CAN CONGRESS SAVE RICO FROM JUDICIAL OVERKILL?

I. Introduction

The current debate raging over the Racketeer Influenced and Corrupt Organization (RICO) provisions[1] of the Organized Crime Control Act of 1970[2] centers mostly on the inconsistent messages the statute has sent the judiciary during the last two decades.[3] While the narrow focus of RICO appears to be the eradication of organized crime, its statutory language simultaneously admits that its remedies will not be solely limited to the criminal realm.[4] The unresolved debate as to the true intent and scope of RICO has resulted in the haphazard application of the statute in the criminal and civil spheres.[5] This note will focus on the largely unsuccessful efforts by the judiciary and Congress to address the confusion the statute has created.

This note will first analyze the legislative history[6] of RICO and attempt to decipher, if possible, the true original intent of Congress. Next, it will discuss judicial treatment of the statute since 1970, emphasizing certain case law the authors of RICO would never have envisioned.[7] With specific attention given to

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[1] Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (1970).

[2] Organized Crime Control Act ("OCCA"), Pub. L. No. 91-452, 84 Stat. 922 (1970).

[3] OCCA, 84 Stat. 923 § 1. "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *See also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). The President's report to Congress concluded that organized crime may have begun to move from its traditional activities in gambling and prostitution to legitimate business activities. The report in large part gave Congress impetus to pass RICO. *But see* Pub. L. No. 91-452 § 904(a). "The provisions of this title shall be liberally construed to effectuate its remedial purposes."

[4] *See* OCCA, 84 Stat. 923 § 1; *see also* Pub. L. No. 91-452 § 904(a).

[5] *See infra* text accompanying notes 23-58.

[6] *See* S. REP. No. 617, 91st Cong., 1st Sess. (1969), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007-91; H.R. REP. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007-91.

[7] *See, e.g.*, Northeast Women's Center v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 261 (1990) (RICO successfully used by abortion clinic

the statute's requirement of a pattern of racketeering activity,[8] the note will highlight recent attempts by the United States Supreme Court to clarify RICO[9] and forestall its constitutional demise under the vagueness doctrine.[10] In addition, the note will detail recent efforts in Congress to amend RICO.[11] Finally, this article will focus on Congressional efforts to respond to the concerns[12] of the Supreme Court, to restrain RICO, and to save the statute from a declaration of unconstitutionality on vagueness grounds.

II. Statute and Legislative Intent

In sum, RICO prohibits the commission of several state and

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against anti-abortion demonstrators for an alleged pattern of extortionate acts); *see infra* text accompanying notes 40-58; Avirgan v. Hull, 691 F. Supp. 1357 (S.D. Fla. 1988) (RICO unsuccessfully used by Christic Institute in alleging a conspiracy among 29 defendants including Oliver North, resulting in the May 30, 1984, terrorist bombing of a press conference in Nicaragua); *see infra* note 55.

8 "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a).

"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." 18 U.S.C. § 1962(b).

"It shall also be unlawful for any person, for any person employed by, or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

9 *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989); *see also infra* text accompanying notes 84-104; Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985), *see also infra* text accompanying notes 59-83.

10 *See H.J.*, 492 U.S. at 251-56 (Scalia, J., concurring), *see infra* text accompanying notes 101-13.

11 *See* S. 438, 101st Cong., 2nd Sess. (1990); *see also infra* text accompanying notes 119-35; H.R. 5111, 101st Cong., 2d Sess. (1990); *see also infra* text accompanying notes 136-48.

12 *See Sedima*, 473 U.S. at 499, where Justice White, while admitting that RICO may have been used against "legitimate enterprises" in "everyday fraud cases" rather than against "the archetypal, intimidating mobster," issued an oft-quoted challenge to Congress: "Yet this defect-if defect it is-is inherent in the statute as written, and its correction must lie with Congress." *Id.*

federal crimes[13] which form a pattern of racketeering activity[14] carried out by an enterprise engaged in interstate commerce.[15] Violations of RICO proven by a United States Attorney are punishable by fines, imprisonment and forfeiture.[16] Violations of RICO proven by a plaintiff in a civil action may result in the award of treble damages, court costs and attorneys fees.[17]

It is a great understatement to suggest that the original in-

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[13] "[R]acketeering activity means (A) any act or threat involving murder, kidnaping, 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 a year (B) any act indictable under provisions of 18 U.S.C. relating to such crimes as counterfeiting, theft, embezzlement, mail fraud, wire fraud, obstruction of criminal investigations, money laundering (C) any act indictable under 29 U.S.C. including embezzlement from union funds (D) fraud in the sale of securities or the felonious dealing in drugs (E) any act indictable under the Currency and Foreign Transactions Reporting Act." 18 U.S.C. § 1961(1).

[14] *See supra* note 8; *see also* 18 U.S.C. § 1961(5) which defines a pattern of racketeering activity "as at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

[15] *See supra* note 8.

[16] *See* 18 U.S.C. § 1963(a): "Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of state law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." *Id.*

[17] *See id.* § 1964(c): "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.*

This provision was added by the House of Representatives to the original Senate bill establishing RICO with virtually no debate in Congress. *See e.g.*, *Sedima*, 473 U.S. at 486-88; Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1394 (E.D.N.Y. 1989).

tent of RICO is the subject of continuous lively debate in the Justice Department, the judiciary, Congress and the media.[18] Even before passage of RICO by the House of Representatives, voices were heard warning of potential abuse of the proposed statute in the courts should the original intent of RICO become lost amidst ambiguous or undesired provisions.[19] While other statutes may only include a particularly vague provision or phrase, RICO's very intent is ambiguous, confounding legal scholars and making the task of interpreting its specific statutory provisions that much more difficult.[20] Indeed, since 1970, the unenviable challenge for the judiciary has been how to approach a schizophrenic statute whose narrow mandate appears to be the eradication of organized crime[21] but which simultaneously urges an expansive statutory interpretation by the courts.[22]

III. Judicial Treatment

A. *Garden Variety Fraud*

Even a cursory reading of the decisions interpreting RICO would suggest that the courts have been willing to grant the statute a liberal interpretation and ignore the provisions limiting its

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18 *See e.g.*, Holmes, *Congress to Take New Look at Racketeering Law*, N.Y. TIMES, Sept. 14, 1990, at B18, col.2. This article describes efforts in Congress to amend RICO. In so doing, Holmes discussed RICO as "originally intended as a weapon against the Mafia, but used increasingly in recent years to attack corporate wrongdoing." *Id.*

19 *See* H.R. REP. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4083 (dissenting views of Representatives John Conyers, Jr., Abner Mikva, and William F. Ryan) "[S]ection 1964(c) provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits the 'indirect use' of such gains - a provision with tremendous outreach - litigation is begun." *Id.*

20 *See id.*, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 4091 "In a criminal statute where the term organized crime is an operative device, it is not defined. When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was." *Id. See also Rehnquist Advocates Civil Rico Reform*, 167 J. ACCT. 15-6 (June 1989), where the Chief Justice of the United States Supreme Court, William Rehnquist, frustrated by the use of the statute beyond the context of organized crime, urges Congress "to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime."

