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Authority to Bring Private Treble-Damage Suits under RICO Should be Reformed, Hearings on RICO, July 31, 1985

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UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

Hearings on Civil RICO

July 31, 1985

"The Authority To Bring
Private Treble-Damage Suits
Under 'RICO' Should Be Reformed"

APPENDIX TO STATEMENT OF
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THE AUTHORITY TO BRING PRIVATE TREBLE-DAMAGE SUITS UNDER "RICO" SHOULD BE REFORMED

This memorandum details some of the serious problems that have arisen with the authorization for private treble-damage suits under the Racketeer Influenced and Corrupt Organizations ("RICO") title of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 et seq. It explains why reform of those provisions is necessary now, and why the amendment of the private civil action section to establish a prior-criminal-conviction requirement is the best solution available.

I. INTRODUCTION

With little discussion, the House of Representatives in 1970 added the provision for private civil suits to a Senate-passed bill that was primarily designed to give the Department of Justice new criminal enforcement tools to attack "the mob." The Senate had drafted a bill with broad language in order to give the Justice Department adequate latitude in prosecuting persistent offenders, even if they were not members of traditional criminal syndicates. It was expected, however, that the Justice Department, in exercising its enforcement discretion, would be faithful to the expressed congressional purpose to direct the new criminal sanctions against "organized crime," as experienced prosecutors understand that term. The Justice Department, in fact, has adopted formal guidelines to avoid abusive or excessive use of the broad language of RICO,

and has exercised discretion in selecting cases for prosecution under RICO. See pp. 46-50, infra.

The provision for private civil suits was added very late in the legislative process and was intended to have the same focus: protecting legitimate businesses from incursions by professional criminals. Congress neglected, however, to include any specific mechanism to confine private civil suits to cases involving the activities of "organized crime."

Private claimants invoking the broadly phrased statute have not shown any of the discipline exercised by the Justice Department in its selective use of this powerful new weapon. As a result, inventive private lawyers seeking treble damages are successfully arguing for the most sweeping interpretation of RICO's broad language and are attempting to apply RICO in contexts far removed from those conceived by the statute's supporters. RICO claims are now added as a matter of course in virtually all cases challenging securities transactions or alleging some type of commercial fraud. RICO also crops up in landlord-tenant and real estate disputes, attorney-client conflicts, and even divorce battles. By contrast, only a tiny handful of the hundreds of cases alleging private civil claims under RICO involve either the people or the conduct that supporters of the bill sought to attack.

Without any of the restraint and responsibility that governs the decisions of public prosecutors, private lawyers are invoking civil RICO on behalf of private clients

to level charges of "racketeering" against reputable businessmen and professionals such as investment bankers, brokers, and accountants. Although RICO was intended to protect legitimate business, the statute is now being used almost exclusively to attack established businesses and firms. The threat to bring a "racketeering" charge sometimes coerces settlements before the filing of a RICO complaint, while the actual filing of a RICO complaint exposes businessmen to continuing embarrassment and expense.

The Supreme Court has now held that the courts do not have the authority to stop the misuse of civil RICO, and that only Congress may do so. In its recent decision in Sedima, S.P.R.L. v. Imrex Co., ___ U.S. ___, 53 U.S.L.W. 5034 (July 1, 1985) ("Sedima"), the Court unanimously recognized that RICO is being used in ways unintended by Congress, as a weapon against legitimate businessmen in ordinary commercial disputes. A bare majority of the Court, however, held that this unfortunate result "is inherent in the statute as written, and its correction must lie with Congress." 53 U.S.L.W. at 5039. Thus, the unintended targets of RICO actions have little or no hope of relief from the courts. The misuse repeatedly noted by commentators and courts alike, including now the United States Supreme Court, can only be eliminated by congressional action.

II. THE STRUCTURE OF THE RICO STATUTE PERMITS OVERLY BROAD USE BY PRIVATE PLAINTIFFS

The private civil RICO section is 18 U.S.C. § 1964(c). Under that provision, a person may press a civil RICO claim if he alleges that he was "injured in his business or property by reason of" the defendant's "pattern of racketeering activity." The plaintiff may recover treble damages as well as costs and attorney's fees. The private civil claim under RICO involves three main components.

A. Predicate Offenses: "Racketeering Activity"

Congress doubted that it could adequately define "organized crime" in a criminal statute in a way that would pass constitutional muster. It chose instead to focus on the types of conduct in which organized crime figures engage. The key to RICO coverage is an extensive list of "predicate" offenses that are defined as constituting "racketeering activity." 18 U.S.C. § 1961. These include a variety of violent crimes, such as murder, kidnapping, extortion, and arson -- crimes that one normally associates with organized crime. In addition, because of some indications from the SEC staff that organized crime figures were involved in trafficking in stolen or counterfeit securities and similar kinds of activity, the SEC asked the Senate to expand the list of predicate offenses in its bill to include mail fraud, wire fraud, and "fraud in the sale of securities." See p. 30, infra.

B. "Pattern" of Racketeering Activity

The commission of at least two predicate acts within a ten year period is defined to be a "pattern" of racketeering activity. The initial step in a plaintiff's civil RICO claim is to assert that a "person" -- including the whole spectrum of legitimate business corporations, associations, partnerships, and their executives -- committed two predicate acts within ten years and thus engaged in a "pattern of racketeering activity."

Unfortunately, this sweeping coverage makes virtually any businessman or business organization a potential target of a RICO claim. Since the two predicate offenses may not need to be separated in time or involve different transactions, a claimant may allege that a single commercial transaction that generates a dispute constitutes a "pattern of racketeering." For example, an investor may allege simply that a securities transaction consisting of two steps involved fraud. This allegation may make out a "pattern of racketeering activity" involving "fraud in the sale of securities." Similarly, a would-be RICO plaintiff may assert that two separate copies of a financial statement, bill, contract, advertisement or other document involved in an allegedly "fraudulent" transaction were sent through the mails. As Justice Marshall, writing for four Justices of the Supreme Court in the Sedima case, recognized, "the effects of making a mere two instances of mail or

wire fraud potentially actionable under civil RICO are staggering," 53 U.S.L.W. at 5040, because of the breadth of those statutory provisions.

C. "Enterprise" Requirement

RICO also requires that the person commit the predicate acts in a particular relationship to an "enterprise." Under the statute, it is unlawful to obtain any interest in an "enterprise" through a pattern of racketeering activity, to control an enterprise through such activity, or to conduct the affairs of an enterprise through racketeering activity. 18 U.S.C. § 1962. Depending on the facts, a plaintiff can easily satisfy the "enterprise" requirement in actions against legitimate businesses or businessmen by alleging that, for example, the defendant corporation or professional partnership is the "enterprise" that is conducting its affairs improperly.

III. THE LEGISLATIVE DEVELOPMENT OF CIVIL "RICO" SHOWS A PURPOSE TO PROTECT LEGITIMATE BUSINESSES

The bill that became the 1970 Organized Crime Control Act, including the RICO title, originated in the Senate. The Senate report stated unambiguously the objective of the legislation:

> "[T]he 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." S. Rep. No. 617, 91st Cong., 1st Sess. 2 (1969) (emphasis added).

In this vein, Senator McClellan, the bill's chief sponsor and a longtime foe of organized crime, focused his arguments for the bill on the insidious activities of "La Cosa Nostra." 116 Cong. Rec. 585-86 (1970). In particular, his sponsorship reflected awareness that, when "organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses." 115 Cong. Rec. 5874 (1969). The Senate wanted to provide a mechanism to respond to reports that "organized crime has begun to penetrate" some legitimate businesses, such as securities firms from which it was stealing securities. See S. Rep. No. 617, supra, at 77; 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan).

The House shared this concern about the infiltration of organized crime into businesses across the nation. Thus, when Congressman Poff, a leading proponent of the legislation, pointed to the takeover of a jukebox business by "a mafia boss," he illustrated the general understanding that RICO was meant to protect legitimate business people injured by organized crime. 116 Cong. Rec. 6709 (1970).

The Senate RICO bill had contained no provision for private civil suits when Senator McClellan introduced it, when the Judiciary Committee added the fraud predicates, or when the Senate initially passed the bill. A private civil remedy finally was added to the RICO legislation in the House Judiciary Committee at the urging of Representative Steiger, who

submitted the draft of the language that ultimately became law. In submitting the amendment, Representative Steiger explained that his proposal was designed to add a private remedy to help in the fight "to deal with organized crime." Organized Crime Control: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States, 91st Cong., 2d Sess. 519 (1970). He carefully emphasized his understanding that RICO was designed "to prevent and reverse the corrupt infiltration of legitimate commercial activities by ruthless organized criminals." Id. So as to leave no room to doubt that he expected that the new statute, including his civil damage remedy, would be directed against "ruthless, organized criminals," Representative Steiger described examples of penetration of legitimate businesses by various "families" of "La Cosa Nostra" -- the Mafia. Id. In the sparse debate on the civil damage provision when the bill reached the House floor, the Chairman of the House Judiciary Committee, Representative Celler, explained that the addition of a treble-damage remedy was to be one of the tools "designed to inhibit the infiltration of legitimate business by organized crime." 116 Cong. Rec. 35,196 (1970).

The bill returned to the Senate shortly before adjournment, and the Senate accepted the amended version without seeking a conference. In doing so, however, no one suggested that the focus of congressional concern --

protection of legitimate businessmen -- had shifted in the slightest. Indeed, Senator McClellan described the House amendments, including the addition of the civil provision, as "comparatively . . . minor changes." 116 Cong. Rec. 36,293 (1970). At no time did any supporter of the bill suggest that the private civil remedy was intended for use against legitimate business people, corporations, or partnerships of licensed professionals, or was to be used in commercial disputes having nothing whatever to do with the activities that were and are commonly recognized as "organized crime."

IV. THE USE OF THE PRIVATE CIVIL DAMAGE PROVISION HAS ACTUALLY UNDERMINED THE CONGRESSIONAL OBJECTIVE

In light of the unambiguous congressional focus, civil RICO actions should closely parallel criminal prosecutions. Instead, civil RICO is used almost exclusively in commercial disputes, against what Assistant Attorney General Stephen S. Trott, in testifying on RICO before this Committee on May 20, 1985, called "conduct bearing little resemblence to organized crime activity in the traditional sense." The statute is now being invoked in every kind of litigation where a litigant can possibly allege the predicate offense of "fraud". Virtually all of these claims are either covered by specific federal regulatory laws such as the securities laws or do not belong in the federal courts at all. In the vast majority of cases, civil RICO claims are being used as weapons against the very people Congress was seeking to protect: legitimate

business people. Not only have these developments distorted congressional expectations, but they also present widely recognized and increasing opportunities for abuse.

A. The Ability Of A Private Lawyer To Charge A Person With Criminal "Racketeering" Is Easily Abused

RICO is unprecedented in authorizing private lawyers who are representing purely private clients to invoke the judicial process by charging another private person with crimes. Under RICO, the private lawyer exercises power that normally is reserved to public officials and grand jurors: the power to lodge a formal accusation of crime. Those public officials and grand jurors, of course, have a duty of fairness and restraint in deciding whether to make that kind of accusation. As the Supreme Court once described the special responsibilities of prosecutors:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935).

