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# An Analysis of the Racketeer Influenced Corrupt Organizations Act: How a Once Promising Bill Became a Corporate Nightmare

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AN ANALYSIS OF THE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT: HOW A  
ONCE PROMISING BILL BECAME A CORPORATE NIGHTMARE

By

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### **Hypothesis**

The civil portion of the Racketeer Influenced Corrupt Organizations (RICO) Act, while created to protect the honest business owners' economic interests from those of the racketeer, has instead created an opportunity for abuse through the inclusion of the treble damages clause and civil RICO's broad language.

### **Abstract**

Through sensationalism, the mafia stereotype, and past commissions' recommendations Congress enacted the Racketeer Influenced Corrupt Organizations (RICO) Act. The Act itself was meant to eradicate organized crime while protecting legitimate businesses from their illegitimate counterparts. Unfortunately, the civil Act's innate flaws have caused an overwhelming number of civil cases to flood the legal system, the majority of which have focused on private organizations and corporations, instead of Organized Crime (Pierson 2013). Civil RICO's exploitation can be traced to its treble damages clause, – which was included in the Act to provide “an effective deterrent to further expansion of organized crime's economic power” – the Statute's broad language and the United States Supreme Court's holdings in key cases. This thesis will start with an overview of the legislation leading up to the introduction of the RICO Act and the legislation's overall effect on the Act itself. From there, this paper will highlight the Act's deeply seated flaws and show how the civil portion of the Act took advantage of these weaknesses through both statistical analysis and past court cases. The RICO Act was intended as a weapon to combat organized crime's infiltration across the United States; instead it has blossomed

into commercial litigation outside the scope of its original purpose (Coppola and DeMarco 2012).

### **Introduction**

The question this paper intends to answer is if and how private individuals and corporations are exploiting the civil portion of the 1970 Racketeer Influenced Corrupt Organizations Act. It is important to note that this paper will be almost entirely focused on civil RICO and not its criminal counterpart. This inquiry is an extremely important question for numerous reasons. First and foremost, civil RICO was created to protect legitimate business from their illegitimate counterparts (Coppola and DeMarco 2012; Lynch 1987; Blakey and Gettings 1980; Pierson 2012). If the Act is being taken advantage of – through private action – Congress and other interested parties need to know, in order to make the requisite changes. Second, honest businessmen and women need to be protected. The Act's treble damage clause is being exploited, turning ordinary commercial litigations into civil RICO claims (Nybo 2013). In fact, past studies have discovered an alarming trend relating to civil RICO's increased use by parties attempting to file frivolous claims (Nybo 2013; Pierson 2012; Bucy 2002). Determining how the civil portion of the Act is being abused would allow Congress to implement a solution to curb both the growing number of civil cases flooding the legal system and reduce the cases' fraudulent claims (Nybo 2013; Pierson 2012; Bucy 2002).

This paper will attempt to answer the question previously described by first providing the appropriate legislative background for the Act. It would be hard to determine whether the civil portion of the Act is being exploited without first knowing

why and how it was implemented in the first place. The second section of the paper will detail the Act itself and attempt to answer how the Act was exploited. In essence, the broad wording of the Act and the Supreme Court's interpretation created an opportunity for private abuse (Nial 1986; Coppola and DeMarco 2012). The third and final portion will answer the all-important "if" question. Through statistical analysis and various studies this paper will prove that private RICO cases are not only increasing, but are abusing civil RICO's purpose, which is to protect legitimate businesses. (Nybo 2013; Pierson 2012; Bucy 2002).

The hypothesis that was stated previously, will be supported using a two-pronged approach. This paper will first show that the Act does in fact have deeply seated flaws through an analysis of the specific wording of the statute and an examination of the Supreme Court's interpretation of law (Nybo 2013; Coppola and Demarco 2012; Morrissey 2008; Trabeau 1990). The second avenue of support will come from statistical evidence and studies showing the increase in private suits under civil RICO (Nybo 2013; Pierson 2012; Bucy 2002). Together these two pieces of evidence will support the hypothesis and prove whether or not civil RICO is being exploited.

Legislative History of the RICO Act

***“If you don't know history, then you don't know anything. You are a leaf that doesn't know it is part of a tree.”***

***- Michael Crichton***

To understand how exactly the Racketeer Influenced Corrupt Organizations Act, hereinafter RICO, came to fruition, one must begin with an overview of the numerous legislative acts upon which it was founded. Without an exploration of this history, one cannot fully comprehend the Act in its entirety. These historic pieces of legislation created the RICO Act's innate weaknesses and led to the current problems that will be discussed later in the paper.

As the 20<sup>th</sup> century began, Organized Crime was not as prominent in society or as prevalent in the minds of legislators and law enforcement officials as it would soon become. There were no mentions of a national syndicate or of infiltration into legitimate businesses and enterprises. It was not until the 1920's and the introduction of the Prohibition Era that gangsters truly began to rise. The government's decision to ban alcohol created an opening for a black market commodity with unfathomable profits. This market needed greedy men confident enough to supply illegal alcohol to the requisite customers (Kefauver et al 1951; Coppola and DeMarco 2012). Powerful gangs and criminal groups were more than ready to fill this vacuum. Gangsters whose notorious reputations were built in the Prohibition Era include: Al Capone, Lucky Luciano, Johnny Torrio and Arnold Rothstein. Once these infamous criminal groups established a foothold in major cities across the United States, it would be decades before they relinquished power. As the years continued to pass, criminal activity slowly increased. Organized

crime had begun to infiltrate every branch of government, while continuing to diversify its illegal activities (Katzenbach 1967). Political corruption had become commonplace, with bribes and kickbacks being part of the normal routine. Unfortunately, the government was not the only party affected; law enforcement and legitimate businesses were targeted as well. Law enforcement officers were paid to look the other way, while high-ranking officials sold intelligence that shielded organized crime from imprisonment (Katzenbach 1967). It is within this setting that the first piece of legislation designed to combat organized crime was written.

### **Kefauver Committee Uncovers Organized Crime (1950s)**

First term Senator Estes Kefauver, from Tennessee, drafted a resolution petitioning Congress to establish a special committee that would investigate the issue of organized crime. At that time organized crime and the America Mafia were used synonymously. The Mafia, otherwise known as La Cosa Nostra, was a group of Sicilian and Italian gangsters who after migrating to the United States brought their code and enterprises with them (Ferranti 2015). The American Mafia rose to power in the 20<sup>th</sup> century, and became a household name when the Kefauver Committee publically recognized its existence (Coppola and DeMarco 2012). The Committee's investigation began in 1950 and lasted approximately 15 months, after vocal public support extended the inquiry (Senate Historical Office 2015). The Kefauver Committee hearings "became the most widely viewed congressional investigation to date," (Senate Historical Office 2015). Citizens of the United States were glued to the issue of interstate crime. This emerging problem was slowly becoming known to society as a whole, as the

investigation became a major subject of national conversation (Senate Historical Office 2015). Millions of citizens were discussing the idea of organized crime, more specifically the American Mafia, for the first time in its history (Coppola and DeMarco 2012).

The Committee began its investigation by choosing 14 major metropolitan cities, from Miami to New York. In each of these 14 cities they questioned numerous witnesses connected to organized crime and illegal racketeering activities, attempting to determine the principal activities present and level of infiltration within each branch and level of the government (Kefauver et al 1951). They found evidence of: gambling, drug smuggling, bookmaking, counterfeiting, prostitution, fencing, blackmailing, and corruption of public officials. The Committee was forced to conclude that, “the most dangerous criminal gangs are not specialists in one type of predatory crime, but engage in many and varied forms of criminality” (Kefauver et al 1951, p. 126). Furthermore, they determined that organized crime members had begun to “operate behind legitimate fronts” (Kefauver et al 1951, p. 129). A determination of this magnitude would have far reaching consequences for legitimate businesses (Kefauver et al 1951). The final and most disturbing conclusion was the pervasive evidence of corruption among public officials and high-ranking members of law enforcement (Kefauver 1951; Coppola and DeMarco 2012). Committee members said, “law enforcement has broken down in many of the communities visited by the committee” (Kefauver 1951, p. 162). An important aspect of this corruption was the use of law enforcement to reduce competition and public officials to protect organized crime’s interests. In September of 1951 the Committee completed its investigation, without yielding any fruitful legislation; however, by informing the public of this national

issue the Kefauver Committee laid the foundation for a crucial piece of legislation in the future, the RICO Act (Coppola and DeMarco 2012).

