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CIVIL RICO ACTIONS IN COMMERCIAL LITIGATION: RACKETEER OR BUSINESSMAN?

by Drew Alan Campbell

IN 1970 Congress responded to the proliferation of organized crime in the United States by enacting the Organized Crime Control Act.¹ Section 901(a) of the Act, commonly known as the Racketeer Influenced and Corrupt Organizations Act (RICO),² is designed to combat the infiltration of organized crime and racketeering³ into legitimate businesses.⁴ To accomplish this objective, Congress, while providing criminal sanctions under section 1963 of RICO,⁵ also affords government prosecutors the advantages of a civil action under section 1964.⁶ Of greater significance to

1. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified in scattered sections of 18, 28 U.S.C.) [hereinafter cited as OCCA-70].

2. 18 U.S.C. §§ 1961-1968 (1976 & Supp. IV 1980).

3. Racketeering is commonly defined as the "[a]ctivities of organized criminals who extort money from legitimate businesses by violence or other forms of threats or intimidation or conduct of illegal enterprise . . ." BLACK'S LAW DICTIONARY 1132 (5th ed. 1979). Although RICO specifies types of conduct that constitute racketeering, 18 U.S.C. § 1961(1) (1976 & Supp. IV 1980), it does not define the term.

4. Statement of Findings and Purpose, OCCA-70, *supra* note 1, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 1073:

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.

5. 18 U.S.C. § 1963 (1976).

6. *Id.* § 1964:

(a) 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.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United

the private bar and its corporate clients, section 1964 expressly provides a private right of action for any person injured in his business or property by reason of a RICO violation.⁷ Under RICO's civil sanctions violators may be subject to divestiture of any interest in a business enterprise, and businesses owned by or controlled by violators may be subject to enjoinder from further business activities, dissolution, or reorganization.⁸ RICO also authorizes the award of treble damages, costs, and reasonable attorney's fees in a successful private action.⁹ Because the proscribed activity under RICO includes mail and wire fraud and violations of the antifraud provisions of the federal securities laws,¹⁰ the statute provides an expansive cause of action for the private plaintiff.

Only recently, however, have private parties begun to consider the broad ramifications of RICO and to utilize the treble damage remedy in business activities unrelated to organized crime.¹¹ Because of RICO's limited use by the private bar in the past, the courts, while strictly construing the statute, have only begun to consider its availability to individuals involved in commercial disputes.¹² Thus far, some courts have imposed judicially created restrictions on RICO's application in civil actions. Despite these early signs, many civil litigants view the treble damages remedy and the potential settlement value of a racketeering allegation as creating a powerful and versatile weapon for defrauded businessmen engaged in commercial litigation.

This Comment provides an overview of the legislative history and congressional purpose behind RICO. Additionally, this Comment analyzes the statutory construction of RICO, examining the elements that constitute a civil RICO violation and the types of proscribed conduct of particular relevance to business lawyers and their clients. Included in this discussion is the potential application of the Act to mail and wire fraud and to fraud

States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

7. *Id.* § 1964(c).

8. *Id.* § 1964(a).

9. *Id.* § 1964(c).

10. *Id.* § 1961(1)(B).

11. Although the public accusation of engaging in racketeering may imply an affiliation with organized crime, liability under RICO is not necessarily predicated on such a finding. *See, e.g.,* United States v. Aleman, 609 F.2d 298, 304 (7th Cir.), *cert. denied*, 445 U.S. 946 (1979); United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 646 (N.D. Ill. 1980); United States v. Chovanec, 467 F. Supp. 41, 44 (S.D.N.Y. 1979); United States v. Vignola, 464 F. Supp. 1091, 1095 (E.D. Pa.), *aff'd*, 605 F.2d 1199 (3d Cir.), *cert. denied*, 444 U.S. 1072 (1979). *But see infra* notes 132-42 and accompanying text.

During the first seven years of RICO's existence only two reported cases involved the treble damage remedy of § 1964(c). *See* Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978); Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975). Only in the last five years have private parties begun to allege civil RICO violations.

12. *See infra* notes 121-42, 156-208 and accompanying text.

under the securities laws. Recent decisions construing the requisites for alleging a civil RICO action are considered, and this Comment analyzes recent judicially imposed restrictions on the statute's availability in commercial litigation. Finally, the future of RICO in commercial litigation is contemplated in light of the legislative changes necessary to effectuate the Act's intent and to alleviate the concern for vexatious racketeering allegations.

I. LEGISLATIVE HISTORY AND CONGRESSIONAL PURPOSE BEHIND CIVIL RICO

In 1967 the President's Commission on Law Enforcement and Administration of Justice, well aware of organized crime's influence on legitimate businesses and unions,¹³ reported on the prevailing methods employed by organized crime to acquire control of business enterprises.¹⁴ The Commission suggested that existing regulatory devices such as forfeiture, divestiture, and dissolution be used to weaken the economic power base of organized crime.¹⁵ The Commission noted that use of these remedies would avoid the troublesome procedural aspects of a criminal prosecution by providing a lesser civil standard of proof, the availability of discovery, the right to amend pleadings, and the right to appeal adverse decisions.¹⁶

In response to the Commission's recommendations, Senate Bills 2048 and 2049 were proposed in an attempt to apply antitrust-type remedies to organized criminal activity.¹⁷ These bills were not acted upon by Con-

13. The Kefauver Committee reported in 1951:

One of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises. . . . In most cases, these are enterprises in which gangster methods have been used to obtain monopolies so that their vicious practices taint otherwise legitimate business

S. REP. NO. 141, 82d Cong., 1st Sess. 16, 33 (1951).

14. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 189-90 (1967). The Commission found: "Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." *Id.* at 190.

15. *Id.* at 208. Professor G. Robert Blakey, a draftsman of RICO, credits the Commission's recommendation as the origin of the statute's civil-criminal dichotomy. See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1015 n.25 (1980).

16. The advantages of civil remedies for a RICO violation were articulated by Senator John L. McClellan, a co-sponsor of the bill that was incorporated into title IX of OCCA-70, *supra* note 1. *Hearings on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 106 (1970) [hereinafter cited as *House Hearings on S. 30*].

17. In 1967, Senate Bill 2048 proposed an amendment to the Sherman Antitrust Act prohibiting the investment or business use of unreported income. S. 2048, 90th Cong., 1st Sess. (1967). The bill's sponsor, Senator Roman L. Hruska, wanted the "extraordinarily broad and flexible remedies" of the Sherman Act to have an impact upon the "legitimate" business activities of organized crime. 113 CONG. REC. 17,999 (1967).

Senate Bill 2049 was independent legislation drafted to supplement the Sherman Act

gress, but the Antitrust Section of the American Bar Association, after evaluating their potential effect, suggested that legislation should be drafted as criminal statutes and should be independent of federal antitrust laws.¹⁸ As a result, in 1969 Senator John L. McClellan introduced Senate Bill 30,¹⁹ a broad-based reform bill lacking any RICO-type provisions, that was subsequently enlarged by Senator Roman L. Hruska's Senate Bill 1623.²⁰ The combined effort gave rise to RICO's predecessor, Senate Bill 1861,²¹ which defined the scope of proscribed "racketeering activities"²² and required the illegal conduct to be performed through a "pattern of racketeering."²³ After referral to the Subcommittee on Criminal Law of the Senate Judiciary Committee and scrutiny by various segments of the legal community,²⁴ a revised version of Senate Bill 30 emerged and was

amendments proposed by Senate Bill 2048. S. 2049, 90th Cong., 1st Sess. (1967). The bill would prohibit: (1) the acquisition of an interest in a business affecting interstate commerce with income derived from listed criminal activities, *id.* § 2(1); and (2) authorization by the agent of a corporation to engage in any of the listed criminal activities, *id.* § 3. The government and third parties could seek enjoinder of S. 2049 violations, *id.* § 4(b)-(c); treble damages were available to victims, *id.* § 5(a); and a full range of liberal procedural provisions were provided, *id.* §§ 5-10.

18. The Antitrust Section of the American Bar Association recommended the bills be independent criminal statutes to avoid potential discord from the commingling of distinct statutory purposes. *See House Hearings on S. 30, supra* note 16, at 149. The Antitrust Section also recognized that a separate statute would free a private litigant from the restrictive body of case precedent in antitrust law. *Id.*

19. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969).

