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COMMODITIES LITIGATION: THE IMPACT OF RICO

Michael S. Sackheim*
Francis J. Leto**
Steven A. Friedman***

INTRODUCTION

The number of private actions commenced against commodities brokers and other professionals in the futures area has increased dramatically in the last few years. Although these lawsuits primarily have been based on violations of the Commodities Exchange Act (CEAct), the complaints have frequently included allegations that the federal Racketeering Influenced and Corrupt Organization Act (RICO) was also violated by the subject defendants. In invoking the racketeering laws, the plaintiff often seeks to take advantage of the treble damage provision of RICO.

This article will analyze the application of the racketeering laws to common, garden-variety commodities fraud cases. Specifically, this article addresses those cases where a brokerage firm is sued because of the illegal acts of its agents. It is the authors' contention that the treble damages provision of RICO should not be applied to legitimate brokerage firms who are innocently involved in instances of commodities fraud through the acts of their agents.

Part I of this article discusses the history and regulation of the futures markets in the United States. In part II, the evolution of the private cause of action based on violations of the CEAct is discussed. Part III provides a discussion of the various approaches the courts have taken in applying RICO to civil investment fraud actions. Part IV analyzes the application of the RICO remedies to lawsuits which involve allegations of violations

*** Associate, Parker, McCay, & Criscuolo, P.A., Marlton, N.J.; B.A., 1976, Tulane University; J.D., 1984, Delaware Law School (Cum Laude).
3. 18 U.S.C. § 1964(c) (1982) provides that:
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id.
of anti-fraud provisions of the federal commodities laws. This article concludes with arguments against the application of RICO to innocent commodities firms unknowingly involved in commodities fraud through their agents' illegal acts.

I. BACKGROUND

A. Development of Futures Trading

Commodity futures\textsuperscript{4} and options markets\textsuperscript{5} have been the subject of ever
increasing federal regulation. Trading of consumable commodities was introduced in America in the late 1700's, and generally was limited to eggs, butter, vegetables, and grain traded in cash markets for immediate, or "spot" delivery. Spot delivery, however, failed to take into account that when farmers brought their goods to market, supply sometimes exceeded the market demand. This system gradually gave way to a system of forward contracting, which involved the sale of a commodity on a spot market with delivery deferred to a future date. Although this innovation protected farmers from delivering excessive amounts of goods to market, forward contracting was not without its problems. For example, farmers who bargained for future delivery of a given quantity of goods assumed the financial risk of events such as crop failures and shipping disasters.

In response to these continuing problems, during the latter half of the nineteenth century commodity "futures" trading developed in the United States. Futures trading involves a contractual obligation to buy or sell a specified quantity of goods at a specified future date. In effect,
The futures market developed in response to the increasing economic need for centralized pricing and large-scale risk bearing in the agricultural market. Through the buying and selling of futures contracts, traders were able to discover the general consensus of what traders believed the price ought to be in the future, based on existing information. By projecting demand and price into the future, futures trading provides a means of appraising supply-and-demand conditions and dealing with price risks over time and distance.\textsuperscript{13}

The nineteenth century saw the evolution of futures trading, the development of mechanized farming, increased availability of land, and the expansion of transportation and shipping methods. The advent of industrialized farming resulted in wide-spread grain planting and subsequent harvesting.\textsuperscript{14} Chicago, acting as a nexus for new railroad and shipping routes, saw tons of grain pass through the city during this time period.\textsuperscript{15} Price inflation and

<table>
<thead>
<tr>
<th>Year</th>
<th>Bushels Received</th>
<th>Bushels Shipped</th>
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</thead>
<tbody>
<tr>
<td>1854</td>
<td>3,038,955</td>
<td>2,306,925</td>
</tr>
<tr>
<td>1855</td>
<td>7,535,097</td>
<td>6,298,155</td>
</tr>
<tr>
<td>1856</td>
<td>8,767,760</td>
<td>8,364,420</td>
</tr>
<tr>
<td>1857</td>
<td>10,554,761</td>
<td>9,846,052</td>
</tr>
<tr>
<td>1858</td>
<td>9,639,614</td>
<td>8,850,257</td>
</tr>
<tr>
<td>1859</td>
<td>8,060,766</td>
<td>7,166,696</td>
</tr>
<tr>
<td>1860</td>
<td>14,927,083</td>
<td>12,402,197</td>
</tr>
<tr>
<td>1861</td>
<td>17,385,002</td>
<td>15,835,953</td>
</tr>
<tr>
<td>1862</td>
<td>13,978,116</td>
<td>13,808,898</td>
</tr>
<tr>
<td>1863</td>
<td>11,408,161</td>
<td>10,793,295</td>
</tr>
<tr>
<td>1864</td>
<td>12,184,977</td>
<td>10,250,026</td>
</tr>
</tbody>
</table>

\textit{Id.} at 26 (citing \textit{Chicago Board of Trade, Yearbook} (1910)).
deflation, the absence of standardized grading, and irresponsible trading led a group of grain merchants to attempt to establish "order in a world of chaos." Thus, in 1848, the nation's largest commodity futures exchange, the Chicago Board of Trade, was formed with standardized rules for the trading of grain futures.

Other boards or exchanges developed under similar circumstances in an effort to standardize trading. "[S]tandardized agreements covering specific quantities of graded agricultural commodities to be delivered during specified months in the future were bought and sold pursuant to rules developed by the traders. . . ." Similarly, terms describing quantity and quality of goods, time and place of delivery, and method of payment developed. The only non-standardized term was price. In essence, price is what made, and presently makes, the commodity market "go round"—it offers the investor the opportunity to make a profit or minimize the risk of loss.

16. Id. at 24.
18. Id. at 827. Rules eventually developed for all types of agricultural trading.
21. Id.
22. Generally, there are two types of traders that utilize the futures markets—speculators and hedgers. A speculator is "one who voluntarily accepts the risks associated with the ownership of a commodity and relies on a price change in the commodity to produce a profit, or risk premium for his efforts." S. ANGRIST, SENSIBLE SPECULATING IN COMMODITIES 205 (1972). Historically, however, it has been the speculators who have lost money on their investments. B. STEWART, AN ANALYSIS OF SPECULATIVE TRADING IN GRAIN FUTURES (U.S. Dep't of Agric. Tech. Bull. No. 1001, Oct. 1949). For example, in the years between 1964 and 1975 the volume of commodity trading increased almost 400%. H.R. Rep. No. 975, 93d Cong., 2d Sess. 156 (1974) [hereinafter cited as H.R. Rep. No. 975]. In 1974, the futures trading volume was at 27.7 million contracts; in 1977, the volume increased to 41.5 million contracts. Over the same periods, the value of the contracts rose from $571.6 billion to $1.1 trillion. See Rainbolt, Regulating the Grain Gambler and His Successors, 6 Hofstra L. Rev. 1, 2 n.4 (1977).

The House Report on the 1974 amendments to the CEAct described the role of a speculator as follows:

The principal role of the speculator in the markets is to take the risks that the hedger is unwilling to accept. The opportunity for profit makes the speculator willing to take those risks. The activity of speculators is essential to the operation of a futures market in that the composite bids and offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a
B. Legislation

Increased dissatisfaction with the speculative nature of the trading system and an awareness of the likelihood of the potential difficulties arising from the system led to a movement to abolish futures trading. This effort to eliminate futures soon gave way to restrictive federal regulation. Early attempts at regulation sought to impose tax restriction upon certain types of trading. For example, the Cotton Futures Act of 1917 placed a prohibitive tax upon "each contract of sale of any cotton for future delivery made at, on, or in any exchange, board of trade, or similar institution or place of business." A like approach was taken in 1921 with the enactment of the Futures Trading Act. Again, the legislation attempted to impose a prohibitive tax upon futures transactions and contract markets. The Futures Trading Act, however, was declared unconstitutional on the ground that it exceeded the taxing authority of Congress. Congress quickly reacted

host of speculative orders in the trading ring, many larger trade orders at limit prices would simply go unfilled due to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match. H.R. Rep. No. 975, supra, at 138.

On the other hand, "[t]ypically a hedger is engaged in production, distribution, processing or consumption of the actual commodity or its by-products," Commodity Futures Trading Comm'n, Report to the Congress in Response to Section 21 of the Commodity Exchange Act 6 (1981). A hedger utilizes the market "to stabilize his profit structure and reduce his business risk." Chicago Board of Trade, Commodity Trading Manual 61 (1982). For example, the producer of a physical commodity can hedge against price decreases of the commodity by entering into equivalent short futures contracts that are due in the month he plans to sell the physical commodity. By assuming a short position in the market, an investor believes the price of an underlying commodity will decline. Therefore, any losses the producer has by reason of decline in prices on the cash market will be offset by the profits he or she receives in the futures contract transactions. See Cargill, Inc. v. Harding, 452 F.2d 1154, 1157-58 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972); H.R. Rep. No. 975, supra, at 130-34.

23. S. Rep. No. 850, supra note 8, at 7. For example, in 1864, Congress banned trading of gold commodity futures contracts. This statute was later repealed. See Stassen, supra note 17, at 827 n.13 (citing G. Hoffman, Future Trading Upon Organized Commodity Markets in the United States 364-65 (1932)). The Anti-Options Bill of 1892, see House Comm. on Agriculture, Dealing in Fictitious Farm Products, H.R. Rep. No. 969, 52d Cong., 1st Sess. (1892), was an unsuccessful attempt to levy a prohibitive tax on certain agricultural futures contracts.


25. Cotton Futures Act, ch. 313, § 3, 39 Stat. 476, 476 (1916). As the senior author has previously noted, this "legislation made no distinction between futures and cash forward contracts. Present futures legislation clearly exempts from the definition of a futures contract and from the jurisdiction of the CFTC 'any sale of any cash commodity for deferred shipment or delivery.' " See Private Rights of Action, supra note 4, at 55 n.18 (citing CEAct, 7 U.S.C. § 2(a)(1)(n) (1982)).


27. The legislation imposed a prohibitive tax upon commodity futures transactions and commodity exchanges such as the Chicago Board of Trade. The Future Trading Act, ch. 86, § 4, 42 Stat. 187, 187 (1921).

28. See Hill v. Wallace, 259 U.S. 44 (1922). Specifically, the Court stated: "The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which
and, "[w]ith cut and paste," the 1921 Futures Trading Act was modified to become the Grain Futures Act of 1922.

Authority for the 1922 Act was based upon the congressional power to regulate interstate commerce. Consequently, the legislation was declared constitutional by the Supreme Court. Thus, the groundwork for further federal regulation was in place.

Commodity exchanges, rather than individual investors, were the target of the 1922 Act. Responsibility for the protection of market participants was placed upon licensed commodity exchanges or "contract markets" as they were designated by the Act. Responsibility for enforcement of the Act was placed under the auspices of the Department of Agriculture, "but its regulatory powers were limited and proved inadequate in dealing with market abuses."

The weaknesses found in the 1922 Act were significantly strengthened with the passage of the 1936 amendments, which renamed the statute the Commodity Exchange Act. The amendments extended the Act's coverage

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29. Stassen, supra note 17, at 830.
31. See Board of Trade v. Olsen, 262 U.S. 1 (1923). The Court found:
   The Grain Futures Act which is now before us differs from the Future Trading Act. The act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that, by manipulation, they have become a constantly recurring burden and obstruction to that commerce.
   Id. at 32.
32. Previous legislation placed a tax upon trading transactions. These transactions are normally carried on by individual investors; therefore, it was the individual that was affected. See, e.g., supra text accompanying notes 24-30.
34. Commodity exchanges or boards of trade are designated as a contract market for each type of futures contract it is authorized to trade. In order to be designated as a contract market, the governors of the board of the contract market are required, inter alia, to (1) prevent its members from releasing misleading market information, The Grain Futures Act, ch. 369, § 5(c), 42 Stat. 998, 1000 (1922); and (2) prevent the "manipulation of prices or the cornering of any grain, by the dealers or operators upon such board," The Grain Futures Act, ch. 369, § 5(d), 42 Stat. 998, 1000 (1922). A contract market's failure to meet the prescribed statutory standards was grounds for revocation by the Secretary of Agriculture who was responsible for monitoring the exchanges. See Campbell, Trading in Futures Under the Commodity Exchange Act, 26 GEO. WASH. L. REV. 215, 226-33 (1958) (explaining contract markets).
35. The Future Trading Act, ch. 86, 42 Stat. 188 (1921).
37. Weaknesses within the 1922 Act were not the only reason for the new legislation. Following the Great Depression, President Roosevelt recommended to Congress a comprehensive federal regulatory scheme to eliminate what he saw as abuses in the nation's securities and commodity exchanges. These regulations would provide for protection of the public and eliminate "unnecessary, unwise, and destructive speculation." 78 CONG. REC. 2264 (1934).
to include additional agricultural commodities. Moreover, the power of the Secretary of Agriculture to license and regulate contract markets and commodity futures brokers, called "future commission merchants" (FCM), was greatly increased; strict anti-fraud requirements were imposed upon members of contract markets; and FCMs and floor brokers were required to register with the Department of Agriculture.

Between 1936 and 1968 several minor amendments extended the coverage


40. See Act of June 15, 1936, ch. 545, § 3(b), 49 Stat. 1491, 1491-92. A futures commission merchant is defined as

individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.


