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COMMENTS

Standing and Liability of State and Local Government Under the Civil Rico Statute

I. INTRODUCTION

The Justice Department's recent investigation and suit against the Teamsters' Union in June, 1988, has once again brought the civil RICO statute¹ to the forefront of national attention, highlighting its use as a viable law enforcement alternative to criminal prosecution.² Not as well publicized is the increasing use of civil RICO suits,³ especially the treble damages provision, by state and local "governments."⁴

The purpose of this comment is three-fold: (1) to provide a general overview of the federal civil RICO statute in the context of state and local government cases; (2) to explore the issues of state and local government standing and liability under RICO; and (3) to broadly outline how state and local governments have used and may use civil RICO to supplement their law enforcement goals. However, since this comment is necessarily broad in scope, it is meant only to raise the potential issues, not to ex-

1. 18 U.S.C. § 1961-1968 (1982 & Supp. IV 1986).

2. Squiers, *U. S. Sues to Take Over Teamsters Union*, N.Y.L.J., June 29, 1988, at 1, col. 2.

3. According to a two-year study of 222 reported civil RICO cases from 1985 to 1986, 10 involved government plaintiffs. See Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, app. at 621 (1987). By contrast, a 1982 article cites only seven cases decided over a period of six years wherein the government was plaintiff in a civil RICO action. See Tannenbaum & Molo, *State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing the Economic Effects of Unlawful Conduct*, 35 BAYLOR L. REV. 1, 4 n.14 (1983).

4. By use of the term "governments" in this article, I refer generally to taxpayer-supported public bodies created by state law, including, but not limited to, state departments and divisions, administrative agencies, political subdivisions, municipalities, counties, towns, redevelopment agencies, public utilities, and other general or special function governmental units established by state law.

haustively analyze all the possible arguments and issues presented.

In order to give the reader a better understanding of the issues discussed in this comment, section II provides a general overview of the civil RICO provisions and their historical background. Section III examines the scope of standing and the scope of liability under the civil RICO provisions, especially in the context of state and local government cases. Standing concepts⁵ examined under this section include analysis of the terms "person," "injured," "business or property," and the "by reason of" requirement of subsection 1964(c), RICO's civil action provision. Of special importance is the statutory construction and congressional intent of the term "person" found in 18 U.S.C., sections 1961(3),⁶ 1962⁷ and 1964(c).⁸ Liability concepts⁹ examined include "person," "enterprise," the non-identity of "person" and "enterprise," and respondeat superior. In section IV, government immunity to RICO liability will be discussed, based on constitutional, statutory, and public policy arguments, in-

5. See *infra* notes 8 and 36-77 and accompanying text.

6. A "person" is defined in 18 U.S.C. § 1961(3) (1982) as including "any individual or entity capable of holding a legal or beneficial interest in property."

7. The term "person" appears five times throughout 18 U.S.C. § 1962 (1982):

(a) It shall be unlawful for any *person* who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such *person* has participated as a principal . . . 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. . . .

(b) 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.

(c) 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.

(d) It shall be unlawful for any *person* to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Emphasis added)

8. 18 U.S.C. § 1964(c) (1982) provides:

Any *person* injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore 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.

(Emphasis added)

9. See *infra* notes 78-106 and accompanying text.

cluding eleventh amendment immunity, treble damages immunity, government non-indictability under the "racketeering activity" requirement, and government tort immunity.¹⁰ Section V considers recent uses of the civil RICO statute by state and local government plaintiffs in areas such as public contract fraud, tax fraud, environmental and toxic waste management, and government loan fraud.¹¹ This section also examines potential uses of the statute in abating illegal gambling, illegal liquor distribution, corrupt zoning practices, and other uses.¹² Finally, this section examines the inability of other state and federal criminal laws to deal with RICO-type problems, and the tactical advantages and disadvantages peculiar to the RICO statute.¹³

II. STATUTORY BACKGROUND

In 1970, Congress passed the Omnibus Crime Control Act¹⁴ to stem the tide of organized and white collar crime in the United States.¹⁵ Title IX of this Act contained the RICO provisions.¹⁶ This enactment represented the culmination of years of congressional studies and proposed legislation.¹⁷ The intent of the drafters is reflected in the congressional findings found in the Act:

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.¹⁸

10. See *infra* notes 107-49 and accompanying text.

11. See *infra* notes 150-92 and accompanying text.

12. See *infra* notes 193-200 and accompanying text.

13. See *infra* notes 201-22 and accompanying text.

14. Pub. L. No. 91-452, 84 Stat. 922-23 (1970).

15. See DuVal, *A Trial Lawyer's Guide: Everything You Always Wanted to Know About RICO Before Your Case Was Dismissed*, 12 WM. MITCHELL L. REV. 291, 293 (1986).

16. Title IX is entitled Racketeering Influenced and Corrupt Organizations, and is now codified at 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

17. See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013-21 (1980).

18. Congressional Statement of Findings and Purpose, Pub. L. No. 91-452, § 1 (1970) (codified at 18 U.S.C. § 1961 (1982)) (emphasis added). The legislative history shows clearly that the Congress did not intend to limit the applicability of this Act to organized crime. See *United States v. Turkette*, 452 U.S. 576, 586-87 (1981). Congress intended to reach criminal activity involving both legitimate and illegitimate enterprises.

The sponsors of the legislation deliberately employed broad language in the statute¹⁹ and inserted a liberal construction clause²⁰ in order to effectuate the broad purposes of RICO.

The RICO statute defines four broad, substantive violations for which criminal²¹ and civil²² remedies are available. These substantive violations are located in four subsections of section 1962.²³ Each one of these four subsections proscribes certain transactions or business activities involving commission of predicate acts constituting "racketeering activity."²⁴ First, subsection 1962(a) outlaws the investment of proceeds obtained through a pattern of "racketeering activity" in the acquisition, establishment or operation of any "enterprise"²⁵ in interstate commerce. Second, subsection 1962(b) proscribes the maintenance or control of any enterprise through a pattern of racketeering activity. Third, subsection 1962(c) outlaws participation in the conduct of an enterprise's affairs through a pattern of racketeering activity. Finally, subsection 1962(d) prohibits any conspiracy to violate the above provisions.

Subsection 1962(c)²⁶ is the most used statutory subsection in civil RICO complaints, whether filed by government or private organizations.²⁷ This subsection provides a broad prohibi-

See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

19. See DuVal, *supra* note 15, at 294-95.

20. "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, title IX, § 904(a) (1970) (codified at 18 U.S.C. § 1961 (1982)).

21. A person convicted under the criminal RICO statute may be penalized by up to \$25,000 in fines, by twenty years in prison, and by forfeiture of any interest obtained or maintained by way of the RICO violation. See 18 U.S.C. § 1963 (Supp. IV 1986).

22. Civil damage remedies are expressly provided in § 1964(c), including treble damages for injury to business or property and recovery of costs and attorney's fees. See *supra* note 8. Some courts allow equitable remedies to private parties under § 1964(a) while other courts have denied such relief. See *infra* note 211.

23. For the text of 18 U.S.C. § 1962 (1982), see *supra* note 7.

24. "Racketeering activity" is defined in 18 U.S.C. § 1961(1) (Supp. IV 1986) as including acts which are indictable or chargeable under: (1) various state criminal laws, including bribery and extortion; (2) 33 enumerated federal statutes, including violations of the mail and wire fraud statutes, the Hobbs Act (dealing with extortion, interference with commerce, and "acting under color of state law"), and 18 U.S.C. § 1511 (relating to the obstruction of state or local law enforcement); and (3) offenses involving fraud in securities, fraud in bankruptcy, or dealing in narcotics or other dangerous drugs.

25. "Enterprise" is defined in 18 U.S.C. § 1961(4) (1982) as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

26. See *supra* note 7 for the text of section 1962(c).

27. Approximately 92% of all RICO suits cite subsection 1962(c) in their pleadings. See *Blakey & Cessar, supra* note 3, app. at 619.

tion against conducting or participating in the conduct of an enterprise's affairs through RICO predicate acts by a person who is "employed by or associated with" such enterprise.²⁸ Subsections 1962(a) and (b) are probably more difficult to use for government plaintiffs because, even though state and local governments meet the section 1962 "enterprise" requirement,²⁹ they typically do not offer investments and are not acquired or maintained by predicate RICO acts.³⁰

III. GOVERNMENT STANDING AND LIABILITY UNDER CIVIL RICO

Several RICO concepts, including the terms "enterprise," "racketeering activity," "pattern," etc., reappear frequently throughout the statute and have special importance in determining RICO's scope. One concept in particular which significantly affects the breadth of civil RICO, especially in regard to state

28. The terms "employed by or associated with" the enterprise (whether corporate, government, or illegal entity) draws within its reach a wide scope of prospective defendants, both individuals and organizations. *See supra* note 7 for the text of section 1962(c). *See infra* notes 89-96 and accompanying text for a discussion of the "enterprise" requirements.

29. *See infra* note 93 and accompanying text. For the definition of "enterprise" in section 1961(4), *see supra* note 25.

30. In the context of a government complaint, use of subsections (a) and (b) would focus on either: (1) investment of illegal proceeds in order to acquire, establish, or operate a government enterprise; or, (2) illegal efforts to acquire or maintain any interest or control in a government enterprise. *See supra* note 7. Therefore, since government enterprises are typically funded by taxpayer money, and do not involve private investments or buy-outs, the relative number of government suits under subsections (a) and (b) would probably be small.

This is not to say that subsections (a) and (b) should not be considered in filing a RICO complaint. If there is a "non-identity" problem, *see infra* notes 97-100 and accompanying text, in filing a subsection 1962(c) complaint, creative pleading might find a basis for liability under subsections (a) or (b). For example, the government plaintiff could name a corporation as a subsection (a) enterprise, which after receiving income from a pattern of racketeering in which it has participated as a principal, violates the subsection by subsequently investing that income in its own operations. *See Pennsylvania v. Derry Construction Co.*, 617 F. Supp. 940 (W.D. Pa. 1985). Similarly, in a subsection (b) context, *see Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986) ("person" and "enterprise" can be the same where the corporation is the "direct or indirect beneficiary of the pattern of racketeering activity").

Furthermore, government plaintiffs may plead alternative subsections of section 1962 because courts will recognize alternative theories of "enterprise." *See United States v. Ambrose*, 740 F.2d 505, 512 (7th Cir. 1984) ("The enterprise here is the Chicago Police Department (though it could just as well be the kingpins' businesses)"); *United States v. Stratton*, 649 F.2d 1066 (5th Cir. 1981) (there is "no logical reason to force the government to choose between alternative enterprise theories"); *United States v. Barber*, 476 F. Supp. 182 (S.D.W. Va. 1979) (Alcoholic Beverage Control Commissioner could have been enterprise, but the government named the state agency to be the enterprise).

and local government, is the term "person." The term is broadly defined in subsection 1961(3).³¹ The definition appears to make state and local governments qualify for standing to sue under subsection 1964(c) and for liability under section 1962, thus potentially subjecting states and municipalities to civil RICO liability. Prospective state and local government RICO liability may cause some judges to resist the conclusion that state or local governments are "persons" within the meaning of the RICO statute.³² Such a conclusion would make state and local governments ineligible as RICO plaintiffs because the term "person" is defined the same no matter whether it involves a section 1962 defendant "person"³³ or a subsection 1964(c) plaintiff "person."³⁴ However, constitutional, statutory, and public policy reasons³⁵ may provide state and local governments immunity from civil RICO liability despite the broad definition of "person" in subsection 1961(3), thus making it unnecessary to exclude governments from the definition of a RICO "person."

The foregoing conclusions, which suggest that governments may successfully sue for, and defend against, civil RICO remedies, will be examined below under three categories: (1) the scope of RICO standing, (2) the scope of RICO liability, and (3) government immunity under RICO.

A. *Scope of RICO Standing*

Subsection 1964(c)³⁶ outlines the coverage of civil RICO. In order to state a prima facie case under subsection 1964(c), the plaintiff must be able to show that it is (1) a person; (2) injured; (3) in its business or property; (4) by reason of a violation of section 1962. These requirements will be discussed below.

1. *Subsection 1964(c) "person" requirement*

Most courts deciding the issue have held that a government entity falls within the term "person" under the RICO statute.³⁷

31. See *supra* note 6.

32. See, e.g., *Fiore v. Kelly Run Sanitation, Inc.*, 609 F. Supp. 909, 912-13 n.1 (W.D. Pa. 1985) (citation omitted) (state or state agency is not a "person" under RICO statute).

33. See *infra* notes 83-88 and accompanying text.

34. See *infra* notes 37-54 and accompanying text.

35. See *infra* notes 107-49 and accompanying text.

36. See *supra* note 8.

37. See, e.g., *American Bonded Warehouse Corp. v. Compagnie Nationale Air*

The legislative history, evidence of congressional intent, and antitrust arguments strengthen the proposition that the RICO "person" includes state and local governments.