20. The Criminal Activities Profits Act of 1969, S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969).

21. The Corrupt Organization Act of 1969, S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-71 (1969).

22. (1) The term "racketeering activity" means (A) any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 664 (relating to embezzlement from pension and welfare funds), section 659 (relating to theft from interstate shipment), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling transformation [*sic*]), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1954 (relating to welfare fund bribery), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), section 501(c) of the Labor Management Reporting and Disclosure Act of 1959 (relating to embezzlement from union funds), and (C) any conspiracy to commit any of the foregoing offenses.

S. 1861, 91st Cong., 1st Sess. § 2(a), 115 CONG. REC. 9569 (1969) (proposed § 1961(1)).

23. Senate Bill 1861 gave an unenlightening definition of a pattern: "(6) The term 'pattern of racketeering activity' includes at least one act occurring after the effective date of this Chapter." *Id.* (proposed § 1961(6)).

24. The most vocal opposition to the proposed legislation came from the American Civil Liberties Union. *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 268 (1969). The ACLU was concerned not only with possible fifth amendment and right to privacy violations, but more importantly the Union feared that the broad legislation would extend beyond its intended scope:

First and foremost we are concerned by the enormous and virtually unlimited

passed almost unanimously by the Senate.²⁵ The House of Representatives, after adding a treble damages action²⁶ and narrowing certain statutory definitions in Senate Bill 30,²⁷ returned it to the Senate for final approval. The basic form and substance of the bill remained unchanged, and rather than risk the possible demise of the bill, the Senate concurred with the House version.²⁸ RICO was signed into law on October 15, 1970.²⁹

The draftsmen of RICO intended a liberal construction and broad application in order to effectuate the statute's purpose.³⁰ Although the legislative history provides little insight into RICO's application to private actions, it does emphasize the necessity for civil remedies to surmount the inherent difficulties of criminal prosecution of organized crime figures. To utilize those remedies fully, Congress expressly created a private right of action for individuals victimized by conduct proscribed under RICO.³¹ Because many of the offenses engaged in by organized crime, such as commercial bribery and fraud, have also plagued corporate enterprises in the past,³² RICO's application may not be limited, as originally contemplated,

breadth of the criminal provisions of the proposed legislation There is no guarantee nor reason to assume that in times of stress, or where the aim seems laudable, S. 1861 would not be used in areas far from what we know as organized crime.

Id. at 475. This concern with infringement upon the civil liberties of persons far removed from organized crime should receive heightened attention with the emergence of private party RICO litigation.

25. The Senate vote was 73 to 1. 116 CONG. REC. 972 (1970).

26. *See* 116 CONG. REC. 35,227 (remarks of Rep. Steiger).

27. The statutory definition of "unlawful debt" was changed to exclude legal gambling debts from RICO's prohibition against collection of debts. 18 U.S.C. § 1961(6) (1976). A "pattern of racketeering activity" was limited by requiring two acts within a ten-year period. *Id.* § 1961(5).

28. 116 CONG. REC. 36,296 (1970). Surprisingly, little House debate ensued over RICO, and only three Congressmen feared the broad implications of RICO's creation of a private cause of action. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 187, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4083. Congressmen Conyers, Mikva, and Ryan displayed considerable sagacity in their concern over the private cause of action:

Indeed, another section of this title—section 1964(c)—provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the "indirect use" of such gains—a provision with tremendous outreach—litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the rival's business.

Id. To avoid such a distortion of the legislation's intent, Congressman Mikva proposed an amendment that would allow recovery of treble damages by the victim of a frivolous private action under RICO. The amendment, however, was soundly defeated. 116 CONG. REC. 35,342, 35,343 (1970) (remarks of Rep. Mikva).

29. 116 CONG. REC. 37,264 (1970).

30. "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, 84 Stat. 922, 947 (1970). *See generally* Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980). *But see* *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979) (contrasting a liberal and strict construction of various sections of RICO).

31. 18 U.S.C. § 1964(c) (1976); *see supra* note 6.

32. *See* Ross, *How Lawless are Big Companies?*, FORTUNE, Dec. 1, 1980, at 56, 58. The

solely to syndicate corporate criminals. Arguably, any person twice victimized by an enterprise may be able to assert a RICO violation despite the fact that the alleged transgressor has no ties with organized crime. Thus, as long as plaintiff in a business dispute can prove up the elements of a RICO offense, the legislative history does not expressly preclude an ostensibly legitimate enterprise from being held accountable for racketeering activity.

II. BECOMING A RACKETEER: A CONCEPTUAL ANALYSIS OF RICO

RICO makes unlawful³³ four types of activities by any person.³⁴ First, section 1962(a) forbids the use or investment of income derived from a "pattern of racketeering activity" to operate or acquire an interest in any enterprise affecting interstate or foreign commerce.³⁵ In essence, this subsection prevents "racketeers" from diversifying their interests by taking the proceeds accumulated through illegal "racketeering activity" and investing the income to acquire an enterprise. Secondly, subsection (b) prohibits the acquisition or maintenance, through a "pattern of racketeering activity," of any enterprise affecting interstate or foreign commerce.³⁶ Thirdly, subsec-

article features a "Roster of Wrongdoing" that focuses on corporate crime and lists major corporations and their respective offenses. Principal among the improprieties were fraud and bribery ("sensitive payments"), both of which are predicate offenses under RICO. *Id.*

33. Professor Blakey emphasizes that although RICO's initial directive was at organized crime,

RICO is not a criminal statute; it does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of "racketeering activity" that violates an independent criminal statute. In addition, its standards of unlawful, *i.e.*, criminal or civil, conduct are sanctioned by both criminal and civil remedies. RICO, in short, is a "remedial" statute.

Blakey & Gettings, *supra* note 15, at 1021 n.71 (citations omitted).

34. 18 U.S.C. § 1961(3) (1976) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property." *Id.*

35. *Id.* § 1962(a) provides:

(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 within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

See *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980), the only reported decision to date that premises its RICO allegation on § 1962(a). For an analysis of § 1962(a), see Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974).

36. 18 U.S.C. § 1962(b) (1976) provides: "It shall be unlawful for any person through a

tion (c) prohibits any employee or associate of any enterprise affecting interstate or foreign commerce from conducting the affairs of such enterprise through a "pattern of racketeering activity."³⁷ Finally, subsection (d) prohibits any person from conspiring to violate any of the aforementioned provisions.³⁸ An examination of the definition of a pattern of racketeering activity and of the "enterprise" concept reveals how a legitimate business's handling of its affairs, despite the lack of any connection with organized crime, may bring it within the broad scope of RICO.

A. *Pattern of Racketeering Activity*

Any acquisition or operation of an enterprise that violates RICO must be accomplished through a pattern of racketeering activity. Racketeering activity is defined prescriptively in section 1961,³⁹ and includes offenses indictable under state law such as murder, gambling, and extortion.⁴⁰

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."

37. *Id.* § 1962(c) provides:

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

38. *Id.* § 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

39. *Id.* § 1961(1) (Supp. IV 1980) provides:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property) . . . sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

40. *Id.* § 1961(1)(A).

Bribery, mail fraud, and wire fraud, acts indictable under federal law, are also proscribed.⁴¹ More significantly in the corporate context, any offense, indictable or not, involving fraud in the sale of securities constitutes racketeering activity under section 1961.⁴² A pattern of racketeering activity, defined in section 1961(5), requires at least two acts of racketeering activity within ten years of each other, one of which occurred after RICO's effective date.⁴³ Although the legislative history of RICO suggests that the racketeering acts must be related,⁴⁴ some judicial debate has arisen regarding the necessity of a common link between the acts.⁴⁵ Some courts have construed a pattern to require two acts occurring within ten years that are connected by a common scheme, plan, or motive.⁴⁶ Clearly, sporadic activity will not suffice,⁴⁷ but some courts have held that the relationship to an enterprise supplies a unifying link sufficient to constitute a pattern.⁴⁸ Providing the unlawful acts are done in the conduct of the affairs of an

41. *Id.* § 1961(1)(B).

42. *Id.* § 1961(1)(D).

43. *Id.* § 1961(5) (1976) provides: "pattern of racketeering activity" requires 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 (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

44. S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969).

45. *See, e.g.*, *United States v. Weisman*, 624 F.2d 1118 (2d Cir. 1980); *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978). *But see* *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978); *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

46. *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). The court construed the term "pattern" as "requiring more than accidental or unrelated instances of proscribed behavior." 409 F. Supp. at 613. The court found support for this reading in a simultaneously enacted section of the OCCA-70, *supra* note 1, § 3575(e)(3), which defined a "pattern of criminal conduct" as follows: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *See* 409 F. Supp. at 614; *see also* *United States v. White*, 386 F. Supp. 882, 883 (E.D. Wis. 1974).