A private lawyer, by contrast, owes allegiance to his client's private interest, not to a higher sense of justice. His interest is not in impartiality, but in partisan advocacy. He is his client's servant, not the servant of the

law. His client's interest is not that "justice" be done, but that he obtain money from the defendant.

Because of these fundamental differences, our system surrounds the exercise of prosecutorial power with many legal and ethical restrictions not applicable to the private attorney. The officials who exercise prosecutorial discretion are accountable to the public for their judgments. As a further shield against overzealousness, the Constitution interposes grand jurors who, like the prosecutor himself, are sworn to secrecy while the prosecutor is attempting to demonstrate that there is substantial evidence to justify a proposed criminal charge. None of these restrictions, however, applies to a private lawyer who is considering filing a civil lawsuit in order to promote his client's financial interests.

The private claimant's power to brand a businessman or firm a "racketeer" may cause almost as much irreversible injury to the legitimate businessman as may an unwarranted criminal charge. Business rivals may use this power to gain economic advantage without actually having to go beyond the threat to file a civil RICO suit. The people who are monitoring the actual use of civil RICO know that this is the reality, not mere speculation. As Justice Marshall noted in the Sedima decision: "[T]he defendant, facing a tremendous financial exposure in addition to the threat of being labelled a 'racketeer,' will have a strong interest in settling the dispute."

53 U.S.L.W. at 5041. Ironically, therefore, civil RICO creates an opportunity for civil claimants to engage in a form of extortion, even though the criminal features of the statute are geared to prevent similar exactions by organized crime figures.

Several recent RICO cases illustrate the full range of the distortion to which the present language of the civil RICO provision lends itself and the difficulties the courts are having in applying the statute sensibly. In at least two instances RICO has been invoked in religious squabbles, and the trial judges have struggled to make RICO inapplicable. In Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125 (D. Mass. 1982), the district court was faced with a claim brought by a disaffected former adherent of the Scientologists alleging fraudulent misrepresentations. The RICO claim in Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983), turned on a dispute about the proper succession to the "Skolyer Rebbe," a Chassidic Jewish leadership position. The plaintiffs invoked "mail fraud" and other predicate offenses based on alleged misrepresentations by the defendants about their right to administer the congregation.[1/]

the bizarre uses to which RICO may be put are not limited to religious disputes. RICO is being used as well in

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[1/] The district court dismissed the suit on the ground that the religious issues were non-justiciable. 566 F. Supp. at 558.

disputes between spouses and over inheritance. See Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law ("ABA RICO Task Force Report") 39 n.41 (1985). In another recent case, a RICO suit was filed against former Vice President Walter Mondale, the Democratic National Committee and several individual members of the DNC, alleging that the defendants offered political contributions to other Democratic candidates in exchange for promises not to oppose Reagan Administration policies. While the court dismissed the claim, it did so solely on the ground that the plaintiffs had failed to allege acts that fell within the predicate acts specified in the statute. Taylor v. Mondale, Civ. No. 84-3149 (D.D.C. May 7, 1985), reported in Civil RICO Report (BNA), June 5, 1985, at 6. Thus, the court found nothing wrong with the basic use of RICO, only with the choice of the particular criminal acts pleaded as predicate offenses. In addition, at least one federal court has held that the fraud predicates supported a civil RICO claim for damages against FBI agents who orchestrated an undercover "sting" operation. Lightner v. Tremont Auto Auction, No. 82C 20090 (N.D. Ill. June 29, 1984), reported in 1 RICO Litigation Reporter 317 (September 1984). It is hard to imagine a more glaring illustration of the point that civil RICO is now being used against the very people it was designed to aid.

B. Civil RICO Suits Are Directed Mostly At Well Established Businesses, Not Organized Crime

The American Bar Association's special RICO Task Force recently collected comprehensive data about hundreds of private civil RICO cases, almost all of which have been reported since 1982.[2/] The Report classified the essential allegations underlying the RICO charges as follows:

Percentage	Underlying Allegation
40%	securities fraud
37%	common law fraud in a commercial setting
4%	antitrust or unfair competition
4%	bribery or commercial bribery
3%	other fraud
2%	labor disputes
1%	theft or conversion
9%	offenses associated with professional criminal activity[3/]

Another private survey located 132 civil RICO cases in which opinions have been published. According to the descriptions of allegations contained in those cases, they fall into the following categories:

[2/] ABA RICO Task Force Report at 53, 55 (of the cases collected in the Report's database, 3% were decided prior to 1980, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984).

[3/] Id. at 55-56.

Securities transactions	57
Commercial and contract disputes	38
Commodities trading	6
Bank loans	6
Antitrust price fixing	3
Religious disputes	2
Divorce	1
Union affairs	3
Commercial bribery/kickbacks	2
Political corruption (including official extortion and bribery)	9
Theft (by cleaners from apartment dwellers)	1
Violent crimes (murder, arson, extortion)	3

Thus, cases that could fairly be characterized as having anything to do with aiding the war on organized crime are a tiny minority.[4/]

In his recent testimony before the Senate Judiciary Committee on the need for civil RICO reform, Assistant Attorney General Trott of the Department of Justice reported that the Department's own survey of private RICO cases confirmed this pattern of massive abuse. He estimated that, as a result of

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[4/] Both the majority and minority opinions in the Sedima accepted and cited these statistics. 53 U.S.L.W. at 5039 n.16, 5041. Both recognized that this result was not what Congress intended; they diverged only on the question whether the courts may properly do anything to prevent future use of the statute in this manner. The majority concluded that this is a task for Congress, not the courts. See pp. 31-35, infra.

the increasing use of civil RICO in commercial disputes, the actual number of private cases filed already exceeds 500. According to the Justice Department's calculations, only about 7% of these cases involve either actual organized crime figures or the kinds of criminal conduct common to organized crime syndicates. As Assistant Attorney General Trott concluded:

> "Experience has shown . . . that the instances of private civil RICO's use against traditional organized crime activities are far outweighed by example of its application as a general federal anti-fraud remedy against seemingly reputable businessmen."

On some occasions, private plaintiffs have used civil RICO to pursue people who had first been prosecuted and convicted of the predicate acts or RICO itself. The three civil RICO cases noted in the private survey of 132 cases which involved allegations of gangster-like conduct -- murder, arson and extortion -- were cases filed after the authorities had obtained criminal convictions. See Anderson v. Janovich, 543 F. Supp. 1124 (W.D. Wash. 1982) (tavern owner claimed that convicted competitors tried to control local tavern business through threats of murder and arson); State Farm Fire and Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982) (insurance company sought to recover fraudulently obtained proceeds after convictions in arson-for-hire case); City of Milwaukee v. Hansen, No. 77-C-246 (E.D. Wis. January 13, 1981) (city sought to recover costs incurred in fighting fires started by convicted arsonists). In addition, about a

dozen other civil RICO cases have followed criminal convictions, generally for some form of political corruption. In one recent case, the Seventh Circuit upheld a RICO judgment against a defendant sued after he had pleaded guilty to charges of mail fraud based on the same conduct. See McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985). In another recently filed action, a corporation brought RICO claims against, inter alia, two individuals who had recently pleaded guilty to federal securities law violations. Anheuser-Busch Companies, Inc. v. Thayer, No. 3-85-0794-R (N.D. Tex.; complaint filed April 26, 1985), reported in Racketeer Litigation Reporter at 695 (May 1985). RICO thus can be, and has been, used to pursue civil remedies against convicted felons.

In most civil RICO cases, however, the public authorities have not found a basis to proceed with any criminal charges. There has been, therefore, no careful screening by publicly accountable officials before private claimants have charged those defendants with criminal "racketeering." This is not surprising, because public officials would not have considered it fair or accurate to brand the defendants in these cases "racketeers." Indeed, one commentator, who maintains the computerized database of civil RICO decisions upon which the ABA RICO Task Force relied and who served as Executive Director of that Task Force, concluded that, "realistically speaking, the likelihood of state or federal prosecutors seeking indictments in the vast majority of these types

of cases is as close to zero as anything could be." Weissman, "Circuit Aims To Curb Private Civil RICO Actions," Legal Times, August 20, 1984, at 12. Thus, these civil cases are not supplementing the enforcement efforts of prosecutors who simply lack the resources to deal with all the offenses deserving prosecution. Instead, these cases involve, with rare exceptions, disputes that no responsible prosecutor would brand as criminal, much less as the manifestations of "organized crime" or "racketeering."

Although the burden of RICO's misuse does not fall solely on persons in the financial community and in related professional services, the burden has become especially severe for these people because they are viewed as vulnerable "deep pockets" whenever an investment or a commercial transaction goes sour. As The New York Times reported, despite the expectation that civil RICO would focus on "mobster deals," "legitimate businesses" such as Morgan Stanley, American Express, and Lloyd's of London have "found their names smeared with racketeering charges. . . ." N.Y. Times, September 4, 1984, at D2.[5/] A partial roster of defendants in civil RICO suits includes the following established and respected entities that private claimants have charged with a "pattern of racketeering":

[5/] In light of civil RICO's unintended use as a weapon against "ordinary enterprises," The New York Times recently called for a legislative "repair job" on RICO's civil treble-damage provisions. "Where To Fix The Rackets Law," N.Y. Times, July 8, 1985, at A16.

Investment bankers and brokers

Bache Halsey Stuart Shields, Inc.
Bear Sterns & Co.
Dean Witter Reynolds
Lehman Brothers Kuhn Loeb, Inc.
Loeb Rhodes & Co., Inc.
Merrill Lynch, Pierce Fenner & Smith, Inc.
Morgan Stanley & Co., Inc.
Oppenheimer & Co.
Paine Webber Jackson & Curtis, Inc.
Shearson/American Express, Inc.
Thomson McKinnon Securities, Inc.

National C.P.A. Firms

Alexander Grant & Company
Arthur Andersen & Co.
Coopers & Lybrand
Ernst & Whinney
Laventhol & Horwath
Peat Marwick Mitchell & Co.
Price Waterhouse
Touche Ross & Co.

Law Firms

Lord, Bissel & Brook
Pierson, Ball & Dowd
Singer, Hutner, Levine & Seemans
Sullivan & Worchester

Banks

Citibank, N.A.
Continental Illinois National Bank & Trust Co.
Crocker National Bank
First American Bankshares, Inc.
First Interstate Bank of Oregon
First National Bank of Atlanta
First National Bank of Maryland
Marine National Bank (Wisconsin)
National Republic Bank of Chicago
Pacific Western Bank
Riggs National Bank of Washington, D.C.
Sierra Federal Savings & Loan Association
Southwest National Bank
State Bank of India
Union Bank

Insurance Companies

Allstate Insurance Co.
Lincoln Insurance Co.
Prudential Insurance Co. of America
State Farm Mutual Automobile Insurance Co.
Travelers Insurance Co.
Underwriters of Lloyd's, London
USLIFE Corp.