21 *See supra* note 3.

22 *Id.*

mandate to the eradication of organized crime.[23] In civil RICO actions, the lure of treble damages and attorneys costs have encouraged suits unintended by Congress.[24] RICO's vague statutory language has only helped to encourage the filing of suits[25] in the federal courts.[26] Indeed, federal judges across the country have openly criticized the abuse of RICO.[27] The Honorable William Rehnquist, the Chief Justice of the United States Supreme Court, has been quite vocal in denouncing RICO's lucrative damages provisions.[28] Chief Justice Rehnquist has decried the liberal interpretation of RICO which, in his view, has improperly vested the federal courts with subject matter jurisdiction over "garden variety" fraud cases best left to the state courts to adjudicate.[29] Others have suggested that the expansive interpretation of the statute has encouraged "theory shopping"[30] where attorneys frame state law fraud claims in RICO statutory language in order to avail themselves of the federal courts and RICO's generous

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23 *See* Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 624 (1990) "While academics continue to disagree over whether Congress intended RICO to extend beyond the paradigmatic case of an organized crime family running a legitimate business, it is well settled that RICO today ranges far beyond such a situation." *Id.*

24 *See* Comment, *The RICO Pattern After Sedima-A Case For Multifactored Analysis*, 19 SETON HALL L. REV. 73 (1989).

25 N.Y. TIMES, Aug. 1, 1988, at A1. The article cites the dramatic increase in the number of private civil RICO suits filed annually from 117 in 1984 to 1000 in 1987. The article notes by comparison that only 1000 criminal and civil RICO suits have been filed by the government since passage of the statute in 1970.

26 Rasmussen, *supra* note 23, at 626. "Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad predicate acts, it takes little imagination to deem those actions RICO violations." *Id.*

27 *See, e.g.*, *Schact v. Brown*, 711 F.2d 1343, 1361 (7th Cir. 1983), "Congress . . . may well have created a runaway treble damage bonanza for the already excessively litigious;" In Re Dow Co. v. Sarabond Prod. Liab. Litig., 666 F. Supp. 1466, 1470 (D. Colo. 1987), "RICO is a recurring nightmare for federal courts across the country. Like the Flying Dutchman, the statute refuses to be put to rest. Beating against the wind, it has jettisoned an effusion of opinions which bobble in its wake."

28 *Rehnquist Advocates Civil Rico Reform*, *supra* note 20, at 15.

29 *Id. See* S. REP. No. 269, 101st Cong., 2d Session at 4, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS (1990) (quoting speech of the Chief Justice of the U.S. Supreme Court, William Rehnquist, at the Brookings Eleventh Seminar on the Administration of Justice) "Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts." *Id.*

30 Rasmussen, *supra* note 23, at 629, 636.

damage awards.[31] Chief Justice Rehnquist has suggested that such creative lawyering poses real threats to the already overcrowded federal courts and undermines our system of federalism.[32] His critics point to the fact that other federal statutes provide generous damage awards and that RICO is not radical in this regard.[33]

The specific case law does support the Chief Justice's view. In particular, RICO's mail and wire fraud predicate acts have encouraged "garden variety" fraud cases brought under the guise of RICO.[34] Many of these cases could be adjudicated without reliance on RICO by simply invoking the provisions of substantive state anti-fraud law.[35] Yet, there are several factors which militate against the use of state law remedies in this context. They include the lure of treble damages, the fact that the mail and wire fraud statutes contain no federal private cause of action other than via RICO,[36] and the heavy burden of proof state common

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31 *Id.*

32 *Rehnquist Advocates Civil Rico Reform*, *supra* note 20, at 16. "The imposition of some limitations on civil RICO actions is required so that federal courts are not required to duplicate the efforts of state courts." *Id.*

33 *See* Clayton Act, 15 U.S.C. § 15(a) (1988); *see also* Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN L. REV. 827, 871 (1987) (the author emphasizes that RICO is not alone among federal statutes in providing for treble damages as a deterrent to undesired behavior).

34 *See* 18 U.S.C. 1961(1)(B); *see also*, Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 385 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (fraud action against a bank for charging higher interest rate in violation of contract); Fleischhauer v. Feltner, 879 F.2d 1290, 1293-95, 1300 (6th Cir. 1989) (action by investors against promoters of tax shelter scheme); Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989) (action by oil suppliers against purchaser whose credit limit could not absorb cost of the supplies); Ocean Energy II, Inc. v. Alexander & Alexander Inc., 868 F.2d 740, 741-42 (5th Cir. 1989) (action by insurance purchaser against insurance agent for failure of agent's company to pay claims); Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 190 (9th Cir. 1987) (action by savings and loan against former CEO for bribery).

35 *See* Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970); *see also supra* note 3. The Statement of Findings and Purpose of the Organized Crime Control Act envisions RICO as a deterrent against fraud in the organized crime context. It does not envision use of the statute in garden variety fraud actions better left to state courts to litigate. *Id.*

36 *But see* Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983) (where the Court could find no authority in RICO's legislative history that Congress intended to provide a private right of action in the federal courts for violations of the mail and wire fraud predicate acts); *see also* Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 680 (1990).

law fraud requires by clear and convincing evidence,[37] a standard more stringent than the test of preponderance of the evidence in federal court.[38] As a result, creative plaintiffs lawyers have succeeded in commandeering these claims away from state tribunals and into the federal courts under the guise of RICO.[39]

B. *Political Protest*

In addition to state law fraud, another important area of the law into which civil RICO has overrun, absent the clear intent of Congress, is the volatile arena of political protest.[40] Certainly, Congress could never have envisioned or intended that RICO would become inextricably linked to the ongoing debate in the United States over the right to abortion. In many respects, *Northeast Women's Center, Inc., v. McMonagle* represents the ultimate abuse of RICO.[41]

In *McMonagle*, a women's health center providing abortions brought a complaint against anti-abortion protestors under civil

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37 *See* J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2498 at 424.