42. Act of June 15, 1936, ch. 545, § 4b, 49 Stat. 1491, 1493. The antifraud provision is essentially the same as it was in 1936. Currently, the provision provides:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.


of the Act." Congress significantly extended the coverage of the Act in 1968 and in so doing provided additional enforcement authority for the Secretary. It was in 1974, however, that "[t]he most important piece of futures legislation in fifty years" was passed by Congress—the Commodity Futures Trading Commission Act. The 1974 CFTC "completed the move towards stronger federal regulatory authority over the futures industry which was begun in 1922."

Most significantly, the 1974 CFTC established the Commodity Futures Trading Commission (CFTC). This independent federal regulatory agency was vested with powers modeled after the Securities and Exchange Commission (SEC). Congress transferred the Department of Agriculture's authority

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44. See Johnson, The Parameters of Regulatory Jurisdiction Under the Commodity Futures Trading Commission Act, 25 Drake L. Rev. 61, 64 (1975).

45. Act of Feb. 19, 1968, Pub. L. No. 90-258, 82 Stat. 26. Live cattle and pork bellies were added to the list of regulated commodities. Section 5a(8) required contract markets to enforce their rules; currently the provision provides that a contract market shall:

Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, that (i) have been approved by the Commission, pursuant to paragraph (12) of this section, (ii) have been effective under such paragraph, or (iii) must be enforced pursuant to any Commission rule, regulation, or order; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission.


47. See Stassen, supra note 17, at 833.


49. See Private Rights of Action, supra note 4, at 59.

50. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 2(a), 88 Stat. 1389, 1389. The CFTC is an independent federal regulatory agency. It is directed by five commissioners who are appointed by the President with the advice and consent of Congress. The CFTC is the successor to the Department of Agriculture's Commodity Exchange Authority. See generally Rainbolt, Regulating the Grain Gambler and His Successors, 6 Hofstra L. Rev. 1 (1977) (CFTC was amended to provide a new, independent regulatory commission); Note, Abuses in the Commodity Markets: the Need for Change in the Regulatory Structure, 63 Geo. L.J. 75 (1975) (authority criticized for inadequacy of its regulation).

51. See Sackheim, Judicial Equitable Enforcement of the Federal Commodities Laws, 32 Am. U.L. Rev. 945 (1983) [hereinafter cited as Judicial Enforcement]. There, the senior author stated:

In congressional hearings on the Commodity Futures Trading Commission Act of 1974, Professor Glenn Willet Clark testified that "[a] full-time Futures Exchange Commission, deliberately patterned in the structure of the SEC, must be created if regulation of this growing and vitally important market is to meet today's pressing demands." ... One commentator has noted that "the emphasis [of the hearings] was on filling the regulatory gap by creating a strong regulatory agency comparable to the SEC." ... A former vice-chairman of the Commission concluded that "[t]he 1974 amendments replaced regulation by the Secretary of Agriculture
over commodity future trading to the CFTC, which was granted new and broad enforcement power.\(^5^2\)

In keeping with the trend toward stronger federal regulation over commodity trading,\(^2\) the CFTC was granted extensive enforcement powers to ensure compliance with the CEAct.\(^4^\) Among these powers is the CFTC’s authority to invoke its own administrative disciplinary proceedings\(^6\) whereby it may suspend or revoke the registration of parties from trading over contract markets,\(^6\) impose civil monetary penalties for violating the CEAct,\(^5^7\) and issue cease and desist orders affecting possible future violative activities.\(^5^8\) The CFTC is also authorized to institute equitable injunctive actions in federal district courts\(^9\) to remedy the wrong and to prevent future violations of

with regulation by the CFTC, a five-member, independent regulatory commission, similar to the SEC.

\(^1\) Id. at 948 n.5 (citations omitted).
\(^2\) See CEAct § 6(b), 6(c), 7 U.S.C. § 9 (1982).
\(^3\) See supra note 49 and accompanying text.
\(^4\) See generally Sackheim, Administrative Enforcement of the Federal Commodities Laws by the Commodity Futures Trading Commission, 12 SETON HALL L. REV. 445 (1982) (exploring the aggressive enforcement program the CFTC has engaged in in order to protect the public from abuses in commodity trading and to ensure the integrity of the markets).
\(^7\) Id.
\(^8\) Id. § 13(b). Section 13(b) provides, in part, that, the Commission may, upon notice and hearing, . . . make and enter an order directing [that any violator of the Act] cease and desist therefrom, and if such person thereafter . . . shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100,000, or imprisoned for not less than six months nor more than one year, or both.

\(^9\) Id. § 13a-1. Senator Alan Cranston stated with respect to the passage of the new Act:

The effectiveness of the new Commodity Exchange Commission depends upon its ability to act swiftly to enforce its regulations. If the Commission was authorized to go directly into court to seek injunctions rather than notifying the Attorney General to bring action, unnecessary delays would be avoided and the public would be better protected against such practices as fraud, manipulation of the market, and mishandling of funds.


the CEAct. 60

The 1974 legislation also sought to protect individual investors through the imposition of two new remedial measures. Section 5a(11) provided for the resolution of customer grievances through arbitration procedures. 61 Section 14 authorized the CFTC to grant reparations 62 to any individual "complaining of any violation of the CEA, or its implementing regulations, committed by any futures commission merchant or any associate thereof, floor broker, commodity trading advisor, or commodity pool operation." 63

In 1978, Congress passed its first "sunset" review 64 of the CFTC, which "emerg[ed] intact with a fine-tuning, but not an overhauling, of its powers." 66 The primary effect 67 of the new legislation was to settle the "jurisdictional battle" 68 over certain financial instruments that arose between the CFTC and SEC. 69 "Congress found sunset review such a wholesome experience that it slated a new sunset for 1982." 70

Almost eight full years after its creation, the CFTC and the CEAct underwent a "comprehensive" 71 review by Congress. This review resulted in the Futures Trading Act of 1982. 72 Among other things, the 1982 Act strengthened the CFTC's enforcement authority, 73 redefined the jurisdiction

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60. Judicial Enforcement, supra note 51, at 950; see also Aaron v. SEC, 446 U.S. 680, 703 (1980) (Burger, C.J., concurring) ("[a]n injunction is a drastic remedy, not a mild prophylactic").
62. Id. § 18. For regulations concerning the conduct of reparations proceedings before the CFTC, see 17 C.F.R. §§ 12.1-102 (1983).
64. Currently there are five other federal agencies subject to sunset review. See Young, A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission, 27 EMORY L.J. 853, 859 n.29 (1978). The term "sunset" generally refers to the "statutory method of forcing a legislature to make a periodic determination whether to allow a particular program or agency to continue." Id. at 854. See generally Adams, Sunset: A Proposal for Accountable Government, 28 AD. L. REV. 511 (1976) (discussing the sunset review mechanism).
67. There were other effects of the 1978 legislation. For example, the sale of options was banned, except options sold by dealers in the trade. 7 U.S.C. § 6c(c) (Supp. II 1978), amended by 7 U.S.C. § 6c(c) (1982).
68. See Stassen, supra note 17, at 834.
69. For a discussion of the jurisdictional battle, see I.P. JOHNSON, COMMODITIES REGULATION 40-45 (1982).
70. See Stassen, supra note 17, at 835 (citing 7 U.S.C. § 16(d) (Supp. II 1978)).
73. See, e.g., 7 U.S.C. § 12a(9) (1982) (exempting the CFTC's exercise of its emergency
of the CEA, and created additional categories of offenses. The effect of the legislation has not yet been fully felt, but one commentator has opined that "the Futures Trading Act of 1982 sets out a full-fledged regulatory agenda that may alter the course of commodities regulation."

II. THE PRIVATE CAUSE OF ACTION

The evolution of the CEA also brought attempts by litigants to initiate private rights of action based on the CEA. Implied private causes of action were allowed by the courts. Soon after, an amendment to the CEA was added which expressly allowed for a cause of action.

A. The Implied Cause of Action

Prior to 1975, implying a private cause of action for damages under the provisions of a federal statute was governed by the principles set forth by the United States Supreme Court in Texas & Pacific Railway Co. v. Rigsby. Under the Rigsby approach, the violation of a statute which "results

powers from judicial review except where such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; id. § 13a-1 (providing for the issuance of ex parte orders restraining the spilation of books, records, and assets in CFTC federal court injunctive actions).

74. See id. § 2 (jurisdictional accord concerning certain financial futures and options); id. § 6c (foreign currency options traded over national securities exchanges are not within the jurisdiction of the CEA). The enactment of this jurisdictional accord was the result of an agreement reached in 1981 between Chairman Johnson of the CFTC and Chairman Shad of the SEC. See H.R. REP. No. 565, 97th Cong., 2d Sess. 38-40 (1982) [hereinafter cited as H.R. REP. No. 565].

75. See, e.g., 7 U.S.C. § 6(a) (1982) (off-exchange commodity futures contracts made unlawful); id. § 6(o) (extending the anti-fraud provisions of the CEA to associated persons of both commodity pool operators and commodity trading advisors); id. § 13 (criminal sanctions for the conversion of commodity pool participation monies).

76. Rosen, supra note 66, at 143. One case which has dealt with the 1982 legislation is Lopez v. Dean Witter Reynolds, Inc., 591 F. Supp. 581 (N.D. Cal. 1984). In Lopez, the district court granted a plaintiff leave to amend her complaint which alleged a violation of § 4b of the CEA, 7 U.S.C. § 6b (1982). In allowing the plaintiff leave to amend, the court noted that a complaint based on a violation of the CEA must allege that the commodities firm "acted with knowledge or in ignorance brought about by willfully or carelessly ignoring the truth." 591 F. Supp. at 584.

77. In 1975, the Supreme Court set out a new analysis to be followed in implying a private cause of action for damages. See Cort v. Ash, 422 U.S. 66 (1975), which is discussed infra at notes 85-87 and accompanying text.


Prior to Rigsby, the basis for implication of private rights of action can be traced to early English jurisprudence. See Pitt & Miles, Implied Private Rights of Action Under the Commodity Exchange Act and the Federal Securities Laws, in COMMODITIES FUTURES LITIGATION & REGULATION: NEW DIRECTIONS 139 (1982). Pitt and Miles believe that, [t]he notion that private actions might be implied from existing statutes perhaps stems from the Statute of Westminster. . . . In Sir John Comyns' Digest of the
in damage to one of the class for whose especial benefit the statute was enacted," should accord the wronged party the right to recover damages from the "party in default." Following these guidelines, the Supreme Court frequently implied causes of action under various statutes, as did the lower federal courts.

The area of law in which private rights of action are perhaps most often implied is under the Securities Exchange Act (SEC Act). From the early 1940's until the present, courts have freely implied causes of action under the SEC Act

*Laws of England,* . . . Comyns recited the then standardized English jurisprudence that: "in every case, where a statute enacts or prohibits a thing for the benefit of a Person, he shall have a Thing enacted for his Advantage or for the Recompense of a Wrong done to him contrary to said law."

Id. (citations omitted); see e.g., *Couch v. Steel,* 3 El. & Bl. 402, 411, 118 Eng. Rep. 1193, 1196 (Q.B. 1854).


79. 241 U.S. at 39. The Court specifically stated:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed . . . in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." . . .

This is but an application of the maxim, *Ubi jus ibi remedium.*

Id. at 39-40 (citation omitted).


82. *See, e.g., Blue Chips Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975) (overwhelming consensus of federal courts acknowledges an implied cause of action under rule 10b-5 for actual purchasers and sellers of securities); *Superintendent of Ins. v. Bankers Life & Casualty Co.,* 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10(b)." ); *J.I. Case Co. v. Borak,* 377 U.S. 426 (1964) (implying a cause of action under § 14(a) of the Act); *Deckert v. Independence Shares Corp.,* 311 U.S. 282 (1940) (implying a cause of action under § 22(a) of the 1934 Act); *Fratt v. Robinson,* 203 F.2d 627 (9th Cir. 1953) (implying a cause of action under § 10(b) of the Act); *Fischman v. Raztheon Mfg. Co.,* 188 F.2d 783 (2d Cir. 1951) (implying a cause of action under § 18(a) of the Act); *Baird
and statutes administered by the SEC. The courts also implied causes of action under the CEA. One court noted that "it was scarcely surprising that the courts that considered the question prior to the 1974 amendments unanimously upheld the implication of a private cause of action under the CEA."  

After 1975, implication of a private right of action was controlled by the analysis set forth in *Cort v. Ash*. In *Cort*, the Supreme Court drew from

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As stated by one court: "[T]here can be no doubt that particularly in the closely related field of violations of statutes administered by the SEC, the implied cause of action was so much taken for granted that usually the issue was not even raised..." Leist v. Simplot, 638 F.2d 283, 299 n.15 (2d Cir. 1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). But see Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (limiting implied cause of action under rule 10b-5 to actual purchasers and sellers of securities).