First, the statute was designed to rid government as well as business of corrupt influences.³⁸ President Johnson's Commission on Law Enforcement and Administration of Justice reported in 1967 (three years before RICO's enactment) that "organized crime flourishes only where it has corrupted local

France, 653 F. Supp. 861, 864 (N.D. Ill. 1987) (a foreign government-owned entity can be deemed a person within the RICO statute); *City of New York v. Balkan*, 656 F. Supp. 536, 541 (E.D.N.Y. 1987) (city has standing to sue as "person" under RICO); *Commonwealth v. Cianfrani*, 600 F. Supp. 1364, 1367 (E.D. Pa. 1985) (Commonwealth of Pennsylvania is a "person" within the meaning of § 1964(c)); *Callan v. State Chem. Mfg. Co.*, 584 F. Supp. 619, 622 (E.D. Pa. 1984) (RICO "permits the government to seek both criminal and civil sanctions"). *Contra*, *Michigan Dep't of Treasury v. Fawaz*, 653 F. Supp. 141, 142 (E.D. Mich. 1986), *aff'd on other grounds*, 848 F.2d 194 (6th Cir. 1988) (state department is not "person" within the meaning of the RICO statute). *Fawaz* is unreliable authority because the judge erroneously believed that the "RICO statute itself contains no definition of 'person.'" *Id.* at 142. In an opinion not published in an official reporter, the Sixth Circuit affirmed on other grounds, but voiced its disagreement with the District Court's conclusion as to whether the state was a RICO "person":

We are unable to agree with the district court's conclusion that the state was not a "person" who could bring the action, that it lacked standing. In view of the repeated admonitions by the Supreme Court to liberally construe the civil remedies portions of RICO . . . we are unable to say that a state is not an "entity capable of holding a legal or beneficial interest in property" and thus not a "person" within the contemplation of RICO.

Michigan Dep't of Treasury v. Fawaz, No. 86-1809, slip op. at 2 (6th Cir. May 9, 1988) (citation omitted). The Sixth Circuit opinion may also be found in 8 RICO L. Rep. 160 (1988).

The Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.15 (1985), also suggested a broad interpretation of the RICO term "person." See also, Comment, *Tax Fraud and Civil RICO: Implications for Business and Governmental Entities*, 21 U.C. DAVIS L. REV. 1233, 1249 n.88, 1263 n.196 (1988).

38. In enacting the statute, Congress made express findings of fact, including that "organized crime activities . . . subvert and corrupt our democratic processes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970) (codified at 18 U.S.C. § 1961 (1982)). Furthermore, civil RICO was designed to fill prosecutorial gaps. See *infra* note 202 and accompanying text. If civil RICO was designed to fill prosecutorial gaps, then it would be inconsistent with that intent for the courts to discourage or limit governments as RICO plaintiffs. Who knows better how to fill prosecutorial gaps than the prosecutor himself? Perhaps this is why attempts at RICO "reform" legislation did not even attempt to limit government use of civil RICO treble damages. See AMERICAN BAR ASSOCIATION, RICO COORDINATING COMMITTEE REPORT 6-7 (1987). The reform bill, H.R. 5445, passed the House but failed in the Senate by only two votes. Blakey & Cessar, *supra* note 3, at 578-80. It is significant that the opponents of civil RICO remedies for private plaintiffs did not attempt to pare back the use of the treble damages remedy for federal and state government plaintiffs. Perhaps one reason for this is the belief that government entities are not as economically interested in abusing the statute, e.g., by intimidation of competitors.

officials.”³⁹ In light of this history, it would be strange to deny racketeering-injured governments standing to sue under civil RICO while allowing the same cause of action to private corporations. Such an interpretation might bar a civil RICO remedy when no private entity is directly injured by the corruption, as in the case of bribery.⁴⁰

Second, the broad intent demonstrated by the liberal construction clause,⁴¹ the purpose clause,⁴² and the broad statutory language⁴³ offer good reasons not to limit the scope of civil RICO

39. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 6 (1967). The Commission further reported that: "The purpose of organized crime is not competition with visible, legal government but nullification of it. When organized crime places an official in public office, it nullifies the political process. When it bribes a police official, it nullifies law enforcement." *Id.* at 2.

The potential harm of corruption is greater today if only because the scope of governmental activity is greater [O]rganized crime has corrupted police officials, prosecutors, legislators, judges, regulatory agency officials, mayors, councilmen, and other public officials, whose legitimate exercise of duties would block organized crime and whose illegal exercise of duties helps it.

Id. at 6. Earlier reports came to similar conclusions: "[T]he largest single factor in the breakdown of law enforcement agencies in dealing with organized crime [was] the corruption and connivance of many public officials." THE ABA REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT 10 (1952-1953). See also, *City of New York*, 656 F. Supp. at 541 ("the legislative history of RICO shows, and the Second Circuit has held, that Congress intended that RICO apply to corruption and infiltration of local governmental units").

40. See, e.g., the cases referenced at *infra* notes 153-55 and accompanying text.

41. See *supra* note 20; see also, Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 245 & n.25 (1982).

42. See *supra* note 18 and quotation in text.

43. The definition of "person" in section 1961(3) uses the term "includes" which is generally interpreted as being a term of enlargement, not of limitation. See Blakey & Gettings, *supra* note 17, at 1023 n.78. The definition contains neither modifiers nor restrictive language. See Blakey, *supra* note 41, at 241 n.17. See also, Tannenbaum & Molo, *supra* note 3, at 7. Furthermore, the very title of RICO, Racketeering Influenced and Corrupt Organizations, draws no distinction between racketeering influenced organizations, whether government or private.

Similar arguments were put forward during the debate on whether state and local governments could be considered to be "enterprises" under RICO. Cf. *United States v. Angelilli*, 660 F.2d 23, 30-31 (2d Cir. 1981) (use of the word "any" indicates intent to make the list of entities all-inclusive, and "any being whose existence is recognized by law" is within meaning of the term); *United States v. Barber*, 476 F. Supp. 182, 188 (S.D.W. Va. 1979) (citing *United States v. Mandel*, 415 F. Supp. 997, 1020-21 (D. Md. 1979)); Blakey, *supra* note 41, at 269 n.93; Blakey & Gettings, *supra* note 17, at 1023-25. Governments are now accepted as "enterprises" under RICO. See *infra* note 93 and accompanying text. Therefore, governments should also qualify as "persons" under RICO.

Courts rejecting limits on civil RICO's defendant class have held such limits to be contrary to the plain statutory language. See Abrams, *The Place of Procedural Control in Determining Who May Sue or Be Sued: Lesson in Statutory Interpretation from Civil RICO and Sedima*, 38 VAND. L. REV. 1477, 1511-13 (1985).

to private plaintiffs or defendants. Although some early case law interpreted the scope of civil RICO narrowly,⁴⁴ much of that early reasoning has been undermined by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*⁴⁵ Some courts now adhere to the rule that the decision lies with Congress to narrow the scope of RICO even though judges may believe it cuts too wide a swath.⁴⁶

Finally, the broad construction of the antitrust term "person" to include state and local governments⁴⁷ is persuasive authority for at least as broad interpretation under the RICO statute. The United States Supreme Court has recently held that the Clayton Act's statute of limitation should be applied to civil RICO because of the close analogy, common language, and "similarities in purpose and structure" between the two statutes.⁴⁸

44. See, e.g., *Callan v. State Chem. Mfg. Co.*, 584 F. Supp. 619, 622 (E.D. Pa. 1984) (much of the support for the position that civil RICO should be given a narrow interpretation comes from the old line of competitive injury cases); *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1136 (D. Mass. 1982) (courts interpreting § 1964(c) have interpreted it "narrowly and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state court").

45. 473 U.S. 479 (1985). In *Sedima*, the Supreme Court held that no requirements of prior conviction or "racketeering injury" separate from the predicate acts are necessary to support a civil RICO finding of liability. The Court said that "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Id.* at 492 n.10.

46. See *Schacht v. Brown*, 711 F.2d 1343, 1361 (7th Cir. 1983) ("The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime."); *Callan*, 584 F. Supp. at 622; *Blakey & Gettings*, *supra* note 17, at 1040.

47. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972) (state of Hawaii plainly qualifies as a "person" under §§ 4 and 16 of the Clayton Act); *Georgia v. Evans*, 316 U.S. 159 (1942) (a state, unlike the federal government, is a "person" under § 7 of the Sherman Act); *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (a city is a "person" within § 7 of the Sherman Act); see also *Pfizer Inc. v. India*, 434 U.S. 308, 312 (1978) (a foreign nation otherwise entitled to sue in the courts of this country is a "person" under § 4 of the Clayton Act and is entitled to sue for treble damages; "person" under § 4 of Clayton Act is given a "naturally broad and inclusive meaning"). *But see* *United States v. Cooper Corp.*, 312 U.S. 600, 612 (1941) (Section 4 of the Clayton Act held to mean that a "person" does not include the "United States" because "in common usage, the term 'person' does not include the sovereign.").

48. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 107A S. Ct. 2759, 2765 (1987). The Court also noted that:

The Clayton Act . . . offers a far closer analogy to RICO than any state law alternative. Even a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act.

Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees.

However, antitrust laws are designed to promote competition and market efficiency rather than provide remedies for harm suffered by individual businesses.⁴⁹ Antitrust law was intended to prevent windfalls to "undeserving" plaintiffs and to avoid putting offending firms out of business.⁵⁰ By contrast, RICO is designed to inflict severe economic injury on violators and perhaps even to destroy them.⁵¹ Putting some offenders out of business furthers the goals of RICO.⁵² Therefore, because the intended application of RICO appears to be as broad, or possibly broader, than the intended application of antitrust, the scope of the term "person" under RICO should be at least as broad as the scope of the term "person" under the antitrust laws.⁵³

Some of the more notable counterarguments to state and local government standing are: (1) creation of the RICO remedy federalizes state law, violating the principle of comity and the right of states to create and administer their own remedies; (2) dual recovery under state law and federal RICO grants a windfall to government plaintiffs that was not intended by Congress; (3) prior recovery under a state remedy may negate the injury

Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.

The close similarity of the two provisions is no accident. *Id.* at 2764.

49. See *Abrams*, *supra* note 43, at 1511-13; see also, *Blakey*, *supra* note 41, at 241 n.17.

50. See *Binder*, *The Potential Application of RICO in the Natural Resources/Environmental Law Context*, 63 DEN. U.L. REV. 535, 549 (1986).

51. See *Furman v. Cirrito*, 741 F.2d 524, 532 (2d Cir. 1984), *vacated and remanded sub nom.*, *Joel v. Cirrito*, 473 U.S. 922 (1985); *Abrams*, *supra* note 43, at 1512.

52. See *Blakey & Gettings*, *supra* note 17, at 1042; see also, *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) ("RICO . . . is precisely designed to ruin those individuals and enterprises it is aimed at.").

53. See *Blakey*, *supra* note 41, at 258 n. 58 ("Surely, RICO ought to be read at least as broadly as the antitrust statutes on which its civil relief provisions were modeled."). *Binder* explains this argument in the context of the current debate over the RICO analogy to antitrust: The purpose of antitrust is to preserve the competitive market and to make it more efficient while preserving the primary participants. On the other hand, RICO is designed to eliminate some players because of their criminal disposition. Such elimination arguably requires remedies that are more exacting and more available than under the antitrust laws. Therefore, RICO's design requires standing rules at least as permissive as the antitrust laws. See *Binder*, *supra* note 50, at 537. However, *Binder* points out that this argument may not withstand scrutiny because RICO plaintiffs may be as "undeserving" as antitrust plaintiffs and, therefore, expanded standing under RICO may only give rise to spurious RICO complaints. *Id.*

element of civil RICO; and (4) since RICO was designed to supplement inadequate state and federal remedies, there is no need for it where remedies have been adequate, such as in the prosecution of state tax evasion.⁵⁴

2. 1964(c) "injury" requirement

Subsection 1964(c) requires an "injury" to the business or property of the plaintiff. The injury requirement creates a special problem for government cases in two contexts: (1) *parens patriae* cases by municipalities or states on behalf of injured consumers or citizens, and (2) citizen or taxpayer suits, claiming indirect injury or the right to honest government, by which citizens sue on behalf of their state or local government.

The Second and Seventh federal circuits have recently dismissed *parens patriae*⁵⁵ suits filed by state plaintiffs under civil RICO.⁵⁶ Both circuit opinions indicated that the state complaints were inadequately pleaded because of the failure either to plead a separate injury to an exclusive state interest⁵⁷ or to seek redress for the separate state injury.⁵⁸ However, the tenor of these opinions apparently do not altogether preclude *parens patriae* suits. Some commentators have urged an amendment to RICO to ensure the viability of these suits as tools by the state to fight consumer fraud.⁵⁹ However, Professor Blakey, citing

54. For a more detailed examination of these arguments, see *infra* notes 166-70 and accompanying text; Comment, *supra* note 37, at 1252-66.

