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NOTES

CIVIL RICO AND PARENS PATRIAEE: LOWERING LITIGATION BARRIERS THROUGH STATE INTERVENTION

The Racketeer Influenced and Corrupt Organizations Act (RICO) is a criminal and civil statute designed to rid the economy of organized crime or any corrupt practice. RICO prohibits the use of racketeering-derived funds to invest in, control, or operate an "enterprise." The statute defines racketeering as a series of already unlawful acts commonly committed by organized criminals to which the criminal or civil sanctions of RICO apply.


4. Id. § 1962(a).

5. Id. § 1962(b).

6. Id. § 1962(c).


Recently, the United States Court of Appeals for the Eleventh Circuit held that a corporation could be both a defendant and the enterprise. United States v. Hartley, 678 F.2d 961 (11th Cir. 1982).

8. 18 U.S.C. § 1961(1) defines racketeering activity as any serious state felony, or violations of federal bribery, counterfeiting, interstate theft, embezzlement, extortion, gambling,
RICO's criminal sanctions include fines, imprisonment, and criminal forfeiture of all interests in the enterprise. Although these criminal sanctions are the focus of most RICO prosecutions, Congress intended that RICO's civil sanctions be the statute's central thrust. These civil sanctions include structural remedies such as divestiture, injunctions, dissolutions, and reorganizations. More importantly, RICO provides a private treble damage remedy for those injured in their business or property by racketeering activities. A private person can use this remedy for mail or wire fraud, securities fraud, obstruction of justice, or narcotics statutes. 18 U.S.C. § 1961(1) (1976). See also Strafer, Massumi & Skolnick, Civil RICO in the Public Interest: "Everybody's Darling", 19 AM. CRIM. L. REV. 655, 656-57 (1982).

Because racketeering activities are specifically defined state and federal offenses, RICO does not create new offenses. Rather, it creates new remedies to deal with existing offenses.


10. Since 1970, only 50 civil RICO cases have been brought. None of these actions dealt with organized crime figures. During the same period, hundreds of criminal RICO cases have been litigated successfully. See infra notes 35 & 46.

11. RICO's central purpose is economic and remedial, not punitive. RICO's "Statement of Findings and Purpose" states that:

(1) Organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct.

Organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens.


13. Id. § 1964(c). Controversy exists as to whether a private person may sue for structural injunctive relief, such as dissolution, under § 1964. Some cases and commentators believe that RICO does not allow private persons to sue in equity to prevent or restrain a § 1962 violation through the structural sanctions in § 1964(a). The statute only permits individuals to sue for treble damages. See Kaushal v. State Bank of India, No. 82 C 7414 (N.D. Ill. Feb. 2, 1983)(available on LEXIS); McKeon, The Incursion by Organized Crime into Legitimate Business, 20 J. PUBL. L. 117, 132 (1971). For a discussion of private divestiture suits in antitrust, see Comment, Private Divestiture: Antitrust's Latest Problem Child, 41 FORDHAM
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edy independently or in conjunction with any government civil action.\(^{14}\)

RICO arose from Congress' deep concern over organized crime's infiltration into the economy.\(^{15}\) Many courts and commentators, however, interpret the statute broadly, and use RICO to combat any form of sustained corrupt practice that significantly damages a business or threatens the economy.\(^{16}\) These practices include various white collar crimes and government corruption,\(^{17}\) securities

L. Rev. 569 (1973). This interpretation seems correct if § 1964 is read literally. Section 1964(a) grants the federal district courts jurisdiction to try civil RICO cases. Section 1964(b) gives the Attorney General standing to sue for structural relief, and § 1964(c) gives a private individual standing to sue for treble damages. This interpretation also prevents businessmen from using divestiture suits for harassment of competitors. See Note, Enforcing Criminal Laws through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970), 53 Tex. L. Rev. 1055, 1059 n.34 (1975).

Other commentators believe that § 1964 gives a private citizen the right to sue for both structural and remedial relief. Blakey & Gettings, supra note 7, at 1038 n.133. "A congressional grant of the right to sue in absence of statutory limitations, conveys the availability of all necessary and appropriate relief." Id. (emphasis added). This interpretation follows the general rule that courts interpret remedial statutes broadly. See E. Crawford, Statutory Construction §§ 243, 251 (1940). Additionally, the treble damage clause is preceded by the expansive word "and," not "to," suggesting a broader interpretation. 18 U.S.C. § 1964(c) (1976). See Blakey & Gettings, supra note 7, at 1038 n.133. See also Strafer, Massumi & Skolnick, supra note 8, at 709-15.


