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Civil RICO Reform: The Gatekeeper Concept

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Civil RICO Reform: The Gatekeeper Concept

Michael Goldsmith* and Mark Jay Linderman**

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I. INTRODUCTION

Since coming into vogue in the mid-1980s, civil RICO has often been criticized and targeted for reform. Critics claim that civil RICO is too broad because it potentially applies to all commercial transactions. More specifically, opponents claim that RICO's inclusion of mail and wire fraud as predicate acts unjustly subjects all "legitimate businesses"

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to liability.

For example, Representative Rick Boucher, sponsor of the 1989 RICO reform legislation, has stated:

[F]raud allegations are commonly made in contract situations, and all that is needed to convert a simple contract dispute into a civil RICO case is the allegation that there was a contract and the additional allegation that either the mails or the telephones were used more than once in either forming or breaching the contract.¹

Such criticism has led to numerous attempts by courts² and legislators³ to curtail civil RICO. For the most part, these efforts have sought to

1. 132 CONG. REC. H9371 (daily ed. Oct. 8, 1986) (remarks of Representative Rick Boucher, sponsor of 1989 RICO reform legislation).

2. Courts initially attempted to limit civil RICO in one of the four following ways: 1) by including an organized crime requirement, 2) by requiring proof of a competitive injury, 3) by requiring proof of a racketeering injury, or 4) by requiring a prior criminal conviction. The least successful of these limitations was an attempt to limit civil RICO to traditional organized crime activities. *See, e.g., Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581, 588 (N.D. Cal. 1984), *aff'd*, 805 F.2d 880 (9th Cir. 1986); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1308 (D. Colo. 1984); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746 (N.D. Ill. 1981). Plaintiffs had to allege that defendants were linked to organized crime to withstand summary judgment. Courts soon rejected such an organized crime limitation because it was unsupported by RICO's text or its legislative history. *See, e.g., Plains Resources, Inc. v. Gable*, 782 F.2d 883, 887 (10th Cir. 1986); *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir.), *cert. denied*, 469 U.S. 831 (1984).

Other courts attempted to limit civil RICO by requiring proof of a competitive injury. Rather than recognize injuries from the defendant's predicate acts, these courts required that the plaintiff prove injury from having to compete with an enterprise which had obtained an unfair advantage through racketeering activity. *See, e.g., Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *aff'd on other grounds sub nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980). Courts modeled this requirement after a similar requirement in antitrust law. Courts uniformly have rejected this limitation on civil RICO.

The two most important and widely used attempts to limit the scope of civil RICO were the prior conviction and racketeering injury requirements, which were argued unsuccessfully in *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). The prior conviction limitation required that the defendant be convicted of the predicate acts in a prior criminal action as a prerequisite to civil relief. *Id.* at 496. The racketeering injury requirement is not explained as easily. *See Sedima*, 473 U.S. at 494 (stating that the court was "hampered by the vagueness of [racketeering injury]"). The Second Circuit had defined racketeering injury as "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Sedima*, 741 F.2d at 496. An example of a racketeering injury would be the loss of a business through bankruptcy, caused by the predicate acts of mail fraud and extortion. The Supreme Court in *Sedima* rejected both the prior conviction and the racketeering injury requirements. *Sedima*, 473 U.S. at 485.

3. *See, e.g., S. 1523*, 100th Cong., 2d Sess. (1988); H.R. 4923, 100th Cong., 2d Sess. (1988); H.R. 5445, 99th Cong., 2d Sess., 132 CONG. REC. H9365-66 (daily ed. Oct. 7, 1986); H.R. 5290, 99th Cong., 2d Sess. (1986); H.R. 2943, 99th Cong., 1st Sess., 132 CONG. REC. H9371 (1985); S. 1521, 99th Cong., 1st Sess. (1985).

For a discussion and criticism of the rationale behind former RICO reform proposals, see generally Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827 (1987); Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55.

emasculate civil RICO rather than to rectify isolated problems of abuse or overbreadth.⁴

By enacting the Racketeer Influenced and Corrupt Organizations law as title IX of the Organized Crime Control Act of 1970,⁵ Congress sought to eradicate enterprise criminality⁶ through enhanced criminal sanctions and new civil remedies.⁷ Thus, section 1962 prohibits four types of enterprise criminality activities: (1) investing racketeering proceeds in an interstate enterprise;⁸ (2) acquiring or maintaining an interest in an interstate enterprise through a pattern of racketeering activity;⁹ (3) conducting the affairs of an interstate enterprise through a pattern of racketeering activity;¹⁰ and (4) conspiring to commit any of the preceding violations.¹¹ In addition to severe criminal sanctions, Congress also included a civil remedy modeled after the treble damages

4. For a discussion of how RICO can be fine-tuned to eliminate abuse and potential overbreadth, see Goldsmith, *supra* note 3, at 858-83.

5. Pub. L. No. 91-452, tit. IX, §§ 901-902, 84 Stat. 922, 941-48 (codified at 18 U.S.C. §§ 1961-1968 (1988)) [hereinafter RICO].

6. See *United States v. Cauble*, 706 F.2d 1322, 1330 & n.7 (5th Cir. 1983) (stating that enterprise criminality consists of all types of organized criminal behavior ranging "from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors" (citing Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013-14 (1980))), *cert. denied*, 465 U.S. 1005 (1984).

7. The Statement of Findings and Purpose of the Organized Crime Control Act of 1970 provides that "[i]t is the purpose of this Act to seek the eradication of organized crime . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." RICO, *supra* note 5, § 901, 84 Stat. at 923.

8. Section 1962(a) states in part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) (1988).

9. Section 1962(b) states:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id. § 1962(b).

10. Section 1962(c) states:

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

Id. § 1962(c).

11. Section 1962(d) states, "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." *Id.* § 1962(d).

provision of the Clayton Act.¹² Congress intended that RICO's treble damages provision, along with attorney's fees, would deter criminal activity by encouraging private attorneys general to sue on behalf of persons injured by RICO violations.¹³ RICO reform should not be attempted without adhering to this original legislative purpose.

Recently, however, Senator Dennis DeConcini and Representative Rick Boucher introduced a restrictive bill, entitled "The RICO Reform Act of 1989,"¹⁴ that, in most situations, would: (1) eliminate the possibility of treble damages and attorney's fees; (2) exclude securities fraud from RICO's purview; and (3) apply retroactively to pending litigation. Though reform may be appropriate to clarify any statutory uncertainties, the proposed bill would simply weaken the statute while failing to address any real problems. As the *New York Times* observed: "Reducing damages would reduce deterrence. It makes no sense to exempt commodities and securities frauds when these seem rampant. Above all, retroactive relief is unfair. By going along with it, Congress would turn itself into a partial substitute for impartial courts."¹⁵ Responsible reform legislation must fine-tune RICO's statutory provisions and eliminate any abuse, while preserving the treble damages remedy and attorney's fees for deserving cases.

From a political standpoint,¹⁶ the most promising reform proposal attempts to limit civil RICO claims through a gatekeeper mechanism.¹⁷

12. See *id.* § 1964(c). Section 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . and shall recover threefold the damages . . . and the cost of the suit, including a reasonable attorney's fee." *Id.*

13. For a discussion of the purposes behind the treble damages provision of civil RICO, see *infra* notes 46-61 and accompanying text.

14. See H.R. 1046, 101st Cong., 1st Sess., 135 CONG. REC. H369, E460 (daily ed. Feb. 22, 1989); S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1652 (daily ed. Feb. 23, 1989).

15. *Topics of The Times: Save RICO From "Reform,"* N.Y. Times, Oct. 6, 1988, at A30, col. 1.

16. This type of reform proposal may be necessary politically though it does not contain certain important ingredients that one of the authors has suggested previously. See Goldsmith, *supra* note 3, at 858-83.

17. Although a civil RICO gatekeeper has never been included in reform legislation, it is not a novel suggestion. In testimony before the Senate Judiciary Committee in 1985, Dominic T. Gentile, Chair of the American Bar Association Criminal Justice Section RICO Committee, proposed the inclusion of a preliminary hearing in all civil RICO cases at which the plaintiff would have to establish probable cause as to each element of the claim. See *Oversight on Civil RICO Suits: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 556-57 (1985) (statement of Dominic T. Gentile). Professor Goldstock made a similar suggestion, based on his experience with New York's version of the RICO statute. Professor Goldstock suggests that Congress draft a preamble to RICO with general legislative findings concerning its intended scope. Rule 11 sanctions could then be granted for bad faith claims based on the congressional finds. Moreover, a RICO defendant could bring a motion to dismiss on the ground that the RICO claim was inconsistent with RICO's intended scope. See *Hearings on H.R. 1046 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *H.R. 1046 Hearings*] (hearings not officially printed as of current date) (testimony of Prof. Ronald Goldstock).

More specifically, the approval of a screening authority would be necessary before a civil RICO claim could proceed. Professor Norman Abrams suggests that a government prosecutor review all civil RICO claims, and dismiss any that would not be prosecuted criminally.¹⁸ Alternatively, Representative William J. Hughes proposes a judicial gatekeeper to oversee RICO claims. Because the gatekeeper concept raises important concerns, it requires careful scrutiny.

The gatekeeper concept is set forth most comprehensively by Professor Abrams. He suggests that civil RICO abuse may occur when a suit is filed that a prosecutor, exercising proper discretion, would not have initiated.¹⁹ Professor Abrams asserts that such a gatekeeper would bring the exercise of prosecutorial discretion to civil RICO.²⁰ This proposal, however, is based on the faulty assumption that civil RICO's sole purpose is to enforce the criminal law. Though a gatekeeper may be an appropriate means for dealing with perceived problems in civil RICO, misconceptions about RICO's purpose must be corrected in order to create effective standards for the gatekeeper to function properly.

Representative Hughes also would change civil RICO to "emulate the results attained by prosecutorial discretion in the criminal area."²¹ He proposes that a district court judge serve as the gatekeeper. An early draft of Representative Hughes's proposed bill and his comments delivered at this Symposium suggest that the bill both fine-tunes civil RICO's existing provisions and sets forth procedures and standards to govern the court in its role as a gatekeeper.

This Article examines the rationale behind the gatekeeper concept, points out misconceptions, and suggests standards to be used if a gatekeeper is incorporated into civil RICO. Part II of this Article examines Professor Abrams's analysis and proposals.²² Part III critiques the gatekeeper concept advanced by Representative Hughes.²³ Part IV suggests the appropriate use of a gatekeeper and sets forth standards for reviewing civil RICO cases.²⁴ Part V concludes that, although Professor Abrams's and Representative Hughes's proposals contain flaws, political realities mandate that the gatekeeper concept be examined, corrected, and implemented.²⁵

18. Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1 (1989).

19. *Id.* at 6.