55. *Parens patriae* is defined as "a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979) (citing *Gibbs v. Titelman*, 369 F. Supp. 38, 54 (E.D. Pa. 1973)).

56. See *New York v. Seneci*, 817 F.2d 1015 (2d Cir. 1987) (state had no representative standing in RICO suit on behalf of consumers injured by defendants' fraudulent business opportunity schemes); *Illinois v. Life of Mid-America Ins. Co.*, 805 F.2d 763 (7th Cir. 1986) (state attorney general sued under RICO on behalf of eight elderly state citizens who had been defrauded by an insurance company marketing deceptive tax shelter schemes).

57. State plaintiff failed to allege an injury to a "quasi-sovereign interest of the state" which must be an injury separate and apart from the interests of private parties. *Life of Mid-America*, 805 F.2d at 766 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

58. The state adequately pleaded the separate state injury but "the monetary relief sought by the complaint is not designed to compensate the state for those damages." *Seneci*, 817 F.2d at 1017.

For a *parens patriae* suit arising in an antitrust context, see *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972) (state not authorized to sue under § 4 of Clayton Act when state's injury is merely for damage to "general economy").

59. See, Note, *Civil RICO and Parens Patriae: Lowering Litigation Barriers*

substantial authority, argues that "[u]nless Congress expressly prohibited such suits," the courts should recognize them, and thus no amendment to RICO is required.⁶⁰ The latter view seems more consistent with the limited rulings of the Second and Seventh Circuits.

State plaintiffs have also been allowed to seek civil RICO damages as representatives of injured private plaintiffs in other contexts, such as insurance regulation.⁶¹

Citizen or taxpayers' suits have fared poorly under the injury requirement in subsection 1964(c). For example, in *Carter v. Berger*,⁶² taxpayers sued a fellow taxpayer under civil RICO for tax fraud which allegedly caused the plaintiffs to be assessed higher taxes as a result of the defendant's non-assessment. The court held that, although RICO applied to state or local tax fraud, the plaintiffs were not the proper parties to bring the suit, despite indication of some indirect harm to plaintiffs.⁶³

Through State Intervention, 24 WM. & MARY L. REV. 429, 451-52 (1983) (such suits promote judicial economy, prevent inconsistent results, remove plaintiffs' fears of reprisal, and serve the compensatory goals of RICO); Wise, *State Files Federal RICO Suit in Consumer Fraud Action*, N.Y.L.J., May 29, 1986, at 3, col. 3 ("This is precisely the type of deliberate and repeated fraud for which the federal RICO statute was intended. The treble damages in the RICO law will hopefully prove an effective deterrent to those who repeatedly prey on innocent consumers and investors."). Furthermore, consumer fraud was the largest single area of fraud in terms of gross monetary injury, according to one nationwide study. UNITED STATES CHAMBER OF COMMERCE, WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS 6 (1974).

60. Blakey & Cessar, *supra* note 3, at 552 n.129.

61. See, e.g., *Corcoran v. American Plan Corp.*, No. CV 86-1729 (E.D.N.Y. Feb. 6, 1987) (WESTLAW, Federal library, Allfeds file) (state superintendent of insurance has standing to bring an action on behalf of two subsidiaries alleging a fraudulent scheme by officers and directors of the parent company to defraud and drain the subsidiaries of their assets). But see *County of Oakland by Kuhn v. City of Detroit*, 620 F. Supp. 1399, 1404 (E.D. Mich. 1985) (counties had no standing as a result of higher prices charged for sewage disposal because of an alleged improper contract award where counties merely collected sums necessary to pay disposal charges from smaller municipalities and neither retained a profit nor made up deficiencies).

62. 777 F.2d 1173 (7th Cir. 1985).

63. In *Carter*, the court explained that the RICO civil remedy provision is almost identical to the antitrust provisions, which deny relief in the case of "passing on" injury. "Passing on" injury occurs when a cartel establishes an overcharge and the middleman pays for it. *Id.* at 1175. The middleman, in turn, passes the overcharge along to consumers. Under antitrust law, the direct purchaser can sue to recover the full overcharge, trebled; the indirect purchaser (usually the consumer) cannot. *Id.*

In the same manner, the court here concluded that "the directly injured party should receive a complete recovery, no matter what; an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer, for relief." *Id.* at 1176. The court noted that although "*Sedima* held that the 'antitrust injury' rule of antitrust does not apply to RICO . . . this is so because 'RICO injury' would be an

3. 1964(c) "business or property" requirement

The meaning of "business or property" under section four of the Clayton Act has been broadly construed as "anything of material value owned or possessed."⁶⁴ In 1987, *McNally v. United States*⁶⁵ curtailed the potential breadth of the RICO statute by holding that the interests protected by the federal mail fraud and wire fraud statutes are limited to pecuniary interests and do not include "intangible rights" such as the public's right to impartial or honest government.⁶⁶ However, a subsequent case, *Carpenter v. United States*,⁶⁷ has limited the apparent scope of *McNally* by recognizing that some compensable intangible rights will be recognized under *McNally*, such as confidential business information.⁶⁸ Although the argument for compensable intangible rights is arguably stronger in the commercial context, i.e., trade secrets,⁶⁹ patents, copyrights, or contract rights,⁷⁰ the dictum in *Carpenter*⁷¹ should allay fears that jurisdictional "hooks" other than the mail and wire fraud statutes will have to be employed where any intangible rights are concerned.⁷²

unintelligible requirement, not because there is no parallel between the two statutes." *Id.* The court's analysis and conclusion that taxpayers suing on behalf of the state have no standing under RICO has some weight because of the almost verbatim language in the antitrust statutes.

At least one other court, also using an antitrust analogy, has decided against RICO taxpayer standing. In *O'Donnell v. Kusper*, 602 F. Supp. 619 (N.D. Ill. 1985), a taxpayer sued the county clerk and some printing companies for violations of law regarding public notice and competitive public contract bidding. The court reserved the issue of whether standing would exist if the plaintiff had alleged fraud in the state attorney's failure to institute a similar action. *Id.* at 623-24.

64. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979); see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) ("the words 'business or property,' . . . refer to commercial interests or enterprises"). For a more complete discussion of the "business or property" injury requirement in civil RICO cases where a governmental entity is the plaintiff, see Comment, *Government Corruption and Civil RICO: Providing Compensation for Intangible Losses*, 58 N.Y.U. L. REV. 1530, 1556-74 (1983).

65. 107A S. Ct. 2875 (1987).

66. *Id.* at 2879-80.

67. 108 S. Ct. 316 (1987).

68. "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* at 320.

69. *Rockwell Graphic Sys., Inc. v. DEV Industr., Inc.*, 3 U.S.P.Q. 2d (BNA) 1545 (N.D. Ill. 1987) (misappropriation of trade secrets satisfies the RICO injury to business or property requirement).

70. *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property).

71. See *supra* note 68.

72. See Rakoff, *Intangible Rights and Wrongs: The McNally Case*, 6 RICO L. REP. 254 (1987).

4. "By reason of a violation of section 1962"

The standing requirement that RICO plaintiffs be injured "by reason of a violation of section 1962" requires allegations of two things: 1) that defendant's conduct falls within the parameters of one of the subsections of section 1962;⁷³ and 2) that such violation proximately cause plaintiff's injuries.

On the issue of causation, the United States Supreme Court, in *Sedima*, reversed a Second Circuit Court of Appeals opinion that had required a separate "racketeering injury," and held that RICO plaintiffs had standing if they alleged injury resulting directly from any of RICO's underlying criminal acts.⁷⁴ However, the Court did not rule that the harder-to-prove "indirect" or "racketeering" injuries were disallowed.⁷⁵ Thus, both direct and indirect injuries to plaintiffs, resulting either from any of the predicate acts themselves or from the "pattern" of activity should qualify. Nevertheless, some courts continue to require injury caused from the "pattern" of racketeering,⁷⁶ while other courts allow only injuries resulting directly from predicate acts.⁷⁷

B. Scope of RICO Liability

The types of parties that may be liable under civil RICO depends upon the peculiar wording of each subsection of section 1962.⁷⁸ Subsection 1962(c) is the most used subsection in civil RICO pleadings.⁷⁹ The elements of a subsection 1962(c) claim are: (1) a person;⁸⁰ (2) employed or associated with; (3) an enterprise;⁸¹ (4) which is engaged in activities that affect interstate or

73. See *supra* notes 21-26 and accompanying text for commentary about the elements of a § 1962 violation.

74. 473 U.S. at 495-97. The plaintiff has standing to sue "to the extent that he has been injured . . . by the conduct constituting the violation." *Id.* at 496.

75. The Court merely criticized the requirement of an "additional" and separate "racketeering injury." *Id.* at 495. Furthermore, allowing "indirect" injury would be consistent with the Supreme Court's "less restrictive reading" of RICO's standing requirements. *Id.* at 497.

76. See, e.g., *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 648 F. Supp. 1412, 1418 (D.N.J. 1986), *rev'd*, 829 F.2d 1263 (3d Cir. 1987) (the acts causing plaintiff's injury, in themselves, must constitute a pattern).

77. See, e.g., *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987) (RICO claim for wrongful discharge dismissed because officer's discharge lacked proximate cause, i.e., it did not "flow directly from the predicate acts, the defendants' banking violations.").

78. See *supra* notes 7 and 23-26 and accompanying text.

79. See *supra* note 27.

80. See *supra* note 6.

81. See *supra* note 25.

foreign commerce; (5) who conducts or participates in the enterprise's affairs; (6) through a pattern of racketeering activity.⁸²

Of special significance to the question of government liability are the following concepts which will be examined below: "person," "enterprise," the non-identity requirement in section 1962(c) cases, and respondeat superior.

1. Section 1962 "person"

The term "person" should have the same meaning under sections 1962 and 1964(c) because, as explained below, the term is specifically defined by the RICO statute. However, some courts, perhaps in order to restrict state and local government liability in civil RICO actions, have held that state and local governments are not "persons" within the intent of the RICO statute.⁸³ Unfortunately, such a narrow interpretation is a double-edged sword. If governments cannot be defendant persons under section 1962, then they should not be plaintiff persons under subsection 1964(c).⁸⁴

However, narrow application of the term "person," in order to protect governments from RICO liability is inconsistent and

82. "Pattern of racketeering activity" is defined in subsection 1961(5) as "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 the commission of a prior act of racketeering activity." The term "racketeering activity" is defined in subsection 1961(1), and includes a host of federal and state penal statutes. See *supra* note 24. The term "pattern" can best be understood by referring to *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), and its progeny.

83. See, e.g., *Fiore v. Kelly Run Sanitation, Inc.*, 609 F. Supp. 909, 912-13 n.1 (W.D. Pa. 1985) (citation omitted); see also, *Michigan Dep't of Treasury v. Fawaz*, 635 F. Supp. 141, 142 (E.D. Mich. 1986), *aff'd on other grounds*, 848 F.2d 194 (6th Cir. 1988).

84. Most courts construing the RICO term "person" for purposes of determining section 1964 standing have held it to include governments. See *supra* note 37 and accompanying text. Construing the term "person" in order to exclude governments from section 1962 liability would create an inconsistent construction of the same term, contrary to the singular definition of the term in subsection 1961(3). Furthermore, a consistently narrow interpretation of the term, for both standing and liability purposes, would violate the broad congressional intent behind the RICO statute. See *supra* notes 38-46 and accompanying text.

Whether Congress intended governments to be RICO defendants is unclear. However, such an intention appears to conflict with clear congressional intent to aid, not hinder, state and local efforts to combat public and private corruption. State and local prosecution is hardly furthered by awarding treble damages against state and local governments because penalizing innocent taxpayers will not deter offending officials. See *infra* note 124 and accompanying text. Furthermore, dissipation of public funds through treble damage awards will reduce funding available for state and local prosecution of corruption. Thus, state and local government treble damages liability may violate the spirit of the RICO statute.

unnecessary. First, interpreting the term "person" under section 1962 more narrowly than under section 1964 would call for two inconsistent applications of subsection 1961(3), which broadly defines the term "person."⁸⁵ Therefore, in order to give a consistent meaning, faithful to congressional intent, to the term "person" throughout the RICO statute, it should be conceded that government units are "persons" under both sections 1962 and 1964. Justice Rehnquist's bitter-with-the-sweet analogy⁸⁶ might seem appropriate in this context: local government must take the bitter (defendant person status) along with the sweet (plaintiff person status) in order to take advantage of civil RICO's treble damage remedies.⁸⁷

Second, it may be unnecessary to narrowly interpret the term "person" in order to exclude governments from RICO liability because there are well-founded constitutional, statutory, and public policy reasons for allowing state and local governments to have immunity from civil RICO treble damages. These reasons will be discussed in Section IV.⁸⁸

2. Nature of RICO "enterprise"

The breadth of the term "enterprise" will greatly affect government use of civil RICO because all RICO causes of action must plead the existence of an enterprise. Subsections (a), (b), and (c) of section 1962 prohibit, respectively, (1) investment of illegal proceeds in an enterprise, (2) acquisition of an interest in an enterprise through racketeering, and (3) participation in the conduct of an enterprise through racketeering.⁸⁹

In government civil RICO complaints, there are three primary ways to meet the "enterprise" requirement of section 1962. First, the enterprise can be the injured government itself.⁹⁰ Second, the enterprise can be a business entity negotiating or trans-

85. See *supra* notes 6 and 84.

86. *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J., plurality opinion).