### **McClellan's Crusade for La Cosa Nostra (1950s)**

The late 1950s were no different; organized crime continued to exert its influence around the country through its control of legitimate businesses (Kefauver 1951; Blakey & Gettings 1980; Block 1980). A lack of progress from either a legislative or law enforcement standpoint forced President Eisenhower to appoint Senator John McClellan to investigate reports of corruption (Fruehauf and Norman). The McClellan Committee was formed in 1957, with the goal of investigating corruption, criminal infiltration, and illegal activities in the nation's various labor unions (Fruehauf and Norman). More specifically, their mandate was to "study the extent to which criminal and other improper practices or activities are...to the detriment of the interests of the public, employers, or employees" (Jacobs 1963, p. 296). The Committee documented illegal activities taking place within America's prominent labor unions, while simultaneously exposing the structure of organized crime's national syndicate, known as La Cosa Nostra (Jacobs 1963). This public exposure created a permanent fixation on organized crime, particularly the American Mafia, which would affect future legislation (Katzenbach 1967). The Committee's efforts "culminated in the Labor-Management Reporting and Disclosure Act of 1959" (Fruehauf and Norman). This piece of legislation, while a refreshing attempt at reducing corruption in legitimate businesses, once again posed no real threat to the future of organized crime (Katzenbach 1967).

### **Katzenbach Commission Uncovers Flaws in Law Enforcement (1960s)**

In 1967, organized crime was fully entrenched within American society, and crime was an issue that needed a solution. In an effort to produce answers, President Johnson created the Commission on Law Enforcement & Administration of Justice (referred hereafter as the Katzenbach Commission). The Katzenbach Commission was to report on the developing problem known as organized crime, specifically why it was happening and what could be done about it. One of the most important findings of the Katzenbach Commission was that law enforcement's "efforts to curb the growth of organized crime in America have not been successful" (Katzenbach 1967, p. 198). The Commission cited numerous reasons for this failure including: difficulties in obtaining proof, lack of resources, lack of coordination, failure to develop strategic intelligence, failure to use available sanctions, and lack of commitment (Katzenbach 1967, p. 198-200). These obstacles to future success forced the Commission to conclude "law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating" (Katzenbach 1967, p. 200). Furthermore the Commission concluded "methods at least as effective as organized crimes" needed to be used (Katzenbach 1967, p. 200). These findings set the stage for the RICO Act's enactment, a modern piece of legislation to counter organized crime.

The second critical detail brought to light by the Katzenbach Commission, was the federal government's continued Mafia fixation (Coppola and DeMarco 2012; Blakey & Gettings 1980). Gerald Lynch highlighted this fixation when he claimed that "the Commission clearly conceived of organized crime as a single entity and directed its

primary attention toward a single target: the Italian syndicate it believed controlled organized crime throughout the United States” (Lynch 1987, p. 672). The “mafia infiltration,” along with its historic rise to power, fueled the belief held by many high-ranking government officials, that a powerful piece of legislation was needed (Katzenbach 1967; Finklea 2010). Furthermore, the Katzenbach Commission further emphasized the Syndicate’s threat to legitimate businesses nationwide (Coppola and DeMarco 2012; Lynch 1987). The Syndicate’s infiltration of businesses negatively affected the honest business owners’ ability to make money (Coppola and DeMarco 2012; Lynch 1987). Finally, the Katzenbach Commission played a prominent role in the formation of the Organized Crime Control Act (Blakey & Gettings 1980; Coppola and DeMarco 2012). Many of the provisions found in the Organized Crime Control Act can be traced back to the Katzenbach Commission’s findings (Coppola and DeMarco 2012).

### **Organized Crime Control Act Sets the Stage For RICO (1970s)**

When Senator John McClellan introduced Senate Bill 30, society’s Mafia fixation had reached fervor. Sensationalism formed a perception of organized crime that created turmoil at the core of the Organized Crime Control Act (Lynch 1987). As was mentioned previously, McClellan’s bill “contained most of the organized crime recommendations of the Katzenbach Commission” (Coppola and DeMarco 2012, p. 247). However, his bill lacked proper avenues for civil relief to citizens whose legitimate businesses were affected (Coppola and DeMarco 2012, p. 247). At the same time Senate Bill 30 was being created, Senator Roman Hruska was working on a separate bill, which would come to be known as the Criminal Activities Profits Act. Hruska’s Act would have made investing

money – derived from specific illegal activities – into a legitimate business enterprise illegal (Coppola and DeMarco 2012, p. 247). In other words, the Hruska Proposal directly addressed the civil relief provision that Senate Bill 30 was lacking. In 1969, Senators Hruska and McClellan recognized that fact and decided to join forces, effectively merging their bills, creating the Organized Crime Control Act (Coppola and DeMarco 2012, p. 247). Furthermore, Professor Blakey concluded that McClellan’s Senate Bill 30 and Hruska’s Proposal should have been seen as RICO’s immediate predecessors (Blakey and Gettings 1980).

In a similar fashion to that of its predecessors, the Organized Crime Control Act was created with the belief that La Cosa Nostra was increasing its control in many legitimate businesses across the United States (Block 1980; Kefauver 1951; Blakey & Gettings 1980; Lynch 1987). This fear, held by Congress and the public, formed a stereotype of organized crime members. Senator McClellan described the America Mafia as “epitomizing, if it does not exhaust the definition, of Organized Crime” (Lynch 1987, p. 675). This definition of organized crime, held by Senator McClellan and other members of Congress, hindered legislative growth and knowledge on the subject (Block 1980, p. 41). In addition to this approach, the Organized Crime Control Act had numerous issues that would eventually spill over into the RICO Act, the most fundamental of which was the broad language found throughout the Act. Professor Alan Block stated that, “definitional turmoil goes to the core of the Organized Crime Control Act” (Block 1980, p. 43). When researching the Act itself as well as the members of the committee and their particular opinions, no clear-cut definition of organized crime can be

found. The General Accounting Office even went on record as saying “that there is no agreement on what organized crime is, and consequently, who or what the Government is fighting” (U.S. General Accounting Office 1977, p. 1). The legislature never defined organized crime because they were too intent on expanding the language to encompass as many groups as possible (Lynch 1987). Furthermore, the legislature was focused entirely on physical results (Block, 1980). Robert Kennedy – the former Attorney General and brother of President Kennedy – epitomized this focus by saying, “Don’t define it, do something about it” in reference to organized crime (Block 1980, p. 43). Professor Block, then posed a pertinent question, “Without knowing what organized crime is, how can one know the effect of any strategy designed to combat it?” (Block 1980, p. 45) This inherent flaw had far reaching consequences; in order to address a problem without an explicit definition “a wide legislative net” was needed, and RICO was the eventual result (Block 1980, p. 47).

Introduction of the RICO Act and an Analysis of its Inherent Flaws

*“It is the purpose of the RICO Act to seek the eradication of organized crime in the United States.”*

*-Organized Crime Control Act Statute 922*

The RICO Act was formed, debated, introduced and eventually implemented with admirable intentions. Legislators were seeking an answer to Organized Crime, more specifically the American Mafia, and society was clamoring for a response; the RICO Act was the federal government’s answer. To clearly understand how the Act negatively affected the same legitimate business interests it was designed to protect, a brief breakdown of the Act’s legal ramifications is necessary.