38 *See Sedima*, 473 U.S. at 491.

39 Note, *Civil Rico and "Garden Variety" Fraud—A Suggested Analysis*, 58 ST. JOHN'S L. REV. 93, 122-23 (1983) (recommending that claims based on violations of the mail and wire fraud predicates be adjudicated exclusively in state courts).

40 *See, e.g., McMonagle*, 868 F.2d at 1342; Feminist Women's Health Center v. Roberts, No. C 86-1612 (W.D. Wash. May 5, 1989) (1989 WL 56017). In addition to garden variety fraud and political protest, federal courts in recent years have been forced by creative lawyers to consider RICO-based claims in a number of other contexts not associated with organized racketeering activity. *See, e.g.*, Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555, 557 (E.D.N.Y. 1983) (suit concerning control of a Chassidic congregation); Kaushal v. State Bank of India, 556 F. Supp. 576, 578 (N.D. Ill. 1983) (suit concerning control of an Indian bank); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1135 (D. Mass. 1982) (suit concerning operations of a church); Nelson v. Bennett, 83-820-RAR (E.D. Cal.) (suit concerning violation of the securities laws where federal grand jury found Laventhol & Horwath the first major accounting firm to be held liable under RICO); *see also* 12 AM. LAW. 96 (Nov. 1990) for discussion of a recent RICO suit against the Huntington Beach, California, Police Department and the Orange County, California, Municipal Court, for operation of an allegedly illegal speed trap along a stretch of the Pacific Coast Highway. Attorney Ernest Franchesi, Jr., had been stopped for speeding three times along this highway between August 1988 and May 1989. Although he successfully challenged each ticket in municipal court, he nevertheless initiated a $60 million suit under RICO for alleged extortion and deprivation of civil rights.

41 868 F.2d at 1342. *See also* Melley, *The Stretching of Civil Rico: Pro-Life Demonstrators are Racketeers?*, 56 UMKC L. REV. 287 (1988), which concludes that *McMonagle* is contrary to congressional intent.

RICO, the Sherman Act, and state trespass and contract law.[42] The RICO claim was grounded in the Hobbs Act[43] definition of a pattern of extortionate acts.[44] The District Court set aside the jury's punitive damage award and invoked the unclean hands doctrine to deny injunctive relief under RICO, the Sherman Act, and state contract law.[45] The District Court granted injunctive relief as to the trespass claim.[46] The court did let stand approximately $43,000 in compensatory damages awarded under the RICO and the state trespass law counts.[47] Both parties appealed.[48]

The Court of Appeals, in upholding the RICO damage award, was careful not to suggest that the decision would chill free speech under the first amendment.[49] The court found, instead, that the conviction under RICO was reasonable because it was based on destruction of the center's property and medical equipment.[50] The court rejected the defendant's argument that RICO could not be invoked since the plaintiff did not suffer a compensable, "competitive" injury.[51] The court held that the damage to the center's property was sufficient to constitute racketeering injury.[52] The court also found the Hobbs Act applicable despite the defendant's argument that it is limited to situations where there is evidence of an economic motive.[53] The court relied on substantial precedent in holding that the Hobbs Act applied in this case despite the evidence of a political, non-economic motive.[54]

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42 *McMonagle*, 868 F.2d at 1345 (here again a federal court was asked to adjudicate non-federal claims).

43 The Hobbs Act defines extortionate acts as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951 (1988).

44 *McMonagle*, 868 F.2d at 1348.

45 *Id.* at 1347.

46 *Id.*

47 *Id.*

48 *Id.* at 1348.

49 *Id.*

50 *Id.* at 1349.

51 *Id.* (citing *Sedima*, 473 U.S. at 497 n.15.).

52 *Id.*

53 *Id.* at 1350.

54 *Id.* (citing United States v. Cenilli, 603 F.2d 415, 420 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); United States v. Starks, 515 F.2d 112, 124 (3rd Cir. 1975); United States v. Anderson, 716 F.2d 446 (7th Cir. 1983)).

RICO has been applied in other political contexts[55] including the areas of political terrorism and obscenity.[56] Commentators have warned that further abuse of RICO could result in additional threats to free speech and other civil liberties.[57] Since RICO is now perceived as a threat to civil liberties, many in the judiciary and the Congress favor rewriting the statute.[58]

C. The *Sedima* Decision

The *McMonagle* decision arguably speaks for the failure of the Court in *Sedima, S.P.R.L. v. Imrex Co.*[59] to rein in RICO. The *Sedima* Court was presented with a golden opportunity to limit the reach of RICO by clarifying the pattern requirement.[60] The Court made it very clear, however, that if any changes were to be made to RICO's statutory language, Congress, not the judiciary, should enact them.[61]

In *Sedima*, petitioner, Sedima, a Belgian corporation, brought a civil RICO action arising out of a joint venture with respondent Imrex to supply electronic components to another Belgian corporation.[62] Under their agreement, Sedima and Imrex were to split the proceeds of the venture. Sedima launched the suit when it became convinced that Imrex was misappropriat-

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55 *See* Avirgan v. Hull, 691 F. Supp. 1357 (S.D. Fla. 1988); *see also supra* note 7. In this case, reporters brought a civil RICO action after an explosion at a press conference held by a Nicaraguan opposition leader. The action was dismissed after Judge James Lawrence King found that plaintiffs had failed to substantiate their theory that Oliver North, Richard Secord, and others were participants in a conspiracy responsible for the bombing which killed 9 people and injured 17 others including Avirgan. *Id.* The Christic Institute, which brought the suit on behalf of Avirgan, was later sanctioned $1 million under Rule 11 of the Federal Rules of Civil Procedure for initiating a frivolous suit. *See* 705 F. Supp. 1544 (S.D. Fla. 1989); *order clarified*, 125 F.R.D. 189 (S.D. Fla. 1989). *See also* Penthouse Int'l Ltd. v. American Family Ass'n of Fla., Inc., No. 89-2526 (D. Fla. filed Nov. 14, 1989); Walden Book Company, Inc. v. American Family Ass'n of Fla., Inc., No. 89-2426 (D. Fla. filed Oct. 31, 1989). In these suits, defendants are charged with committing extortionate acts under RICO for threatening to libel the publications as obscene.