87. Furthermore, two definitions for the term "person" would be hard to support, as one opinion illustrated in another context. See *Andersen-Myers Co. v. Roach*, 660 F. Supp. 106, 112 (D. Kan. 1987) ("The court finds no reasonable basis upon which to hold that the one definition of 'person' as stated in section 1964(c) encompasses different classes of people or entities depending on whether the case is a civil or criminal suit.").

88. See *infra* notes 107-49 and accompanying text.

89. See *supra* notes 7 and 23-26 and accompanying text.

90. Most government plaintiff cases appear to fall into this category. See, e.g., *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980).

acting with the government.⁹¹ Third, the enterprise may be an association-in-fact working as or with governmental employees or "associated with" the government by participation in the conduct of their own or another enterprise through racketeering that harms the government.⁹²

It has been held that individuals, corporations, other business enterprises, governments,⁹³ or illegal entities⁹⁴ may be RICO enterprises. The term "enterprise" has also been held by some courts to include political coalitions⁹⁵ and sole proprietorships.⁹⁶

91. See, e.g., *United States v. Ambrose*, 740 F.2d 505, 512 (7th Cir. 1984) ("The enterprise here is the Chicago Police Department (though it could just as well be the *kingpins' businesses*).") (emphasis added).

92.

[A]n association in fact could be a group of corporations, or a group of individuals associated with several corporations. Moreover, it may be possible to charge each individual entity as a person under RICO and then group them together as an enterprise, or even to name an individual defendant as the enterprise and allege the other defendants as persons "associated with" the enterprise.

One court has even held that the RICO enterprise may be named as a defendant as long as one or more of the defendants are the "person" or "persons" who act upon the enterprise "in such a way that the enterprise's affairs are conducted in the pattern of racketeering activity."

Abrams, Enterprise Liability under Section 1962(c), 2 RICO L. REP. 683 (1985) (footnotes omitted).

93. After an initial split among courts, state and local governments are now accepted as RICO enterprises. The federal courts of appeals are unanimous in upholding this view. *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982) (office of governor); *United States v. Angelilli*, 660 F.2d 23, 30-35 (2d Cir. 1981) (city court); *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980) (prosecutor's office); *United States v. Grant*, 622 F.2d 308, 313 (8th Cir. 1980) (county judge); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (sheriff's department); *United States v. Bachelier*, 611 F.2d 443, 450 (3d Cir. 1979) (traffic court); *United States v. Grzywacz*, 603 F.2d 682, 685-87 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (police department); *United States v. Frumento*, 563 F.2d 1083, 1089-92 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Bureau of Cigarette and Beverage Taxes); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977) (law enforcement department), *cert. denied*, 435 U.S. 904 (1978); *United States v. Ohlson*, 552 F.2d 1347, 1348 (9th Cir. 1977) (law enforcement department) (sub silentio); see also, Blakey, *supra* note 41, at 268 n.93; Poklemba & Crusco, *Public Enterprises and RICO: The Aftermath of United States v. Turkette*, 18 CRIM. L. BULL. 197 (1982). See generally, Comment, *Criminal Law—Are Governmental Entities Appropriate RICO Enterprises?*, 13 MEM. ST. U.L. REV. 96 (1982).

94. See *United States v. Turkette*, 452 U.S. 576 (1981) (the term "enterprise" as used in RICO statute encompasses both legitimate and illegitimate enterprises).

95. See, e.g., *Hudson v. LaRouche*, 579 F. Supp. 623 (S.D.N.Y. 1983) (an alleged "network" between individual and corporate defendants who were affiliated with a political candidate and who banded together to further the candidate's political interests constituted an "enterprise" for civil RICO purposes).

96. See, e.g., *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985) (sole proprietorship

3. Non-identity of "person" and "enterprise"

The section 1962 non-identity requirement limits the conceptual breadth of the term "enterprise." This requirement arises by implication within subsection 1962(c), which makes it "unlawful for any person employed or associated with any enterprise" to conduct or participate in the conduct of the enterprise's affairs. Logic urges that a "person" employed by or associated with the enterprise must be physically or conceptually distinct from the enterprise. The non-identity requirement has also been held to apply, according to some courts, to subsections (a) and (b).⁹⁷

The requirement of non-identity of person and enterprise has resulted in some limitations on the concept of association-in-fact.⁹⁸ However, the Fourth Circuit has held that an intra-corporate organization of employees having no existence separate

can be an "enterprise" with which its proprietor can be "associated"; result might be different "if the sole proprietorship were strictly a one-man show"; defendant's proprietorship employed several people); *United States v. Weinberg*, 656 F. Supp. 1020 (E.D.N.Y. 1987) (criminal defendant was held distinct from his real estate business).

97. See, e.g., *Waldo v. North American Van Lines, Inc.*, 669 F. Supp. 722 (W.D. Pa. 1987); *CATV Support Services, Inc. v. Magnavox CATV Systems, Inc.*, No. 86 Civ. 2276 (S.D.N.Y. May 7, 1987) (WESTLAW, Federal library, Allfeds file) (the subsections of § 1962 should be construed uniformly and therefore the requirement of a distinct "person" and "enterprise" applies to each alike); *Bisceglie, Enterprise: Relation of Liable Person*, 6 RICO L. Rep. 831 (1987).

98. See, e.g., *Roberts v. Heim*, 670 F. Supp. 1466, 1477 (N.D. Cal. 1987) (sub-group of defendants not sufficiently distinct under § 1962(c) from association-in-fact enterprise they comprised); *Prodex, Inc. v. Legg Mason Wood Walker, Inc.*, No. Civ. A. 86-1950 (E.D. Pa. Feb. 6, 1987) (WESTLAW, Federal library, Allfeds file) (allegations naming brokerage firm as person and brokerage firm and its broker as the enterprise fail to satisfy the non-identity requirement); *Radionic Industr., Inc. v. GTE Products Corp.*, 665 F. Supp. 622 (N.D. Ill. 1987) (a corporation cannot be liable as a person where enterprise is composed exclusively of association in fact between corporation and its officers and employees); *Ellis v. Merrill Lynch & Co.*, 664 F. Supp. 979 (E.D. Pa. 1987) (corporate defendant and its employee cannot constitute both the RICO person and enterprise because a corporation can only operate through its officers and agents). One case has even ruled that a group of businesses cannot be an association-in-fact enterprise because the word "association" means a group of "individuals." See *Roberts*, 670 F. Supp. at 1466. *Contra*, *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (group of corporations may be an enterprise); *Ross v. Omnibusch, Inc.*, 607 F. Supp. 835, 838 (W.D. Mich. 1984) (Two corporate defendants either together or separately constituted the requisite enterprise(s): "The agency relationships which are asserted to exist between these Defendants are sufficient to indicate that Defendant R.E. Busch and/or Defendant Omnibusch may be the persons who acted upon the enterprises of Defendant Omnibusch and/or Defendant Chicago Grain. Therefore, I am unable to find that Plaintiffs can prove no set of facts which establish an enterprise distinct from a culpable person.").

from the corporation may constitute a separate enterprise,⁹⁹ and the Seventh Circuit has held that a corporate subsidiary is a distinct entity from its parent company for RICO purposes.¹⁰⁰

4. *Respondeat Superior*

Some plaintiffs have tried to escape the requirement of non-identity of person and enterprise by pleading the corporate employees as the "persons" liable in the corporate "enterprise" and then asserting that the corporation is liable under principles of respondeat superior, vicarious liability, or agency law.¹⁰¹ However, most courts appear to question whether respondeat superior should be available to "end run" the subsection 1962(c) requirement of non-identity.¹⁰² Nevertheless, respondeat superior has been applied using all three subsections of section 1962.¹⁰³ Under subsection (a) of section 1962, courts typically allow both respondeat superior¹⁰⁴ and aiding and abetting liability.¹⁰⁵ However, subsection (a) is not used extensively by plaintiffs, whether government or private.¹⁰⁶

99. See *United States v. Computer Servs. Corp.*, 689 F.2d 1181 (4th Cir. 1982) (organization having no corporate existence separate and apart from that of the corporation itself, but having a substantial number of corporate employees working within groupings or divisions known by the organization's name constituted a de facto enterprise).

100. See *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 402-13 (7th Cir. 1983), *aff'd on other grounds*, 473 U.S. 606 (1985).

101. See, e.g., *Federal Savings & Loan Ins. Corp. v. Shearson-Am. Express, Inc.*, 658 F. Supp. 1331 (D.P.R. 1987); *Bernstein v. IDT Corp.*, 582 F. Supp. 1079 (D. Del. 1984). For example, in *Federal Savings & Loan*, the court reasoned that the remedial purposes of subsection 1962(c) were broad enough to impute liability to a corporation (even though it is also the RICO enterprise) that causes its employees to infiltrate a legitimate business. The court based its reasoning on the Supreme Court's statement in *United States v. Turkette* that the major purpose of the RICO statute is "to address the infiltration of legitimate business by organized crime." 452 U.S. 576, 591 (1981). This argument may also be useful to government plaintiffs. See *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Congress intended to prevent the infiltration of organized crime into all areas of economic life, not only into private business).

102. See *Respondeat Superior*, 6 RICO L. REP. 845, 846 (1987).

103. See, e.g., *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987) (subsections 1962(a) and (b)); *Connors v. Lexington Ins. Co.*, 666 F. Supp. 434 (E.D.N.Y. 1987) (subsection 1962(c)).

104. *Respondeat Superior*, *supra* note 102, at 846-47.

105. See, e.g., *Petro-Tech, Inc. v. The Western Co. of N. Am.*, 824 F.2d 1349, 1361 (3d Cir. 1987).

106. See *Blakey & Cessar*, *supra* note 3, app. at 619.

IV. GOVERNMENT IMMUNITY TO RICO LIABILITY

The last section discussed the scope of standing and liability of state and local governments in civil RICO suits. This section considers some existing and potential arguments, based on constitutional, statutory, and public policy grounds, for state and local government immunity to civil RICO liability.¹⁰⁷

A. *Eleventh Amendment Immunity*

Grounds for state immunity to civil RICO actions commenced in federal court may be found in the eleventh amendment¹⁰⁸ of the United States Constitution. The amendment has been held to bar recovery in federal court against a state by its own citizens, as well as by citizens of other states.¹⁰⁹ In addition, the amendment bars any judgment that would require payment from the public funds of the state treasury,¹¹⁰ unless Congress authorizes federal courts to enter such an award pursuant to enforcement provisions of the fourteenth amendment,¹¹¹ or unless a state expressly or impliedly elects to waive the protection of the amendment.¹¹² Note, however, that the amendment only bars suits in federal court. This is especially important in light of recent opinions deciding whether federal courts have exclusive jurisdiction over RICO suits, as they do over antitrust.¹¹³

The eleventh amendment has been held to bar civil RICO treble damages actions against state governments and its officers who are sued in their official capacities. The Ninth Circuit, in

107. As stated at the beginning of this comment, the following review of potential immunity arguments is intended only to provide a broad outline for state and local governments. The following discussion is by no means represented as being exhaustive of the arguments and issues involved. Each of the immunity arguments presented below might well deserve a separate law review article.

108. The eleventh amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens or subjects of any Foreign State." U.S. CONST. amend. XI.

109. *Hans v. Louisiana*, 134 U.S. 1 (1890).

110. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

111. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

112. *Edelman*, 415 U.S. at 673; *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964).

113. Some recent opinions have held for exclusive federal jurisdiction. *See, e.g., Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir. 1987); *Massey v. City of Oklahoma City*, 643 F. Supp. 81 (W.D. Okla. 1986); *Simpson Elec. Corp. v. Leucadia, Inc.*, 128 A.D.2d 339, 515 N.Y.S.2d 794 (N.Y. App. Div. 1987). *But see, Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987); *Jae-Soo Yang Kim v. Pereira Enters., Inc.*, 694 F. Supp. 200, 202 & n.1 (E.D. La. 1988); *Rice v. Janovich*, 109 Wash. 2d 48, 55, 742 P.2d 1230, 1234 (1987).