**Understanding the RICO Act**

The RICO Act, a federal statute, imposes criminal and civil penalties and permits treble damages when a defendant, or persons charged under the Act, use one of two methods to interact with an enterprise in any one of four prohibited ways (Racketeer Influenced Corrupt Organizations 1970). The two methods that are outlawed, with respect to interacting with an enterprise are (1) a pattern of racketeering activity and (2) the collection of an unlawful debt (Racketeer Influenced Corrupt Organizations 1970). This paper is focused solely on the first method, establishing a pattern of racketeering activity. “Furthermore, RICO makes four activities, by any person, unlawful:

- (1) Using income derived from a pattern of racketeering activity to acquire an interest in an enterprise;

- (2) Acquiring or maintain an interest in an enterprise through a pattern of racketeering activity;
- (3) Conducting the affairs of an enterprise through a pattern of racketeering activity; and
- (4) Conspiring to commit any of these offenses.” (Racketeer Influenced Corrupt Organizations 1970)

Each of these four prohibited acts must be triggered by the use of a pattern of racketeering activity (Racketeer Influenced Corrupt Organizations 1970)

As was previously mentioned in the introduction, this paper is primarily focused on civil RICO. However, –before analyzing civil RICO’s flaws – it is important to briefly discuss the strengths and success of criminal RICO. Criminal RICO proved to be a powerful tool in the fight against Organized Crime, just as Congress had intended (Demise of the Mafia 2009). In fact, “during the 1980s and 1990s, RICO laws were used to convict high-ranking mobsters, who in the past had been able to avoid prosecution” (Demise of the Mafia 2009). The American Mafia, the poster child and fuel behind the RICO Act’s implementation, was a shadow of its former self by the early 21<sup>st</sup> century (Demise of the Mafia 2009). It is with this background and the knowledge that RICO’s criminal application succeeded in weakening organized crime that this paper turns to the unintended consequences of RICO’s civil application.

### **Broad Language Creates Inherent Flaws Within the Act**

The four prohibited acts outlined in the previous section are extremely broad and heavily reliant on the definition and interpretation of key words. This section will focus

on the following four words and phrases in an attempt to showcase this reliance:

“racketeering activity”, “pattern of racketeering activity”, “people” and “enterprise”. The phrase “racketeering activity” as it is used within the Act, consists of nine generic state crimes as well as a longer list of specific federal offenses (Racketeer Influenced Corrupt Organizations 1970). Included in this list of federal offenses that are considered “racketeering activities” are mail fraud and wire fraud (Racketeer Influenced Corrupt Organizations 1970). This is a significant piece of information that will be expounded upon later in the paper.

A “pattern of racketeering activity” on the other hand, simply requires two “racketeering activities” – which was defined in the previous paragraph – within ten years of each other (Racketeer Influenced Corrupt Organizations 1970). While, ten years might seem like a long time between criminal acts to an outside observer, it is important to remember that this act was implemented for the express purpose of curtailing organized crime (An Act Relating to the Control of Organized Crime in the United States 1970; Block 1980).

RICO defines a “person” extremely liberally. The definition encompasses “any individual or entity capable of holding a legal or beneficial interest in property” (Racketeer Influenced Corrupt Organizations 1970). Finally, an “enterprise” – with respect to the RICO Act – “includes any individual, partnership, corporation, association, or other legal entity” (Racketeer Influenced Corrupt Organizations 1970). The most significant part of the “enterprise” definition was the inclusion of “private businesses as well as labor organizations” under the RICO Act (Blakey and Gettings 1980, p. 1023).

The inclusion of private businesses was meant to provide the honest businessman, affected by the unfair practices of the racketeer, with options for civil relief (Blakey and Gettings 1980; Lynch 1987; Coppola and DeMarco 2012; Nybo 2013). Furthermore, the civil sanctions were supposed to be an effective deterrent to organized crime's further expansion into legitimate businesses (Nybo 2013). This decision, however, would have far reaching implications for the future of civil RICO and its exploitation by private businesses seeking treble damages (Coppola and DeMarco 2012; Nybo 2013).

### **How Private Businesses Abuse the Act**

A civil RICO case has many advantages, which Congress incorporated in order to increase its appeal to litigants and prosecutors alike. These advantages include: "federal court jurisdiction, treble damages, attorney fees, an extremely broad scope, and the ability to raise claims against third parties" (Sheldon and Carter 2016, p. 163). Unfortunately, some of these advantages have contributed to the rise in private civil action. Federal jurisdiction for example, is appealing to litigants because RICO causes of actions have extremely broad rules of discovery under the Federal Rules of Civil Procedure (Blakey & Cornell Institute on Organized Crime 1980). These discovery rules require "discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action" (Blakey & Gettings 1980, p. 1043). This vital clause was meant to increase the transparency between parties, but has instead given greedy litigants with frivolous claims an opportunity to review key evidence and construct a case – that they otherwise would not have had the evidence to make – after the fact (Blakey and Gettings 1980).

Treble damages – just like they sound – triple the damages that a plaintiff would receive in an ordinary case. The party against whom the adverse verdict was obtained is also responsible for the paying the attorney fees of the prevailing party. In fact, Stuart Diamond of the *New York Times* wrote an article describing this trend-taking place in courtrooms across the United States. The article stated, “The federal racketeering law, created to help fight organized crime, is now being used primarily by private individuals and corporations trying to extract large damage awards from legitimate businesses” (Diamond 1988, p. 1). It goes on to state, “In each of the last two years, about 1,000 civil racketeering suits have been filed by private plaintiffs seeking to recover triple their actual damages” (Diamond 1988). The treble damages clause was included in the civil portion of the Act in an effort to provide civil relief to honest business owners negatively affected by the racketeer (Coppola and DeMarco 2012). In addition, Congress claimed that treble damages were included to provide “an effective deterrent to further expansion of organized crime’s economic power” (Nybo 2013). A clause that was supposed to strengthen sanctions against illegal criminal groups is instead being used to line the pockets of private litigants (Nybo 2012).

Finally, the deliberately broad provisions within the Act include various types of business misconduct that are not exclusive to organized crime groups, i.e. mail and wire fraud. These “racketeering activities” as they are categorized under the Act provide the basis for private suits; a plaintiff need only allege that a private business committed these acts in order to bring forth a civil RICO suit (Blakey and Gettings 2012). These numerous factors created an extremely advantageous setting for RICO claims, which have resulted

in a gradual increase in private civil RICO cases (Coppola and DeMarco 2012; Diamond 1988; Pierson 2013).

In addition to the advantages previously outlined, RICO charges – unlike the weak state penalties that existed before it – allow the prosecutors to charge top members of organized crime groups (Coppola and DeMarco 2012). An important provision within the Act allows leaders to be charged “without engaging in the actus reus of the underlying crime, so long as they are involved in some level” (Coppola and DeMarco 2012, p. 248). In other words, prosecutors only have to prove that the heads of these criminal organizations handed out orders – to lower ranking members – not that they participated in the illegal acts themselves. RICO’s crime fighting role would be an important motivator for the Supreme Court, who would eventually exacerbate the statute’s inherent flaws (Nial 1986; Trabeau 1990; Morrissey 2009).

