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ARTICLES

CIVIL RICO: OVERVIEW ON THE EVE OF THE 200TH ANNIVERSARY OF THE FEDERAL JUDICIARY

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I. INTRODUCTION

On the eve of the federal judiciary's bicentennial anniversary, our courts are challenged with a statute whose various elements pose "the widest and most persistent circuit split on an issue of federal law in

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recent memory."[1] The source of this persistent circuit split relates to the scope, breadth and reach of the Racketeer Influenced Corrupt Organizations Act (RICO).[2]

The RICO statute was forged in the tradition of antitrust and securities legislation, which contained criminal as well as civil remedies and private rights of action. The statute was enacted in 1970 and, for the first decade of its existence, resulted in mainly criminal prosecutions.[3] Thereafter, however, the private civil remedies provided by the RICO statute have become the basis for ever-increasing action by civil litigants.[4] Perhaps the primary reasons for this increased utilization of civil remedies include: (1) congressional expansion of the predicate offenses, (2) the statutory provisions for liberal construction, (3) the use of a mere preponderance evidentiary burden, and (4) the lure of treble damages and attorney fees.[5]

The purpose of this article is to help the civil practitioner prepare for the defense or offense of a civil RICO case and keep in mind the ever-present possibilities of criminal RICO prosecutions. Accordingly, the article will begin with a general overview of the legislative history of RICO, a discussion of the statutory elements of RICO, and an analysis of the implications of the use of differing burdens of proof and issues of discovery for civil and criminal actions. The authors hope that the issues raised by this article and the possible "chilling effect" that they pose will stimulate debate, encourage the self-imposition of prosecutorial restraints and spur reform through legislation.

II. LEGISLATIVE HISTORY

The RICO statute was enacted as Title IX of the Organized Crime Control Act of 1970[6] and is codified at 18 U.S.C. sections 1961

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1. H.J., Inc. v. Northwestern Bell Tel. Co., 57 U.S.L.W. 4951, 4956 (U.S. Jun. 27, 1989)(Scalia, J., concurring).

2. 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987).

3. *See, e.g.*, Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 662 n.4 (1982)(noting fewer than 50 decided civil RICO cases as of spring 1982); Parrish, *RICO Civil Remedies: An Untapped Resource for Insurers*, 49 INS. COUNS. J. 337, 338 n.6 (1982)(indicating 29 civil suits filed as of May, 1982).

4. *See* Patton, *Civil RICO: Statutory and Implied Elements of the Treble Damage Remedy*, 14 TEX. TECH L. REV. 377, 381 (1983)(potential treble damage recovery increased number of civil RICO suits filed).

5. *Id.* at 378-81.

6. *See* Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 941-48 (1970). For an extensive chronicling of the legislative history of the OCCA, see Blakey, *The RICO*

through 1968. After three congressional sessions of debate, the 91st Congress approved the statute in response to ineffective government efforts to stem the tide of organized crime.[7] Prosecution of organized crime figures had failed to produce convictions due to what were termed "defects in the evidence gathering process."[8]

In 1967, the President's Commission on Law Enforcement and Administration of Justice prepared its Task Force Report recommending the use of new approaches to fight the infiltration of legitimate business by organized crime.[9] This report stimulated the introduction of a series of Senate bills.[10] After recommendations from the antitrust section of the American Bar Association,[11] the Department of Justice,[12] and after numerous Senate hearings, the process culminated in the introduction of Senate Bill 1861.[13] Referred to the Subcommittee on Criminal Law of the Senate Judiciary Committee, the ensuing legislative process produced an amended version of 18 U.S.C. § 1861. The House made minor revisions[14] and the final version of what today is

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Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249-80 (1982); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L. Q. 1009, 1014-21 (1980). Professor Blakey served as Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures during the passage of the OCCA.

7. D. SMITH & T. REED, CIVIL RICO, ¶ 1.01 at 1-1 (1988).

8. *Id.* at 1-8 n.26 (remarks of Senator McClellan).

9. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, at 16-24 (1967).

10. For a concise discussion of these bills, see D. SMITH & T. REED, *supra* note 7, ¶ 1.01 (legislative history).

11. D. SMITH & T. REED, *supra* note 7, ¶ 1.01, at 1-3 n.8 (Report of Anti-Trust Section of ABA). The Anti-Trust Section objected to a proposed amendment to the Sherman Act that indicated anti-trust precedent posed barriers on issues of standing and proximate cause. The Anti-Trust Section advocated a separate criminal statute. It reasoned that the primary goal of the Sherman Act was to maintain free competition and, thus, an amendment designed to broadly combat organized crime was inappropriate. Note, *Business Law—Racketeer Influenced And Corrupt Organizations Act (RICO)—Maintenance Of A Private Civil RICO Action Does Not Require A Showing That The Defendant Has Been Criminally Convicted Of The Predicate Acts Nor That The Plaintiff Has Sustained A "Racketeering Injury" Distinct From The Alleged Predicate Acts*, 17 ST. MARY'S L.J. 465, 469 n.19 (1986).

12. D. SMITH & T. REED, *supra* note 7, ¶ 1.01, at 3 n.10. The Department of Justice contributed greatly to the development of section 1962(c) by criticizing the initial vague language regarding "any act involving the danger of violence to life, limb, or property indictable under State or Federal Law" and by proposing that specific acts by substituted for this language. *Id.* at 1-6.

13. Senate Bill 1861 was included in Title IX of Senate Bill 30, which Senator McClellan introduced in 1969. Note, *supra* note 11.

14. These revisions, thought to be minor at the time, provided a private treble damages

commonly referred to as the RICO Act was signed by President Nixon on October 15, 1970.[15]

There have been various amendments to the RICO Statute since its enactment. Of these, the most significant was implemented in 1984, when Congress expanded the list of predicate offenses that provide the basis for a RICO violation.[16] The 1984 amendment also strengthened

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remedy in section 1964(c). *See* Note, *supra* note 11, at 470 n.22 (RICO as reported out of House). This amended version of OCCA, which was to include RICO, was met with a most vociferous dissent from three members of the House Committee on the Judiciary. The use of RICO, specifically its private treble damage remedy in section 1964(c), was criticized for its potential for abuse as a tool of harassment against competitors and, significantly, its potential for stimulating adverse publicity for competitors as a result of charges being filed and subsequent litigation. (*See* discussion on burden of proof, *infra* at p.41). Despite this criticism, the report from the Committee on the Judiciary was favorable. *See* Note cited *supra* note 11, at 471 n.22. An outspoken critic, Representative Mikva, voiced similar concerns and unsuccessfully tried to amend Senate Bill 30 so that it would allow treble damages where frivolous lawsuits brought under section 1964(c). *Id.*

15. The House version of the bill passed Oct. 7, 1970 and was approved by the Senate five days later. D. SMITH & T. REED, *supra* note 7, ¶ 1.01, at 1-8 n.26.

16. The "predicate offenses" or racketeering activity proscribed by RICO are today defined as:

> (1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, 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), section 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devises), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) sections 1461-1465 (relating to obscene matter), 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 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), 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), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property) section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sec-

the ability of the Justice Department to effectuate the criminal forfeiture provisions of the Act.[17]

RICO has been met with strong support in Congress, reflected in the nature of the several amendments. With the legacy of the Reagan

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tions 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), (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, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C.A. § 1961 (West 1984 & Supp. 1989).

Smith and Reed have commented on Congress' use of the terms "chargeable" when referring to state law violation and "indictable" when referring to federal law violation in section 1961.

> It is not clear why Congress used the term 'chargeable' when referring to State law violations and the term 'indictable' when referring to Federal law violations. [Probably] . . . because the specific federal offenses were known to be indictable, the more precise term was applied to them. Because the state offenses were stated generically, the use of the language 'chargeable' and 'punishable by imprisonment for more than one year' encompassed all offenses that under Federal law would have been indictable felonies, but that under the procedures of a particular state might not be indictable or designated as felonies. Thus, the terminology chosen was apparently designed to prevent a defendant from escaping punishment due to a technicality in a particular state's law.

D. SMITH & T. REED, *supra* note 7, ¶ 2.02 [1], at 2-4, 5; *see also* Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980). One commentator has criticized the vague and generic approach of section 1961 (1) (A) to state offenses. The criticism asserts that the federal courts may construe a generic category as broadly as they wish, thus preventing an individual from receiving fair notice that his behavior is criminal. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 225 n.300 (1980). Numerous challenges to the criminal liability under RICO as void for vagueness have failed. D. SMITH & T. REED, *supra* note 7, ¶ 2.02, at 2-6. *But see H.J. Inc. v. Northwestern Bell Tel. Co.*, 57 U.S.L.W. 4951, 4957-58 (U.S. Jun. 27, 1989) (Scalia, J. concurring)(indicating challenge on basis of vagueness may succeed).

The predicate offenses were further expanded in a 1986 amendment. *See* Pub. L. 99-570, 100 Stat. 3207-35 (1989); Pub. L. 99-646, 100 Stat. 360 (1986). These amendments expanded the list of predicate offenses of 18 U.S.C. sections 1956 and 1957 (relating to money laundering) and 18 U.S.C. sections 1512 and 1513 (relating to obstruction of justice) respectively. Because the money laundering provisions include their own predicate offenses, one commentator has pointed out that the 1986 amendment could significantly expand the scope of RICO. *See* D. SMITH & T. REED, *supra* note 7, ¶ 1.02, at 1-9.

17. For an excellent comprehensive discussion on RICO's criminal forfeiture provisions, see D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES, chs. 13 & 14 (1987). For a discussion of the significant points of the Comprehensive Forfeiture Act of 1984, see generally Reed, *Criminal Forfeiture under the Comprehensive Forfeiture Act of 1984, Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1985). A brief discussion of RICO's criminal forfeiture provision is included below.

Administration's anti-crime mandate well settled in the federal judiciary, RICO also has received strong support from the judiciary.

III. STATUTORY ELEMENTS

The breadth of civil RICO and the ensuing problems posed for the civil practitioner arise from the courts' complex definitional holdings regarding the various statutory elements of RICO offenses. Violations arising under section 1962(c) are by far the most frequently encountered RICO offenses; therefore the section's elements will be the subject of the following analysis. Sections 1962(a)[18] and (b)[19] are infrequently encountered, as will be discussed later. Conspiracy counts under section 1962(d)[20] require an understanding of the elements of subsection (c).[21]

Reduced to its three essential elements, a civil RICO claim must involve: (1) a *person* who engages in (2) a *pattern of racketeering activity* (3) connected to the *acquisition, establishment, conduct or control of an enterprise*.[22] Section 1962(c), the primary workhorse for civil claims, was intended to prevent the operation of a legitimate business through racketeering activity. This section 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 enterprises' affairs through a pattern of racketeering activity or collection of unlawful debt.[23]

Accordingly, a violation of section 1962(c) requires "(1) conduct, (2)

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18. For the text of section 1962(a), *see infra* note 88 and accompanying text.

19. For the text of section 1962(b), *see infra* note 89 and accompanying text.

20. 18 U.S.C. § 1962 (1982). Section 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." RICO conspiracy charges have been the subject of extensive analysis and are beyond the scope of this article. For discussions of subsection (d), see D. SMITH & T. REED, *supra* note 7, ¶ 5.05; Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 383-98 (1983).