Productions & Leasing, Ltd. v. Hotel Conquistador, Inc.,¹¹⁴ held that a private plaintiff could not raise a civil RICO claim against the Nevada Gaming Commission and State Gaming Control Board because the eleventh amendment provided immunity to state governments, there was no clear showing that Congress intended to abrogate that immunity, and the state itself had explicitly reserved eleventh amendment immunity. However, the Ninth Circuit did not explicitly treat the issues of (1) whether Congress had power to abrogate eleventh amendment immunity when it enacted the civil RICO statute, and (2) whether the implied inclusion of governments within the RICO definition of "person" was enough to evince a congressional intent to abrogate eleventh amendment immunity.

One court has directly addressed the issue of whether section 1961(3), which defines the term "person," abrogates eleventh amendment immunity. In *Fiore v. Kelly Run Sanitation, Inc.*,¹¹⁵ an individual involved in the trash hauling business sued his competitors and the Pennsylvania Department of Environmental Resources under civil RICO because of an alleged bribery scheme. Although the court ruled that the state agency was not amenable to suit in federal court, it also stated that the

absence of any provision applying the term "person" to sovereign governments implies that Congress did not intend the term to extend to them. . . . The language in 18 U.S.C. § 1961(3) does not specifically define a state or state agency to be a "person" under RICO. This is also true of the language of the various antitrust laws. Thus there is nothing inherent in these statutes to provide for Congressional abrogation of Eleventh Amendment immunity and there has been no waiver by the state.¹¹⁶

While the *Fiore* court may have reached the correct *result* in terms of eleventh amendment case law, its reasoning is troubling. The court assumed that holding a state to be a "person" within the meaning of section 1961(3) would necessitate a conclusion that Congress intended to abrogate state immunity. This might not be a fair assumption because such eleventh amendment abrogation has always been pursuant to Congress' four-

114. 709 F.2d 21 (9th Cir. 1983).

115. 609 F. Supp. 909 (W.D. Pa. 1985).

116. *Id.* at 912-13 n.1 (citation omitted).

teenth amendment powers.¹¹⁷ RICO jurisdiction, by contrast, is based on commerce clause jurisdiction.¹¹⁸ Therefore, even if state governments are persons under subsection 1961(3), the eleventh amendment may bar RICO suits against them by private plaintiffs. However, to the extent that the eleventh amendment does not restrict the commerce clause powers of Congress, then the issue of implied abrogation of eleventh amendment state immunity under RICO will need clarification.¹¹⁹

B. Treble Damages Immunity

Another area in which courts have limited the liability of municipalities involves the award of punitive¹²⁰ or treble damages. In a decision containing analysis that may be applicable to civil RICO, the Supreme Court, in *City of Newport v. Fact Concerts, Inc.*,¹²¹ ruled that punitive damages could not be awarded against a municipal defendant for violation of a plaintiff's civil rights under 42 U.S.C. § 1983. The Court said that analyzing whether Congress intended punitive damages to be applied to the civil rights statute required an examination of the history and public policy behind the municipal immunity doctrine and

117. "Congress may create federal causes of action against states without their consent when it acts pursuant to its power to enforce the fourteenth amendment. The extent to which the eleventh amendment restricts other Congressional powers has not yet been determined." J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, section 2.11, at 49 (3d ed. 1986). See also, *Alabama v. Pugh*, 438 U.S. 781 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976).

118. See 18 U.S.C. § 1962 (1982).

119. See *supra* note 117. It may be argued that implied abrogation of eleventh amendment immunity was never intended by RICO in light of the policy arguments at *supra* note 84.

120. Punitive damages may or may not be analogous to treble damages. Statutory double or treble damages are regarded by some courts as punitive but by other courts they are regarded as remedial and nonpunitive. See 22 AM. JUR. 2D *Damages* § 268 (1965). However, under the Clayton Act, the Supreme Court has ruled that although treble damages play an important role in penalizing wrongdoers and in deterring wrongdoing, nevertheless section four is designed primarily as a remedy. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Because the antitrust statutes serve as the closest analogy to the RICO statute, there is a good argument for applying the same rule to the RICO statute. Therefore, the punitive damages analogy may be of only limited value to government defendants seeking immunity. Nevertheless, the Court's dicta in *Newport* as to why treble damages should not be applied against municipalities may provide a new immunity argument. See *infra* notes 124-125 and accompanying text. See also, *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1242-43 (W.D. Okla. 1984) (RICO's treble damages are wholly disproportionate to injuries and are punitive).

121. 453 U.S. 247 (1981).

section 1983.¹²² Because no state recognized the imposition of punitive damages against municipalities in 1871, when section 1983 was passed, the Court concluded that Congress could not have intended the abrogation of municipal immunity to punitive damages.¹²³

This analysis implies that treble damages could be awarded against a municipality upon a showing that treble damages had been awarded against municipalities in cases prior to the enactment of civil RICO. However, the *City of Newport* opinion went further, stating that neither the retribution nor the deterrence objectives of punitive damages and of section 1983 would be advanced by such damages because the award came out of the pockets of innocent taxpayers whose punishment could not be expected to deter offending officials.¹²⁴ The Court cited an old treble damages case which distinguished treble damages recovery from private as opposed to government defendants.¹²⁵

At least one opinion has applied the Supreme Court's analysis in *City of Newport* to the civil RICO area. In *Massey v. City of Oklahoma City*,¹²⁶ the court held that public policy immunizes a city from the treble damages provision of the RICO statute. The court, citing the Supreme Court's public policy rationale for limiting punitive damage awards against municipal defendants in *City of Newport*,¹²⁷ said that any award would require payment to be made by the innocent taxpayers residing in the city. Therefore, it would be unjust to award treble damages.¹²⁸ Furthermore, it was held that a municipal corporation is

122. *Id.* at 258-59.

123. *Id.* at 259-66.

124. *Id.* at 266-71.

125. *Id.* at 261-62. The case was *Hunt v. City of Boonville*, 65 Mo. 620 (1877), in which a municipality was found not liable for treble damages under a trespass statute notwithstanding the statute's authorization of such damages against "any person." The Missouri court cited the fact that a municipal corporation cannot do a criminal act or a willful or malicious wrong. *Id.* at 624. The court also distinguished the relationship of municipal officials to citizens from that of private corporate officials to shareholders: "[T]here is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for the willful or malicious acts of its officers, as there is in the case of private corporations." *Id.* at 625.

126. 643 F. Supp. 81 (W.D. Okla. 1986).

127. 453 U.S. at 258-71.

128. 643 F. Supp. at 84-87. An analogous argument has been used in another government RICO liability case. See *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984) (treble damages cannot be assessed against FDIC as receiver for defunct bank, since innocent depositors and creditors, rather than bank itself, would be punished).

an artificial person incapable of performing the underlying criminal predicate acts and, thus, did not have the requisite mens rea for criminal liability or the authority from the state legislature to act criminally.¹²⁹ Therefore, the court denied RICO treble damages without having to find that the city was not a "person" under section 1961(3).

But does limitation of the treble damages remedy for government defendants violate the broad intent of Congress? Arguably it does. However, the legislative history emphasizes the need to protect, not harm, these public entities.¹³⁰ Although it was the purpose of RICO to "put out of business" even legitimate business enterprises that are found to be corrupted, it is disingenuous to argue that RICO was meant to put legitimate government "out of business."¹³¹

Furthermore, commentators generally have argued under the antitrust laws that, in treble damage suits against state and local government,

public policy considerations (chilling effect on local government decision-making, enormous potential budgetary impact, possible retroactive effect) should prevent the granting of treble damages. Injunctions on the basis that a particular activity was a violation of the federal antitrust statutes would vindicate the federal policy.¹³²

Extension of this reasoning to civil RICO may be persuasive.

C. Governmental Non-Indictability Under Subsection 1961(1)

The RICO statute itself may provide a solution to the prob-

129. The court reasoned that since all their powers were derived from the state legislature and the legislature did not grant any power to perform acts of racketeering, any illegal acts of city officials are ultra vires. *Id.* at 84-85. However, this reasoning may be criticized. The same rationale may be applied to exempting corporations and other business "artificial persons" from the scope of RICO. Equally in the case of legitimate business enterprises as in the case of municipal corporations, it may be stated that the original purposes were not to commit acts of racketeering. Instead of relying on an ultra vires or artificial person analysis, a better approach for excluding municipalities from liability may be to rely solely on the policy argument that the Supreme Court put forth in *City of Newport*, i.e., that the innocent taxpayers should not be required to pay out beyond compensatory damages. See *supra* note 124 and accompanying text.

130. See *supra* notes 38-46 and accompanying text.

131. See *supra* notes 51-52 and accompanying text.

132. D. MANDELKER, D. NETSCH, P. SALSICH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 493-94 (1977).

lem of state and local government RICO liability. Governmental liability may fail under the RICO "racketeering activity" prong, which is defined in subsection 1961(1).¹³³ The Supreme Court stated in *Sedima, S.P.R.L. v. Imrex Co.* that "racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he *could* be."¹³⁴ State and local governments have seldom been held to be indictable or capable of conviction under the criminal law and typically for few types of criminal causes of action.¹³⁵ If cities and states are not capable of performing the underlying "racketeering activity," as defined under the relevant state or federal penal statutes cited in subsection 1961(1),¹³⁶ then it is difficult to say that they "could be" convicted as the Supreme Court required in *Sedima*.¹³⁷ Therefore, government defendants may avoid liability because they are not indictable under the "racketeering activity" prong of section 1962.¹³⁸

Private corporate indictability under the criminal law is of much wider scope.¹³⁹ Since the criminal liability of private cor-

133. See *supra* note 24.

134. 473 U.S. 479, 488 (1985) (emphasis added).

135. Cases of government criminal liability typically have involved state prosecution against a city or county for abatement of a nuisance created by the municipality or failure to perform duties of a public nature or an imperative governmental function. See 56 AM. JUR. 2D Municipal Corporations § 27 (1971). The United States Supreme Court has even cited with approval a case stating that a municipal corporation cannot do a criminal act. See *supra* note 125 and accompanying text. Cf. *Wiley v. Federal Land Bank*, 657 F. Supp. 964, 965 (S.D. Ind. 1987) (defendants, as federal instrumentalities, are immune from RICO liability; the alleged racketeering activity providing RICO jurisdiction did not apply to defendant). However, there is some authority for assimilating municipalities as natural persons capable of criminal as well as civil liabilities. See 64 C.J.S. *Municipal Corporations* § 2215 (1950).

136. See *supra* note 24.

137. 473 U.S. at 488. See also the discussion on governmental immunity regarding intentional misconduct of government employees, *supra* notes 142-44 and accompanying text.

138. This type of analysis is arguably better than the "artificial person" analysis undertaken by the court in *Massey*, see *supra* note 129 and accompanying text, because private corporations, and other legal and illegal entities which fall within the scope of RICO enterprises meant to be "put out of business," are not unnecessarily excluded.

139. Private corporations have been indicted under a broad scope of criminal sanctions, including criminal homicide, see Annotation, *Corporation's Criminal Liability for Homicide*, 45 A.L.R.4TH 1021 (1986), extortion, see Annotation, *Criminal Liability of Corporation for Extortion, False Pretenses, or Similar Offenses*, 49 A.L.R.3D 820 (1973), and bribery and conspiracy to bribe, see Annotation, *Criminal Liability of Corporation for Bribery or Conspiracy to Bribe Public Official*, 52 A.L.R.3D 1274 (1973). Corporate liability is usually premised upon three main factors: 1) whether the crime is punishable by non-corporal punishment, i.e., fine; 2) whether a corporation is a "person" within the statutory definition of the crime involved; and 3) whether the corporation has the ability

porations traditionally has been interpreted much more broadly than the criminal liability of governments, then it should be much easier to impose civil RICO liability on private corporations than on state and local governments. Hence, the non-indictability analysis will allow private corporations to escape civil RICO damages.

Furthermore, the civil RICO remedies are based on the same substantive violations as the criminal RICO remedies. Therefore, to hold governments liable under civil RICO may theoretically make them liable under criminal RICO. Although the label "civil" RICO appears to place the remedy fully inside the civil sphere of legislation, civil RICO, unlike the civil rights and antitrust remedies, is founded wholly upon predicate acts found exclusively within federal and state penal statutes. Because of the unique nature of civil RICO, courts should only with great caution hold governments liable under civil RICO.

There are advantages and disadvantages to the non-indictability analysis. It is based on the plain language of the statute and thus avoids the debate over congressional intent. This analysis also avoids policies like the disfavored *ultra vires* or "artificial person" theories.¹⁴⁰ However, the criminal liability of state and local government is ill-defined. Legal precedent for government criminal liability may differ among the various states and, thus, the non-indictability analysis may create an arbitrary and inconsistent rule.¹⁴¹ Furthermore, simply because there is no legal precedent for finding government criminal liability does not mean that such liability is therefore precluded. Nevertheless, the non-indictability analysis may be, in the majority of cases, an alternative basis on which to exempt state and local governments from civil RICO liability.