### **Civil RICO Breakdown**

Now that the RICO Act’s legal framework has been outlined – albeit very limitedly – it is time to discuss the legal ramifications of a civil RICO case. The plaintiff in a civil RICO case, is defined by the statute as “any person injured in his business or property” (Racketeer Influenced Corrupt Organizations 1970, p. 944). This definition when coupled with the earlier, liberal definition of enterprise creates the foundation for its exploitation by private litigants (Blakey and Gettings 2012; Mitchell, Cunningham and Lentz 2008). According to the statute a plaintiff who brings a civil suit under the RICO Act “may obtain not only equitable relief, but treble damages and costs, including a reasonable attorney’s fee” (Racketeer Influenced Corrupt Organizations 1970). In

addition, it is important to remember that the standard of proof is much lower in a civil case than it is in a criminal case. In a criminal case, crimes must be proven “beyond a reasonable doubt.” A civil cause of action must be proven through a “preponderance of the evidence,” meaning that it is more likely than not that a crime occurred (Brook 1982). The lower standard of proof provides private litigants leverage over the defendant, usually a private business, which results in settlements due to the fear of treble damages (Nybo 2012). There is one final point that should be highlighted before looking at the Supreme Court’s interpretation of the Act, more specifically how the Court broadened the already broad language that was previously discussed. Congress qualified the RICO Act’s interpretation with an extremely important statement, which reads as follows, “The provisions of the title shall be liberally construed to effectuate its remedial purposes” (Racketeer Influenced Corrupt Organizations 1970). This congressional directive was cited in numerous Supreme Court opinions interpreting the Act (*Sedima v. Imrex* 1985; *H.J. Inc. v. Northwestern* 1989; *NOW v. United States* 1994; *Boyle v. United States* 2009).

### **Key Cases that Liberally Construed the Act**

As was previously noted, it was not just poor wording that led to the Act’s abuse by private litigants, but the Supreme Court’s interpretation through a handful of key cases. This next section will consist of a brief summary of each of these crucial cases, identification of the issue being addressed, the Supreme Court’s interpretation of the issue, and what it means moving forward for civil RICO and its private litigants.

*Sedima v. Imrex Company 1985*

In response to an increase of private individuals and corporations utilizing the civil portion of RICO – primarily in an attempt to extract large awards through the treble damage clause – the Supreme Court granted certiorari to the first case, *Sedima v. Imrex Company* (Diamond 1988). In 1985 when this case was being heard, rampant confusion and conflicting opinions plagued the courts; civil misuse of RICO by private plaintiffs was slowly becoming an extremely contested issue (Nial 1986, p. 189). As was mentioned earlier, the broad language within the Act created its potential for abuse. This case focuses primarily on the “racketeering activity” definition – which was discussed earlier – and the inclusion of wire and mail fraud, as predicate acts for a civil RICO case. The violation of at least two predicate acts “is a threshold requirement which the plaintiff must satisfy before invoking the civil provisions of RICO” (Nial 1986, p. 190). *Sedima* attempts to address whether an additional threshold is needed – in order to reduce the number of illegitimate cases – before a civil RICO case can be brought. The additional threshold, according to the *Sedima* majority opinion, is as follows: plaintiffs must allege and prove that they suffered a RICO injury, which was either a distinct “racketeering injury” or “competitive injury,” rather than injury caused merely by the predicate acts (*Sedima v. Imrex* 1985). The facts of the case are as follows.

The petitioner, *Sedima*, a Belgian corporation, entered into a joint venture with *Imrex Co.* to provide goods to an unnamed third party. Approximately \$8 million in orders were placed through *Imrex Co.* by this unnamed third party. *Sedima* however, became convinced that *Imrex Co.* had been forwarding inflated bills, thereby cheating

Sedima out of its proceeds. Sedima's RICO complaint stated, "that the defendant, Imrex, had violated...the Act by its use of the mail and wire to communicate these fraudulent bills" (Nial 1986, p. 206-207). Sedima then sought to recover treble damages and attorney fees under the civil provisions of the Act. It was at this point that the additional threshold, a special RICO injury, was introduced by the district court. The district court dismissed the complaint on the grounds that the plaintiff failed to allege an injury separate from those caused by the predicate acts (*Sedima v. Imrex* 1985). The trial court believed that a standing requirement of this nature "would restrict the use of RICO to plaintiffs who had suffered an injury of the type RICO was designed to prevent," thereby limiting the use of RICO to its designed target, legitimate businesses affected by organized crime (Nial 1986, p. 204). The U.S. Supreme Court chose to not uphold this ruling. The Supreme Court held that the plaintiffs do not need to allege a separate and distinct RICO injury (*Sedima v. Imrex* 1985). The *Sedima* opinion went on to state that the special RICO injury was not only vague in nature but also unhelpful in its guidance to future RICO plaintiffs (*Sedima v. Imrex* 1985). Furthermore, the *Sedima* court claimed that the Act's language "leaves no room for the addition of the amorphous racketeering injury" (*Sedima v. Imrex* 1985, p. 495). This ruling by the *Sedima* Court emphasizes judicial activism versus judicial conservatism. In this instance, the Supreme Court refused to make law – implementing the additional RICO injury threshold – instead opting to interpret the Act Congress wrote. The *Sedima* majority opinion even commented on the Act's use by unintended parties stating, "this defect — if defect it is — is inherent in the statute as written, and its correction must lie with Congress" (*Sedima*

*v. Imrex* 1985). Finally the Supreme Court characterized the trial court's decision as too restrictive in scope and employed Congress' liberal construction clause as a crutch to support this statement (Nial 1986, p. 209). In essence, *Sedima* was one of the court's first opportunities to limit the broad wording of the Act and correct a major flaw in its civil application. Instead, the Supreme Court rejected an additional threshold that would severely limit the number of private plaintiffs abusing the Act's treble damage clause (*Sedima v. Imrex* 1985; Nial 1986).

*H.J. Inc. v. Northwestern Bell Telephone Co. 1989*

On the heels of the *Sedima* case came another noteworthy piece of litigation that would further pave the way for private abuse of civil RICO (Trabeau 1990). The *Sedima* court focused primarily on the definition of "racketeering activity" and the inclusion of mail and wire fraud in the list of potential predicate acts (Nial 1986). The *H.J. Inc.* case targeted the Act's pattern requirement when it came to racketeering activity. The Act itself stated that a pattern required two predicate acts, "it does not however, clearly explain what is meant by a pattern of racketeering activity" (Trabeau 1990, p. 1219). The *H.J. Inc.* court even claimed in its majority opinion that they were "called upon to consider what conduct meets RICO's pattern requirement" (*H.J. Inc. v. Northwestern Bell* 1989). The facts of the case were as follows.

In 1986 *H.J. Inc.* – a customer of Northwestern Bell Telephone Co. – filed a class action suit against Northwestern, citing several violations under the RICO Act. *H.J. Inc.* claimed, "Northwestern Bell sought to influence members of the Minnesota Public Utilities Commission (MPUC) in the performance of their duties" (*H.J. Inc. v.*

*Northwestern Bell* 1989, p. 233). They further alleged that MPUC approved unreasonable and unfair rates for Northwestern due to Northwestern's use of numerous acts of bribery, including cash payments to commissioners, negotiating future employment and payments for entertainment services (*H.J. Inc. v. Northwestern Bell* 1989). The trial court – again attempting to restrict civil RICO abuse – dismissed H.J. Inc.'s claim stating that the alleged acts were committed in “furtherance of a single scheme to influence MPUC” when RICO clearly requires two predicate acts (*H.J. Inc. v. Northwestern Bell* 1989, p. 234). The U.S. Supreme Court then reversed the lower court's opinion stating that the pattern requirement must be allowed sufficient breadth (*H.J. Inc. vs. Northwestern Bell* 1989). The *H.J. Inc.* court envisioned a pattern concept that might encompass multiple predicates within a single scheme, so long as the multiple acts were related and amounted to continued criminal activity. The Supreme Court's majority opinion adopted a continuity plus relationship requirement, when dealing with RICO's pattern requirement (*H.J. Inc. vs. Northwestern Bell* 1989). The relationship standard set by the *Sedima* court and followed by *H.J. Inc.* was fairly simplistic stating that “criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods” (*H.J. Inc. v. Northwestern Bell* 1989, p. 240). Continuity on the other hand – according to the *H.J. Inc.* majority opinion – required the predicate acts to constitute a threat of continued racketeering activity (*H.J. Inc. v. Northwestern Bell* 1989). In *H.J. Inc.* the Supreme Court was given another opportunity to interpret RICO in a way that would at least curb some of its current and future abuse. Instead, the Supreme Court once again relied on the breadth of the Act as its makers

“intended”. Dawn Trabeau says it best, “Despite all the debate on whether the pattern element should be construed narrowly in order to eliminate the abuse of RICO, the Court evidently will continue to interpret a pattern broadly in accord with the expansive concepts and terms within the statute” (Trabeau 1990, p. 1226).