Manufacturing Companies

A.H. Robins Co., Inc.
Boeing Co.
Continental Group, Inc.
General Motors Corp.
Miller Brewing Co.
Mitsui & Co. (U.S.A.), Inc.
Rockwell International Corp.
Rohm & Haas Co.

Firms like those have been named as defendents in dozens of civil RICO suits, even though the Justice Department has not seen merit enough even to file criminal charges against them, much less to obtain convictions. Of course, the enormous expenses associated with defending against unchecked civil RICO claims become a cost of doing business that ultimately taxes the consumers of the goods and services provided by these firms and by their customers and clients.

C. Civil RICO Is Used Most Extensively In Ordinary Commercial Disputes

As the figures demonstrate, the vast bulk of private civil RICO cases have come in commercial contexts -- hardly in the settings that Congress thought needed bold new weapons or special incentives to sue. All its sponsors expressly agreed that RICO was aimed at preventing the infiltration of legitimate business by organized crime.

The draftsmen certainly did not intend, for example, to have RICO become a device for challenging corporate takeover bids or to add a new level of regulation of those hotly contested deals. Yet, as SEC member Charles Marinaccio told this Committee in May of this year, "[i]t has become standard practice to add a RICO charge to lawsuits challenging tender offers." Statement of Charles L. Marinaccio, Member of the Securities and Exchange Commission, Before the Committee on the Judiciary, United States Senate, May 20, 1985, at 3; see, e.g., Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Gearhart Industries, Inc. v. Smith International, Inc., 592 F. Supp. 203 (N.D. Tex.), modified, 741 F.2d 707 (5th Cir. 1984). In Dan River, Inc. v. Icahn, supra, the court of appeals expressed concern about attempts to use RICO to block a takeover bid through a public tender offer, pointing out that this is simply one illustration of the unintended and excessive use of civil RICO:

> "Finally, we note the mounting controversy in the federal courts over the proper limits, if any, upon the use of RICO in cases far removed from the context which Congress had in mind when it enacted the statute. Congress was out to attack the problem of organized crime, not the problem of corporate control and risk arbitrage. We of course make no attempt to resolve the dispute here and now. We do not propose to enter the fray. We only note that the reach of RICO is itself a troubling issue . . . ." 701 F.2d at 291.

See also Tyson & August, The Williams Act After RICO: Has The Balance Tipped In Favor Of Incumbent Management?, 35 Hastings L.J. 53, 111-12 (1983) ("By giving target management a powerful

new weapon in the takeover battle, the judicial approval of RICO suits predicated on Williams Act violations undermines the careful policy of evenhandedness that the Williams Act Congress sought so hard to attain").

The treble-damage weapon of RICO and the "racketeering" label are also being used to challenge the ways banks set up their loan procedures and terms. For instance, in Morosani v. First National Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983), the Eleventh Circuit has allowed a case to proceed on the claim that the "prime rate" used in computing the interest on the plaintiff's loan was not the bank's true prime rate. The Supreme Court recently agreed that RICO sweeps so broadly as to encompass such a case. See Haroco v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd, ___ U.S. ___, 53 U.S.L.W. 5067 (July 1, 1985) (per curiam). In Lode v. Leonardo, 557 F. Supp. 675 (N.D. Ill. 1982), the court explained why it, too, felt obliged to entertain a RICO suit involving alleged misrepresentations relating to a commerical loan:

> "Congress may not have envisioned that the civil remedies it supplied in RICO would find the widespread use that they have in commercial fraud cases. And such use of RICO's remedies may well be somewhat undesirable. But, when a plaintiff makes allegations which appear to state a claim under the statute as it is written, it is not the function of this Court to reject that claim on the ground that Congress must have meant something other than what it said in the statute." 557 F. Supp. at 681.

RICO counts have already appeared in many other cases involving disputed commercial transactions, including churning of stock,[6] representations about a broker's expertise,[7] projections used in real estate syndication,[8] disputes between landlord and tenant,[9] disallowance of insurance claims,[10] alleged overcharges by a printer,[11] and failure to publish a medical journal according to a contractual agreement.[12] Because Congress included open-ended "fraud" predicates, there is ample room for transforming even more kinds of commercial disputes into RICO cases.

Although the "fraud" predicates are the easiest to abuse by artful pleading, they are not alone. In a recent decision, the Fourth Circuit ordered reinstatement of a civil RICO case brought by a condominium developer who alleged that

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[6] See, e.g., Harper v. New Japan Securities International, Inc., 545 F. Supp. 1002 (C.D. Cal 1982).

[7] See, e.g., Noland v. Gurley, 566 F. Supp. 210 (D. Colo. 1983).

[8] Gordon v. Terry, 684 F.2d 736 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983).

[9] Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983).

[10] Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983).

[11] Estee Lauder, Inc. v. Harco Graphics, Inc., 558 F. Supp. 83 (S.D.N.Y. 1983).

[12] American Society of Contemporary Medicine, Surgery & Opthalmology v. Murray Communications, Inc., 547 F. Supp. 462 (N.D. Ill. 1982).

the purchasers of an office condominium unit were trying to "extort" an unreasonably high price from him in connection with the developer's effort to repurchase the condo unit in order to include it in a block of units the developer wanted to sell to IBM. Although the district court found that this was "at best a garden-variety commercial breach of contract" case, the Fourth Circuit concluded that the allegations might make out a claim of "extortion" under state law and, therefore, the plaintiff could press the case under RICO. Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984). The two businessmen who originally bought the condominium unit -- and their wives as co-defendants -- now stand accused of being racketeers and must defend themselves against a statute that Congress believed would protect business people from, in Representative Steiger's words, "ruthless organized criminals."

D. The Inclusion Of Fraud-Based Predicate Offenses Is The Source Of Most Of The Abuse Of Civil RICO

Without doubt, the single most important aspect of RICO that permits plaintiffs to transform commerical disputes into federal treble-damage actions is the inclusion of "mail fraud," "wire fraud," and "fraud in the sale of securities" in the list of predicate offenses. The comprehensive survey by the ABA Special Task Force on Civil RICO ascertained that 91% of RICO claims appear in cases that involve sales of securities or commodities or relate to contract disputes or other ordinary commercial transactions. See ABA RICO Task Force Report at 55-56. Although Congress

added the fraud-based predicates at a time when RICO did not provide for a private remedy, and it added the private remedy at the last minute without careful consideration of how it would be used, the result, to quote the words of Justice Marshall in Sedima, "quite simply revolutionizes private litigation." 53 U.S.L.W. at 5040. Justice Marshall went on: "The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations." Id. He similarly recognized that the fraud-based predicates allow a plaintiff to bypass the federal securities laws in favor of a claim under RICO. Id. at 5041. The result, Justice Marshall and these other Justices realized, is "the federalization of broad areas of state common law of frauds, and . . . the displacement of well-established federal remedial provisions." Id. at 5040.

Claims based on "mail fraud" and "wire fraud" predicate offenses are easy to plead in many commercial disputes. They are also likely to survive motions to dismiss made at early stages. This is so because the underlying law in this area has been developed in criminal prosecutions under broadly worded criminal statutes. Courts have been willing to allow public officials to use broad prosecutorial discretion in determining which transactions are properly prosecutable:

> "The crime of mail fraud is [broad] in scope. The fraudulent aspect of the scheme to 'defraud' is measured by a non-technical standard. Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing

> in the general and business life of members of society.' This is indeed broad." Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (citations omitted).

In almost any instance where a venture has lost money, or a stock has fallen in value, a disappointed investor can allege that the businessman's behavior was not a "reflection of moral uprightness" and "fair play." As Justice Marshall noted in his opinion in Sedima:

> "The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years Courts of Appeals have 'tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.'" 53 U.S.L.W. at 5040, quoting United States v. Weiss, 752 F.2d 777, 791 (2d Cir. 1985) (Newman J., dissenting).

Justice Marshall recognized that "[t]he only restraining influence on the 'inexorable expansion of the mail and wire fraud statutes,' United States v. Siegal, 717 F.2d, at 24 (Winter, J., dissenting in part), has been the prudent use of prosecutorial discretion." 53 U.S.L.W. at 5040. The courts have permitted the expansive reading of the mail and wire fraud statute knowing full well that no private right of action existed under those criminal statutes. Id. Although Congress has never directly authorized private civil suits under the mail or wire fraud statutes, the inclusion of those offenses among the predicates for a civil suit under RICO now has given this vast discretion to private claimants through the back door.

The result, as Justice Marshall wrote, is an enormous expansion in federal jurisdiction over ordinary civil disputes:

> "In the context of civil RICO . . . the restraining influence of prosecutors is completely absent. . . . [S]uch litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. . . . The civil RICO provision consequently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the states." Id. at 5041.

As one former federal prosecutor recently wrote in calling for legislation to delete "the mail fraud and wire fraud statutes from the list of predicate acts required to bring a private civil RICO action:"

> "[A] general problem with RICO, that the constraints of prosecutorial discretion and guidelines which limit its application in the criminal sphere are no bar to its private civil application . . ., is most acute when the underlying predicate statutes are mail fraud and wire fraud, since it is the breadth of these statutes, both actual and potential, that forms the basis for most of the recent expansion of civil RICO litigation." Rakoff, "Opinion," 1 RICO Litigation Reporter 206-07, 211 (September 1984).

Nothing in the legislative history of RICO suggests Congress intended to federalize local commercial disputes. Continued inclusion of "mail fraud" and "wire fraud" as predicates for civil RICO claims, however, allows private plaintiffs to disregard these concerns about federalism and to transform local disputes into federal cases simply because one of the parties used the mail or the telephone.

Similarly, private plaintiffs find it easy to level allegations of "securities fraud." Since the federal courts

are reluctant to dismiss complaints before a plaintiff has had a chance to pursue substantial discovery in a search of evidence to support his allegations of "fraud," these cases withstand initial challenges. Even if the predicate offense that a plaintiff must ultimately prove in a civil RICO case is criminal securities fraud, a plaintiff may not even have to allege -- much less prove -- a deliberate intent to defraud him. For example, in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976), the court upheld the conviction of a partner in a major accounting firm. On the basis of a finding that he had "recklessly" conducted a corporate audit, he was convicted of assisting in the corporation's filing of a false proxy statement in violation of 15 U.S.C. § 78ff(a). The trial judge, in sentencing the accountant, indicated that no finding of actual knowledge of falsity was necessary for conviction:

> "I think you are absolutely sincere when you say that you do not believe that you did anything wrong in this audit or audits. . . . But the tragedy is that the jury found that this was an audit or audits done with reckless disregard for what was really involved." United States v. Natelli, 74 Cr. 43 (S.D.N.Y.), Transcript of Sentencing at 12.

Thus, a plaintiff may be able to assert a viable RICO claim based on alleged "fraud in the sale of securities" simply by claiming that the defendants were reckless in their actions, and that, as a result, a "fraudulent" filing or similar securities law violation occurred.

