate these possibilities. H.R. 3985, 99th Cong., 1st Sess. (1985), appears to be adequate in this respect.

194. Furthermore, a relationship between episodes is not prerequisite to a pattern. *See* United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); United States v. Elliot, 571 F.2d 880, 899 n.23 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979). Such a requirement would shield criminals from RICO remedies to the extent that their racketeering activity is unrelated. For example, the fact *A* extorts *B* may have no relation to his defrauding *C;* hence, there would be no RICO prosecution. Some criminal associations often use this mode of operation. All that should be required is that the racketeering acts be related to the enterprise or to each other.

quirement would obviously rectify a major source of excessive litigation, RICO's overall palatability could be greatly enhanced through another legislative amendment: deletion of the term "racketeering" from the statute.

C. The Racketeering Characterization

RICO's use of the term "racketeering" has been a major source of controversy. Businessmen maintain the characterization is unduly pejorative, and their counsel contend its use during settlement negotiations and in court is unfairly prejudicial.[195] In response, RICO proponents argue that use of the term "racketeering" is consistent with dictionary definitions, and that white-collar crime should not be treated differently from other categories of criminality; if businessmen act as racketeers, they should be treated accordingly.[196]

While RICO's use of the term "racketeering" comports with dictionary definitions and may further social responsibility by adding moral opprobrium to white-collar crime,[197] debating this issue has shifted attention from more important concerns. RICO seeks to eradicate continuing enterprise criminality. On balance, it matters relatively little whether we designate such misconduct as racketeering activity; saving the term "racketeering" is simply not worth the loss that may be occasioned by diluting RICO's remedial provisions. Accordingly, Congress should amend RICO by substituting the word "criminal" wherever the word "racketeering" presently appears.[198] The predicate offenses, which would remain the same, would then be characterized as "criminal activity" and the pattern would be characterized as a "pattern of criminal activity."

Each of the preceding proposals would contribute to RICO reform without undermining remedial goals. In terms of the abuse issue, however, the most direct and appropriate reform would be an amendment authorizing enhanced sanctions for RICO abuse.

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195. *See supra* notes 63, 64.

196. *See* NAAG, *supra* note 32, at 10.

197. *See, e.g.*, D. CRESSEY, OTHER PEOPLE'S MONEY (1952).

198. Some states do not use the term "racketeer" in their "little RICO" statutes. *See, e.g.*, CAL. PENAL CODE §§ 186-186.8 (West Supp. 1985); OHIO REV. CODE ANN. § 2923.01 (Page Leg. Bulletin #3 1985).

D. Enhanced Sanctions for Abuse

Notwithstanding Rule 11's potential effectiveness, counsel defending inappropriate RICO actions should be given protection commensurate with the leverage presently afforded RICO plaintiffs.[199] Specifically, district judges should be given discretion to award treble attorney's fees to parties forced to defend frivolous RICO suits. By authorizing this sanction, Congress would establish a strong disincentive against abuse and provide RICO defendants with ample leverage to defend themselves.[200] Moreover, since the sanction would be limited to frivolous claimants—as opposed to all who lose on the merits—the provision will not serve as an *in terrorem* deterrent to RICO litigation generally.[201] RICO's remedial function could thus be preserved, while rendering abuse a statutory nullity.

VI. Conclusion

Those opposed to RICO have seized upon abuse as their mandate for legislative reform. Upon review, however, RICO abuse is not a serious problem for our legal system so long as counsel and courts appreciate the utility of existing remedial procedures. Accordingly, both Congress and the courts should

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199. A proposal in S. 1521, 99th Cong., 1st Sess. (1985), would award attorney's fees and costs for frivolous litigation. The criticism of this proposal is that it does not go far enough. Donald Egan, an attorney critical of the present scope of RICO, recognized that the proposal for attorney's fees is unnecessary:

> I do not believe this proposed section is necessary in light of Rule 11 of the Federal Rules of Civil Procedure which was recently amended . . . . The proposed provision to civil RICO adds nothing that Rule 11 does not presently provide and, indeed, because its use of such ambiguous terms as "frivolous" and "without merit," may allow for inroads on the very exacting standard to which Rule 11 presently holds attorneys.

D. Egan, *supra* note 80, at 22-23.

200. The proposal is for discretionary—rather than mandatory—treble damages because the severity of treble damages may make some judges reluctant to find that any violation has occurred. *See also NAAG, supra* note 32, at 38 (supporting RICO provision authorizing treble actual costs, including attorneys fees, for defendants in frivolous RICO litigation). In contrast, if damages are not automatically trebled, many judges may ha more inclined to find a violation. Note that, to the extent victims of a frivolous RICO claim suffer special damages to business, property, or reputation, they have available common law tort remedies.

201. In contrast, giving attorney's fees to tbe prevailing party as per the so-called English rule would be a general deterrent inconsistent with RICO's remedial purposes of encouraging an army of private attorneys general to supplement public enforcement. *But see* Neeley, Loser Pays Nothing: Why Our Courts Are Overcrowded, Washington Monthly, June 1983 at 40.

recognize that abuse arguments are more likely motivated by hostility to the RICO remedy. As the continued vitality of this remedy is debated, our lawmakers would do well to heed Cicero's sad refrain voiced more than two thousand years ago: "I am ashamed at those . . . who believe it honourable to avoid condemnation for a crime without having avoided the crime itself."[202]

202. THE GREAT LEGAL PHILOSOPHERS 49-50 (C. Morris ed. 1985).

Appendix

The following "standing order" is issued by Judge Alvin I. Krenzler of the United States District Court for the Northern District of Ohio in all cases filed in his court that contain RICO claims to "establish a uniform and efficient procedure for processing" those claims. As the order reflects many of the Rule 9(b) and 11 concerns discussed in this article, it may serve as an appropriate model for handling future RICO litigation.

> The plaintiff shall file, within twenty (20) days hereof, a RICO case statement. This statement shall include the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.
>
> 1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).
>
> 2. List each defendant and state the alleged misconduct and basis of liability of each defendant.
>
> 3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.
>
> 4. List the alleged victims and state how each victim was allegedly injured.
>
> 5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:
>
> a. List the alleged predicate acts and the specific statutes which were allegedly violated;
>
> b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;
>
> c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularlity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;
>
> d. State whether there has been a criminal conviction for violation of the predicate acts;
>
> e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity"; and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeerting activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. State who is employed by or associated with the enterprise.

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe the detail the alleged conspriacy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to tbe Court in processing your RICO claim.