47. S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1970), states that the "factor of continuity plus relationship . . . combines to produce a pattern."

48. *See, e.g.*, *United States v. Weisman*, 624 F.2d 1118 (2d Cir. 1980); *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978). The court in *Weisman* stated:

[T]he broad spectrum of predicate acts of racketeering enumerated in section 1961(1) belies any intent on the part of Congress to require that such predicate acts of racketeering must possess a unitary character. . . . Most importantly, the predicate acts constituting a "pattern of racketeering activity" must all be done in the conduct of the affairs of an "enterprise." . . . Thus, the enterprise itself supplies a significant unifying link between the various predicate acts

624 F.2d at 1122 (citation omitted). Similarly, the *Elliot* court stated:

We note that at least two district courts have construed "a pattern of racketeering activity," as used in the Act, to require that the two or more acts of "racketeering activity" be interrelated. *United States v. White*, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973). On its face, however, the statute does not require such "interrelatedness," and we can perceive no reason for reading it into the statutory definition.

571 F.2d at 899 n.23. According to Professor Blakey, *Elliot*, not *Stofsky*, accurately defined pattern. *See* Blakey & Gettings, *supra* note 15, at 1030 n.96.

enterprise, a pattern arguably exists despite the lack of any interrelatedness. This broad interpretation of the definition of pattern may give significant latitude to the civil litigant who attempts to establish a pattern of racketeering activity in framing a RICO allegation.

B. *The Existence of an Enterprise*

To violate RICO a person must acquire or maintain an interest in or control an enterprise,⁴⁹ or conduct or participate in the enterprise's affairs.⁵⁰ Congress has provided the commercial litigant with a broad and flexible concept in which to satisfy the enterprise element. The statutory definition of enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."⁵¹ Courts have interpreted this definition to include private businesses,⁵² government employees and agencies,⁵³ and labor organizations.⁵⁴ Additionally, associations in fact, informally organized groups of individuals, constitute a RICO enterprise.⁵⁵ The Supreme Court recently decided that enterprise includes both illegitimate and legitimate organizations.⁵⁶ Virtually any commercial en-

49. 18 U.S.C. §§ 1962(a)-(b) (1976); *see supra* notes 35-36 for full text of §§ 1962(a) and (b).

50. 18 U.S.C. § 1962(c) (1976); *see supra* note 37 for full text of § 1962(c).

51. 18 U.S.C. § 1961(4) (1976).

52. *See, e.g.*, United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978) (restaurant), *cert. denied*, 441 U.S. 933 (1979); United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (beauty college); United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978) (theater).

53. *See, e.g.*, United States v. Grant, 622 F.2d 308, 313 (8th Cir. 1980) (county judge); United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977) (Bureau of Cigarette and Beverage Taxes), *cert. denied*, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407 (5th Cir. 1977) (law enforcement department), *cert. denied*, 435 U.S. 904 (1978).

54. *See, e.g.*, United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

55. *See, e.g.*, United States v. Clemones, 577 F.2d 1247, *modified*, 582 F.2d 104, 106 (2d Cir. 1976).

56. *See* United States v. Turkette, 452 U.S. 576 (1981), in which the Supreme Court refused to narrow the definition of enterprise by excluding illegitimate businesses from its purview. Justice White, speaking for the majority, found the statute unambiguous:

On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope. . . . Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.

Id. at 580-81.

Some courts have balked in applying RICO to a legitimate business. In *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975), the court held that Congress did not intend to include legitimate businesses in their definition of enterprise:

The legislative history [of RICO] makes frequent references to "racketeers," "organized crime" and organized crime families, as well as the "syndicate," "Mafia" and "Cosa Nostra." It is clear that it was aimed not at legitimate business organizations but at combating "a society of criminals who seek to operate outside the control of the American people and their governments."

Id. at 113 (citations omitted); *see infra* notes 132-42 and accompanying text. Draftsman Blakey disagreed with the court's reading of the statute: "There is nothing in RICO that

tity, or subsidiary or division thereof, is an enterprise affecting interstate or foreign commerce thus satisfying the statutory definition.

A literal reading of the Act suggests that a cause of action for treble damages under section 1964(c) arises from injury caused by an enterprise's involvement in racketeering activity, rather than from injury arising from the activity itself.⁵⁷ Hence, while section 1962 proscribes enterprise involvement in racketeering activity, racketeering itself is not violative of the section.⁵⁸ The courts, however, have construed the enterprise concept in two distinct ways. The first approach, a broad construction of section 1964(c), contemplates that treble damage suits may be instituted whenever a plaintiff alleges a section 1962 violation.⁵⁹ If a pattern of racketeering activity is used to invest in, control, or conduct the affairs of an interstate enterprise, then damages may be sought despite the lack of any connection between the alleged injuries and the section 1962 violation. Accordingly, RICO applies as long as the injuries arise from a predicate offense that comprises a part of the ultimate violation. This broad reading of the statute focuses upon injuries resulting directly from the predicate offenses rather than upon injuries sustained as a result of a substantive violation of RICO by the enterprise. In essence, this interpretation reads the enterprise element out of the statute.⁶⁰

A more restrictive statutory construction focuses upon injuries arising from a defendant's conducting of an enterprise through a pattern of offenses.⁶¹ Under this reading recovery can be sought only when a plaintiff is competitively injured by an interstate enterprise's involvement in or subsidization by racketeering activities.⁶² RICO provides no recourse for an injury arising solely from racketeering acts. This narrower reading of the enterprise element reflects a recent attempt by some district courts to limit private rights of action under section 1964(c).⁶³ Nonetheless, once the existence of an enterprise affecting interstate commerce and a pattern of

says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers." Blakey & Gettings, *supra* note 15, at 1025 n.91.

For a thorough analysis of the enterprise concept, see Note, *The Enterprise Element in RICO: A Proposed Interpretation*, 49 GEO. WASH. L. REV. 123 (1980).

57. See 18 U.S.C. § 1964(c) (1976).

58. *Id.* § 1962(a)-(c).

59. See *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 646 (N.D. Ill. 1980); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1279 (D. Del. 1978). Both cases survived motions to dismiss although the suits alleged injury from securities fraud and failed to allege damages arising from any enterprise involvement in the fraudulent activity. See also *United States v. Sutton*, 605 F.2d 260, 265-66, *vacated en banc*, 642 F.2d 1001 (6th Cir. 1980); *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

60. See generally Comment, *Reading the Enterprise Element Back Into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100 (1981).

61. See *Maryville Academy v. Lock Rhoades & Co.*, 530 F. Supp. 1061, 1069-70 (N.D. Ill. 1981) (RICO claim of securities fraud dismissed for failure to show damage arising from putative racketeering activity); *North Barrington Dev., Inc. v. Fanslow*, No. 80c 2644, slip op. at 7-8 (N.D. Ill. Oct. 9, 1980) (fraud claim under RICO dismissed because of plaintiff's failure to allege competitive injury).

62. See *infra* notes 176-209 and accompanying text.

63. *Id.*

rackeering activity have been shown, a RICO violation can be proved by establishing a sufficient nexus between the activity and the enterprise. RICO's liberal procedural rules facilitate the institution of a civil action once a plaintiff demonstrates this connection.

C. Procedural Aspects of RICO⁶⁴

A RICO plaintiff may include the Attorney General and "any person injured in his business or property."⁶⁵ In a civil action the federal district courts have the authority to grant equitable relief including divestiture of an interest in an enterprise, restrictions on future activities or investments, and dissolution or reorganization of an enterprise.⁶⁶ A private party may obtain treble damages and costs, including reasonable attorney's fees.⁶⁷ The courts have yet to resolve, however, whether a private litigant may obtain equitable relief under section 1964(c). If the courts interpret RICO as granting a private right to obtain injunctive relief, which one court has already done,⁶⁸ the Act's potential scope becomes even more expansive. For example, RICO could conceivably become an effective antitakeover device. A targeted company, threatened by a tender offer, could seek enjoinderment of the acquiring corporation's efforts if it could successfully allege that the offering involved two predicate acts of securities, mail, or wire fraud.⁶⁹

Section 1964(c) does not, however, provide an explicit grant of a private right to obtain injunctive relief.⁷⁰ This section affords a general right to sue, but only section 1964(b) expressly grants the Attorney General equitable relief.⁷¹ Arguably, the courts could interpret the treble damage remedy under section 1964(c) to supplement rather than restrict the equitable remedies already provided in the Act.⁷² The legislative history of section 1964 suggests, however, that Congress did not contemplate a private right of

64. For a detailed discussion of the procedural considerations of RICO, see CORNELL INSTITUTE ON ORGANIZED CRIME, MATERIALS ON RICO 607-816 (1981) [hereinafter cited as MATERIALS].