21. Analysis of subsection (c) is the subject of this article generally.

22. Delta Truck and Tractor, Inc. v. J.I. Case Co., 855 F.2d 241 (5th Cir. 1988).

23. 18 U.S.C. § 1962(c) (1982). The private treble damages remedy is, of course, the basis for a civil action under section 1964(c). It provides: "Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1982). For a general discussion of section 1964(c), see generally, Patton, *supra* note 4.

of an enterprise, (3) through a pattern of racketeering activity."[24]

IV. CONDUCT

Section 1961 provides the definitions of the terms used in RICO.[25] Unfortunately, "the key phrase, 'to conduct or participate . . . in the conduct of [the] enterprise's affairs through a pattern of racketeering activity' is not defined."[26] Thus, the required nexus between the unlawful acts of the defendant and the affairs of the enterprise has been the subject of much judicial debate. While every jurisdiction requires the unlawful acts to be connected to the affairs of the enterprise in some fashion, there has been sharp disagreement over the extent to which the interrelationship must exist.[27]

Perhaps the most restrictive test is that adopted by the Fourth Circuit in *United States v. Mandel*.[28] This test focuses on the degree of participation by each defendant in the conduct of the affairs of the enterprise. As the Eighth Circuit explained in *Bennett v. Berg*,[29] the requisite degree "ordinarily will require some participation in the op-

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24. Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 424 (5th Cir. 1987)(quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)). The Fifth Circuit has held that these are separate requirements. *See* Old Time Enters. v. International Coffee Corp., 862 F.2d 1213, 1217 (5th Cir. 1989). The collection of unlawful debt will not be included in this analysis. It is an infrequent aspect of RICO charges involving instead a pattern of racketeering activity. *See* D. SMITH & T. REED, *supra* note 7, ¶ 4.05(1).

25. 18 U.S.C. § 1961 (1982). Other important elements, such as the nexus between the pattern of racketeering activity and the affairs of the enterprise, are not defined in section 1961 but rather have been judicially implied. *See generally* Patton, *supra* note 4, at 407-09. For an excellent discussion of the nexus, see D. SMITH & T. REED, *supra* note 7, ¶ 5.04(3).

26. Patton, *supra* note 4, at 404.

27. *Id.* The Fifth Circuit has rejected expressly the requirement that a relationship exist between the predicate acts. United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.)(citing United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *cert. denied*, 439 U.S. 953 (1978)); *accord* United States v. Phillips, 664 F.2d 971, 1011 (5th Cir.), *cert. denied*, 457 U.S. 1136 (1982); United States v. Bright, 630 F.2d 804, 830 n.47, (5th Cir. 1980). *But see* R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985)(two acts of mail fraud sufficient to constitute pattern because they were related). This subject will be discussed further in the Pattern Section below. The Fifth Circuit has emphasized the relationship between the unlawful acts and the enterprise as opposed to that between the unlawful acts themselves.

28. 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). The defendants in *Mandel* had been charged with a section 1962(c) violation involving mail fraud and bribery. A partnership in a company had been transferred to a state politician (a governor) in return for political favors. The Fourth Circuit actively interpreted the term "conduct or participate" and concluded that the possession of a non-management interest was not the same as operating the business. *Id.* at 1374.

29. 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

eration or management of the enterprise itself."[30]

In *United States v. Scotto*,[31] the Second Circuit found that an individual conducts the affairs of an enterprise through a pattern of racketeering activity "when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise."[32]

The Fifth Circuit was persuaded by this rationale but modified it in *United States v. Cauble*.[33] In *Cauble*, the court ruled:

> A defendant does not 'conduct' or 'participate in the conduct' of a lawful enterprise's affairs, unless (1) the defendant has, in fact, committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.[34]

The court expanded this concept in a footnote, stating that the effect of the predicate acts "may be direct, such as the deposit of money in the enterprise's bank account, or indirect, such as the retention of the enterprise's existing clients."[35]

The *Cauble* court also noted that the prosecution's only burden was to prove that, in some fashion, the enterprise was affected by the racketeering acts.[36] When a defendant exercises vast control over an enterprise, the court held, "[T]he defendant's connection with the racketeering acts is also the enterprise's connection.[37] This is 'con-

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30. *Id.* at 1364. The Eighth Circuit has subsequently adopted the approach of the Fifth Circuit. *See* United States v. Ellison, 793 F.2d 942, 950 (8th Cir. 1986).

31. 641 F.2d 47 (2nd Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). *Scotto* involved labor union officials who were convicted of taking illegal payoffs from businesses employing union members. On appeal, the defendants contended that the required nexus between the predicate acts and the affairs of the enterprise had to be analyzed in terms of whether the acts "concerned or related to the operation or management of the enterprise" and "affected the affairs of the enterprise in its essential management." *Id.* at 54.

32. *Id.* at 54. The *Scotto* test has been adopted by the Third and Ninth Circuits. *See* United States v. Provenzano, 688 F.2d 194, 200 (3rd Cir.), *cert. denied*, 459 U.S. 1071 (1982); Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 195 (9th Cir. 1987).

33. 706 F.2d 1332 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). *Cauble* involved Texas millionaire Rex Cauble and the affairs of his partnership, Cauble Enterprises. This ranching and land business was found to have been operated in part by the depositing of profit, derived from marijuana smuggling, into the enterprise's bank accounts. *Id.* at 1333.

34. *Id.* at 1333.

35. *Id.* at 1333 n.24.

36. *Id.*

37. *Cauble*, 706 F.2d at 1333 n.24

duct' of a legal enterprise through a pattern of racketeering activity."[38] Relying on its holding in *United States v. Martino*,[39] the court noted parenthetically that the definition of "conducts" is the "performance of activities necessary or helpful to [the] operation of [the] enterprise."[40]

This requirement contrasts with the test adopted by the Eleventh Circuit in *United States v. Carter*.[41] In *Carter*, a dairy farm owned by two of the RICO defendants was used for drug smuggling. The farm office was used as the communications center for the racketeering activity and the farm employees assisted in the drug smuggling. The court held that the facilities of the dairy farm, the legitimate enterprise, had been "regularly and repeatedly utilized to make possible the racketeering activity."[42]

The *Carter* test's focus on the frequency the enterprise is used in facilitating the racketeering activity provides a much less certain standard than the *Cauble* test's focus on the defendant's use of his position within the enterprise to facilitate the racketeering acts. Commentators have pointed to the superiority of the *Cauble* test's clarity, its ease of applicability, and its ostensible requirement of a greater nexus between the enterprise and the racketeering activity.[43] They have been equally critical of the deficiencies of the *Carter* test. Determining precisely when the frequency of use of an enterprise, and the extent of that use, constitutes a sufficient nexus appears quite onerous.[44] Furthermore, the frequency of use of an enterprise's property cannot be controlling by itself, for the mere facts of employment by an enterprise and the commission of unlawful acts by the employee on the premises of an enterprise "[do] not establish that the defendant participated in the conduct of the enterprise's affairs through [the racketeering acts]."[45]

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38. *Id.*

39. 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on reh'g*, 681 F.2d 952 (5th Cir. 1982)(en banc), *aff'd sub nom.* Russello v. United States, 464 U.S. 16 (1983).

40. *Cauble*, 706 F.2d at 1333 n.24.

41. 721 F.2d 1514 (11th Cir. 1984).

42. *Id.* at 1526-27; *accord* United States v. Webster, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982)(phone messages relayed regularly by nightclub personnel facilitated defendant's drug dealing business sufficient to form nexus).

43. D. SMITH & T. REED, *supra* note 7, ¶ 5.04[e].

44. Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 375 (1983).

45. United States v. Dennis, 458 F. Supp. 197, 199 (E.D. Mo. 1978), *aff'd on other grounds*, 625 F.2d 782 (8th Cir. 1980). *Dennis* has been cited as a classic example of the need

V. ENTERPRISE

The RICO "enterprise" element is a strange animal indeed. Section 1961(4) defines an enterprise 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."[46] The concept of an enterprise, and the ensuing litigation regarding its meaning, have sparked considerable controversy. Entities ranging from groups of corporations to individual persons have been held to be enterprises.[47] These decisions have greatly expanded the scope of

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for a nexus requirement. Patton, *supra* note 4, at 405. *Dennis* involved the collection of usurious loans. The defendant was an autoworker at a General Motors factory and had made the loans to fellow employees. The charge alleged, amazingly, that the defendant was operating General Motors through the collection of unlawful debts. The court held that the mere fact of the geographical nexus alleged did not establish that the defendant participated in the conduct of the enterprise's affairs through the collection of unlawful debts. *Dennis*, 458 F. Supp. at 199.

46. 18 U.S.C. § 1961(4) (1982).

47. A wide spectrum of entities have been held to be enterprises for purposes of RICO. *See* United States v. Turkette, 452 U.S. 576, 580 (1981)(holding broadly that illegitimate as well as legitimate enterprises encompassed by section 1961(4)); *see also* United States v. Frumento, 563 F.2d 1083, 1089 (3rd Cir.), *cert. denied*, 434 U.S. 1072 (1987)(Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes); *Cauble*, 706 F.2d at 1340 (limited partnership); United States v. Thompson, 685 F.2d 993, 998 (6th Cir. 1982)(en banc), *cert. denied*, 459 U.S. 1072 (1983)(governor's office); United States v. Angelilli, 60 F.2d 23, 31 (2nd Cir. 1981), *cert. denied*, 455 U.S. 955, *reh'g denied*, 456 U.S. 939 (1982)(New York City Civil Court); United States v. Dozier, 672 F.2d 531, 535 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982)(Louisiana Department of Agriculture); United States v. Sutherland, 656 F.2d 1181, 1191 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982)(city municipal court); United States v. Thevis, 665 F.2d 616, 625 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982)(group of individuals and corporations); United States v. Kovic, 684 F.2d 512, 516 (7th Cir.), *cert. denied*, 459 U.S. 972 (1982)(city police department); United States v. Bledsoe, 674 F.2d 647, 660 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982)(cooperative, as legal entity, could be enterprise); United States v. Dean, 647 F.2d 779, 791 (8th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982)(County Judge's office); United States v. Long, 651 F.2d 239, 241 (4th Cir.), *cert. denied*, 454 U.S. 896 (1981)(office of State Senator); United States v. Lee Stoller Enters., Inc., 652 F.2d 1313, 1319 (7th Cir.)(en banc), *cert. denied*, 454 U.S. 1082 (1981)(Sheriff's department); United States v. Clemente, 640 F.2d 1069, 1081 (2nd Cir.), *cert. denied*, 454 U.S. 820 (1980)(group of individuals); United States v. Huber, 603 F.2d 387, 394 (2nd Cir. 1979)(group of corporations); United States v. Brown, 555 F.2d 407, 415 (5th Cir. 1977)(public as well as private entities); Gunther v. Dinger, 547 F. Supp. 25, 27 (D.C.N.Y. 1982)(estate of decedent); United States v. Vignola, 464 F. Supp. 1091, 1099 (E.D. Pa.)(traffic court), *aff'd*, 605 F.2d 1199 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980). This list is, of course, merely illustrative. For a more comprehensive list, *see* Department of Justice, Criminal Division, Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors, at 27-29 nn.52-61 (1985). The RICO enterprise obviously is an extremely broad concept and attorneys can be quite creative in this area. However, caution should be taken when considering the requirements for an enterprise.

RICO, broadening the definition of the enterprise to include wholly illegitimate criminal associations and legitimate entities with no economic purpose, such as courts and governmental agencies.[48]

The most significant case dealing with the enterprise concept is *United States v. Turkette*.[49] In *Turkette*, the United States Supreme Court held that the term enterprise encompasses both illegitimate and legitimate enterprises.[50] The expansion of this issue was not disruptive to Fifth Circuit enterprise jurisprudence.[51]

In *United States v. Elliott*,[52] the Fifth Circuit had emphasized Congress' intent to give enterprise an exceedingly broad meaning.[53] The

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48. *See, e.g., Turkette*, 452 U.S. at 580; *Frumento*, 563 F.2d at 1089; *Dozier*, 672 F.2d at 535.