56 *See supra* note 55.

57 *See* Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805 (1990). Califa suggests that RICO is a tangible threat to first amendment freedoms.

58 *Id.* at 846-50.

59 473 U.S. 479 (1985).

60 *Id.*

61 *Id.* at 499.

62 *Id.* at 483-84.

ing for itself proceeds belonging to Sedima.[63] The complaint alleged both RICO and state common law claims.[64] The RICO claims were based on conspiracy and the mail and wire fraud predicate acts.[65] Not surprisingly, Sedima's complaint asked for treble damages and attorneys costs.[66]

The United States District Court for the Eastern District of New York and the Second Circuit Court of Appeals attempted to use this case to place restraints on RICO.[67] First, the District Court held that for a racketeering injury to exist, it must be distinct from the "direct injury" which the predicate acts caused.[68] Since the court found that no "RICO-type" injury existed apart from the direct injury, or the loss of proceeds, it dismissed the RICO claims.[69] Next, the Court of Appeals[70] affirmed the finding that Sedima failed to state a specific racketeering injury.[71] In addition, the Second Circuit held that Sedima failed to prove that the defendants had been criminally convicted under the mail and wire fraud acts.[72] The Supreme Court feared that failure to grant certiorari in this case would result in additional confusion among lower courts concerning the breadth of RICO and the meaning of the pattern requirement.[73]

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63 *Id.* at 484.

64 *Id.*

65 *Id.* (citing 18 U.S.C. §§ 1341, 1343, 1961(1)(B), 1962(c)).

66 *Id.*

67 *Id.* at 484-85.

68 *Id.* at 484 (citing 574 F. Supp. 963 (E.D.N.Y. 1983)).

69 *Id.*

70 *See* 741 F.2d 482 (2nd Cir. 1984).

71 *Sedima*, 473 U.S. at 484-85.

72 *Id.* at 485.

73 *Id.* at 484-86. The Supreme Court noted that a divided panel of the Second Circuit had decided *Sedima*. In addition, the day following that decision, another divided panel of the Second Circuit decided Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2nd Cir. 1984). This case suggests, as in *Sedima*, the need for a separate and distinct racketeering injury. The day following the *Bankers Trust* decision, another divided panel of the Second Circuit decided Fuman v. Cirrito, 741 F.2d 524 (2nd Cir. 1984), again finding the need for a separate racketeering injury, yet criticizing the *Sedima* and *Bankers Trust* decisions.

The Supreme Court also noted the confusion in other circuits. In the Eighth Circuit, one decision, Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408 (1984), managed to state that its holding was contrary to *Sedima*, consistent though broader than *Bankers Trust*, although holding, as both *Sedima* and *Bankers Trust* did, that a separate racketeering injury was required. The *Alexander Grant* court even more unbelievably reaffirmed a prior decision it had rendered, Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd in part and rev'd in part*, 710 F.2d 1361 (1983) (en

The Supreme Court began its reasoning by focusing on the treble damages provisions of RICO which the House of Representatives had added to the original Senate bill establishing RICO.[74] The Court relied on the remarks of the Senate sponsor of the RICO statute, Senator McClellan, in support of the House amendment authorizing treble damages, as evidence of the wide Congressional support for such a broad and powerful remedy.[75] The Court cited the oft-quoted language that RICO should be "liberally construed to effectuate its remedial purposes."[76] Finally, the Court found no support in the statute's legislative history for the requirements of a prior criminal conviction or a separate racketeering injury.[77]

Although the Supreme Court purportedly rejected the narrow interpretations of RICO posited in the lower courts, the Court's reasoning does not consistently hold to the opposite view urging a liberal approach.[78] In particular, footnote 14[79] of the majority opinion seems, oddly enough, to offer support for the lower courts' restrictive interpretations of RICO.[80] Footnote 14

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banc), *cert. denied*, 464 U.S. 1008 (1983), which had *rejected* the requirement of a distinct competitive injury.

The Supreme Court noted that the Fifth and Seventh Circuits had dismissed the Second Circuit's interpretations in *Sedima* and *Bankers Trust*. *See* Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd* 473 U.S. 606 (1985) (holding that *Sedima* revived the discredited theory that defendants in a civil RICO action be required to be involved in organized crime); *see also* Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984).

74 *Sedima*, 473 U.S. at 486-88. *See also Hearings on S.30. Before Subcomm. No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess., 520 (1970); 116 CONG. REC. 35295, 35363-64 (1970).

75 *Sedima*, 473 U.S. at 488 (citing remarks of Senator McClellan, sponsor of S.30). Senator McClellan stated that treble damages would be "a major new tool in extirpating the baneful influence of organized crime in our economic life." *Id. See also* 116 CONG. REC. 25190 (1970). The Court unfortunately failed to recognize that Senator McClellan's endorsement of the House amendment was limited to use of the remedy in the organized crime context.

76 *Sedima*, 473 U.S. at 498. *See also id.* at 497 (the Court states that "RICO is to be read broadly" (citing U.S. v. Turkette, 452 U.S. 576 (1981)).

77 *Id.* at 488, 495.

78 *See id.* at 500. "We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *See also id.* at 499, "Instead of being used against mobsters and organized criminals, [RICO] has become a tool for everyday fraud cases."

79 *Id.* at 496 n.14.

80 *See* Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 38 (3d Cir. 1987) (footnote 14 "has been widely viewed as a signal to the federal courts to

cautions that while section 1961 of RICO requires at least two racketeering acts, it does not necessarily follow that two acts alone form a pattern.[81] The Court reasoned that RICO's legislative history requires a showing of continuous and related acts to form a pattern.[82] The Court, in effect, warned prospective RICO plaintiffs that their RICO claims will be dismissed if they can allege only isolated or sporadically-related acts.[83] This is hardly the reasoning that one would expect from a Court which was simultaneously refusing to limit RICO's scope.