65. 18 U.S.C. § 1964(c) (1976). Although stringent standing requirements have severely restricted private plaintiffs from recovery under antitrust laws, Professor Blakey suggests the policies behind these rules make them inapplicable to RICO. He contends RICO plaintiffs need more incentive to bring suit. See Blakey & Gettings, *supra* note 15, at 1040-43.

66. 18 U.S.C. § 1964(a) (1976).

67. *Id.* § 1964(c).

68. See *Aetna Casualty & Sur. Co. v. Liebowitz*, No. 81-2616 (E.D.N.Y. 1981) (injunctive relief granted insurance company in suit against broker); see also *Vietnamese Fishermen Assoc. v. Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (court assumed availability of equitable relief but denied injunction on other grounds).

69. See *Spencer Cos., Inc. v. Agency Rent-A-Car, Inc.*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981) (target corporation had standing to assert RICO claim in takeover attempt); *infra* notes 167-71 and accompanying text.

70. 18 U.S.C. § 1964(c) (1976).

71. *Id.* § 1964(b).

72. The Supreme Court has noted that a congressional grant of a general right to sue, absent any statutory limitations, confers accessibility to all necessary and applicable remedies: "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

action for equitable redress.⁷³ RICO was patterned after the antitrust legislation,⁷⁴ which concurrently enacted two separate provisions for private rights of action.⁷⁵ One provision, in language analogous to section 1964(c), provides a general right to sue.⁷⁶ The other provision affords an explicit grant of injunctive relief.⁷⁷ Conversely, RICO failed to insert a similar right-to-equitable-relief provision. In fact, the proposed bills and amendments that espoused a separate provision were rejected⁷⁸ as were subsequent Senate bills attempting to clarify an individual's rights under RICO.⁷⁹ In light of RICO's legislative history and the absence of an explicit grant of equitable relief, RICO plaintiffs will have to rely on the courts' willingness to imply the availability of equitable remedies in private actions.⁸⁰

Apparently, civil RICO actions are permissible as class actions under rule 23 of the Federal Rules of Civil Procedure.⁸¹ If RICO is construed narrowly, then the Act requires each plaintiff to be injured by at least two acts of racketeering activity.⁸² Arguably, under a broader interpretation of the statute, victims of separate racketeering acts could consolidate their claims against a common defendant and satisfy the RICO pattern of racketeering requirement. The plaintiffs would, of course, have to meet the requirements of rule 23 before initiating the group action. The class action suit would also provide a useful vehicle for encouraging small claim litigants to consolidate their actions when a common enterprise's racketeering activity has injured several individuals.

While a civil RICO action must be brought in accordance with the Federal Rules of Civil Procedure, section 1965 provides special rules for venue and service of process.⁸³ Section 1965(a) grants jurisdiction and proper venue to any district court in which the defendant "resides, is found, has

73. See, e.g., H.R. REP. NO. 1549, 91st Cong., 2d Sess. 58 (1970), in which the House Committee on the Judiciary clarified that § 1964(c) solely provided treble damage relief.

74. 113 CONG. REC. 17,999 (1967).

75. See 15 U.S.C. §§ 15, 26 (1976 & Supp. IV 1980).

76. *Id.* § 15.

77. *Id.* § 26.

78. See, e.g., S. 1623, 91st Cong., 1st Sess. § 3(c), 115 CONG. REC. 6996 (1969); H. 19215, 91st Cong., 2d Sess. § 1964(c) (1970).

79. S. 16, 92d Cong., 1st Sess., 118 CONG. REC. 29,368-69 (1972); S. 13, 93d Cong., 1st Sess., 119 CONG. REC. 10,319-21 (1973).

80. See *Cort v. Ash*, 422 U.S. 66, 78 (1975), in which the Supreme Court enumerated the factors necessary to imply a statutory grant of a private remedy. See also *MATERIALS*, *supra* note 64, at 423-27.

81. FED. R. CIV. P. 23; see *MATERIALS*, *supra* note 64, at 894-973; see also *Van Schaik v. Church of Scientology*, No. 79-2941-G (D. Mass. March 26, 1982), and *infra* notes 204-08 and accompanying text.

82. 18 U.S.C. § 1961 (1976 & Supp. IV 1980).

83. *Id.* § 1965 provides:

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose

an agent, or transacts his affairs."⁸⁴ The venue provisions, however, can be read in conjunction with the federal venue statute, which lays proper venue in the district where the cause of action arose.⁸⁵ Plaintiffs should also be able to take advantage of the long-arm statute of the state in which the district court is sitting.⁸⁶ Section 1965(b), the service of process provision, is the most liberal and potentially far-reaching of RICO's procedural devices.⁸⁷ If the venue and jurisdiction requirements of section 1965(a) are met, the court may, in the interests of justice, serve and join parties normally not amenable to suit.⁸⁸ Process may be served in any judicial district in the country.⁸⁹ The suit need only be brought in a court that is proper for at least one defendant.

A private plaintiff pursuing a treble damage recovery under RICO can take advantage of the broad discovery provisions of the Federal Rules of Civil Procedure. A major limitation upon discovery, however, may be the privilege against self-incrimination.⁹⁰ Because the same facts that establish civil liability may also prove criminal liability, RICO defendants will oftentimes assert the privilege during pre-trial discovery.⁹¹ To avoid delays in discovery due to the asserted privilege or due to the imposition of a judicial stay, rule 26(c) provides a protective order allowing continued discovery while protecting potentially incriminating information.⁹²

RICO does not include a specific statute of limitations, and as a result this issue remains unsettled with respect to private civil actions. The courts may use this open issue to restrict RICO's application by imposing analogous state limitations periods that are particularly short. Some guidance

may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

84. *Id.* § 1965(a); see *King v. Vesco*, 342 F. Supp. 120, 121, 125 (N.D. Cal. 1972) (RICO claim dismissed because plaintiff failed to satisfy burden of establishing proper venue and jurisdiction).

85. 28 U.S.C. § 1391(b) (1976); see *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278 (D. Del. 1978) (RICO securities fraud claim dismissed because claim against co-conspirators arose in district, but defendant had insufficient contacts).

86. State rules regarding amenability to suit are recognized in federal courts. See *Black v. Acme Markets, Inc.*, 564 F.2d 681, 684 (5th Cir. 1977).

87. 18 U.S.C. § 1965(b) (1976).

88. *Id.*

89. *Id.*

90. U.S. CONST. amend. V. The amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*

91. See Comment, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 TUL. L. REV. 769 (1978).

92. FED. R. CIV. P. 26(c).

can be found, however, by looking at RICO's model, the antitrust laws. Before Congress enacted a four-year limitation applicable to antitrust actions,⁹³ courts typically applied the state statute of limitations for an analogous type of action.⁹⁴ Some suggestions have recently been made to apply the nearest analogous federal statute in cases in which the federal law in question does not provide a limitations period.⁹⁵ Apparently, however, future treble damage actions under RICO will involve a state statute of limitations, evoking the inevitable questions of which state's statute to apply and which statute of limitation within that given state controls the action.⁹⁶

III. RICO'S APPLICATION IN COMMERCIAL LITIGATION

Although recent civil RICO decisions have tended to restrict the Act's availability to individuals in commercial disputes, its application has not been completely foreclosed. Consequently, a discussion of RICO's potential use in mail, wire, and securities fraud actions merits some consideration.

A. Mail and Wire Fraud under RICO⁹⁷

Section 1961 incorporates mail⁹⁸ and wire⁹⁹ fraud into the activities pro-

93. 15 U.S.C. §§ 15-15c (1976).

94. See, e.g., *UAW v. Hoosier Corp.*, 383 U.S. 696 (1966); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).

95. See *Occidental Life v. EEOC*, 432 U.S. 355 (1977), in which Justice Stewart said "[s]tate limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Id.* at 367.