Moreover, the result of converting securities fraud claims into RICO claims is to displace the carefully structured remedies of the federal securities laws. First, civil RICO has unwittingly created a treble-damage remedy for ordinary securities law violations even though "the federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees." Sedima, 53 U.S.L.W. at 5041 (Marshall, J., dissenting). Second, under RICO the plaintiff can raise the non-monetary stakes as well, because now the defendant runs the risk of being branded a "racketeer." As Justices Marshall, Brennan, Blackmun, and Powell recognized, the result of this double-barrel risk is not justice, but capitulation:

> "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." Id.

Third, and perhaps most important, this use of civil RICO "virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws." Id. This end-run around the requirements of the securities laws is possible because a RICO plaintiff can simply allege a RICO violation based on mail or wire fraud predicate acts, rather than "securities fraud," growing out of a securities transaction. Thus, despite that fact that "[o]ver the years, courts have paid close attention to matters such as standing, culpability, causation, reliance and materiality, as well as the definitions of 'securities' and 'fraud,'" id.,

the broad swath that the civil RICO's fraud provisions cut through established legal principles makes all of this carefully fashioned law "now an endangered species . . . ." Id.

The Senate added securities fraud, as well as wire and mail fraud, to the bill's list of predicates at the suggestion of the SEC's Division of Enforcement because organized crime figures had begun to engage in market manipulation and securities theft. The SEC officials recommended the changes when they understood that the legislation would provide only for government, not private, remedies. They believed that RICO could serve as an important weapon for government enforcement against those activities. See ABA Civil RICO Task Report at 99-100 n.130. When the House added the private civil remedy, no one suggested that the securities fraud predicate was intended to displace the specific statutory scheme long in place.

Moreover, when Congress decided to add securities fraud as a RICO predicate, it referred to only one significant kind of misconduct that was not already covered by the federal securities laws but was attracting organized crime: trafficking in stolen or counterfeit securities. Experience has shown, however, that civil RICO is not being used against schemes of that type. By including the securities fraud predicates, RICO instead allows private claimants to duplicate -- but for treble damages -- the rights already granted by the federal securities laws or allows them to circumvent the limitations that Congress has deliberately fashioned for civil suits under

those laws. In neither type of situation is there any justification for tolerating the costly mischief that civil RICO permits.

E. The Supreme Court Has Held That Congress, Not the Courts, Must Correct Civil RICO'S Overbreadth

Up until recently, several trial judges and one federal circuit attempted to restrain the use of civil RICO in ordinary commercial disputes. Some tried to treat the statute as requiring an allegation of some actual connection with "organized crime." E.g., American Savings Ass'n v. Sierra Federal Savings & Loan Ass'n, 586 F. Supp. 888 (D. Colo. 1984). Others tried to require a showing of some special "racketeering injuries." E.g., Harper v. New Japan Securities International Inc., 545 F. Supp. 1002 (C.D. Cal. 1982). These efforts generally met with hostility in most appellate courts. See, e.g., Moss v. Morgan Stanley Inc., 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 104 S. Ct. 1280 (1984) (rejecting requirement of link to "organized crime"); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) (same); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984) (same); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), cert. denied, 104 S. Ct. 508, 509 (1983) (rejecting special injury requirement); Alexander Grant & Co. v. Tiffany Industries, Inc., 742 F.2d 408, 413 (8th Cir. 1984) (same).

This past term, the Supreme Court dashed whatever faint hope had existed that judicial construction of the statute could tame runaway civil RICO. In a 5-4 vote, the Court overturned a decision of the Second Circuit in which the court of appeals had held that a civil RICO claim could only be brought against a defendant who had been convicted of the predicate acts underlying the RICO claim or of RICO itself and could only be brought to collect damages for a separate "racketeering injury," wholly distinct from injury arising from the predicate acts themselves. Sedima, supra. At the same time, the Court affirmed a Seventh Circuit decision in which the lower court had rejected the requirement of a separate injury. American National Bank v. Haroco, Inc., ___ U.S. ___, 53 U.S.L.W. 5067 (July 1, 1985) (per curiam). In deciding these cases, the Court made it crystal clear that any correction in the course civil RICO has taken must come from Congress, not the courts.

The Court was unanimous in recognizing that civil RICO had strayed far from the object that Congress had in mind when it wrote and passed the Act. The majority opinion in Sedima acknowledged that it understood the "concern over the consequences of an unbridled reading of the statute," and the Second Circuit's perception of "misuse of civil RICO." 53 U.S.L.W. at 5034. The majority opinion also recognized that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors," id. at 5039, and that "private civil actions

under the statute are being brought almost solely against" what the Court called "respected and legitimate enterprises," rather than against "the archetypal, intimidating mobster." Id. And the majority cited with approval the statistics from the ABA Task Force Report, see pp. 14-15, supra, that bear out that conclusion. 53 U.S.L.W. at 5039 n.16.

As the quotations throughout this Appendix suggest, Justice Marshall, writing in dissent for four members of the Court, was even more explicit in detailing the ways in which civil RICO claims have caused disruptions far beyond anything intended by Congress, but the majority did not disagree with the dissenters' descriptions. Justice Marshall detailed the ways that "in both theory and practice, civil RICO has brought profound changes to our legal landscape," id. at 5041, and he recognized that "nothing in the language of the statute or the legislative history suggests that Congress intended either the federalization of state common law or the displacement of existing federal remedy." Id. Justice Marshall's opinion summarized the problematic results of civil RICO:

> "These cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect." Id. at 5045.

Justice Marshall as a general matter is neither a strident supporter of states' rights nor an advocate of business

interests against the injured individual; yet he concluded in no uncertain terms that civil RICO has unintentionally altered the balance between federal and state law in a profound manner and has made legitimate businesses a target of "uncalled-for punitive bills and undeserved labels." Id. at 5045.

Justice Powell, who joined in Justice Marshall's opinion, also wrote separately, reiterating the manner in which civil RICO has come to be used "against legitimate businesses seeking treble damages in ordinary fraud and contract cases," and concluding that "it defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result." Id. at 5047.

The majority and minority parted company only over the question of whether the courts could play any role in narrowing civil RICO's reach. The minority believed that the language of the statute could plausibly be interpreted narrowly in certain respects. The majority, applying its philosophical belief that the courts should not rewrite statutes, accepted the premise that the statute is being used in unintended ways but rejected the notion that the Court could play any role in solving that dilemma. The majority placed responsibility for solving the problem upon the representative body that passed the statute in the first place: "[T]his defect -- if defect it is -- is inherent in the

statute as written, and its correction must lie with Congress." Id. at 5039 (emphasis added).

F. Civil RICO Claims Against Legitimate Businesses Are Burgeoning

It is likely that, in the face of the Supreme Court's rejection of the major judicial attempts to construe civil RICO narrowly and its deferral to Congress to correct the overbreadth, RICO suits simply alleging securities fraud, commercial fraud, or other "imaginative" claims will continue to grow. The situation is already out of hand and likely to get worse.

Relatively few private RICO cases have progressed all the way to judgment, because intensive use of the statute in civil cases only began to blossom a few years ago. The ABA RICO Task Force Report found that, although the statute was enacted in 1970, there was only one reported opinion in a civil RICO case as of 1972, only one other case reported prior to 1975, and only nine reported decisions prior to 1980. ABA RICO Task Force Report at 55. Since then, the numbers have grown exponentially. Id. See also p. 14 n.2, supra. The invocation of RICO against legitimate businesses in kinds of disputes never contemplated by Congress when it passed RICO is almost certain to accelerate in the wake of the recent Supreme Court decisions, since the Court has eliminated almost any chance that previously existed that a defendant could defeat a RICO claim at the threshold of litigation. Reflecting this impact, the Washington Post headlined its article on the Sedima

decision: "RULING SEEN INCREASING OUT-OF-COURT SETTLEMENTS: More Costly Litigation Also Predicted." Abramowitz, Washington Post, July 2 1985, at E10.

In addition, there is rapidly spreading publicity about the utility of RICO as a device for getting a local commercial dispute into federal court or as a tactic for dramatically increasing the stakes in a case otherwise covered by the traditional single-damage remedy of other, specific federal laws, such as the securities laws. The Washington Post story on Sedima quoted a leading plaintiff's attorney who predicted that civil RICO would be used increasingly in the future to "federalize" product liability litigation. Id. The same day, the Wall Street Journal also commented that civil RICO suits, "few of which involve organized crime, are proliferating because they can be quite lucrative." Wermeil, "Supreme Court Refuses to Curb Racketeer Law," Wall Street Journal, July 2, 1985, at 2. The article summarized the lure: "Plaintiffs favor RICO because of the chance to triple damages and win attorneys' fees and legal costs, and because it poses fewer procedural hurdles than federal securities law or state contract law." Id. As another article discussing the wider use of civil RICO expected in the wake of the Supreme Court's decision put it in its headline: "'Sedima': The Civil RICO's Juggernaut Steams On." Mathews and Weissman, Legal Times (ABA Daily Ed.), July 9, 1985, at 10.

Legal and business journals are filled with articles discussing the statute. See, e.g., Blakey, "RICO Is Working," The Brief (the magazine published by the Tort and Insurance Practice Section of the American Bar Association), Summer 1985, at 18; Quinn and Bograd, "RICO Is Backfiring," id. at 19; Pickholz, "The Firestorm Over Civil RICO," 71 ABA Journal 79 (1985); Skinner and Tone, "Recent Developments in RICO Litigation," National Law Journal, February 13, 1984, at 20; Skinner and Tone, "Civil RICO and the Corporate Defendant," National Law Journal, January 30, 1984, at 22; Flaherty, "Private RICO Damages Awarded," National Law Journal, December 26, 1983, at 8; Sylvester, "Civil RICO's New Punch," National Law Journal, February 7, 1983, at 1; Weissmann, "'Moss' Makes RICO Statute the Darling of Plaintiffs' Bar," Legal Times, December 19, 1983, at 24; Murphy, "RICO -- A Federal Treble Damage Fraud Statute?", New York State Bar Journal, July 1983, at 18; "Business is Picking Up An Anticrime Weapon," Business Week, February 20, 1984, at 85.

So too, law reviews are focusing a great deal of attention on the statute, debating the extent of its flaws and the proper methods of correcting them. See, e.g., Civil RICO Symposium, 21 Cal. W. L. Rev. No. 2 (1985); Comment, Sedima v. Imrex: Civil Immunity for Unprosecuted RICO Violations?, 85 Colum. L. Rev. 419 (1985); Note, Civil RICO: A Call For A Uniform Statute of Limitations, 13 Fordham Urban L.J. 205 (1984); Sackheim, Leto & Friedman, Commodities Litigation: The Impact of RICO, 34 DePaul L. Rev. 23 (1984);

Tyson & August, The Williams Act After RICO: Has The Balance Tipped In Favor Of Incumbent Management, 35 Hastings L.J. 53 (1983); Note, RICO and Securities Fraud: A Workable Limitation, 83 Colum. L. Rev. 1513 (1983); Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982); Campbell, Civil RICO Actions in Commercial Litigation, 36 Sw. L.J. 925 (1982). One recently published bibliography listed approximately 150 articles on civil RICO that have appeared in legal publications. See Milner, A Civil RICO Bibliography, 21 Cal. W.L. Rev. 409, 427-35 (1985).