85. 422 U.S. 66 (1975). In *Cort*, the plaintiff was a stockholder of the Bethlehem Steel Corporation. The plaintiff brought a private action for damages, based on the Federal Election
sixty years of prior case law to establish a four part test\textsuperscript{6} to determine whether an implied cause of action exists under a silent statute:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"—

\ldots that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? \ldots Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?\textsuperscript{7}

The passage of the 1974 amendments to the CEAct\textsuperscript{8} resulted in a split among the federal courts regarding the continued existence of a private cause of action.\textsuperscript{9} In the years following the \textit{Cort} decision, the Supreme Court

\begin{itemize}
  \item Campaign Act, 18 U.S.C. § 610 (1970), against the chairman of the board of Bethlehem Steel for political advertisements paid for by the corporation. The Act provided only for a criminal penalty for unauthorized contributions by corporations to political campaigns. After applying the test there established, the Court held that a private right of action did not exist. 422 U.S. at 83.
  \begin{quote}
  \end{quote}
  Comment, \textit{Continued Validity}, supra, at 588 n.72.
  \item 87. 422 U.S. at 78 (citations omitted). For examples of the application of the \textit{Cort} test, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), and Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). For an analysis of the Supreme Court’s application of \textit{Cort} to the Chris-Craft case, see Pitt, supra note 82.
  \item 88. See supra notes 47-63 and accompanying text.
\end{itemize}
seemed to be "pulling in the reins" when implying a cause of action. With the 1974 amendments, Congress added two new remedial measures designed to protect individual traders, but remained significantly silent with respect to private causes of action for violation of the CEA. Many defendants argued that these developments "eradicated any pre-existing implied right of action." It was not until 1982 that the Supreme Court finally put the issue to rest in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*.

The plaintiffs in *Curran* alleged, *inter alia*, violations of the 1974 CEA by the New York Mercantile Exchange and certain commodities brokers. Justice Stevens, writing for the majority, explained that under the pre-1974 amendments to the CEA, "the federal courts routinely and consistently had recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA." Thus, the issue as framed by the Court was whether, with the passage of the CEA in 1974, Congress intended to eliminate the remedy that had been previously available.

The Court began its inquiry with a rather detailed examination of the history of the CEA. As the majority concluded, "[t]he key to [the resolution of] these cases is our understanding of the intent of Congress in 1974 when it comprehensively reexamined and strengthened the federal regulation of futures trading." Presuming that Congress was aware of the judicial interpretations of the statute, and noting that the CEA left certain anti-fraud provisions of the original 1936 Act intact, the Court held that Congress intended to preserve private rights of action for damages under those

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91. See supra notes 61-63 and accompanying text.

92. See Pitt & Miles, supra note 78, at 206.


94. 456 U.S. at 367-74.
95. Id. at 379.
96. Id. at 374.
97. Id. at 357-67.
98. Id. at 378.

99. Id. at 381-82 (citing Cannon v. University of Chicago, 441 U.S. 677 (1979)).
100. 456 U.S. at 365-66.
sections of the CEAct. Moreover, the majority found that investors involved in futures speculation were of a class of persons for whose *especial* benefit the CEAct had been enacted and, therefore, had standing to commence an action.

**B. The Express Cause of Action**

In partial response to the Curran decision, an express cause of action was created in the 1982 amendments in section 235, codified as section 22 of the CEAct (section 22). Under certain specified conditions, section 22 expressly provides for a private cause of action by individual investors for alleged violations of any provisions of the CEAct or the rules and regulations promulgated thereunder. Prior to its enactment in 1982, some felt that a provision such as section 22 would be beneficial to the futures

101. Id. at 387-88.
102. Id. at 388-94. Speculators were not the only protected persons. “[A]ll purchasers or sellers of futures contracts—whether they be pure speculators or hedgers—necessarily are protected” by the antifraud provisions of the federal commodities laws. Id. at 389.
103. See H.R. Rep. No. 565, supra note 74, at 239-40 (statement of Rep. Glickman) (“The Act is currently silent on whether such a right exists; however, the Supreme Court recently ruled that the Act implicitly provides such a right.”).
105. The legislative history indicates that the remedies available under § 22 are limited to actual market participants to avoid suits for speculative damages to assets that are affected by fluctuations in prices on the commodity market but which are not the subject of transactions on such market.” H.R. Rep. No. 565, supra note 74, at 57.
106. Section 22 of the CEAct provides:

(a)(1) Any person (other than a contract market, clearing organization of a contract market, licensed board of trade, or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in clauses (A) through (D) of this paragraph and caused by such violation to any other person—

(A) who received trading advice from such person for a fee;
(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract;
(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 6c of this title (other than an option purchased or sold on a contract market or other board of trade);
(ii) a contract subject to section 23 of this title; or
(iii) an interest or participation in a commodity pool; or
(D) who purchased or sold a contract referred to in clause (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

(2) Except as provided in subsection (b) of this section, the rights of action authorized by this subsection and by sections 7a(11), 18, and 21(b)(10) of this title shall be the exclusive remedies under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter. Nothing in this subsection shall
limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration.  

(b)(1)(A) A contract market or clearing organization of a contract market that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by section 7a(8) and section 7a(9) of this title, (B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or (C) any contract market, clearing organization of a contract market, or licensed board of trade that in enforcing any such bylaw, rule, regulation, or resolution violates this chapter or any Commission rule, regulation, or order, shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such contract market or licensed board of trade to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

(2) A registered futures association that fails to enforce any bylaw or rule that is required under section 21 of this title or in enforcing any such bylaw or rule violates this chapter or any Commission rule, regulation, or order shall be liable for actual damages sustained by a person that engaged in any transaction specified in subsection (a) of this section on, or subject to the rules of, such contract market, licensed board of trade or, in the case of an officer, director, governor, committee member, or employee of a registered futures association, any transaction specified in subsection (a) of this section, in either case to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaw or rule.

(3) Any individual who, in the capacity as an officer, director, governor, committee member, or employee of a contract market, clearing organization, licensed board of trade, or a registered futures association willfully aids, abets, counsels, induces, or procures any failure by any such entity to enforce (or any violation of the chapter in enforcing) any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, shall be liable for actual damages sustained by a person who engaged in any transaction specified in subsection (a) of this section on, or subject to the rules of, such contract market, licensed board of trade or, in the case of an officer, director, governor, committee member, or employee of a registered futures association, any transaction specified in subsection (a) of this section, in either case to the extent of such person's actual losses that resulted from such transaction and were caused by such failure or violation.

(4) A person seeking to enforce liability under this section must establish that the contract market, licensed board of trade, clearing organization, registered futures association, officer, director, governor, committee member, or employee acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused the loss.

(5) The rights of action authorized by this subsection shall be the exclusive remedy under this chapter available to any person who sustains a loss as a result of (A) the alleged failure by a contract market, licensed board of trade, clearing organization, or registered futures association or by any officer, director, governor, committee member, or employee to enforce any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, or (B) the taking of action in enforcing any bylaw, rule, regulation, or resolution referred to in this subsection that is alleged to have violated this chapter, or any Commission rule, regulation, or order.

(c) The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action must be brought within two years after the date the cause of action accrued.

(d) The provisions of this section shall become effective with respect to causes of action accruing on or after . . . [January 11, 1983]: Provided, That the enactment of the Futures Trading Act of 1982 shall not affect any right of any parties which may exist with respect to causes of action accruing prior to such date.

market." It is a provision "with which commodity attorneys will have to become intimately familiar," primarily because it is expressly intended to be the exclusive remedy for the aggrieved customer under the CEA. Section 22 contains two major substantive divisions. Subsection (a)(1) provides a private right of action against any person, other than a designated class of self-regulatory organizations, who violates the CEA. Subsection (b)(1) authorizes private rights of action against contract markets, "clearing house" organizations affiliated with contract markets, licensed boards of trade, registered futures associations, and certain specified

107. See H.R. Rep. No. 565, supra note 74, at 56-57 ("[T]he right of an aggrieved person to sue a violator of the Act is critical to protecting the public and fundamental to maintaining the credibility of the futures market."); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 387 (1982) (Solicitor General argued that a private cause of action "enhances the enforcement mechanism fostered by Congress over the course of 60 years.").


109. See 7 U.S.C. § 25(a)(2) (1982), which provides:

Except as provided in subsection (b) of this section, the rights of action authorized by this subsection and by sections 7a(11), 18, and 21(b)(10) of this title shall be the exclusive remedies under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving under this section, including arbitration.

110. Id. § 25(a)(1). An aggrieved customer may recover damages in a private suit if he received trading advice concerning commodity futures transactions for a fee, id. § 25(a)(1)(A); purchases or sells futures or option contracts, id. § 25(a)(1)(B); purchases or sells off exchange commodity option contracts in violation of § 4 of the CEA, id. § 25(a)(1)(C)(i); purchases or sells a leverage contract referred to in § 23 of the CEA, id. § 25(a)(1)(C)(ii); purchases or sells an interest in commodity pools, id. § 25(a)(1)(C)(iii); or has been damaged by manipulative acts or practices, id. § 25(a)(1)(D).

111. Id. § 25(a)(2).

112. Id. § 25(b)(1). The failure to enforce bylaws, rules, regulations, and resolutions by the enumerated organization permits an aggrieved customer, who engaged in the purchase or sale of commodity futures or options contracts, to commence a private right of action against the organization and its affiliated individuals for actual damages. Id. There must be an affirmative showing of acting in bad faith on the part of the alleged violator. Id. § 25(b)(4); see also Strobl v. New York Mercantile Exch., 561 F. Supp. 379, 384 (S.D.N.Y. 1983) ("absent bad faith, the Exchange may not be held liable for discretionary actions taken pursuant to its duties under the CEA").

The CFTC was apparently divided over the parameters of such liability. See Private Rights of Action, supra note 4, at 77 n.164.


116. Id. § 25(b)(2).
individuals. Such suits may be brought in federal district court and do not require the allegation of any particular amount in controversy.

While the intent of this article is not to further outline the detailed requirements for maintaining an action under section 22 of the CEAct, it is important to take note of the remedies that are available to an aggrieved plaintiff. Both subsections (a)(1) and (b)(1) provide for a private action seeking actual damages. Accordingly, recognized forms of actual damages, such as consequential and rescissory damages, should also be recoverable.

117. See id. § 25(b)(3).

118. See id. § 25(c) ("The United States district courts shall have exclusive jurisdiction of actions brought under this section."). This same section also provides for a two year statute of limitations. Id.; see also § 13a-2 (grants states permission to commence civil actions in state court for violations of the CEAct).


120. See, e.g., Horwitz & Markham, Sunset on the Commodity Futures Trading Commission: Scene II, 39 BUS. LAW. 67 (1984); Rosen, supra note 66; Private Rights of Action, supra note 4.


The senior author is also of the opinion that "in private actions commenced under § 22 of the CEAct, plaintiffs should be permitted, if appropriate, to seek ancillary and equitable relief, pendente lite, to preserve the status quo pending a determination of the ultimate issues in the action." Private Rights of Action, supra note 4, at 79 n.177.


More importantly, however, punitive or exemplary damages\textsuperscript{124} are not expressly recoverable. By the enactment of the new express civil private right of action for aggrieved futures market participants, Congress has devised an exclusive remedy for aggrieved parties. This remedy is consistent with the underlying purpose of the CEAct: the development of a unified and uniform body of law for the preservation of the integrity of the marketplace and for the protection of the investor.\textsuperscript{125}

III. THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATION ACT

A. The RICO Legislation

In October 1970, Congress enacted RICO,\textsuperscript{126} and in so doing sought to combat organized crime's infiltration into legitimate businesses.\textsuperscript{127} Congress recognized that organized crime drains billions of dollars annually from the American economy.\textsuperscript{128} Additionally, Congress found that organized criminal activity weakens the stability of the nation's economic system, harms innocent investors and competing organizations, and interferes with free competition.\textsuperscript{129} Through the enactment of RICO, Congress sought to eradicate "organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."\textsuperscript{130}

\textsuperscript{124} Black's Law Dictionary defines "exemplary or punitive damages" as follows: Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages. Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers, as above noted. In cases in which it is proved that a defendant has acted willfully, maliciously, or fraudulently, a plaintiff may be awarded exemplary damages in addition to compensatory or actual damages. Damages other than compensatory damages which may be awarded against person [sic] to punish him for outrageous conduct.


\textsuperscript{130} Id. For a detailed accounting of RICO's legislative history, see Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil
An attractive feature of civil RICO is that it affords a plaintiff an opportunity to recover treble damages and attorney fees, as well as allowing a plaintiff to bring suit in federal court. Since its enactment, civil RICO has been experiencing growing pains as the judiciary attempts to delineate the proper scope of RICO's applicability. As a result, two schools of thought have emerged. One school favors a literal interpretation of RICO's civil provision. Due to the broad sweeping language employed by Congress, if a literal reading is given to civil RICO, its application may be far reaching. A literal interpretation of RICO enables a litigant to sue under RICO and thus recover treble damages where otherwise one could only recover actual damages under a different statute or the common law.

The second school of thought includes those courts which seek to curtail RICO's applicability. These courts seek to limit RICO's application by reading

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Remedies, 53 Temp. L.Q. 1009, 1014-21 (1980). The report of the Senate Judiciary Committee on the Organized Crime Act (OCCA) states that the "attack [on the subversion of our economy by organized crime] must begin . . . with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organization." S. Rep. No. 617, 91st Cong., 1st Sess. 76, 78 (1969). The report further states that "the time has come for a frontal attack on the subversion of our economic system by organized criminals . . . . [W]hat is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the nation." Id. at 78-79. Senator Robert Dole of Kansas stated: "Title IX of the Organized Crime Control Act . . . contains a proposal designed to curtail—and eventually eradicate—the vast expansion of organized crime's economic power." 116 Cong. Rec. 36,296 (1970); see also id. at 35,319 (remarks of Congressman Roth stating that the Organized Crime Control Act of 1970 was a necessary step toward the eradication of organized crime).