*National Organization for Women Inc. v. Scheidler 1993*

This case took a different approach than the first two, instead of looking at the direct language of the statute in an attempt to clarify key definitions, the *NOW* Court was asked to determine whether a RICO defendant was required to have economic motive (*NOW v. Scheidler* 1993). This 1993 Supreme Court case further broadened the Act – which was meant to curb organized crime, whose sole motivation is of an economic nature – by finding anti-abortion protestors to be a legitimate RICO defendant. The facts of the case were as follows.

According to the Supreme Court’s majority opinion, *NOW* supported the legal availability of abortion in the United States through health care clinics around the country (*NOW v. Unites States* 1993). *Scheidler* along with other individuals and organizations named in the suit opposed legal abortion, specifically health centers providing that service. *NOW*’s “complaint alleged that the respondents were members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion” (*NOW v. Scheidler* 1993, p. 253). They further alleged that the defendants used threatened or actual force to intimidate clinic employees, doctors and patients in an attempt to shut down the clinic’s medical services. The district court dismissed the case on the grounds that no economic motivation was cited, merely

political ones (*NOW v. Scheidler* 1985). However, the Supreme Court overturned this ruling, claiming that nowhere in the statute “is there any indication that an economic motive is required” (*NOW v. Scheidler* 1985, p. 257). Not only does this holding broaden the RICO Act’s flaws, thus opening the door for private abuse but it infringed on an individual’s First Amendment rights as well.

*Boyle v. United States*

The final case highlighting the RICO Act’s inherent flaws – specifically how the court broadened the statute’s language through its interpretation of law – hinges on the Act’s definition of “enterprise”. As a reminder, an “enterprise” is defined as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity” (Racketeer Influenced Corrupt Organizations 1970). The *Boyle* Court was asked to determine what constituted an “associated-in-fact enterprise”. The Court’s majority opinion stated, “an association-in-fact enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct” (*Boyle v. United States* 2009, p. 2243). Furthermore, they concluded, “an association-in-fact enterprise must have...a purpose, relationships among those associated with the enterprise, and longevity” (*Boyle v. United States* 2009, p. 2244). The Court’s decision will have far reaching implications for civil liability under RICO, and opened the door for private corporations to be considered “associated-in-fact enterprises” (Morrissey 2009; Mitchell et al 2008). The facts of the case were as follows.

According to the *Boyle* Court, Edmund Boyle was involved in a bank burglary ring, known as the “Boyle Crew” (*Boyle v. United States* 2009). Between the years of

1991 and 1999 the group burglarized numerous bank deposit boxes in five separate states. In 2003, Boyle was indicted under RICO charges for his participation in “an enterprise through a pattern of racketeering activity” (*Boyle v. United States* 2009, p. 2246). Each member of the group had a role in the bank robberies and their illegal gains were split up based on the inherent risk of each participant’s job. However, the group was characterized as loosely and informally organized with no leader, hierarchy, or chain of command. The *Boyle* Court, based on their earlier ruling in *Turkette v. United States*, stated, “you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts” (*Boyle v. United States* 2009, p. 2251). To further this ruling the *Boyle* Court claimed, “that proof of a pattern of racketeering activity may be sufficient in a particular case to... infer the existence of an association-in-fact enterprise” (*Boyle v. United States* 2009, p. 2247).

The previous section of this paper expanded upon the RICO Act’s inherent flaws and how the Supreme Court’s interpretation of the statute’s language – in a number of pivotal cases – aggravated those flaws. Together these two problems resulted in a drastic increase of civil RICO cases, where private litigants abused the Act’s vulnerabilities in an attempt to take advantage of the treble damage clause. The final section of this paper will highlight the increase in civil RICO liability through statistical evidence and past studies.

Exploitation of Civil RICO through Private Action

*“The Court’s interpretation of the civil RICO statute quite simply revolutionizes private litigation.”*

*- Justice Thurgood Marshall in his Sedima v. Imrex Dissenting Opinion*

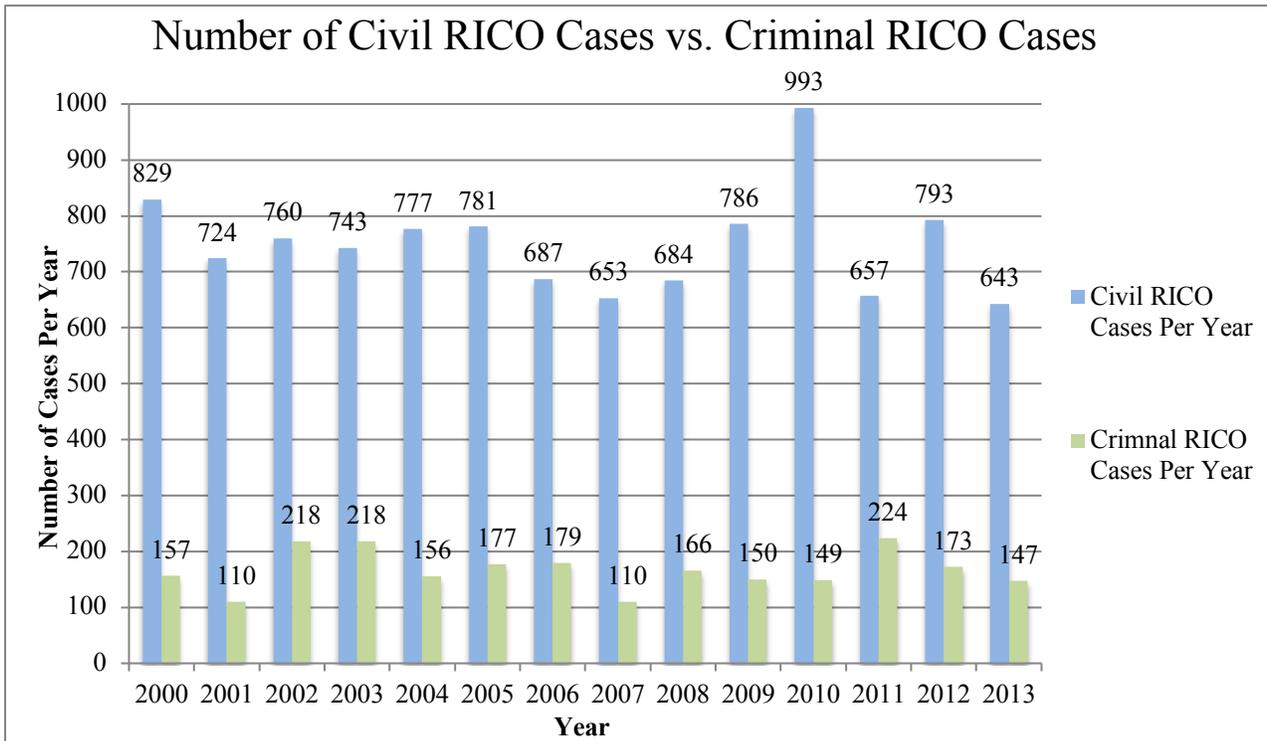
The final section of the paper will be centered on proving the abuse of civil RICO in two ways. First, by analyzing the amount of civil RICO cases filed in the district courts per year between 2000 and 2013 and comparing those numbers to the amount of defendants indicted under criminal RICO per year over the same 13-year time period. Second, by presenting data from two separate studies analyzing opinions rendered by the federal courts of appeals (Pierson 2013; Bucy 2002). One of these studies looked at opinions rendered between 1999 and 2001, while the other evaluated opinions between 2005 and 2011 (Pierson 2013; Bucy 2002). The results from both studies are remarkably similar demonstrating a pattern of abuse (Nybo 2010). After the exploitation of civil RICO has been supported, this paper will highlight the potential solutions to the problem, including a determination of the best available option.

