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EXCLUSIVE OR CONCURRENT JURISDICTION OVER PRIVATE CIVIL RICO ACTIONS: FINDING THE APPROPRIATE REFERENCE*

RICO is the acronym for Title IX of the Organized Crime Control Act of 1970, entitled "Racketeer Influenced and Corrupt Organizations."¹ Congress enacted RICO primarily to combat organized crime, specifically racketeering activity.² RICO prohibits:

- (1) conducting the affairs or participating in the conduct of the affairs of an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity;
- (2) acquiring or maintaining an interest in such an enterprise through a pattern of racketeering activity;
- (3) using funds obtained through a pattern of racketeering activity to invest in any such enterprise.

RICO also makes it illegal to conspire to engage in any of the foregoing conduct.³

"Racketeering activity" includes certain enumerated criminal acts under federal or state law.⁴ Besides providing for criminal

* *Editors' Note:* Well into the publication of this Note, the United States Supreme Court decided that state courts have concurrent jurisdiction over civil RICO claims in *Tafflin v. Levitt*, No. 88-1650 (Jan. 22, 1990) (LEXIS, Genfed library, US file). Because the author addresses and rejects most of the arguments accepted by the Court, the Note may be read as a criticism of the Court's decision.

1. Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987)).

2. See *infra* notes 9-11, 14-16 and accompanying text.

3. Bond & Holmes, RICO: Pleading, Jurisdiction, Venue, Res Judicata and Collateral Estoppel (Feb. 4-5, 1988) (presented to the Civil RICO 1988 Symposium at Southern Methodist University School of Law); see 18 U.S.C. § 1962 (1982 & Supp. V 1987).

4. See 18 U.S.C. § 1961(1) (Supp. V 1987).

"[R]acketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than 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 section 659 is felonious, section 664 (relating to embezzlement from pension and welfare

penalties, RICO permits "any person" who suffers injury in her "business or property" as a result of another's racketeering activities to bring a civil action.⁵ This private right of action provision also allows a prevailing plaintiff to recover treble damages and reasonable attorney's fees.⁶

funds), sections 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), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with 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), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320[] (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (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, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

Id.

5. See 18 U.S.C. § 1964(c) (1982 & Supp. V 1987). A plaintiff's injury to "business or property" includes any form of monetary loss. *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1985); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982). RICO does not authorize compensation for intangible losses or personal injuries. See *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 501 (W.D. Wis. 1985); *Callan v. State Chem. Mfg.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984). Further, a plaintiff need not establish a "racketeering injury" distinct from the "harm caused by predicate acts sufficiently related to constitute a pattern" to meet the injury element of a RICO private cause of action. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-98 (1985). A plaintiff has a claim under section 1964(c) "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by [sections 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property . . ." *Id.* at 495.

6. 18 U.S.C. § 1964(c) (1982 & Supp. V 1987).

Although Congress expressly granted subject matter jurisdiction over civil RICO actions to the federal courts, RICO does not specify whether such jurisdiction is exclusive.⁷ As a result of Congress' silence, federal and state courts have issued conflicting rulings regarding whether state courts have concurrent jurisdiction.⁸ Unfortunately, such ambiguity affects the plaintiff counsel's ability to plan litigation strategy, leads to judicial waste when appellate courts dismiss complaints on review, frustrates the consistent application of procedural principles and encourages forum shopping.

This Note first reviews the legislative history of the Organized Crime Control Act of 1970, focusing on RICO and its predecessor. It then examines the appropriate test for determining the propriety of concurrent jurisdiction over any claim arising under federal law, including a RICO claim. Because courts have issued conflicting rulings on whether concurrent jurisdiction exists over private civil RICO claims, the Note discusses next the differing courts' analyses, highlighting the arguments for and against concurrent jurisdiction. Lastly, the Note examines the RICO jurisdictional issue from a procedural perspective, focusing on the viability of a Clayton Act/RICO procedural analogy. The Note concludes that an examination of the RICO jurisdictional issue from this perspective strongly suggests that federal courts should exercise exclusive jurisdiction over private civil RICO claims.

LEGISLATIVE HISTORY

Congress enacted the Organized Crime Control Act of 1970⁹ in response to the nation's growing concern with organized crime's increased activity and corresponding economic power, and their severe impact upon the nation's economy, legitimate enterprises,

7. Section 1964(c) states:

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

Id. (emphasis added).

8. See *infra* text accompanying notes 86-141, 159-75.

9. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C.).

commerce and citizens' general welfare.¹⁰ The purpose of the Organized Crime Control Act was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."¹¹ The Act received widespread support from the legal community¹² and captured a substantial majority vote in Congress.¹³

RICO's legislative history illustrates the considerable effort and attention it received prior to passage. RICO had its genesis in the "Criminal Activities Profits Act," introduced in 1969 by Senator Roman Hruska.¹⁴ That bill specifically addressed racketeering infiltration of legitimate businesses.¹⁵ Existing antitrust laws served as the bill's principal premise because of a belief that the "racketeer infiltration of legitimate business inevitably creates unfair competition."¹⁶

The Criminal Activities Profits Act was the synthesis of two prior bills: S. 2048 and S. 2049.¹⁷ Congress framed S. 2048 as an amendment to the Sherman Act and intended it to prohibit the investment of intentionally unreported income in any business enterprise.¹⁸ Legislators drafted S. 2049 as independent legislation¹⁹ that would have criminalized the application of income received from certain criminal activities to any business enterprise.²⁰ Further, S. 2049 provided a civil cause of action for persons injured

10. See *id.*; 116 CONG. REC. 36,296 (1970) (statement of Sen. Dole).

11. Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (reproduced but not codified following 18 U.S.C. § 1961 (1982)) (Congressional Statement of Finding and Purpose).

12. RICO embodies the recommendations of such organizations as the American Bar Association and the President's Commission on Crime and Administration of Justice. 116 CONG. REC. 36,293 (1970) (statement of Sen. McClellan).

13. Ninety-five senators supported the Act, and the House passed substantially the same provisions by a vote of 341 to 26. *Id.*

14. 115 CONG. REC. 6992 (1969) (statement of Sen. Hruska).

15. *Id.* at 6993 (statement of Sen. Hruska).

16. *Id.*

17. *Id.* Senator Hruska introduced S. 2048 and S. 2049 in the 90th Congress. *Id.*

18. *Id.* at 6994 (Exhibit I, *Report on S. 2048 and S. 2049*, 1968 A.B.A. SEC. ANTITRUST REP.)

19. *Id.* Although S. 2049 would have been independent of the Sherman Act, it included the discovery and enforcement procedures of the antitrust laws. *Id.*

20. *Id.*

because of the application of criminally derived income to legitimate businesses.²¹

The American Bar Association examined both bills and endorsed their principles and objectives.²² The ABA believed the bills "extend[ed] the use of the antitrust machinery as a weapon against organized crime."²³ The ABA recommended, however, that Congress enact the proposed legislation as an independent statute and not incorporate it in an existing antitrust law.²⁴ Hence, the synthesis of bills S. 2048 and S. 2049 into the Criminal Activities Profits Act resulted in self-contained enforcement and discovery procedures.²⁵

The antitrust theme pervaded the proposed Act. The proposed Act provided civil remedies for "the honest businessman who [was] damaged by unfair competition from the racketeer businessman."²⁶ Patterned closely after the antitrust laws, the bill provided for private treble damage suits and injunctive relief.²⁷ Notably, Congress intended the bill's criminal provisions as an adjunct to the civil provisions.²⁸

The general prohibitions and civil remedies outlined in the Criminal Activities Profits Act reappeared in a bill entitled "Organized Crime Control Act of 1969," later enacted in substance as the Organized Crime Control Act of 1970.²⁹ Antitrust laws continued to act as a framework and a model at each stage of the bill's progress.³⁰ In fact, the legislature patterned RICO's private civil

21. *Id.*

22. *Id.* at 6993 (statement of Sen. Hruska).

23. *Id.* at 6995 (quoting Exhibit I, *Report on S. 2048 and S. 2049*, 1968 A.B.A. SEC. ANTI-TRUST REP.)

24. *Id.*

25. *Id.* at 6993 (statement of Sen. Hruska).

26. *Id.*

27. *Id.* Congress patterned the Criminal Activities Profits Act's private civil action and remedy provision after the Clayton Act. *See id.* at 6994-96 (Exhibit I, *Report on S. 2048 and S. 2049*, 1968 A.B.A. SEC. ANTI-TRUST REP., and Exhibit 2 (provisions of S. 1623)).

28. *Id.* at 6993.

29. *See* 115 CONG. REC. 39,906-07 (1969) (statement of Sen. McClellan); 116 CONG. REC. 952-53 (1970) (statement of Sen. Thurmond).

30. *See, e.g.*, 116 CONG. REC. 1,953 (1970) (statement of Sen. Thurmond); 116 CONG. REC. 35,295 (1970) (statement of Rep. Poff).

action and remedy provision after the Clayton Act.³¹ At the time of RICO's creation and subsequent enactment, the Supreme Court had long held that the federal courts have exclusive jurisdiction over all private civil actions brought under the Clayton Act.³²

The frequent antitrust references in RICO's legislative history and the parallel wording between the relevant remedial sections of RICO and the Clayton Act imply that Congress intended federal courts to exercise exclusive jurisdiction over private civil RICO actions.³³ RICO's legislative history, however, contains little, if any, express reference to whether Congress intended jurisdiction over private civil claims to be exclusively federal. Representative Richard Poff made the only statement purporting to address this issue:

In addition, at the suggestion of the gentleman from Arizona . . . and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in *Federal courts*—another example of the antitrust remedy being adapted for use against organized criminality.³⁴

Professor G. Robert Blakey, a principal draftsman of RICO, acknowledged the lack of attention that the jurisdictional issue received, but stated that Congress would have designated exclusive federal jurisdiction had it addressed the issue.³⁵

Because Congress did not explicitly grant civil RICO jurisdiction to the federal courts exclusively, state and federal courts and litigants have struggled with the issue. Uncertainty over the jurisdiction question has resulted in conflicting judicial rulings that create

31. See, e.g., 116 CONG. REC. 25,190-91 (1970) (statement of Sen. McClellan) (A.B.A. Board of Governor's Resolution). Compare Clayton Act § 4, 15 U.S.C. § 15(a) (1982) (private parties injured by conduct violating antitrust laws may bring actions to recover treble damages and attorney's fees) with RICO, 18 U.S.C. § 1964(c) (1982 & Supp. V 1987) ("Any person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."). See generally *supra* notes 14-29 and accompanying text (legislative history reflects that Congress patterned RICO's predecessor closely after the antitrust laws).