131. See 18 U.S.C. § 1964 (1982). For the text of the provision granting a private right of action and damages, see infra note 142. The rationale for such a dramatic consequence may lie in Congress' attempt to combat organized crime by attacking the economic power base of organized crime. See supra note 130.

132. See Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 399 (7th Cir. 1984) ("When Congress deliberately chooses to unleash such a broad statute on the nation, in absence of constitutional provision, complaints must be directed to Congress rather than to the courts."); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983) ("[I]t is not the 'judiciary's' role to reassess the costs and benefits associated with the creation of a dramatically expansive . . . tool for combating organized crime."); cert. denied, 104 S. Ct. 1280 (1984); Schacht v. Brown, 711 F.2d 1343, 1361 (7th Cir.) ("The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime."); cert. denied, 104 S. Ct. 508 (1983); Mauriber v. Shearson/Am. Express, Inc., 567 F. Supp. 1231, 1239 (S.D.N.Y. 1983) ("Congress intentionally declined to limit the reach of the statute to defendants with connections to organized crime."); see also Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101, 1120-21 (1982) [hereinafter cited as Note, Civil RICO] (the author argues that a literal interpretation should be given to RICO and that complaints concerning RICO's scope should be addressed to Congress rather than to the courts).

133. For example, in security fraud cases, the plaintiff may only recover the consideration paid plus interest under the Securities Act of 1933, 15 U.S.C. § 77k (1982) (damages cannot exceed the price at which the security was offered to the public).
the statutory language in conjunction with RICO's legislative history, or by reading requirements into the statute based upon the court's interpretation of the statute's mechanics. As will be shown, if a limited reading is given to civil RICO, its application is more in tune with the goals set by Congress in drafting RICO. Thus, it may be said that the second school of thought better represents the congressional intent behind RICO.

Generally, for a plaintiff to invoke RICO, only two pleading requirements must be satisfied. First, the plaintiff must allege that the defendant, through the commission of two or more acts (predicate acts) constituting a pattern in one 134. See, e.g., Noland v. Gurley, 566 F. Supp. 210, 218 (D. Colo. 1983) (The treble damage provision, § 1964(c), “must be interpreted with careful attention to the provision's purposes and 'avoid a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions in state courts.'”); Minpeco, S.A. v. ContiCommodity Servs., Inc., 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983) (analysis of legislative history led the court to hold that a RICO complaint must allege that the defendants are linked with organized crime); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) (there must be an injury of that type RICO was intended to prevent); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 748 (N.D. Ill. 1981) (where plaintiffs are able to state another cause of action under federal law, they should not be allowed to use the “drastic and unique remedies [i.e., treble damages] utilized by Congress in response to a specific and different problem”).

135. See, e.g., Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982) (the court, in noting that attention needs to be given to the “complex syntax of the RICO statute,” held that the enterprise element of RICO must have a context economically independent of the fraudulent scheme of racketeering), cert. denied, 104 S. Ct. 527 (1983); Dakis v. Chapman, 574 F. Supp. 757, 761 (N.D. Cal. 1983) (“RICO requires a 'racketeering enterprise injury:' either the loss of control over an enterprise due to infiltration by use of two concerted prohibited offenses . . . or a competitive injury to a legitimate enterprise by that racketeering activity.”); Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240-41 (S.D.N.Y. 1983) (“[T]he plaintiff’s injuries must derive from the 'pattern of racketeering activity' which violates § 1962 rather than directly from the underlying acts which combine to constitute that pattern.”), aff'd sub nom. Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984); Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1136 (D. Mass. 1982) (the treble damage provision of § 1964(c) should apply only “to business loss from racketeering injury”); North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980)- (competitive injury required in order to have standing to seek treble damages under § 1964(c)).

136. The kind of act the defendant must commit in order to invoke RICO is a “racketeering act.” 18 U.S.C. § 1961(1) (1982) defines a racketeering act as follows:

"Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under 659 if felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions, section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of criminal investigation), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with
of racketeering activity, directly or indirectly invests in, or maintains an interest in, or participates in an enterprise whose activities affect interstate or foreign commerce. Second, by reason of the defendant’s actions

commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to whiteslave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restriction on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States; . . .

Id.

137. A pattern of racketeering activity is established when there are two acts of racketeering activities, referred to as predicate acts, occurring within 10 years of each other, one of which must have occurred after the effective date of the statute, October 15, 1970. 18 U.S.C. § 1961(5) (1982).


It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do no confer, either in law or in fact, the power to elect one or more directors of the issuer.

139. 18 U.S.C. § 1962(b) (1982) provides in full: "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."

140. 18 U.S.C. § 1962(c) (1982) provides in full:

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 of collection of unlawful debt.

Id.

141. An enterprise, under RICO, "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. § 1961(4). The United States Supreme Court has held that enterprises, as defined in § 1961(4) and used in § 1962(c), refer to both legitimate and illegitimate enterprises. United States v. Turkette, 452 U.S. 576, 590 (1981).
as set out in the first allegation, the plaintiff must allege an injury to his or her business or property. 142

Much of the uncertainty surrounding RICO’s applicability may be traced to two interrelated factors. First, RICO’s legislative history is replete with references to organized crime, yet RICO itself is devoid of any mention of organized crime. 143 Second, the judiciary is concerned with preventing the application of allowing RICO’s treble damage provision in unintended circumstances. 144 As stated by one court:

The potential for an award of treble damages to a RICO plaintiff has led to concern over the apparent reach of the statute. Read broadly, RICO would permit every plaintiff alleging at least two of the predicate acts listed in 18 U.S.C. § 1961 to bring a suit for treble damages. In fact, an expansive interpretation of the law would create private rights of action where none existed before. 145

Since the categories of predicate acts are so broad, 146 it is relatively easy to state a cause of action in situations possibly unintended by Congress. Such cases may involve garden-variety investment fraud. 147 One court has

142. 18 U.S.C. § 1964(c) (1982) provides in full:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id.


144. “[O]n the civil side the judicial responses have often reflected an uneasiness with RICO’s possible swallowing up of all common law fraud, a clearly unintended result reached in a clearly unintended way.” Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 23 (N.D. Ill. 1982). The Dakis court, in response to the plaintiff’s RICO allegation charging the defendant with “churning” her account, stated that “RICO was intended to address a different malady than . . . allege[d] . . . here. RICO was aimed at marauding bands of criminals, whose ongoing use of criminal behavior was part of their concerted ‘business plan’ to control or eliminate otherwise legitimate commerce.” Dakis v. Chapman, 574 F. Supp. 757, 760 (N.D. Cal. 1983).

145. Action Indus. Tender Offer, 572 F. Supp. 846, 849-50 (E.D. Va. 1983). For example, there was no private right of action for violations of the mail fraud statute when RICO was enacted. The court went on to note that “[i]t is hard to believe that Congress would create such a right of action for treble damages without mentioning it in the negotiations surrounding the Act.” Id. at 850.

146. See supra note 136 and accompanying text.

147. For example, in garden variety fraud claims, two mailings may constitute a pattern of racketeering activity under § 1961(5) since mail fraud constitutes a predicate racketeering act under § 1961(1). Given the broad scope of the mail fraud statute, which requires only a showing of (1) a scheme to defraud, and (2) use of the mails in furtherance of that scheme, “two mailings hardly [pose] much of a problem to find even the most pedestrian alleged fraud” that will allow a RICO claim to be brought. See Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 23 (N.D. Ill. 1982). But see DeMier v. United States, 616 F.2d 366, 369 (8th
perceptively noted that "[l]itigators, never at a loss for ingenuity, naturally found the prospect of treble damages . . . (as well as the possibility of invoking what might otherwise be unavailable federal jurisdiction) very inviting for garden-variety fraud claims." It is this abuse of RICO some courts are trying to prevent. In buttressing their decisions to limit RICO's application, courts allude to the existing remedies available to plaintiffs under federal and state statutes and the common law for garden-variety investment fraud. One court, after reviewing the legislative history of RICO, stated that "[t]here is simply no hint in the congressional proceedings that the Act [RICO] was viewed as an alternative, and cumulative, remedy for private plaintiffs alleging securities fraud." The Court of Appeals for the Seventh Circuit has aptly and prophetically observed that if RICO is given a literal interpretation, "Congress . . . may well have created a runaway treble damage bonanza for the already excessively litigious." In an effort to curb the runaway treble damage bonanza, the judiciary has carved out six limitations on RICO's applicability. These six limitations have met with varying degrees of acceptance.

B. Judicial Limitations on the Application of RICO

The judiciary has carved out several significant limitations on the applica-

Cir. 1980) (a scheme to defraud under the mail fraud statutes requires a showing of an intent to defraud). For a discussion of the application of civil RICO to garden-variety business fraud cases, see generally Moran, Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and the Practitioner's Dilemma, 57 Temp. L.Q. 731 (1984).


149. See, e.g., Noland v. Gurley, 566 F. Supp. 210, 218 (D. Colo. 1983); see also Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1008 (C.D. Cal. 1982) ("While RICO utilized and sometimes expands upon the offenses designated as racketeering activities, there is no evidence that it was meant to pre-empt or supplement the remedies already provided by those statutes which define a predicate RICO offense."); supra notes 144-45 and accompanying text.


151. Id. at 747. In Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982), the court stated:

Congress could not have intended to provide treble damages causes of action [sic] to persons whose only injury stems directly from the predicate acts alone. It is simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury.

In a more recent case, one court stated that "[t]he assertion that Congress would have, without comment or explanation, altered the [remedies provided in the] statutes . . . which could be used as predicates to RICO allegations, to provide not only for a private right of action, but also for treble damages, costs and attorneys fees, strains credibility." Minpeco, S.A. v. Con- tiCommodity Servs., Inc., 558 F. Supp. 1348, 1350 (S.D.N.Y 1983). But see Haber v. Kobrin, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,259, at 96,164 (S.D.N.Y. June 3, 1983):

I realize that by allowing a private cause of action for treble damages under RICO, the plaintiffs in this case can effectively circumvent the damage provisions of the federal securities laws. It is unclear whether Congress intended such a result. Although both approaches to this complex issue have merit, I find the rationale expressed in a case allowing a private cause of action] more compelling.

tion of RICO which have met with varying degrees of acceptance. Some courts have required plaintiffs to allege in their complaint the defendant's involvement with organized crime.¹⁵³ These courts require this allegation although there is no mention of this requirement in the statute. The rationale underlying these decisions has its basis in the legislative history of RICO which is replete with reference to organized crime.¹⁵⁴ Restricting RICO to actions alleging a link with organized crime, however, has been rejected by an overwhelming majority of jurisdictions.¹⁵⁵

The absence of any reference to organized crime in the statute is due to mainly practical concerns. When Congressman Biaggi proposed an amendment that would specifically criminalize membership in the Mafia or La Cosa Nostra,¹⁵⁶ it was objected to on the grounds that mere membership in an organization should not be punished.¹⁵⁷ Congressman Poff also objected to the amendment fearing that specifying membership in an organization might violate the Supreme Court's rulings that struck down statutes which created status offenses.¹⁵⁸ Furthermore, having to prove the defendant's membership in organized crime would be a difficult burden which might frustrate RICO's usefulness.¹⁵⁹ Thus, because Congress enacted RICO without any

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¹⁵⁴. See supra note 130.


¹⁵⁷. Id.


mention of organized crime, this method of limiting RICO's application has been rejected by most courts.

The second judicially imposed limitation on RICO is the requirement of a criminal conviction of the predicate offenses in order to constitute a pattern of racketeering. At least one court of appeals and a host of district courts have repudiated this requirement. The language of RICO does not condition any civil cause of action upon a previous conviction. Yet, the Court of Appeals for the Second Circuit in *Sedima, S.P.R.L. v. Imprex Co.*, characterized a RICO violation as a criminal conviction in holding that "there must be a RICO 'violation,' that is, criminal convictions on the underlying predicate offenses." Thus, this limitation remains, at least in the Second Circuit, a viable method of limiting RICO.

The third judicially imposed limitation to invoking RICO's treble damages provision requires that the plaintiff allege a competitive injury. This competitive injury appears analogous to the competitive injury requirements of the antitrust laws. In fact, those courts which require a competitive injury

160. Congress was effectively precluded from specifying organized crime in the statute. Therefore, it sought to accomplish its goal of striking a mortal blow against organized crime by specifying those activities usually engaged in by organized crime. "[The] definition of organized crime was obviously elusive. And to employ the undefined term 'organized crime' in substantive prohibitions would invite attacks on the legislation. . . . So the legislative draftsman took another approach. They defined 'racketeering activity' . . . to embrace any act indictable under a host of federal statutes." Parries v. Heinold Commodities, Inc., 548 F. Supp. 20, 22 (N.D. Ill. 1983). Thus, "the difficulties of drafting had caused RICO to sweep up far more than it was orginally intended to encompass." Id. at 23. In the House debate, Representative Mikva stated that his "objection to [the] bill in toto is that whatever its motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kinds of horrible examples of overreach." 116 Cong. Rec. 35,204 (1970); see also Note, *Civil RICO*, supra note 132, at 1109 ("Congress sought to reach organized criminals by imposing sanctions for the types of activities in which they generally engage, rather than by directly proscribing the criminal association.").