**Analysis of the District Courts Reveals Statistical Abuse**

In order to answer the question posed at the beginning of this paper – if corporations and private individuals were exploiting the civil portion of the RICO Act – evidence needed to be gathered. This evidence needed to show a contrast between the number of civil RICO cases and criminal RICO cases being filed. An analysis of the United States district courts supports this contrast. The numbers shown in Chart 1 come from two highly reliable sources within the federal government, the Administrative

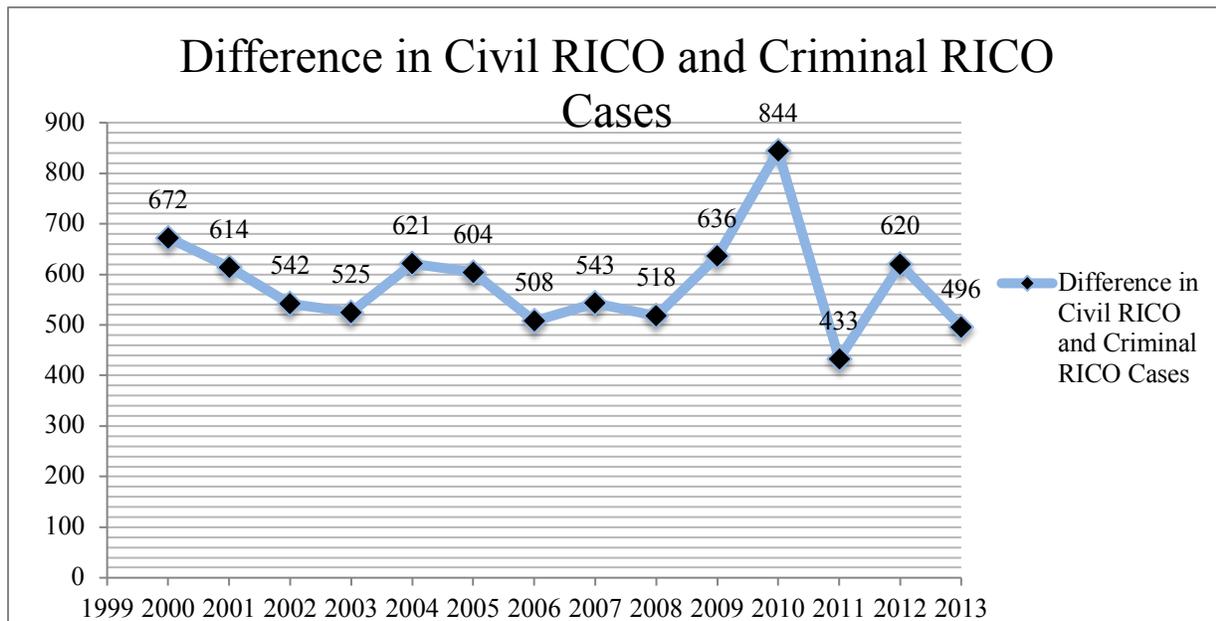
Office of the Courts for the civil RICO case numbers and the U.S. Department of Justice’s Bureau of Justice Statistics for the criminal RICO case numbers.

**Chart 1**



As seen in the data above, there is a clear discrepancy in the number of civil RICO cases filed and the number of indictments brought for criminal RICO charges over a sustained 13-year period. According to the Office of the Courts’ data, over this 13-year period there were an average of 750 civil RICO cases filed per year. On the other hand, according to the Bureau of Justice Statistics’ data, there were only 167 criminal RICO charges made, an average difference of approximately 583 cases per year. Chart 2 illustrates the difference per year for civil and criminal RICO charges.

Chart 2



It is important to note the distinction between civil cases filed and criminal indictments made. Civil RICO cases are filed independently, with each case relating to an entirely different matter; while criminal RICO indictments may consist of numerous defendants per indictment, thus inflating the criminal RICO numbers. Even with this necessary qualification – it is easy to see the distinct difference between the filing of civil and criminal RICO cases – civil RICO has outperformed criminal RICO in recent years (Pierson 2013).

#### **Past Federal Courts of Appeals Studies Create Pattern**

Evidence of civil RICO's abuse is not limited to the United States district courts; other studies have analyzed the federal United States appellate courts with similar results. The following paragraphs will detail these studies and their findings in order to provide the full breadth of civil RICO's exploitation. This will prove not only that civil RICO is

being abused but also that the abuse is occurring within different levels of the U.S. judicial system.

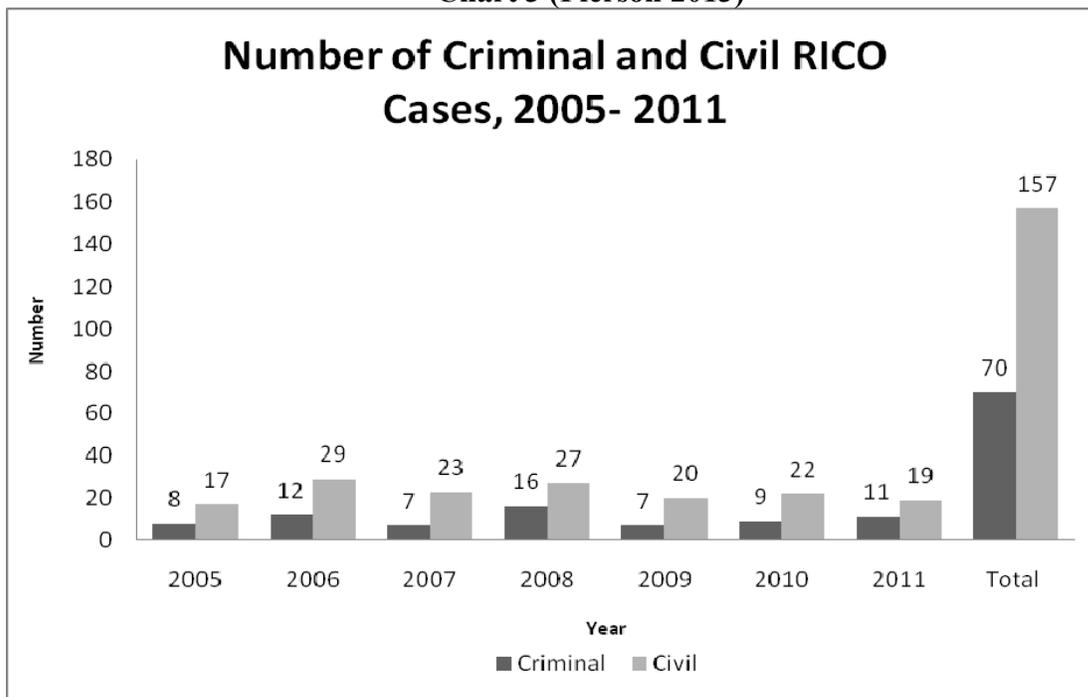
The first study, conducted by Pamela Bucy of the University of Alabama, examined “all federal appellate decisions in RICO cases rendered between 1999 and 2001” in an effort to “provide a snapshot of contemporary RICO jurisprudence” (Bucy 2002). This 2002 study revealed that of the 185 RICO cases decided by federal appellate courts, 145 (78%) were civil RICO cases (Bucy 2002). While in the same three-year span, a relatively pedestrian 40 (22%) criminal RICO cases were settled by federal appellate courts (Bucy 2002). These statistics indicated a similar trend to that of the district courts, in that civil litigants were filing more private cases than prosecutors were making criminal indictments (Nybo 2013).