Numerous how-to-do-it courses are being offered nationwide to acquaint lawyers with RICO's possibilities. For example, the ABA already has held four "continuing legal education" National Institutes on RICO, three in New York City in September 1983, February 1984 and October 1984, and one in Los Angeles in November 1983. With ominous accuracy the ABA titled the first three of these sessions "RICO: The Ultimate Weapon in Business and Commercial Litigation." The latest session, in New York, was entitled "RICO -- The Second Stage." Among the featured topics at the October 1984 meeting were discussions of RICO and its impact on states and municipalities, RICO suits by and against unions, and RICO suits against financial institutions. The popularity of the presentations is great; the mailing for the February 1984 course pointed out that the two earlier meetings were sold out, with over 600 lawyers in attendance. Moreover, one of the programs held at the ABA's August 1984 annual convention was entitled "RICO:

The Current Status of Baby Huey," and at its most recent convention just completed in July 1985, the ABA again had a major program on current developments in civil RICO.

The Practicing Law Institute ("PLI") also held RICO sessions in June of 1984 both in New York City and in San Francisco, with topics including the use of RICO in "antitrust cases," "commercial bribery and faithless employee cases," "unfair competition cases," "securities and commodities cases," and "corporate takeover cases." In addition, Law & Business, Inc., offered RICO programs in Chicago in June and in San Francisco in July of last year and plans similar progams in New York, San Francisco, and Chicago in September, October, and November 1985, respectively.

The volume of RICO litigation is expected to be so heavy that a special reporting service called the "RICO Litigation Reporter" -- now renamed the "RICO Law Reporter" -- began regular publication in May 1984, and two additional reporting services devoted exclusively to this subject recently began publishing. The recent Supreme Court decisions, with the attendant publicity as well as the substantive message contained in those decisions that it is all right to use civil RICO broadly, will only increase the spotlight on civil RICO's potential uses as a weapon in commercial litigation.

The bonanza for lawyers in RICO cases is widely and candidly recognized. Indeed, when the Los Angeles Times did a series of articles last year on "the litigation explosion," it devoted a front page article just to private civil

RICO suits, entitling the feature, "'RICO' Running Amok in the Board Rooms," and subtitling the piece, "Law aimed at Mafia becomes popular in private suits." Siegel, Los Angeles Times, February 15, 1984. The article quoted one RICO lawyer as explaining that when he set up his private law practice he "was looking for a way to develop business," and he "studied RICO and saw the potential for lots of civil litigation." As the Supreme Court recognized, as long as the statute remains worded broadly, lawyers will have every incentive to continue pushing its use to the outer limits of the statutory language. As one author counseled:

> "[A] plaintiff's attorney zealously protecting the rights of his client, as he is charged to do, is obligated to bring RICO claims where they can reasonably be interposed." Brodsky, "RICO," New York Law Journal, February 15, 1984, at p. 1, Col. 1.

Of course, in addition to multiple damages, the plaintiffs in these actions seek attorney's fees. While there are few civil RICO cases that have progressed far enough to have reached the fee-determination stage, the amounts at issue are substantial.[13/] Awards of hundreds of thousands or even millions of dollars are not uncommon under other statutes that contain similar "fee shifting" provisions. The prospect of

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[13/] For example, in Schacht v. Brown, supra, the lead counsel for the plaintiff Insurance Commissioner reported billings of $363,737.00 through September of 1982. "Insurance Liquidations a Legal Bonanza," Chicago Tribune, September 12, 1982, § 5 at 1. This may include expenses for some items in addition to the Schacht litigation itself, but the vast majority is almost certainly for that civil RICO action, in a period before any significant discovery had commenced.

such handsome awards is a powerful stimulus to press RICO to even newer frontiers.

V. REFORM OF CIVIL "RICO" SHOULD REINTRODUCE THE IMPORTANT OVERSIGHT BY FEDERAL AND STATE PUBLIC PROSECUTORS BY CREATING A PRIOR-CRIMINAL-CONVICTION REQUIREMENT

A. The Administration, The Courts, And Others Have Recognized The Need For Reform

The explosion of unjustified civil RICO cases is already at hand, and the adverse effects of this development on the courts and on legitimate business are direct, palpable, and unwarranted. It would be difficult to overstate the in terrorem effect of civil RICO on legitimate businesses, even though relatively few companies, so far, actually have been ordered to pay treble damages in these cases. As Business Week reported:

> "Lawyers say the number of court awards under RICO is not an accurate measure of the problem, because few cases go to trial: The mere threat of a headline suggesting a connection with organized crime often induces a settlement." February 20, 1984, at 85.

In addition, the scope of the permissible allegations permits wide-ranging pre-trial discovery: "That gets very, very expensive," one securities lawyer was quoted as explaining, "and the cost tends to result in settlements." Id. As Justice Marshall himself recognized, a "defendant, facing a tremendous financial exposure in addition to the threat of being labelled a 'racketeer,' will have a strong interest in settling the dispute," 53 U.S.L.W. at 5041, "even a case with no merit." Id.

In urging reform, the American Bar Association has stated:

> "When RICO is combined with mail fraud predicate offenses, the effect is to federalize all torts involving business transactions in which a party thinks deceitfully and uses the mails. This result is undesirable in two respects: (1) the efficient operation of federal courts will be significantly impaired, if not crippled, by a tidal wave of RICO civil actions when plaintiffs become aware of the attractions of treble damages and recovery of attorney's fees; and (2) the balance between state and federal power will be substantially disrupted. If future RICO statutes are to include civil remedies, use of mail fraud as a predicate offense must be limited." Reports with Recommendations to the House of Delegates, ABA, 1982 Annual Meeting, August 1982, Report No. 112C at 8, adopted by the House of Delegates August 1982.

According to the recent ABA RICO Task Force Report, fully 74% of all lawyers surveyed with actual experience with RICO claims, either as counsel for plaintiffs or for defendants, believe that the statute should be amended, and only 8% see no need for reform. ABA RICO Task Force Report at 62.

From his unique vantage point as a regulator of the securities industry and the accounting profession, SEC Commissioner Charles L. Marinaccio expressed his view that civil RICO has "gone awry in the execution," and is being used against "the very legitimate corporations and businesses that were intended to be protected" to undermine the "carefully crafted structures" of express and implied remedies under state and federal securities laws. See Statement of Charles L. Marinaccio, Member of the Securities and Exchange Commission, Before the Committee on The Judiciary, United States Senate, May 20,

1985, Exhibit 3. As the Commissioner told this Committee in testimony in May of this year, "I believe there is an urgent need to amend RICO by legislation to end the excessive uses to which the statute's private civil remedy has been put." Id. at 1. The Commissioner recounted the ways in which private civil RICO is "threatening to disrupt the balance of the [federal securities] regulatory scheme," id. at 6, and he concluded that "predicating the availability of a private remedy on prior criminal convictions offers the most reasonable way to mitigate problems in the securities fraud area." Id. at 8. The Chairman of the SEC, John S.R. Shad, has also expressed concern about the unintended impact of civil RICO on "the carefully crafted scheme of express and implied remedies for securities law violations which the Congress and the courts have fashioned over the past 50 years." Id. Exh. 2.

Federal judges, acting in their capacity as commentators on what they are witnessing, also have spoken out in public about the problem. Thus, District Judge Milton Pollack of New York has said:

> "[O]ne of the proliferating developments in civil litigation has been the use of RICO, the Racketeer Influenced and [Corrupt] Organizations Act, in civil claims, in routine commercial disputes, including those arising under the Federal Securities Laws. I think that the proliferation of those claims and the use of a law that was designed to eliminate organized crime is a very bad influence on the commercial community." "Symposium Highlighting Developments in Securities Law Over Past Century," New York Law Journal, January 30, 1984, at 52.

And Judge Abner Mikva of the United States Court of Appeals in the District of Columbia, who had warned against the overbreadth of the proposed RICO bill when he was in Congress in 1970, has seen RICO outstrip his worst fears. He warned then that placing a treble-damage remedy under so broadly worded a statute would provide an "invitation" to the "disgruntled and malicious" to "harass innocent businessmen . . . ." H. R. Rep. No. 1549, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4007, 4083. As he predicted, "What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish -- destruction of the rival's business." Id. Judge Mikva was quoted in an interview as expressing regret that these problems were not avoided by complete deletion of the civil provision, which "was not an important element of the legislation." Los Angeles Times, February 15, 1984.

In their formal opinions as well, many courts, as the Supreme Court did in Sedima, have warned about these dangers and abuses, even while deciding that they are obliged to apply the expansive language of the statute as originally written. For example, in allowing a mail fraud allegation to proceed as a RICO case, the Seventh Circuit in Schacht ruefully observed that Congress inadvertently "may well have created a runaway treble damage bonanza for the already excessively litigious." Schacht v. Brown, supra, 711 F.2d at 1361. In another Seventh Circuit case, the court observed that RICO "is constructed on the model of a treasure hunt," Sutliff,

Inc. v. Donovan Cos., supra, 727 F.2d at 652, and went out of its way to comment:

> "We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about." Id. at 654.

The Administration has heard these calls for reform and has decided that they are well founded. The Vice President's Task Group on Regulation of Financial Services, whose members included the Attorney General, recognized in its final report adopted on July 2, 1984, that civil RICO is being abused. The Task Group found that:

> "[A] statute designed to control organized crime through both criminal and civil penalties against racketeering . . . has increasingly been utilized by imaginative lawyers in suits against banks, securities firms, accountants and other perfectly legitimate businesses without even any alleged connection to organized crime."

The Report continued:

> "This litigation increases the backlog in federal courts, undermines the structure of the substantive banking and securities laws enacted by Congress, and creates totally unnecessary costs for the affected firms and, ultimately, their customers."

Accordingly, one of the Task Group's recommendations (number 5.15) calls for "Elimination of Nuisance Litigation Under RICO." Without defining precisely how RICO should be amended, the Task Group states as the Administration's goal the formulation of amendments "to ensure that its civil liability provisions are

not misused by private parties in litigation involving financial institutions."

Attorney General Meese expressed similar concerns during his nomination hearing before this very Committee. In response to a question from Senator Grassley about RICO, Mr. Meese stated:

> "I share with you your concern that what is essentially a form of action against criminal activity, even though with civil penalties and civil actions involved -- that this not be misused as a means of carrying on ordinary civil litigation where no organized crime is involved." Transcript of Proceedings (Jan. 30, 1985) at 13.