163. 741 F.2d 482 (2d Cir. 1984). *Sedima* is one of a trilogy of RICO cases recently decided by the Second Circuit. In addition to *Sedima*, see Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984) (RICO complaint must allege a distinct RICO injury, apart from that injury required by the essential elements of a RICO violation); Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984) (affirming dismissal of plaintiff's RICO complaint based on *Sedima* and *Bankers Trust*). *But see* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984) (criticizing the Second Circuit trilogy).

164. 741 F.2d at 503.

165. The term "competitive injury" refers to "any kind of injury resulting from the competitive advantage gained by the RICO violator through resort to illegal business tactics." Note, *Civil RICO*, supra note 132, at 1110 n.49.

allude to the antitrust laws where the treble damage provision allows recovery only for those injuries which the antitrust laws intended to prevent.\(^{167}\) Since RICO attempts to prevent illegal interference with free competition and its treble damages provision extends only to persons who suffer an injury to their businesses or property,\(^ {168}\) these courts conclude that Congress designed the provision to protect only those whose businesses are infiltrated and damaged.\(^ {169}\) As a result of the competitive injury requirement, it would be increasingly difficult to provide a damage remedy for the direct\(^ {70}\) victims of the racketeering activity.\(^ {171}\) Under the competitive injury limitation, treble damages are available only to plaintiffs who allege a competitive injury from the illegitimate advantage derived by the defendant in operating an enterprise through racketeering activity.\(^ {172}\)

The competitive injury requirement, however, has been rejected by several courts of appeals\(^ {173}\) and by a number of district courts,\(^ {174}\) as well as by commentators.\(^ {175}\) These cases argue that although Congress, in drafting RICO,}


167. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (treble damages provisions are available to remedy only an "injury of the type the antitrust laws were intended to prevent."); infra note 169.


170. As the Schacht court stated, "RICO was designed to protect direct, and not just second-order, victims . . . ." Schacht v. Brown, 711 F.2d 1342, 1358 (7th Cir.), cert. denied, 104 S. Ct. 508 (1983).


172. Id.

173. See, e.g., Schacht v. Brown, 711 F.2d 1342, 1358, (7th Cir.) ("[T]he erection of a 'competitive' or 'indirect' injury barrier to RICO recovery comports with neither the plain language nor the central goal of the statute."); cert. denied, 104 S. Ct. 508 (1983); Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982) ("We conclude that an allegation of commercial or competitive injury is not required by the RICO Act.").


175. See, e.g., Blakely & Gettings, supra note 130, at 1040-43; Strafer, Massumi & Skolnick, supra note 155, at 689-707; Note, Civil RICO, supra note 132, at 1109-14. But see Comment, Reading the "Enterprise" Element Back into RICO: Sections 1962 and 1964(c), 76 Nw. U.L.
"borrowed the tools of antitrust law," it did not intend to limit RICO by antitrust concepts such as "competitive injury" or "direct or indirect injury." Two compelling reasons support the conclusion that RICO should not be viewed as an extension of antitrust law. First, the underlying policies of the two bodies of law are different. The antitrust laws are primarily aimed at promoting competition in a free marketplace, whereas RICO is primarily concerned with "striking a mortal blow against the property interests of organized crime." Hence, treble damages should be allowed without a need to show a competitive injury, because the antitrust laws already cover such injuries. Second, Congress rejected early efforts to draft a RICO-like statute within the antitrust context. This legislation apparently failed on the ground that antitrust concepts such as "standing" and "proximate cause" would create "inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery."

Another judicially imposed limitation on civil RICO is the requirement that the enterprise be distinct from the pattern of racketeering activity. Under this limitation, the plaintiff must allege and prove that the defendant was engaged in an enterprise with an independent economic existence apart from the alleged pattern of racketeering activity. Therefore, the facts used by the plaintiff to establish the enterprise element of a RICO count must

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Rev. 100, 125-26 (1981) (competitive injury requirement preferable restriction of RICO) [hereinafter cited as Comment, Reading the "Enterprise").
176. See, e.g., Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982).
177. For example, the Dakis court stated:
We do not concur with the much discredited "antitrust-type" injury requirement . . . [W]e note that there is frequent great similarity between RICO "competitive-type" and traditional antitrust injury but, despite the fact that RICO civil remedies were intentionally patterned after those awarded in antitrust, by § 4 of the Clayton Act, RICO contains no express requirement that the plaintiff establish any of the market proof or share analysis of either the Sherman or Clayton Acts. RICO has none of the strict macro- or micro-economics requirements of antitrust.

178. See Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982).
180. REPORT OF ANTITRUST SECTION OF THE ABA, reprinted in 115 CONG. REC. 6995 (1969); see also Schacht v. Brown, 711 F.2d 1342, 1357-58 (7th Cir.) (quoting the ABA report), cert. denied, 104 S. Ct. 508 (1983). In addition, it also "appeared undesirable to create the possibility that case law governing RICO actions, which might be heavily weighted in favor of the private citizen, would be transferred to the antitrust context." Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1005 (C.D. Cal. 1982).
182. See, e.g., Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982); Barker v. Underwriters
be distinct and different from the facts used to establish a pattern of racketeering activity.\textsuperscript{a} This limitation is currently viable in some jurisdictions and consequently represents a significant defense strategy in RICO litigation.\textsuperscript{b}

The requirement that the enterprise be distinct from the pattern of racketeering activity, however, is not without its critics. The Court of Appeals for the Second Circuit has expressly rejected the Eighth Circuit's position "that the evidence offered to prove the 'enterprise' and 'pattern of racketeering' must necessarily be distinct."\textsuperscript{c} In the Second Circuit, the same proof used to establish the enterprise element may coalesce, in particular cases, with the proof offered to establish the pattern of racketeering activity element.\textsuperscript{d} Thus, in some jurisdictions RICO may be applied where the enterprise is, in effect, no more than the sum of the predicate racketeering acts.\textsuperscript{e}

The fifth limitation imposed upon RICO's application is the requirement that the plaintiff "allege that he has suffered a distinct RICO injury as opposed merely to a direct injury from the underlying predicate acts."\textsuperscript{f}

\textsuperscript{a} at Lloyds, London, 564 F. Supp. 352, 357 (E.D. Mich. 1983); see also Batista, supra note 171, at 205 (defense represents significant strategy in RICO litigation).

\textsuperscript{b} Those courts which endorse this limitation and require separate factual proof for the enterprise element and pattern of racketeering element draw support from the United States Supreme Court: "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." United States v. Turkette, 452 U.S. 576, 583 (1981); see Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982); Barker v. Underwriters at Lloyds, London, 564 F. Supp. 352, 357 (E.D. Mich. 1983).

\textsuperscript{c} Batista, supra note 171, at 205. For example, the Court of Appeals for the Eighth Circuit has expressly rejected the Eighth Circuit's position "that the evidence offered to prove the 'enterprise' and 'pattern of racketeering' must necessarily be distinct." United States v. Turkette, 452 U.S. 576, 583 (1981); Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982). The Eastern District of Michigan, in the Sixth Circuit, has also endorsed this position. Barker v. Underwriters at Lloyds, London, 564 F. Supp. 352, 357 (E.D. Mich. 1983). But see Moss v. Morgan Stanley, Inc., 719 F.2d 5, 22 (2d Cir. 1983) (rejecting the defendant's argument that the enterprise must have an independent economic existence apart from the pattern of racketeering activity).

\textsuperscript{d} 183. Those courts which endorse this limitation and require separate factual proof for the enterprise element and pattern of racketeering element draw support from the United States Supreme Court: "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." United States v. Turkette, 452 U.S. 576, 583 (1981); see Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982); Barker v. Underwriters at Lloyds, London, 564 F. Supp. 352, 357 (E.D. Mich. 1983).

\textsuperscript{e} 184. Batista, supra note 171, at 205. For example, the Court of Appeals for the Eighth Circuit has expressly rejected the Eighth Circuit's position "that the evidence offered to prove the 'enterprise' and 'pattern of racketeering' must necessarily be distinct." United States v. Turkette, 452 U.S. 576, 583 (1981); see Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir. 1982). The Eastern District of Michigan, in the Sixth Circuit, has also endorsed this position. Barker v. Underwriters at Lloyds, London, 564 F. Supp. 352, 357 (E.D. Mich. 1983). But see Moss v. Morgan Stanley, Inc., 719 F.2d 5, 22 (2d Cir. 1983) (rejecting the defendant's argument that the enterprise must have an independent economic existence apart from the pattern of racketeering activity).


186. Moss v. Morgan Stanley, Inc., 719 F.2d 5, 22 (2d Cir. 1983). This line of cases also draws support from the United States Supreme Court: "[P]roof used to establish these separate elements [the enterprise and pattern of racketeering elements] may in particular cases coalesce . . . ." United States v. Turkette, 452 U.S. 576, 583 (1981); see also United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), cert. denied, 103 S. Ct. 2124 (1983) (proof of elements may coalesce). It should be noted that courts which require separate proof for the "enterprise" and "pattern of racketeering injury" elements also draw their support from Turkette. See supra note 183.


188. Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240 (S.D.N.Y. 1983). The Bankers Trust court, aware of the proliferation of private RICO suits and the judiciary's desire to limit such suits, stated that "the proper way to restrict the private remedy to its intended scope is by applying the limitations Congress has itself built into the statute." \textit{Id.} The court then went on to find that the plaintiff's injuries must stem from the pattern of racketeering activity which violates § 1962 rather than from the predicate acts which combine to constitute that pattern. \textit{Id.} at 1240-41.
Under section 1964(c) of the Act, a cause of action arises and inures to "[a]ny person injured in his business or property by reason of a violation of section 1962." Therefore, the injury must be more than that associated with the underlying predicate acts which form the pattern of racketeering activity. There must be an allegation that the plaintiff suffered a "racketeering enterprise injury."

One court has recently stated that "although there is some ambiguity in the case law as to the precise dimensions of civil RICO, the overwhelming authority is to restrict the broad remedial provisions of RICO to injuries 'by reason of' a violation of § 1962, not merely the damages from two predicate acts of securities fraud." The requirement that the injury be caused "by reason of" a section 1962 violation (a racketeering enterprise injury) has been labeled by one court as "the most meaningful limitation which can be imposed on § 1964(c)."

Despite this strong support for demanding "something more" than an injury stemming from the predicate acts, the requirement of a racketeering enterprise injury has yet to gain across-the-board acceptance by the courts. Those courts which have not embraced this limitation are unclear as to what the "something more" is or what a racketeering enterprise injury

193. See, e.g., Eisenberg v. Gagnon, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983) ("Although the defendants argue that 'something more than an injury stemming from racketeering activity must be alleged' ... it has not been made clear either by the defendants or the cases so requiring it what that 'something more' would be."); But see Williamette Sav. & Loan v. Blake & Neal Fin. Co., 577 F. Supp. 1415, 1430 (D. Or. 1984). The court in stating what a racketeering enterprise injury is, drew an analogy to Justice Stewart's well-known observation on the
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encompasses. Interestingly, one court has gone so far as to ignore the express language of the statute and impose its own requirements: "[t]he requirement of 'injury by reason of violation of section 1962' should be read as requiring that the plaintiff was injured by at least two acts of racketeering activity." 

If Congress had intended that RICO's treble damages provision compensate injuries caused by racketeering activity, however, it presumably would have made reference to section 1961(1) of the Act which enumerates the predicate acts, rather than referring to section 1962. "The fact that the statute specifically requires a violation of Section 1962 and not just a violation of two or more predicate acts . . . demonstrates that alleging predicated acts alone is not sufficient to maintain a civil RICO claim." Yet, the statutory language of section 1964(c) in referring to section 1962 is clear. The plaintiff, in order to invoke the treble damage provision, must allege and prove that his or her injury was "by reason of a violation of section 1962." In other words, the plaintiff must allege that the injury resulted from the "defendant's acquisition of an interest in an enterprise or operation of an enterprise.

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definition of pornography. The Williamette court stated that "[c]ourts recognize a racketeering enterprise injury when they see it." Id.


There are at least three reasons for requiring a private RICO plaintiff to allege something more than an injury from racketeering activity itself. First, § 1964(c) specifically says 'by reason of section 1962.' If Congress has intended that § 1964 compensate injuries caused by racketeering activity it could have made reference to § 1961(1) rather than § 1962.

Id.; see also Comment, Reading the "Enterprise," supra note 175, at 128 (A broad reading of § 1962, which permits recovery absent a direct connection between the injuries sustained by racketeering activity and a violation of § 1962, "does not comport with the statute as written by Congress.").

198. Action Indus. Tender Offer, 572 F. Supp. 846, 850 (E.D. Va. 1983). The Action Tender court stated further that, "[t]he Supreme Court opinion in United States v. Turkette, . . . buttresses this conclusion by making it clear that the enterprise requirement found in Section 1962 must be proven in addition to proving the predicate acts stated in Section 1961." Id. (citation omitted).