49. 452 U.S. 576 (1981).

50. *Id.* at 576. The Court resolved a major split in federal appellate authority with its decision in *Turkette*. *See id.* at 578 n.1 (citing cases). It found that nothing in the statutory language nor the legislative history of RICO provided a basis to limit the concept of an enterprise to solely legitimate organizations. *See id.* at 576. The Court declared that Congress could easily have inserted the term "legitimate" had it chosen to narrow the scope of RICO. *See id.* at 581. In explaining why the breadth of its interpretation did not eliminate the enterprise element by equating it with the requirement of a pattern of racketeering activity, the Court stated:

> In order to secure a conviction under RICO, the government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering is, on the other hand, a series of criminal acts as defined by the statute . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government.

Id. at 582-83. The *Turkette* decision has been criticized precisely on the basis that it read out of the statute the enterprise element. D. SMITH & T. REED, *supra* note 7, ¶ 3.02, at 3-4 (arguing persuasively that proof of pattern of racketeering activity logically is enough to establish proof of enterprise under Court's decision).

51. Patton, *supra* note 4, at 411 n.184 (citing Fifth Circuit cases and criticisms from other circuits prior to *Turkette*).

52. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

53. *Id.* at 897-98 (quoting United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976)). *Elliott* involved a group of six individuals involved in a number of criminal activities ranging from arson to murder. The Fifth Circuit traced the origins of the dispute over the extent of the reach of RICO to dicta in *Ianelli v. United States*, 420 U.S. 770 (1975). *See Elliott*, 571 F.2d at 897 n.17. *Elliott* is a landmark decision regarding section 1962(d) conspiracy jurisprudence for its holding that the criminal enterprise is broader in scope than a conspiracy. *See id.* at 902.

Court in *Elliott* anticipated the Supreme Court's ruling in *Turkette* when it held: "There is no distinction, for 'enterprise' purposes, between a duly formed corporation that elects officers and holds annual meetings, and an amoeba-like infra-structure that controls a secret criminal network."[54] Legitimate enterprises usually are proven adequately by proof of the "legal" existence of the enterprise.[55] However, the Supreme Court in *Turkette* stated that an enterprise entirely illegitimate in purpose, or an association-in-fact with no legal existence, may be demonstrated by proof of an ongoing formal or informal organization, and by proof that the several defendants functioned as a continuous unit with a common purpose.[56]

The *Turkette* decision has had a greater impact on criminal RICO jurisprudence than on civil RICO.[57] However, because a corporate defendant may not also be the RICO enterprise,[58] the civil plaintiff may reach the "deep pockets" of a corporation by use of the association-in-fact concept derived from *Turkette*.[59]

For excellent discussions of *Elliott* as it relates to conspiracy under RICO and subsequent court treatment of it, see D. SMITH & T. REED, *supra* note 7, ¶ 5.05(2); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 383-98 (1983).

54. *Id.* at 898; *see also* United States v. Sutherland, 656 F.2d 1181, 1192-95 (5th Cir. 1981)(explaining *Elliott* and citing critical authority), *cert. denied*, 455 U.S. 949 (1982).

55. Usually, legitimate enterprises can be proven by production of corporate charters, tax records, etc.

56. *See* Patton, *supra* note 4, at 411 n.184 (citing Fifth Circuit cases decided pre-*Turkette*).

57. This is because most civil cases usually involve legitimate businesses and, thus, the association-in-fact concept approved of in *Turkette* is not relied upon.

58. *See* Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122, at 122-23 (5th Cir. 1986)(citing cases); *see also* D. SMITH & T. REED, *supra* note 7, ¶ 3.07(1)(a), at 3-58 n.2 (citing cases). Only one circuit does not follow this position. *See* United States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 815 (1983).

59. The broad interpretation of enterprise is seen in the Fifth Circuit's decision in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985). *R.A.G.S.* involved a scheme to defraud a company of its sewing machines. One of the defendants was a former president and stockholder of R.A.G.S. She allegedly formed an enterprise with another defendant who allegedly owned the sewing machines and rented them to the company. *Id.* at 1351-52. Because the plaintiff company R.A.G.S. was comprised of only the two remaining stockholders, it was able to reach the interests owned by the defendants by alleging that the defendants were an enterprise separate and distinct from the company itself. In finding that the two individual defendants constituted an enterprise, the Court noted the specific language of section 1961(4). The Fifth Circuit upheld a lower Court's denial of the defendant's motions to dismiss and for summary judgment on the association-in-fact issue. *Id.* at 1353. The district court's findings concluded that a material question of fact existed as to whether an association in fact was created by the defendant. The Fifth Circuit relied on "this circuit's broad interpretation of the definition of 'enterprise' " to affirm the district court's ruling. However, the Fifth Circuit ob-

VI. PATTERN OF RACKETEERING ACTIVITY

By far the most complex and controversial of the essential elements of civil RICO is the "pattern of racketeering activity." Section 1961(5) defines a pattern of racketeering activity as requiring "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."[60]

In *Sedima, S.P.R.L. v. Imrex Co.*,[61] the United States Supreme Court attempted to assist the controversy between the circuit courts of appeal regarding the pattern issue. In its now-famous footnote 14,[62] the Court relied heavily on RICO's legislative history and observed that the pattern element required "continuity plus relationship."[63]

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served that the scope of the civil RICO statute is "breathtaking" and concluded by noting that it was "unfortunate for federal courts to be burdened by this kind of case." *Id.* at 1355.

The decision in *R.A.G.S.*, while utilizing a broad interpretation of the enterprise element, did not apply the elements of relationship and continuity to the pattern of racketeering activity as suggested by the Supreme Court. *See* Semida, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985). This issue is discussed further in the section on pattern of racketeering activity, *infra* at p.35. The Fifth Circuit has limited the enterprise element by applying the Supreme Court's ruling in *Turkette* that the enterprise "function as a continuing unit," where the enterprise alleged is an association-in-fact. *Turkette*, 452 U.S. at 583; Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 440-41 (5th Cir. 1987); *see also* Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 427 (5th Cir. 1987); Shaffer v. Williams, 794 F.2d 1030, 1032 (5th Cir. 1986). In *Montesano*, an association of two corporate and one individual defendant was found to lack continuity. *Montesano*, 818 F.2d at 427. The Fifth Circuit concluded that the alleged enterprise had to be an entity distinct from the pattern of racketeering activity. The enterprise had to be "an ongoing organization or be a continuing unit, such that the enterprise has an existence that can be defined apart from the commission of the predicate act." *Id.* at 426-27 (citing *Atkinson*, 808 F.2d at 440-41). Thus, the association-in-fact enterprise, associated for the sole purpose of repossessing a vessel owned by the plaintiff, lacked continuity. The court in *Montesano* was extremely critical of *R.A.G.S.* and indeed urged that it be overturned *en banc*. *Id.* at 424. The Fifth Circuit's emphasis on continuity in the enterprise element, in the absence of emphasis on the requirement of continuity in the pattern element, may be subject to alteration due to a recent decision by the Supreme Court in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 57 U.S.L.W. 4951 (U.S. June 26, 1989).

60. 18 U.S.C. § 1961(5) (1982).

61. 473 U.S. 479 (1985).

62. *Id.* at 496 n.14

63. *Id.* The Court relied on the following statement: "The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." *Id. But see* United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir.)(finding in legislative history of RICO only temporal requirement of relationship and that pattern of acts

The Court also recognized the importance of Congress' use of the term "requires" in the language of section 1961(5), noting that this implied "that while two acts are necessary they may not be sufficient."[64] The Court then invited the lower courts to fashion their own definition of the term pattern as used in section 1961(5)[65] and offered as instruction the definition of pattern in the Special Dangerous Offender statute.[66]

The lower courts responded to *Sedima* in several ways, ranging from consideration of footnote 14 as unpersuasive dictum, to reading its assertion of the requirements of relationship and continuity as a requirement of multiple schemes.[67] The relationship prong has been widely understood to require that the predicate acts are in some fashion related to the affairs of the enterprise. A "common scheme" requirement has arisen as a result of the relationship requirement in situations involving association-in-fact enterprises.[68] Such enterprises may often be intrinsically related to the commission of the predicate acts.[69] Therefore, requiring that the predicate acts be committed in furtherance of a common scheme and relating the offenses to one another gives greater meaning to the relationship requirement in the definition of a "pattern."[70] However, it must be noted that the lower

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be related to enterprise), *cert. denied*, 449 U.S. 871 (1980); *see also* D. SMITH & T. REED, *supra* note 7, ¶ 4.02 (1988)(arguing conclusion in *Weisman* could easily have been reached in *Sedima*).

64. *Sedima*, 473 U.S. at 496 n.14.

65. *Id.* at 500; *see also* H.J., Inc. v. Northwestern Bell Tel. Co., 57 U.S.L.W. 4951, 4956 (U.S. June 26, 1989)(Scalia, J., concurring)(observing instruction to lower courts has created wide split amongst circuits).

66. *Sedima*, 473 U.S. at 496 n.14.

67. *H.J., Inc.*, 57 U.S.L.W. at 4952 n.2 (citing cases).

68. D. SMITH & T. REED, *supra* note 7, ¶ 4.03 (quoting Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 864 (1980)).

69. Association-in-fact enterprises, for example, may exist solely for the purpose of committing the predicate acts and have no identity apart from their commission.

70. A number of courts have required that the racketeering acts be related to each other by virtue of a common scheme in order to establish a pattern. *See* United States v. Brooklier, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983); United States v. Dean, 647 F.2d 779, 791 (8th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982); United States v. Starnes, 644 F.2d 673, 677-78 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981); United States v. Weatherspoon, 581 F.2d 595, 601 n.2 (7th Cir. 1978); United States v. Kaye, 556 F.2d 855, 860-61 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); United States v. Stofsky, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2nd Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974). A number of other courts have determined that a pattern could be found if any of two acts of racketeering within ten years of each other were in some way related to the affairs of the enterprise. *See* Alcorn County, Miss.

courts have focused primarily on the continuity requirement of footnote 14 in *Sedima*.[71]

Sedima's continuity requirement and its consequences have been the point of departure for the differences between the circuits. Most circuit courts of appeal have treated footnote 14 as persuasive and have inserted the continuity requirement into the pattern element.[72] The approach adopted by the majority of circuits considers several factors and is based on a case-by-case analysis. Among the factors considered are the names of victims, the number of predicate acts, the time span involved, the seriousness of the offenses committed, and the number of perpetrators involved.[73] From analysis of these factors, the circuits find the requisite continuity and relationship.

A highly restrictive requirement maintained by the Eighth Circuit is that of a multiple scheme.[74] This approach has been expressly re-

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v. U. S. Interstate Supplies, Inc., 731 F.2d 1160, 1168 (5th Cir. 1984), *cert. denied sub nom.* Robinson v. Tanner, 481 U.S. 1039 (1987); United States v. Gottesman, 724 F.2d 1517, 1522 (11th Cir. 1984); United States v. Sinito, 723 F.2d 1250, 1261 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983), *cert. denied*, 459 U.S. 1174 (1983); United States v. Bright, 630 F.2d 804, 830 n.47 (5th Cir. 1980); United States v. Weisman, 624 F.2d 1118, 1122-23 (2nd Cir.), *cert. denied*, 449 U.S. 871 (1980); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978); United States v. Boffa, 513 F. Supp. 444, 456 n.16 (D. Del. 1980).