20. The choice of a prosecutor to oversee civil RICO is inappropriate. See *infra* note 177.

21. Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639 (1990).

22. See *infra* notes 26-163 and accompanying text.

23. See *infra* notes 164-89 and accompanying text.

24. See *infra* Part IV.

25. See *infra* Part V.

II. PROFESSOR ABRAMS'S GATEKEEPER RATIONALE

Professor Abrams is concerned about cases on the "borderland" between criminality and legitimate business.²⁶ Although these cases technically involve violations of the criminal law, Professor Abrams does not consider these violations to be sufficiently criminal for RICO purposes. Professor Abrams claims that "borderland" cases are not prosecuted because of the appropriate exercise of prosecutorial discretion.²⁷ He suggests the following test to determine whether a civil RICO case should be brought: "If these facts had been brought to the attention of the public prosecutor, and if that office had unlimited resources available, would this case have been criminally prosecuted?"²⁸ If a criminal suit would not have been brought, Professor Abrams contends that a civil claim should not be allowed.²⁹

Professor Abrams claims that Congress intended such a test for RICO claims.³⁰ He states that suits that a prosecutor, using his or her discretion, would not file "should not be permitted to be brought as civil RICO actions because *Congress intended* the test for a civil RICO suit to be whether it involved a criminal RICO matter, that is one which would have been prosecuted criminally."³¹ Unfortunately, he fails to support this statement with any evidence of legislative intent.³² Further analysis of Professor Abrams's gatekeeper proposal will show that it rests on three mistaken premises: (1) that civil RICO is primarily a

26. Abrams, *supra* note 18, at 6; see also *infra* text accompanying note 48.

27. Abrams, *supra* note 18, at 6; see also *infra* notes 92-96 and accompanying text.

28. Abrams, *supra* note 18, at 7.

29. Professor Norman Abrams states:

If the prosecutor would not have filed in the case even if he or she had unlimited resources available, then the filing of that private civil RICO complaint would involve in a civil matter the application of the criminal law that criminal prosecution would not produce even in a world of unlimited resources. In such a case, the private civil enforcement mechanism would be effecting a significant and, arguably, inappropriate expansion of the criminal law, albeit in a civil proceeding.

Id.

30. Professor Abrams does not explicitly characterize the "borderland" cases as abusive. Nevertheless, this is the clear implication of his analysis—especially because he analyzes the question of abuse in light of the private attorney general rationale. See *id.* at 5. The test for abuse under rule 11 of the Federal Rules of Civil Procedure is whether the suit is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass." FED. R. CIV. P. 11.

31. Abrams, *supra* note 18, at 7 (emphasis added).

32. In support of this claim, Professor Abrams quotes another law review article which merely states: "[C]ivil RICO actions should closely parallel criminal prosecutions." *Id.* at 7 n.15 (quoting Lacovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-1986)). Such a statement in no way supports Professor Abrams's assertion regarding congressional intent.

criminal enforcement mechanism;³³ (2) that civil RICO's primary rationale is to provide private attorneys general;³⁴ and (3) that RICO abuse is caused by the lack of prosecutorial discretion.³⁵ Each premise will be considered in turn.

A. *Civil RICO As a Criminal Enforcement Mechanism*

Professor Abrams argues that "[t]he RICO . . . statute, at its core, is a criminal enforcement mechanism."³⁶ In support, he states that private civil RICO cases involve direct enforcement of the *criminal* law through *civil* proceedings.³⁷ This, however, is not novel, nor does it suggest that civil RICO is primarily a criminal enforcement mechanism. Civil enforcement of the criminal law is a frequent phenomenon. For example, wrongful death statutes impose liability for acts which may be charged criminally as murder.³⁸ Similarly, a civil conversion action may be maintained against a defendant who could be charged criminally with theft.³⁹ Fraud, too, may be charged either criminally or civilly.⁴⁰ Such remedial proceedings, like civil RICO, are separate from their criminal counterparts, and may be maintained without regard to criminal charges. Congress enacted RICO within this established jurisprudence.

Furthermore, Congress carefully considered civil RICO; it was not a mere afterthought to criminal RICO.⁴¹ At the American Bar Associa-

33. For a discussion of this premise, see *infra* notes 36-45 and accompanying text.

34. For a discussion of this premise, see *infra* notes 46-61 and accompanying text.

35. For a discussion of this premise, see *infra* notes 62-163 and accompanying text.

36. Abrams, *supra* note 18, at 2.

37. *Id.* at 5 (emphasis in original).

38. MODEL PENAL CODE art. 223 (1985) (discussing theft and other related offenses); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 946 (5th ed. 1984) (discussing the tort of conversion) [hereinafter PROSSER & KEETON]; Every state has either a wrongful death statute or other statutory remedy. *Id.* § 127, at 945. Moreover, some federal statutes provide a remedy for wrongful death. *Id.*

39. PROSSER & KEETON, *supra* note 38, § 15, at 88-107.

40. MODEL PENAL CODE art. 224 (discussing forgery and fraudulent practices); PROSSER & KEETON, *supra* note 38, §§ 105-110, at 725-70 (discussing the tort of misrepresentation and nondisclosure).

41. In an attempt to discredit civil RICO, opponents have argued that it was a mere afterthought to criminal RICO. See, e.g., *P.M.F. Servs. v. Grady*, 681 F. Supp. 549, 555 (N.D. Ill. 1988) (stating that "civil RICO . . . was a late addition, spot-welded to an already fully-structured criminal statute"). RICO's legislative history shows, however, that Congress consciously added RICO's civil remedy after careful consideration. See *infra* notes 42-45 and accompanying text.

Even if Congress had not added an express civil remedy to the statute, a civil remedy could have been implied. "The Senate passed the bill, of course, with only express government criminal and civil relief, but it is likely a private claim for relief for actual damages would have been implied in the statute based on 1970 jurisprudence." *Hearings on S. 438 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *S. 438 Hearings*] (hearings not officially printed as of current date) (statement of Prof. G. Robert Blakey) (referring to *J.I. Case Co. v.*

tion's suggestion, the Senate added the private treble damages provision to Senate Bill 30, the bill that eventually would become RICO.⁴² Senator John L. McClellan, RICO's primary sponsor, characterized the ABA's proposal as a significant contribution to the legislation.⁴³ The ABA also offered testimony supporting a private treble damages provision. ABA president Edward L. Wright recommended "an amendment to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act."⁴⁴ In addition, after the Senate added the treble damages provision to the bill, Emanuel Celler, Chair of the House Judiciary Committee, noted its existence and observed that it was modeled after similar civil remedies found in the antitrust field.⁴⁵ Just as these antitrust remedies have never been treated primarily as a criminal enforcement mechanism, no reason exists to view civil RICO in such restrictive terms.

B. *Civil RICO and Private Attorneys General*

Professor Abrams does not fully consider the broad rationale behind RICO's private civil remedy. Perhaps because Professor Abrams believes that civil RICO exists primarily to enforce the criminal law, he concludes that the main rationale behind the treble damages provision is to create private attorneys general who act in place of a public prosecutor.⁴⁶ Presumably, this private attorney general under civil RICO

Borak, 377 U.S. 426, 433 (1964), which interpreted the Securities Act of 1934 to imply a private remedy).

42. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 274-75 (1982) (setting forth the legislative history of RICO).

43. 116 CONG. REC. 25,190 (1970). Senator John L. McClellan stated:

In recommending the passage of S. 30, the bar association also urged that the Congress give prompt consideration to seven specific amendments to the bill as it passed the Senate. In the main, I find these amendments generally acceptable. Indeed, they may be characterized as constructive contributions to the legislative process. For example, amendment No. 6 suggests that title IX of S. 30, dealing with racketeer influenced and corrupt organizations, be amended to authorize private civil damages suits

Id.

44. *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 538, 543-44 (1970) (testimony of Edward L. Wright).

45. 116 CONG. REC. 35,196 (1970). Representative Emanuel Celler stated:

Title IX is designed to inhibit the infiltration of legitimate business by organized crime. In addition to creating new Federal offenses punishable by traditional criminal sanctions of a fine of not more than \$25,000 or a prison term up to 20 years, or both, title IX also creates civil remedies modeled on those found in the antitrust field. These include orders of divestment, prohibition against business activity and orders of dissolution or reorganization, and treble damage suits on the part of private parties who are injured. The title also authorizes forfeiture of any interest which has been attained in violation of the criminal provision.

Id.

46. Abrams, *supra* note 18, at 2-3. Professor Abrams asserts:

should act just like the public prosecutor by bringing only those cases which the government would prosecute.⁴⁷ Professor Abrams states that public prosecutors should not bring "borderland" cases:

There are many kinds of cases in the borderland of the criminal law—for example, involving minor injuries or practices that are widespread and generally accepted in the particular setting—that, absent some egregious circumstance, are not prosecuted even though falling within the literal definition of the criminal law. . . . There are many kinds of injuries which in practice are relegated to our general system of civil liability for adjudication.⁴⁸

Professor Abrams's observation, however, contradicts his initial suggestion that civil claims to redress criminal wrongs are somehow anomalous to our legal system. Moreover, Professor Abrams's focus on "minor" injuries is irrelevant to RICO, which is limited to serious wrongs constituting a pattern of racketeering activity.⁴⁹

Finally, Professor Abrams takes an unduly narrow view of the role of the private attorney general.⁵⁰ Civil RICO's rationale can be understood by examining the treble damages concept. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*⁵¹ the Supreme Court considered the treble damages provision of the Clayton Act,⁵² on which civil RICO was modeled.⁵³ The Court concluded that section 4 of the Clayton Act "is in essence a remedial provision" providing relief to those people whose

The provision for a private civil remedy in the statute was designed to provide a supplementary way to enforce its basic purposes and to add substantial private resources to the enforcement of the criminal law. Thus, the commonly accepted rationale for the private civil RICO action is that it serves to convert each individual plaintiff, attracted by the incentive of treble damages, into a private attorney general who can enforce the RICO statute's prohibitions against criminal conduct in a civil lawsuit.

Id.

47. *See id.* at 7.

48. *Id.* at 6.

49. *See infra* notes 134-42 and accompanying text.

50. "Private attorney general provisions such as § 1964(c) are *in part* designed to fill prosecutorial gaps." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985) (emphasis added). Professor Abrams quotes this language but fails to find any significance in the words, "in part," which allude to other purposes behind the treble damages provision. *See Abrams, supra* note 18, at 3 n.8.

51. 429 U.S. 477 (1976).

52. *Id.* at 485-86 (discussing § 4 of the Clayton Act). Section 4 of the Clayton Act provides: *Suits by persons injured; amount of recovery.* — Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15(a) (1988)).