96. For example, potentially applicable limitations periods for a RICO suit brought in Texas would include: (1) two years—personal injury, TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958 & Supp. 1982); (2) three years—civil securities actions, *id.* art. 581—33 (Vernon Supp. 1982); (3) four years—liabilities under penal statutes, *id.* art. 5527 (Vernon 1958 & Supp. 1982); usury, *id.* arts. 5069—1.06, —8.04 (Vernon 1971); and liabilities not otherwise provided for, *id.* art. 5529 (Vernon 1958 & Supp. 1982).

97. For a comprehensive analysis of mail and wire fraud in light of civil RICO actions, see MATERIALS, *supra* note 64, at 120-53.

98. 18 U.S.C. § 1341 (1976) provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

99. *Id.* § 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign

scribed by RICO.¹⁰⁰ The broad concept of fraud¹⁰¹ reaches many areas of commercial activity, and RICO provides a plaintiff the potential opportunity to transform a state fraud claim into a federal cause of action. Fearing a deluge of cases on the federal dockets, recent district court decisions have resisted a broad application of RICO to common law fraud claims.¹⁰² Apparently, the courts in civil actions will retreat from the broad construction traditionally given the mail and wire fraud statutes in criminal prosecutions.¹⁰³

The mail and wire fraud statutes are *in pari materia*.¹⁰⁴ Thus, a basic explanation of section 1341,¹⁰⁵ the mail fraud statute, also applies to the wire fraud statute.¹⁰⁶ The purpose of section 1341 is to prevent the use of the Postal Service to effect fraudulent schemes.¹⁰⁷ An offense under section 1341 consists of two elements: (1) an intent to execute a scheme to defraud; and (2) use of the mails.¹⁰⁸ The concept of a scheme to defraud has been broadly construed to include "all acts, conduct, omissions, and concealment involving breach of legal or equitable duty and resulting in damage to another."¹⁰⁹ The only state of mind required is an intent to execute such a scheme.¹¹⁰ Each use of the mails constitutes a separate offense.¹¹¹ Since each mailing is an offense, and the offense is racketeering activity under RICO,¹¹² more than one mailing to perpetrate the scheme establishes the pattern of racketeering activity necessary to violate RICO.¹¹³ If the defendant or his agent¹¹⁴ places or takes the mail, or even "causes" the

commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

100. *Id.* § 1961(1) (1976 & Supp. IV 1980); *see supra* note 39 for text of § 1961(1).

101. *See Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.); *cert. denied*, 314 U.S. 687 (1941): "The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity." *See also* ABA SECTION ON CRIMINAL JUSTICE, THE PROSECUTION AND DEFENSE OF RICO AND MAIL FRAUD CASES (1980).

102. *See infra* notes 133-42 and accompanying text.

103. *See, e.g., United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 and 417 U.S. 950 (1974); *United States v. Buckner*, 108 F.2d 921, 926 (2d Cir.), *cert. denied*, 309 U.S. 669 (1940).

104. *See United States v. Tarnpool*, 561 F.2d 466, 475 (3d Cir. 1977); *United States v. Pollack*, 534 F.2d 964, 971 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976).

105. 18 U.S.C. § 1341 (1976).

106. *Id.* § 1343.

107. *See Parr v. United States*, 363 U.S. 370, 389 (1960); *United States v. Keane*, 522 F.2d 534, 544 (7th Cir.), *cert. denied*, 424 U.S. 976 (1976).

108. *See, e.g., Pereira v. United States*, 347 U.S. 1, 8 (1954); *Blachley v. United States*, 380 F.2d 665, 671 (5th Cir. 1967).

109. *Isaacs v. United States*, 301 F.2d 706, 713 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962).

110. *See Durland v. United States*, 161 U.S. 306, 313 (1896); *United States v. Sparrow*, 470 F.2d 885, 889 (10th Cir. 1972).

111. *See United States v. Joyce*, 499 F.2d 9, 19 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); *United States v. Crummer*, 151 F.2d 958, 962 (10th Cir. 1945).

112. *See supra* note 39 and accompanying text.

113. *See United States v. Brown*, 583 F.2d 659 (3d Cir. 1978); *United States v. Hasenstab*, 575 F.2d 1035 (2d Cir. 1978); *United States v. Maze*, 414 U.S. 395 (1974).

114. *See United States v. Kenofsky*, 243 U.S. 440, 443 (1917).

use of the mails,¹¹⁵ his conduct falls within section 1341.¹¹⁶ The mailing must be closely related to the scheme, however, and this test has been construed to mean "incident to an essential part of the scheme" and in furtherance thereof.¹¹⁷ Routine business mailings that incidentally benefit a scheme are not offenses.¹¹⁸

A typical mail fraud case under RICO premises the alleged violation upon section 1962(c), illegal use of an enterprise through a pattern of racketeering activity. A pattern of racketeering activity requires two offenses within a ten-year period, and since each use of the mails constitutes an offense under the mail fraud statute, the pattern is not difficult to prove. The plaintiff must then show that the defendant employee or associate conducted the enterprise's affairs through the pattern of mail fraud.¹¹⁹ A common example of a mail fraud allegation involves the use of the mails to perpetrate a land sale scheme.¹²⁰ A company will acquire property and implement a nationwide marketing scheme to sell the land to the general public. Deceptive representations may be made to induce potential buyers. If the representations are false and promulgated through the mails by letters of solicitation, for example, a disenchanted buyer may have a cause of action under RICO. Provided two or more mailings are made within a ten-year period, the land sale enterprise engages in interstate commerce, and the requisite intent to carry out the fraudulent scheme exists, a restraining order may be issued to halt the activity, and a treble damage action may lie.

The initial decisions involving fraud claims under RICO, although only addressing the dismissal issue, indicated the courts' willingness to apply the Act to fraudulent transactions. In *Hensarling v. Conticommodity Services, Inc.*,¹²¹ a speculator brought suit against his commodities broker for losses in trading. The plaintiff founded his RICO claim on alleged mail and wire fraud. The defendant argued against an overbroad application of RICO to an "everyday business dispute,"¹²² but the court refused to dis-

115. See *Pereira v. United States*, 447 U.S. 1, 8-9 (1954): "[W]here [use of the mails] can reasonably be foreseen, even though not actually intended, then [the defendant] 'causes' the mails to be used."

116. See *supra* note 98.

117. 447 U.S. at 8.

118. See *United States v. Brown*, 583 F.2d 659, 668 (3d Cir.), *cert. denied*, 440 U.S. 909 (1978). Various types of mailings have satisfied the close relationship and in furtherance of a scheme criteria. See, e.g., *United States v. Craig*, 573 F.2d 455, 483 (7th Cir. 1977) (mailing incidentally informing co-schemers of the plan's status); *United States v. Tallant*, 547 F.2d 1291, 1298 (5th Cir.) (mailing of securities to the victim following a purchase), *cert. denied*, 434 U.S. 889 (1977); *United States v. Kelem*, 416 F.2d 346, 349-50 (9th Cir. 1969) (mailing causing delay essential to scheme was in furtherance of scheme), *cert. denied*, 397 U.S. 952 (1970).

119. See *supra* notes 43-48 and accompanying text. The enterprise must be engaged in interstate commerce. See *supra* note 36 and accompanying text.

120. See *MATERIALS*, *supra* note 64, at 124-26 (analyzing *United States v. AMREP Corp.*, 560 F.2d 539 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978)).

121. No. 79 C 3112 (N.D. Ill. filed July 27, 1979).

122. Reply Memorandum of Conticommodity Services, Inc., In Support of Its Motion to Dismiss Counts V and VI, No. 79 C 3112 (N.D. Ill. filed July 27, 1979). Defendant argued that "Congress did not—could not—have intended to add this enormous club to the arsenal."

miss the RICO count.¹²³ A district court in Illinois denied a motion to dismiss another RICO claim in *Heinold Commodities, Inc. v. McCarty*.¹²⁴ The plaintiffs in *McCarty* were also speculators who suffered losses in commodities trading. The defendants urged the court to refrain from applying RICO to "legitimate businessmen," but the court held that commission of any of the proscribed offenses under the statute was a violation irrespective of who committed the acts.¹²⁵ In a related case, *Parnes v. Heinold Commodities*,¹²⁶ another Illinois district court judge refused to dismiss a RICO allegation involving the sale of commodities.¹²⁷ In *Parnes* the court held that a complaint alleging that the defendant used the United States Postal Service mail system two or more times in furtherance of an alleged fraudulent scheme in commodities dealings stated a civil cause of action under RICO.¹²⁸

Waterman Steamship Corp. v. Avondale Shipyards, Inc.,¹²⁹ another RICO action that originally survived dismissal, exemplifies the courts initial receptiveness to bringing "an everyday business dispute" within the reach of RICO. In *Waterman Steamship* the plaintiffs alleged mail and wire fraud against a contractor and subcontractors based upon misrepresentations about the suitability of defective turbine couplings.¹³⁰ In addition to the typical breach of contract, warranty, negligence, and products liability claims, the plaintiffs availed themselves of potential treble damage recovery under a RICO claim predicated on the alleged mail and wire fraud.¹³¹ The district court in *Waterman Steamship* later reversed its initial denial of summary judgment on the civil RICO claim.¹³² The court's restrictive reading of the statute signified a retreat from the more expansive construction applied in the earlier action. The court stated that "[t]he civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones to conduct their business in interstate commerce into treble damages RICO actions."¹³³ The court noted "a clearly expressed legislative intent" that RICO was intended to combat activities of organized criminals and not to apply to private litigants unrelated to organized crime.¹³⁴

The *Waterman Steamship* decision reiterated the holding of *Barr v.*

of legal devices already available to private litigants to settle everyday business disputes, simply because the disputes involve claims of fraud." *Id.* at 3-4.