71. The Supreme Court recently has had occasion to discuss the continuity requirement in the pattern racketeering activity. *See* H.J., Inc. v. Northwestern Bell Tel. Co., 57 U.S.L.W. 4951 (U.S. Jun. 27, 1989). In *H.J., Inc.*, the Court stated:

> 'Continuity' is both a closed and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition . . . . It is, in either case, centrally a temporal concept—and particularly in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements.

See id. at 4954 (citing Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3rd Cir. 1987)). However, Justice Scalia found in a concurring opinion that the Court's definition of continuity added nothing to its interpretation of continuity in earlier cases. *Id.* at 4957 (Scalia, J., concurring).

72. *See* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3rd Cir. 1987); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154 (4th Cir. 1987); Medalian Television Enters. v. SelecTV of California, Inc., 833 F.2d 1360, 1363 (9th Cir. 1987); Condict v. Condict, 826 F.2d 923, 927-29 (10th Cir. 1987); Morgan v. Bank of Waukegan, 804 F.2d 970, 976 (7th Cir. 1986).

73. *See supra* note 72 (citing cases).

74. Terre DuLac Ass'n v. Terra DuLac, Inc., 834 F.2d 148, 149 (8th Cir. 1987). The position adopted by the Eighth Circuit has its basis in dictum from an Illinois district court ruling. The Illinois court stated:

> Surely the continuity inherent in the term [pattern] presumes repeated criminal activity,

jected, however, by the United States Supreme Court in *H.J., Inc. v. Northwestern Bell Telephone Co.*[75] Justice Brennan, writing for a unanimous Court, found no support for the multiple schemes approach in either the text of the statute or in its legislative history.[76] Because the multiple schemes approach would allow the perpetrators of numerous predicate offenses in furtherance of a single scheme to go unpunished under RICO (and, thus, the victims of such scheme to remain uncompensated for their injuries) the Court stated, "Congress had a more natural and common sense approach to RICO's pattern element in mind . . . envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity."[77] Essentially, the Court held what it had previously only noted in footnote 14 of *Sedima*, namely, that the pattern of racketeering activity requires both relationship and continuity.[78]

Therefore, the Court's ruling in *H.J., Inc.* rejected the multiple schemes approach of the Eighth Circuit in favor of the multiple factor approach[79] articulated in footnote 14 of *Sedima*. Accordingly, *H.J., Inc.* refuted the view "that a pattern is established merely by proving two predicate acts."[80]

The Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*[81] held that two

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not merely repeated acts to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'

See Northern Trust Bank/O'Hare N.A. v. Inryco, Inc., 615 F. Supp. 828, 831 (N.D. Ill. 1985).

75. 57 U.S.L.W. 4951 (U.S. Jun. 27, 1989). *H.J., Inc.* involved allegations by customers of Northwestern Bell that the respondent had sought to influence members of the Minnesota Public Utilities Commission in the performance of their duties. *Id.* at 4951-52. The Eighth Circuit has concluded that the petitioner's failure to allege that similar endeavors had been engaged in the past by the respondent rendered the allegations insufficient. *Id.* at 4953.

76. *Id.* at 4954.

77. *Id.* at 4952-53.

78. *Id.*

79. *See supra* note 72 and accompanying text.

80. 57 U.S.L.W. at 4952; *see also* United States v. Jennings, 842 F.2d 159, 163 (6th Cir. 1988); United States v. Ianello, 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987); Bank of America v. Touche Ross & Co., 782 F.2d 966, 970-71 (11th Cir. 1986); R.A.G.S. Couture, Inc. v. Hyatt, 744 F.2d 1350, 1354-55 (5th Cir. 1985). Interestingly, the Supreme Court in *H.J., Inc.* referred to *United States v. Jennings*, where the Sixth Circuit suggested that proof of two predicate acts would be sufficient to establish a pattern. H.J., Inc. v. Northwestern Bell Tel. Co., 57 U.S.L.W. 4951, 4952-53 (U.S. June 26, 1989); *see also Jennings*, 824 F.2d at 163. The extent of the impact of *H.J., Inc.* on the remaining circuits which adhere to the pre-*Sedima* definitions of the pattern is yet to be seen.

81. 774 F.2d 1350 (5th Cir. 1985).

predicate acts were sufficient to establish a pattern of racketeering activity.[82] In the words of Circuit Judge Wisdom, "[T]he Supreme Court in *Sedima* implied that two 'isolated' acts would not constitute a pattern. In this case, however, the alleged acts of mail fraud are related."[83]

Subsequent decisions of the Fifth Circuit adhered to *R.A.G.S.*, but criticized it.[84] These cases instead applied a continuity requirement to the enterprise element.[85] Because the precise issue in *H.J., Inc.* was the Eighth Circuit's multiple scheme requirement,[86] the validity of the comparative effectiveness of a continuity requirement for the enterprise element, absent the imposition of a continuity requirement in the pattern element, is not a completely settled issue.

VII. SECTION 1962

Section 1962 sets out four ways in which a RICO violation may occur. Three provisions provide for substantive violations, and one provides for conspiracy. Section 1962(a) declares unlawful the use of income derived from a pattern of racketeering activity to acquire an interest in an enterprise. Section 1962(b) forbids the acquisition or maintenance of an interest in an enterprise through a pattern of racketeering activity. Subsection (c) prohibits conducting the affairs of an enterprise through a pattern of racketeering activity. A conspiracy to violate the prohibitions set forth in the preceding subsections is proscribed by section 1962(d).

Subsections (a) and (b) strike close to the original purpose of RICO, namely by prohibiting the infiltration of legitimate business through illegitimate means. Subsection (c), on the other hand, uniquely criminalizes the individual who conducts or participates in an enterprise through illegitimate means. Subsection (d) makes it unlawful to conspire to violate any of the other subsections.[87]

Few cases have been brought under subsections (a)[88] and (b);[89] vio-

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82. *Id.* at 1354-55.
83. *Id.* at 1355 (opinion by Wisdom, J.).
84. *See supra* note 56 and accompanying text.
85. *See supra* note 56 and accompanying text.
86. H.J., Inc. v. Northwestern Bell Tel. Co., 57 U.S.L.W. 4951-52 (U.S. June 26, 1989).
87. Patton, *supra* note 4, at 402.
88. Section 1962(a) provides:

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

lations of these subsections are usually combined with a subsection (c)

> debt in which such person has participated as a principle within the meaning of Section 2, Title 18, U.S.C. 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 effect, 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 were 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 (1) percent of the outstanding securities of any one class, and do not confer, either in the law or in fact, the power to elect one or more directors of the issuer.

The uses of section 1962(a) may be increasing. This is because the courts now require that the "person" and the "enterprise" must be distinct in cases brought under subsection (c). *See* cases cited *supra* note 58. It is not infrequent that a subsection (a) violation will arise from the investigation of a violation of section 1962(c). In these situations a legitimate enterprise that has been operated through a pattern of racketeering activity frequently will have money derived from such an operation reinvested into the corrupted business, thus creating a section 1962 (a) violation. *See* United States v. Cauble, 706 F.2d 1322, 1335 (5th Cir. 1983), *cert. denied*, 465 U.S. 996 (1984); *see also* D. SMITH & T. REED, *supra* note 7, ¶ 5.02[1], at 5-4, 5. Smith and Reed observe that there does not seem to be a single "pure" section 1962(a) case involving an organized crime figure infiltrating a legitimate business through the investment of profits from gambling or other illegal activities. *Id.* at 5-5.

Section 1962(a) is broad enough to reach such professionals as accountants, attorneys, or investment counselors who assist "racketeers" in devising ways to invest funds derived from a pattern of racketeering. *United States v. Loften*, 518 F. Supp. 839 (S.D.N.Y. 1981). *Loften* involved the activities of a narcotics trafficker in Arizona. Proceeds from the narcotics business had been invested into a goldmining project. The defendant's attorney, Albert Socolov, was indicted pursuant to section 1962(a). *Id.* at 843. Allegedly, Socolov had been deeply involved in the investment scheme. Socolov argued among other things that the statute was not intended to reach investment advisors. Further, he argued that the statute failed to give him fair notice that his conduct might subject him to prosecution. *Id.* Socolov argued that attorneys who were generally aware of their client's status as racketeers would be required to investigate the source of their client's income before they could recommend investments. Thus a chilling effect would be placed on lawyers who were involved in corporate or commercial law and frequently provided investment advice to their clients. The court, in rejecting these arguments, held that the prosecution would have to "prove that Socolov was aware that the funds to be invested were the proceeds of narcotics activities and that he had knowledge before he gave investment advice." *Id.* at 854. The court concluded that the active involvement of the attorney in making the investments was far beyond what legal counseling would normally entail.

In addressing the issue of fair notice, the court stated, "The evidence necessary to establish Socolov's knowledge of the racketeering activities of other defendants may be circumstantial evidence of intent and knowledge for the RICO offense." The court observed:

> Even if we assume that Socolov did not know that his own conduct was illegal under RICO, although he knew that the actions of Loften and his associates were illegal, by assisting them in making their investments (beyond simply giving advice as to the legality thereof), he ran the risk of being charged as an accessory after the fact.

Id. at 854-56.

violation.[90] Further, as was noted in a study of 236 RICO indictments,[91] approximately thirty percent of the indictments in which subsections (a) and/or (b) were combined with subsection (c), the (a) and (b) counts were dismissed or convictions on those counts were reversed on appeal.[92] Moreover, the same study concluded that, given the original congressional intent of preventing the infiltration of legitimate business by organized crime, there appeared to be only one successful prosecution under subsections (a) and (b) that conformed to the intended mold.[93]

Analyzing the difficulties present in establishing the "infiltration" of legitimate business,[94] the author of the study found illustrative the

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89. Section 1962(b) provides:

> 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.

Section 1962(b) is even less frequently encountered than section 1962(a). *See* D. SMITH & T. REED, *supra* note 7, ¶ 5.03. Section 1962(b) prosecutions generally involve the " 'muscling' into businesses through loan sharking, bribery, extortion or fraud." Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 323 (1983). The Fifth Circuit has summed up a 1962(b) charge as essentially prohibiting the use of racketeering methods to acquire or maintain an interest in an enterprise. *See* United States v. Martino, 681 F.2d 952, 955 (5th Cir. 1982), *aff'd sub nom.* Russello v. United States, 464 U.S. 16 (1983). The Second Circuit in *United States v. Jacobson* faced a fact situation illustrative of section 1962(b) offenses. 691 F.2d 110 (2nd Cir. 1982). The defendant had made a series of usurious loans to a financially troubled bagel bakery. As security for one of the loans, the defendant received an assignment of the bakery's lease. The court held that this assignment constituted the acquisition of an interest in the bakery in violation of section 1962(b). *See id.* at 113. The court also held that the defendant exercised control over the bakery and that such control while clear to the Court after the defendant evicted the proprietor and purchases the bakery's fixtures at an IRS auction, could have been inferred simply from the changing of the locks on the bakery by the defendant and his direct use of money from the registers to cover the debts owed him. *See id.* at 112.

90. For the text of section 1962(c), *see supra* notes 18-24 and accompanying text.

91. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 724 (1987).

92. Professor Lynch surveyed all reported criminal RICO cases decided in the Courts of Appeals through 1985. Two hundred thirty-six of the indictments contained enough underlying facts to provide a basis for determining use patterns of the criminal provisions of RICO. *Id.* at 713-64. *See generally* Blakey & Goldstock, *"On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 356 (1980)(indicating section 1962(a) is rarely used). By the end of 1984 the Justice Department had reported to Congress that approximately 500 RICO cases had been brought. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 724 n.265 (1987).