53. The Supreme Court in *Sedima* noted that "[t]he clearest current in [RICO's legislative] history is the reliance on the Clayton Act model." *Sedima*, 473 U.S. at 489.

business or property is injured because of antitrust violations.⁵⁴ Although Justice Thurgood Marshall's unanimous opinion noted that "treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing,"⁵⁵ he concluded that "[i]t nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, *is designed primarily as a remedy.*"⁵⁶

The Court reached this conclusion after a thorough review of the legislative histories of both the Sherman Act and the Clayton Act.⁵⁷ During Senate debate of the Sherman Act, Senator James George observed that the bill's purpose was to provide a remedy for consumers.⁵⁸ "Treble damages were provided in part for punitive purposes, but also to make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit against a combination—such as is described' in the Act."⁵⁹ Similarly, the legislative history of the Clayton Act indicates that its civil provision was conceived primarily as a remedy. During the House debates, Representative Edwin Webb observed that the treble damages provision of the proposed bill would provide ample com-

54. *Brunswick Corp.*, 429 U.S. at 485.

55. *Id.* at 485 (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130 (1969); *Fortner Enter. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969); and *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968)).

56. *Brunswick Corp.*, 429 U.S. at 485-86 (emphasis added) (footnote omitted).

57. *Id.* at 486 n.10 (reviewing the legislative history of both the Sherman Act and the Clayton Act).

58. 21 CONG. REC. S1767-68 (1890). Senator James Z. George observed in part:

The right of action against the persons in the combination is given to the party damnified. Who is this party injured, when, as prescribed in the bill, there has been an advance in the price by the combination? The answer is found in the bill itself in the words, "intended to advance the cost to the consumer of any such articles." The consumer is the party "damnified or injured."

. . . The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured.

Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination.

Id.

59. *Brunswick Corp.*, 429 U.S. at 486 n.10 (quoting 21 CONG. REC. 2456, 2456, 3147 (1890) (testimony of Sen. James Z. George and Sen. John Sherman)). Senator Sberman noted, in part:

The second section of the bill provides that any person or corporation injured or damnified by such a combination may sue for and recover in any court of the United States of competent jurisdiction, of any person or corporation a party to such a combination, all damages sustained by him. The measure of damages, whether merely compensatory, putative, or vindictive, is a matter of detail depending upon the judgment of Congress. My own opinion is that the damages should be commensurate with the difficulty of maintaining a private suit against a combination such as is described.

21 CONG. REC. 2456 (1890).

pensation for injury.⁶⁰

The congressional purpose underlying treble damages was well conceived. Subsequent experience has demonstrated that, given the pressures and vicissitudes of modern commercial litigation, treble damages provisions merely allow victims to recover their *actual* losses.⁶¹ Thus, treble damages are required even for cases involving "borderland" crimes—especially because victims still must prove a pattern of racketeering activity.

C. Civil RICO Abuse

• Professor Abrams suggests that private parties arguably abuse civil RICO when they bring cases which, though facially violative of the law, would have been rejected at the discretion of a public prosecutor. This assertion, however, is based on the two flawed premises just discussed.⁶² Moreover, even if the preceding premises were true, actual abuse must exist or talk of reform is misguided. Obviously, some abuse of every statute occurs.⁶³ Remedies, however, already exist to combat such

60. 51 CONG. REC. 9073 (1914). Representative Edwin Y. Webb observed: [S]ection 5 gives any person [whose business may be injured] . . . by reason of anything forbidden in the antitrust laws, the right to sue for such injury in any district court where the defendant resides, or is found without respect to the amount in controversy and shall recover threefold the damages sustained, together with the cost of the suit, including a reasonable attorney's fee. This section opens the door of justice to every [person] . . . injured by those who violate the antitrust laws, and gives the injured party ample damages for the wrong suffered.

Id. 61. See *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399 n.16 (7th Cir. 1984), *aff'd on other grounds*, 476 U.S. 606 (1985). The Seventh Circuit in *Haroco* observed:

The delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

Id. Furthermore, limiting civil RICO to actual damages may encourage rather than discourage deliberate violations of the statute. See R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 223 (1976). Judge Richard Posner observes that "[i]f because of concealability, the probability of being punished for a particular . . . violation is less than unity, the prospective violator will discount (i.e., multiply) the punishment cost by that probability in determining the expected punishment cost for the violation." *Id.* The analysis applies directly to RICO, as many violations, especially those involving fraud, will go undetected. See GEN. ACCOUNTING OFFICE, *FRAUD IN GOVERNMENT PROGRAMS—HOW EXTENSIVE IS IT?—HOW CAN IT BE CONTROLLED?* cover page (1980) (noting that most fraud goes undetected). In essence, it may be economically advantageous for a person to continue to violate the statute even though he may occasionally be required to return his ill-gotten gains. RICO's treble damages provision makes statutory violations uneconomical.

62. See *supra* notes 36-61 and accompanying text.

63. In 1983 the Supreme Court strengthened rule 11, which provides for sanctions to combat abusive litigation, because systemic abuse had become so rampant. See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 870 (5th Cir. 1988). The Fifth Circuit in *Thomas* noted:

Growing concern over misuse and abuse of the litigation process prompted rulemakers to

abuse.⁶⁴ Proof of unusual abuse is required to mandate reform of any statute on this basis alone. To this end, Professor Abrams notes various long-standing criticisms of civil RICO, and ultimately implies that RICO's private attorney general rationale is abused when civil plaintiffs bring cases that prosecutors would not file.⁶⁵ He also points to the expansion of fraud liability under RICO as contributing to the potential for misguided litigation.⁶⁶ Professor Abrams's concerns, however, are unwarranted.

1. Long-Standing Criticisms As Evidence of Abuse

Professor Abrams notes many of the long-standing criticisms of civil RICO,⁶⁷ and observes that most of these criticisms "translate into the contention that the private attorney general purpose is not being properly implemented insofar as a great many cases are being filed that would not warrant criminal prosecution."⁶⁸

Although Professor Abrams does not take a formal position on these criticisms, his proposal implicitly accepts them as true—otherwise he would not propose reform. The criticisms, however, do not withstand analysis. For example, RICO critics state that federal courts have been overwhelmed with RICO claims.⁶⁹ The number of civil RICO claims, however, has leveled off at approximately one thousand per year.⁷⁰ Of the cases filed, approximately sixty percent contain other jurisdictional grounds.⁷¹ Thus, claims of a federal judicial overload attributable to RICO are grossly misrepresented.

amend Rule 11 in 1983 to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of attorneys and reinforcing those obligations through the imposition of sanctions.

Id.; see also 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 244 (Supp. 1989).

64. For a discussion of the existing remedies for combating abuse, see *infra* notes 143-63 and accompanying text.

65. See Abrams, *supra* note 18, at 5-6.

66. See *id.* at 8-10.

67. See *id.* at 3 n.9.

68. *Id.* at 3-4.

69. *Id.* at 3 n.9. Representative Boucher made such a statement in 1986. Referring to RICO he claimed:

[T]he federalization of thousands of mere commercial disputes, irrespective of the amount in controversy or the diversity of citizenship of the parties threatens to swamp a Federal judiciary that was never designed to handle this kind of case.

132 CONG. REC. H9371 (daily ed. Oct. 7, 1986) (remarks of Rep. Rick Boucher).

70. See Goldsmith, *RICO and "Pattern:" The Search for "Continuity Plus Relationship,"* 73 CORNELL L. REV. 971, 998 (1988) (depicting by graph the number of RICO cases filed between November 1985 and January 1988, showing monthly totals).

71. Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 619 (1987).

Opponents also assert that "civil RICO claims are being used to displace 'well-established federal remedial provisions.'"⁷² RICO supplements, rather than displaces, other federal remedial provisions.⁷³ Furthermore, although RICO may overlap with federal remedies such as antitrust and securities, the overlap is not complete. Numerous RICO based securities and antitrust claims, for example, have been rejected for failure to establish RICO's enterprise and pattern elements.⁷⁴ Moreover, statutory overlap is neither uncommon⁷⁵ nor inappropriate.⁷⁶ Consequently, this concern is fundamentally misplaced.

Critics further contend that civil RICO claims convert broad areas of state civil law into federal issues.⁷⁷ Their argument is that the ease with which state common-law fraud claims can be converted into a RICO action violates principles of federalism. Courts, however, have regularly rejected common-law fraud claims filed under RICO, for failure to satisfy RICO's complex statutory requirements.⁷⁸ Moreover, in *United States v. Turkette*⁷⁹ the Supreme Court dismissed an analogous argument based on federalism.⁸⁰ After reviewing the legislative history, the Court stated that Congress enacted RICO knowing that the conduct being prosecuted under RICO also might be criminal under state law,⁸¹

72. Abrams, *supra* note 18, at 3 n.9.

73. Goldsmith & Keith, *supra* note 3, at 75-76.

74. See, e.g., *International Date Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987) (finding no pattern); *In re The Evening News Ass'n Tender Offer Litig.*, 642 F. Supp. 860, 861 (E.D. Mich. 1986) (noting that one offer to one entity does not constitute a pattern); *Parnes v. Heinold Commodities*, 548 F. Supp. 20, 24 n.9 (N.D. Ill. 1982) (finding that plaintiff failed to allege the proper RICO person or enterprise).

75. See, e.g., *Rosenberg v. United States*, 346 U.S. 273, 294 (1953) (noting the overlap of criminal laws); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983) (noting the overlap of arbitration provisions); *Nilsen v. City of Moss Point*, 701 F.2d 556, 561 (5th Cir. 1983) (noting the overlap of civil rights laws).

76. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983). In *Huddleston* the Supreme Court observed that "[t]he fact that there may well be some overlap [between statutes] is neither unusual nor unfortunate." *Id.* (quoting *United States v. Naftalin*, 441 U.S. 768, 778 (1979)).

77. Abrams, *supra* note 18, at 3 n.9.

78. See, e.g., *Bingham v. Zolt*, 683 F. Supp. 965 (S.D.N.Y. 1988) (dismissing a fraud-based RICO claim for failure to allege a "pattern"); *Abernathy v. Erickson*, 657 F. Supp. 504 (N.D. Ill. 1987) (same); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983) (same).

79. *United States v. Turkette*, 452 U.S. 576 (1981).

80. *Id.* at 586. For a discussion of when federalism concerns are raised properly, see Goldsmith, *supra* note 3, at 844 n.72 (stating that federalism concerns are raised legitimately when federal jurisdiction is artificially asserted to deprive states of authority to regulate their own affairs).