123. No. 79 C 3112 (N.D. Ill. filed April 8, 1980).

124. 513 F. Supp. 311 (N.D. Ill. 1979).

125. *Id.* at 313.

126. 487 F. Supp. 645 (N.D. Ill. 1980).

127. *Id.* at 647.

128. *Id.*

129. No. 78-2118 (E.D. La. filed Feb. 15, 1980).

130. *Id.*

131. *Id.*

132. 527 F. Supp. 256 (E.D. La. 1981).

133. *Id.* at 259.

134. *Id.*

WUI/TAS, Inc.,¹³⁵ the first case to interpret RICO's private civil remedy provision. In *Barr* the plaintiffs attempted to convert an antitrust case into a RICO violation under the mail fraud statute by alleging that the defendants had used the mails to transmit inflated bills. The district court held that a RICO claim must allege the defendant's affiliation with organized crime.¹³⁶ The court feared that to allow a claim to be filed would be "patently unfair" to the defendant because of the implications of alleging racketeering activity.¹³⁷

Subsequent courts, however, uniformly rejected the *Barr* rationale and refused to restrict RICO's application solely to proven organized criminals.¹³⁸ Several criminal cases noted that nothing in the language of the statute required either proof or allegation of any connection to organized crime.¹³⁹ Further, although the express purpose of RICO's enactment was to eradicate organized crime, two considerations compelled Congress not to restrict RICO explicitly to organized criminals. First, to confine the applicability of the statute to one defined group would raise serious doubts about the constitutionality of the statute.¹⁴⁰ Secondly, to require proof of organized crime affiliation would impose a more difficult burden of proof and obviate the purpose of the civil provisions' less stringent standards.¹⁴¹

Despite this precedent, a number of recent decisions have returned to the narrow statutory construction espoused in *Barr* and *Waterman Steamship*.¹⁴² In light of the legislative history and the intended effect of RICO's

135. 66 F.R.D. 109 (S.D.N.Y. 1975).

136. See *supra* note 56 for the *Barr* court's analysis of RICO's legislative history.

137. 66 F.R.D. at 113.

138. See *United States v. Aleman*, 609 F.2d 298, 304-05 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1981); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247-48 (S.D.N.Y. 1981); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645 (N.D. Ill. 1980).

139. See *United States v. Campanale*, 518 F.2d 352 (9th Cir.), *cert. denied*, 423 U.S. 1050 (1975); *United States v. Chovanec*, 467 F. Supp. 41 (S.D.N.Y. 1979); *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979).

140. 116 CONG. REC. 35, 343-44 (1970); see *Robinson v. California*, 370 U.S. 660, 666-67 (1962), in which the Supreme Court held that a statute punishing a person based upon status was violative of the 8th and 14th amendments. See also *Scales v. United States*, 367 U.S. 203 (1961); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Inclusion of the term organized crime in the statute would also raise vagueness questions. See, e.g., *Connally v. General Constr. Co.*, 269 U.S. 385 (1976).

141. See *supra* note 16 and accompanying text.

142. In *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736 (N.D. Ill. 1981), purchasers alleging land fraud against developers were denied a cause of action under RICO. After scrutinizing RICO's legislative history, the court found:

[I]t seems reasonably clear that the limit of the Act's application is to entities involved with "organized crime" or activities within the penumbra of that phrase . . . There simply is no hint in the congressional proceedings that the Act was viewed as an alternative, and cumulative, remedy for private plaintiffs alleging securities fraud or misrepresentations in the context of real estate transactions . . . They [plaintiffs] . . . have at their disposal laws specifically designed to remedy fully the injuries they claim to have suffered. There is no justification for resort to the drastic and unique remedies utilized by Congress in response to a specific and different problem.

Id. at 747-48; see also *Kleiner v. First Nat'l Bank*, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981) (suit by borrower against lender alleging misrepresentations regarding interest rates dis-

civil provisions, this judicially imposed restriction may thwart the objectives of RICO. This recent trend suggests an attempt by district courts to infer a restriction on private actions under section 1964(c) that was not contemplated by the legislature. As the courts become increasingly wary of the potential breadth of RICO's application in private suits, they appear more willing to ignore legislative history and precedent in an attempt to limit their perceived abuse of the statute's intent.

*B. Securities Fraud Under RICO*¹⁴³

In view of recent Supreme Court decisions restricting the creation of new implied rights of actions for securities laws violations,¹⁴⁴ RICO provides an attractive alternative that may yield more severe penalties for the violator and greater monetary recovery for the victim of securities fraud.¹⁴⁵ Analogous to the case of mail fraud, a RICO violation arises in the securities field when two acts of securities fraud, occurring within ten years and linked by a common scheme, are perpetrated by an enterprise affecting interstate commerce.¹⁴⁶ Further, because section 1964(c) of RICO provides an express private right of action for individuals,¹⁴⁷ the narrow standing requirement for rule 10b-5¹⁴⁸ violations set forth in *Blue Chip Stamps v. Manor Drug Stores*¹⁴⁹ may be inapplicable to RICO actions. While restricting standing to actual purchasers or sellers of securities, the Supreme Court's holding acknowledged that a legislative grant of a private cause of action would obviate *Blue Chip's* judicial retrench-

missed because such banking practices were "not a recognized form of criminal activity"); *Green v. Bartholomew*, No. 78 Civ. 3994 (S.D.N.Y. May 11, 1979) (complaint by plaintiff against will beneficiary-conservator alleging diversion of funds dismissed because of lack of racketeering evidence).

143. For a thorough discussion of securities fraud under RICO, see MATERIALS, *supra* note 64, at 154-210.

144. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

145. Under the securities laws, a plaintiff in a private action is limited to either rescission or recovery of actual damages. 15 U.S.C. § 77(f) (1976). Under RICO a private plaintiff's recovery is threefold the damages. 18 U.S.C. § 1964(c) (1976). Attorney's fees are also awarded under RICO. *Id.* The securities laws, 15 U.S.C. §§ 77(e), 78r(a) (1976), allow a judge discretion in awarding attorney's fees.

146. 18 U.S.C. §§ 1961-1962 (1976 & Supp. IV 1980).

147. *Id.* § 1964(c).

148. 17 C.F.R. § 240.10b-5 (1978):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

149. 421 U.S. 723, 731 (1975).

ment.¹⁵⁰ Section 1964(c) grants such an express private right of action.¹⁵¹

The Court in *Blue Chip* also expressed concern over the "widespread recognition that litigation under rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."¹⁵² These same fears were echoed by some members of Congress during the House deliberations over RICO's enactment.¹⁵³ Congress nonetheless felt compelled to include "any offense involving . . . fraud in the sale of securities"¹⁵⁴ as a proscribed racketeering activity in order to reach this common malefaction of organized crime. To safeguard against vexatious abuse of the statute, Congress required a pattern of activity to be proven.¹⁵⁵ Clearly, the scope of the Act did not contemplate an isolated case of securities fraud. The Act does provide an express right of action, however, and if the underlying rule 10b-5 violations and the requisite pattern can be established, then RICO may provide victims with a vehicle to circumvent recent restrictions on the institution of securities fraud claims.