93. Lynch, *supra* note 91, at 726-27; *see also* United States v. Gambino, 566 F.2d 414, 416 (2nd Cir. 1977), *cert. denied*, 435 U.S. 952 (1978). *Gambino* involved several defendants who operated on behalf of a mafia family in exercising control over the affairs of a private sanitation collection business in the Bronx.

94. The issue of determining when infiltration has occurred is central to both section

Fifth Circuit's decision in *United States v. Cauble*.[95] In *Cauble*, the court upheld a conviction of a subsection (a) violation, coupled with a violation of subsection (c). Proceeds from the sale of marijuana had been invested in a real estate and ranching partnership. This enterprise (the partnership), however, also was operated through a pattern of racketeering activity (the marijuana business). Thus, the study's author argued that *Cauble* represented the use of a legitimate business as a front for drug trafficking, rather than representing the infiltration of a legitimate enterprise by criminal elements.[96]

The Fifth Circuit in *Cauble* rejected the defendant's contention that the more than $1 million deposited into the enterprise's bank account had to be traced specifically to the particular marijuana sales.[97] The court held, "[T]he prosecution need only prove that the illegally derived funds *flowed* into the enterprise; it need not follow a trail of specific dollars from a particular criminal act."[98] The court's formulation stopped short of requiring a showing that actual racketeering funds were invested in the enterprise. This holding, combined with an emerging consensus that corporate deep pockets may be reached in cases brought under subsection (a),[99] and a desire by plaintiffs to avoid difficulties associated with subsection (c) counts, had made the uses of subsection (a) a more promising proposition in the federal courts generally.

While subsection (a) indictments may thus enjoy some increased use, indictments arising under subsection (b) still are relatively

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1962(a) and (b). The issue has no bearing on section 1962(c) which involved the operation of an enterprise.

95. 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

96. *See* Lynch, *supra* note 91, at 728 n.282. *Cauble*, therefore, should have been brought under subsection (c) rather than subsection (a).

97. The issue of the extent to which the funds must be traced in a section 1962(a) violation is still unclear. Only two decisions are on point. *See Cauble*, 706 F.2d at 1343 (funds must be traced specifically to sales of illegal goods); United States v. McNary, 620 F.2d 621, 629 (7th Cir. 1980)(legitimate funds considered traced when shown to be invested in enterprise by receipt of defendant's racketeering income). *But see* D. SMITH & T. REED, *supra* note 7, ¶ 5.02[5] (arguing need for tracing is obviated by Seventh Circuit's interpretation of the statute). Any individual who had acquired income from racketeering would be subject to 1962(a) liability upon investing in any legitimate business on the theory that the racketeering income had allowed the investment to be made. *Id.*

98. *Cauble*, 706 F.2d at 1342 [emphasis added].

99. This applies also to section 1962(b) cases. In both situations it must be shown that the racketeering income benefited the corporate defendant. *See* D. SMITH & T. REED, *supra* note 7, ¶ 3.07[1][a], at 3-59 n.4 (citing cases).

rare.[100] Case law interpreting the language of subsection (b) also provides little insight.

In *United States v. Martino*,[101] the Fifth Circuit analyzed an indictment pursuant to subsection (b) and concluded that the subsection sought to prohibit the use of racketeering methods to infiltrate a legitimate business.[102] One writer has termed these racketeering efforts "muscling,"[103] which means acquiring or maintaining an interest in an enterprise.[104]

While prosecutors and plaintiffs' counsel have rarely used the infiltration subsections of section 1962, subsection (c), the operation subsection, has been used extensively.[105] As such, it has provided the greatest source of analysis and interpretation for the courts. It has also been the greatest source of wariness and uncertainty for the civil practitioner.[106]

In *United States v. Elliott*,[107] the Fifth Circuit confronted the scope of a subsection (c) indictment with its use of the term associated with. The court held:

> The substantive proscriptions of the RICO statute apply to insiders and outsiders — those merely 'associated with' an enterprise — who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity. Thus the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the

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100. *See supra* notes 90-94 and accompanying text.

101. 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on reh'g*, 681 F.2d 952 (5th Cir. 1982)(en banc), *aff'd sub nom.* Russello v. United States, 465 U.S. 16 (1983).

102. *Id.* at 381-82.

103. Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 323 (1983).

104. *Id.* While section 1962(b) is not the subject of any extensive analysis within this article, it is important to note the differing nexus requirement for section 1962(b) as opposed to 1962(c). The nexus requirement of section 1962(b) requires a relationship between the "racketeering activity and the acquisition or maintenance of an interest in or control of the enterprise. . . . It is essentially a simple cause and effect relationship, i.e., it requires a showing that the racketeering activity resulted in or at least facilitated, the defendant's acquisition or maintenance of an interest in or control of the enterprise." *See* D. SMITH & T. REED, *supra* note 7, ¶ 5.03, at 11 (citing VonBulow By Auersperg v. VonBulow, 634 F. Supp. 1284, 1307 (S.D.N.Y. 1986)).

105. *See* D. SMITH & T. REED, *supra* note 7, ¶ 5.01, at 5-2 (section 1962(c) most often charged in RICO cases); *see also* Lynch, *supra* note 91, at 731 (most RICO cases in study of such cases involved section 1962(c) violations); Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 324 (1983)(section 1962(c) frequently litigated).

106. Formulating adequate pleading on the various elements of a section 1962(c) allegation is by far the most difficult hurdle for the civil practitioner to overcome.

107. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

enterprise.[108]

This liberal interpretation, in line with Congress' provision for a liberal construction of RICO generally,[109] has made subsection (c) a potent offensive weapon in civil litigation. It has been noted that those found to be associated with an enterprise may include auditors, independent accountants, lenders, contractors, and customers.[110] Indeed, anyone who is aware of the existence of the enterprise, and participates in any way with the pattern of racketeering activity, can be found to be associated with the enterprise.[111]

The Fifth Circuit further expanded the scope of subsection (c) in *R.A.G.S.*,[112] when it held that only a minimal effect on interstate commerce is required.[113] While this is easily demonstrated in situations involving legitimate enterprises, those cases involving illegitimate enterprises require a showing that the racketeering acts

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108. *Id.* at 903. While this is the majority position, a minority view requires that some involvement in the operation or management of the enterprise be demonstrated. *See, e.g.*, Bennett v. Berg, 710 F.2d 1316, 1364 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983)(some participation in affairs of enterprise ordinarily will be required); United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982)(association with enterprise must be distinct from participation in conduct of enterprise through pattern of racketeering activity, such as formal membership or employment); United States v. Mandel, 591 F.2d 1347, 1375 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980)(some involvement in operation or management of enterprise required). *But see* D. SMITH & T. REED, *supra* note 7, ¶ 5.04[1], at 5-16 n.5 (indicating minority position may no longer be followed today).

109. Organized Crime Control Act of 1970, Pub. L. 91-452 § 904(a), 84 Stat. 922, 947 (1970). The text states: "The provisions of this Title [enacting this chapter and amending sections 1505, 2516, and 2517 of this Title] shall be liberally construed to effectuate its remedial purposes." *Id.* For a discussion of the liberal construction clause in RICO, see Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980); *see also* Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 308-311 (1983). Interestingly, the vast majority of the states have adopted either a fair import or liberal construction clause. For a collection of the statutes and relevant decisions, see Blakey, *RICO Civil Fraud Action in Context: Reflections On Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 245 n.25 (1982).

110. D. SMITH & T. REED, *supra* note 7, ¶ 5.04[1], at 5-16 n.6.

111. *Id.* at 5-17.

112. 774 F.2d 1350 (5th Cir. 1985).

113. *Id.* at 1353 (citing United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)). *R.A.G.S.* was not the first to hold that the impact on interstate commerce would only have to be minimal. *E.g.*, United States v. Robinson, 763 F.2d 778, 781 (6th Cir. 1985); United States v. McManigal, 708 F.2d 276, 783 (7th Cir.), *vacated on other grounds*, 464 U.S. 979 (1983); United States v. Dickens, 695 F.2d 765, 781 (3rd Cir.), *cert. denied*, 460 U.S. 1092 (1983); United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981), *cert denied*, 456 U.S. 962 (1982); United States v. Allen, 656 F.2d 964 (4th Cir. 1981); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Barton, 647 F.2d 224, 233-34 (2nd Cir.), *cert. denied*, 454 U.S. 857 (1981).

themselves, as opposed to the legitimate business, affect interstate commerce.[114]

The courts have uniformly held that a nexus must exist between the racketeering activity and the affairs of the enterprise in order to establish a violation of subsection (c).[115] The courts also have been in substantial agreement concerning whether there must be some benefit to the enterprise as a result of the illegal acts. Some courts, however, have clearly rejected the benefit requirement[116] and instead demand that some effect on the enterprise must be shown.[117]

VIII. BURDENS OF PROOF

One of the most important debates about this legislation concerns the burden of proof required of civil RICO plaintiffs.[118] The issue before the lower courts is, in a general sense, one of fairness; that is, civil RICO defendants perceive the statute as patently unfair because of the lower burden of proof requirement.[119] Civil defendants claim

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114. *R.A.G.S.*, 774 F.2d at 1353.

115. *See* D. SMITH & T. REED, *supra* note 7, ¶ 5.04, at 5-21. This issue should not be confused with the question of whether the predicate acts must be related to one another in order to form a pattern of racketeering activity. *See* section on pattern of racketeering activity *supra* at p.35.

116. *E.g.*, United States v. Ellison, 793 F.2d 942, 950 (8th Cir. 1986); United States v. Cauble, 706 F.2d 1322, 1333 n.24 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); United States v. Provenzano, 688 F.2d 194, 200 (3rd Cir.), *cert. denied*, 459 U.S. 1071 (1982); United States v. Kovic, 684 F.2d 512, 517 (7th Cir.), *cert. denied*, 459 U.S. 972 (1982); United States v. Hartley, 678 F.2d 961, 990-91 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170, 1183 (1983); United States v. Dozier, 672 F.2d 531, 543-44 (5th Cir. 1982), *cert. denied*, 456 U.s. 935 (1982); United States v. Scotto, 641 F.2d 47, 57 (2nd Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

117. *E.g.*, *Ellison*, 793 F.2d at 950; *Cauble*, 706 F.2d at 1333 n.24; United States v. Nerone, 563 F.2d 836, 861 n.15 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978).

118. The RICO statute does not expressly provide for a particular burden of proof to be used in civil proceedings. The limited discussion of the issue in the legislative history dealt with the extent to which a lower standard of proof would contribute to civil trial convictions. *See* Strafer, Massumi & Skolnick, *Civil RICO In The Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 715 n.416 (1982)(favorable judgments may be facilitated by lower civil standard of proof). Representative Poff, for example, emphasized establishing a lower burden of proof for civil cases. Excerpts from the Congression Record regarding consideration of Title IX of the Organized Crime Control Act of 1970 in the House suggest that the preponderance standard was intended for burden of proof. D. SMITH & T. REED, *supra* note 7, ¶ 8.03, at 8-6, 8. The lack of discussion of the issue in the statute itself or its legislative history is not surprising because the courts traditionally have established burdens of proof for particular claims. Strafer, Massumi & Skolnick, *Civil RICO In The Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 715 n.420 (1982).