D. Governmental Tort Immunity

Another reason for an exemption from civil RICO liability

to form the criminal intent necessary to commit such a crime or whether such intent can be imputed from corporate agents. *See generally*, Annotation, *Corporation's Liability to Criminal Prosecution As Affected by Punishment or Penalty Imposed*, 80 A.L.R.3d 1220 (1977); 45 A.L.R.4th 1021.

140. *See supra* notes 129 and 138 and accompanying text.

141. In some states, the non-indictability analysis may assist in creating a clear line exempting state or local government. *See, e.g.*, ALA. CONST. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."). However, in states lacking a clear-cut statutory or constitutional exemption, the non-indictability analysis may yield a different result.

for state and local governments may be found in the express public policy of governmental tort immunity. The general rule in state courts throughout the country is that the state or city will not be held liable for the ultra vires acts of its public officials.¹⁴² A "number of state statutes requiring municipal corporations to indemnify their employees for adverse judgments rendered as a result of performance of governmental duties specifically exclude indemnification for malicious or willful misconduct by the employees."¹⁴³ Another example of governmental tort immunity, the Federal Tort Claims Act, abrogates sovereign immunity for the negligent acts of governmental employees, but makes an exception for intentional misconduct by non-law enforcement federal employees.¹⁴⁴ Because RICO involves underlying criminal offenses, the acts of government employees which qualify as RICO predicate acts are, almost by definition, intentional, malicious, and ultra vires. For Congress to override the express will and policy of state legislatures, which exempt state and local governments from the intentional and malicious acts of public employees, would represent a serious threat to our federal structure and a breach of the principle of comity.¹⁴⁵ Therefore, to avoid these potential constitutional problems and to accommodate the states' express tort immunity policies, the courts may conclude that state and local governments are exempt from civil RICO remedies which are not now available under the law of qualified governmental tort immunity.

One advantage of governmental tort immunity is that it still allows suits against the culpable officials when they are sued in their individual capacities. However, a potential pitfall in adopting this form of immunity in RICO cases is that it may "federalize" the law of governmental tort immunity and may cause the

142. See 18 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.60 (3d ed. 1977).

143. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 n.30 (1981).

144. See 28 U.S.C. § 2680(h) (1982).

145. A crude analogy might be drawn to the "state action" exemption found under the antitrust laws. That doctrine allows an exemption to state liability where there is a "clearly articulated and affirmatively expressed" state policy. See Annotation, *What Constitutes "State Action" Under Rule Exempting State and Local Governmental Action From Antitrust Laws—Federal Cases*, 70 L. Ed. 2d 973, 979 (1983). In a similar fashion, the governmental tort immunity policies of the states are "clearly articulated and affirmatively expressed."

federal courts to engage once-again in the loathsome task of dealing with the governmental/proprietary distinction.¹⁴⁶

Some courts have not considered the above policy and statutory reasons for government immunity when confronted with civil RICO suits against state or local governments.¹⁴⁷ By adopting some or all of the above reasons for government RICO immunity, and by repelling the argument that a government is not a "person," courts may foster a consistent definition of the RICO "person" in both the standing and the liability contexts, and, at the same time, limit government exposure to civil RICO liability.¹⁴⁸ However, Congress ultimately may ensure government immunity to civil RICO by amending subsection 1961(3) to specifically exclude governments from the definition of the term "person" under section 1962.¹⁴⁹

V. CIVIL RICO: A TOOL FOR STATE AND LOCAL GOVERNMENT

The federal civil RICO statute is a valuable tool for state and local governments to recover their losses from illegal business or taxpayer practices, to effectively and less expensively de-

146. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

147. See, e.g., *Cullen v. Margiotta*, 811 F.2d 698, 730 (2d Cir.), cert. denied, 107A S. Ct. 3266 (1987) (civil rights and RICO suit brought against county, town, and city based on alleged coercion of political contributions and denial of promotions and other employment benefits).

It is not a good enough answer to simply say that because the courts or the parties in these cases have not reached the issue of whether governmental entities may be held civilly liable under RICO, it is settled that governments do not have civil RICO immunity.

Government immunity under the RICO statute would not be the first area of the law in which the courts and parties have failed to consider relevant issues that might influence the outcome of civil RICO suits. One commentator observed that no party or court in any reported case had raised the issue of whether the Supreme Court's decision in *Aldinger v. Howard* would permit federal pendent jurisdiction over state respondeat superior claims arising in conjunction with an underlying civil RICO action. See Note, *The Applicability of Civil RICO to Toxic Waste Polluters*, 62 IND. L.J. 451, 463-66 (1986-87). "Suprisingly, every RICO plaintiff, RICO defendant, and federal court to this author's knowledge has assumed that jurisdiction exists for federal courts to adjudicate a state-created respondeat superior claim against an 'enterprise' in conjunction with a federally-created section 1962(c) RICO claim against an 'enterprise's' employees." *Id.* at 465.

148. See *supra* note 83-88 and accompanying text.

149. The 1986 amendments to the Clayton Act serve as a good example of the kind of amendment that might be proposed for RICO. Congress limited the potential liability of local government under the Clayton Act by first defining the term "local government," and then specifically excluding that term from the definition of "person" under the amendment. See 15 U.S.C. § 34 (Supp. IV 1986). Congress disallowed any action by or against local government for damages, costs or attorney fees, but left intact suits for injunction. See *id.* at §§ 35-36.

ter illegal activities, and to overcome the prosecutorial inadequacies of state and federal criminal laws. Special problems of the federal civil RICO statute will also be discussed below.

A. *The Expanding Use of RICO by State and Local Government*

Recent federal RICO cases illustrate the creativity of state and local governments in using civil RICO to further their law enforcement objectives. Early government cases primarily involved governments suing under civil RICO for contract fraud, misrepresentation, or competitive injury claims.¹⁵⁰

In addition to public contracts, cities and states are now employing RICO as a tool against tax fraud, environmental damage, complex conspiracy, and other areas in which governments have not previously used RICO.

1. *Public contracts and public corruption*

Probably the most active area of state and local government use of civil RICO is still in public contracts and public corruption. The RICO enterprise may be the governmental body (plaintiff), the contracting company, or a contractor and government employee(s). Common fact scenarios involve bid-rigging¹⁵¹ or kickback schemes,¹⁵² bribery of public officials,¹⁵³ corruption of government institutions,¹⁵⁴ legislative or executive influ-

150. See, e.g., *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984) (false billing claims submitted to county); *County of Cook v. Lynch*, 560 F. Supp. 136 (N.D. Ill. 1982) (fraudulent real estate tax assessment reductions obtained through bribery); *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980) (rigging of competitive bidding).

151. See, e.g., *County of Oakland by Kuhn v. City of Detroit*, 620 F. Supp. 1399 (E.D. Mich. 1985) (improper award of disposal contract without competitive bidding); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (D. Alaska 1982) (telephone cable contracts); *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980) (demolition projects). Various criminal RICO prosecutions could have also been the basis for a civil suit. See, e.g., *United States v. Caldwell*, 544 F.2d 691 (4th Cir. 1976); *United States v. Addonizio*, 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

152. See, e.g., *United States v. Butler*, 618 F.2d 411 (6th Cir.), cert. denied, 447 U.S. 927 (1980) (criminal case).

153. See, e.g., *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536 (E.D.N.Y. 1987) (evasion of city sewer system inspections).

154. See, e.g., *County of Cook v. Lynch*, 560 F. Supp. 136 (N.D. Ill. 1982) (suit against attorneys for corrupt practices before County Board of Tax Appeals).

ence,¹⁵⁵ fraudulent corporate reorganization of a public utility,¹⁵⁶ and law enforcement "protection" rackets.¹⁵⁷

2. Tax evasion

Civil RICO may be used as a tool to sue state or local tax evaders.¹⁵⁸ RICO suits for tax evasion employ either the mail fraud¹⁵⁹ or the wire fraud¹⁶⁰ statutes for the predicate offense because these statutes have been widely applied to prosecute both state and federal tax evaders.¹⁶¹

The first published opinion to apply civil RICO to tax eva-

155. These schemes involve public officials who use the influence and power of their public office to extort or exploit others for money, political support, or business favors. For examples of cases prosecuted in a criminal context, but potentially applicable to a civil suit, see *United States v. Gillock*, 587 F.2d 284 (6th Cir. 1978), *rev'd on other grounds*, 445 U.S. 360 (1980); *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978) (Hobbs Act prosecution); *United States v. DiCarlo*, 565 F.2d 802 (1st Cir. 1977) (Hobbs Act); *United States v. Mazzei*, 521 F.2d 639 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975) (Hobbs Act); *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977). A number of criminal convictions have involved members of state ABCC's (Alcoholic Beverage Control Commissions) who extort money or "campaign contributions" through use of their office. See, e.g., *United States v. Adcock*, 558 F.2d 397 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977) (Iowa ABCC); *United States v. Barber*, 476 F. Supp. 182 (S.D.W. Va. 1979) (West Virginia ABCC). For other criminal cases involving bribes masquerading as "political contributions," see Ewing, *Combating Official Corruption By All Available Means*, 10 MEM. ST. U.L. REV. 423, 480-81 (1980).

156. See, e.g., *County of Cook v. Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983).

157. See the following criminal cases: *United States v. Richardson*, 596 F.2d 157 (6th Cir. 1979) (sheriff's extortion scheme involving illegal liquor); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (extortion racket by police department involving illegal alcohol, gambling and prostitution). For a general overview of the use of civil RICO against public corruption, see Comment, *supra* note 64, at 1530-87.

158. See, e.g., *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986) (criminal RICO case involving state sales tax evasion); *Illinois Dep't of Rev. v. Phillips*, 771 F.2d 312 (7th Cir. 1985) (civil RICO suit for state sales tax evasion); *contra*, *Michigan Dep't of Treasury v. Fawaz*, 653 F. Supp. 141 (E.D. Mich. 1986), *aff'd on other grounds*, 848 F.2d 194 (6th Cir. 1988) (civil RICO case involving state sales tax evasion). The Sixth Circuit, in an unpublished slip opinion, specifically disavowed part of the district court's RICO analysis. See *supra* note 37; see also *United States v. Standard Drywall Corp.*, 617 F. Supp. 1283 (E.D.N.Y. 1985) (criminal RICO case involving federal individual and corporate income tax and FICA tax evasion). Although some of these cases are criminal RICO suits, they can be used as support for civil RICO tax actions because the substantive violation is identical for both civil and criminal cases. See *infra* note 204.

For an excellent review of the area of civil RICO tax suits, see Comment, *supra* note 37.

159. 18 U.S.C. § 1341 (1982).

160. 18 U.S.C. § 1343 (1982).

161. See, e.g., *United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984) (state tax fraud); *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977) (federal tax evasion).

sion was *Illinois Department of Revenue v. Phillips*.¹⁶² In *Phillips*, the court was presented with a retail businessman who filed nine fraudulent state sales tax returns over a period of eight months. In deciding for taxpayer liability, the issue on appeal was described as "one of first impression: under RICO may a state governmental unit use federal courts and take advantage of attractive federal remedies to enforce state laws?"¹⁶³

At least two criminal RICO opinions have also applied the RICO statute to tax fraud situations. In *United States v. Ianniello*, the Second Circuit found the evidence in the trial record sufficient to uphold a conviction under RICO for use of the mails in a state sales tax fraud scheme.¹⁶⁴ In *United States v. Standard Drywall Corp.*, the district court denied a motion to dismiss a RICO claim involving federal income tax and mail fraud.¹⁶⁵

However, in *Michigan Department of Treasury v. Fawaz*, a federal district court held that a state treasury department does not have standing as a plaintiff "person" against a state tax violator.¹⁶⁶ The *Fawaz* court noted that the Seventh Circuit, in *Phillips*, had "reluctantly" reversed the district court's holding against the state revenue department because of what the *Phillips* court perceived to be a duty of Congress to correct.¹⁶⁷ The *Fawaz* court disagreed with the *Phillips* court's deference to Congress and found "deep-rooted policy questions" behind its refusal to grant the plaintiff standing. First, the Michigan legislature had not provided a state treble damages remedy for state tax violators, which was indicative of the state's satisfaction with the existing sanctions.¹⁶⁸ Second, the court argued that a restitu-

162. 771 F.2d 312 (7th Cir. 1985).