81. The Supreme Court found:

Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law.

because states retain jurisdiction over such matters. RICO not only fails to raise any legitimate federalism concerns, but is a perfect example of cooperative federalism.⁸²

Opponents of civil RICO also assert that RICO claims label ordinary business people as "racketeers."⁸³ At best, this argument is a false issue. The racketeering label can be eliminated simply by changing the terminology of the statute. In place of the prejudicial word "racketeering," Congress could insert the word "illicit" or another neutral term.⁸⁴

Finally, critics contend that "the threat or use of a RICO claim has given plaintiffs improper leverage to induce settlements."⁸⁵ No evidence actually supports this claim. Treble relief is needed to ensure the recovery of actual damages and otherwise equalize the plaintiff's chance of success. If anything, the record demonstrates that frivolous claims encourage defendants to stiffen their resistance when racketeering charges have been brought.⁸⁶

2. Cases of Abuse

As Professor Abrams observes: "[A]ny evidence of abuse must be found, if at all, . . . in the actual content of the claims being filed."⁸⁷ Professor Abrams, however, considers the abuse issue solely in terms of the private attorney general rationale, and even then never examines the content of the many RICO cases that have been filed. Instead, he simply asserts that "[m]any of the civil RICO cases being filed would never have been criminally prosecuted, even though involving facial violations of criminal provisions, since these are cases in which the prose-

There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

Turkette, 452 U.S. at 587 (citing *United States v. Culbert*, 435 U.S. 371, 379-80 (1978)). The Court also reasoned:

RICO imposes no restrictions upon the criminal justice systems of the States. ("Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title"). Thus, under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute predicate acts of racketeering under RICO, is no restriction on the separate administration of criminal justice by the States.

Id. at 586 n.9 (quoting RICO, *supra* note 5, § 904, 84 Stat. at 947).

82. See Goldsmith, *supra* note 3, at 845 n.72.

83. Abrams, *supra* note 18, at 3 n.9.

84. For a discussion on how the details of such an amendment would work, see Goldsmith, *supra* note 3, at 859-60; see also H.R. 5445, *supra* note 3.

85. Abrams, *supra* note 18, at 3 n.9.

86. See A.B.A. CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION: A REPORT OF THE RICO CASES COMMITTEE 121-23 (1985) (noting that the addition of a RICO claim inhibits, rather than facilitates, settlement).

87. Abrams, *supra* note 18, at 5.

ctor would have exercised his or her discretion not to prosecute.”⁸⁸ Although Professor Abrams cites Philip A. Lacovara and Geoffrey F. Aronow in support of this assertion, their conclusions fail to support the claim of unusual abuse.⁸⁹

Lacovara and Aronow, anti-RICO lobbyists for the Accountant's Association, conclude, in part, that many civil RICO claims are not prosecuted criminally because “no responsible prosecutor would brand [arguably borderline claims] as criminal. . . .”⁹⁰ This analysis, however, misconceives the role of prosecutorial discretion. Cases might not be prosecuted for a variety of reasons. For example, many cases may not withstand the higher burden of proof required in a criminal prosecution, but may be viable under the lower burden of proof required in a civil case.⁹¹ A case might not be brought because of the need to protect confidential information.⁹² Other cases may have evidentiary problems specific to criminal prosecution that would not be troublesome in civil litigation.⁹³ Prosecution may be declined because vital evidence was ob-

88. *Id.* at 6.

89. Lacovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-1986). Professor Abrams quotes Lacovara and Aronow's statement: “[T]hese cases involve, with rare exceptions, disputes that no responsible prosecutor would brand as criminal.” Abrams, *supra* note 18, at 6 n.14 (quoting Lacovara & Aronow, *supra*, at 15).

90. See Lacovara & Aronow, *supra* note 89, at 15. Professor Abrams apparently agrees with Lacovara & Aronow, as he cites their analysis in support of his previous assertion. See *supra* note 89 and accompanying text. Following this same analysis, Professor Abrams asserts that there are only two reasons why borderline fraud cases are not prosecuted: (1) “potential complainants often do not complain to the criminal authorities, recognizing that though a breach of ethical practices may have occurred, no crime was committed;” and (2) “when borderland complaints are brought to the attention of prosecutors, they ordinarily are not prosecuted.” Abrams, *supra* note 18, at 9. “In such cases,” Abrams asserts, “(whether the declining decision is made by the putative complainant or the prosecutor), a judgment is being made that the nature of the matter does not warrant criminal prosecution.” *Id.* Such analysis fails to consider other reasons for the exercise of prosecutorial discretion. For a discussion of other reasons for the exercise of prosecutorial discretion see *infra* notes 91-96 and accompanying text.

91. The burden of proof in a criminal RICO prosecution is guilt “beyond a reasonable doubt.” See *In re Winship*, 397 U.S. 358, 364 (1969) (stating that “[l]est there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”). The burden of proof under civil RICO, however, is the “preponderance of the evidence” standard. See, e.g., *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985) (noting that the appropriate burden of proof for the government under civil RICO is “preponderance of the evidence”); *United States v. Cappelto*, 502 F.2d 1351, 1358 (7th Cir. 1974) (holding that the burden for equitable relief under civil RICO is “preponderance of the evidence”).

92. See Berke, *Attempt at Prosecution Would Face Obstacles*, N.Y. Times, Dec. 22, 1989, at A19, col. 1 (noting that a federal district court dismissed a case against former CIA station chief Joseph F. Fernandez after the Attorney General prohibited the disclosure of classified materials and that Manuel Noriega may avoid prosecution for the same reason).

93. One such problem may be the application of the confrontation clause of the sixth amend-

tained illegally⁹⁴ or because immunity grants preclude conviction.⁹⁵ Finally, the government simply may lack the resources to investigate and prosecute the case successfully.⁹⁶ Thus, the absence of prosecution hardly demonstrates that no serious crime has occurred. Indeed, by focusing on the prosecution factor, Lacovara and Aronow improperly attempt to resurrect a standard akin to the prior conviction requirement for civil RICO that the Supreme Court unanimously rejected in *Sedima, S.P.R.L. v. Imrex Co.*⁹⁷

Professor Abrams further claims:

A review of the reported cases as well as discussions with business lawyers regarding the kinds of matters in which they file RICO claims and their reasons for doing so suggest that private civil RICO is being used in a manner that does go far beyond its private attorney general rationale.⁹⁸

In support, Professor Abrams again cites Lacovara and Aronow.⁹⁹

Lacovara and Aronow provide a list of civil RICO cases they deem abusive.¹⁰⁰ This list includes: a claim against the FBI, *Compton v. Ide*;¹⁰¹ a suit against the United Farm Workers Union, *Bruce Church, Inc. v. United Farm Workers*;¹⁰² along with two cases involving reli-

ment to the Constitution which is limited to criminal prosecutions. See C. McCORMICK, *McCORMICK ON EVIDENCE* § 252, at 749 (3d ed. 1984). The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

94. For example, police may have failed to obtain a valid warrant before conducting a search which produced vital evidence.

95. In order to coerce testimony without violating a witness's privilege against self-incrimination, a prosecutor may offer either transactional immunity or use immunity. Transactional immunity protects a witness from prosecution for the events about which he or she is testifying. Use immunity prohibits the witness's testimony or its fruits to be used against him or her. See *Kastigar v. United States*, 406 U.S. 441 (1972) (noting that use immunity at a minimum is required). Immunity, however, only applies to criminal prosecution, not to a subsequent civil case. *United States v. Cappetto*, 502 F.2d 1351, 1359 (7th Cir. 1974) (noting that testimony obtained after a grant of immunity in a criminal case may be used in a subsequent civil proceeding), *cert. denied*, 420 U.S. 925 (1975); *United States v. Kates*, 419 F. Supp. 846 (E.D. Pa. 1976).

96. Professor Abrams recognizes this last point and builds it into his test for abuse. See Abrams, *supra* note 18, at 7.

97. 473 U.S. 479, 488-93 (1985) (holding that neither RICO's history, language, nor policy considerations supports the requirement that a defendant be convicted in a prior criminal action as a prerequisite to civil relief). The Court in *Sedima* observed:

A guilty party may escape conviction for any number of reasons—not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice.

Id.

98. Abrams, *supra* note 18, at 5.

99. Lacovara & Aronow, *supra* note 89, at 1.

100. *Id.* at 11 & n.75.

101. 732 F.2d 1429 (9th Cir. 1984).

102. 805 F.2d 1353 (9th Cir. 1986).

gious organizations, *Van Schaick v. Church of Scientology of California, Inc.*¹⁰³ and *Church of Scientology v. Armstrong*.¹⁰⁴ Even Professor Abrams views these cases as "odd" and beyond the focus of his article.¹⁰⁵ In any event, the first three of these cases were abusive and the respective courts expeditiously dismissed them, illustrating that existing procedures are adequate to handle such cases. The Ninth Circuit, in *Compton*, dismissed the RICO claim because the statute of limitations had expired. Moreover, the court could have dismissed the claim for failure to allege a "pattern."¹⁰⁶ Similarly, the district courts, in both *Bruce Church* and *Van Schaick*, dismissed the RICO claims for failure to plead fraud with particularity. The only case not dismissed is *Armstrong*, and this case hardly seems abusive. The defendants in *Armstrong*, over several years, burglarized the plaintiff church and used the stolen material to defraud church members.¹⁰⁷ This is the type of ongoing criminal activity that civil RICO was designed to remedy.

More significantly, studies of civil RICO fail to support the claim of abuse. In recent testimony before the Senate Committee on the Judiciary, Professor G. Robert Blakey summarized his study of cases that RICO opponents considered abusive.¹⁰⁸ His findings demonstrate that little actual abuse exists and that available remedies are adequate to handle any instances of abuse. Professor Blakey examined fifty-three cases, filed between December 1979 and January 1988,¹⁰⁹ that were cited by RICO opponents as abusive. He found that eighty-seven percent of these claims had been dismissed in whole or in part, emphasizing the effectiveness of existing remedies for abuse.¹¹⁰ His study also found that sanctions were requested in only nineteen percent of the cases and were granted in only eight percent, suggesting that even the defendants did not consider the claims to be frivolous.¹¹¹ Another study by one of the authors found that claims of abuse often have been exag-

103. 535 F. Supp. 1125 (D. Mass. 1982).

104. C.D. Cal. July 16, 1985, reported in 1 CIV. RICO REP., July 24, 1985, at 2.

105. Abrams, *supra* note 18, at 5 n.11.

106. See *S. 438 Hearings*, *supra* note 41 (testimony of Prof. G. Robert Blakey). Professor Blakey further observes that "Federal law enforcement officers, acting in an objectively reasonable fashion, are immune from federal and state criminal prosecution." *Id.* (citing case law).

107. See *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1078-79 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). *Armstrong* was part of the same litigation as *Wollersheim*.

108. *S. 438 Hearings*, *supra* note 41 (testimony of Prof. G. Robert Blakey).