119. The majority view of the lower courts favors a preponderance of the evidence stan-

that since the offending conduct is described by reference to criminal statutes, plaintiffs should be required to establish the allegedly offensive conduct by these same criminal standards, i.e., by proof beyond a reasonable doubt, or at a minimum, proof by clear and convincing evidence, before a finding of liability can be imposed upon them in a private civil action.

In *Addington v. Texas*,[120] the United States Supreme Court observed that three standards of proof are recognized at law: proof beyond a reasonable doubt, proof by clear and convincing evidence, and proof by a preponderance of the evidence.[121] The Court stated:

> The function of a standard of proof as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to 'instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication' . . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.[122]

The Court also stated that the concern to society in the outcome of a civil case involving a monetary dispute is minimal and the preponderance standard allows the individual litigants to "share the risk of error in roughly equal fashion."[123] However, because the interests of a criminal defendant are of such magnitude, the use of the reasonable

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dard of proof. *See, e.g.*, Cullin v. Margiotta, 811 F.2d 698, 731 (2nd Cir. 1987); Wilcox v. First Interstate of Oregon, N.A., 815 F.2d 522, 531 (9th Cir. 1987); Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481 (5th Cir. 1986); United States v. Local 560 Int'l Bd. of Teamsters, 780 F.2d 267, 279-80 n.12 (3rd Cir. 1985), *cert. denied*, 106 Supreme Court 2247 (1986).

120. 441 U.S. 418 (1979).

121. *Addington*, 441 U.S. at 423-24. In *Addington v. Texas*, the Supreme Court further observed that most civil disputes are governed by the preponderance standard. *Id.* The Court also noted, however, that in a variety of situations the intermediate standard of a clear unequivocal and convincing standard of proof has been utilized to protect particularly important individual interests. Further, the Court stated that this standard typically is used in cases involving civil allegations of fraud. *Id.* at 424. This is highly relevant as the majority of the civil cases brought under RICO involve the predicate acts of mail fraud, wire fraud, or securities fraud. Interestingly, most states imposed the clear and convincing standard of proof for fraud allegations. *See* Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 533 (9th Cir. 1987)(Boochever, J. dissenting)(citing C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 959-965 (3rd ed. 1984)). *But see* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985)(criminal conduct punishable only upon proof beyond reasonable doubt also can merit civil sanctions upon preponderance of evidence).

122. *Id.* at 423 (quoting *In re* Winship, 397 U.S. 358, 370 (1970)(Harlan, J., concurring)).

123. *Id.*

doubt standard creates a situation in which "society imposes almost the entire risk of error upon itself."[124]

In its discussion of the intermediate standard of proof, the clear and convincing evidence standard, the Court observed that it typically is used in civil cases where fraud is alleged.[125] Significantly, the Court noted: "The interests at stake in those cases are deemed more substantial . . . and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[126]

It is not unique for a statute to have criminal penalties,[127] and it is firmly established that criminal charges must be proven beyond a reasonable doubt. However, the RICO statute permits a civil plaintiff to accuse his defendant of "racketeering activities" and certain predicate offenses without that defendant ever having been indicted or, in most cases, ever having become the focus of any law enforcement investigation or inquiry. Further, if the plaintiff does obtain a judgement, this could be construed as a judicial finding that the defendant is a racketeer. The difficulties here are exacerbated by the Supreme Court's decision in *Sedima*,[128] which indicated that although the issue of the correct burden of proof was not before it, and therefore not decided,[129] the statute requires only a preponderance of the evidence.[130]

A higher standard of proof has heretofore been required for fraud allegations because state common law generally has considered fraud to be quasi-criminal conduct that is actionable both civilly and criminally.[131] *Sedima* has effectively prevented the use of this traditional,

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124. *Id.*

125. Addington v. United States, 441 U.S. 418, 424 (1979); *cf. supra* note 121.

126. *Id.*

127. The classic example is, of course, the antitrust laws, after which civil RICO was patterned.

128. 473 U.S. 479 (1985).

129. *Id.* at 491.

130. *Id.* at 492.

131. The Supreme Court first used the term "quasi-criminal" in *Boyd v. United States*, 116 U.S. 616, 634 (1886). For a discussion of the quasi-criminal nature of a civil RICO claim, *see* Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest; "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 707-09 (1982). At least one court has indicated that civil RICO actions are quasi-criminal in nature. *See* Page v. Moseley, Hallgarton, Estabrook & Weeden, 806 F.2d 291, 298 (1st Cir. 1986). *Page* involved a group of investors who sued their broker and his brokerage firm and the alleged RICO violations. The defendants moved to compel arbitration on the RICO allegations. The district court, finding the law favoring arbitration unclear, dismissed the motion. *Id.* at 293. On appeal, the First Circuit held the RICO claim

heightened standard of proof even in cases where mail and/or wire frauds are urged as the predicate offenses.[132] It would appear that this is one of the primary factors behind the increase of civil RICO filings. Under *Sedima*, a state common law fraud allegation may now be instantly transformed into a federal racketeering allegation that requires a less stringent standard of proof. In addition, the federal racketeering allegation goes a long way towards defaming the defendant in the process.[133]

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to be non-arbitrable and vacated with instructions to stay litigation on the RICO claim pending arbitration on another issue in the case. In finding the RICO claim non-arbitrable, the First Circuit concluded that a civil RICO suit was quasi-criminal in nature. In a footnote, the court found that the Supreme Court in *Sedima* had acknowledged such a risk with its statement that "to the extent an action under Section 1964(c) might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, the solution is to provide those protections." *Id.* at 298 n.12 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985)).

132. While the Supreme Court in *Sedima* reserved the issue of the requisite standard of proof for civil RICO cases, all subsequent courts which have confronted the issue have held that the preponderance of the evidence standard applies. *See Sedima*, 473 U.S. at 491; *see also* cases cited *supra* note 119; *accord* Ford Motor Co. v. B & H Supply, Inc., 646 F. Supp. 975, 1001 (D. Minn. 1986); Bosteve, Ltd. v. Marauszwski, 642 F. Supp. 197, 202 n.7 (E.D.N.Y. 1986). *But see* Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 532 (9th Cir. 1987)(Boochever, J., dissenting)(advocating higher standard of clear and convincing evidence); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest; "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655, 715-18 (1982)(arguing persuasively that clear and convincing standard should be applied); ABA, Report of the Ad Hoc Civil RICO Task Force 384 (1985)(arguing in favor of applying reasonable doubt standard to predicate acts). The position of the ABA has found favorable support in at least one court of appeals. Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 404 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985)(asserting in dicta that reasonable doubt standard applied to predicate acts).

133. The term racketeer carries with it a negative connotation which places a stigma on the convicted individual. Indeed, given today's press, a conviction is not even necessary for the stigma to be attached and defamation to occur. On the issue of stigma, see D. SMITH & T. REED, *supra* note 7, ¶ 8.03, at 8-8 (concluding Supreme Court's decision in *Sedima* indicates civil RICO liability has at least the stigma of a finding of fraud); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest; "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 716 (1982)(stigma attaches to civil RICO finding of nexus to organized crime); Note, *Enforcing Criminal Laws Through Civil Proceedings; Section 1964 of the Organized Crime Control Act of 1970*, 53 TEX. L. REV. 1055, 1064 (1975)(protection of defendant from unnecessary stigmatization may require stricter standard of proof); American Bar Ass'n Criminal Justice Section, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation, Report to the House of Delegates, Appendix A, 3-4 (1982)(recommending, among other things, replacement of the pejorative phrase racketeering activity).

The ABA report commented:

> The recommended language 'criminal activity' replaces the pejorative term 'racketeering activity' of existing law. The present law brands the accused as a racketeer with a resulting prejudicial impact on judges and juries. This stigma is particularly unfair since RICO is not applied solely to racketeers or offenses committed by racketeers but has also been

In fact, this was essentially the position of the Second Circuit when it affirmed the district court's dismissal in *Sedima*.[134] The circuit ruled that private action could proceed only against a defendant who had already been convicted of a predicate act or of a RICO violation.[135] In so concluding, the circuit court stated that it:

> [f]eared that any other construction would raise severe Constitutional questions, as it would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages, which are clearly punitive, including attorney fees, and constitute a civil remedy aimed in part to avoid the Constitutional protections of the criminal law[136]

The Supreme Court rejected the Second Circuit's view as not being "so close to the Constitutional edge."[137] The Supreme Court went on to state:

> A civil RICO proceeding leaves no greater stain than do a number of other civil proceedings. Furthermore, requiring conviction of the predicate acts would not protect against an unfair imposition of the "racketeer label." If there is a problem with stigmatizing a garden variety

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applied to businessmen and politicians engaged in criminal conduct unrelated to traditional notions of organized crime. When the defendant is charged with an invalid RICO count, the Eighth Circuit has held that it must be reversed even where the sentence on the RICO count runs concurrently to the other counts because of the 'stigma' attached to the 'racketeering terminology.'

There is no proper advantage to the government from 'racketeering' language which results in retrials solely because of its prejudicial impact. In view of the unnecessary prejudicial effect of the 'racketeering' language, this proposal replaces that terminology with the phrase 'criminal activity.'

American Bar Ass'n Criminal Justice Section, A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation, Report to the House of Delegates, Appendix A, 4 (1982). Thus, the stigma is not only at the societal level but also found within the courts and can have a tremendous prejudicial effect on the trial process. This clearly raises due process issues as well as torts arising in defamation.

The minority position in the ABA report argued that judges and juries had little difficulty in distinguishing between charges and proof. The "brand" of the racketeering label, it was argued, did not apply until conviction. At that point, the label was appropriate, and thus, there was no need to prohibit its use. *Id.*

134. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 485 (2nd Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

135. *Sedima*, 473 U.S. at 485. The Court noted that the appellate court "observ[ed] that its prior conviction requirement would avoid serious Constitutional difficulties, the danger of unfair stigmatization, and problems regarding this standard by which the predicate acts were to be proved." *Id.*

136. *Id.* at 492 (quoting 741 F.2d 482, 500 n.49 (1984)).

137. *Id.*

defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of fraud beyond a reasonable doubt.[138]

The Fifth Circuit has interpreted *Sedima*, in dicta, in *Armco Industrial Credit Corp. v. SLT Warehouse Co.*[139] In *Armco*, the court found that the preponderance of the evidence standard is sufficient to prove the criminal elements of a civil RICO charge.[140] The court stated, "We are reluctant to inject another judicial construct into a statute that we are commended to construe broadly."[141]

The Fifth Circuit is in line with virtually all post-*Sedima* holdings on the issue of the appropriate burden of proof.[142] A number of commentators have advocated the use of a clear and convincing evidence standard.[143] Few commentators, however, support bifurcating the standards of proof applied in civil RICO and incorporating a reasonable doubt standard for the criminal element of the offense.[144] The courts have been even more reluctant to assert such a position.[145] In the absence of congressional action, it appears as though the preponderance of the evidence standard will remain intact for civil RICO for some time to come.

IX. DISCOVERY

Because of the dual civil and criminal nature of RICO, the discovery process presents some unique issues for the civil practitioner. These issues include the assertion of the fifth amendment[146] and access to grand jury materials in the context of RICO.

Rule 26 of the Federal Rules of Civil Procedure provides that all

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138. *Id.* This statement by the Court has been interpreted as a tacit recognition of at least the risk of a stigma being attached to a civil RICO conviction. *See supra* note 131. The Court long ago recognized the detriment a criminal charge presents to the defendant. *See In re* Gault, 387 U.S. 1, 23-25 (1967)(indicating further that nature of underlying offense is relevant).

139. 782 F.2d 475, 480 (5th Cir. 1986).

140. *Id.* at 481.