D. The *H.J.* Decision

The inconsistency between the *Sedima* holding and footnote 14 fueled the post-*Sedima* debate which ultimately led to another watershed decision by the Supreme Court in *H.J. Inc., v. Northwestern Bell Telephone Co.*[84] In this case, customers of Northwestern Bell filed a class action suit against the corporation, its officers, employees, and individuals employed by the Minnesota Public Utilities Commission (MPUC).[85] The plaintiffs alleged violations of section 1962(a), (b), (c) and (d) of RICO and sought injunctive relief and treble damages.[86] The complaint alleged that MPUC was unduly influenced in violation of Minnesota's bribery statute by officers of Northwestern Bell resulting in the approval of unfair and unreasonable rates.[87] In addition, the RICO claims alleged a pattern of racketeering based on the predicate act of bribery.[88]

The District Court dismissed the complaint.[89] The court adopted a restrictive test for interpreting a pattern of racketeering activity similar to that followed by other lower courts subsequent to *Sedima.*[90] The District Court, and later the Court of

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fashion a limiting construction of RICO around the pattern requirement"). *See also* Comment, 19 SETON HALL L. REV. 73, 83; N.J.L.J., March 1, 1990, at 8.

81 *Sedima*, 473 U.S. at 496.

82 *Id.*

83 *Id.*

84 492 U.S. 229 (1989).

85 *Id.* at 233.

86 *Id.*

87 *Id.*

88 *Id.* (citing 18 U.S.C. § 1962).

89 *H.J.*, 492 U.S. at 234; *see* 648 F. Supp. 419 (D. Minn. 1986); *see also* Fed. R. Civ. P. 12(b)(6).

90 *H.J.*, 492 U.S. at 234-35 (citing Superior Oil Co. v. Fulmer, 785 F.2d 252

Appeals, found only a single illegal scheme to exist. This was held insufficient to constitute a pattern.[91]

In its reasoning, the Supreme Court expressed frustration, not surprisingly, that its *Sedima* decision, coupled with Congress' apparent inability to act on proposed RICO amendments, had resulted in a failure by the lower courts to define clearly the constituent elements of a pattern.[92] Despite this understandable frustration, the *H.J.* decision fails to address or correct the confusion and inconsistencies causing the Court's angst. In reversing the courts below, the Court does place itself squarely within that school of thought envisioning a more expansive interpretation of RICO.[93] In holding to that position, however, the Court undercuts its decision by again advancing inconsistent messages and confusing directives to its readers and more importantly to the lower courts.[94]

For example, the Court relies on footnote 14 of *Sedima* to explain that two predicate acts alone may not be sufficient to meet the pattern requirement.[95] However, the Court simultaneously asserts that Congress clearly envisioned situations where two predicate acts without more would be sufficient to invoke RICO's protections.[96] Furthermore, the holding offers what the Court considers "a less inflexible approach that seems to us to derive from a common-sense, everyday understanding of RICO's

(1986); Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985)).

91 *H.J.*, 492 U.S. at 234-35; *see* 829 F.2d 648, 650 (8th Cir. 1987).

92 *H.J.*, 492 U.S. at 236. "Congress has done nothing . . . to illuminate RICO's key requirement of a pattern of racketeering; and as the plethora of different views expressed by the Court of Appeals since *Sedima* demonstrates . . . developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task." *Id.*

93 *Id.* at 236-37. "In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also 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." *Id.* at 237.

94 *See infra* text accompanying notes 95-100.

95 *H.J.*, 492 U.S. at 237-38. "It is not the number of predicates but the relationship they bear to each or to some external organizing principle that renders them 'ordered' or 'arranged.' " *Id.* at 238.

96 *Id.* at 237. "Congress envisioned circumstances in which no more than two predicates would be necessary . . . otherwise it would have drawn a narrower boundary to RICO liability, requiring proof of a greater number of predicates." *Id.*

language and Congress' gloss on it. What a plaintiff or prosecutor must prove is continuity of racketeering activity or its threat, *simpliciter*."[97] As if this were not sufficiently vague, the Court then explains that this "common-sense" approach may be met "in a variety of ways."[98] This is hardly the kind of concrete direction for which the lower courts are begging.[99] Indeed, the Court admits the *H.J.* decision decides little if anything when it concedes that "the development of these concepts must await future cases."[100]

The concurring opinion authored by Justice Scalia warns, however, that the next RICO case to come before the Supreme Court may be the last.[101] Scalia submits that the majority's guidance to the lower courts is "as helpful to the conduct of their affairs as 'life is a fountain.' "[102] Scalia finds the Court's denunciation of the Eighth Circuit's multiple scheme requirement unauthoritative and non-definitional, thereby rendering it nearly impossible for a future defendant to know when his actions may fall within the scope of RICO.[103] The result, Scalia concludes, is a statute which is impermissibly vague and therefore vulnerable to constitutional challenge.[104]

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97 *Id.* at 241.

98 *Id.*

99 *See id.* at 249. The majority opinion thrives on ambiguities. For example, the Court states, "[c]ontinuity is both a closed and open-ended concept . . . [i]t is . . . centrally a temporal concept." *Id.* at 241-42. In addition, the Court resigns itself to a vague "I'll know a valid RICO claim when I see it" analysis reminiscent of Justice Potter Stewart in Jacobilus v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), *see* similar analogy in Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (Stevens, J., dissenting), in announcing a preference "to deal with this issue in the context of concrete factual situations presented for decision." *H.J.*, 492 U.S. at 242.

100 *Id.* at 243.

101 *Id.* at 251-56.

102 *Id.* at 252, where Justice Scalia also remarks that "I doubt that the lower courts will find the Court's instructions much more helpful than telling them to look for a 'pattern' which is what the statute already says." *Id.*

103 *Id.*

104 *Id.* at 252-56. Justice Scalia writes that vagueness is "bad enough with respect to any statute, but it is intolerable with respect to RICO." *Id.* at 255. He concludes with a now famous unveiled threat: "No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in this land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented." *Id.* at 255-56.