32. See, e.g., *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943).

33. See *infra* notes 165-74 and accompanying text.

34. 116 CONG. REC. 35,295 (1970) (statement of Rep. Poff) (emphasis added).

35. Flaherty, *Two States Lay Claim to RICO*, Nat'l L.J., May 7, 1984, at 3, col. 1 (attributing comments to Professor G. Robert Blakey).

a quagmire of procedural problems. RICO is not the first federal statute, however, that courts have had to struggle with to decipher jurisdictional issues. The United States Supreme Court addressed the issue of concurrent jurisdiction over federal causes of action and defined an appropriate jurisdictional analysis in *Gulf Offshore Co. v. Mobil Oil Corp.*³⁶ An examination of the Supreme Court's approach to the problem highlights the debate over civil RICO jurisdiction.

THE PROPRIETY OF CONCURRENT JURISDICTION OVER FEDERAL CAUSES OF ACTION

Gulf Offshore Co. v. Mobil Oil Corp.: Guiding Principles and the Appropriate Test

In *Gulf Offshore Co. v. Mobil Oil Corp.*,³⁷ the United States Supreme Court enunciated the parameters for determining whether exclusive federal jurisdiction exists over any particular federal claim.³⁸ The issue in this case was "whether federal courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act"³⁹ A brief review of the case's facts and the rationale underpinning the Court's holding provides a framework for applying *Gulf Offshore* to the RICO jurisdictional issue.

Mobil Oil Corporation had contracted with Gulf Offshore Company to have Gulf Offshore perform certain operations on offshore oil drilling platforms.⁴⁰ The parties' agreement provided that Gulf Offshore would indemnify Mobil for all claims resulting from the work performed.⁴¹ In 1975, a Gulf Offshore employee was injured while working on an oil drilling platform above the Outer Continental Shelf.⁴² The employee brought suit against Mobil in a Texas state court alleging negligence.⁴³ Mobil filed a third-party com-

36. 453 U.S. 473 (1981).

37. 453 U.S. 473 (1981).

38. See *id.* at 477-84.

39. *Id.* at 475.

40. *Id.*

41. *Id.*

42. *Id.* at 475-76.

43. *Id.* at 476.

plaint for indemnification against Gulf Offshore.⁴⁴ In response, Gulf Offshore asserted that the court lacked subject matter jurisdiction over the third-party complaint.⁴⁵ Specifically, Gulf Offshore "argued that Mobil's cause of action arose under the Outer Continental Shelf Lands Act (OCSLA), and that OCSLA vested exclusive subject-matter jurisdiction in a United States district court."⁴⁶ The state trial court rejected Gulf Offshore's argument.⁴⁷

A Texas appellate court affirmed the trial court's finding that it had proper subject matter jurisdiction over the causes of action arising under OCSLA.⁴⁸ First, the appellate court "found no explicit command in the Act that federal-court jurisdiction be exclusive."⁴⁹ Second, the court noted that "exclusive federal-court jurisdiction was unnecessary [sic] because the Act incorporates as federal law in personal injury actions the laws of the State adjacent to the scene of the events, when not inconsistent with other federal laws."⁵⁰ The Texas Supreme Court denied review.⁵¹

The United States Supreme Court granted certiorari to determine whether exclusive federal jurisdiction existed over suits arising under OCSLA.⁵² *Gulf Offshore*, however, involved only the jurisdiction of a state court over federal actions based on federally incorporated state law.⁵³ The Court specifically stated that it "express[ed] no opinion on whether state courts enjoy concurrent jurisdiction over actions based on the substantive provisions of OCSLA."⁵⁴

The Court held that federal courts do not have exclusive jurisdiction over personal injury and indemnity actions arising under OCSLA.⁵⁵ The Court based its holding on general principles gov-

44. *Id.* The basis of Mobil's indemnification claim was its contract with Gulf Offshore and an allegation that Gulf Offshore's negligence caused the accident that injured the employee. *Id.* at n.1.

45. *Id.* at 476.

46. *Id.*

47. *Id.*

48. *Id.* at 476-77.

49. *Id.* at 477.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 480 n.6.

54. *Id.*

55. *Id.* at 484.

erning a state court's jurisdiction over claims arising under federal laws.⁵⁶ The Court began its analysis by explaining the established rule governing concurrent jurisdiction:

[S]tate courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state court adjudication. This rule is premised on the relation between the States and the National Government within our federal system. . . . Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws.⁵⁷

According to this principle, exclusive federal jurisdiction over claims based on federal law has been the exception, not the rule.⁵⁸ The Court relied on this precedent and applied a three-part test to determine the propriety of state court jurisdiction over any federal claim: As a starting point, state courts have presumptive subject matter jurisdiction over claims arising under federal law.⁵⁹ One can rebut this presumption, however, by demonstrating an intention of exclusive federal jurisdiction through evidence of (1) an explicit statutory directive; (2) an unmistakable implication from legislative history; or (3) clear incompatibility between state court jurisdiction and federal interests.⁶⁰

In *Gulf Offshore*, the Court reiterated the "black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action."⁶¹ Thus, the first of the three rebuttals requires more than an affirmative grant of federal jurisdiction to establish that jurisdiction is exclusive. The Court offered no general guidance regarding the rebuttal of concurrent jurisdiction by an

56. See *id.* at 477-84.

57. *Id.* at 477-78 (citations omitted) (footnote omitted).

58. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962). Commentators offer another characterization of this "exception," stating "the presumption is that jurisdiction is concurrent, and some strong showing of need for exclusive jurisdiction is required to overcome that presumption." Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 325 n.63 (1976).

59. *Gulf Offshore*, 453 U.S. at 478.

60. *Id.*

61. *Id.* at 479.

unmistakable implication from legislative history. The Court did enumerate, however, some factors that generally support exclusive federal jurisdiction when a court is considering the third form of rebuttal: clear incompatibility between state court jurisdiction and federal interests.⁶² These factors include "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims."⁶³ The caveat is that these factors will not support exclusive federal jurisdiction when state law provides the rules governing the particular federal claim.⁶⁴

In applying the three-part test to Gulf Offshore's assertion that the state court lacked jurisdiction over personal injury and indemnity claims arising under OCSLA,⁶⁵ the Court found that Gulf Offshore failed to meet any of the rebuttals. The Court noted first that neither party alleged that Congress explicitly granted the federal courts exclusive jurisdiction over cases arising under OCSLA.⁶⁶ The Court determined next that OCSLA's legislative history did not rebut the presumption of concurrent jurisdiction.⁶⁷ Finally, the Court found that a state court's assertion of jurisdiction over personal injury actions would not frustrate the operation of OCSLA because the federal statute borrows state law to govern claims arising under it.⁶⁸ In fact, the Court posited that a state court's ability to hear personal injury and contract actions "[would] advance interests identified by Congress in enacting OCSLA."⁶⁹ In sum, the Court found "nothing in the language, structure, legislative history, or underlying policies of OCSLA suggest[ing] that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under OCSLA."⁷⁰

62. *Id.* at 483-84.

63. *Id.*; see Redish & Muench, *supra* note 58, at 329-35.

64. *Gulf Offshore*, 453 U.S. at 484.

65. See *id.* at 478-84.

66. *Id.* at 478. Congress' mere grant of original jurisdiction over cases arising under OCSLA to the federal courts does not negate a state court's concurrent jurisdiction over such claims. See *id.* at 478-79.

67. *Id.* at 482-83.

68. *Id.* at 483.

69. *Id.* at 484.

70. *Id.*

Subsequent Application of Gulf Offshore Co. v. Mobil Oil Corp. to Other Areas of Federal Law

Since the Supreme Court decided the issue of concurrent jurisdiction in *Gulf Offshore* in 1981, courts have applied its analysis to other federal statutes, such as the anti-tying provisions of the Bank Holding Company Act,⁷¹ the Suits in Admiralty Act,⁷² the Public Vessels Act of 1925,⁷³ the Administrative Procedure Act,⁷⁴ Title VII of the Civil Rights Act of 1964⁷⁵ and section 1981 of the Civil Rights Act of 1866.⁷⁶ Furthermore, the bench has not challenged the application of *Gulf Offshore's* analysis for determining concurrent jurisdiction over RICO claims.

Although the federal and state courts addressing RICO jurisdiction have conducted their inquiries within the parameters of *Gulf Offshore*, their rulings conflict as to whether concurrent jurisdiction exists.⁷⁷ Courts generally agree that no explicit statutory directive in RICO rebuts the presumption of concurrent jurisdic-

71. See *Lane v. Central Bank of Ala.*, 756 F.2d 814, 816-18 (11th Cir. 1985).

72. See *Guidry v. Durkin*, 834 F.2d 1465, 1473 (9th Cir. 1987).

73. See *id.*

74. See *Federal Nat'l Mtg. Ass'n v. LeCrone*, 868 F.2d 190, 192-93 (6th Cir. 1989).

75. See, e.g., *Donnelly v. Yellow Freight Sys.*, 874 F.2d 402, 405-09 (7th Cir. 1989).

76. See *DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 879 F.2d 459, 462-63 (9th Cir. 1989).

77. Compare the following cases supporting concurrent jurisdiction, *McCarter v. Mitcham*, 883 F.2d 196, 200-01 (3d Cir. 1989); *Tafflin v. Levitt*, 865 F.2d 595, 600 (4th Cir.), *cert. granted*, 109 S. Ct. 2428 (1989); *Brandenburg v. Seidel*, 859 F.2d 1179, 1195 (4th Cir. 1988); *Lou v. Belzberg*, 834 F.2d 730, 735 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Contemporary Servs. Corp. v. Universal City Studios*, 655 F. Supp. 885, 893 (C.D. Cal. 1987); *HMK Corp. v. Walsey*, 637 F. Supp. 710, 717 (E.D. Va. 1986), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988); *Karel v. Kroner*, 635 F. Supp. 725, 731 (N.D. Ill. 1986); *Cianci v. Superior Court*, 40 Cal. 3d 903, 908, 710 P.2d 375, 377, 221 Cal. Rptr. 575, 576 (1985); *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 461, 530 N.E.2d 860, 866, 534 N.Y.S.2d 152, 158 (1988), *with the following cases supporting exclusive federal jurisdiction*, *Chivas Prods. Ltd. v. Owen*, 864 F.2d 1280, 1285 (6th Cir. 1988); *Intel Corp. v. Hartford Accident & Indem. Co.*, 662 F. Supp. 1507, 1511 (N.D. Cal. 1987); *Spence v. Flynt*, 647 F. Supp. 1266, 1270 (D. Wyo. 1986); *Broadway v. San Antonio Shoe, Inc.*, 643 F. Supp. 584, 586 (S.D. Tex. 1986); *County of Cook v. Midcon Corp.*, 574 F. Supp. 902, 912 (N.D. Ill. 1983), *aff'd on other grounds*, 773 F.2d 892 (7th Cir. 1985); *Levinson v. American Accident Reinsurance Group*, 503 A.2d 632, 635 (Del. Ch. 1985); *Maplewood Bank & Trust Co. v. Acorn, Inc.*, 207 N.J. Super. 590, 592-94, 504 A.2d 819, 821 (1985); *Main Rusk Assocs. v. Interior Space Constructors*, 699 S.W.2d 305, 307 (Tex. Ct. App. 1985). The United States Supreme Court granted certiorari to resolve this conflict. See *Tafflin v. Levitt*, 109 S. Ct. 2428 (1989).