163. *Id.* at 314. In holding the answer to be affirmative, the Seventh Circuit reasoned that the antitrust analogy was not entirely applicable, that prior federal court opinions had assumed governmental plaintiffs are proper under RICO, that these prior cases had involved enforcement of state laws through RICO, and, therefore, that the present case was indistinguishable. *Id.* at 314-16. The court stated that Congress very deliberately made RICO broad in scope and remedy and that any narrowing of its scope should come from that body. *Id.* at 317. The Supreme Court has "emphasized that the importation of state claims into federal court is inherent in RICO's purpose." *Id.*

164. 808 F.2d 184, 194-95 (2d Cir. 1986).

165. 617 F. Supp. 1283, 1295-96 (E.D.N.Y. 1985).

166. 653 F. Supp. 141 (E.D. Mich. 1986), *aff'd on other grounds*, 848 F.2d 194 (6th Cir. 1988).

167. *Id.* at 143.

168. *Id.*

tion order in the underlying criminal tax case, in addition to interest and penalties, would equal the eventual RICO damages.¹⁶⁹

The *Fawaz* court's analysis is poor precedent.¹⁷⁰ First, the holding is undermined by the court's erroneous belief that "[t]he RICO statute itself contains no definition of 'person'."¹⁷¹ Second, concern about a barrage of tax cheater suits¹⁷² is no reason, by itself, to limit federal jurisdiction.¹⁷³ Third, the fact that the Michigan legislature has not enacted any state treble damages remedy for tax cheaters is no reason to believe that a RICO suit is therefore inappropriate. State plaintiffs under other civil RICO suits¹⁷⁴ and under the antitrust laws¹⁷⁵ would have been

169. *Id.*

170. Although the Sixth Circuit affirmed the ruling, the unpublished slip opinion criticized the district court's conclusion that the Michigan Department of Treasury did not have standing to sue under civil RICO. *See supra* note 37. For a copy of this opinion, see *Michigan, Dep't of Treasury v. Fawaz*, 8 RICO L. Rep. 160 (6th Cir. May 9, 1988). It should be noted that the Sixth circuit designated this opinion as one "not recommended for publication." *Id.* at 160. Such a recommendation means that citation of this opinion is "disfavored" in any proceeding in the Sixth Circuit. *See* Sixth Circuit Rules, Rule 24, 28 U.S.C.A. *See also*, Comment, *supra* note 37, at 1273 ("Since the great weight of authorities suggests that *Phillips* was decided correctly and the *Fawaz* district court decision incorrectly, these departments do have standing. The Sixth Circuit *Fawaz* decision affirmed this conclusion, even though the court found other grounds to deny the action.").

However, the Sixth Circuit's opinion cites policy reasons, beyond those cited by the district court, for making civil RICO unavailable in this case. First, it argued that considerations of comity barred the RICO remedy here. A RICO remedy would "designate the district courts as collection agencies for unpaid state taxes," giving the state attorney general a civil remedy "not now prescribed by state law." *Id.* at 161. Second, the court argued that the intent of Congress clearly did not encompass "the circumstances of this case" because, as the court implied, Congress was concerned with the serious threat of organized crime, not with mere tax cheaters. *Id.* However, the Sixth Circuit opinion merely concluded that Congress did not intend RICO to apply to state tax cheaters, citing no authority for that conclusion. Furthermore, considerations of comity should not bar this suit any more than any other case involving the government as a civil RICO plaintiff. By analogy, such a rule of law might destroy the availability of all civil RICO remedies to state governments, at least in those states not having a comparable state law remedy, contrary to the intent of civil RICO. *See supra* notes 38-46 and accompanying text.

171. *Id.* at 142. *Cf.* 18 U.S.C. § 1961(3) (1982).

172. *See id.* at 143.

173. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (concern over crowded dockets cannot be a "controlling consideration" in a standing determination under the Clayton Act, § 4).

174. The Seventh Circuit in *Illinois Dep't of Rev. v. Phillips* addressed the problem of federal enforcement of state law and found a Fifth Circuit civil RICO case in which such enforcement had been upheld. 771 F.2d 312, 315-16 (7th Cir. 1985) (citing *Alcorn County v. U.S. Interstate Supplies, Inc.* 731 F.2d 1160 (5th Cir. 1984)).

175. *See supra* note 47.

uniformly denied relief under that rationale. Fourth, the problem of double recovery because of the restitution order is not a bar to civil RICO damages.¹⁷⁶ Finally, the approach of the Second and Seventh Circuits is much closer to the statutory language and congressional intent.¹⁷⁷

3. *Environmental suits*

An expanding area of RICO use generally and one which could be of particular use to state or local government involves environmental and toxic waste management. The EPA has estimated that "only 10 percent of the total hazardous waste in the United States has been disposed of legally and safely."¹⁷⁸ In addition to avoiding the limitations of CERCLA,¹⁷⁹ RICO may be used effectively to provide compensation to "landowners and residents affected by toxic waste dumps underlying their property or leaching into their water supplies" by a "cause of action premised on fraud or statutory violations of the facility's operator."¹⁸⁰ The injury to "business or property" element of civil RICO could be satisfied by injury to public utilities or public owners of local water supplies contaminated by the illegal wastes, or by states suing on behalf of residents in a *parens patriae* suit.¹⁸¹

Another type of suit might involve a public utility as a waste "generator" defrauded on a disposal contract by a "dumper" or a "disposer" that illegally disposes of the waste.¹⁸²

A potential cause of action also lies in the fraudulent use of

176. See *Pennsylvania v. Cianfrani*, 600 F. Supp. 1364 (E.D. Pa. 1985).

177. Compare the cases in *supra* notes 162-165 with the purposes of RICO at *supra* notes 38-46 and accompanying text. For commentary on the *Phillips* case and RICO tax cases in general, see Ohmes, *The Use of Federal Racketeering Statutes to Enforce State Tax Laws Is Upheld*, 5 J. ST. TAX'N 241 (1986).

178. Note, *supra* note 147, at 458-59.

179. The Comprehensive Environmental Response, Compensation and Liability Act (codified at 42 U.S.C. §§ 9601-9657 (1982)) provides for a private cause of action, but its scope is very narrow and only compensates for the "response cost," requiring a government-authorized clean-up program to commence before the action may arise. See Binder, *supra* note 50, at 560-61.

180. *Id.* at 561.

181. See *supra* notes 55-63 and accompanying text.

182. A waste generator is liable along with the hauler and dumper for clean-up costs and environmental damage, even though the illegal disposal was perpetrated by the latter actors. See 42 U.S.C. § 9607 (1982). See also, Note, *supra* note 147, at 476 n.124. The Note cited concludes that the innocent generator should therefore have a RICO cause of action for disposal fees and injury to business reputation due to "public outrage." *Id.*

an environmental impact statement (EIS) by industrial and residential developers to obtain project approval from a redevelopment agency or city council. If the city or agency thereafter is forced to deal with increased drainage, solid waste disposal, erosion, or other environmental costs, the local unit might find a RICO violation by showing a history of "deficient" EIS's or other development filing requirements.¹⁸³

The RICO predicate acts would be grounded in the mail and wire fraud statutes.¹⁸⁴ The scheme to defraud could be based on written or oral correspondence¹⁸⁵ by the defendant companies with local and federal environmental officials.¹⁸⁶ The fraudulent misrepresentations need not be made directly to the injured plaintiff¹⁸⁷ and "will most likely come from communication between the defendant(s) and the government."¹⁸⁸

4. *Other state and local government activity under RICO*

Government plaintiffs have filed RICO complaints in a variety of entirely new areas in recent years, including misrepresentation in obtaining government loans or grants, bankruptcy fraud, and insurance law.

In one recent case involving bankruptcy and government

183. See Binder, *supra* note 50, at 561-62.

184. See Note, *supra* note 147, at 470-79.

185. Among the types of evidence that may be useful in civil RICO discovery are concealed environmental information held by the company, misrepresented waste practices, non-disclosure of facts to a government agency requiring disclosure, and falsified reports required to be mailed to the EPA under the RCRA (Resource Conservation and Recovery Act). See 42 U.S.C. §§ 6922, 6923, 6924 (1982). See Note, *supra* note 147, at 476-78.

186. See, e.g., *Huntsman-Christensen Corp. v. Mountain Fuel Supply Co.*, No. Civ. C86-0530G (D. Utah Nov. 24, 1986) (WESTLAW, Federal library, Allfeds file). The court described the facts of that case:

[T]he RICO Defendants operated an enterprise which systematically engaged in a scheme to defraud and deceive federal, state and local governmental regulatory agencies . . . into believing that Mountain Fuel's operations were conducted in a safe and lawful manner, and to conceal the massive contamination of the soil, ground water and air on land adjacent to the various Mountain Fuel sites described above.

Id.

187. "The plaintiff can meet the requirements of section 1964(c) without ever seeing the defendant's fraudulent mailings to the government. All that is necessary is that the corporation lull the government into inaction with the result that the corporation is allowed to carelessly dispose of leaking toxic waste." Note, *supra* note 147, at 478 (footnote omitted). Thus, state or local bodies could rely on a fraud scheme involving mail sent to the federal EPA.

188. *Id.* at 477-78.

loan fraud, Salt Lake City filed a civil RICO suit against a Washington, D. C. law firm working to secure a \$4.2 million Urban Development Action Grant (UDAG) from the federal government on behalf of a client, Select Telephone Technologies (STT). STT had proposed a plant in Salt Lake City that would employ 700 people to refurbish old telephone equipment.¹⁸⁹ By federal law, the grant, involving federal money used to promote local economic development, is directly loaned to a private developer that the city has chosen. The developer then repays the loan when due to the city, and the city keeps the funds for its own purposes.¹⁹⁰ When STT filed bankruptcy only six months after the UDAG loan was approved, and was unable to repay the loan, the City sued the law firm on the grounds that the firm knew of its client's financial woes, misrepresented that status in order to obtain the UDAG loan for its client, and then received a substantial portion of those loan proceeds as a creditor beneficiary.¹⁹¹

In suits involving insurance law, at least two decisions have found that a state director of insurance may file suit as a statutory liquidator for insurers that are looted by their parent companies.¹⁹²

5. *Other potential suits by government plaintiffs*

Assuming the standing requirements are met, the potential application of civil RICO to illegal schemes is virtually as broad as the government lawyer's imagination because of the potential reach of the mail and wire fraud statutes.¹⁹³ Government plaintiffs might use civil RICO to protect legitimate gambling businesses or lotteries by suing operators of illegal gambling busi-

189. See *Lauter, Akin Gump Angers Salt Lake City*, Nat'l L. J., Dec. 15, 1986, at 3.

190. Thus, non-repayment of the loan was the city's alleged property injury.

191. The law firm was among the first creditors paid in full after receipt of the loan.

192. *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1982), *cert. denied*, 464 U.S. 1002 (1983) (suit by state director of insurance and court-appointed liquidator against former officers, directors, accountants, and reinsurers of an insolvent insurance company for alleged fraudulent misrepresentation of company's financial status); *Corcoran v. American Plan Corp.*, No. CV 86-1729 (E.D.N.Y. Feb. 6, 1987) (WESTLAW, Federal library, Allfeds file) (state superintendent of insurance has standing to sue on behalf of two subsidiaries alleging a fraudulent scheme by officers and directors of the parent company to defraud and drain the subsidiaries of their assets).

193. The "reach of the mail fraud statute is 'seemingly limitless.'" *United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983) (quoting *United States v. Von Barta*, 635 F.2d 999, 1001 (2d Cir. 1980). The elements of mail fraud require 1) use of the U.S. mails, and 2) a scheme to defraud. *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978).

nesses for lost revenues.¹⁹⁴ Other potential uses of civil RICO may involve cigarette smugglers who have not paid cigarette excise taxes,¹⁹⁵ illegal importation and sale of alcoholic beverages in the so-called "control" states,¹⁹⁶ where the state Alcoholic Beverage Control Commission (ABCC) holds a monopoly on the in-state distribution and sale of alcoholic beverages,¹⁹⁷ and corruption involving land use planning¹⁹⁸ and redevelopment.¹⁹⁹ Payoffs to public officials for favorable zoning actions have been successfully prosecuted under three statutes that constitute RICO predicate acts.²⁰⁰

B. *The Inadequacy of State and Local Laws to Fight Crime*

Today, as when RICO was passed in 1970, the ability of

194. See Shaw, *Use of RICO Civil Remedies by State, Local Governments*, N.Y.L.J., June 14, 1982, at 4.

195. See *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978) (criminal prosecution of cigarette smuggling ring).

196. Originating from the post-Prohibition days, when many states wanted to replace federal with state control of alcoholic products, a current publication discusses the "control" states:

Eighteen states, representing about 30% of the entire U. S. population, control directly the sale of beverage alcohol within their borders. Not surprisingly, they are called the "control" or, sometimes, the "monopoly" states.

In some of those states, consumers purchase liquor, wine or beer by the package only in a state store from a state employee. In all of them, the distribution at wholesale of beverage alcohol is handled by state agencies.