199. Erlbaum v. Erlbaum, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) § 98,772, at 93,922 (E.D. Pa. July 13, 1982). The Action Tender court stated that, RICO requires an injury unique to that Act. There is no evidence that Congress meant to preempt existing remedies or to provide cumulative remedies for the crimes listed in Section 1961(1). . . . Instead, Congress intended to provide a treble damages
The sixth and final significant limitation to invoking a RICO claim is the requirement that the defendant cannot simultaneously be both the enterprise and the person associated with the enterprise. This limitation has been gaining widespread acceptance and is predicated on the rationale that allowing the person and the enterprise to be one in the same would lead to the "absurd result that a "person" could "invest in," "acquire or maintain . . . control of," or be "employed by or associated with" and "conduct itself (as an "enterprise") in violation of Section 1962."

remedy to those plaintiffs who could allege and prove an injury resulting from a pattern of racketeering and corruption—not simply from a predicate act for which the plaintiff could be fully compensated under federal or state law. Section 1964(c) compensates plaintiffs suffering from a racketeering injury—not just from a predicate act . . .


In response to a RICO allegation in a garden-variety securities case involving the "churning" of an account, one court stated:

Mere negligence or even recklessness by the firms in supervising trading of the plaintiff's accounts . . . does not allege the essence of an 'independent' conspiratorial enterprise consisting of [the brokerage house] and [the defendant/broker], based upon a mutual, and nefarious, gain from [the broker's] illicit activities; it is to the perceived strength of organized, concerted commission of two predicate offenses with the intent to corrupt or vanquish a legitimate enterprise that RICO was addressed.


The statutory language of RICO prohibits any person, employed or associated with an enterprise, from participating in the conduct of such enterprise through a pattern of racketeering activity.\textsuperscript{202} Section 1964(c) in turn allows treble damages and attorney fees to plaintiffs who are injured in their businesses or property by a violation of section 1962.\textsuperscript{203} The section 1964(c) cause of action, which is a suit for the violation of section 1962—the "person" who has engaged in the unlawful conduct. The element, therefore, which raises the underlying criminal act to a RICO violation is the defendant's interaction with the enterprise.\textsuperscript{204} Thus, RICO "does not hold the enterprise criminally liable, but only those persons who seek to participate in the affairs of the enterprise through a pattern of racketeering activity."\textsuperscript{205} As one court has noted, "It would be an obvious distortion to permit suit against the 'enterprise' that had itself been infiltrated by the 'unlawful' conduct or participation of the 'person'—the 'enterprise' that may itself be a victim of the racketeering activity."\textsuperscript{206}

Much of the confusion surrounding the issue of whether the person may simultaneously be the enterprise and the individual defendant stems from the statutory definition of those terms. RICO defines both person\textsuperscript{207} and enterprise\textsuperscript{208} so broadly as to embrace every type of legal entity. Thus, when read in the abstract, that which falls within the definition of an enterprise will also fall within the definition of a person. The few courts which have held that the person and the enterprise may be one and the same have noted the expansive definitions of those terms.\textsuperscript{209} In supporting their holdings, these

\textsuperscript{202} See supra notes 136-37.
\textsuperscript{203} See supra note 142.
\textsuperscript{205} Id.
\textsuperscript{206} Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 23-24 (N.D. Ill. 1983) (footnote omitted). In the garden variety commodities or securities case the scenario is as follows: The broker who has allegedly churned the plaintiff's account is characterized as the "person" engaged in the conduct of the enterprise's affairs through his "pattern of racketeering activity," i.e., the multiple churning of the plaintiff's account. The "enterprise" is the brokerage house by whom the broker was employed. The brokerage house can be characterized as a conduit through which the broker conducted his churning. Thus, under this scenario, there are, in reality, two victims: the client whose account was churned along with the brokerage house themselves, who are victims of an ongoing rule infraction by an employee. In fact, it has been suggested that in such cases, the brokerage firms, more than the plaintiff-client, may be the proper plaintiffs of a RICO action against the broker. See Dakis v. Chapman, 574 F. Supp. 757, 760 (N.D. Cal. 1983).
\textsuperscript{207} 18 U.S.C. § 1961(3) (1982) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property."
\textsuperscript{208} The definition of 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. § 1961(4).
\textsuperscript{209} See, e.g., United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982) ("A corporation may be simultaneously both a defendant and the enterprise under RICO."); United States v. Benny, 559 F. Supp. 264, 268 (N.D. Cal. 1983) (defendant can constitute an enterprise for the purposes of RICO).
courts also note that the Supreme Court has broadly construed the enterprise element\textsuperscript{210} and absent any prohibitions of an entity assuming a dual role, the entity may indeed assume the dual role.\textsuperscript{211} These decisions, however, have been criticized\textsuperscript{212} as “result-orientated”\textsuperscript{213} and “unconvincing.”\textsuperscript{214} “[T]hese courts’ invocation of RICO’s liberal interpretation provision . . . is unavailing. A statute should not be interpreted so as to torture its plain meaning or to go beyond the intent of the legislature.”\textsuperscript{215}

It is evident that there is an enormous amount of judicial uncertainty surrounding the interpretation and scope of civil RICO. This uncertainty emanates from the judiciary on the one hand wanting to apply RICO according to its plain meaning,\textsuperscript{216} and on the other hand wanting to apply RICO so as to limit the treble damage remedy to prevent its application in unintended circumstances.\textsuperscript{217} By virtue of this dichotomy, the judicial decisions have been anything but consistent. Nevertheless, it seems clear that a majority of courts, even those embracing a “literal interpretation view,” are desirous of limiting RICO’s application.\textsuperscript{218}

\textsuperscript{210}See, e.g., United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982) (\textit{Turkette} gave the term “enterprise” a broad reading); United States v. Benny, 559 F. Supp. 264, 269 (N.D. Cal. 1983) (“The Supreme Court has broadly construed the ‘enterprise’ element . . . ”).

\textsuperscript{211}See, e.g., United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982) (“Considering the broad reading given the term ‘enterprise’ in \textit{Turkette}, the Court’s willingness to expand the scope of RICO’s application, and absent any prohibition of [the defendant] assuming a dual role, . . . [a] corporation may be simultaneously both a defendant and the enterprise under RICO.”).


\textsuperscript{213}The \textit{Longhorn} court in referring to both \textit{Hartley} and \textit{Benny}, as authority to the contrary, stated: “It [the \textit{Hartley} and \textit{Benny} decisions] is result-oriented in that the courts were facing defendants (significantly, criminal defendants) who had perpetrated a number of predicate acts of racketeering activity under RICO and who the courts apparently did not want to ‘get away.’” Id.

\textsuperscript{214}Id.

\textsuperscript{215}Id. After noting that the definitions of person and enterprise are so broad as to embrace every kind of legal entity, another court has stated that:

\textit{[W]e may look at the possibility of a strained reverse construction, under which [the defendant brokerage house] would be the “person” . . . and [the brokers] would be the “enterprise.” That possibility would turn the English language on its head. [The brokerage house] after all cannot be said to have “participated . . . in the conduct of [the broker’s] affairs . . . ” as required by Section 1962(c).}


\textsuperscript{216}See supra note 132 and accompanying text.

\textsuperscript{217}See supra notes 134-35 and accompanying text.

\textsuperscript{218}See Moss v. Morgan Stanley, Inc., 719 F.2d 5, 20-21 (2d Cir. 1983) (Court of Appeals for the Second Circuit sympathized with the district court’s concern about the broad scope of civil RICO but nevertheless gave RICO a literal interpretation); Schacht v. Brown, 711 F.2d 1343, 1361 (7th Cir.) (Seventh Circuit Court of Appeals noted that although Congress may have created a “runaway treble damage bonanza for the already excessively litigious,” Congress was aware of RICO’s implications and, therefore, it was not the court’s “role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps \textit{insufficiently discriminate}, tool for combating organized crime.”) (emphasis added), cert. denied,
A careful examination of the limitations sought to be imposed on RICO reveals that the courts may indeed give RICO a literal interpretation and yet limit its application. The first limitation of requiring an allegation of the defendant’s involvement with organized crime has been largely discredited and is generally no longer viable.\(^2\) Similarly, requiring a criminal conviction of the predicate acts is no longer a formidable limitation\(^2\) because it strains logic to read such a requirement into the statute. Although the third limitation, requiring the plaintiff to allege and prove a competitive injury, is still a viable limitation in some jurisdictions,\(^2\) the sounder view is to reject this requirement. “RICO was designed to protect direct,” and not just the indirect victim.\(^2\) By requiring a competitive injury, a majority of the direct victims would be effectively precluded from seeking redress—a clearly unintended result.

The limitation requiring that the enterprise be distinct from the pattern of racketeering activity is also viable in some jurisdictions.\(^2\) According to the Supreme Court, “[t]he ‘enterprise’ is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be [proven].”\(^2\) Even though the proof in establishing both elements may coalesce, the enterprise element is proven “by evidence of an ongoing organization . . . and by evidence that the various associates function as a continuing unit.”\(^2\) In contrast, the pattern of racketeering activity is proven “by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.”\(^2\)

The fifth limitation, requiring the plaintiff to be injured by reason of a section 1962 violation and not merely by a violation of the predicate acts, seems to be clearly mandated by RICO’s express language.\(^2\) The Supreme Court has stated that “[i]f the statutory language is unambiguous, in the absence of a ‘clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.’ ”\(^2\) Indeed, the statutory language of section 1964(c) is unambiguous,\(^2\) and there is no express legislative intent

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219. See supra notes 153-60 and accompanying text.
220. See supra notes 161-64 and accompanying text.
221. See supra notes 165-80.
223. See supra notes 170-71 and accompanying text.
224. See supra notes 181-87 and accompanying text.
226. Id.
227. Id.
228. See supra notes 188-99 and accompanying text.
230. See supra note 142.
to the contrary. Furthermore, restricting RICO’s application to a racketeering enterprise injury does not impose an undue hardship on plaintiffs because they have other remedies at their disposal.\textsuperscript{231}

The final limitation, requiring that the defendant cannot simultaneously be both the enterprise and the person associated with the enterprise,\textsuperscript{233} also seems clearly mandated when the statute is given a fair and unstrained reading.\textsuperscript{233} Most of the courts who have considered this issue have so ruled,\textsuperscript{234} and it appears that this limitation may be the first to gain across-the-board acceptance.

Thus, it seems that those courts desiring to give RICO a literal interpretation may still do so and yet limit RICO’s application by “hanging their hat” on the fourth, fifth, or sixth limitations. In addition to the limitations inherent in RICO’s plain language, which will prevent its application in unintended circumstances, such as in garden-variety fraud cases, support may be found outside of the statute. As noted previously, the legislative history indicates that RICO and its treble damage remedy were intended to attack the economic power base of organized crime.\textsuperscript{235} Therefore, RICO should not be applicable to ordinary businessmen charged with garden-variety fraud whose only alleged violation is from the predicate acts and not by reason of a section 1962 violation.

Furthermore, even though fraud in the sale of securities is expressly enumerated as a racketeering act in section 1961,\textsuperscript{236} it is questionable whether that language was ever intended to include garden-variety investment fraud. The legislative history reveals that Congress expressly considered two instances to which the phrase “fraud in the sales of securities” may be applicable. The first instance involves thefts of securities from brokerage houses,\textsuperscript{237} Professor Louis Loss has noted that “[t]he closest reference in the legislative history is (in the testimony of J. Edgar Hoover) to ‘thefts of securities from brokerage houses,’ in a number of which ‘[c]lose associates and relatives of La Cosa Nostra figures are known to be involved.’”\textsuperscript{238} The second instance involves stock manipulation, one of the methods by which organized crime permeates legitimate business:

In recent weeks the financial journals have carried stories of current investigations involving manipulation of listed stocks on a major exchange

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{231} See supra note 133 and accompanying text.
\item \textsuperscript{232} See supra notes 205-15 and accompanying text.
\item \textsuperscript{233} See id.
\item \textsuperscript{234} See supra note 200.
\item \textsuperscript{235} See supra note 130.
\item \textsuperscript{236} 18 U.S.C. § 1961(1)(D) (1982).
\item \textsuperscript{237} In S. Rep. No. 617, 91st Cong., 1st Sess. 77 (1969) (footnote omitted) it was stated: It is most disturbing, however, to learn that organized crime has begun to penetrate securities firms and the Stock Exchange itself. J. Edgar Hoover has testified: “We have over 30 pending cases (March 1, 1969) involving thefts of securities from brokerage houses. Close associates and relatives of La Cosa Nostra figures are known to be involved in at least 11 of these cases.” Apparently, no area is immune.
\item \textsuperscript{238} L. Loss, Fundamentals of Securities Regulation 800 n.4 (1983).
\end{itemize}
\end{footnotesize}
by persons with known underworld ties. A simple but effective procedure was followed. First, an established brokerage house would be penetrated by the placing of a customer's man with a criminal background. Then, miraculously, almost overnight, the new man would become a top producer and attract "customers" with substantial funds available for investment. From there, target companies would be selected, then substantial and carefully controlled purchases of stockholdings negotiated. Then proven techniques would be utilized to run up the selling price of the affected stock. False rumors would be circulated as to potential earnings or new product developments. Mergers and acquisitions, real or imagined, were promoted. When stock values soared to desired levels, profit-taking would occur. Then the helpless management, stockholders, and creditors were left holding the bag.239

It is submitted that Congress intended that RICO, and its treble damage remedy, be applied to the above-described racketeering activity and not to garden-variety investment fraud for which there is sufficient remedies available. A fair and unstrained literal reading of RICO supports this conclusion and will narrow RICO's scope to circumstances contemplated by Congress.