tion.⁷⁸ The conflicting holdings result instead from the courts' analyses of the other two methods of rebutting the concurrent jurisdiction presumption.⁷⁹ A determination that a state court's adjudication of a civil RICO claim is clearly incompatible with the federal interests underpinning RICO can resolve the jurisdictional issue in favor of exclusive federal jurisdiction.⁸⁰ Alternatively, a finding that RICO's legislative history reflects congressional intent to limit jurisdiction to federal courts also will support a finding of exclusive federal jurisdiction.⁸¹ A review of the courts' analyses of these two areas highlights arguments for and against concurrent jurisdiction over private civil RICO actions.

JUDICIAL VIEWS OF THE RICO JURISDICTIONAL ISSUE

Are State Court Jurisdiction and Federal Interests Underpinning RICO Clearly Incompatible?

In *Gulf Offshore Co. v. Mobil Oil Corp.*,⁸² the Supreme Court noted that factors such as "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims" generally recommend exclusive federal jurisdiction over

78. See, e.g., *Brandenburg*, 859 F.2d at 1193; *Chivas Prods.*, 864 F.2d at 1283; *Belzberg*, 834 F.2d at 736; *Contemporary Servs. Corp.*, 655 F. Supp. at 893; *HMK Corp.*, 637 F. Supp. at 717; *Karel*, 635 F. Supp. at 729; *Cianci*, 40 Cal. 3d at 910, 710 P.2d at 378, 221 Cal. Rptr. at 577-78; *Levinson*, 503 A.2d at 634-35; *Maplewood Bank & Trust*, 207 N.J. Super. at 591, 504 A.2d at 820; *Simpson Elec.*, 72 N.Y.2d at 455, 530 N.E.2d at 862, 534 N.Y.S.2d at 154. This agreement derives from RICO's statutory language, which grants federal jurisdiction over private civil RICO suits, and the "black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore Co. v. Mobil Oil Corp.* 453 U.S. 473, 479 (1981); see 18 U.S.C. § 1964(c) (1982 & Supp. V 1987).

79. See, e.g., *Chivas Prods.*, 864 F.2d at 1283-86; *Belzberg*, 834 F.2d at 736-39; *Intel Corp.*, 662 F. Supp. at 1511; *Brandenburg v. First Md. Sav. & Loan*, 660 F. Supp. 717, 731-33 (D. Md. 1987), *aff'd sub nom. Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *Spence*, 647 F. Supp. at 1270; *HMK Corp.*, 637 F. Supp. at 717; *Karel*, 635 F. Supp. at 729-31; *Cianci*, 40 Cal. 3d at 911-16, 710 P.2d at 378-82, 221 Cal. Rptr. at 578-81; *Levinson*, 503 A.2d at 635; *Maplewood Bank & Trust*, 207 N.J. Super. at 594, 504 A.2d at 820-21; *Simpson Elec.*, 72 N.Y.2d at 456-60, 530 N.E.2d at 862-65, 534 N.Y.S.2d at 155-58.

80. See *Gulf Offshore*, 453 U.S. at 478 ("[c]lear incompatibility between state-court jurisdiction and federal interests" can rebut presumption of concurrent jurisdiction).

81. See *id.* ("[u]nmistakable implication from legislative history" can rebut presumption of concurrent jurisdiction).

82. 453 U.S. 473 (1981).

claims arising under federal law.⁸³ These factors, however, do not support exclusive federal jurisdiction over federal claims whose "governing rules are borrowed from state law."⁸⁴ Courts examine the factors when determining whether state court jurisdiction is clearly incompatible with the federal interests underpinning RICO.⁸⁵ Disagreements within these inquiries result in conflicting rulings on the "compatibility" issue.

Arguments favoring concurrent jurisdiction

In *Cianci v. Superior Court*,⁸⁶ the Supreme Court of California considered the importance of uniform interpretation and application of federal law, and concluded that RICO does not necessitate such uniformity. The court rejected the uniformity argument even though the statute "takes aim at a national problem, . . . deals with uniquely federal issues, and establishes a comprehensive enforcement scheme."⁸⁷ The court explained that if the "national" character of a problem necessitated uniformity, a presumption of concurrent jurisdiction would never exist.⁸⁸ The court also noted that the "existence of a comprehensive enforcement scheme" alone does not mandate exclusive federal jurisdiction and uniformity, referring as

83. *Id.* at 483-84.

84. *Id.* at 484.

85. *See, e.g.,* *Brandenburg v. Seidel*, 859 F.2d 1179, 1194-95 (4th Cir. 1988); *Chivas Prods. Ltd. v. Owen*, 864 F.2d 1280, 1285-86 (6th Cir. 1988); *Lou v. Belzberg*, 834 F.2d 730, 737-38 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Intel Corp. v. Hartford Accident & Indem. Co.*, 662 F. Supp. 1507, 1511 (N.D. Cal. 1987); *Brandenburg v. First Md. Sav. & Loan*, 660 F. Supp. 717, 732 (D. Md. 1987), *aff'd sub nom.,* *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *HMK Corp. v. Walsey*, 637 F. Supp. 710, 717 (E.D. Va. 1986), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988); *Karel v. Kroner*, 635 F. Supp. 725, 729-31 (N.D. Ill. 1986); *Cianci v. Superior Court*, 40 Cal. 3d 903, 914-16, 710 P.2d 375, 380-82, 221 Cal. Rptr. 575, 580-82 (1985); *Levinson v. American Accident Reinsurance Group*, 503 A.2d 632, 635 (Del. Ch. 1985); *Maplewood Bank & Trust Co. v. Acorn, Inc.*, 207 N.J. Super. 590, 593-94, 504 A.2d 819, 821 (1985); *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 460, 530 N.E.2d 860, 865, 534 N.Y.S.2d 152, 157-58 (1988); *Greenview Trading Co. v. Hershman & Leicher, P.C.*, 108 A.D.2d 468, 472-73, 489 N.Y.S.2d 502, 505-06 (1985).

86. 40 Cal. 3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985).

87. *Id.* at 915, 710 P.2d at 381, 221 Cal. Rptr. at 581. The court rejected the "uniquely federal" description of the issues RICO dealt with by stating that "the predicate offenses underlying the RICO cause of action encompass violations of state as well as federal criminal law." *Id.*, 710 P.2d at 381, 221 Cal. Rptr. at 581.

88. *Id.*, 710 P.2d at 381, 221 Cal. Rptr. at 581.

an example to the Securities Act of 1933, which grants both state and federal jurisdiction.⁸⁹ The clarity of RICO's provisions and legislative history also supported the court's position by providing sufficient guidance to limit the likelihood of judicial gloss.⁹⁰

Federal and state courts also reject the assertion that federal judges necessarily have superior expertise over RICO claims because the predicate offenses underlying RICO encompass both state and federal law.⁹¹ In fact, a "vast majority of RICO cases involve garden variety state law fraud," and thus state courts should be equally competent to handle them.⁹² In *Brandenburg v. Seidel*,⁹³ the Court of Appeals for the Fourth Circuit concluded that state court jurisdiction is compatible with federal interests despite RICO's provisions "dealing with governmental enforcement of the anti-racketeering laws [that] do not authorize action by state officials."⁹⁴ According to the court, these provisions do not address the nature of section 1964(c)'s private enforcement mechanism.⁹⁵ The court further explained that RICO's "expansive venue

89. *Id.*, 710 P.2d at 381, 221 Cal. Rptr. at 581 (citing 15 U.S.C. § 77a-aa (1982)).

90. *Id.* at 914, 710 P.2d at 380-81, 221 Cal. Rptr. at 580. The court characterized RICO as a fairly "close-textured" statute based on the statute's language, in part, and on the Supreme Court's "clarifying reading" in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Indeed, the court acknowledged that its conclusion regarding the limitation of the scope of judicial gloss might have been different if the Supreme Court in *Sedima* had determined that RICO required a "racketeering injury" like the "antitrust injury" requirement. *Cianci*, 40 Cal. 3d at 915 n.4, 710 P.2d at 381 n.4, 221 Cal. Rptr. at 581 n.4; *accord* *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 460, 530 N.E.2d 860, 865, 534 N.Y.S.2d 152, 157 (1988).

91. *See, e.g.*, *Lou v. Belzberg*, 834 F.2d 730, 737-38 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Brandenburg v. First Md. Sav. & Loan*, 660 F. Supp. 717, 733 (D. Md. 1987), *aff'd sub nom.* *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *HMK Corp. v. Walsey*, 637 F. Supp. 710, 717 (E.D. Va. 1986), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988); *Karel v. Kroner*, 635 F. Supp. 725, 730-31 (N.D. Ill. 1986); *Cianci*, 40 Cal. 3d at 915, 710 P.2d at 381, 221 Cal. Rptr. at 581. One court noted that "RICO incorporates by reference [to predicate acts] both State and Federal law and there is little difference between State Judges interpreting Federal criminal law if the predicate act alleged is a Federal law violation and Federal Judges interpreting State criminal law if the predicate act alleged is a State law violation." *Simpson Elec.*, 72 N.Y.2d at 460, 530 N.E.2d at 865, 534 N.Y.S.2d at 157-58.