Of the 145 civil RICO cases Bucy examined, 102 (70%) resulted in dismissals of the case or successful summary judgments in favor of the defendant (Bucy 2002). Even more alarming, was that only three of the 145 cases (2%) Bucy studied resulted in a final victory for the plaintiff (Bucy 2002). These distressing statistics show that the disparity between the filing of civil and criminal RICO cases is “not a product of legitimate differences” but merely “private plaintiffs filing frivolous claims that falter before a jury” (Nybo 2013). This trend raises questions about civil RICO’s wording, and its use as a legitimate form of civil relief (Bucy 2002; Nybo 2013).

The second study conducted by Bucy was similar to the first study. Bucy examined “all opinions rendered by the federal courts of appeals from 2005 to 2011 in RICO cases” (Pierson 2013). This 2013 study, examined 227 RICO cases over a seven-

year period to determine the difference in criminal and civil case numbers (Pierson 2013). “Of the 227 RICO opinions rendered...157 (74%) were civil RICO cases and 70 (26%) were criminal” (Pierson 2013, p. 9). As seen in Chart 3, there is a clear discrepancy between the number of civil and criminal RICO cases brought to the federal appellate courts’ attention (Pierson 2013). Once again, the results of this study matched the district court numbers as well as the previous study of the federal appellate courts, indicating that civil RICO is being used more than criminal RICO.

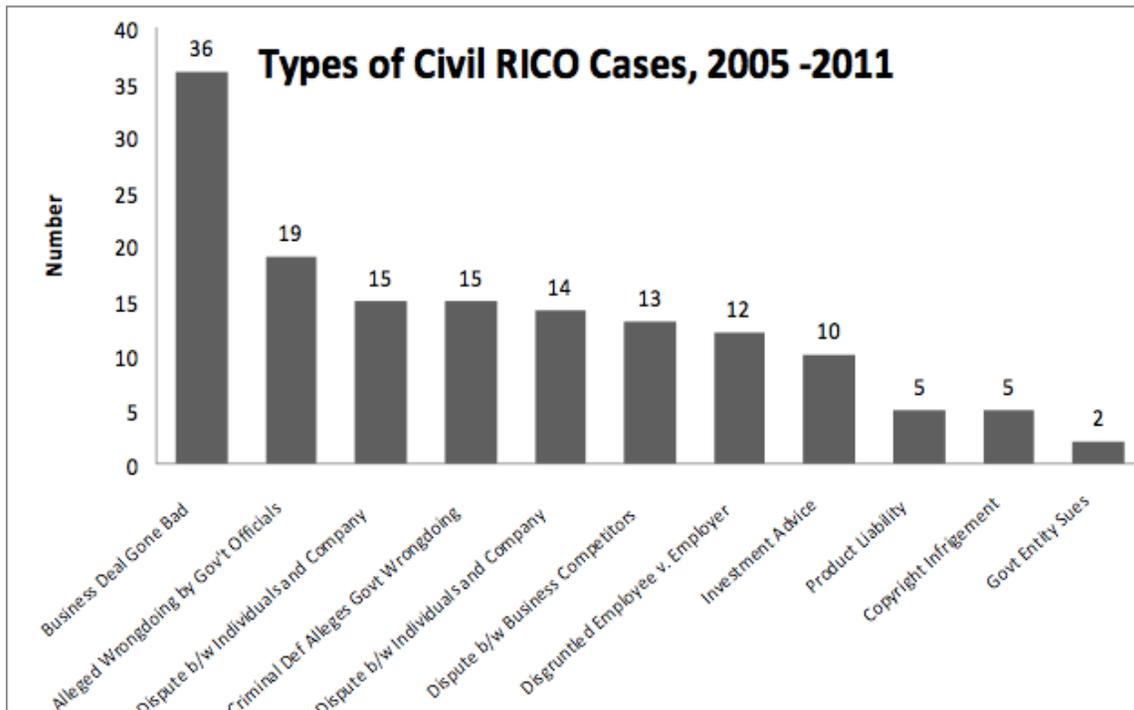
**Chart 3 (Pierson 2013)**



An important question that the second study raised and provided an answer to – that the previous study did not – was what kind of civil RICO cases are actually being brought forth. Chart 4, from the Pierson study, indicated that the nearly half of civil RICO cases occur between businesses, approximately 78 out of the 157 civil cases or

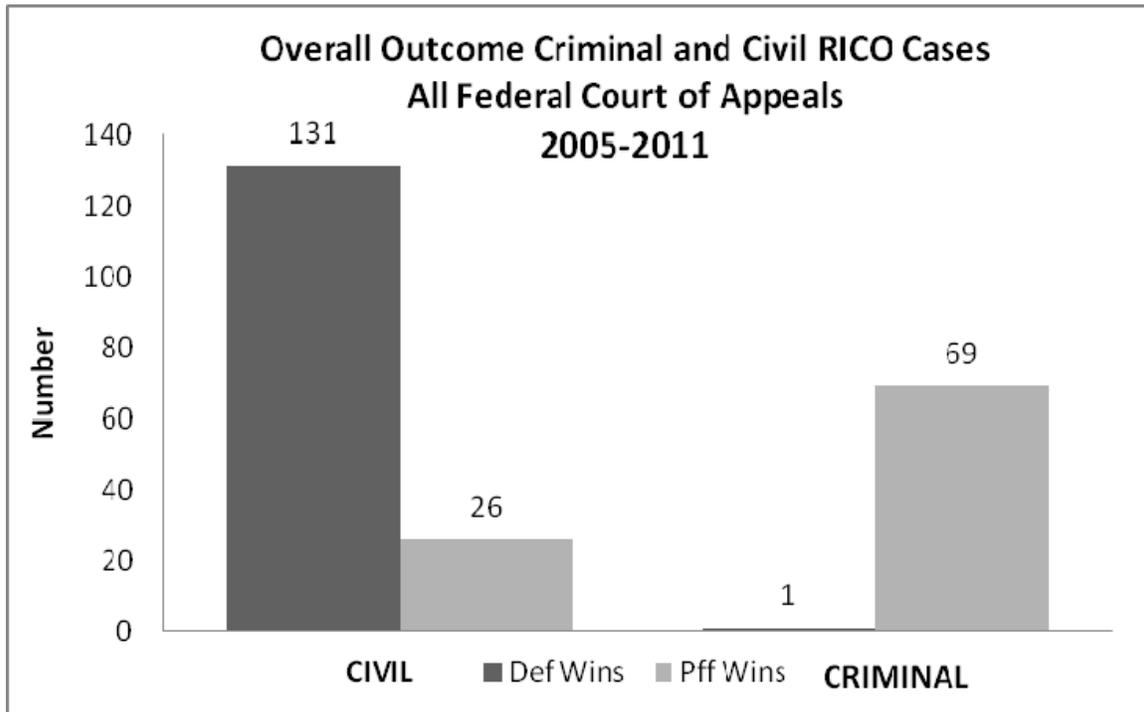
49.6% occurred with a business as one of the parties (Pierson 2013). On the other hand, 32 of the 157 cases or 20% “were brought in cases for which civil RICO clearly was not intended to be used” (Pierson 2013, p. 15).

**Chart 4 (Pierson 2013)**



The last point to be made by the second study mirrors a point made in the first study: the overwhelming number of civil RICO cases in which the defendant wins. According to the Pierson study, “the defense won in 83% (131 out of 157) of the civil cases,” which is shown below in Chart 5 (Pierson 2013, p.16). The collection of data demonstrates a direct contrast between the number of civil and criminal RICO cases filed. Furthermore, the civil RICO cases filed are frivolous in nature and exploitative of the civil portion of the RICO Act (Nybo 2013).

Chart 5



### **Potential Solutions to Civil RICO Exploitation**

Now that this paper has answered both if and how the civil RICO Act is being exploited, it is time to introduce and explain the potential solutions available. Each of the following solutions hold merit, and could – if properly implemented – be used to curb civil RICO’s abuse. The three solutions this paper will discuss are as follows: no longer considering corporations to be seen as associated-in-fact enterprises, Federal Rule of Procedure 11, and requiring a separate RICO injury (*Sedima v. Imrex* 1985; Nial 1986; Rodrigues 1990; Mitchell et al. 2008; Nybo 2013).