141. *Id.*

142. *Id. See generally* cases cited *supra* note 119 and accompanying text.

143. *See supra* note 132.

144. Mixed burdens of proof have been approved by the Supreme Court in libel cases. *See* New York Times v. Sullivan, 376 U.S. 254, 283 (1964)(public official plaintiff to prove libel must show defendant acted with actual malice).

145. *See supra* note 132.

146. U.S. Const. amend. V. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . . "

relevant information, or information reasonably calculated to lead to the discovery of admissible evidence, may be obtained by a party for use in a civil proceeding.[147] However, Rule 26 also indicates that privileged information may not be acquired.[148] Thus, the assertion of the fifth amendment right against compelled self-incrimination may affect the civil discovery process.[149]

Civil RICO often involves parties not recognized as natural persons protected by the fifth amendment.[150] The Supreme Court, in *Boyd v. United States*,[151] an 1886 case, observed that privacy of the individual was the central purpose of the fifth amendment privilege. In subsequent cases, the Court has determined that only a "natural individual" is protected by the privilege.[152] Therefore, corporations cannot invoke the privilege in civil RICO actions.[153]

A section 1962(c) violation, involving the operation of an enterprise through a pattern of racketeering activity, will almost undoubtedly entail the production of documents and this production may be of a testimonial nature.[154] Moving away from the traditional analysis fo-

147. FED. R. CIV. P. 26(b)(1).

148. *Id.* at (b)(4)(A)-(C).

149. The Federal Rules and the Constitution protect parties from compulsory discovery in civil action where there is a risk of self incrimination. Baker v. Limber, 647 F.2d 912, 916 (9th Cir. 1981). In civil cases the fifth amendment may be asserted at the pleading, discovery, or trial stage. National Acceptance Co. of Amer. v. Bathalter, 705 F.2d 924, 927 (7th Cir. 1983). For a discussion of the fifth amendment privilege in civil RICO proceedings, see D. SMITH & T. REED, *supra* note 7, ¶ 7.03 [2][a]-[b]. Practitioners should be aware of the sanctions applicable under Rule 37 of the Federal Rules of Civil Procedure should a court hold that a party's privilege claims are groundless. *See Baker*, 647 F.2d at 917-18 (discussing array of sanctions under Rule 37 for party's groundless claims of privilege).

150. *See* cases cited *supra* note 47 and accompanying text.

151. 116 U.S. 616 (1886).

152. *See, e.g.*, Wilson v. United States, 221 U.S. 361, 379-85 (1910)(explaining and citing cases for proposition that corporations cannot invoke fifth amendment). The Supreme Court has specifically held that corporations, unincorporated associations, labor unions, and partnerships are prohibited from invoking the fifth amendment privilege. *E.g.*, Bellis v. United States, 417 U.S. 85, 100-01 (1974)(partnership cannot invoke privilege); Curcio v. United States, 354 U.S. 118, 122-23 (1957)(labor unions cannot invoke privilege); Rogers v. United States, 340 U.S. 367, 371-72 (1951)(political party as unincorporated association cannot invoke privilege); United States v. White, 322 U.S. 694, 700-01 (1944)(observing historic function of fifth amendment protection was to protect natural individual from compulsory incrimination); Hale v. Henkel, 201 U.S. 43, 70 (1906)(corporations cannot invoke privilege). *But see* Fisher v. United States, 425 U.S. 391, 405-14 (1976)(indicating shift in fifth amendment analysis of compelled document production from inquiry into status of party to incriminating nature of act of production).

153. *Hale*, 201 U.S. at 70.

154. The Supreme Court held in *Fisher v. United States*, that if the act of production was

cusing on the status of the party invoking the fifth amendment, the Supreme Court in *Fisher v. United States*[155] set forth a three-part test for the compelled production of documents that focused on the incriminating nature of the act of production itself. The Court asserted that the act of production: (1) must be testimonial in character, (2) must be compelled, and (3) must be incriminating before the privilege will be allowed.[156] Thus the private individual's status has changed in regard to documents, and the previous inapplicability of the privilege to corporate documents may be undermined if it can be shown that the act of production is testimonial in character.[157]

It should be noted that the corporate defendant may be required to produce documents by appointment of an agent who would not face the risks of incrimination.[158] Furthermore, in cases involving the gov-

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testimonial in nature, the documents produced may be protected. 425 U.S. 391, 414 (1976). The Court reaffirmed this position in *United States v. Doe*. 465 U.S. 605, 612 (1984).

A section 1962(c) violation frequently will involve a legitimate enterprise and a variety of records and/or documents may be required to be produced for purposes of the proceedings. Even in situations involving association-in-fact enterprises in section 1962(c) violations, plaintiffs will be interested in acquiring any records which the enterprise may have kept regarding its affairs.

155. 425 U.S. 391 (1976).

156. *Id.* at 410-11. *Fisher* involved a taxpayer's assertion of the fifth amendment privilege against the production of accountant's work papers held by attorneys. The Court, after applying its three-part test, did not consider whether the actual act of production was testimonial. The Court, rather, concluded that the testimonial aspects of production were a foregone conclusion. *Id.* The testimonial nature of the act of production generally is understood as either an acknowledgment of the authenticity of the documents themselves, an indication of responsiveness to the summons, or that the documents are possessed by the defendant. *Id.*; *see also Doe*, 465 U.S. at 611 n.7 (affirming applicability of *Fisher's* three-part privilege analysis). For a general discussion of *Fisher*, see Height, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439 (1984).

157. The Act of Production Doctrine established in *Fisher*, which took root in *Doe*, raises a number of unresolved issues including continued protection for individual private records and the exclusion of the privilege for corporate records. D. SMITH & T. REED, *supra* note 7, ¶ 7.03, at 7-26; *see also* Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 40-4 (1986)(*Doe* and *Fisher* decisions have altered traditional assumptions about inapplicability of fifth amendment privilege to corporations).

158. Generally, when corporate officers decide to claim their fifth amendment privileges, an uninvolved custodian of records must be furnished to produce and identify the records. Should no one in the employ of the corporation be available, an entirely new agent with no previous connection to the corporation could be appointed either by the corporation itself or by the Court. This would seemingly lead to the conclusion that there is no situation in which the fifth amendment would prevent a corporation from producing corporate records. *See* United States v. Sancetta, 788 F.2d 67, 74-75 (2nd Cir. 1986)("even were it to incriminate him, another agent could be appointed by Sancetta Corp. or by the court to produce the records");

ernment, a grant of immunity may overcome an assertion of the privilege.[159] The availability of immunity in a private action still is an unsettled issue.[160] Private civil plaintiffs may benefit greatly from materials discovered from grand jury proceedings of parallel criminal proceedings. While there is a burden of secrecy to overcome in acquisition of grand jury materials,[161] the Supreme Court in *Douglas Oil Co. v. Petrol Stops Northwest*[162] allowed for limited disclosure of grand jury transcripts in an antitrust setting.[163] The Court required that disclosure be allowed only after a showing of a "particularized need" for the information, in order to avoid a possible injustice in another proceeding.[164] Beyond this requirement of avoidance of in-

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In re Grand Jury Subpoenas Issued to Thirteen Corporations, 775 F.2d 43, 46 (2nd Cir. 1985)(fifth amendment cannot protect corporation from being compelled to produce documents), *cert. denied*, 475 U.S. 1081 (1986); *In re* Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52, 6 (2nd Cir. 1985)(corporation has no fifth amendment privilege).

159. *See* United States v. Porter, 711 F.2d 1397, 1404 (7th Cir. 1983). The government, of course, is not required to give immunity for production purposes and would only do so under circumstances where production is necessary. *See* United States v. Doe, 465 U.S. 605, 616-17 (1984).

160. *See* Pillsbury Co. v. Conboy, 459 U.S. 248, 261 n.20, (1983). Thus, in the civil setting the testimonial character of document production, absent immunity, will be sufficient for invoking the fifth amendment privilege. There are other methods which a party can employ to overcome the obstacle of the fifth amendment when it is asserted by a natural person. First, the party can be made to justify its assertion. *Doe*, 465 U.S. at 614 N.13; United States v. Edgerton, 734 F.2d 913, 919 (2nd Cir. 1984). Second, a deposition can be insisted upon. Because the assertion of the privilege must be made on a question by question basis, ultimately some questions will have to be answered. *See* General Dynamics Corp. v. Selby Mfg. Co., 841 F.2d 1204, 1213-14 (8th Cir. 1973). Third, the existence of a prior waiver of a fifth amendment privilege at an administrative hearing or in a related proceeding, may be of assistance. Waivers however will be inferred only in the most compelling of circumstances. Klein v. Harris, 667 F.2d 274, 288 (2nd Cir. 1981); E.F. Hutton & Co. v. Jupiter Dev. Corp., 91 F.R.D. 110, 114 (S.D.N.Y. 1981). *But see* United States v. James, 609 F.2d 36, 45 (2nd Cir. 1979)(waiver in one proceeding may not affect rights in subsequent proceeding), *cert. denied*, 445 U.S. 905 (1980). For a discussion of these and other alternatives, *see* Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L. J. 1062 (1982).

161. Rule 6 of the Federal Rules of Criminal Procedure requires that all matters occurring before the Grand Jury must be kept secret. FED. R. CRIM. P. 6(e)(2). Furthermore, there has been a tradition of keeping grand jury proceedings secret. Rule 6 also requires that the disclosure of federal grand jury material to a private party may be obtained by the filing of a petition in the district in which the grand jury convened. FED. R. CRIM. P. 6(e)(3)(D); *see also* Illinois v. Abbott & Assoc., 460 U.S. 557, 572 n.28 (1983); Dowd v. Calabrese, 101 F.R.D. 427, 433 (D.D.C. 1984).

162. 441 U.S. 211 (1979).

163. *Id.* at 223.

164. *Id.* at 222. Furthermore, the Court required "that their request [be] structured to cover only material so needed." *Id.*

justice, a balancing of the need for disclosure, as opposed to the need for secrecy, must also occur.[165]

Several other points regarding discovery merit brief mention. In camera inspection of documents may provide the necessary recourse for plaintiffs or defendants in civil RICO.[166] Attorneys should also be cognizant of the general uses of the doctrine of res judicata (issue and claim preclusion).[167] Also, because of the crime-fraud exception to both the attorney-client privilege and the work product doctrine,[168] attorney debriefing memoranda regarding a witness' grand jury appearance may be available.[169] Finally, because non-parties (particularly the government) may seek disclosure of discovery materials, attorneys should attempt to obtain protective orders for materials they wish to protect.[170]

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165. When disclosure of grand jury materials is sought purely for discovery purposes, the need for disclosure will not overcome the need for secrecy. *See In re* Grand Jury Matter, 697 F.2d 511, 512 (3rd Cir. 1982). The Fifth Circuit has ruled that when the Grand Jury is still investigating, the need for secrecy is paramount. *See In re* Grand Jury Proceedings, 613 F.2d 501, 505 (5th Cir. 1980); *see also In re* Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986).

166. In camera inspection of grand jury materials by district courts for purposes of making disclosure decisions has been approved by several circuit courts. D. SMITH & T. REED, *supra* note 7, ¶ 7.03(3), at 7-33 (citing cases).

167. The term res judicata refers to the two different preclusion defenses of collateral estoppel and res judicata. D. SMITH & T. REED, *supra* note 7, ¶ 9.02, at 9-16. For a discussion of collateral estoppel, *see generally* Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical, and Strategic Implications for Criminal and Civil Litigation*, 70 GEO. L. J. 1079 (1982). For a specific discussion of the uses of collateral estoppel in civil RICO actions, see D. SMITH & T. REED, *supra* note 7, at ¶ 9.02, at 9-14, 9-26; *see also* Ginger, *The Use of Collateral Estoppel in Private Civil RICO Actions*, 54 TENN. L. REV. 31 (1985).