92. *Belzberg*, 834 F.2d at 738 (quoting *HMK Corp.*, 637 F. Supp. at 717); *accord* *Brandenburg v. Seidel*, 859 F.2d 1179, 1195 (4th Cir. 1988), *aff'g*, 660 F. Supp. 717 (D. Md. 1987); *Karel*, 635 F. Supp. at 730-31.

93. 859 F.2d 1179 (4th Cir. 1988).

94. *Id.* at 1194.

95. *Id.*

and service-of-process provisions [that] are applicable only in federal court" are not significant in determining jurisdictional compatibility because "state courts retain the authority to promulgate procedural rules for their own courts."⁹⁶

Many courts do not assume that federal courts afford greater hospitality to RICO claims than state courts.⁹⁷ To support this position, courts cite: the common goal to "avoid the costs of crime in the marketplace";⁹⁸ the observation that "state judges cannot be presumed hostile to claims that may be federal in label only, any more than federal judges would be hostile to claims based on violation of state laws";⁹⁹ and, the enactment of "little RICO" statutes in some states.¹⁰⁰ Courts also assert that concurrent jurisdiction provides more than one forum for the parties' convenience¹⁰¹ and thereby supports Congress' admonition that RICO should be "liberally construed to effectuate its remedial purposes."¹⁰²

The federal appellate courts for the Fifth and Seventh Circuits have expressed doubt that federal courts have exclusive jurisdiction over private civil RICO actions.¹⁰³ The Fifth Circuit questioned the propriety of a federal court's intrusion into state law even when the state law claims are interrelated with RICO

96. *Id.*

97. *See, e.g.,* *Cianci v. Superior Court*, 40 Cal. 3d 903, 916, 710 P.2d 375, 381, 221 Cal. Rptr. 575, 581 (1985).

98. *Id.*, 710 P.2d at 381, 221 Cal. Rptr. at 581.

99. *Id.*, 710 P.2d at 381, 221 Cal. Rptr. at 581.

100. *See id.*, 710 P.2d at 381, 221 Cal. Rptr. at 581; *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 460-61, 530 N.E.2d 860, 865-66, 534 N.Y.S.2d 152, 157-58 (1988). Courts refer to the enactment of "little RICO" statutes to support a conclusion that state judges are not unsympathetic to RICO claims. *Cianci*, 40 Cal. 3d at 916, 710 P.2d at 381, 221 Cal. Rptr. at 581; *Simpson Elec.*, 72 N.Y.2d at 460-61, 530 N.E.2d at 865-66, 534 N.Y.S.2d at 157-58. *But see* *Kinsey v. Nestor Exploration, Ltd.*, 604 F. Supp. 1365, 1370 (E.D. Wash. 1985) (court construed enactment of state "Baby RICO" statutes to indicate that state does not believe its own courts should have concurrent jurisdiction over federal civil RICO claims).

101. *See* *Brandenburg v. First Md. Sav. & Loan*, 660 F. Supp. 717, 732 (D. Md. 1987), *aff'd sub nom.* *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *accord* *Contemporary Servs. Corp. v. Universal City Studios*, 655 F. Supp. 885, 893 (D.C. Cal. 1987); *Karel v. Kroner*, 635 F. Supp. 725, 730-31 (N.D. Ill. 1986).

102. Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

103. *See* *Dubroff v. Dubroff*, 833 F.2d 557, 562 (5th Cir. 1987); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1236-37 (7th Cir. 1986); *County of Cook v. Midcon Corp.*, 773 F.2d 892, 898, 905 n.4 (7th Cir. 1985), *aff'g on other grounds*, 574 F. Supp. 902 (N.D. Ill. 1983).

claims.¹⁰⁴ The Seventh Circuit similarly noted the irony of finding exclusive federal jurisdiction in a RICO case involving the operation of state-regulated public utilities.¹⁰⁵ Further, the Seventh Circuit noted potential areas of procedural abuse, such as a party's attempt to disregard, on the basis of exclusive federal jurisdiction over civil RICO claims, the results of prior state court action.¹⁰⁶

Arguments favoring exclusive federal jurisdiction

In *Chivas Products Limited v. Owen*,¹⁰⁷ the Court of Appeals for the Sixth Circuit asserted that state court jurisdiction and the "strong federal interests" underpinning RICO are clearly incompatible. This position follows from the premise that RICO is primarily a criminal statute and that the meaning of section 1964(c),

104. In *Dubroff*, a woman sued her ex-spouse, several business associates and the ex-spouse's lawyers alleging violations of federal securities laws and RICO in connection with the division of a closely held family corporation in a prior divorce proceeding. *Dubroff*, 833 F.2d at 557. The woman settled with all of the defendants except her ex-spouse's attorneys. *Id.* at 558. The district court dismissed the plaintiff's case on res judicata grounds because "the actions complained of were all approved by a Texas state court in a divorce decree" *Id.* (quoting district court). The Fifth Circuit abstained from deciding the federal securities and RICO issues "[b]ecause the federal claims in this case arise out of a divorce proceeding, and because no Texas law to which we have been directed . . . gives even the faintest guidance as to how the Texas courts would treat an action against an ex-spouse's lawyers based on federal law" *Id.* at 561. Specifically, the court found that 1) federal court intrusion into domestic relations law was inappropriate; 2) this action "present[ed] novel and dubious questions of state family law"; and, 3) the plaintiff could probably bring all of her claims, including RICO, in state court. *Id.* at 561-62. Although the court suggested that state court jurisdiction over RICO claims was "likely to prevail in Texas as well," the court stopped short of actually holding that such jurisdiction exists over RICO claims. *Id.* at 562.

In *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126 (5th Cir. 1988), the Fifth Circuit again did not reach the presented issue of exclusivity because it "[did] not perceive that this case implicate[d] the derivative jurisdiction doctrine." *Id.* at 128-29. Here, the Fifth Circuit did not indicate a preference for concurrent jurisdiction over RICO claims, unlike the court's expression in *Dubroff*. See *id.* at 128 n.1. The Fifth Circuit has not yet resolved the issue of whether exclusive federal jurisdiction exists over civil RICO claims.

105. *County of Cook*, 773 F.2d at 905 n.4.

106. *Henry*, 808 F.2d at 1235-37 (disguising fraud and forgery defenses as civil RICO claims cannot circumvent res judicata determination because of failure to raise such defenses in state trial); *County of Cook*, 773 F.2d at 904 ("Illinois collateral estoppel principles would bar relitigation of issues which control plaintiffs' claim that there was a scheme to defraud, cognizable under the mail fraud statute and hence under RICO.").

107. 864 F.2d 1280, 1284-86 (6th Cir. 1988).

the private right of action provision for civil RICO claims,¹⁰⁸ stems from RICO's total statutory scheme.¹⁰⁹ The court noted that RICO's legislative history "indicate[d] clearly that the civil damages remedy of section 1964(c) was designed as an integral part of a broad-front attack on organized crime."¹¹⁰ The private civil litigant, according to the court, plays an important role in the enforcement and effectiveness of the statute.¹¹¹ Consequently, the court determined it must consider the statute's structure in determining the appropriateness of concurrent jurisdiction over civil RICO actions.¹¹²

The court said RICO's structural features were incompatible with concurrent jurisdiction for three "principal reasons."¹¹³ First, one must prosecute most of the "racketeering activity" predicate offenses in section 1961(1) in federal courts.¹¹⁴ The only exceptions are the "generic offenses" outlined in section 1961(1)(A) and, perhaps, some fraud in the sale of securities chargeable under section 1961(1)(C).¹¹⁵ The court pointed out that many of the federal crim-

108. See *supra* note 7.

109. *Chivas Prods.*, 864 F.2d at 1284-85. The court explained:

The entire scheme has been well described by the commentators: § 1961 defines key concepts, including predicate acts of "racketeering activity," in the language of criminal liability; § 1962 prohibits different acts; § 1963 establishes criminal penalties; and § 1964 provides civil remedies on top of the criminal liability. Sections 1965-68 govern venue and process, and provide specially for expedition of actions, discovery and closure of proceedings brought by the United States.

Id. (citing P. BATISTA, *CIVIL RICO PRACTICE MANUAL* §§ 2.2-2.6 (1987) and Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980)). The court determined that "[t]he federal interests embedded in civil RICO are best assessed not by narrow scrutiny of § 1964(c) in isolation but by examination of the civil RICO damages remedy in the context of the entire RICO statutory scheme." *Id.* at 1284.

110. *Id.* at 1284. The legislative history reflects an intent that the civil remedy provision enhance the overall effectiveness of RICO. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487 (1985).

111. *Chivas Prods.*, 864 F.2d at 1284.

112. *Id.*

113. *Id.* at 1285-86.

114. *Id.* at 1285; see 18 U.S.C. § 1961(1) (1982 & Supp. V 1987).

115. *Chivas Prods.*, 864 F.2d at 1285. In fact, one court noted that "Senator McClellan explained in floor debate that [RICO] was not designed to convert every fraud, misrepresentation or other act violative of state law into a RICO action." *Main Rusk Assocs. v. Interior Space Constructors*, 699 S.W.2d 305, 306 (Tex. Ct. App. 1985) (citation omitted). Instead,

inal offenses are "highly specialized areas" that statutes restrict to federal jurisdiction.¹¹⁶ As a result, the court claimed, "state courts do not have jurisdiction to interpret and apply these laws, and they are generally unfamiliar with them."¹¹⁷

Second, the court reasoned that "racketeering enterprises" frequently possessed an "interstate character" because "often predicate acts by the same defendants will occur in several states."¹¹⁸ The risk of inconsistent state court decisions would multiply if state courts had concurrent jurisdiction over civil RICO claims because "[t]he state courts have no multi-district litigation panel and no way to make their decisions on federal law consistent except through review by the Supreme Court."¹¹⁹ Consequently, the court

"RICO was designed to protect the public's interest in the economy by preventing the infiltration of organized crime into legitimate businesses." *Id.* at 306-07.

116. *Chivas Prods.*, 864 F.2d at 1285. The "specialized areas" that the court referred to include "drug laws, ERISA, labor, bankruptcy, securities, white slavery, [and] mail fraud." *Id.* (citing 18 U.S.C. § 3231 (1982)).

117. *Id.* Another court opined that Congress intended RICO to extend beyond the scope of "garden variety" fraud and to "cause the role of the federal government to be extended into areas previously reserved for the states." *Intel Corp. v. Hartford Accident & Indem. Co.*, 662 F. Supp. 1507, 1511 (N.D. Cal. 1987).