109. Professor Blakey notes that approximately 1,910,520 cases were filed in federal district court between December 1979 and January 1988. *Id.* Of these nearly two million cases only approximately 2742 were RICO filings. Thus, Professor Blakey observes that "[t]hese 'abusive' cases . . . constitute only .003% of total filings, and 1.9% of the RICO filings." *Id.*

110. For a discussion of existing remedies designed to combat abusive litigation, see *infra* notes 143-63 and accompanying text.

111. *S. 438 Hearings*, *supra* note 41 (testimony of Prof. G. Robert Blakey).

gerated and that many civil RICO cases labeled abusive, actually raised serious allegations of enterprise criminality.¹¹²

3. The Breadth of Criminal Fraud As a Contributing Factor to RICO Abuse

Professor Abrams points specifically to the breadth of criminal fraud and its expansion under RICO as contributing to misguided RICO claims. Professor Abrams's main focus is not on the unusual uses of RICO, but rather on what he claims has become the typical pattern of injecting a civil RICO claim into an ordinary business dispute context.¹¹³ Professor Abrams states that many ordinary business disputes may be filed as facially plausible civil RICO claims because it is relatively easy to plead a case of criminal fraud under applicable federal law.¹¹⁴ The implication is that undeserving cases are drawn into RICO's scope through its criminal fraud provisions. Although federal fraud provisions are admittedly broad, criminal fraud is neither as innocuous nor as easy to prove as Professor Abrams appears to believe.

By using the term "ordinary business dispute" Professor Abrams implicitly de-emphasizes the serious nature of fraud. Though not a violent crime, fraud is a profound national problem. In 1984 the Department of Justice reported that losses from fraud exceeded two hundred billion dollars annually.¹¹⁵ The total impact of fraud undoubtedly has increased since that study. Unfortunately, therefore, the ordinary business dispute may be laced with serious fraud. As Chief Justice William Rehnquist recently noted, white-collar crime is "the most serious and all-pervasive crime problem in America today."¹¹⁶ Thus, terms such as "ordinary business dispute" or "garden variety fraud"¹¹⁷ downplay the

112. See Goldsmith & Keith, *supra* note 3, at 80 (citing numerous cases).

113. Abrams *supra* note 18, at 5 n.11.

114. *Id.* at 9.

115. 1984 ATT'Y GEN. ANN. REP. 42. For a list of studies examining the impact of fraud in America, see Goldsmith, *supra* note 3, at 833 n.31.

116. *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)).

117. In *Furman v. Cirrito*, the Second Circuit noted:

Despite the clarity of [C]ongress's language [in drafting RICO], defendants argue that, since RICO's primary purpose is to eradicate organized crime, it is [not] directed . . . against businessmen engaged in "garden variety fraud" While RICO's primary focus may have been on organized crime, when considering the statute [C]ongress also recognized that fraud is a pervasive problem throughout our society which causes billions of dollars in economic loss each year. Congress further acknowledged that existing state and federal law was not capable of dealing with this problem.

. . . .

When Congress provided severe sanctions, both civil and criminal, for conducting the affairs of an "enterprise" through a "pattern of racketeering activity", it provided no excep-

serious nature of this national problem. Thus, for example, the prime rate cases that Professor Abrams chose to demonstrate the improper expansion of fraud liability prove precisely the opposite point. Each of these cases involved allegations that banks intentionally overstated interest charges to customers on a widespread basis.¹¹⁸ If true, these charges in no way expand traditional fraud jurisprudence.¹¹⁹

Furthermore, although the mail fraud,¹²⁰ wire fraud,¹²¹ and securities fraud violations¹²² incorporated as RICO predicates are governed by broad statutory language, these provisions are limited by a stringent intent requirement. Though the element of intent is not included specifically in the statutory language, courts unanimously have required criminal intent.¹²³ Courts continue to require proof of intent when these

tion for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud", we can only conclude that by the RICO statute [C]ongress has provided an additional means to weed that "garden" of its fraud.

741 F.2d 524, 528-29 (2d Cir. 1984) (citations omitted).

118. See *Morosani v. First Nat'l Bank*, 703 F.2d 1220 (11th Cir. 1983) (per curiam). In *Morosani* the court found that "[o]btaining money by false pretenses, if proved, clearly falls within the traditional definition of criminal activity." *Id.* at 1222 (emphasis added) (footnote omitted). Professor Abrams also cites the Supreme Court's affirmation of *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606 (1985), which contained facts similar to *Morosani*, as supporting a broad reading of the mail fraud statute in civil RICO cases. See *Abrams, supra* note 18, at 11 n.27.

119. The fact that these cases later proved to be untrue does not change the analysis because motions to dismiss must treat the allegations contained in the complaint as true. See, e.g., *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984) (noting that the court accepts plaintiff's well pleaded facts as true).

120. 18 U.S.C. § 1961(1)(B) (1988); see *id.* § 1341 (mail fraud). Section 1341 states:

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

Id.

121. *Id.* § 1961(1)(B); see *id.* § 1343 (wire fraud). Section 1343 states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Id.

122. *Id.* § 1961(1)(D).

123. See *United States v. McNeive*, 536 F.2d 1245, 1247 (8th Cir. 1976) (stating that "it is

fraud statutes are used as RICO predicate acts.¹²⁴ The intent requirement is a significant limitation because it ensures that only deliberate or intentional misconduct will be punished. Indeed, in analogous contexts, the intent requirement has saved arguably vague statutes from constitutional attack.¹²⁵

Furthermore, it appears that at least some courts are construing the criminal fraud provisions more narrowly, making it tougher to allege and prove fraud. The Fifth Circuit in *Gregory v. United States*¹²⁶ and later in *Blachly v. United States*,¹²⁷ set the groundwork for a broad definition of fraud. Under these cases, the standard for determining if fraud occurred was whether the conduct in question failed "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.'" ¹²⁸ The Seventh Circuit, however, recently rejected this standard as too broad in *United States v. Holzer*.¹²⁹ *Holzer* dealt with the con-

essential that the evidence show the defendant entertained an intent to defraud"); *United States v. Jones*, 425 F.2d 1048, 1058 (9th Cir.) (stating that "intent is an essential element in a mail fraud case"), *cert. denied*, 400 U.S. 823 (1970); *United States v. Shipp*, 359 F.2d 185, 188 (6th Cir.) (stating that "[p]roof of the scheme to defraud requires establishment of the element of intent"), *cert. denied*, 385 U.S. 903 (1966).

Courts also require criminal intent under both the wire fraud statute, *see, e.g.*, *United States v. Cowart*, 595 F.2d 1023, 1031 n.10 (5th Cir. 1979) (stating that "[t]o prove wire fraud the government must show a scheme, use of interstate communication, . . . and criminal intent to defraud"); *United States v. Dorfman*, 532 F. Supp. 1118, 1123 (N.D. Ill. 1981) (noting that proof of intent to defraud is required), and the securities laws, *see, e.g.*, *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 29 n.4 (2d Cir. 1983) (stating that "[o]nly willful violations of the Securities and Exchange Act are criminally punishable"); *United States v. Dixon*, 536 F.2d 1388, 1395 (2d Cir. 1976) (noting that intentional conduct is required).

124. *See, e.g.*, *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 49-50 (2d Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988) (finding that fraudulent intent must be proved).

125. *See, e.g.*, *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925) (noting that intent requirement prevented New York statutes from being held unconstitutionally vague).

126. 253 F.2d 104 (5th Cir. 1958).

127. 380 F.2d 665 (5th Cir. 1967).

128. *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967) (quoting *Gregory*, 253 F.2d at 109); *see also* *United States v. Lindsey*, 736 F.2d 433, 436 (7th Cir. 1984) (citing *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980) (commenting that "the measure of fraud is its departure from moral uprightness, fundamental honesty, fair play and candid dealings in the general life of members in society")); *United States v. Keplinger*, 776 F.2d 678, 698 (7th Cir. 1985); *United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982); *United States v. Mandel*, 591 F.2d 1347, 1360-61 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

129. 816 F.2d 304 (7th Cir.), *vacated on other grounds*, 484 U.S. 807 (1987). The Seventh Circuit more recently has reaffirmed its position on fraud in *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989), in which it again rejected a broad interpretation of fraud. The court summarized its previous decisions as follows:

This circuit, however, has cautioned that the broad language in cases like *Blachly* and *Lindsey* "cannot have been intended, and must not be taken literally." Not all conduct that strikes a court as sharp dealing or unethical conduct is a "scheme or artifice to defraud." Given the pervasive use of the mails and of telephone and related services in the business world, along with the ease of satisfying the mailing or wiring requirement, such a broad mean-

viction of a former judge for mail fraud, as well as extortion and RICO. A central issue on appeal was whether the judge's conduct was fraudulent within the meaning of the mail fraud statute. The Seventh Circuit rejected *Gregory's* broad definition of fraud and found that the definition was not intended to be applied literally.¹³⁰ *Holzer's* antagonism towards the standard set forth in *Gregory* is best understood after examining *United States v. Dial*,¹³¹ in which the court previously voiced its concern over a broad interpretation of fraud. In *Dial* the court expressed "[c]oncern . . . with the possible abuse of the mail and wire fraud statutes to punish criminally any departure from the highest ethical standards."¹³² In *Holzer* the court acted on these concerns and rejected the broad interpretation of fraud.¹³³ As the federal fraud provisions are not intended to punish inadvertent ethical breaches, other courts are likely to follow the Seventh Circuit's approach.

Professor Abrams further argues that "[g]iven the further ease under the relevant law of finding a basis for more than one such violation, it is usually quite easy to allege and prove the two or more predicate offenses needed to form a pattern of racketeering activity."¹³⁴ This statement, however, misstates the prevailing judicial interpretation of RICO's pattern limitation, and also fails to recognize civil RICO's other requirements.

Recent congressional testimony shows that, in the two-year period

ing of fraud for the mail and wire fraud statutes "would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute."

Id. at 1252 (citation omitted) (quoting *Holzer*, 816 F.2d at 309).

130. The Seventh Circuit noted:

The frequently quoted suggestion, . . . that whatever is not a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society" is fraud cannot have been intended, and must not be taken, literally. It is much too broad and, given the ease of satisfying the mailing requirement, . . . would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute.

Holzer, 816 F.2d at 309 (citation omitted) (quoting *Gregory*, 253 F.2d at 109).

131. 757 F.2d 163 (7th Cir. 1985).

132. *Dial*, 757 F.2d at 170. The court in *Dial* noted:

When the broad language of the statutes ("Whoever, having devised or intending to devise any scheme or artifice to defraud . . ."), which punishes the scheme to defraud rather than the completed fraud itself, is read by the light of the broad concept of fraud that has evolved in civil cases and the precept that mail and wire fraud statutes are not confined to common law fraud, concern naturally arises that the criminal law will be used to hold businessmen to the maximum, rather than minimum, standards of ethical behavior.