B. The Justice Department's RICO Guidelines Apply The Prosecutorial Discretion Envisioned By Congress, And Absent From Private Actions, That Prevents Abuse Of RICO

In 1981, the Criminal Division of the United States Department of Justice promulgated "Guidelines" for the exercise of the Department's power to initiate criminal prosecutions under RICO. See U.S. Department of Justice, United States Attorneys' Manual, §§ 9-110.200 - 110.500 (March 9, 1984). The Guidelines were promulgated because the Department recognized the great possibility for abuse if RICO is applied to every set of circumstances that may conceivably be covered by the broad statutory language. These Guidelines in effect formalize the exercise of prosecutorial discretion that Congress envisioned when it wrote this broadly worded statute.

In their "Preface," the Guidelines state that, despite the statutory provision that RICO is to be "liberally construed to effectuate its remedial purpose," it is the

policy of the Department of Justice that RICO should only be used "selectively." The Guidelines are designed to assure "that not every case, in which technically the elements of a RICO violation exists, will result in the approval of a RICO charge." The Justice Department will not "approve 'imaginative' prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute." As the Guidelines recognize, "the activity which Congress most directly addressed -- the infiltration of organized crime in the nation's economy" -- is the touchstone for determining whether a RICO charge is warranted.

Moreover, the overall theme of the Guidelines, as stated in their Preface, is that "the consequences for the accused" require "particularly careful and reasoned application" of RICO's purposes before making the decision to charge a RICO violation. Accordingly, the Guidelines insist on careful monitoring and centralized control over the Government's filing of any RICO charge. This centralized monitoring guarantees that the Guidelines will be effectively enforced by officials who are charged with public accountability. In dramatic contrast, the decision whether to file a private RICO claim under the broadly worded statute is currently left wholly to the discretion of entrepreneurial private lawyers. Their sole loyalty is to their private clients, and they have no public responsibility for the consequences of any extravagant allegations.

The Justice Department Guidelines highlight another problem with civil RICO as it currently stands. The Preface states that the Department ordinarily will not add a RICO charge "which merely duplicates the elements of proof of a traditional" statute that specifically covers the conduct in question. One of the major criticisms of the current civil RICO provision, however, is that it creates a general, private federal claim for treble damages even where federal law already provides a carefully crafted set of prohibitions and remedies.

The Justice Department's Guideline III expressly directs that, except in extraordinary circumstances, a RICO count will not be asserted "where the predicate acts consist solely and only of state offenses." Reflecting important considerations of federalism, the commentary explains that this guideline is designed "to underscore the principle that prosecution of state crimes . . . is primarily the responsibility of state authority."

Similar observations apply to the use of the federal courts to litigate civil disputes governed by state law. Nevertheless, the inclusion of "mail fraud" and "wire fraud" in RICO has been used by private plaintiffs as a device for bringing into federal courts what are essentially local commercial or property disputes. This use of RICO has "federalized" state commercial and tort cases.

The statute suggests that any two occurrences of a predicate violation within ten years may be sufficient to show a "pattern of racketeering activity." Guideline IV recognizes

that this definition is subject to abuse and provides that no RICO count will be charged "based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."

Most of the private civil cases that have been filed under RICO, by contrast, relate to allegedly fraudulent activity in connection with a single episode or transaction, such as the sale of stock in a single company or the structuring of a particular venture that includes a number of parties. Since each mailing of, for example, a copy of an allegedly misleading financial statement constitutes a separate violation, it is easy for the artful pleader to allege a "pattern" of racketeering in connection with a single commercial episode or transaction. This usage, however, has little to do with the congressional goal of cracking down on racketeers who make their living by engaging in a continuous pattern of illicit activity over a long career.

In addition, Guideline V states that, in order to constitute a violation of RICO, the "pattern of racketeering activity" should have "some relation to the purpose of the enterprise." This sensible interpretation is not followed in the civil cases that have been filed under RICO, where allegedly fraudulent activities conducted by legitimate businesses such as investment banking houses, brokerage firms, accounting firms, law firms, and others are -- even if true -- aberrational rather than related to the purpose of those "enterprises."

Many of the concerns reflected in the Justice Department Guidelines, thus, apply with equal force to private civil litigation under RICO. These internal Guidelines, however, do not regulate the activity of private plaintiffs. Therefore, legislation is necessary in order to erect similar safeguards around the private civil RICO mechanism and in that way to minimize its great potential for abuse.

C. A Prior-Criminal-Conviction Requirement Is The Most Straight-Forward And Workable Solution To The Current Abuse Of Civil RICO

There is one straight-forward amendment to civil RICO that would eliminate the existing abuses, refocus the statute on its intended targets, and adapt the Justice Department's Guidelines to the civil use of RICO. That would be to permit civil claims to proceed under RICO only after the defendant has been convicted of a RICO offense or of one of the predicate offenses. This amendment would effectively curb the abuse of the discretionary power to bring private claims against legitimate business people involved in ordinary commercial activities. It would confine the circumstances in which suits can be filed to those in which public prosecutors have screened those people who may fairly be charged with being involved in crimes from those who should not be subject to accusations of "racketeering". This is the kind of protection that a panel of the Second Circuit read into RICO in the Sedima case and that SEC Commissioner Marinaccio called upon Congress to write into the statute.

The American Bar Association's Special Task Force on Civil RICO also recognized that a prior criminal conviction requirement would eliminate the abuse of civil RICO and restore the statute to the purpose Congress originally intended:

> "Requiring a criminal conviction as a predicate to civil treble damage liability under RICO would alleviate virtually all the problems critics have posed concerning overbreadth of the civil remedy." ABA RICO Task Force Report at 222.

What is needed is legislation that will amend 18 U.S.C. § 1964(c) so that a private civil plaintiff could only bring suit against a defendant who has been convicted either of one of the predicate acts or of a RICO violation itself. In either case, the conviction would have to be for the conduct upon which the private suit is based. (We attach as Exhibit A to this Appendix proposed language to accomplish this result. The suggested amendment would also set a statute of limitations of one year, measured from the latest judgment of conviction for RICO or the civil predicate acts upon which the civil action is based. This proposal is identical to H.R. 2943, introduced on July 10, 1985, by Representative Boucher.)

Under this amendment, civil RICO could no longer be used simply to raise the stakes in or federalize commercial disputes. The plaintiff would have to prove that:

(1) the defendant violated the provisions of RICO by engaging in conduct that violated 18 U.S.C. § 1962;

(2) the defendant has been convicted either of a RICO violation or of one of the predicate acts based on the conduct upon which the plaintiff bases his civil RICO claim;

(3) the plaintiff has been injured in his business or property by the defendant's violation of Section 1962; and

(4) the plaintiff has filed his treble-damage suit within one year of the latest pertinent convictions.

With this change in the law, civil RICO could only be used against persons whom prosecutors have decided to charge with crimes and who have been found guilty of criminal acts. This amendment would restore the central role of public prosecutors originally envisioned by Congress. Before plaintiffs could call upon the treble-damage remedy made available under RICO specifically to deal with organized crime, there would first have to be a determination by the public prosecutors and juries that the defendant was actually engaged in criminal activity.

The ABA RICO Task Force Report agrees that the creation of some prior criminal conviction requirement "would be preferable to the present statute and its intolerable overbreadth." ABA RICO Task Force Report at 238. Nevertheless, instead of this direct and precise solution, the ABA Task Force offers as an alternative a package of ten different substantive changes in the statute in order to achieve the same basic result as the prior criminal conviction requirement -- returning civil RICO to its proper focus. That laundry

list of changes, however, is cumbersome. It is likely to raise complex problems in the course of drafting and implementation. In fact, the drafting issues were so unwieldy that the Task Force did not even attempt to offer specific statutory language to implement its proposals.

Furthermore, most changes in statutory language, no matter how minor, raise issues of interpretation and implementation unanticipated at the time of passage. An approach that requires ten major changes is certain to create many new issues. The prior criminal conviction requirement achieves the same result with but one simple amendment. It has already been drafted and its impact has been subjected to intense scrutiny and conjecture by its proponents and opponents alike. As the following discussion demonstrates, despite that intense scrutiny, no major problems that would arise from its implementation have been identified.

The ABA RICO Task Force alternatively suggests that if some version of a prior criminal conviction requirement is adopted, the Congress should consider making treble damages available only where there are prior criminal convictions, but allow private plaintiffs to sue for actual damages even where there have been no previous convictions. ABA RICO Task Force Report at 238. Such a change would, of course, not solve the underlying problem, which is the use of civil RICO for unintended and abusive purposes. Two major opportunities to abuse civil RICO would remain. First, plaintiffs would still be able to increase the <u>in terrorem</u> effect of their

suits -- and hence their settlement value, whatever the merits of the cases -- because of the coercive effect of even an unsubstantiated accusation of "racketeering." Second, plaintiffs would be able to "federalize" traditional state law tort and contract claims by recasting them as RICO cases, and thus accelerate the growth of cases on the federal court dockets that rightfully belong in the state legal systems, if anywhere. Thus, all civil RICO claims should be subject to a prior conviction requirement.

D. None Of The Criticisms Of A Prior Criminal Conviction Requirement Is Substantial

Persons eager to preserve the potent weapon which civil RICO has become in ordinary commercial litigation have repeatedly thrown out a laundry list of so-called problems associated with a prior-criminal-conviction requirement. Through repetition -- and undoubtedly because to date these claims have generally gone unanswered -- these assertions have taken on more credence than they deserve, and we find less jaundiced observers, such as the ABA RICO Task Force and the five-Justice majority of the Supreme Court in Sedima, repeating these criticisms. In truth, if these so-called problems are examined one by one, one discovers that there is no real substantial impediments behind the rhetoric.[14/]

[14/] The proof, in part, is in the doing. We discussed earlier cases in which plaintiffs brought civil RICO cases against defendants who had first been convicted on criminal charges. See pp. 16-17, supra. There is no indication in any of these cases that the plaintiffs found insurmountable problems or even substantial difficulties in bringing those lawsuits.

1. "Gutting" the civil remedies

A criminal conviction precondition to private civil RICO actions would not "gut" the remedies available to private parties, as some critics of a prior-criminal-conviction requirement charge. As our earlier discussion demonstrates, there already have been cases in which plaintiffs have used civil RICO to go after defendants who had been first convicted of criminal charges. See pp. 16-17, supra. Cases of this type would continue. Moreover, if there has been no criminal prosecution and conviction, a potential plaintiff would still have available all the other federal and state law remedies that apply to commercial disputes and torts; he would not be left without a remedy.

2. The "private attorney general" rationale

The ABA Task Force suggests that the criminal conviction requirement may be "too restrictive" because it would eliminate "what some courts have labelled the useful 'private attorney general' aspect of Civil RICO." ABA RICO Task Force Report at 238. The Supreme Court majority in Sedima similarly referred to Section 1964(c) as a "private attorney general "provision[]." 53 U.S.L.W. at 5038. This view, however, rests on the erroneous assumption that civil RICO was meant to deputize private claimants and their lawyers to serve as "private attorneys general." The private damage remedy under RICO, however, was not created in order to empower private citizens to take on law enforcement responsibilities, and

there is no good reason to view the statute today as serving that end.