The Sixth Circuit cited statistics supporting the position that a "great preponderance" of civil RICO actions involve federal offenses of wire or mail fraud or federal securities fraud, rather than the "'garden variety state law fraud'" that the courts favoring concurrent jurisdiction over civil RICO claims represent. *Chivas Prods.*, 864 F.2d at 1285 (quoting *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* 57 (1985) (approximately 80% of civil RICO claims are based on mail, wire or securities fraud)).

The dissent, however, determined that "the majority's conclusion that most RICO predicate offenses are exclusively federal in nature [was] misplaced." *Id.* at 1289 (Krupansky, J., dissenting). Judge Krupansky characterized predicate offenses such as mail fraud, securities fraud or other federal crimes as "generally only nominally 'federal.'" *Id.* (Krupansky, J., dissenting). Relying on statistics that showed approximately half of all civil RICO cases filed after *Sedima* involved "common law fraud" and the Supreme Court's holding that RICO claims may be subject to arbitration, the dissent dismissed the argument that state courts were incompetent to hear civil RICO claims. *Id.* (Krupansky, J., dissenting) (citing in part *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); 62 *Civil RICO Report*, No. 44 at 7 (April 14, 1987)).

118. *Id.* at 1285 (citing *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987)).

119. *Id.* The dissent rejected the majority's claim that "the interstate character of RICO precludes concurrent state jurisdiction and that exclusive jurisdiction is necessary to decrease the risk of 'inconsistent decisions.'" *Id.* at 1289 (Krupansky, J., dissenting). The dissent believed that the majority's claim would eliminate concurrent jurisdiction in "virtually all federal cases" if extended to "its ultimate conclusion." *Id.* at 1290 (Krupansky, J., dis-

was concerned about the possibility of RICO's "complex and ambiguous" nature resulting in "conflicting interpretations not only in the 12 regional federal courts of appeals but also in 50 states."¹²⁰

The court's third and final reason for finding incompatibility between state court jurisdiction and RICO's federal interests centered on the apparent inconsistency between the "procedural apparatus created by §§ 1965-68 [and] concurrent state court adjudication of § 1964(c) claims."¹²¹ For example, RICO's extensive venue and process provisions apply only to civil cases brought in *federal court*.¹²² The effect of this distinction between civil RICO cases brought in state court and those brought in federal court was the creation of "either a procedural quagmire of multiple state and federal remedial procedures or a comity-threatening necessity for many state courts to alter radically their normal procedures."¹²³ In sum, the Sixth Circuit did not believe that RICO's statutory scheme would "explicitly provide[] extraordinary procedural vehi-

senting). The dissent also noted that finding exclusive federal jurisdiction over civil RICO claims would not preclude inconsistent decisions because "'even a finding of exclusive jurisdiction over claims arising under a federal statute usually will not prevent a state court from deciding a question collaterally.'" *Id.* at 1290 (Krupansky, J., dissenting) (quoting *Hathorn v. Lovorn*, 457 U.S. 255 (1982)). Partly for this reason, the dissent highlighted that "the Supreme Court has specifically rejected the premise that concurrent jurisdiction would produce unworkable conflict and inconsistent decisions. Such conflicts are 'not necessarily unhealthy,' the Court has reasoned, and are not a significant factor in the exclusive jurisdiction inquiry" *Id.* at 1290 (Krupansky, J., dissenting) (quoting *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 514 (1962)). The dissent characterized the "diversities and conflicts" as "no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law." *Id.* (Krupansky, J., dissenting) (citing *Courtney*, 368 U.S. at 514).

120. *Id.* at 1285.

121. *Id.* Addressing the majority's final claim that RICO's procedural apparatus "seems inconsistent with concurrent state court adjudication," *id.*, the dissent rejected the notion that the "little practical importance" of concurrent jurisdiction, in light of the "many incentives to litigate in federal court," reflected Congress' intent to impose exclusive federal jurisdiction over civil RICO claims. *Id.* at 1291 (Krupansky, J., dissenting). The dissent noted the Supreme Court's finding of concurrent jurisdiction over other federal acts that possess either the "little practical importance" of concurrent jurisdiction, or venue and process provisions comparable to those in RICO. *Id.* (Krupansky, J., dissenting). The dissent instead agreed with the conclusion that concurrent jurisdiction "'encourage[s] enforcement of RICO and provides an appropriate role for state courts in cases involving essentially state law.'" *Id.* (Krupansky, J., dissenting) (quoting *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988)).

122. *Id.* at 1285; see 18 U.S.C. § 1965(a), (d) (1982).

123. *Chivas Prods. Ltd. v. Owen*, 864 F.2d 1280, 1285 (6th Cir. 1988).

cles in the federal district courts . . . [and] silently contemplate concurrent jurisdiction in state courts, many of which either lack those mechanisms or would require considerable revamping to afford them."¹²⁴

While the Sixth Circuit's decision in *Chivas Products* exemplifies the analysis of federal courts that have found incompatibility destroys the presumption of concurrent jurisdiction, *state courts* also have voiced concern about their resolution of RICO issues.¹²⁵ A primary concern is that RICO claims involve "the interpretation and application of a number of Federal statutes that constitute predicate offenses."¹²⁶ This concern, as well as others addressed by the Sixth Circuit in *Chivas Products*, has prompted some state courts to decide that the desirability of uniform interpretation, the expertise of federal judges and the greater hospitality of federal courts regarding civil RICO claims mandate exclusive federal jurisdiction over such claims.¹²⁷

Does RICO's Legislative History Imply Unmistakably that Congress Intended Exclusive Federal Jurisdiction?

A second area of judicial controversy surrounds Congress' implied intent regarding RICO jurisdiction. The debate focuses on the viability of a Clayton Act/RICO jurisdictional analogy in light of RICO's legislative history and the Supreme Court's pronouncements in *Sedima, S.P.R.L. v. Imrex Co.*¹²⁸

Arguments favoring concurrent jurisdiction

Courts refer to two arguments to support the conclusion that "RICO's legislative history does not provide the requisite 'unmis-

124. *Id.* at 1285-86.

125. See, e.g., *Levinson v. American Accident Reinsurance Group*, 503 A.2d 632, 635 (Del. Ch. 1985); *Maplewood Bank & Trust Co. v. Acorn, Inc.*, 207 N.J. Super. 590, 593-94, 504 A.2d 819, 821 (1985); *Greenview Trading Co. v. Hershman & Leicher, P.C.*, 108 A.D.2d 468, 472-73, 489 N.Y.S.2d 502, 505-06 (1985).

126. *Maplewood Bank & Trust*, 207 N.J. Super. at 593-94, 504 A.2d at 821 (quoting *Greenview Trading*, 108 A.D.2d at 472, 489 N.Y.S.2d at 506).

127. See, e.g., *Levinson*, 503 A.2d at 635; *Maplewood Bank & Trust*, 207 N.J. Super. at 593-94, 504 A.2d at 821; *Greenview Trading*, 108 A.D.2d at 472-73, 489 N.Y.S.2d at 505-06.

128. 473 U.S. 479 (1985). *Sedima* is discussed *infra* text accompanying notes 140-62.

takable implication' that exclusive jurisdiction was intended."¹²⁹ First, courts rely on the fact that Congress did not expressly consider the question of jurisdiction.¹³⁰ Second, courts reject the assertion that exclusive federal jurisdiction is implicit in Congress' use of section 4 of the Clayton Act, judicially construed to restrict jurisdiction to the federal courts, as a model for section 1964(c) of RICO.¹³¹ Courts support their rejection by distinguishing the natures of RICO and the Clayton Act.

As the New York Court of Appeals noted in *Simpson Electric Corp. v. Leucadia, Inc.*,¹³² the language of section 4 of the Clayton Act, the Act's private right of action provision, does not restrict jurisdiction to the federal courts.¹³³ Rather, judicial interpretation of the Clayton Act conferred exclusive federal jurisdiction over claims arising under the Act.¹³⁴ The New York Court of Appeals

129. *Lou v. Belzberg*, 834 F.2d 730, 737 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *accord* *Brandenburg v. First Md. Sav. & Loan*, 660 F. Supp. 717, 731 (D. Md. 1987), *aff'd sub nom.* *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *HMK Corp. v. Walsey*, 637 F. Supp. 710, 717 (E.D. Va. 1986), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 484 U.S. 1009 (1988); *Karel v. Kroner*, 635 F. Supp. 725, 729-31 (N.D. Ill. 1986); *Cianci v. Superior Court*, 40 Cal. 3d 903, 911-14, 710 P.2d 375, 378-80, 221 Cal. Rptr. 575, 578-80 (1985); *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 456-58, 530 N.E.2d 860, 862-64, 534 N.Y.S.2d 152, 155-56 (1988).

130. *See Belzberg*, 834 F.2d at 736 & n.4; *Cianci*, 40 Cal. 3d at 911-12, 710 P.2d at 378-79, 221 Cal. Rptr. at 578-79.

As stated by Professor G. Robert Blakey, who was chief counsel to the Senate Subcommittee on Criminal Laws and Procedures, which proposed RICO: "There is nothing on the face of the statute or in the legislative history' that touches on the question of concurrent jurisdiction "To my knowledge, no one even thought of the issue."

Cianci, 40 Cal. 3d at 912, 710 P.2d at 379, 221 Cal. Rptr. at 579 (quoting Flaherty, *supra* note 35, at 10, col. 2).

131. *See Belzberg*, 834 F.2d at 736-37; *Brandenburg*, 660 F. Supp. at 731-32; *HMK Corp.*, 637 F. Supp. at 717; *Karel*, 635 F. Supp. at 729-31; *Cianci*, 40 Cal. 3d at 912-13, 710 P.2d at 379, 221 Cal. Rptr. at 579.

The California Supreme Court addressed the accepted premise that no necessary connection exists between exclusive federal jurisdiction and a private right of action. *Cianci*, 40 Cal. 3d at 913, 710 P.2d at 379-80, 221 Cal. Rptr. at 579-80. The court attributed the fact that § 4 of the Clayton Act bestows both a private right of action and exclusive federal jurisdiction to "two distinct policies that inform the provision," rather than to a necessary connection between the private action and exclusive jurisdiction. *Id.*, 710 P.2d at 380, 221 Cal. Rptr. at 579.

132. 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988).

133. *Id.* at 457, 530 N.E.2d at 863, 534 N.Y.S.2d at 156.