Id. (citation omitted) (quoting 18 U.S.C. § 1341 (1988)).

133. The court reasoned that a broad reading of the application of the mail fraud statute to include unethical behavior would be improper given the ease of satisfying the mailing requirement. The court concluded that such a broad reading could not have been intended. See *Holzer*, 816 F.2d at 309.

134. Abrams, *supra* note 18, at 9.

prior to *H.J. Inc. v. Northwestern Bell Telephone Co.*,¹³⁵ forty-nine percent of RICO cases were rejected for failing to meet RICO's pattern requirement.¹³⁶ Since the Supreme Court revisited RICO's pattern requirement in *H.J. Inc.*,¹³⁷ lower courts have continued this trend.¹³⁸ Clearly, alleging and proving a pattern of racketeering activity is not automatic.

Furthermore, other RICO limitations also serve to restrict RICO's use in commercial contexts. For example, beyond proof of a pattern of fraud or other racketeering activity, a RICO plaintiff also must prove the existence of an enterprise.¹³⁹ Other limitations include standing,¹⁴⁰

135. 109 S. Ct. 2893 (1989).

136. See *H.R. 1046 Hearings*, *supra* note 17 (statement of Prof. Ronald Goldstock).

137. The Supreme Court has given further guidance on the pattern element in *H.J. Inc.* Apart from rejecting the multiple scheme approach of the Eighth Circuit, the Court further discussed the meaning of continuity plus relationship. For analytical purposes, the Court considered each of these requirements separately, although it noted that their proof would overlap.

In defining the relationship requirement, the Court looked for guidance elsewhere in the Organized Crime Control Act of 1970. *H.J. Inc.*, 109 S. Ct. at 2901. Section 3575(e), which defines title X's pattern element solely in terms of relationship, states: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001, 84 Stat. 922, 950 (partially repealed 1987). The Court felt that Congress could not have intended any narrower definition than this. *H.J. Inc.*, 109 S. Ct. at 2901.

The Court then turned its attention to the continuity requirement. It adopted a more flexible approach that was "derive[d] from a common sense, everyday understanding of RICO's language and Congress[s] gloss on it." *Id.* at 2901. Unfortunately, the Court declined to formulate a concrete test for continuity, instead giving various examples to further delineate the requirement. The plaintiff must prove either a series of past repeated acts or that one or more past acts poses a threat of continued racketeering activity in the future. In either case, continuity is centrally a temporal concept; the key to showing continuity in a series of past events is the amount of time over which the events occurred. "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.* at 2902. On the other hand, whether there is a threat of continued racketeering activity will depend on the facts of each case. The Court attempted to give more guidance by giving the three following examples: 1) when the predicates themselves pose a threat of continuity (as with extortion), 2) when the predicates are part of the entity's way of doing business (as with the Mafia), and 3) when the predicates are part of the entity's way of carrying on its legitimate business. *Id.*

138. Of the cases addressing the pattern issue since *H.J. Inc.*, 23 of 55 were dismissed for lack of pattern. See P. Dane, RICO and "Pattern": The Impact (or Lack Thereof) of *H.J. Inc.* (unpublished paper) (examining cases from the Supreme Court's decision in *H.J. Inc.* through Dec. 1989).

139. RICO's definition of "enterprise" is found in 18 U.S.C. § 1961(4) (1988), which states: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . ." *Id.* From this definition, courts have held that an enterprise includes: commercial entities such as domestic and foreign corporations, partnerships, and sole proprietorships; benevolent organizations such as unions, benefit funds, and cooperatives; governmental entities such as the office of governor, the office of a state legislator, courts, prosecutors, police agencies and governmental agencies. See

rule 9(b)'s pleading requirement,¹⁴¹ and RICO's limitation on vicarious liability.¹⁴² Thus, numerous technical grounds, unique to RICO fraud

Blakey, *RICO Litigation Update*, in PRENTICE-HALL LAW AND BUS., SIXTH ANNUAL RICO LITIGATION UPDATE 283-85 (1990) (citing cases for each category). Apart from legal entities, an enterprise also may consist of a group of individuals or entities associated in fact. Associations in fact may include a group of individuals, a group of legal entities, or any combination of individuals and entities. There is no restriction on the associations embraced. *See id.* at 285-87.

United States v. Turkette, 452 U.S. 576 (1981), the leading case on the enterprise element, dealt with an enterprise that was associated in fact. In holding that RICO applied to illegitimate as well as legitimate enterprises, the Court gave further guidance on the enterprise element:

The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. . . . [The enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. . . . The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id. at 583.

Courts have dismissed numerous fraud-based RICO claims for failure to show an "enterprise." *See, e.g.,* Furman v. Cirrito, 828 F.2d 898 (2d Cir. 1987) (dismissed for failure to allege enterprise or pattern); Mastercraft Indus. v. Breining, 664 F. Supp. 859 (S.D.N.Y. 1989) (dismissed for failure to allege continuing criminal enterprise); Sigmond v. Brown, 645 F. Supp. 243 (C.D. Cal. 1986) (dismissed for failure to allege an enterprise), *aff'd*, 828 F.2d 8 (9th Cir. 1987); *see also infra* notes 154-55 and accompanying text.

140. Section 1964(c) permits recovery under RICO if the person's business or property is injured "by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1988). Consequently, to have standing to sue under RICO, a plaintiff must show: (1) injury to business or property; (2) a violation of § 1962; and (3) that the violation caused the injury. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (stating that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation"); *see also* O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989) (finding no standing in alleged mail fraud case in which injury flowed from refusal to participate in the predicate acts and not from the predicate acts themselves); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211 (5th Cir. 1988); *see also infra* notes 154-55 and accompanying text.

141. Rule 9(b) provides, in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). Courts have dismissed numerous fraud-based RICO claims for failure to plead fraud with particularity. *See, e.g.,* Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983) (dismissed for failure to plead fraud with particularity and for failure to allege a "pattern"); Van Schaick v. Church of Scientology, 535 F. Supp. 1125 (D. Mass. 1982) (dismissed for failure to plead fraud with particularity); *see also infra* note 153 and accompanying text.

142. RICO's limitation on vicarious liability stems from the judicially created distinction between person and enterprise. The majority of circuits have held that under 18 U.S.C. § 1962(c) (1988), a single entity cannot be named as both the defendant and the enterprise. *See, e.g.,* Schofield v. First Commodity Corp., 793 F.2d 28, 29-34 (1st Cir. 1986) (noting that defendant and enterprise cannot be the same under § 1962(c)); B.F. Hirsh, Inc. v. Enright Ref. Co., 751 F.2d 628 (3d Cir. 1984); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); Bennett v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982). The Eleventh Circuit appears to be the only circuit to hold that the same entity may be both the RICO defendant and the RICO enterprise under § 1962(c). *See* United States v. Hartly, 678 F.2d 961, 986 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). The Supreme Court has not yet spoken on the issue.

To circumvent the above stated rule, plaintiffs, instead of naming the entity as a defendant, have attempted to invoke the doctrine of *respondet superior* to hold the entity liable for the acts of its agents. Courts, however, have rejected this attempt at imposing liability and have disallowed

litigation, serve to limit the otherwise expansive scope of civil fraud jurisprudence.

4. Adequacy of Existing Remedies for Limiting RICO and Addressing Abuse

Underlying Professor Abrams's gatekeeper proposal is the belief that existing remedies against RICO abuse are inadequate. Some civil RICO abuse undoubtedly occurs. Abusive litigation, however, is not a problem limited to civil RICO, but is of general concern in our legal system. Moreover, such abuse does not necessarily evidence the need for reform,¹⁴³ as existing remedies may adequately address the problem. Fortunately, existing remedies for abusive civil litigation generally are adequate for RICO's needs as well.¹⁴⁴ Such remedies include ethical constraints;¹⁴⁵ tort remedies,¹⁴⁶ and Federal Rules of Civil Procedure 12(b)(6),¹⁴⁷ 9(b),¹⁴⁸ and 11.¹⁴⁹ Other remedies also are potentially available.¹⁵⁰

such vicarious liability. See *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987); *Petro-Tech, Inc. v. Western Co. of North Am.*, 824 F.2d 1349 (3d Cir. 1987); *Schofield*, 793 F.2d at 28. Moreover, because of similar concerns, allegations that a corporation aided and abetted its employees have been disallowed. See *Petro-Tech*, 824 F.2d at 1349. For a more thorough discussion of these issues, see Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179 (1988).

143. As Justice John Paul Stevens observed in *Hoover v. Ronwin*:

Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law. . . .

466 U.S. 558, 601 (1984) (Stevens, J., dissenting) (footnote omitted).

144. For an analysis of these remedies, see Goldsmith & Keith, *supra* note 3, at 84-97.

145. Ethical constraints prohibit an attorney from filing frivolous civil suits. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1), (2) (1982). Violation of these ethical rules may result in sanctions.

146. The defendant of a frivolous claim may file a tort action for malicious prosecution. RESTATEMENT (SECOND) OF TORTS § 674 (1977), provides:

[A person is liable for wrongful civil proceedings when:]

- (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
- (b) except when they are *ex parte*, the proceedings have terminated in favor of the person against whom they are brought.

Id.

147. Under rule 12(b)(6), a defendant can move that a RICO claim be dismissed for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

148. Rule 9(b) requires the plaintiff to plead fraud with particularity. Rule 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition mind of a person may be averred generally." FED. R. CIV. P. 9(b).

149. Rule 11 provides sanctions for the filing a frivolous claim. FED. R. CIV. P. 11.

150. See Goldsmith & Keith, *supra* note 3, at 96 n.178 (discussing a possible counter RICO suit based on extortion and a possible shifting of attorney's fees when a RICO plaintiff fails to get

Professor Ronald Goldstock, in a recent statement before the Subcommittee on Crime of the House Judiciary Committee, summarized his review of 704 civil RICO cases decided between January 1, 1987, and June 1, 1989.¹⁵¹ His study showed that sixty-five percent of the cases were dismissed before trial.¹⁵² Of these 457 cases, courts dismissed: twenty-one percent for failure to plead fraud with particularity,¹⁵³ forty-nine percent for failure to state a claim upon which relief could be granted,¹⁵⁴ and thirty percent on summary judgment.¹⁵⁵ Thirty-seven additional cases were partially dismissed. These figures suggest that judges are dismissing improper RICO claims at the pretrial pleading stage. Thus, our existing system appears adequate for controlling unwarranted claims.

In addition, to combat the threat of frivolous claims, the Supreme Court promulgated rule 11 of the Federal Rules of Civil Procedure.¹⁵⁶

a judgment surpassing defendant's prior settlement offer).

151. *H.R. 1046 Hearings, supra* note 17 (statement of Prof. Ronald Goldstock).