A recent civil RICO action under section 1962(c), alleging securities fraud, illustrates the statute's potential in this area of commercial litigation. In *Engl v. Berg*¹⁵⁶ a United States district court refused to dismiss a claim brought by several limited partners against the promoter of a real estate syndication.¹⁵⁷ The RICO allegation was premised on two separate transactions incident to the financing, syndication, and resyndication of a commercial office building. The first transaction in 1975 involved the promoter's assignment of his interests under a lease to a limited partnership in which he was the general partner. Those interests were subsequently purchased by the plaintiffs, based upon a "project synopsis" distributed by him.¹⁵⁸ The plaintiffs alleged that Berg made false and misleading representations to them regarding the nature of the interests in the property in violation of various securities laws.¹⁵⁹

The second transaction occurred in 1979 when a second limited partnership was formed with the promoter's company as general partner and twenty-six individuals as limited partners.¹⁶⁰ Berg and his company, acting as general partner, then conveyed the interests of the first partnership in an installment sales agreement and a leasehold to the second partnership in consideration of a purchase money mortgage and a "senior partici-

150. The Court stated:

We quite agree that if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.

Id. at 748.

151. 18 U.S.C. § 1964(c) (1976).

152. 421 U.S. at 739.

153. See *supra* note 28 and accompanying text.

154. 18 U.S.C. § 1961(1) (1976 & Supp. IV 1980).

155. *Id.* § 1962.

156. 511 F. Supp. 1146 (E.D. Pa. 1981).

157. *Id.* at 1156.

158. *Id.* at 1150.

159. *Id.*

160. *Id.*

pating certificate.”¹⁶¹ Plaintiffs contended that the mortgage was inadequate and that the transaction occurred without their knowledge or acquiescence, amounting, therefore, to a forced sale of their interests.¹⁶² Allegedly, the transactions violated section 17(a) of the Securities Act of 1933 and rule 10b-5 of the Securities Exchange Act of 1934. These transactions, taken together, constituted a pattern of racketeering activity under RICO.

In establishing the elements of a RICO violation, the court found that the partnerships were engaged in interstate commerce, and that the 1975 and 1979 transactions involving Berg and his company constituted racketeering activity.¹⁶³ The court refuted the defendant's argument that no proof was shown of a sufficient nexus between the enterprise and its racketeering activity.¹⁶⁴ According to the court, collection and investment of capital through the syndication and resyndication of the office building constituted participation “in the conduct of the enterprise's affairs” within the meaning of section 1962(c).¹⁶⁵ As a result, the court refused to dismiss the RICO allegation as an “overly broad interpretation of RICO.”¹⁶⁶

In *Spencer Companies, Inc. v. Agency Rent-A-Car*¹⁶⁷ a Massachusetts district court refused to dismiss a RICO action alleging securities fraud in a corporate takeover attempt.¹⁶⁸ The plaintiff alleged that the acquiring corporation acquired stock in two corporations, including the plaintiff's corporation, through a pattern of racketeering activity.¹⁶⁹ The pattern was established by the filing of misleading statements pursuant to Regulation 13d. The court rejected the defendant's argument that a literal reading of the statute's prohibition of “fraud in the sale of securities” excluded RICO's application to the defendant's acquisition of stock.¹⁷⁰ Rather, the court noted that the remedial nature of the statute encompassed fraud

161. *Id.*

162. The “forced seller” doctrine gives a minority shareholder standing to sue under securities laws without actual sale of the stock if, because of the corporation's activity, his only alternatives are to sell at a majority-directed price or retain illusory interests in the corporation. *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967). Plaintiffs claimed that the 1979 transaction transformed tangible interests in a going partnership into illusory rights to receive mortgage payments in the future. 511 F. Supp. at 1152.

163. 511 F. Supp. at 1154-55.

164. *Id.* at 1155. Defendants argued that defrauding an enterprise through misuse and misapplication of its assets was not participation “in the conduct of such enterprise's affairs.” *Id.*; see *United States v. Ladmer*, 429 F. Supp. 1231 (E.D.N.Y. 1977).

165. 511 F. Supp. at 1155. The court cited *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978), as controlling precedent. 511 F. Supp. at 1156.

166. 511 F. Supp. at 1155-56.

167. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981), *modified*, No. 81-2097-S (D. Mass. Dec. 7, 1981).

168. *Id.* at 92,217.

169. *Id.* at 92,216.

170. *Id.* at 92,215. The court cited *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278 (D. Del. 1978), in which plaintiffs sued 51 corporate and individual defendants alleging conspiracy to defraud through the use of a mortgage scheme involving the assignment of forged securities and concealment of material information. *Id.* at 1279. Predicating the RICO claim on the securities fraud provision of § 1961(a), the court held that plaintiffs had a claim for which relief could be granted and refused to dismiss the action. *Id.* at 1280.

committed by the purchaser as well as the seller of securities.¹⁷¹

The decisions in *Engl* and *Spencer Companies* illustrate how RICO can be used to complement an action predicated upon violations of the securities laws. Arguably, a broad reading of the statute's application to securities fraud will advance RICO's purpose of eradicating organized crime by providing a more expansive dragnet. It is doubtful, however, that the requisite proof of a pattern of racketeering activity will adequately safeguard against vexatious litigation. Because a rule 10b-5 action will often arise from the mailing of a prospectus that contains untrue statements or omissions of material fact pursuant to an offer or sale of securities, a pattern of racketeering activity may easily be established upon use of the mails two or more times.¹⁷² In this context RICO conceivably applies to any securities fraud allegation. This broad application of the statute essentially creates an express private right of action under the securities laws where previously the courts only recognized a restricted implied right.¹⁷³ By providing a private right of action under RICO, Congress invited an inevitable misuse of the statute and a significant departure from its original purpose of curbing organized crime's pervasion of legitimate business. If the legislature chooses not to reconsider the potential breadth of RICO, the judiciary must assume the legislative task of narrowing the statutory construction of RICO. One response is the recent restriction imposed by the courts that requires proof of "competitive injury."

IV. RICO'S FUTURE IN COMMERCIAL LITIGATION

The early RICO decisions evinced a receptive attitude toward RICO's application in commercial litigation and a broad construction of the private action under section 1964(c).¹⁷⁴ In light of this acceptance, a recent influx of RICO claims in business disputes has convinced some courts to reconsider the Act's intended purpose and to search for rational limitations upon its extended scope. One previously mentioned judicial curtailment is the re-emergence of the requirement that a violator be affiliated with organized crime.¹⁷⁵ Another recently imposed restriction involves standing to sue under section 1964(c).

Under section 1964(c) a private litigant under RICO must prove injury to himself or his business "by reason of a violation of section 1962."¹⁷⁶ One manifestation of this requirement is the "competitive injury" standard enunciated in *North Barrington Development Co. v. Fanslow*.¹⁷⁷ In *North*

171. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) at 92,215.

172. If the mails or a telephone have been used to transmit fraudulent information, the RICO plaintiff may allege mail or wire fraud and avoid having to prove the underlying rule 10b-5 violations. See *supra* notes 97-134 and accompanying text.

173. See *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971) (Supreme Court recognized implied private right of action under § 10(b)).

174. See *supra* notes 121-30, 156-71 and accompanying text.

175. See *supra* notes 132-42 and accompanying text.

176. 18 U.S.C. § 1964(c) (1976).

177. No. 80 C 2644 (N.D. Ill. Oct. 9, 1980).

Barrington the plaintiffs alleged that the defendants engaged in a conspiracy fraudulently to induce the plaintiffs into signing a contract that conveyed to the defendants beneficial title to certain property.¹⁷⁸ In addressing the section 1964(c) RICO allegation, the court scrutinized the Act's language and intent and noted that "the purpose of § 1964(c) was not to transform state law violations into federal violations, but to prevent interference with free competition In short, plaintiff must allege how it was injured competitively by the RICO violation in order to state a cause of action under § 1964(c)."¹⁷⁹ The court expressed concern that without such a requirement RICO would essentially federalize "every bad faith breach of contract or common law fraud where a plaintiff alleges that defendants used the mails"¹⁸⁰ Furthermore, a RICO plaintiff must plead injury to its business or property through the requisite pattern of racketeering to establish a RICO violation.¹⁸¹ Injuries arising solely from the predicate offenses are deemed to be state law offenses.¹⁸²

*Landmark Savings & Loan v. Rhoades*¹⁸³ articulated another restrictive standing requirement in RICO actions. In *Landmark Savings* the plaintiff, a thrift institution, alleged that the defendants invested income in the acquisition or operation of an interstate enterprise with funds derived from fraudulent securities sales.¹⁸⁴ The court noted, however, that "something more or different than injury from predicate acts is required for a plaintiff to have standing to recover treble damages under the RICO Statute."¹⁸⁵ The court cited a Supreme Court decision that articulated the competitive injury proof required in treble damages actions under federal antitrust laws but then distinguished the type of injury exacted under RICO.¹⁸⁶ A plaintiff must allege a "racketeering enterprise injury" in order to have standing to sue under RICO.¹⁸⁷ An illustration of this type of injury is the enhancement of a defendant's ability to harm a plaintiff by the injection of income from a pattern of racketeering activity into the enterprise.¹⁸⁸ The court provided no further insight into the meaning of racketeering enterprise injuries. The court did, however, assert that the requisite injury should not "be construed to require a competitive injury as that term is defined in antitrust suits."¹⁸⁹

178. *Id.* at 2.