134. *See id.* at 456-57, 530 N.E.2d at 863, 534 N.Y.S.2d at 155.

stated that a policy reason for exclusive federal jurisdiction over the Clayton Act was the "uniquely" federal nature of the antitrust laws, given that this body of law was enacted for "the protection of *competition*, not *competitors*.'"135 The court believed that courts could not restrict jurisdiction over civil RICO claims to the federal courts based on an analogy to antitrust laws because RICO was not "a 'uniquely' Federal law in the same way as the antitrust laws."136 Instead, RICO's "evinced legislative intent [was] that the private right of action was designed to provide a legal remedy to individuals wronged by racketeering activity."137

The New York Court of Appeals also compared RICO's private right of action, enforcement and venue provisions to similar provisions of other federal statutes to weaken the Clayton Act/RICO jurisdictional analogy.¹³⁸ For example, the court stressed that "the private right of action created by Congress to enforce the antitying provisions of the Bank Holding Company Act contains virtually identical language to that of RICO found in 18 U.S.C. § 1964(c), was described as a 'valuable supplement' to the antitrust laws and yet it has been held that States can exercise concurrent jurisdiction over private actions to enforce it."¹³⁹

Most of the courts finding that Congress did not intend exclusive federal jurisdiction over civil RICO actions have based their determination on an application of *Sedima, S.P.R.L. v. Imrex Co.*¹⁴⁰ to the RICO jurisdictional issue.¹⁴¹ In *Sedima*, the Supreme Court

135. *Id.* at 457-58, 530 N.E.2d at 864, 534 N.Y.S.2d at 156 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)). The court questioned whether a clear rationale even existed for restricting jurisdiction to the federal courts for antitrust claims. *Id.*

136. *Id.*, 530 N.E.2d at 864, 534 N.Y.S.2d at 156.

137. *Id.* at 458, 530 N.E.2d at 864, 534 N.Y.S.2d at 156 (construing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487 (1985)).

138. *See id.* at 457-59, 530 N.E.2d at 863-65, 534 N.Y.S.2d at 155-57 (referring to judicial interpretations of the Labor Management Relations Act of 1947, the anti-tying provisions of the Bank Holding Company Act, and the Petroleum Marketing Practices Act).

139. *Id.* at 459, 530 N.E.2d at 864, 534 N.Y.S.2d at 157 (citations omitted).

140. 473 U.S. 479 (1985).

141. *See, e.g.,* *Lou v. Belzberg*, 834 F.2d 730, 737 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Brandenburg v. First Md. Sav. & Loan*, 660 F. Supp. 717, 732 (D. Md. 1987), *aff'd sub nom. Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988); *Karel v. Kroner*, 635 F. Supp. 725, 729-31 (N.D. Ill. 1986); *Simpson Elec.*, 72 N.Y.2d at 458, 530 N.E.2d at 864, 534 N.Y.S.2d at 156.

held that a plaintiff need not establish a "racketeering injury" in order to maintain a private treble damage suit under RICO.¹⁴² In arriving at its decision, the Court rejected the argument that the relationship between RICO and the antitrust laws necessarily warranted the application of antitrust standing principles to RICO claims.¹⁴³ The Court did not accept the Second Circuit's conclusion, based on an analogy between the Clayton Act and RICO, that "just as an antitrust plaintiff must allege an 'antitrust injury,' so a RICO plaintiff must allege a 'racketeering injury.'"¹⁴⁴ The Supreme Court rejected the appellate court's reasoning because of RICO's language and the express intent of Congress, as recorded in RICO's legislative history.¹⁴⁵

The Court found that "[t]here is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."¹⁴⁶ The Court interpreted RICO to require only the following:

Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), 'an activity which RICO was designed to deter.' Any recoverable damages

142. *Sedima*, 473 U.S. at 495. The Court also found no requirement that a private civil RICO action proceed only against one convicted of a predicate act or of a RICO violation. *Id.* at 493. In sum, the Court found that RICO's legislative history and statutory language, and considerations of policy did not support a prior conviction requirement. *See id.* at 488-93. In light of discretionary criminal prosecution and the accompanying criminal burden of proof, the Court noted the potential burdens that would be placed on RICO litigants if a prior conviction requirement existed. *See id.* at 490-93 & n.9.

143. *See id.* at 484-85, 487-88, 497-99.

144. *Id.* at 484-85. The Second Circuit determined that the plaintiff must show "'the kind of economic injury which has an effect on competition.'" *Id.* at 494 (quoting *Sedima, S.P.R.L. v. Imrex, Co.*, 741 F.2d 482, 496 (2d Cir. 1984)).

145. *Id.* at 495-99.

146. *Id.* at 495. RICO provides that if the defendant engages in a pattern of racketeering activity, defined pursuant to § 1961(1), in a manner prohibited by § 1962(a)-(c), and such activity injures the plaintiff in her business or property, then the plaintiff has a RICO claim under § 1964(c). *See id.*; 18 U.S.C. §§ 1961(1), 1962(a)-(c), 1964(c) (1982 & Supp. V 1987).

occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.¹⁴⁷

Consequently, the Court did not find it necessary to apply anti-trust standing principles to RICO claims.

Congress' mandate that RICO "be liberally construed to effectuate its remedial purposes" supported the Court's interpretation of RICO.¹⁴⁸ In fact, the Court noted that RICO's "remedial purposes" are most evident in section 1964(c).¹⁴⁹ Hence, a more restrictive reading of RICO's private right of action provision would effectively excise this section from RICO.¹⁵⁰ The Court also derived support for its holding from Congress' express refusal to add a RICO-like provision to the Sherman Act because it "could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'"¹⁵¹ The imposition of a "racketeering injury" requirement based on antitrust principles thus would create problems that Congress attempted to avoid.¹⁵²

The Court recognized, and to an extent shared, the appellate court's underlying concern about private civil litigants' use of RICO against "respected and legitimate 'enterprises,'" a divergence from RICO's original conception.¹⁵³ The Court, however, disagreed with the appellate court's belief that this divergence resulted from misconstructions of or ambiguities in section 1964(c).¹⁵⁴ Instead, the Court reasoned that RICO's unanticipated use may demonstrate its "breadth."¹⁵⁵ Alternatively, the fact that

147. *Sedima*, 473 U.S. at 497. A plaintiff must allege each required element of a § 1962(c) violation: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Id.* at 496.

148. *See id.* at 497-98 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)).

149. *Id.* at 498.

150. *See id.*

151. *Id.* (quoting *Report on S. 2048 and S. 2049*, 1968 A.B.A. SEC. ANTITRUST REP., reprinted in 115 CONG. REC. 6995 (1969)).

152. *Id.* at 498-99.

153. *Id.* at 499-500 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487 (2d Cir. 1984)).

154. *Id.*

155. *Id.*

plaintiffs are not bringing private civil actions against "the archetypal, intimidating mobster" as Congress intended may reflect an inherent defect in RICO.¹⁵⁶ The Court nevertheless said that "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications."¹⁵⁷ The Court concluded that the appellate court's attempt to redirect the present use of RICO toward its intended purpose via an "amorphous standing requirement" did not respond to these problems, nor was it a "form of statutory amendment appropriately undertaken by the courts."¹⁵⁸

Fleshing out the Supreme Court's reasoning, the Court of Appeals for the Ninth Circuit in *Lou v. Belzberg*¹⁵⁹ construed *Sedima* "as a recognition that Congress' mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." The court was not convinced that "the legislators must have known that Clayton Act jurisdiction was exclusively federal and that they intended the same exclusivity for RICO."¹⁶⁰

On the basis of *Sedima*, courts also reason that exclusive jurisdiction would hamper the remedial purpose of section 1964 and thus thwart Congress' mandate that RICO's provisions "be liberally construed to effectuate its remedial purposes."¹⁶¹ In essence, the courts hold, a determination of exclusive federal jurisdiction over civil RICO claims "would place an obstacle in the way [of] a private litigant who, for a variety of reasons, might prefer a State forum."¹⁶² Also, courts construe Congress' intent to remove obsta-

156. *Id.* The Court further noted that Congress and the courts' failure to develop a meaningful concept of "pattern" may contribute to the "extraordinary" present uses of RICO. *Id.* at 500.

157. *Id.* at 499-500.

158. *Id.* at 500.

159. 834 F.2d 730, 737 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

160. *Id.*

161. *Id.* (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970)); *accord* *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 458, 530 N.E.2d 860, 864, 534 N.Y.S.2d 152, 156 (1988) (citing *Sedima*, 473 U.S. at 494-95).

162. *Simpson Elec.*, 72 N.Y.2d at 458, 530 N.E.2d at 864, 534 N.Y.S.2d at 156; *accord* *Cianci v. Superior Court*, 40 Cal. 3d 903, 912, 710 P.2d 375, 379, 221 Cal. Rptr. 575, 579 (1985) ("private litigant . . . would be compelled to bring his RICO claim in federal court even if he preferred a state forum").

cles from the private RICO litigant as an admonition that courts not "read the obstacle of exclusive jurisdiction into section 1964(c) on the sole basis of its similarity to section 4 of the Clayton Act."¹⁶³

Arguments favoring exclusive federal jurisdiction

In *Chivas Products Limited v. Owen*,¹⁶⁴ the Court of Appeals for the Sixth Circuit offered the most thorough analysis of any court supporting the view that Congress intended exclusive federal jurisdiction over civil RICO claims.¹⁶⁵ A review of RICO's legislative history led the Sixth Circuit to believe that "considerable evidence" supported this view.¹⁶⁶ Specifically, the court relied on the legislative history regarding the role played by antitrust laws, particularly the Clayton Act, in the creation and drafting of RICO's provisions.¹⁶⁷

The Sixth Circuit's development of the Clayton Act/RICO jurisdictional analogy was straightforward. According to the court, the drafters of RICO "consciously borrowed the exact language of the Clayton Act in drafting the jurisdiction and venue sections for civil RICO."¹⁶⁸ The Clayton Act's "explicit" legislative history and the

163. *Cianci*, 40 Cal. 3d at 913, 710 P.2d at 379, 221 Cal. Rptr. at 579.

164. 864 F.2d 1280 (6th Cir. 1988).