IV. RICO IN COMMODITIES LITIGATION

In commodities litigation, there has been only a handful of cases in which RICO allegations have been asserted.240 For the most part, the courts have analyzed these cases in a manner similar to that used in securities cases where a civil RICO violation is alleged. One district court's limitation on RICO has received the express approval of the Court of Appeals for the Seventh Circuit in its analysis of RICO.241 A second case discusses RICO as it relates to the CEAAct as a result of a unique argument proffered by the defendants.242 These two cases, along with other cases involving RICO allegations, will now be discussed.

241. See Parnes v. Heinhold Commodities, Inc., 548 F. Supp. 20 (N.D. Ill. 1982) (holding that RICO does not contemplate the imposition of liability against an innocent commodities firm for fraud perpetrated by its agents). Parnes was explicitly approved by the Court of Appeals for the Seventh Circuit in Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400 (7th Cir. 1984); see infra note 276.
A. Judicial Limitations

The first case involving a RICO allegation in commodities litigation is Heinold Commodities, Inc. v. McCarty. In McCarty, the plaintiff, a FCM registered with the CFTC, filed an action for a declaratory judgment. The plaintiff sought a declaration that the defendants were not entitled to recover losses in their commodities trading. In response, the defendants filed a counterclaim alleging, inter alia, that the FCM's fraudulent actions constituted a RICO violation. The FCM argued that no civil RICO action could be maintained absent a criminal conviction of the underlying predicate acts. The court, siding with the majority view, summarily rejected this argument and found that RICO is not conditioned upon the finding of a previous conviction.

The FCM further argued that RICO was not intended to apply to legitimate businessmen, but rather should apply only to a certain society of criminals, namely organized crime. The court, again siding with the majority view, rejected this argument, noting that the statutory language of RICO did not require an affiliation with organized crime. In addition, the court noted that the legislative history indicated that Congress did not intend for RICO to apply solely to organized crime members. Accordingly, the plaintiff's motion for a declaratory judgment was denied and the defendants' RICO counterclaim was allowed to stand.

The practical effect of rulings such as McCarty, which allow RICO claims to stand, is the possibility that a defendant, an otherwise legitimate and

244. Id. at 312.
245. The defendants also alleged that Heinold's fraudulent actions constituted a violation of the CEAct and a violation of the Illinois Consumer Fraud Act. Id.
246. Id.
247. Heinold also attacked the counterclaim on the grounds "that it is without merit, and that it is scandalous, impertinent, and indecent." Heinold argued that the RICO count should be stricken because it essentially accuses them of being criminals and thus damages their reputation. In rejecting Heinold's argument, the court stated:
If the counterclaim states a claim under this statute, it is not scandalous or immaterial to accuse the plaintiffs of violating it. Moreover, a civil suit alleging a violation of a criminal statute does not necessarily imply that the alleged violators could be convicted as criminals. The motion to strike is improper unless the counterclaim has no substantive merit.
Id. at 313.
248. Id. at 313-14; see also Glusband v. Benjamin, 530 F. Supp. 240 (S.D.N.Y. 1981). The plaintiff, as receiver of Pyne Commodities Corp., brought suit against former persons associated with that organization alleging RICO violations. The defendant's argument that convictions of the predicate acts were necessary in maintaining a civil RICO action was rejected by the court. Id. at 240-41.
250. Id. at 313.
251. Id.
252. Id. at 314.
regulated business commodities firm, could be characterized as a "racketeer." The obvious injustice of this characterization cannot be justified in garden-variety investment fraud allegations of brokerage house wrongdoing.\footnote{253} As noted earlier,\footnote{254} in a garden-variety investment fraud case, there are, in reality, two victims: the aggrieved customer and the brokerage house which is the victim of an ongoing infraction by an employee. Furthermore, the requirement that publicly held corporations, such as brokerage houses, disclose such a finding of liability to its shareholders, coupled with the stigma attached to one labeled a racketeer, can have a detrimental effect upon the corporation’s business. This is not to say that a legitimate business, which knowingly involves itself in prohibited activity, should not answer for its action where it violates section 1962. RICO, however, was not intended to apply to legitimate businesses which are victimized by the fraud of their agents. This proposition is supported by the second of two opinions in the same case litigated in the district courts of northern Illinois.

In Parnes v. Heinold, Inc. (Parnes I),\footnote{255} a RICO count withstood the defendant’s motion to dismiss for failure to state a claim upon which relief could be granted.\footnote{256} Parnes alleged that the defendant—FCM’s agents perpetrated a scheme to defraud.\footnote{257} More particularly, two members of the FCM’s sales force successfully solicited the plaintiff’s futures trading account. Three months later, acting on the advice and insistence of the brokers “that investing more money would bring greater profits, the plaintiff opened another account.”\footnote{258} Throughout the trading period the brokers made numerous fraudulent misstatements to the plaintiff.\footnote{259} In addition, the brokers engaged in unauthorized trading and misrepresented to the plaintiff the extent of his losses and the current positions held in each account.\footnote{260} In essence,

\begin{footnotes}
\item 253. For the McCarty court’s comments to the contrary, see supra note 247.
\item 254. See supra note 206.
\item 255. 487 F. Supp. 645 (N. D. Ill. 1980).
\item 256. FED. R. CIV. P. 12(b)(6).
\item 257. 487 F. Supp. at 645-46.
\item 258. Parnes v. Heinold, Inc., 548 F. Supp. 20, 21 (N. D. Ill. 1982). The facts of the Parnes cases are more fully set out in Parnes II. For clarity, the second opinion is cited here and in following footnotes.
\item 259. These misrepresentations included statements that:
\begin{enumerate}
\item Trading for the accounts was part of a prudent commodities investment policy suitable for plaintiffs’ investment objectives.
\item Heinold’s trading methods were consistent with plaintiffs’ prudent investment goals and were in plaintiffs’ best interest.
\item Keever and Costello [the brokers] had great expertise in commodities trading.
\item Keever and Costello would watch closely over plaintiffs’ accounts. Because of such supervision plaintiffs suffered little or no risk of loss.
\item No unauthorized trading would take place in either account. Parnes would be consulted before each transaction.
\end{enumerate}
\item 260. Id. at 21-22. One of the brokers wrote Parnes a letter promising to stop the prior course of conduct. Despite the broker’s promise, however, unauthorized and fraudulent trading in the second account continued. (A second account was set up in another person’s name, so
the plaintiff's allegations arguably amounted to nothing more than garden-variety civil fraud claims.

In support of the 12(b)(6) motion, the FCM argued that, because a violation meant a criminal conviction, no violation of section 1962(c) had occurred. The court rejected this argument and held that RICO "does not condition any civil cause of action upon previous conviction under the criminal penalties section of the statute." Thus, the court found that a viable claim for relief had been stated.

Two years later, however, in *Parnes v. Heinold Commodities, Inc. (Parnes II)*, the court granted the FCM's motion for judgment on the pleadings, thereby dismissing the RICO allegation. In *Parnes II*, the court began its analysis by recognizing the unique problems faced by Congress in enacting a statute designed to combat organized crime. These problems led to an expansive definition of racketeering activity, thus causing RICO to sweep more broadly than originally intended. The court expressed concern that many litigants found the prospect of treble damages and federal jurisdiction very inviting for garden-variety fraud claims. In essence, the court was concerned with the misapplication of civil RICO. The court felt that the use of RICO in a garden-variety commodities civil fraud claim was "a clearly unintended result reached in a clearly unintended way." The court stated that,

where plaintiffs must founder is in their effort to make the quantum leap from those prima facie conclusions to Section 1964 coverage. They have tried to reshape a conventional (alleged) fraud, perpetrated by lower-level corporate executives acting without corporate sanction (albeit conducting themselves within the scope of their authority for common-law purposes), into a Section 1962(c) RICO violation by the corporation.

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262. *Id.* at 647.
263. *Id.*
265. *Id.* at 24. The court noted that the questions posed in *Parnes I* (i.e., whether a nexus with organized crime and convictions of the underlying predicate acts need be shown) were different than the questions considered in *Parnes II*. Interestingly, the court also noted that its analysis "owe[d] nothing to the litigants themselves." *Id.* at 24 n.10.
266. *Id.* at 23; see *supra* notes 146-51 and accompanying text.
267. 548 F. Supp. at 23.
268. *Id.* More specifically, the court also stated:

[O]n the civil side the judicial responses have often reflected an uneasiness with RICO's possible swallowing up of all common law fraud, a clearly unintended result reached in a clearly unintended way that has led to such narrowing opinions as (to take only this District Court as an example) *Salisbury v. Chapman*, 527 F. Supp. 577, 579-80 (N.D. Ill. 1981); *North Barrington Development, Inc. v. Fanslow*, No. 80C2644, slip op. at 6-8 (N.D. Ill. Oct. 9, 1980); *Katzen v. Continental Illinois Nat'l Bank & Trust Co.*, No. 80C1378, slip op. at 9-10 (N.D. Ill. Aug. 14, 1980)
269. 548 F. Supp. at 23 (emphasis in original).
The court went on to hold that in order to invoke RICO's treble damages provision, a suit for a section 1962 violation must be asserted against the violator—the person who engaged in the unlawful conduct. In this instance, the plaintiff should have brought suit against the brokers who were the wrongdoers and not the brokerage house. "It would be an obvious distortion to permit suit against the 'enterprise' that had itself been infiltrated by the 'unlawful' conduct or participation of the 'person'—the 'enterprise' that may itself be a victim of the racketeering activity."

The court also considered a strained reverse construction of RICO in which the FCM would be characterized as the person—thus suable under section 1964—and the two brokers characterized as the enterprise. The court rejected that possible construction as it "would turn the English language on its head."

The court postulated that, even were that possible[,] HeinoId [sic] would also have to be considered as having engaged in the "pattern of racketeering activity" by virtue of having ascribed to it [sic] the mail fraud perpetrated by [the two brokers]. That sort of respondeat superior application, perhaps permissible to establish ordinary civil liability, would be bizarre indeed as a means to warp the facts alleged in this case into the RICO mold. Under that theory malefactors at a low corporate level could thrust treble damage liability on a wholly unwitting corporate management and shareholders.

The holding of Parnes II was subsequently adopted by the Court of Appeals for the Seventh Circuit in a non-commodities case. The Parnes scenario serves as an example of the type of garden-variety commodity civil fraud cases in which plaintiffs often attempt to take advantage of RICO in order to obtain treble damages. It is in precisely this type of situation, however, that RICO claims should not be allowed to stand.

270. Id.
271. The court stated:
Under the allegations of the Complaint the normal reading of the RICO sections would characterize brokers Keever and Costello, the two active wrongdoers, as the "persons" engaged in the conduct of HeinoId's affairs through the brokers' "pattern of racketeering activity." HeinoId would normally be viewed as the "enterprise" by whom the "persons" were employed. That normal reading however gives plaintiffs no comfort, for they have sued not the alleged RICO violators—"persons" Keever and Costello—but "enterprise" HeinoId. Plaintiffs have not brought themselves within RICO's coverage under the normal application of the statutory definitions and terms.

_Id._ at 24.
272. _Id._ at 23-24; see _supra_ note 206.
274. 548 F. Supp. at 24; see _supra_ note 215.
275. 548 F. Supp. at 24 n.9 (emphasis in original).
276. In Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), the court of appeals expressly agreed with the _Parnes_ decision. The _Haroco_ court stated that the _Parnes_ court was "surely correct in saying that the corporation-enterprise should not be liable when the corporation is itself a victim or target, or merely the passive instrument for the wrongdoing of others." _Id._ at 401.
In the *Parnes* cases, the FCM involved was and still is a legitimate, nationwide firm which employs hundreds of individuals. The mere fortuitous circumstance that two brokers, for personal gain and without corporate sanction, would churn an account, should *not*, in and of itself, subject the FCM to RICO liability.  

Additionally, when considering the purpose behind RICO's enactment, it is even more absurd to allow a RICO claim to stand in such a garden-variety fraud case. RICO is intended to protect legitimate businesses from organized criminal activity. This was stated in the Senate report accompanying the RICO Act. RICO was not intended to combat mere garden-variety fraud, for which there are specific remedies, such as the CEAAct's express private right of action. It would be anomalous indeed to punish the very party/victim sought to be protected.

The foregoing discussion is not intended to imply that a brokerage firm will never be liable for RICO's treble damages. RICO allegations may be properly asserted against so-called "boiler-room" operations and legitimate brokerage houses knowingly involved in fraudulent activity. Moreover, in cases such as *Parnes*, the FCM will always be liable for actual damages.