No one who has taken a hard look at the problem of organized crime -- not the Kefauver Committee in the 1950s, not the Katzbach Commission in the 1960s, not Senator McClellan's Committee in the 1960s and 1970s -- has ever believed that private civil suits could be an important weapon in the war against organized crime. Significantly, the Department of Justice itself has never suggested that it believes that private citizens should have the right to accuse other persons of crimes, nor has the Justice Department indicated that private suits are necessary to supplement its efforts to attack organized crime.

Indeed, it would be foolish to believe that a private citizen would have the temerity to sue a real organized crime figure for racketeering, unless the government has first prosecuted and convicted him. There is no indication that anyone in Congress entertained that naive belief when RICO was passed in 1970. The lesson of the last 15 years' experience with civil RICO confirms the sensible assumption that criminal conviction is, as a practical matter, a necessary precondition to private RICO suits against the kind of criminal Congress had in its sights. In the few civil RICO cases that have been brought against violent organized crime figures, private suits actually have followed prosecution and conviction, and have not been a substitute for criminal conviction. See pp. 16-17, supra.

Thus, the only impact from adopting a criminal conviction requirement would be to filter out the suits that have nothing to do with the war on organized crime.

Moreover, Assistant Attorney General Trott's testimony before this Committee in May 1985 shows that the Justice Department has brought RICO prosecutions in at least as many cases as civil litigants are using the statute, and the number of federal criminal cases is growing. Federal and state prosecutors, of course, bring thousands of non-RICO prosecutions involving the predicate offenses listed in RICO. It is baseless to assert that the targets of the private civil RICO cases that private lawyers have brought in the absence of prior convictions would have been prosecuted if only federal and state prosecutors had more resources. The simple truth is, as the Executive Director of the ABA RICO Task Force acknowledged elsewhere, these private civil suits are brought in cases that no responsible prosecutor would have treated as criminal. See pp. 17-18, supra.

3. Possible effects on public prosecutors

The opponents of the prior-criminal-conviction requirement assert that this requirement could influence the way public prosecutors perform their duties. They speculate:

(1) Federal prosecutors could be subject to undue pressures from private parties with potential civil RICO claims to press RICO-related prosecutions.

(2) Prosecutors may be subject to accusations that they were influenced in their decisions to press RICO-related prosecutions because of the impact on individuals' civil remedies.

(3) Prosecutors may be willing to accept plea bargains that are unrelated to the merits of the case. The criminal conviction requirement, it is suggested, could create a powerful new weapon in the hands of the prosecutor to force defendants to plead to lesser, non-predicate-act offenses. If prosecutors accept pleas to non-predicate act offenses, private litigants would lose their opportunity for civil relief, or at least lose the opportunity to sue certain defendants.

The fact is that public prosecutors already are subject to the entreaties of private parties whose interests are at stake in criminal proceedings. In the full range of potential civil litigation, from murder and arson to securities fraud and antitrust, there are private parties whose ability to win civil damage suits would be vastly enhanced by a successful criminal prosecution. The public prosecutor's duty, however, is to weigh those interests in balance along with other relevant factors in deciding where the public interest lies. There is simply no reason to presume that a RICO statute subject to a prior-criminal-conviction requirement would create pressures qualitatively different from those which already exist, or that the prosecutors would no longer be able to discharge their duties fairly, or that the public perception of the prosecutor's decision-making would be adversely affected.

Nor is there any basis to assume that a federal prosecutor will bargain away a good case against racketeers -- either on the predicate offenses or the RICO charge itself -- and thus foreclose an otherwise proper civil RICO case. Many of the predicate acts listed in the RICO statute do not have

"lesser included offenses," and so it would be difficult, if not impossible, to arrange a plea to a non-predicate offense in an organized crime case. Furthermore, plea bargaining in the federal courts has never been as extensive as in the overcrowded and understaffed state court systems. Federal prosecutors simply do not bargain away good cases because of other constraints, such as limited resources. It is virtually unthinkable that federal prosecutors, despite public and congressional oversight, would irresponsibly agree to drop real organized crime cases in plea bargaining.

The decision to enter a plea bargain in federal court is governed principally by three general considerations: (1) the severity of the crime; (2) the record of the defendant; and (3) the strength of the government's case. The United States Attorneys' Manual, which states the rules and guidelines that govern federal prosecutors, sets out eleven factors that the prosecutor must consider in "determining whether it would be appropriate to enter into a plea agreement." The factors at the top of the list include the "defendant's willingness to cooperate in the investigation or prosecution of others," the defendant's criminal record, the nature of the charges, the defendant's "remorse or contrition," the "likelihood of obtaining a conviction at trial," and similar concerns. Only at the end of this exhaustive list does the manual even mention consideration of prosecutorial and judicial resources. See U.S. Department of Justice, United States Attorneys' Manual

§ 9-27.420 (June 15, 1984). Thus, the Department of Justice's own standards will prevent prosecutors from allowing organized crime figures to escape with pleas to minor crimes.

Finally, as a practical matter, it is doubtful that fear of civil liability would be a major factor in a criminal defendant's decision whether to enter a plea bargain. Moreover, if it did provide an additional incentive to get organized crime figures to plead guilty and to cooperate with the federal authorities, Congress should encourage that result, not fear it. The primary purpose of RICO has always been, and should remain, to increase the weapons available to federal prosecutors in fighting organized crime. If the rare case comes along in which the prosecutor concludes that he can use the threat of a private civil suit to gain cooperation from a racketeer, purely private financial interests should not be allowed to frustrate the public interest in effective criminal law enforcement.

4. Possible effect on witness credibility

Another concern that has been raised is that a witness's credibility would be subject to challenge at a criminal trial if he stands to gain from the conviction of the defendant. Here again, a criminal conviction requirement would not qualitatively change the present situation. Any witness with an actual or potential civil claim against the defendant has a financial and personal stake in the success of the criminal prosecution; thus, the witness's credibility is already

subject to challenge on that basis. Moreover, under modern notions of collateral estoppel, if the defendant is convicted on the charges, the factual issues resolved against the defendant by the verdict would in all likelihood be considered settled against him in a civil suit. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Thus, under RICO as well as under other statutes, the benefit accruing to a victim/witness from a conviction in a parallel criminal proceeding already provides a basis for attacking the witness's credibility in the criminal trial.

Indeed, if a criminal conviction is not a precondition to civil suit, the witness may have a civil suit pending concurrently with his testimony in a criminal case. In the jury's eyes, this direct and specific interest in obtaining a conviction may cast more doubt on the witness's credibility than would the mere possibility that the witness might file a civil suit if the defendant is convicted. Thus, by postponing the ability to file a civil RICO suit, Congress could actually minimize questions about the complaining witness's credibility at the criminal trial and thereby enhance the statute's primary purpose, the prosecution and conviction of organized crime figures.

5. Delay in bringing the civil RICO suit

Another category of issues raised about the prior-criminal-conviction requirement involves the timing of civil suits. The comments generally take the following form:

(1) Uncertainty would exist as to when the statute of limitations begins to run on the RICO claim, and whether the civil plaintiff must wait until criminal appeals are exhausted.

(2) It is unclear what effect reversals or pleas of nolo contendere would have on civil RICO claims.

(3) Private parties would be forced to divide causes of action and bring two separate suits, because they have to go forward with their non-RICO claims before the statute of limitations runs out.

(4) Because of the long interval that can pass between the occurrence of a crime and a conviction, the private plaintiff's ability to pursue a civil remedy successfully could be prejudiced by (a) the staleness of evidence and (b) the defendant's dissipation or concealment of assets.

None of these worries is substantial. There is no difficulty in establishing the beginning of the limitations period. A claim does not accrue for purposes of a statute of limitations until all the elements of the plaintiff's cause of action exist. See, e.g., Impro Products, Inc. v. Block, 722 F.2d 845, 850 (D.C. Cir. 1983), cert. denied, 105 S. Ct. 327 (1984). If a prior criminal conviction constituted a necessary element of a civil RICO claims, the statute of limitations would not begin to run until the government secured the pertinent conviction. In any event, the amendment can include language that specifically links the limitations period to the date of the latest pertinent judgment of conviction, as does H.R. 2943.

The other issues can be handled equally easily under well-established principles of judicial procedure. By analogy

to principles of res judicata and collateral estoppel, which take effect as soon as the trial court enters its judgment, the civil RICO suit could commence as soon as a judgment of conviction is entered and need not wait until appeals have run their course. If one of the predicate convictions is reversed on appeal and remanded for a new trial, the civil action could be stayed during the proceedings on remand, or could be dismissed without prejudice to refiling at a later date if the defendant is re-convicted.

If in the criminal proceeding the defendant pleads nolo contendere or enters the kind of "no contest" plea the Supreme Court approved in North Carolina v. Alford, 400 U.S. 25 (1970), the judgment in either case would lay the foundation for a civil RICO complaint. The law treats either of those pleas as a confession of guilt, and the court renders a judgment of conviction. See id. at 35-37; Lott v. United States, 367 U.S. 421, 426-27 (1961). Once a conviction is entered, the private plaintiff could proceed accordingly with a RICO suit.

Nor is there any problem created because certain related causes of action might accrue before the civil RICO claim accrues. The premise underlying this concern is that the civil RICO remedy duplicates other existing federal or state remedies that the plaintiff may pursue. Since the purpose of creating the civil RICO remedy was to authorize redress for people who otherwise have no legal rights under

other statutes and legal theories, this is an ironic objection. In cases of that sort, a potential RICO claim should be viewed as merely cumulative. The plaintiff has no legitimate grievance if he must proceed with other remedies that the law already makes available to him.

In any event, if a plaintiff has both a potential RICO claim and a ripe claim under another legal theory, normal rules of procedure would govern. The plaintiff may bring his non-RICO claim on a timely basis. If he wishes to defer further proceedings in that suit until any criminal charges against the defendant are resolved, he may seek to stay his civil suit until the RICO claim ripens. If he proceeds with the non-RICO claim, the established principles of res judicata and collateral estoppel would govern the impact of the outcome of that first action on any later RICO action. See 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶¶ 0.441-0.448 (2d ed. 1984). If he loses his non-RICO case claim after a fair opportunity to establish it, he has little reason to complain that this decision would bar an overlapping RICO-related claim based on the same conduct.

If, by contrast, the plaintiff wins a damage award in his non-RICO suit based on the predicate acts, and then brings a proper RICO case, the damage awards may not completely overlap. His RICO claim may relate to a distinct type of injury and, in any event, would be trebled. To the degree that there is duplication, the second court would reduce the later award under established legal principles preventing

duplicative awards for the same injury. See, e.g., American Mail Line, Ltd. v. Weaver, 408 F.2d 674, 675 (9th Cir. 1969).