165. See *id.* at 1283-86. Other courts base their conclusion that exclusive federal jurisdiction exists over civil RICO claims on a finding that an implied grant of exclusive federal jurisdiction by Congress rebuts the presumption of concurrent jurisdiction. See *Intel Corp. v. Hartford Accident & Indem. Co.*, 662 F. Supp. 1507, 1511-12 (N.D. Cal. 1987); *Spence v. Flynt*, 647 F. Supp. 1266, 1270 (D. Wyo. 1986); *Broadway v. San Antonio Shoe, Inc.*, 643 F. Supp. 584, 586 (S.D. Tex. 1986); *Massey v. City of Oklahoma City*, 643 F. Supp. 81, 84 (W.D. Okl. 1986); *County of Cook v. Midcon Corp.*, 574 F. Supp. 902, 911-12 (N.D. Ill. 1983), *aff'd on other grounds*, 773 F.2d 892 (7th Cir. 1985); *Levinson v. American Accident Reinsurance Group*, 503 A.2d 632, 634-35 (Del. Ch. 1985); *Maplewood Bank & Trust Co. v. Acorn, Inc.*, 207 N.J. Super. 590, 592-94, 504 A.2d 819, 820-21 (1985); *Greenview Trading Co. v. Hershman & Leicher, P.C.*, 108 A.D.2d 468, 470-71, 489 N.Y.S.2d 502, 504-05 (1985).

166. See *Chivas Prods.*, 864 F.2d at 1283. The dissent disagreed with the majority's finding that RICO's legislative history provided an "unmistakable implication" that exclusive federal jurisdiction existed over civil RICO claims. *Id.* at 1287 (Krupansky, J., dissenting).

The Sixth Circuit again held that federal courts exercise exclusive jurisdiction in *Morda v. Klein*, 865 F.2d 782 (6th Cir. 1989). The court decided *Morda* on the grounds of its decision in *Chivas Prods.* See *id.* at 784.

167. See *Chivas Prods.*, 864 F.2d at 1283-84.

168. *Id.* at 1283 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 486-88 (1985)). RICO's drafters, however, "consciously avoided placing the provisions of RICO within the

Supreme Court's repeated denial of concurrent jurisdiction over the Clayton Act indicated to the court that the Clayton Act "unmistakably provided for exclusively federal jurisdiction."¹⁶⁹ The "unmistakably clear evidence" that Congress closely patterned RICO's civil enforcement/jurisdictional provision, section 1964(c), on section 4 of the Clayton Act "strongly suggests" that exclusive federal jurisdiction over civil RICO claims was the "implicit legislative purpose,"¹⁷⁰ the court said.

Another argument supporting an implied grant of exclusive federal jurisdiction over civil RICO claims addresses RICO's "statu-

Sherman Act" *Id.* (citing *Sedima*, 473 U.S. at 498-99). The court compared verbatim the language of § 4 of the Clayton Act, 15 U.S.C. § 15(a), at the time Congress enacted RICO with the jurisdictional section of RICO, 18 U.S.C. § 1964(c), and noted that the "little nonidentical language [consisted] of necessary substitutions, simplifications, and trivial inversions" *Id.* Compare 15 U.S.C. § 15(a) (1982) with 18 U.S.C. § 1964(c) (1982 & Supp. V 1987). The American Bar Association suggested borrowing this Clayton Act language for RICO's civil enforcement and jurisdictional provision, and RICO's legislative sponsors supported the suggestion. *Chivas Prods.*, 864 F.2d at 1283 (citing *Sedima*, 473 U.S. at 486-88). In fact, Representative Poff, RICO's principal House sponsor, referenced RICO's treble damages provision as "'another example of the antitrust remedy being adapted for use against organized criminality.'" *Id.* at 1283-84 (quoting 116 CONG. REC. 35,295 (1970) (statement of Rep. Poff)).

169. *Chivas Prods.*, 864 F.2d at 1284 (citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81, 386-87 (1985); *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *General Inv. Co. v. Lake Shore & M.S. Ry.*, 260 U.S. 261, 287 (1922); 51 CONG. REC. 9662-64 (1914) (statement of Rep. Floyd)). The court stated that the Clayton Act's legislative history includes the rejection of a proposal for concurrent jurisdiction, *id.* (citing 51 CONG. REC. 9662-64 (1914) (statement of Rep. Floyd)), and reflects Congress' "actual intent . . . to follow the precedent of earlier lower federal court rulings that the Sherman Act, enacted in 1890, had called for exclusively federal jurisdiction." *Id.*

170. *Id.* at 1284, 1286. The court cited the Supreme Court's holding in *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987), and the Court's language in *Sedima*, 473 U.S. at 489, to demonstrate the judicial acknowledgement of a legislative intent to pattern RICO's civil provisions after the Clayton Act. *Chivas Prods.*, 864 F.2d at 1284.

The dissent observed that "there is no indication that Congress intended to impress civil RICO plaintiffs with all of the requirements for a Clayton Act action." *Id.* at 1288 (Krupansky, J., dissenting). Relying, in part, upon the Supreme Court's holding in *Sedima*, the dissent rejected the RICO/Clayton Act jurisdictional analogy. *Id.* The dissent interpreted the Court's holding in *Sedima* as a caution "against employing analogies to the Clayton Act that limit the scope or availability of RICO claims." *Id.* Further, the dissent stressed that the legislative history and other judicial interpretations of RICO supported the position that Congress intended RICO to be construed more liberally than the Clayton Act. *Id.* at 1288 & nn.3-4. The dissent thus concluded that the Clayton Act was inappropriate as a model for RICO jurisdiction given that the requirement of exclusive federal jurisdiction "would unduly limit the availability of RICO claims." *Id.* at 1289.

tory scheme." Courts favoring exclusive federal jurisdiction recognized an overall congressional intent to halt organized racketeering activities and identified indicia militating in favor of exclusive jurisdiction.¹⁷¹ The indicia included:

18 U.S.C. § 1961 (predicate acts defined in terms of substantive federal crimes); § 1963 (criminal prosecutions exclusively federal by unmistakable implication); § 1965 (extended venue and process provisions applicable only in federal courts); § 1966 (only United States Attorney empowered to act thereunder); § 1967 (limited to actions involving the United States); and § 1968 (only Attorney General may act thereunder).¹⁷²

Based on the indicia, a federal district court suggested the inappropriateness of "dissect[ing] a statutory scheme, select[ing] one narrow provision thereof, and determin[ing] that with respect to that one provision at least, congressional silence is the equivalent of an affirmative grant of jurisdiction to the states which creates substantive and remedial rights unknown in the common law."¹⁷³ In essence, the court suggested that bifurcating civil RICO from the exclusively federal provisions would not reflect a reasonable intent of Congress.¹⁷⁴

Despite their uniform reliance on the parameters of *Gulf Offshore Co. v. Mobil Oil Corp.*,¹⁷⁵ federal and state courts that have examined the propriety of concurrent jurisdiction over civil RICO claims have reached conflicting conclusions. Although reasoned analysis supports opposing findings for both the incompatibility and legislative intent factors in the *Gulf Offshore* test, only one interpretation can ultimately prevail. An examination of the jurisdictional issue from a procedural perspective reveals significantly more reason to determine that federal courts should have exclusive jurisdiction over civil RICO claims.

171. See, e.g., *Intel Corp. v. Hartford Accident & Indem. Co.*, 662 F. Supp. 1507, 1510-11 (N.D. Cal. 1987); *Spence v. Flynt*, 647 F. Supp. 1266, 1270 (D. Wyo. 1986); *Kinsey v. Nestor Exploration Ltd.*, 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985).

172. *Kinsey*, 604 F. Supp. at 1370.

173. *Id.* at 1370-71.

174. *Intel Corp.*, 662 F. Supp. at 1511.

175. 453 U.S. 473 (1981).

A PROCEDURAL PERSPECTIVE

When enacting RICO, Congress clearly intended an extensive and comprehensive approach to combatting organized crime.¹⁷⁶ Because then current state law did not afford an adequate approach for attacking this type of crime,¹⁷⁷ Congress created a federal plan to "supplement old remedies and develop new methods."¹⁷⁸ The legislature patterned the federal plan—RICO—closely after existing antitrust laws because of its belief that racketeers infiltrating legitimate businesses created unfair competition.¹⁷⁹ The language of section 1964(c) of RICO is nearly identical to section 4 of the Clayton Act,¹⁸⁰ which courts had long held to confer exclusive jurisdiction to the federal courts.¹⁸¹ Because we can infer that the drafters, legislative sponsors and Congress were aware of the federal courts' exclusive jurisdiction over the Clayton Act, we can reasonably assume they intended the same exclusivity for RICO.¹⁸²

Courts disagree, however, whether this "parental relationship" between the Clayton Act and RICO, particularly their respective remedial provisions, supports an "unmistakable implication" that Congress intended exclusive federal jurisdiction over civil RICO claims.¹⁸³ Courts that rejected the Clayton Act/RICO jurisdictional

176. See *supra* notes 9-11 and accompanying text.

177. See *id.*; 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987).

178. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985); see *supra* notes 9-11, 14-31 and accompanying text (legislative history supports the unique focus and nature of RICO).

179. See *supra* notes 14-31 and accompanying text.

180. Compare Clayton Act § 4, 15 U.S.C. § 15(a) (1982) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . .") with RICO, 18 U.S.C. § 1964(c) (1982) ("[A]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . .").

181. See, e.g., *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943).

182. See, e.g., *Albernaz v. United States*, 450 U.S. 333, 341 (1981) ("Congress is 'predominantly a lawyer's body' . . . and it is appropriate for us 'to assume that our elected representatives . . . know the law.'" (citations omitted)); *Levinson v. American Accident Reinsurance Group*, 503 A.2d 632, 635 (Del. Ch. 1985) ("[A]n accepted principle of statutory construction [is] that the legislature has constructive knowledge of judicial interpretations of existing statutes when drafting new legislation . . ."); see also *supra* notes 14-32 and accompanying text.

183. See *supra* text accompanying notes 131-41, 159-70. Pursuant to the test of implied exclusive federal jurisdiction in *Gulf Offshore Co. v. Mobil Oil Corp.*, the presumption of

analogy rely primarily on the Supreme Court's holding and rationale in *Sedima, S.P.R.L. v. Imrex Co.*¹⁸⁴ These courts claim that exclusive federal jurisdiction over civil RICO claims would place an "obstacle" in the civil RICO litigant's path and thus undermine Congress' mandate that RICO's provisions "be liberally construed to effectuate its remedial purposes."¹⁸⁵ These courts misplace their reliance on *Sedima*,¹⁸⁶ however, because the issues that the Supreme Court addressed there were substantive in nature, not procedural, and directly impacted the plaintiff's ability to bring a RICO claim. Rejecting a Clayton Act/RICO jurisdictional analogy because of "remedial obstacle" concerns is inappropriate precisely because jurisdiction is merely a procedural problem, not a "remedial" or substantive one. Jurisdiction does not implicate the substance of a plaintiff's claim.