152. *Id.* That 65% of all cases are dismissed before trial is quite impressive especially when considering the judicial reluctance to grant such a motion. *See* 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1357, at 598 (1969). Professors Charles Wright and Arthur Miller observe:

The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Rule 8 indicates that a complaint need only set out a generalized statement of facts from which defendant will be able to frame a responsive pleading. Few complaints fail to meet this liberal standard and become subject to dismissal. Moreover, the courts are reluctant to dispose of the complaint on technical grounds in view of the policy of the federal rules to determine actions on their merits. Courts also hesitate to dismiss because of the possible waste of judicial time if on appeal the dismissal is reversed and remanded.

Id. at 598-99 (footnotes omitted). Professor Wright states that "[i]n fewer than 2% of all cases do [rule 12b] motions lead to a final termination of the action." C. WRIGHT, *LAW OF FEDERAL COURTS* § 66, at 432 (4th ed. 1983); *see also* 10 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2712, at 589 (2d ed. 1983) (dealing with summary judgment).

153. *H.R. 1046 Hearings, supra* note 17 (statement of Prof. Ronald Goldstock); *see* FED. R. CIV. P. 9(b).

154. *H.R. 1046 Hearings, supra* note 17 (statement of Prof. Ronald Goldstock); *see* FED. R. CIV. P. 12(b)(6). Professor Goldstock further found:

Of the 224 cases dismissed for failure to state a claim upon which relief could be granted: 119 of the dismissals were justified as having failed to meet RICO's pattern requirement; 20 failed to meet the predicate acts requirement; 25 lacked standing; 4 were barred by the statute of limitations; 39 failed to meet the enterprise requirement; 7 were precluded by res judicata, and 10 were dismissed for other reasons. Thus, Rule 12(b)(6), which was the basis for nearly half of the dismissals, proved to be an economical and expeditious means of eliminating an inappropriate RICO charge.

H.R. 1046 Hearings, supra note 17 (statement of Prof. Ronald Goldstock).

155. Professor Goldstock also found:

Of the 140 cases dismissed through summary judgment: 61 were justified as having failed to meet RICO's pattern requirement; 26 failed to meet the predicate acts requirement; 10 lacked standing; 14 were barred by the statute of limitations; 9 failed to meet the enterprise requirement; 9 were precluded by res judicata; and 11 were dismissed for other reasons.

H.R. 1046 Hearings, supra note 17 (statement of Prof. Ronald Goldstock).

156. *See supra* note 149.

As amended in 1983, rule 11 requires counsel to certify that "after reasonable inquiry" the litigation is "well grounded in fact and is warranted by existing law or a good faith argument for the extension . . . of existing law, and that it is not interposed for any improper purpose, such as to harass."¹⁵⁷ This language places an affirmative duty on the attorney to investigate both the law and the facts of the case to determine that the claim is not frivolous. If the attorney fails to investigate, and the claim is found to be frivolous, rule 11 directs courts to impose "an appropriate sanction" which may include attorney's fees.¹⁵⁸ Moreover, unlike the remedy of malicious prosecution, which must be filed in a separate court proceeding, rule 11 sanctions may be requested or simply imposed by the court during the abusive proceeding.¹⁵⁹ Thus, rule 11 is readily available to combat abusive RICO litigation.¹⁶⁰

Significantly, Professor Goldstock's survey of 140 recent RICO cases in which rule 11 sanctions were requested shows that judges imposed sanctions in thirty-six cases.¹⁶¹ Sanctions imposed ranged from 1000 dollars to 954,880.50 dollars.¹⁶² In fact, RICO claims in nearly sixty percent of the cases in which rule 11 sanctions were requested but denied were found to have merit.¹⁶³ These figures demonstrate that RICO

157. FED. R. CIV. P. 11.

158. *Id.*

159. *Id.*

160. Rule 11 is curbing abuse in civil litigation generally. *See, e.g.,* Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 901 (1988) (stating that "Rule 11 is transforming the conduct of litigation in the federal courts"); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 232 (stating that "the requirement that judges impose sanctions . . . for violations of amended rule 11 . . . seems to have significantly changed the way litigation is conducted in federal courts"); *see also* Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988). Moreover, rule 11 may have a greater effect on RICO litigants because courts may hold them more responsible in light of the possibility of treble damages. *See* Chapman & Cole v. ITEL Container Int'l, 865 F.2d 676, 685 (5th Cir. 1989) (stating that "[g]iven the resulting proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the factual and legal bases of potential claims or defenses prior to bringing such a suit" (quoting Black & Magenheimer, *Using the RICO Act in Civil Cases*, HOUSTON LAW., Oct. 1984, at 20, 24-25)).

161. *H.R. 1046 Hearings*, *supra* note 17 (statement of Prof. Ronald Goldstock). Of these 36 cases, courts imposed sanctions in the following manner: 28% for having no basis in law or in fact; 22% for persisting with meritless claims; 14% for bringing a claim with an improper purpose; 11% for abuse of discovery; 11% for bringing claims in violation of the statute of limitations; 11% for not conducting a reasonable prefiling investigation; and one claim for bringing a frivolous appeal. *See id.*

162. *Id.* Professor Goldstock further noted:

Two of the cases involved non-monetary sanctions; 12 were for costs and attorneys' fees (dollar figures unpublished); 9 involved sanctions between \$1000 and \$4999; 5 were for sanctions between \$5000 and \$9999; 4 were between \$10,000 and \$19,999; 1 was between \$20,000 and \$39,000; 2 were between \$40,000 and \$50,000, and one was for \$954,880.50.

Id.

163. *See id.*; *see also supra* note 155.

abuse is relatively uncommon, and even more significantly, that existing remedies can deal effectively with any abuse that occurs.

Absent evidence of abuse and proof that existing remedies for dealing with abusive litigation are inadequate, sweeping RICO reform is inappropriate. Moreover, the civil RICO gatekeeper as proposed by Professor Abrams also should be rejected. Professor Abrams's proposal is based on the faulty assumptions that civil RICO's primary purpose is to enforce the criminal law, and that civil plaintiffs abuse the statute by going beyond this purpose. Such assumptions simply do not have any basis in fact and should not be the foundation for reform.

Nevertheless, given the prevailing political climate, the gatekeeper concept may be the best way to reform civil RICO in a manner that preserves its effectiveness as an antifraud remedy. Accordingly, Representative Hughes's proposal merits careful consideration.

III. THE REFORM PROPOSED BY REPRESENTATIVE HUGHES

We begin by examining Representative Hughes's proposal, which soon will be before Congress.¹⁶⁴ Representative Hughes graciously has provided a copy of an early draft of his bill, and has asked for comments and suggestions. This section examines the purpose and effect of the proposed bill as reflected in the bill's text and Representative Hughes's remarks at this Symposium.

Representative Hughes's bill attempts to clarify and fine-tune RICO's existing provisions, as well as to insert a gatekeeper to curb civil RICO abuse. Along with inserting a gatekeeper, the bill would: (1) clarify RICO's pattern requirement; (2) require plaintiffs to plead RICO with particularity; and (3) raise the civil burden of proof to clear and convincing evidence. Properly applied, these changes alone would reduce RICO's scope appropriately.

A. Fine-Tuning RICO's Existing Provisions

Representative Hughes proposes that RICO's pattern requirement be tightened by codifying the concept of continuity plus relationship as set forth by the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*¹⁶⁵ He stresses that the new definition, although not yet included in the draft bill, would codify the *H.J. Inc.* relatedness requirement by mandating that the predicate acts be "related to one another or to a common external organizing principle."¹⁶⁶ The definition also would codify *H.J. Inc.*'s continuity prong. Under *H.J. Inc.*,

164. Hughes Draft RICO Bill (source on file with *Vanderbilt Law Review*).

165. 109 S. Ct. 2893, 2900-01 (1989).

166. Hughes, *supra* note 21, at 647.

continuity may be a closed- or open-ended concept. A RICO plaintiff satisfies the continuity prong by proving either a series of past repeated predicate acts or that predicate criminal activity poses a threat of continued racketeering activity in the future.¹⁶⁷ The new pattern definition also would codify *Lipin Enterprises v. Lee*¹⁶⁸ by eliminating "RICO coverage of cases in which there is really only one act of fraud, but the fraud is carried out by a series of phone calls, letters, or similar activity."¹⁶⁹

Because no definition of pattern encompassing all of these factors has been incorporated into the bill, we now suggest an all-inclusive definition. Based on a previous proposal advanced by one of the Authors which is reflected in *H.J. Inc.*, a pattern of racketeering activity means two or more predicate acts "that 1) are related either to each other or to the enterprise; and 2) constitute a series of acts or otherwise pose a threat of continuity."¹⁷⁰

Representative Hughes also would require civil RICO claims to be pleaded with particularity.¹⁷¹ The doctrine of "notice pleading," codified in rule 8(a) of the Federal Rules of Civil Procedure, presently governs civil RICO generally. Rule 8(a) requires simply "a short and plain statement of the claim showing that the pleader is entitled to relief."¹⁷² Such a standard may not be adequate in complex litigation involving allegation of racketeering. Rule 9(b) of the Federal Rules of Civil Procedure presently requires pleading with particularity only in cases alleging fraud or mistake: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."¹⁷³ Expanding this provision to govern all RICO claims will guard against frivolous litigation and ensure that RICO defendants receive adequate notice of the claim against them.¹⁷⁴ Significantly, the stricter pleading requirement of rule 9(b) has been used frequently in

167. *H.J. Inc.*, 109 S. Ct. at 2902.

168. 803 F.2d 322 (7th Cir. 1986).

169. Hughes, *supra* note 21, at 647. The Seventh Circuit, in *Lipin Enterprises*, held that RICO's pattern requirement was not satisfied by multiple predicate acts "designed to defraud one victim . . . on one occasion." *Lipin Enters.*, 803 F.2d at 324.

170. Goldsmith, *supra* note 70, at 1003. For a thorough discussion of the way this definition would work, see *id.* at 997-1003.

171. For discussion of an identical proposal, see *id.* at 880-81.

172. FED. R. CIV. P. 8(a).

173. FED. R. CIV. P. 9(b).

174. See *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981) (stating that "[t]he rule serves to discourage the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusation of moral turpitude" (footnotes omitted)); *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972) (discussing rule 9(b)'s rationale); 5 C. WRIGHT & A. MILLER, *supra* note 152, § 1296, at 399-400.

the past to dismiss RICO claims.¹⁷⁵

The Hughes bill also changes the burden of proof from a preponderance of the evidence to clear and convincing evidence.¹⁷⁶ This higher standard, in combination with rule 11 sanctions, will help to eliminate inappropriate RICO litigation. A potential RICO plaintiff will have to evaluate the facts of the case to be certain that the RICO claim can be proved by clear and convincing evidence, and that, under this higher standard, the claim is not frivolous. As a result, borderline claims will be discouraged.