In 1983, a RICO allegation was asserted in *Minpeco, S.A. v. ContiCommodity Services, Inc.*, a case involving the market manipulation of silver.
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futures. Minpeco alleged that certain defendants (trading defendants)\(^{283}\) conspired to monopolize the silver market, and in doing so, artificially boosted the price of silver.\(^{282}\) Minpeco contended that because of the conspiracy to monopolize, the price of silver did not drop, as it otherwise would have done. The market continued to rise, resulting in Minpeco having to cover its short\(^{284}\) positions at a loss of over $80 million.\(^{287}\) In addition, Minpeco contended that it believed that the trading defendants were buying as individuals and not as members of an organized group.\(^{288}\)

Minpeco also named its brokers\(^{289}\) as defendants. Minpeco alleged that "its brokers deceived it by urging it to 'sell short' while knowing that such a trading plan was 'misleading and detrimental' to it." Minpeco further alleged that "the trading plan was 'misleading and detrimental' to Minpeco, which the brokers knew, since they had been 'participating in the transactions and activities . . . with the intent and effect of raising the price of silver.' "\(^{290}\)

In a somewhat surprising decision,\(^{292}\) the court dismissed the RICO count

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283. The manipulation of the silver market was alleged to have occurred between the summer of 1979 and early 1980 when the price of silver futures rose dramatically from approximately $9 an ounce to $50 an ounce. Minpeco, S.A. v. ContiCommodity Servs., Inc., 552 F. Supp. 332, 334 (S.D.N.Y. 1982). The facts are laid out in this previous opinion and thus cited to hereinafter.

284. These defendants were characterized by the court as the "trading defendants" and included: ContiCommodity Services, Inc.; ContiCapitol Ltd.; Norton Waltuch; Nelson Bunker Hunt; Lamar Hunt; William Herbert Hunt; International Metals Investment Co., Inc.; Sheik Mohammed Aboud Al-Amoudi; Sheik Ali Bin Mussalem; Naji Robert Nahas; Gillian Financial; ACLI International Commodity Services, Inc.; Banque Populaire Suisse; Advicorp Advisory and Financial Corporation, S.A.; Mahmoud Fustak; Faisal Bin Abdullah; and Bache Halsey Stuart Shields, Inc. Id. at 335 n.2.

285. Id. at 334.

286. The court stated that:
A short sale is an agreement by someone who does not own—i.e. is short—a commodity to sell it at a certain time and a specified price. Such a contract is normally entered into by a trader who anticipates that the market price will be below the contract price at the time specified for closing the sale.

Id. at 334-35; see supra note 22.

287. 552 F. Supp. at 335.

288. Id.

289. Minpeco alleged that in early 1979, Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) and E.F. Hutton & Co., Inc. (Hutton) began to solicit Minpeco to engage them as its brokers. After having allegedly induced Minpeco into retaining them, the brokers were alleged to have induced Minpeco to adopt a trading plan of engaging in large volumes of short sales in silver futures. Id. at 339.

Minpeco also named the commodity exchanges as defendants charging them with violating their statutory and common law duties to prevent market manipulation. Id. at 334.

290. Id. at 339.

291. Id.

292. The decision was surprising in the sense that an overwhelming number of courts held, at that time, that no link between the defendant and organized crime need be alleged. See supra note 155. On the other hand, the decision was not surprising because at that time, in
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on the ground that the plaintiff failed to allege "a link between the defendants and organized crime." The Minpeco decision, however, has effectively been overruled by the court of appeals in Moss v. Morgan Stanley, Inc. In light of our previous discussions, such manipulations are an example of the type of situation in which RICO claims should be allowed to stand.

In a market manipulation case, there is an organized concerted effort on the part of the manipulators to "corner the market." Without question, the manipulators themselves should be individually liable for a RICO violation. If such trades made during the manipulations are placed by a broker or brokerage house, an argument may be made that the broker and house knew or should have known that a manipulation or other violative activity was taking place. If this can be proven, liability under RICO is proper. This reasoning is consistent with the Parnes II decision. If, however, a FCM is an unwitting participant in a manipulatory scheme, the RICO claims should not be allowed to stand.

B. Statutory Limitations

Vaccariello v. Financial Partners Brokerage, Ltd. addressed a RICO claim against an individual and three legitimate commodity firms. The Vaccariello decision is especially interesting because to date it is the sole case which discusses the interplay of RICO and the CEAct. Although the unique argument offered by the three commodity firms was rejected by the court, their argument may have renewed life due to the subsequent amendment of the CEAct by Congress.

See supra note 206 and following text.

Again, however, the issue we seek to clarify concerns what parties such claims may be properly asserted against. Resolution of this question is somewhat more complicated that the resolution of the earlier issues.

As previously noted, the CEAct was amended to allow for an express private cause of action. See supra notes 103-25 and accompanying text.
The mastermind behind the commodities fraud scheme in *Vaccariello* was alleged to be Robert Serhant, who allegedly perpetrated the fraudulent scheme through his companies, Financial Partners, Ltd. and Financial Partners Brokerage, Ltd. (collectively referred to as FPB). The plaintiffs deposited money with Serhant and FPB to be invested pursuant to an agreed upon investment program. The plaintiffs alleged that the money deposited by them was used by Serhant, FPB, and their agents for speculative trading in the commodities futures market and was not invested in the agreed upon investment programs. It was further alleged that Serhant and FPB engaged in the trading through the facilities and personnel of three commodities brokerage firms. The plaintiffs contended that the brokerage firms "knew or should have known of the violative practices engaged in by Serhant and FPB who were acting as their agents." In addition, it was alleged that the brokerage firms "aided and abetted Serhant and FPB in their fraudulent scheme by failing to supervise them or failing to require compliance with the various relevant rules and regulations."

The defendant brokerage firms, in support of their motions to dismiss, argued that RICO was pre-empted by section 2 of the CEAct. Section 2 provides that the CFTC "shall have exclusive jurisdiction with respect to

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301. *Id.* There were three types of investment programs in which the monies were to be invested:

1. "Hedge Account" in which approximately 95% of Investor funds were used to purchase United States Treasury Bills (T-Bills) and the remaining 5% was used for futures trading;
2. "T-Bill Account" in which all the investor funds were used to purchase T-Bills;
3. "Trading Account" in which all of the investor funds were used for commodities futures trading.

*Id.*

302. All three brokerage firms were registered with the CFTC as futures commission merchants. *Id.*
303. The plaintiffs alleged that the CEAct, the CFTC regulations and the Chicago Mercantile Exchange (the exchange on which the trades were made) rules were violated by Serhant, FPB, and its agents in their scheme to defraud the plaintiffs. *Id.* at 97,018.
304. *Id.*
305. *Id.*
306. The defendants sought to dismiss all five counts alleged in the complaint. The court noted that:


307. The brokerage firms proffered two additional arguments in support of their motion to dismiss. They first argued that the complaints were defective for failure to plead fraud with particularity as required by rule 9(b) of the Federal Rules of Civil Procedure. The brokerage firms contended that the plaintiffs needed to specify the participation of each individual defendant as well as the time, place, and manner of the alleged misrepresentations. The court found that such a requirement "would go well beyond the requirements of Rule 9 and would be contrary to the spirit of the rules." *Id.* at 97,018.
accounts, agreements, . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market.\textsuperscript{304}

The court, in a very cursory fashion, concluded that RICO did not infringe upon the CFTC’s exclusive regulatory authority and therefore was not preempted by the CEAct.\textsuperscript{309} The court found that the plaintiffs invoked RICO as a general anti-fraud provision. Thus, the claims raised under RICO went beyond the alleged violations of the CEAct to the allegedly fraudulent activities of Serhant, FPB, and their agents in soliciting and retaining customers.\textsuperscript{310}

The Vaccariello court’s holding is sound in light of the defendant’s pre-emption argument concerning the CFTC’s exclusive authority. Given the 1982 amendments to the CEAct and a reformulation of the argument, however, defendants who are faced with allegations of RICO claims relating to violations of the commodities law may have a stronger argument in their attempt to avoid liability.

Cases decided prior to the enactment of the private cause of action under the CEAct uniformly rejected the pre-emption argument.\textsuperscript{311} The courts reasoned that because repeal by implication is not favored “in the eyes of the law,” there must be a finding that a later enacted statute “is clearly intended to be in substitution for the earlier act”\textsuperscript{312} in order for there to be pre-emption or implicit repeal.\textsuperscript{313} To determine legislative intent, a two-step analysis is employed. Initially, a court must examine the legislative history of the later act to see whether Congress expressed an intent to repeal, “at least in part,”\textsuperscript{314} the earlier act. The second step of the analysis involves a determination of whether there is a “repugnancy in the subject matter of the two statutes.”\textsuperscript{315}

In our opinion, with the advent of the private cause of action, defendants, at least in theory will not be successful in arguing that section 22

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\textsuperscript{304} The defendants also argued that the plaintiffs failed to state a claim upon which relief can be granted. The court, guided by the United States Supreme Court’s decision in \textit{Conley v. Gibson} which held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” found that the plaintiffs had alleged facts sufficient to support the claims for relief. \textit{Id.}

\textsuperscript{308} \textit{Id.}

\textsuperscript{309} \textit{Id. at 97,019.}

\textsuperscript{310} \textit{Id.}


\textsuperscript{313} See, supra note 303.


of the CEAct pre-empts RICO. Application of the first prong of the pre-emption analysis is difficult given section 22's sparse, almost nonexistent, legislative history. The second step of the test also poses a difficult hurdle for defendants to overcome in light of the theoretical subject matter of the two statutes. RICO is primarily designed as an offensive weapon to be utilized in attacking the infiltration of organized crime into legitimate business.\(^{316}\) The CEAct, on the other hand, seeks to protect investors and traders in the commodities markets. Thus, arguably there is no "repugnancy in the subject matter of the two statutes."

In reality, the way in which RICO is applied in garden-variety investment fraud cases is repugnant to the subject matter of the CEAct. The repugnancy lies in the fact that the CEAct expressly forbids such violative activity. Courts must realistically examine RICO as to its designed purpose: to prevent the infiltration of organized criminal activity into legitimate business. Plaintiffs who invoke RICO in the garden-variety commodities fraud cases do so primarily in an attempt to circumvent the damage provisions of the CEAct which only provides for actual damages\(^{317}\) so as to benefit from RICO's treble damages provision. The basis of their complaints, however, stems from violations of the CEAct. In such situations, section 22 is expressly designated the exclusive remedy.\(^{318}\) This congressional mandate insures the achievement of a goal of all legislation—a uniform application of the law.\(^{319}\) Accomplishment of this goal necessarily involves the limitation of available remedies and the development of a uniform body of decisional law regarding the CEAct. Permitting plaintiffs to sue under RICO, essentially for violations of the CEAct, in no way fosters this goal.

Moreover, judicial sanctioning of this continued misapplication of RICO bears out important shortcomings in the statute. The very fact that RICO has been utilized, with frighteningly increased frequency, in cases totally unrelated to its purposes and intent, evidences serious deficiencies in the means sought to implement congressional ends.

Applying RICO in garden-variety fraud cases is also repugnant to the policy behind an award of punitive damages. A finding of liability under RICO carries with it an award of treble damages and attorney's fees.\(^{320}\) Treble damages are, in effect, an award of punitive damages. However, punitive damages are recoverable only in cases where it is proven that a defendant has acted willfully, maliciously, or fraudulently.\(^{321}\) It is tenuous, at best, to argue that under a Parnes scenario the FCM acted either willfully, maliciously, or fraudulently. There, the brokerage firm was as much a victim of its brokers' wrongdoing as were the plaintiffs.

\(^{316}\) See supra note 239 and accompanying text.
\(^{317}\) See infra note 322 and accompanying text.
\(^{318}\) See supra note 109 and accompanying text.
\(^{319}\) See Private Rights of Action, supra note 4, at 99.
\(^{321}\) See supra note 124 and accompanying text.
Furthermore, it is well settled that punitive damages are not recoverable for violations of the anti-fraud provisions of the SEC Act. Arguably, punitive damages should not be available under the CEAct. Further support for this contention is found within the CEAct itself. Section 22, which authorizes the private cause of action, states that only actual damages are recoverable by aggrieved market participants for violations of the CEAct. If Congress had intended to permit an award of punitive damages, it would not have limited recoveries to actual damages. This statement must be read in light of the fact that Congress was aware of the decisions concerning punitive damages under the SEC Act, and the general societal interest against such awards. By enacting section 22 of the CEAct, Congress has carved out specific civil damage remedies available to the futures investor, and has impliedly rejected treble or punitive damages as a necessary or desirable remedy.

Conclusion

Commodities fraud litigation is an ever expanding area of the law. RICO counts in commodities litigation are frequently asserted against brokerage firms, and seek treble damages for the fraudulent acts of the firms' agents. However, actions which seek damages against a commodities house should be governed exclusively by the remedies provided in section 22 of the CEAct, where the FCM was not knowingly involved itself in the fraudulent activity.

RICO counts should not be allowed to stand against a brokerage firm who is itself the victim of its agents' fraudulent conduct. In such instances, a brokerage firm should not be subject to the stigma of being labeled a "racketeer," since this term unfairly denigrates the firm's position in the commodities markets. Unless the brokerage firm is itself engaged in racketeering schemes, RICO should not be applicable.

Allowing civil racketeering counts to stand against an innocent brokerage firm also disregards section 22's mandate that it is the exclusive remedy for violations of the CEAct. Congress, in enacting section 22, attempted to ensure a uniform body of law in the commodities area. This goal is subverted through the application of RICO to a brokerage firm victimized by the fraudulent acts of its agents. It is only where a violation of the CEAct also encompasses the component racketeering activities as contemplated by RICO, that both federal statutes may provide private remedies for violative conduct which jeopardizes the integrity of the futures market.