The Supreme Court's holding and rationale in *Agency Holding Corp. v. Malley-Duff & Associates*,¹⁸⁷ concerning the application of the Clayton Act's statute of limitations—a procedural issue—to RICO, provides a more appropriate guide for either accepting or rejecting a Clayton Act/RICO jurisdictional analogy.

The Viability of a Clayton Act/RICO Analogy in a Procedural Context

In *Malley-Duff*, the Court held that the four-year statute of limitations applicable to Clayton Act civil enforcement actions also applied to RICO civil enforcement actions.¹⁸⁸ When the Court decided *Malley-Duff*, RICO did not provide a statute of limitations for civil actions brought under section 1964.¹⁸⁹ The Court, however, found a need for a uniform statute of limitations because a multiplicity of applicable state limitations periods presented dangers of

concurrent jurisdiction over federal claims may be rebutted by an "unmistakable implication from legislative history." 453 U.S. 473, 478 (1981).

184. 473 U.S. 479 (1985); see *supra* note 141 (courts that rejected the Clayton Act/RICO analogy on the basis of *Sedima*).

185. Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970).

186. *Sedima*, 473 U.S. at 479.

187. 483 U.S. 143 (1987).

188. *Id.* at 156.

189. *Id.* at 146; see 18 U.S.C. § 1964 (1982 & Supp. V 1987).

forum shopping and of complex, expensive and unnecessary litigation.¹⁹⁰

The Court first outlined the inquiry for determining which statute of limitations should govern a federal claim in the absence of statutory direction:¹⁹¹

[I]n determining the appropriate statute of limitations, the initial inquiry is whether all claims arising out of the federal statute "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case." Once this characterization is made, the next inquiry is whether a federal or state statute of limitations should be used. We have held that the Rules of Decision Act, 28 U.S.C. § 1652, requires application of state statutes of limitations unless "a timeliness rule drawn from elsewhere in federal law should be applied" In some limited circumstances . . . our characterization of a federal claim has led the Court to conclude that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law."¹⁹²

Lower courts uniformly referred to state statutes of limitations periods instead of a single federal statute of limitations period, but selected inconsistent statutes of limitations periods for civil RICO claims.¹⁹³ The Supreme Court attributed this inconsistency to the

190. *Malley-Duff*, 483 U.S. at 154. In essence, the lack of a uniform statute of limitations period created uncertainty and time-consuming litigation, which led to "real-world consequences to both plaintiffs and defendants in RICO actions." *Id.* at 150. The Court further noted that the "application of a uniform federal limitations period avoids the possibility of the application of unduly short state statutes of limitation that would thwart the legislative purpose of creating an effective remedy." *Id.* at 154.

191. *Id.* at 146-47.

192. *Id.* at 147 (quoting *Wilson v. Garcia*, 471 U.S. 261, 268 (1985), and *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159, 161 (1983)). In *DelCostello*, the Supreme Court noted that "when the federal policies at stake and the practicalities of litigation make that [statute of limitations period] a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." *DelCostello*, 462 U.S. at 172.

193. *Malley-Duff*, 483 U.S. at 148-49. For example, some courts applied the state limitations period most akin to the particular predicate offenses alleged in the plaintiff's RICO

"'numerous and diverse topics and subtopics'" encompassed in RICO's definition of "racketeering activity" and the fact that the common law did not encompass key concepts of RICO, such as "enterprise" and "pattern of racketeering activity" when Congress enacted RICO.¹⁹⁴ In fact, the Court determined that "there is no comparable single state law analogue to RICO."¹⁹⁵ To support this conclusion, the Court stated first that RICO's pivotal predicate acts "are far ranging, and . . . cannot be reduced to a single generic characterization."¹⁹⁶ Second, the Court described RICO claims as possessing a multistate nature: RICO cases commonly involve interstate transactions; thus the predicate acts often occur in several states.¹⁹⁷ Hence, several states' statutes of limitations conceivably could govern any particular RICO claim.¹⁹⁸

The problems of inconsistent limitations periods applied to civil RICO claims and the lack of any viable state law analog to RICO convinced the Court of the necessity for a federal statute of limitations.¹⁹⁹ In determining an appropriate statute of limitations, the Court reasoned that "the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations for Clayton Act actions the most appropriate limitations period for RICO actions."²⁰⁰ The Court based this conclusion on two considerations.

First, the legislature clearly patterned the civil action provision of RICO on the Clayton Act, as demonstrated by RICO's legisla-

claim. *Id.* at 148 (citing *Silverberg v. Thomson McKinnon Sec., Inc.*, 787 F.2d 1079 (6th Cir. 1986); *Burns v. Ersek*, 591 F. Supp. 837 (Minn. 1984)). Other courts created a uniform statute of limitations period for all civil RICO actions brought within a given state's jurisdiction. *Id.* at 148-49 (citing *Tellis v. United States Fidelity & Guar. Co.*, 805 F.2d 741 (7th Cir. 1986); *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984); *Teltronics Servs., Inc. v. Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984)).

194. See *Malley-Duff*, 483 U.S. at 149-50; see also 18 U.S.C. 1961(1) (1982 & Supp. V 1987) (definition of "racketeering activity" includes nine state law felonies and violations of more than 25 federal statutes).

195. *Malley-Duff*, 483 U.S. at 152.

196. *Id.*

197. *Id.* at 153-54. "Indeed, some nexus to interstate or foreign commerce is required as a jurisdictional element of a civil RICO claim, 18 U.S.C. §§ 1962(b) and (c), and the heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Id.*

198. *Id.*

199. See *id.* at 146-53.

200. *Id.* at 156 (citation omitted).

tive history and a comparison of the wording of each act's relevant civil action provision.²⁰¹ Second, the federal statutes shared many underlying purposes:

Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.²⁰²

In essence, the Court acknowledged the unambiguous parental relationship between RICO and the Clayton Act, and held that this relationship supported a procedural analogy between the acts.

The Propriety of a Clayton Act/RICO Analogy Regarding Jurisdiction

The principles enunciated in both *Sedima* and *Malley-Duff* are of equal and compatible importance. In *Sedima*, the Supreme Court removed a substantive "remedial obstacle" from the civil RICO litigant's path and thus supported Congress' admonition that RICO "be liberally construed to effectuate its remedial purposes."²⁰³ The Court's treatment of the substantive requirements of RICO, however, does not necessarily indicate a fear of any conceivable impediment to the civil RICO litigant. In fact, *Malley-Duff* reflects the Court's readiness to impede a RICO claimant's right to bring her claim in order to minimize RICO's inconsistent application.²⁰⁴

201. *Id.* at 150-55; see *supra* notes 14-31 and accompanying text. "The close similarity of the two provisions is no accident. The 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.'" *Malley-Duff*, 483 U.S. at 151 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985)).

202. *Malley-Duff*, 483 U.S. at 151.

203. See *Sedima*, 473 U.S. at 497-99.

204. Some state statutes of limitations afforded litigants a period longer than four years during which to file RICO claims. For example, the Third Circuit held that "Pennsylvania's 'catchall' 6-year residual statute of limitations was the appropriate statute of limitations for

Malley-Duff supports the viability of a Clayton Act/RICO jurisdictional analogy for two reasons. First, the Court has accepted a Clayton Act/RICO analogy within a procedural context, based primarily on "the similarities in purpose and structure between [the statutes and] the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act."²⁰⁵ Second, the Court's concern with a uniform statute of limitations for RICO actions arguably extends to the view that courts should uniformly interpret the statute as well to maintain RICO's federal scheme.²⁰⁶ Uniformity is an unrealistic goal if concurrent jurisdiction exists because state courts' adjudication of RICO claims increases the number of inconsistent interpretations of RICO.

Notably, reliance on *Sedima* does not undermine a Clayton Act/RICO jurisdictional analogy. Exclusive federal jurisdiction over private civil RICO claims does not create the type of substantive "remedial obstacle" to the plaintiff's claim forbidden by the Court's analysis in *Sedima*. A plaintiff's inability to bring her RICO claim in state court does not go to the "heart" of Congress' mandate that RICO "be liberally construed to effectuate its remedial purposes." The requirement of exclusive jurisdiction in no way thwarts a plaintiff in the same manner as would the imposition of an additional standing requirement or a greater burden of proof.²⁰⁷ A plaintiff is simply restricted to a particular "well-equipped" forum.

CONCLUSION

The Clayton Act provides for exclusive federal jurisdiction for civil claims. Courts should imply the same provision for civil RICO claims. The Supreme Court's rulings regarding substantive and

all RICO claims arising in Pennsylvania." *Malley-Duff*, 483 U.S. at 146 (citing *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F.2d 341 (3d Cir. 1986)).

205. *Id.* at 150-52.

206. *See id.* at 148-50, 153-54.

207. One civil RICO practitioner and commentator suggested that a plaintiff may wish to bring a RICO claim in state court due to the plaintiff counsel's familiarity with the court and the widely held belief that state courts are reluctant to dismiss the claim prior to trial. Hence, a private civil RICO litigant's choice of forum may reflect a strategy decision regarding the selection of a particular forum, rather than any objective assessment of whether a RICO claim may be asserted. Bond & Holmes, *supra* note 3.

procedural analogies between the Clayton Act and RICO support a viable jurisdictional analogy between these acts. A "procedural perspective" of RICO highlights the inappropriateness of rejecting a Clayton Act/RICO jurisdictional analogy based on the Court's ruling regarding the substantive standing issue in *Sedima, S.P.R.L. v. Imrex Co.*²⁰⁸ The Court's ruling and rationale in *Agency Holding Corp. v. Malley-Duff & Associates*²⁰⁹ offers instead the more appropriate reference to the viability of a Clayton Act/RICO analogy within a procedural context. Although the closing of state courts' doors will decrease the choice of fora open to a civil litigant, the resulting diminished possibility of inconsistent interpretations of complex RICO provisions will ensure the statute's integrity as a comprehensive federal scheme to combat racketeering activity.

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208. 473 U.S. 479 (1985).

209. 483 U.S. 143 (1987).