B. *The Gatekeeper*

Along with these proposals, Representative Hughes suggests a civil RICO gatekeeper. In contrast to Professor Abrams's approach, the gatekeeper would be the presiding federal district court judge.¹⁷⁷ After the filing of an answer, the judge would conduct a preliminary hearing to determine whether the claim is "consistent with the intent of Congress."¹⁷⁸ No discovery would be permitted until after the preliminary hearing and a presumption in favor of dismissal would exist unless the court determines that the RICO claim was appropriate under the standards set forth in the proposed bill.¹⁷⁹ Before examining these standards, further consideration of the proposed procedure is necessary.

First, if a preliminary hearing is to be effective in screening inappropriate RICO cases, it must occur before an answer has been filed.¹⁸⁰

175. See *supra* note 153 and accompanying text; see also Goldsmith & Keith, *supra* note 3, at 88-92.

176. *Hughes Bill*, *supra* note 164, § 5, at 4. For a discussion of an identical proposal, see Goldsmith, *supra* note 3, at 869-71.

177. A judicial civil RICO gatekeeper has many advantages over Professor Abrams's suggestion that a prosecutor fill the role. Experience in the exercise of prosecutorial discretion is a prosecutor's primary qualification for overseeing civil RICO. This would be a true qualification only if appropriate civil RICO claims were limited to those a prosecutor would initiate criminally; such a limitation, however, is inconsistent with civil RICO's remedial purpose. See *supra* notes 36-61 and accompanying text. Moreover, a prosecutor may not be as impartial as a federal judge, who is appointed for life. The prosecutor may be affected by "ideological, political, and careerist motives." Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 n.25 (1983). Professor Abrams dismisses this possibility, but fails to give his reasons. See Abrams, *supra* note 18, at 20 n.44. Truly, a prosecutor's qualifications for being a gatekeeper are few.

A judge, on the other hand, is well qualified to oversee civil RICO. He or she usually has had experience with civil RICO and experience in administering statutory standards, which are analogous to the standards a gatekeeper would use. Furthermore, a judge acts as a gatekeeper everyday, deciding whether cases should continue to trial or be dismissed as a matter of law. A civil RICO gatekeeper would have equivalent duties. Indeed, a judge's experience on the bench uniquely qualifies him or her to be the civil RICO gatekeeper.

178. *Hughes Bill*, *supra* note 164, § 4, at 4.

179. *Id.* at 3.

180. The proposed bill provides that "[u]pon the commencement of a civil action under this

Under the Federal Rules of Civil Procedure, dismissal motions regularly are filed before an answer is filed.¹⁸¹ Motion practice may consume more resources than the actual trial. Consequently, the preliminary hearing should take place before motions are required to be filed. The court then can determine whether the claim should be dismissed before the defendant must expend significant resources for litigation. Presently, however, Representative Hughes's proposed bill provides for a preliminary hearing only after an answer is filed.¹⁸²

Second, because of the complexity of many RICO claims, limited discovery may be necessary.¹⁸³ For example, in the context of securities fraud, most of the evidence of wrongdoing is held by the securities dealer charged with the RICO violation.¹⁸⁴ A plaintiff may need substantial discovery to prove the alleged RICO violation. Other cases, however, will not necessitate discovery. Thus, a flexible approach, giving the court discretion to allow discovery when appropriate, is needed.

Third, the proposal fails to provide for appellate review. This defect must be remedied because dismissal may not be considered a final order if the RICO claim is joined with other counts conferring federal jurisdiction.¹⁸⁵

Finally, establishing a presumption against civil RICO claims is inconsistent with RICO's broad remedial purpose of combatting enterprise criminality and providing adequate relief to victims. Furthermore, given the absence of pervasive abuse in the past, no reason exists to burden all plaintiffs with such a presumption. Instead, the court ought to be free simply to determine whether the case is appropriate under the applicable standards.

C. Standards Governing the Gatekeeper

The Hughes bill sets out specific standards under which the judicial gatekeeper is to operate. Before the gatekeeper can allow a civil RICO claim to proceed, the court first must find that the claim is consistent with congressional intent and that the conduct alleged:

- (i) formed the basis of a previous conviction . . . or

subsection and after the filing of an answer, the court shall conduct a preliminary hearing." *Id.*

181. For example, motions to dismiss under rule 12 may be made before an answer is filed. FED. R. CIV. P. 12.

182. *Hughes Bill*, *supra* note 164, § 4, at 3.

183. The proposed bill provides that "[t]he court shall order that no discovery occur in the case until after [the] preliminary hearing." *Id.*

184. See Comment, *Enforcement of Pre-Dispute Arbitration Clauses in Broker Investor Contracts: Are Investors Protected?*, 2 B.Y.U. J. PUB. L. 331, 343 (1988) (noting that lack of discovery is a problem in securities arbitration because the broker-dealer possesses all the records).

185. See C. WRIGHT, *supra* note 152, § 101, at 697-707 (discussing the review of final decisions).

(ii) constitutes criminal conduct for which the treble damages remedy . . . is appropriate, given the significance or magnitude of the plaintiff's loss (for which other available remedies are inadequate in relation to the defendant's conduct) and deter[s] future criminal conduct of the defendants and others who could engage in similar conduct.¹⁸⁶

This language, however, fails to provide the gatekeeper with a definitive standard capable of consistent application in every RICO case. Moreover, victims' rights under civil RICO would be impaired by the following proposed statement of congressional intent:

This subsection is intended by Congress to be an *extraordinary* civil remedy for organized criminal activities, when the use of this remedy *clearly* serves the interests of the general public to punish and deter criminal behavior. This subsection is not intended to be used in, among other, commercial disputes for which statutory, contractual, common law, or *other remedies are adequate* to serve the interests of justice. As used in this paragraph, the term organized criminal activity means illegal activities engaged in by a person operating within an association of two or more persons, over a substantial or indefinite period of time, for the purpose of obtaining economic or commercial gains, or protecting against other criminal prosecution.¹⁸⁷

This statement of intent destroys the gatekeeper concept at its inception. Although the proposed text appropriately defines organized crime in terms encompassing white-collar conduct, characterizing civil RICO as an "extraordinary" remedy reserved for cases which "clearly" serve punitive and deterrent goals can only serve to encourage an already hostile judiciary to dismiss virtually every RICO complaint.¹⁸⁸

The statement's emphasis on civil RICO as an extraordinary remedy is misconceived. RICO violations, by definition, constitute extraordinary misconduct because they reflect a pattern of criminality and the perversion of an enterprise. By focusing on the remedy rather than the violation, the Hughes proposal implies that special circumstances, beyond proof of a violation, are required for RICO relief to be allowed.

Moreover, dismissal is especially likely, given the directive that the case ought not proceed if other adequate remedies exist. RICO was designed to supplement preexisting remedies that had not proven adequate in combating enterprise criminality. These remedies, for example, typically failed to provide treble damages or attorney's fees. Given the continued existence of preexisting remedies, the Hughes proposal would allow every RICO claim to be dismissed whenever a judge deems these

186. *Hughes Bill*, *supra* note 164, § 4, at 4.

187. *Id.* at 3 (emphasis added).

188. See Horn, *Judicial Plague Sweeps United States "Result Orientitis" Infects Civil RICO Decisions*, NAT'L L.J., May 23, 1983, at 31. Unfortunately, the language proposed by Representative William Hughes suggests that, like Professor Abrams, he views civil RICO principally as a mechanism for enforcing the criminal law.

alternatives adequate, notwithstanding their failure to provide relief comparable to RICO.

If the primary purpose underlying the gatekeeper concept is to discourage routine commercial disputes from automatically being converted into civil RICO claims, alternative means exist to accomplish this end. In this Symposium, Professor Blakey already has provided a well-considered possibility based upon established principles of federal prosecution.¹⁸⁹ Our suggested alternative is set forth below.

IV. GATEKEEPER PROPOSAL

If the gatekeeper concept is to work fairly, it must be based on standards capable of distinguishing between systemic long-term criminal activity and ordinary commercial disputes. Furthermore, because the gatekeeper concept is designed to ensure that RICO litigation is confined to cases of appropriate social concern, an intangible value beyond mere satisfaction of the statutory elements should be incorporated. The proposed statutory language, set forth below, should achieve this goal.

Preliminary Hearing Standards

In determining whether to permit a civil RICO claim to proceed, the court must find that the allegations concern long-term criminal activity, or the threat thereof, which pose a serious threat to society. Factors to consider in this respect include:

- (i) the duration of the criminal activity and the degree to which each predicate act inflicted independent injury;
- (ii) the extent of economic loss and the number of victims;
- (iii) whether the defendant held a position of special trust or committed crimes against especially vulnerable victims; and
- (iv) whether the allegations concern merely an ordinary commercial dispute.

The decision of the court must be accompanied by a statement of reasons reflecting the application of these factors.

This language ensures fairness to all litigants in the following manner. First, it protects against cases, based on isolated transactions, from getting past the gatekeeper. Even long-term criminal activity would not necessarily ensure passage absent a finding that the alleged crimes posed a serious threat to society.

Second, the proposal sets forth specific factors for deciding whether the activity was sufficiently long-term and serious to warrant RICO

189. Blakey & Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"* 43 VAND. L. REV. 851, App. E. at 1050 (1990).

sanctions. In contrast to the Hughes proposal, none of these factors contains a bias that automatically would allow a hostile judge to dismiss.

Third, by expressly directing the court to consider whether the case merely involves an ordinary commercial dispute, the standard directly addresses the concern that has led to the present RICO controversy. The standard ensures that such cases would be dismissed expeditiously. At the same time, by requiring a statement of reasons, the proposal protects against arbitrary dismissals and will generate a body of jurisprudence defining the contours of what constitutes an "ordinary commercial dispute."

If adopted and conscientiously applied, such a gatekeeper standard would go a long way toward eliminating abuse while still retaining civil RICO as an important remedy for the victims of crime.

V. CONCLUSION

Congress will soon consider the gatekeeper concept as a way to curtail the scope of civil RICO. As conceived by Professor Abrams, however, this proposal ignores civil RICO's remedial purposes. RICO was designed to compensate victims, not merely to fill prosecutorial gaps. Representative Hughes's view of the gatekeeper, though well intentioned, is marred by proposed criteria that inevitably will lead an already hostile judiciary to dismiss virtually every case at whim. For the gatekeeper concept to succeed, it must be based on objective standards that protect victims as well as defendants. This Article has proposed standards that achieve this effect by considering the magnitude of the harm and its social consequences. Whether Congress has the political will to preserve RICO as an effective remedy remains to be seen.