E. *The Vagueness Dilemma*

While it is true that the judiciary has attempted at least procedurally[105] to rein in RICO, that effort has been, at best, piecemeal and, at worst, wholly unsuccessful in removing the threat of a credible constitutional challenge to the statute, of which Justice Scalia has artfully forewarned. While it also may be true that Congress has the predominant role to play today in clarifying RICO[106], with further stalemate in Congress possible, the challenge to save the statute in the courts from constitutional attack has become even more urgent. This is not to say that striking down RICO on vagueness grounds would be an easy task to accomplish. The Supreme Court, in fact, recently declined such a challenge.[107] But, it may only be a short time before the critics, convinced of the statute's unconstitutional vagueness,[108]present the Court with a particular set of facts which will enable Justice Scalia and his supporters to ring the final death knell of RICO.

In a case or controversy, what factor or factors must exist for RICO opponents to provide the Supreme Court with an opportunity to strike down RICO on vagueness grounds? In general, the vagueness doctrine requires that a statute place persons on notice as to prohibited conduct and protect against arbitrary and

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105 *See e.g.*, Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143 (1987) (RICO claims are barred by a four-year statute of limitations); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (RICO claims in securities fraud case should be resolved by arbitration).

106 *See supra* text accompanying note 61; *see also H.J.*, 492 U.S. at 249. "RICO may be a poorly drafted statute; but rewriting it is a job for Congress." *Id.*

107 *See* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989). In this case, a criminal defendant had argued that the state obscenity predicate was void for vagueness. A 6-3 majority of the Supreme Court ruled that although the underlying predicate would determine if the Indiana state RICO statute itself were vague, in this case, the Court found that the language of the obscenity statute passed the void for vagueness test; *see also*, N.J.L.J., March 1, 1990, at 20, "A more intriguing question than whether RICO in fact is unconstitutionally vague is whether the courts will be willing to so hold" (citing Newmeyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 398 (6th Cir. 1989) (constitutionality of RICO remanded to develop record below); Minpeco, S.A. v. Hunt, 724 F. Supp. 259, 260 (S.D.N.Y. 1989) (constitutional challenge rejected because not ripe); Orchard Hills Co-op Apts. v. Germania Federal S&L, 720 F. Supp. 127, 132 (C.D. Ill. 1989) (constitutionality of RICO not addressed because Justice Department did not intervene).

108 Freeman & McSlarrow, *RICO and the Due Process "Void for Vagueness" Test*, 45 BUS. LAW. 1003 (May 1990).

capricious enforcement.[109] If notice or sufficiently specific standards for enforcement are lacking, the statute falls under the due process clause.[110] While it is clear that RICO may indeed fall under this legal framework, recent court decisions reflect a hesitancy to effectuate its demise.[111] The tension in these decisions lies between a statute which may be impermissibly vague on its face, or in application, and a statute which has undeniably aided law enforcement in the eradication of organized crime.[112] Therefore, recognizing the cogency of the vagueness challenge, courts have been forced to grasp at procedural devices, i.e., the ripeness doctrine, in an attempt to save RICO.[113]

IV. Congressional Proposals

With virtual judicial overkill threatening the very existence of RICO, it is necessary to analyze the various RICO reform proposals before Congress with a critical eye to determining if they address the concerns of the judiciary and also produce good policy. The Supreme Court in both *Sedima*[114] and *H.J.*[115] made it clear that the challenge to reform RICO is for Congress and not the judiciary. Indeed, Congress has watched with concern for several years as the statute has been abused in the courts and has attempted in several recent legislative sessions to amend RICO.[116] Members of Congress sitting on committees with jurisdiction over RICO are largely convinced that the intent of the original statute was narrow (eradicate organized crime) and that recent case law in the courts has neglected to follow that mandate.[117] This traditional interpretation of RICO underlies the ef-

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109 *See* NOWAK, CONSTITUTIONAL LAW, 846-47 (3d ed. 1986).

110 *Id.*

111 *See supra* note 107.

112 *Id.*

113 *Id.*

114 *See supra* text accompanying notes 61, 106.

115 *Id.*

116 S. REP. No. 269, 101st Cong., 2d Sess. 2. "[T]he orderly development of the law has been interrupted by the filing of inappropriate actions by private parties under civil RICO. These actions include imaginative attempts to use RICO's treble damages remedy to leverage more favorable settlements in ordinary, even familial disputes." *See also id.* at 4-5 for a discussion of the unsuccessful attempts by Congress to amend RICO since 1985.

117 *Id.* "State law and law under Federal statutes are in danger of being usurped and made obsolete by the misuse of civil RICO . . . RICO's original purpose of

forts in the most recently completed Congressional term to amend the statute.[118]

A. *Senate Bill 438 ("S. 438")*

On February 23, 1989, Senators DeConcini, Hatch, Symms, and Heflin introduced S. 438 to reform RICO.[119] After holding a hearing on June 7, 1989, the Senate Judiciary Committee passed the legislation by a vote of 12-2 on February 1, 1990.[120] While the 101st Congress adjourned in late October 1990 without taking final action on the measure, the 102nd Congress will undoubtedly use S. 438 as a model to revisit the issue of RICO reform.[121]

In particular, S. 438 seeks to restrain RICO by making the statute available only to government agencies and private citizens who have been victimized by organized criminal conduct.[122] While the Senate Judiciary Committee determined that RICO should not be amended to "detreble" damage awards for govern-

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ridding legitimate business and labor organizations of the insidious encroachment of organized crime is hampered. RICO was meant to be an extraordinary Federal remedy for particularly offensive activities that harmed all of society." *See* Star Ledger, June 24, 1990, at 47, where Representative William Hughes, Chairman of the House Crime Subcommittee of the 101st Congress, and sponsor of H.R. 5111, RICO reform legislation, states, "I'm very concerned about the proliferation of civil RICO cases which involve types of conduct that are not ordinarily thought of as racketeering or oganized crime." *See also* N.Y. TIMES, Sept. 14, 1990, at B18, remarks of Representative Rick Boucher, co-sponsor of H.R. 5111, "Civil RICO has been one of the most badly abused of Federal statutes . . . It is so broadly drafted that it could apply to virtually any commercial dispute." *But see* Russello v. United States, 464 U.S. 16 (1983), where the Court held that RICO is to be interpreted broadly.