The concerns expressed about the staleness of evidence also suffer from similar underlying defects. A problem of stale evidence would seldom arise. As previously discussed, under modern notions of offensive collateral estoppel, the criminal conviction would probably establish the defendant's civil liability in the ensuing civil RICO suit, without even the need for further evidence. Moreover, all of the evidence collected through the government's resources and presented at the criminal trial would be available to the civil plaintiff.

In any event, the plaintiff with a civil RICO claim may have to depend, for practical purposes, on a prior criminal proceeding. RICO defines a "pattern of racketeering," which even the civil plaintiff must allege and prove, as at least the commission of two predicate offenses within a ten-year span. Thus, no one may bring a civil RICO claim until the defendant has committed at least a second predicate offense, at which point the first offense may well be quite dated. In the absence of a prior criminal prosecution, a private party could have substantial difficulty proving the earlier predicate offense, especially if it involved an unrelated transaction, as it should. Thus, not only is the "lag time" in government prosecutions unlikely to undermine a plaintiff's ability to prove a proper civil RICO case, prior prosecution

may well be a necessary component of a successful private civil case.[15/]

The prospect of dissipation of assets is also illusory. Under the 1984 amendments to RICO, Congress gave the government expanded powers to bring forfeiture proceedings in conjunction with criminal charges under RICO and to obtain preliminary relief in the form of seizure of assets even prior to indictment. See Sec. 302, P.L. 98-473, 98 Stat. 2040-44 (amending 18 U.S.C. § 1963). The government, therefore, has both the power and the incentive to prevent the defendant from secreting his assets. Moreover, under the 1984 amendments, the Attorney General is empowered to use the funds actually obtained through criminal forfeiture to "restore forfeited

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15/ It is true that some civil RICO plaintiffs have manufactured a "pattern" out of essentially simultaneous events, principally because separate acts of mail fraud, wire fraud, or securities fraud can be pleaded for each instance in which the mail or telephone is used or each time a share is sold. See pp. 5-6, supra. But these are instances in which RICO is being abused to apply only to a single episode or transaction.

In cases actually involving organized crime, the predicate acts will be more widely separated in time. The Justice Department recognizes that this separation in time is a characteristic of a proper RICO case; under its RICO guidelines, the Department prohibits use of RICO to challenge conduct that is simply part of a single episode or transaction. U.S. Department of Justice, United States Attorneys' Manual, ¶ 9-110.340 (March 9, 1984); see pp. 48-49, supra. As the Department explicitly states in explaining this limitation, "the purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute." Id. at ¶ 9-110.341; see also Sedima, 53 U.S.L.W. at 5038 n.14, 5039 (suggesting the statutory requirement of proof of a "pattern" demands something more than just proof of two predicate acts within ten years).

property to victims" of a RICO violation or "take any other action to protect the rights of innocent persons" and "award compensation to persons providing information resulting in a forfeiture . . . ." 18 U.S.C. § 1963(h)(1) and (3). Thus, prior criminal proceedings actually may enhance the ability of civil plaintiffs to secure compensation.

Nor should one lose sight of the fact that persons with claims for relief arising from the predicate acts may press those claims immediately. If they have damage claims for securities fraud or commercial fraud, for example, they would not be inhibited from bringing those claims simply because there is a separate limitation designed solely to assure that civil RICO claims deal only with actual criminal conduct. Rule 64 of the Federal Rules of Civil Procedure provides ample remedies to the private plaintiff to assure that the defendant preserves enough assets to satisfy a potential judgment.

6. Inability to reach some of the culprits

Finally, questions have been raised about whether it is sound to prevent private plaintiffs from bringing civil RICO suits against actual criminal offenders who, for some reason not related to their culpability, are not convicted.

We have already touched on one of these situations, where federal prosecutors are able to get one of the suspects to cooperate by allowing him to plea bargain to a non-predicate offense or even by immunizing him from all criminal liability. See, p. 60, supra. Traditionally, prosecutors have had great

difficulty getting such cooperation from organized crime figures, because of the enormous risks faced by the member of organized crime who aids the government. The Department of Justice and Congress, therefore, should embrace, not reject, the opportunity to create a new incentive to get persons to give evidence against organized crime. Moreover, the private party in these hypothetical situations will still have other potential defendants to sue -- those against whom the cooperating culprit testifies. It is also reasonable to assume that it will be the minor figures who are given the opportunity to plea bargain; the major targets, who are likely to have greater assets, will remain exposed to private civil RICO claims.

The other points voiced by opponents fall equally short. They are:

(1) If the indictment is dismissed for reasons unrelated to the merits, the civil plaintiff will never be able to sue.

(2) Without changes in the legal concept of derivative liability, if individual principals are convicted of predicate acts, but the organization holding the assets is not, the civil plaintiff will not be able to reach the assets necessary for compensation.

(3) If the criminal defendant remains a fugitive from justice, the criminal case will remain unresolved and the private plaintiff will go uncompensated even though the fugitive has assets in this country against which a civil award could be collected.

In fact, a fatal dismissal of an indictment for reasons unrelated to the merits occurs only in the rarest of

cases. In virtually all instances in which the indictment is dismissed on technical grounds, the government can simply reindict. Federal law specifically provides for an extension of all statutes of limitations in order to guarantee federal prosecutors just such an opportunity to reindict. See 18 U.S.C. §§ 3288-89.

Opponents of the criminal conviction requirement also conjure up the specter of a serious criminal case that the government cannot successfully prosecute after a court suppresses critical evidence because it was seized in violation of the Fourth Amendment. This is a far-fetched fear. Even before United States v. Leon, ___ U.S. ___, 82 L.Ed.2d 677 (1984), in which the Supreme Court created a substantial exception to the "exclusionary rule" for cases in which the police rely in good faith on a search warrant, the exclusionary rule actually had led to suppression of evidence in a miniscule proportion of all criminal cases. The empirical studies cited by the Supreme Court in the Leon case found that the exclusionary rule affected the prosecution in the cases of only about 1% of the persons arrested for felonies. 82 L.Ed.2d at 688 n.6. Since these figures relate to all persons arrested, the percentage of arrestees who were actually guilty but escaped conviction because of the suppression of evidence must have been even smaller.

Even those figures overstate the effect of the exclusionary rule in organized crime cases, since most challenged

searches and seizures involve street crimes investigated by local police, not carefully planned and supervised federal investigations of organized crime. It will be the careful investigations of organized crime activities, where search warrants are typically used, that will particularly benefit from the Supreme Court's recent decision in Leon to eliminate the exclusion when investigators rely on warrants.

Furthermore, even when the exclusionary rule applies, its scope is extremely limited. The illegally seized evidence may be used against all defendants except the particular person whose Fourth Amendment rights were actually violated. Brown v. United States, 411 U.S. 223 (1973). Thus, the case against all co-conspirators and other defendants accused of participating in the racketeering enterprise would be unaffected. At bottom, then, only in the rarest of cases, if ever, would the Fourth Amendment block conviction on RICO-related charges and deprive an otherwise deserving plaintiff of the opportunity to pursue a civil RICO recovery.

Similarly insubstantial is the speculation that a conviction requirement could insulate from recovery the assets that a convicted racketeer has placed within some unconvicted enterprise. It is quite unlikely that an organized crime figure will place his assets in a business organization that is outside of his personal control. Rather, the enterprise will be operated in a form -- such as a partnership or a joint venture -- where the assets can be reached through a suit

against the individual. Even if the criminal resorts to a corporate form, the assets will still be reachable for at least one of two reasons. The criminal principal will own or control the stock of the corporation, in which case that stock, representing the value of the assets, can be reached. If the criminal does not own the enterprise outright, then he will undoubtedly be milking it or otherwise misusing the corporate form in a manner that will allow the court to "pierce the corporate veil," thus permitting the civil plaintiff to reach the assets at issue. See generally Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853 (1982). In sum, no criminal is simply going to give away his ill-gotten gains. As long as the assets remain his, the law provides the necessary tools to break through any formal barriers. Thus, the problem supposedly posed by the conviction of the "principals" but not the "organization" is no problem at all.

Similarly, the defendant's fugitive status will rarely, if ever, stand in the way of a civil RICO claim. There are few places left in the world for an indicted criminal to hide. According to the Office of the Legal Adviser at the Department of State, the United States currently has criminal extradition treaties with over one hundred nations, including all of the countries in which a wealthy racketeer might want to take refuge. Moreover, Congress cannot realistically assume that all members of a criminal enterprise will

successfully flee the United States and in that way escape conviction. Only in that extraordinarily unlikely event would a plaintiff be left with no target for a civil RICO suit. Thus, few if any proper civil RICO plaintiffs will be left without any civil recourse against any racketeer.

VI. CONCLUSION

The need for reform is clear. The nature of the reform is clear. And the responsibility for reform is clear. Congress should amend the civil provisions of RICO to focus the private remedy on its original purpose of aiding the war against organized crime, while curing its capacity to bludgeon innocent business people.

The easiest and best method to accomplish this purpose is to amend 18 U.S.C. § 1964(c) to create a prior-criminal-conviction requirement in private civil RICO actions. This type of amendment will give rise to the fewest complications. None of the arguments against this requirement stands up under analysis. The proper civil RICO plaintiff -- the victim who has been damaged by actual criminal activity committed by a repeat criminal offender -- will have a full and effective remedy. The only losers will be those persons who should have no legitimate claim to invoke this special statute at all.

Amend subsection (c) of 18 U.S.C. § 1964 ("Civil remedies") to read as follows (new matter underscored, deleted matter bracketed):

* * *

"(c) Any person injured in his business or property by reason of <u>conduct in</u> [a] violation of section 1962 of this chapter may sue [therefor] <u>any person who engaged in that conduct and, with respect to such conduct, was convicted of racketeering activity or a violation of section 1962</u> 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. <u>A civil action under this subsection may not be commenced against a defendant later than one year after the entry of the latest judgment of conviction against the defendant for racketeering activity or a violation of section 1962 with respect to the conduct out of which such action arises</u>."

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<u>EXPLANATION</u>

This amendment would limit the abuse of RICO's private, civil treble-damage mechanism under which claimants in many types of commercial disputes have been able to gain unwarranted leverage for their positions by branding their adversaries "racketeers." The amendment would implement

Congress' judgment that the use of RICO's powerful weapons against "organized crime" should rest on the expertise and discretion of public prosecutors. The amendment would achieve those objectives by making it clear that the civil treble-damage provision is to be used only against persons whom prosecutors have decided to charge and whom juries have decided to convict of criminal violations of RICO or of the underlying "predicate" offenses.

Under this amendment the civil remedy would dovetail with the careful screening performed by the Department of Justice in applying its guidelines to distinguish cases that are properly subject to the special RICO provisions from those that are not. It also would rely on determinations by federal and local prosecutors and juries that the defendants were actually engaged in criminal activity. Accordingly, the special civil treble-damage provisions of RICO would be directed only at those persons who may fairly be viewed as engaged in the business of "organized crime." Ordinary commercial disputes and tort claims would be left exclusively to the other federal or state remedies that appropriately apply to them.