179. *Id.* at 7-8.

180. *Id.* at 8.

181. *Id.*

182. *Id.*

183. 527 F. Supp. 206 (E.D. Mich. 1981).

184. *Id.* at 207.

185. *Id.* at 208.

186. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 208 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

187. 527 F. Supp. at 208.

188. *Id.* at 209.

189. *Id.* at 208.

Other courts have refused to impose more restrictive standing requirements on section 1964(c) actions. In *Hellenic Lines, Ltd. v. O'Hearn*¹⁹⁰ the plaintiff shipping company alleged a RICO violation because of a fraudulent scheme of kickbacks engaged in by the defendant companies and officials of the International Longshoremen's Association.¹⁹¹ After rejecting the defendant's contention that no injury to the plaintiff's business or property had occurred, the court expressly held that no requirement of proof of competitive injury was intended by Congress.¹⁹² The court asserted that "RICO does not countenance racketeering activity so long as it is done uniformly among competing concerns."¹⁹³ The court further noted that a RICO claim was not precluded merely because the predicate crime might also be actionable under state fraud laws.¹⁹⁴ The same district court in New York later reaffirmed its interpretation of section 1964(c) in *Prudential Lines, Inc. v. McKeon*.¹⁹⁵ In *Prudential* the plaintiff alleged that its executive vice-president of operations conspired with the defendant fraudulently to induce the plaintiff to enter into an unfavorable lease agreement.¹⁹⁶ The parties allegedly agreed that secret kickbacks and bribes would be paid to the defendant for his efforts to secure the consummation of the lease.¹⁹⁷ The court dismissed as "specious" the defendant's assertion that no competitive injury was shown because the plaintiff received a reasonable rate on the lease.¹⁹⁸ The court noted that the "broad remedial purposes of RICO clearly permit private law suits by a firm forced to pay bribes or kickbacks of any kind."¹⁹⁹

*Spencer Companies, Inc. v. Agency Rent-A-Car*²⁰⁰ distinguished *Hellenic Lines* and afforded standing to a corporation targeted by a defendant corporation in a takeover attempt.²⁰¹ The court, however, recognized the "breadth and vagueness" of the statute and the possibility of unwarranted exposure of a business's previous ten years of activities through extensive pretrial discovery.²⁰² Consequently, the court insisted that the plaintiff show "legally compensable injury" before initiating discovery.²⁰³ *Van Schaick v. Church of Scientology*²⁰⁴ subscribed to the *Hellenic Lines* holding, but also revealed an awareness of the potential abuse of RICO.²⁰⁵ In *Van Schaick* the plaintiff brought a class action on behalf of herself and all

190. 523 F. Supp. 244 (S.D.N.Y. 1981).

191. *Id.* at 246.

192. *Id.* at 248.

193. *Id.*

194. *Id.*

195. No. 80 Civ. 5853 (S.D.N.Y. Apr. 21, 1982).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981), *modified*, No. 81-2097-S (D. Mass. Dec. 7, 1981).

201. *Id.* at 92,217.

202. *Id.*

203. *Id.*

204. No. 79-2491-G (D. Mass. Mar. 26, 1982).

205. *Id.* at 17-18.

persons who had donated money or property to the Church of Scientology. The court scrutinized the statutory language "any person injured in his business or property" and recognized a need to be perceptive to the statute's "commercial orientation" and "plaintiff class."²⁰⁶ The court forewarned of the potential federalization of consumer protection law if RICO provided recourse for any consumer who could trace the purchase of a product to a violation of section 1962.²⁰⁷ The court dismissed the RICO claim because the plaintiff failed to specify the requisite relationship between the "person" and the "enterprise" or to allege damages constituting commercial injury.²⁰⁸

Even in the cases that espouse a broad standing requirement and no proof of competitive injury, the courts concede an awareness of the potential expanse of RICO. The express rejection of the competitive injury standard in *Hellenic Lines* and *Prudential* should be qualified. Both cases alleged fraudulent schemes involving illegal bribes and kickbacks. Clearly, this kind of activity was contemplated by RICO's legislative history and statutory language.²⁰⁹ Accordingly, the courts in *Hellenic Lines* and *Prudential* were less compelled to demand a showing of competitive injury when the alleged activity was plainly within the intended scope of the statute. The courts begin to diverge from the statutory purpose of uprooting organized crime when they liberally apply the express private right of action in cases involving state law claims of fraud, tort, and breach of contract. Even RICO's application to common securities fraud claims suggests a strained interpretation of the Act.

Judicial responses to rising fears of a panacean statute include the competitive injury standard and the revival of the organized crime affiliation requirement. Whether the latter will succeed in curbing abuse of the statute is doubtful because of its constitutional deficiencies and its frustration of the purpose for inclusion of the civil action, the availability and advantages of the civil evidentiary apparatus.²¹⁰ In the absence of statutory reform, the competitive injury standard is a logical attempt by the judiciary to restrict RICO's scope. A more restrictive standing requirement that demands a direct causal relationship between the defendant's racketeering

206. *Id.* at 19.

207. *Id.* The court held that:

Such an interpretation would open the federal courts to frequent RICO treble damage claims by federalizing much consumer protection law and by inviting plaintiffs to append RICO claims for consumer fraud to nonfederal claims thereby achieving treble damage recovery and a federal forum. Yet the legislative history contains no hint that Congress intended RICO as a remedy for private plaintiffs alleging consumer fraud.

Id.

208. *Id.*

209. See *supra* notes 13-32 and accompanying text.

210. Some recent commentators have suggested that the purpose of RICO can be better effectuated by imposing a clear and convincing evidence requirement rather than the accepted civil standard of preponderance of the evidence. The imposition of the intermediate standard would be a restriction that is traditionally a judicial task and would "reduce the likelihood of erroneous or undesirable outcomes." See Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655, 717 (1982).

activity and the competitive injury suffered by the plaintiff should aid in the thwarting of vexatious litigation and the potential federalization of state law actions. The courts must, however, more clearly define the elusive concept of competitive injury if it is to become a workable standard for framing RICO allegations in commercial litigation.

Until the legislature reacts to the inevitable abuse invited by its broad draftsmanship, the courts will be hardpressed to construe the statute in a fashion that both effectuates the purpose of RICO and safely excludes those activities not contemplated by the Act. A narrow construction with strict standing requirements will invariably exclude some members of organized crime from the statute's reach, while a broad interpretation beckons spurious suits by disgruntled businessmen in search of a federal forum and treble damages. Rather than relying upon judicially imposed restrictions that attempt to construe an already ambiguous legislative history, Congress should resolve the courts' dilemma by reassessing its initial efforts to remove racketeering from the business community.

V. CONCLUSION

RICO was initially enacted to curb the infiltration of organized crime into legitimate business. In an effort to realize that intent, Congress provided civil remedies to facilitate, if not criminal conviction, at least economic retribution. Congress also afforded the individual injured by racketeering activity the opportunity to recover for financial losses. Because many of the proscribed activities under the antiracketeering statute were those often arising in commercial litigation, the statute's application to private party actions was called into question. Although initially receptive to private actions, the courts, fearing a floodgate of potential civil RICO claims, have begun to restrict the statute's application. Two recent attempts to narrow the breadth of the Act have been judicially required proof of an affiliation with organized crime or a showing of competitive injury from alleged racketeering activity. Both restrictions represent ambitious attempts to construe a convoluted legislative history and an expansive statutory text. As the number of civil RICO actions increases, the courts must remind themselves that the express intent of RICO is to eradicate organized crime, not to federalize common law claims in commercial disputes. With the statute's purpose firmly ingrained, the courts will be better equipped to discourage any perceived abuse of the private action. Ultimately, however, Congress must assume the burden of redefining the parameters of the Act and clarifying the existing ambiguities of RICO's civil provisions.