The first proposed solution – reworking the associated associated-in-fact definition to no longer include corporations – hinges on the Act’s definition of enterprise. As was noted previously in this paper, enterprise “includes any individual, partnership,

corporation, association, or other legal entity” (Racketeer Influenced Corrupt Organizations 1970). Another important piece of information, which has already been discussed in this paper, is the definition of an associated-in fact enterprise. According to the *Boyle* Court, “an association-in-fact enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct” (*Boyle v. United States* 2009, p. 2243). Furthermore, the Court concluded, “an association-in-fact enterprise must have...a purpose, relationships among those associated with the enterprise, and longevity” (*Boyle v. United States* 2009, p. 2244). The *Boyle* Court opened the door for corporations to be considered associated-in-fact enterprises, thereby allowing corporations to be sued for treble damages under the civil portion of the Act (Mitchell et al. 2008).

The associated-in-fact definition was included within the Act in an effort to “draw criminal syndicates and their leaders” within the Statute’s reach (Mitchell et al. 2008, p. 11). “Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against respected and legitimate enterprises” (*Sedima v. Imrex* 1985, p. 496). If the goal of any proposed civil RICO solution is to limit the Acts use against the honest business owner, a narrow reading of both the enterprise and associated-in-fact definitions are needed (Mitchell et al. 2008). In order to achieve this goal a “more considered, textual reading” of the Act’s enterprise definition is needed (Mitchell et al. 2008, p. 34). The exclusion of corporations from the definition of associated-in-fact enterprises would limit “garden variety fraud” from being litigated under the civil RICO Act (Mitchell et al. 2008, p. 32).

The second proposed solution introduces Federal Rule of Procedure 11 as the cure to civil RICO abuse. According to the 2017 Edition of the Federal Rules of Civil Procedure, Rule 11 mandates that an attorney – by presentation of a pleading or other document to a court – certify that the inquiry is reasonable in nature. Furthermore, Rule 11 lists the following requirements: the pleading may not be presented for any improper purpose, the claims within the pleading must be of a nonfrivolous nature, and the factual contents must have evidentiary support (Federal Rules of Civil Procedure Rule 11). Rule 11 provides an opportunity to impose necessary sanctions on attorneys and the appropriate party for any violations of the rule (Rodrigues 1990). This means attorneys who lack a case, and “use RICO to scare defendants into settling basic fraud cases” – through the fear of treble damages – can be punished under Rule 11 (Nybo 2013; p. 36). Rule 11 could be used to address the frivolous nature of civil RICO claims, if the courts upheld the reasonable inquiry requirement for each civil RICO pleading (Nybo 2013). Many of the RICO Act’s commentators believe that the correct use of Rule 11 – through the discretion of each court – would “punish the parties responsible” and curb “meritless and unnecessary litigation” (Nybo 2013; p. 49; Rodrigues 1990, p. 951).

The third and final proposed solution to civil RICO exploitation is the requirement of a separate, special RICO injury for any civil RICO pleading. The idea of a separate RICO injury was first introduced – both in the courts and in this paper – through the *Sedima v. Imrex* case (*Sedima v. Imrex* 1985). In that case, the *Sedima* court addressed the need for an additional threshold in order to reduce the number of illegitimate cases being brought forth (*Sedima v. Imrex* 1985). In case you have forgotten,

a RICO injury is a distinct “racketeering injury” or “competitive injury,” rather than injury caused merely by the predicate acts (*Sedima v. Imrex* 1985; p. 484). The district court in this case claimed, that a standing requirement of this nature “would restrict the use of RICO to plaintiffs who had suffered an injury of the type RICO was designed to prevent” (Nial 1986, p. 204). With this requirement in place, the use of civil RICO by victims of business fraud would be severely limited (Nial 1986). Furthermore, the injury requirement would lessen the impact of expansive predicate acts like mail and wire fraud by requiring a distinct racketeering injury (*Sedima v. Imrex* 1985). The number of frivolous and illegitimate civil RICO cases – sparked by treble damages, with settlement as the goal – would decrease in turn. The *Sedima v. Imrex* dissenting opinion even agreed that the only way to address these concerns was “to require that plaintiffs plead and prove that they suffered RICO injury” (*Sedima v. Imrex* 1985; p. 520).

Each of these potential solutions holds merit; however, it is this commentator’s belief that requiring a separate RICO injury – beyond the predicate acts – would best remedy the current abuse of civil RICO. The first solution – reworking the associated-in-fact definition – only addresses the use of civil RICO for “garden-variety fraud” cases (Mitchell et al. 2008, p. 32). It does not address the frivolous and illegitimate nature of some civil RICO cases, nor does it provide a solution to any cases lacking a corporation as a defendant (Mitchell et al. 2008). Any case without a corporation as the defendant – yet still beyond the intended purpose of the Act – could still be considered an associated-in-fact enterprise.

The second solution – utilizing Rule 11 of the Federal Rules of Civil Procedure – addresses the frivolous nature of civil RICO claims, and provides the court with the ability to impose appropriate sanctions upon the responsible parties (Nybo 2013). Unfortunately, Rule 11 hinges on the specific district court’s discretion (Nybo 2013). In fact, “some federal courts have been reluctant to impose sanctions under Rule 11 for fear of chilling creative advocacy” (Rodrigues 1990; p. 933). Judicial resistance to any proposed RICO solution would be counterintuitive to the goal of reducing civil RICO abuse (Rodrigues 1990).

An additional threshold requiring a distinct “racketeering injury” or “competitive injury” – beyond the mere predicate acts – would reduce the expansive power of the predicate acts and decrease the number of frivolous civil RICO cases (*Sedima v. Imrex* 1985; p. 484). It would also limit ordinary business fraud cases – just like the associated-in-fact solution – because it requires a special RICO injury beyond those of mail and wire fraud, the most common avenues for turning a business fraud case into a civil RICO one (*Sedima v. Imrex* 1985). This additional threshold would solve both problems – everyday fraud cases and frivolous cases looking for treble damages – that have led to the exploitation of civil RICO.

### **Conclusion**

This paper began with two important questions, how and if private individuals and corporations are exploiting the civil portion of the 1970 Racketeer Influenced Corrupt Organizations Act. In order to fully address RICO’s exploitation an appropriate level of legislative background was needed. The Kefauver and McClellan committees,

the Katzenbach commission and the Organized Crime Control Act all played a part in the making and in some cases the wording of the RICO Act (Coppola and DeMarco 2012). After detailing the events leading up to the implementation of the RICO Act, the first question – how the Act was being exploited – was answered. In essence, the broad wording of the Act and the Supreme Court’s interpretation created an opportunity for private abuse (Nial 1986; Coppola and DeMarco 2012). Furthermore, defendants’ fear of the treble damages clause led to its exploitation, and increased the filing of frivolous claims with settling as the goal (Nybo 2013). This paper also analyzed a number of key Supreme Court cases – *Sedima v. Imrex*, *HJ Inc. v. Northwestern Bell*, *Boyle v. United States*, *NOW v. Scheidler* – to showcase the effect of the Act’s broad wording.

After proving how the Act had been violated this paper answered the all-important “if” question through an analysis of statistical evidence. When this commentator looked at both district court and federal court of appeals cases there was a stark contrast between the filing of civil RICO cases and criminal ones (Pierson 2013). In addition, various studies showed that this difference in the filing of civil and criminal RICO cases is “not a product of legitimate differences” but merely “private plaintiffs filing frivolous claims that falter before a jury” (Nybo 2013). Finally – after addressing both questions – this paper highlighted the potential solutions available, and settled on the implementation of an additional threshold requiring a separate RICO injury to curb the exploitation of civil RICO.

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