118 S. REP. No. 269 at 6. "[S]ome ordinary civil disputes, including commercial and contract cases, not involving a pattern of racketeering or criminal behavior, have been filed under civil RICO solely to leverage a more favorable settlement from the defendant." *But see id.* at 5 which notes certain politically organized groups, e.g. Ralph Nader-backed pro-consumer organizations, who are opposed to RICO reform legislation because they espouse a liberal interpretation of the statute. *See also* 48 CONG. Q. 1970 (June 23, 1990) for a discussion of the opposition of consumer and public interest groups to business-backed RICO reform legislation.

119 S. REP. No. 269 at 4.

120 *Id.* at 4-5. At the June 7, 1989, hearing, the Committee had the benefit of the views of groups in favor of S.438, including the Department of Justice, the American Bar Association, a coalition of business groups, as well as those in opposition to the bill, including Ralph Nader and organizations supporting plaintiffs' lawyers.

121 S. 438 will be reintroduced in the 102nd Congress with a new Senate number.

122 S. REP. No. 269 at 5.

mental agencies,[123] the centerpiece of S. 438 is the decision to detreble damage awards for civil litigants unless they can prove a prior criminal conviction upon which the civil suit is based.[124] For certain plaintiffs, the bill would allow recovery of actual damages, costs, and reasonable attorneys fees, as well as punitive damages.[125] The Judiciary Committee, nevertheless, limited the recovery of punitive damages to situations where the plaintiff can prove by clear and convincing evidence that the defendant's actions were intentionally malicious.[126] In addition, the Judiciary Committee placed further obstacles to punitive damage recovery by requiring federal judges to consider evidence respecting punitive damages only after a decision on liability has been rendered.[127]

The bill utilizes other procedural devices to block unwarranted suits. First, the bill establishes a six-year statute of limitations for actions brought by government agencies.[128] All other actions would need to be filed within four years after the cause of action accrued[129] or two years after the defendant was criminally convicted.[130] Second, the bill requires a RICO plaintiff to plead with particularity the facts supporting the claim regardless of whether fraud is involved.[131] Third, the bill provides the federal courts with exclusive jurisdiction to hear RICO cases and additional authority to remand to state courts state law claims which have been opportunistically pleaded with the touchstone term RICO.[132] Lastly, the bill gives defendants the opportunity to interpose a new statutory affirmative defense based upon good faith reliance on a bona fide interpretation of the law by govern-

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123 *Id.* "There are few abuses of civil RICO by governments because of the presence of public opinion against abusive government suits . . . [G]overnments have successfully and responsibly used RICO."

124 *Id.* at 5-7 (S. 438, 101st Cong., 2d Sess., § 5(c)(5) (1990)).

125 *Id.* at 6 (S. 438, § 5(c)(2)). Under the bill, specific plaintiffs able to recover more than an award of actual damages include units of local government and certain natural persons and organizations.

126 *Id.* (S. 438 § 5(c)(2)(C)).

127 *Id.* at 6, 8 (S. 438 § 5(c)(4)).

128 *Id.* at 8 (S. 438 § 5(c)(6)).

129 *Id.*

130 *Id.*

131 *Id.* at 9 (S. 438 § 5(c)(8)); *see also* Fed. R. Civ. P. 9.

132 S. REP. No. 269 at 10 (S. 438 § 5(c)(8)).

ment officials.[133]

Two substantive provisions of the legislation also deserve mention. First, the bill prohibits non-violent public speech from constituting racketeering activity.[134] Second, and arguably inconsistent with the objectives of the legislation, the bill adds a number of predicate offenses to section 1961(1) designed "to combat patterns of terrorism, organized crime, illegal drug trafficking, and white collar crime."[135]

B. *House Bill 5111 ("H.R. 5111")*

Representative William Hughes, Chairman of the House Crime Subcomittee, introduced H.R. 5111[136] on June 21, 1990. On September 18, 1990, the House Judiciary Committee passed H.R. 5111 by voice vote.[137] The House bill does not curtail treble damage awards as greatly as S. 438 does, and for that reason it is considered less onerous.[138]

The House bill attempts to control RICO by clarifying the definition of a pattern of racketeering activity.[139] The bill amends section 1961 by adopting the definition of pattern and the concept of continuity proposed in *H.J.*[140] Under the bill, a pattern of racketeering acts must be "related to one another or to a common organizing principle and constitute or pose a threat of continuing racketeering."[141] The bill makes it clear, however,

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133 *Id.* at 8 (S. 438 § 5(c)(7)).

134 *Id.* at 7, 17 (S. 438 § 3); *see also id.* at 28-9 (additional views of Senator Humphrey).

135 *Id.* at 9-10 (S. 438 § 2).

136 H.R. 5111, 101st Cong., 2d Sess. (1990). Representatives McCollum, Boucher, Mazzoli, Feighan, Smith of Florida, Gekas, and DeWine joined Hughes in introducing H.R. 5111. Representative Boucher was the sponsor of an earlier bill, *see* H.R. 1046, 101st Cong., 1st Sess. (1989), which mirrored S. 438 but which the House Judiciary Committee did not consider. H.R. 5111 and H.R. 1046/S. 438 are similar in many respects as *infra* text accompanying notes 138-48 indicates. In the 102nd Congress, H.R. 5111 has been reintroduced by Representative Hughes as H.R. 1717 and referred to the House Intellectual Property and Judicial Administration Subcommittee which Hughes now chairs.

137 48 CONG. Q. 1970 (June 23, 1990). In addition, the House Judiciary Committee approved H.R. 1717, the reintroduced version of H.R. 5111 in the 102nd Congress, on July 30, 1991. 49 CONG. Q. 2172 (Aug. 3, 1991).

138 48 CONG. Q. 1970.

139 *See* H.R. 5111 § 2.

140 *Id.*; *see also H.J.*, 492 U.S. at 238, 241-42.