168. *See* Clark v. United States, 289 U.S. 1, 15 (1933); *In re* Antitrust Grand Jury, 805 F.2d 155, 163 (6th Cir. 1986). For a discussion of the crime fraud exception, see generally Silbert, *The Crime-Fraud Exception*, 23 AM. CRIM. L. REV. 351 (1986).

169. D. SMITH & T. REED, *supra* note 7, ¶ 7.03[3], at 7-34. Smith and Reed indicate that private litigants have not had much success in obtaining such memoranda. *Id.* (citing Harper & Roe Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971)).

170. Rule 26 of the Federal Rules of Civil Procedure allows a party, upon a showing of good cause, to obtain a protective order preventing disclosure of discovery to non-parties. FED. R. CIV. P. 26(c). In *Martindell v. ITT Corp.*, the Second Circuit enforced a protective order and denied the government access to discovery. 594 F.2d 291, 296 (2d Cir. 1979). The case involved civil depositions which had been taken under a court-approved stipulation. The stipulation provided that only the parties and their counsel could have access to transcripts and that these transcripts were not to be used for any purpose other than the preparation for, and conduct of, the litigation. In a request made by telephone and in a letter to the district court, the government attempted to acquire the transcripts for use in its investigation of possible federal criminal violations by certain deponents. *Id.* at 292-93. In a footnote to the opin-

No discussion of RICO, regardless of its depth, would be sufficient without mention of RICO's broad provisions for forfeiture. Under section 1963(a)(3), "[A]ny property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity" may be forfeited in criminal RICO proceedings.[171] The import of this provision arises from the logical reality that once a criminal conviction is acquired, there simply may be no remaining assets that the plaintiff can seek through a damage award.

The extent of forfeiture under RICO may be illustrated by the Fifth Circuit's decision in *Cauble*.[172] While only $400,000 of illegal assets had been infused into the limited partnership of Cauble Enterprises, the government sought forfeiture of over $50 million in assets accumulated by the defendant, Rex Cauble.[173] After convictions for violations of section 1962(a) and (c), the government secured Cauble's entire general partnership interest.[174]

Because corporations may join together to form association-in-fact

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ion, the court stated, "We are not called upon in the present case to decide whether the government might be entitled to enforcement of a subpoena compelling production of the depositions." *Id.* at 296 n.6. *Compare* United States v. Davis, 702 F.2d 418, 422-23 (2d Cir.)(refusing to enforce "protective order" and distinguishing *Martindell*), *cert. denied*, 463 U.S. 1215 (1983) *with* Palmieri v. State of New York, 779 F.2d 861, 866 (2d Cir. 1985)(denying demands of state Attorney General and enforcing protective order). *Martindell,* therefore, appears to offer some protection to witnesses by virtue of the protective order in Federal Rule of Civil Procedure 26(c).

171. 18 U.S.C. § 1963(a)(3) (1982). Congress clarified criminal forfeiture law with the passage of the Comprehensive Forfeiture Act of 1984 as part of the Comprehensive Crime Control Act of 1984. For a discussion of the Comprehensive Forfeiture Act of 1984, see generally Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1985). The forfeiture provisions under RICO are available only to the government in civil and criminal cases, and thus are not applicable to the private litigant. Their most frequent use is, of course, in the criminal arena. Because criminal proceedings may frequently be instigated prior to, or at the time of, civil proceedings under RICO, the ominous cloud of forfeiture by the government looms over the head of the civil plaintiff and he should be cognizant of its presence. *See infra* note 182 and accompanying text. Sections 1963(a)(1) and (2) have also expanded the scope of criminal forfeiture under RICO. These sections provide respectively for the forfeiture of any interest "acquired or maintained in violation of section 1962," and forfeiture of any "interest in any enterprise" or any "property or contractual right of any kind affording a source of influence over" the enterprise. 18 U.S.C. § 1963(a)(1)-(2) (1982).

172. 706 F.2d 1322 (5th Cir. 1983)(en banc), *cert. denied*, 465 U.S. 1005 (1984).

173. Tarlow, *RICO Forfeitures of Business*, 24 TRIAL 52, 53 (Sept. 1988); *see also Cauble*, 706 F.2d at 1335-39 (detailing distribution of funds in various Cauble businesses.

174. *Cauble*, 706 F.2d at 1330; *see also* Tarlow, *RICO Forfeitures of Business*, 24 TRIAL 52, 53 (Sept. 1988). Tarlow cites the Fifth Circuit's decision in *Cauble* as an example of the disproportionate nature of RICO forfeiture. Tarlow argues persuasively that the scope of for-

enterprises,[175] assets of entire corporations — not just individual defendants — may also be subject to forfeiture.[176] Furthermore, because of the relation back doctrine, the government's interest in forfeitable profits vests at the time of the RICO violation.[177] This is exacerbated by section 1964(d) which provides:

> 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 proceeding brought by the United States.[178]

A RICO defendant may also suffer from the government's ability to acquire a pre-trial restraining order freezing the defendant's assets.[179] This may impair the ability of the defendant to adequately defend himself in a civil proceeding, not to mention his defense in the criminal proceedings.[180] Furthermore, this poses immediate problems for

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feiture under RICO should fit the crime and that the most serious forfeiture sanctions should be applied only to the most serious crimes. *Id.* at 55.

175. Since virtually anything can be an enterprise, it follows that the illicitly obtained proceeds of these enterprises are subject to forfeiture. *See* cases cited *supra* note 47.

176. *See* United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979), *cert. denied*, 455 U.S. 297 (1980)(upholding RICO forfeiture of defendant's interest in several corporations). This situation will arise only in a fact pattern involving an enterprise which is an association-in-fact of solely held corporations owned by one person.

177. The relation back doctrine is codified at 18 U.S.C. section 1963(c). This doctrine vests the government's title to assets forfeited from the date of the "act giving rise to" their forfeitability. 18 U.S.C. § 1963(c) (Supp. V 1987). The doctrine is used to defeat post-offense transfers of assets by the defendants. The government has wide discretion to determine which transactions it wishes to have the jury find voidable under the doctrine. Once such a finding is made by the jury, "the government will have a title claim to the [identified] asset." *Id.* This broad discretion on the part of the government under its forfeiture authority greatly limits the options available to defense or plaintiff counsel in civil RICO litigation. D. SMITH & T. REED, *supra* note 7, ¶ 10.05[2], at 10-28.

178. 18 U.S.C. § 1963(e).

179. *Id.* at (d)(1) (Supp. V 1987). Subsection (d)(1) provides:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability to property described in subsection (a) for forfeiture under this section . . .

Section 1963(d)(2) allows for the issuance of a temporary restraining order "without notice or opportunity for a hearing" if the government demonstrates probable cause to believe that the property may be jeopardized as a result of such notice. *See id.* at (d)(2).

180. *Compare* U.S. v. Monsanto, __ U.S. __, __, 109 S. Ct. 2657, 2666, __ L. Ed. 2d __, __ (1989) (pre-trial order freezing assets not violation of sixth amendment right to counsel or fifth amendment right to due procees) *with* United States v. Harvey, 814 F.2d 905, 926 (4th Cir. 1987)(preventing payment of legitimate criminal defense fees by restraining funds is un-

the civil plaintiff, as his cause of action may be stayed pending the outcome of the criminal trial.[181] Therefore, the plaintiff's only recourse is to attempt to reach forfeited assets through a post-verdict hearing under section M of the Comprehensive Forfeiture Act of 1984.[182]

X. CONCLUSION

The expansive uses of RICO in the civil arena continue to have devastating results. The statute's primary purpose was to facilitate criminal prosecutions of organized crime figures and to prevent the infiltration of legitimate businesses by criminal elements. This is why Congress enacted such broad, punitive, and potentially defamatory civil remedies. As a consequence, plaintiff's counsel are cast in a role akin to that of a federal prosecutor. It is therefore incumbent upon

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constitutional); *cf.* United States v. Thier, 801 F.2d 1463, 1471 (5th Cir. 1986), *amended*, 809 F.2d 249 (5th Cir. 1987) (court should consider defendant's right to attorney of choice when weighing motion for asset-freezing injunction).

181. The use of a stay in pending civil litigation is an alternative to the use of a pre-trial restraining order. Smith and Reed have observed that "even though most stay precedent addresses parallel civil and criminal suits between the government and the same defendant, a court's inherent authority to stay matters before it would also appear to encompass parallel civil and criminal proceedings by the government and private plaintiffs against the same defendant." D. SMITH & T. REED, *supra* note 7, ¶ 7.04, at 7-38.

182. 18 U.S.C. § 1963(m) (Supp. III 1985). The private litigant can seek recourse by entrance of a special appearance at any hearing held to contest the scope of a pre-trail restraining order in a criminal case. *See* United States v. Crozier, 777 F.2d 1376, 1387 (9th Cir. 1984)(holding issuance of pre-trial restraining order without prompt judicial hearing is violative of due process). *But see* Department of Justice, Handbook on the Comprehensive Crime Control Act of 1964 And Other Criminal Statutes Enacted by the 98th Congress 44-45 (1984)(need for hearing prior to imposition of pre-trial restraining order obviated by Comprehensive Forfeiture Act). However, once the government has obtained title to forfeited assets, the post-verdict hearing in the criminal case will offer no remedy to the plaintiff. *See* United States v. Mageean, 649 F. Supp. 820, 824 (D. Nev. 1986)(court denying tort claimants relief from RICO forfeiture order due to absence of "statutory interest in the assets"). The section 1963(m) post-verdict hearing (actually section 1963(a)) is available in situations where a government attempts to bring parallel private civil RICO litigation. *Id.*

> Once the government obtains title to forfeited assets, however, any attempt by third parties to execute upon or otherwise encumber the forfeited assets would probably be precluded by 18 U.S.C. section 1963(i) beyond those limited avenues of redress recognized in the Comprehensive Forfeiture Act under section 1963(1). If the government attempts to bring parallel private civil RICO litigation within the purview of the no-intervention provisions, plaintiff's counsel should move to have a timely judicial ruling on whether the plaintiff's racketeering cause of action is a 'legal right, title or interest in the [forfeitable] property' sufficient to give plaintiff standing to make a section m petition.

D. SMITH & T. REED, *supra* note 7, ¶ 7.04, at 7-40.

plaintiffs' counsel to cautiously assess the claim's nexus to a real pattern of corruption. It would be prudent to identify more than the two predicate offenses required under the statute. If such a nexus does not exist, then claims under civil RICO are foreclosed. The statute was never intended for use in ordinary business litigation, where garden-variety fraud allegations are asserted as a matter of course.

The authors are compelled to recommend that Congress reform certain elements of the statute. Primarily, the statute should be amended to provide for a bifurcation of civil RICO trials. The overall burden of the plaintiff should remain no greater than the preponderance of the evidence standard; however, the specified predicate offenses should require proof by a heightened standard of review. Most logically, this should be the clear and convincing standard. Another avenue of amending this statute may be to require a change in nomenclature so that the terms "racketeer" and "racketeering" are not used as loosely as is currently in vogue. Finally, as a deterrent to the frivolous pleading of civil RICO violations, the statute should be amended to allow the awarding of treble attorney fees in cases where the racketeering nexus has been determined to be frivolous and, as a result, the business' reputation has been injured.