The control states are: Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. . . .

NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION, INC., *A CONTINUING COMMITMENT TO RESPONSIBLE MODERATION* 1-2 (n.d.).

197. See, e.g., UTAH CODE ANN. § 32A-12-6 (1986), making it unlawful for anyone to sell, offer or furnish alcoholic beverages to another unless authorized by title 32A.

Lost state revenues due to illegal importation and sale may potentially support civil RICO actions against legal or illegal enterprises participating in such illegal activities under any of the subsections of section 1962. In Utah, for example, numerous reporting requirements are found throughout title 32A of the Utah Code. If liquor establishments violate these requirements by material misrepresentations or omissions, the Commission could file a civil RICO suit charging a scheme to defraud in connection with the mail fraud or wire fraud statutes. For illegal bootlegging operations, the "jurisdictional hook" could be tax fraud or misrepresentation or omissions in reporting activities to business licensing or tax authorities.

198. See Binder, *supra* note 50, at 560.

199. See *United States v. Salvitti*, 451 F. Supp. 195, 200 (E.D. Pa. 1978) (bribery of director of redevelopment agency).

200. See *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975) (Travel Act); *United States v. Kuta*, 518 F.2d 947 (7th Cir.), cert. denied, 423 U.S. 1014 (1975) (Hobbs Act); *United States v. Staszczuk*, 517 F.2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975) (Hobbs Act and mail fraud statute).

state and federal laws to deal with organized and white collar crime in the absence of RICO legislation is inadequate at best. The Supreme Court stated in *United States v. Turkette* that "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."²⁰¹

1. *Civil RICO fills the prosecutorial gap*

The RICO statute was specially created by Congress to assist both federal and state agencies in dealing with the growing national problem of organized and white collar crime. The Supreme Court has stated that "[p]rivate attorney general provisions such as section 1964(c) are in part designed to fill prosecutorial gaps."²⁰²

Furthermore, local law enforcement is enhanced by the creation of the civil RICO remedy. One criminal RICO commentator asserted that between the Hobbs Act and the mail and wire fraud statutes, "there are few cases of local political corruption that cannot be reached by federal prosecutors if they are so inclined."²⁰³ If criminal RICO will cover all but a "few" cases of local corruption, then civil RICO actions should be equally as comprehensive because they are based on the same substantive violations.²⁰⁴

201. 452 U.S. 576, 586 (1981). See also *supra* note 17 and accompanying text. Professor Blakey states that at the time of RICO's passage, securities fraud and common law fraud remedies then available were not adequate to deal with the growing problem. See Blakey & Cessar, *supra* note 3, at 571 n.194.

202. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985).

203. Rakoff, *Hobbs Act, RICO Added Tools in Local Corruption Cases*, N.Y.L.J., Feb. 14, 1986, at 1, col. 3. Although this article was published before the *O'Malley* and *Carpenter* decisions by the Supreme Court dealing with "intangible rights" theories of liability, the Court's *Carpenter* opinion appears to reinstate much of the supposed erosion of intangible rights implied by *O'Malley*. See *supra* notes 64-72 and accompanying text. Therefore, Rakoff's reasoning should not be significantly undermined.

204. "Interpretation of section 1962(c) is assisted by reference to both civil and criminal RICO cases, since the elements of the claim are identical." *United States v. Standard Drywall Corp.*, 617 F. Supp. 1283, 1294 n.9 (E.D.N.Y. 1985). See also, *Rich-Taubman Assocs. v. Stamford Restaurant Operating Co.*, 587 F. Supp. 875, 878 (S.D.N.Y. 1984) (elements of RICO claim are same whether case is criminal or civil). Therefore, criminal RICO cases prosecuted by the federal government may form the basis for civil RICO suits brought by state or local government.

2. *Advantages of civil RICO*

The use of civil RICO by local or state governments offers many advantages over traditional civil and criminal remedies. First, RICO is a useful tool in abating criminal activity because of the broad interpretation given to the mail fraud and wire fraud statutes.²⁰⁵

Second, the burden of proof under civil RICO is the same standard as in most civil suits: preponderance of the evidence.²⁰⁶ If the prosecutor can frame a RICO cause of action, the burden of persuasion is minimized and prosecutorial resources are conserved, especially by comparison with the deterrent or compensatory value of the case.

Third, extensive or complex prosecutions are better rewarded by the treble damages remedy, particularly in cases of wealthy, corporate defendants who can afford expensive counsel and are more difficult to convict.

Fourth, the scope of discovery under civil RICO is much broader than under state and federal criminal rules.²⁰⁷ One caveat, however, is that the privilege against self-incrimination may curtail discovery techniques, especially in the RICO context, where no prior criminal action has occurred or one is not pending.²⁰⁸

Fifth, the availability of equitable remedies under civil

205. See generally, Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 128-30 (1981); Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 567-72 (1980).

206. See, e.g., *Wilcox v. First Interstate Bank*, 815 F.2d 522, 531 (9th Cir. 1987); *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir.), cert. denied, 107A S. Ct. 3266 (1987); *Armco Industr. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 481 (5th Cir. 1986); *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985), cert. denied, 106A S. Ct. 2247 (1986).

In addition, the United States Supreme Court, in dicta, has expressed cautious support for the preponderance standard:

We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985).

207. For example, under the Federal Rules of Civil Procedure, there are broad deposition and interrogatory rules, FED. R. CIV. P. 26(a) and 33(a), procedures for compelling production of documents, FED. R. CIV. P. 34(a), and protective orders safeguarding against non-party disclosure, FED. R. CIV. P. 26(c).

208. See *Blakey & Gettings*, *supra* note 17, at 1043-44; see *infra* note 222 and accompanying text.

RICO offers other law enforcement alternatives. A government plaintiff may be able to get equitable relief, such as injunction, under subsections 1964(a) or 1964(c). Subsection (a)²⁰⁹ has been interpreted to allow the states or the federal government to sue for divestment.²¹⁰ Subsection (c) authorizes equitable relief for government plaintiffs, according to some commentators.²¹¹ Temporary restraining orders freezing defendant's assets may also help preserve the asset base which is often eroded at the conclusion of a criminal action.²¹²

Sixth, collateral estoppel is available to state and local government plaintiffs. Evidence of prior felony convictions is admissible in civil RICO actions in federal court to prove any fact essential to the judgment.²¹³ The use of offensive collateral estoppel²¹⁴ has been expressly allowed in the context of a civil

209. Subsection (a) states:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a) (1982).

The use of the term "including, but not limited to" would reiterate again Congress' desire to see RICO remedies construed broadly, and makes a good argument for allowing the ordering of injunctions in appropriate circumstances.

210. See Note, *supra* note 59, at 452.

211. Professor Blakey has co-authored an article citing statutory and policy reasons why section 1964 should allow both government and private plaintiffs to sue for equitable relief. See Blakey & Cessar, *supra* note 3, at 542-61. See also, Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945, 953 (1984). *But see*, Binder, *supra* note 50, at 549 ("Although civil RICO legislative history is scarce, there is clear evidence that Congress specifically intended to preclude private equitable relief. Consequently, several courts have denied injunctive relief.").

212. One commentator has noted:

Waiting until a criminal action is terminated very likely may leave a government plaintiff with an assetless defendant who has either dissipated or secretly transferred most of his assets. By first initiating the civil RICO action, the government may use FED. R. CIV. P. 64 and C.P.L.R. 6201 to have an order of attachment issued against the defendant's property during the pendency of the civil action if it can show that the defendant is about to dispose of or secrete his property.

Shaw, *supra* note 194, at 4.

213. See FED. R. EVID. 803(22).

214. Offensive collateral estoppel "occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4

action by a county which was not a party to the original criminal suit.²¹⁵

Seventh, a civil RICO suit in federal court may avoid overcrowded state dockets.

Finally, state and local government lawyers may choose to use federal RICO or the state RICO statute, where there is one. In such states, the federal statute will often provide greater advantages than its state counterpart.²¹⁶ According to Blakey, twenty-seven jurisdictions have passed RICO-type statutes.²¹⁷

4. *Special problems in government use of civil RICO*

Although there are many advantages to federal civil RICO as a state and local law enforcement tool in lieu of criminal prosecution, there are also some pitfalls and disadvantages under the federal statute. First, a state RICO statute might be a better tool. Under some state RICO statutes, the applicable statute of limitations period is longer than the federal statute. In *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*,²¹⁸ the Supreme Court held that the four-year statute of limitations in the Clayton Act would be applied in civil RICO actions. Under

(1979). This concept has arisen in recent years as a result of the erosion of the old "mutuality" requirement (which required that the benefit of issues litigated and decided in a previous proceeding could only be used in later proceedings by the same parties to the prior proceeding) in *Parklane Hosiery* and *S.E.C. v. Everest Management Corp.*, 466 F. Supp. 167 (S.D.N.Y. 1979) (applying *Parklane Hosiery* to the criminal-civil setting).

215. See *County of Cook v. Lynch*, 560 F. Supp. 136 (N.D. Ill. 1982); see also Blakey & Gettings, *supra* note 17, at 1044-46.

216. Federal RICO may differ substantially from the terms of any particular state RICO statute. See *infra* note 217. Therefore, the issues discussed in this article may be insufficient or inapplicable in a state RICO context.

217. See Blakey & Cessar, *supra* note 3, app. at 596. These states are Arizona, California, Connecticut, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, and Wisconsin. *Id.* Of these jurisdictions, two (California and Colorado) do not have an express civil cause of action. *Id.* at 596-618. Of the twenty-five that do have an express civil cause of action, three states (Indiana, Louisiana and Ohio) do not expressly allow civil suit by the state attorney general, seven states (Delaware, Hawaii, New Jersey, North Dakota, Pennsylvania, Rhode Island and Tennessee) do not expressly allow civil suits by local prosecuting or district attorneys, at least two states (Ohio and Wisconsin) provide for a higher civil burden of proof than the federal statute, five states (Hawaii, New York, Pennsylvania, Tennessee and Wisconsin) do not have a treble damages provision, and, surprisingly, only eight states (Colorado, Idaho, Illinois, New Jersey, North Dakota, Oregon, Rhode Island and Tennessee) have liberal construction clauses, while one state (Florida) has a strict construction clause. See *id.*

218. 107A S. Ct. 2759 (1987).

state RICO actions, the limitations period is longer, by statute, than the federal statute in at least twelve states.²¹⁹ Eleven states do not have a specific limitations period for a state civil RICO action.²²⁰

It is probably advantageous in some cases to have the criminal RICO action precede the civil action. Allowing the federal criminal action to precede a state civil RICO action would estop the defendant from relitigating many of the same issues in the civil action.²²¹ If the defendant is acquitted of the criminal charges, the subsequent civil action is still allowed because of the lower standard of proof in civil RICO. The defendant also has no reason to assert his fifth amendment privilege against self-incrimination in a subsequent civil action. Finally, by not pursuing the state civil RICO action first, the defendant cannot use civil discovery to disadvantage the federal prosecution in a subsequent criminal action.²²²

VI. CONCLUSION

The federal civil RICO statute *can* be an effective tool to supplement state and local governments' law enforcement alternatives. Congress clearly intended and formulated the language of the statute to allow civil RICO to be used by state and local governments.

Although the definition of the term "person" in section 1961(3) would seem to subject state and local governments to civil RICO liability, constitutional and public policy reasons may provide effective bars to such suits. Therefore, courts should not be hesitant, for fear of government RICO liability, to allow state and local governments to have standing to sue under civil RICO.

Civil RICO actions by state and local governments have been used effectively to combat public and private corruption, public contract fraud, tax evasion, environmental fraud, and

219. These states are Delaware, Florida, Georgia, Louisiana, Mississippi, Nevada, North Carolina, North Dakota, Ohio, Oregon, Tennessee and Wisconsin. *See* Blakey & Cessar, *supra* note 3, app. at 596.

220. *Id.* These states may have judicially-imposed periods like the federal statute, or they might analogize to the state's common law; thus, the state limitations period might offer no advantage over the federal statute. The only state that statutorily mandates a shorter period than four years is Washington (three years). *Id.* at 615.

221. *See supra* notes 213-215 and accompanying text.

222. *See Shaw, supra* note 194, at 4. However, it should be noted that protective orders under Fed. R. Civ. P. 26(c), limiting the use of information obtained in civil proceedings, may remedy this problem. *See supra* note 207.

government loan fraud. Other potential uses of civil RICO include actions against illegal lottery and liquor establishments and land use planning and redevelopment fraud.

Finally, civil RICO may help fill the prosecutorial gaps in state and federal criminal laws. There are many advantages to civil RICO, such as its breadth of coverage, lower burden of proof, higher recovery, and broader scope of discovery. In sum, civil RICO is a real boon to state and local government.

Paul A. Hoffman