141 *Id.*; *see also* H.R. 5111 § 2.

that "two or more acts which are part of a single episode constitute a single act" under RICO.[142]

Another central component of the bill is the "judicial gatekeeper" provision.[143] This section of the bill grants federal district judges the discretionary authority upon a motion of the defendant or *sua sponte* to dismiss a RICO claim unless the defendant has been convicted of a predicate act, the "magnitude or significance of the injury" claimed can be attributed to the actions of the defendant, the defendant played a major role in the criminal conduct that caused plaintiff injury, and the "remedy is needed to deter future egregious criminal conduct."[144] A related provision gives the federal courts broad authority to dismiss cases that do not serve the public interest.[145]

H.R. 5111 is similar in several respects to S. 438. First, H.R. 5111 requires particularity of pleadings.[146] Second, it grants exclusive jurisdiction over RICO claims to the federal courts.[147] Finally, it prevents political protestors from suffering the racketeering label.[148]

V. Analysis and Conclusion

RICO is undeniably worth saving.[149] Despite its tortured history, RICO has given government agencies and private litigants the statutory tools needed to combat criminal activity, whether that activity is clearly "organized" or only subtly so.[150] Many United States Attorneys and federal judges hail the statute as a necessary ingredient in the war against crime in an increasingly criminal society.[151]

Many of the complimentary remarks about RICO end when

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142 *See* H.R. 5111 § 2; *see also*, Hughes, *RICO Reform: How Much Is Needed*, 43 VAND. L. REV. 639, 647 (1990). In this article, Representative Hughes notes that the definition of "single act" in H.R. 5111 is derived from the definition in Lipin Enterprises v. Lee, 803 F.2d 322, 324 (7th Cir. 1986).

143 H.R. 5111 § 5.

144 *Id.*

145 *Id.* § 3.

146 *Id.* § 4.

147 *Id.* § 7.

148 *Id.* § 8.

149 *See* Hughes, *supra* note 142.

150 *Id.*

151 *Id.*

discussion of its civil applications is raised. While it is debatable whether the original statute was meant to be applied solely against organized crime or "liberally construed to effectuate its remedial purposes," it cannot be said that civil RICO has not been abused.[152] Aggressive plaintiffs' attorneys have seized RICO's overly generous damages provisions and created a statutory monster which has overburdened the federal courts, thus, preventing judges from deciding valid claims and effectuating justice.[153]

Lawyers are not the only culprits. The judiciary cannot go uncriticized. Despite good intentions, attempts by the Supreme Court to clarify RICO in *Sedima* and *H.J.* have proven disasterous.[154] The Circuit Courts are more confused than ever about the scope of RICO and the definition of pattern, continuity and other vexatious terms.[155] The result has been to encourage suits having nothing to do with racketeering.[156] In the process, our federal system has been weakened.

Failure of the courts to control RICO has led to the abridgement of civil liberties.[157] Moreover, failure to define the statute has resulted in a legitimate constitutional challenge to the statute on vagueness grounds.[158] With RICO subject to a possible constitutional challenge, the Supreme Court has decided that the best approach to take is no approach. The message: let Congress rewrite RICO and resolve the mess *it* created.

To be sure, Congress has grappled with amendments to RICO for more than five years. Despite divergent political interests, the 101st Congress showed signs of delivering RICO reform in S. 438 and H.R. 5111 only to adjourn again without taking final action. Perhaps action will finally be taken in the 102nd Congress.

Ironically, in many ways, both H.R. 5111 and S. 438 have proposed that the RICO problem be returned to the courts with instructions to dismiss certain RICO claims on procedural

152 *See supra* text accompanying notes 23-58.
153 *Id.*
154 *See supra* text accompanying notes 59-113.
155 *See id.*
156 *See supra* text accompanying notes 23-58.
157 *See supra* text accompanying notes 40-58.
158 *See supra* text accompanying notes 101-13.

grounds.[159] While these proposals are well-intentioned, they do not necessarily require Congressional action because the liberal Federal Rules of Civil Procedure already give judges wide latitude to dispose of RICO claims on purely procedural grounds.[160] In recent years, the federal courts have been invoking standing and statute of limitations requirements to dismiss RICO claims.[161] Even with this progress, Justice Scalia's warning that RICO may not survive a vagueness challenge has continued to hover over Congressional deliberations.[162]

Therefore, the critical question is whether the substantive provisions of S. 438 and H.R. 5111 give RICO the strength to survive a constitutional attack. The provision in S. 438 to require a prior criminal conviction before civil litigants could invoke the statute and obtain treble damages would go a long way toward clarifying the intent of RICO as a device for government agencies and private litigants to deter organized crime. But clarifying the intent of the statute is not sufficient. S. 438 accomplishes little to redefine patently vague statutory terms such as pattern and continuity which have dogged the courts in recent years. Even more disturbingly, the Senate bill adds a number of predicate acts to the statute.[163] If the goal is to rein in RICO, this is not the time to broaden the scope of the monster.

Representative Hughes, the prime sponsor of H.R. 5111, should be commended for focusing the efforts of the House Judiciary Committee on the statute's vague terminology and on Justice Scalia's wake-up call in *H.J.*[164] While only a specific case or controversy would determine if the House bill's new definition of pattern would withstand constitutional attack, it should be remembered that H.R. 5111 adopted the new definition from *H.J.*'s majority opinion which ignited Scalia's blistering attack on RICO's vagueness.[165] Therefore, as the *H.J.* majority opinion failed to remove the vagueness stigma from RICO, ultimately so does H.R. 5111. The meaning of such phrases as "common or-

159 *See supra* text accompanying notes 119-48.
160 *See supra* text accompanying notes 119-48; *see also* FED. R. CIV. P. 11, 12, 56.
161 *See supra* note 105.
162 *See supra* text accompanying notes 114-48.
163 *See supra* text accompanying note 135.
164 *See* Hughes, *supra* note 142.
165 *See supra* text accompanying notes 136-48.

ganizing principle," "threat of continuing activity" and "single episode" remain unclear at best.[166]

While some commentators have suggested that the best approach would be the repeal of RICO,[167] I join others who find this view wholly irresponsible.[168] The challenge for the 102nd Congress is to take the best S. 438 and H.R. 5111 have to offer and to write a bill which clarifies beyond doubt the meaning of the statute's vaguely constructed terms.

And quickly. The race against time began with Scalia's concurring opinion in *H.J.* If the legislative deadlock is not broken soon, the statute's supporters may find themselves mourning the death of RICO in the courts instead of celebrating its rebirth at a White House signing ceremony with sponsors of the Congressional amendments.

Christopher P. De Phillips

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166 *See supra* text accompanying notes 139-42.

167 *See* Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 802 (1990).

168 Hughes, *supra* note 142, at 642. "Since its enactment, RICO has been an effective tool for law enforcement."