14. 18 U.S.C. § 1964(a) (1976) confers jurisdiction on the federal district courts to hear civil RICO actions. A court can join a government and a private action under Fed. R. Civ. P 20 if the claims relate to the same occurrence and present common questions of law or fact. 15. See supra note 1.


17. McClellan, supra note 1, at 55. White collar crime is very similar to organized crime both in methods and economic effects. See White Collar Crime Symposium, 17 Am. Crim. L. Rev. 271 (1980). Because RICO prohibits conduct, not status, United States v. Forsythe, 560 F.2d 1127, 1136 (3d Cir. 1977); 166 Cong. Rec. 35,343 (1970), and its civil remedies should be interpreted broadly, 18 U.S.C. § 1964 (1976); E. Crawford, Statutory Construction § 251 (1940), RICO should apply to serious white collar offenses. Indeed, because of the fear of reprisal when suing organized crime, most civil RICO cases have involved white collar crimes. See Strafer, Massumi & Skolnick, supra note 8, at 662 nn.54-57.
fraud, mail and wire fraud, and tax fraud.

This Note will critique RICO's central premise and discuss how RICO fails to deal effectively with three major problems most private plaintiffs face when initiating a civil RICO action: fear of reprisal, proof of causation, and establishing standing by proof of injury. The Note then will suggest that Congress reform RICO by providing for a state parens patriae action. Because a state action for treble damages brought on injured citizens' behalf aggregates claims while affording protection, a parens patriae action would lessen a plaintiff's fear of reprisals and eliminate his burdens of proving causation and injury.

Civil RICO

Under section 1962, RICO forbids persons from controlling or conspiring to control any enterprise through one of three possible racketeering activities. Section 1962(a) prohibits investment in legitimate businesses of income derived from corrupt practices.

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19. Note, supra note 18; Comment, supra note 18, at 938-43.


23. Id. § 1962(a).

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assuring another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the
Subsection (b) prohibits obtaining interests in businesses through corrupt practices, and subsection (c) prohibits conducting enterprise affairs through corrupt practices.

RICO’s civil sanctions, contained in section 1964, also are divided into three parts. Subsection (a) grants the federal courts equitable jurisdiction to prevent or restrain RICO violations, as well as express powers of divestiture, dissolution, and reorganization. Subsection (b) provides for a government civil RICO action, and

members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Id.

24. Id. § 1962(b).

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

Id.

25. Id. § 1962(c).

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

Id.

26. Id. § 1964(a).

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Id.

27. Id. § 1964(b).

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

Id.
subsection (c) authorizes a private civil RICO action for those injured in their business or property because of a section 1962 violation.\textsuperscript{28} Subsection (d) states that a criminal RICO conviction estops the defendant from relitigating issues raised in the criminal trial in any subsequent government civil RICO proceeding.\textsuperscript{29}

\textit{Economics: RICO's Answer to Organized Crime}

Congress premised RICO on economic deterrence, believing that organized crime would be deterred if the government or private persons had the statutory right to divest the wrongdoer of any profits. Congress hoped that RICO's remedies would put economic pressure on racketeers while punishing their criminal behavior.\textsuperscript{30} Congress defined racketeering broadly to include bribery, counterfeiting, mail and wire fraud, and extortion,\textsuperscript{31} because organized crime used these methods to infiltrate and corrupt businesses. RICO's author, the late Senator McClellan, underscored RICO's economic purpose when he wrote that "it would be pointless surplusage for [RICO] to cover crimes which are not adapted to commercial exploitation."\textsuperscript{32}

The assumption that economic pressure deters organized crime motivated Congress to pattern RICO's civil remedies after the antitrust laws which also are based on economic deterrence. Antitrust laws protect competition by removing profit incentives for monopolization and unfair trade practices.\textsuperscript{33} Congress believed that the antitrust laws addressed a problem similar to that of organized

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} § 1964(c). "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 the suit, including a reasonable attorney's fee." \textit{Id}.
\item \textsuperscript{29} \textit{Id.} § 1964(d). "A final judgment of decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States." \textit{Id}.
\item \textsuperscript{30} Zuckerman & Hunterton, \textit{supra} note 20, at 215.
\item \textsuperscript{32} McClellan, \textit{supra} note 1, at 161-62.
\item \textsuperscript{33} "The value of private treble damage and equitable suits has been amply demonstrated in the antitrust field, where they have been extremely effective in preventing and rectifying economic harm to individuals and companies, and in furthering the public purpose of preventing improper commercial practices." 116 \textit{Cong. Rec.} 35,227 (1970). \textit{See also} S. \textit{Rep.} No. 617, \textit{supra} note 1, at 121.
\end{itemize}
crime—how to maintain fair and open economic competition. Congress therefore assumed that the antitrust methods, especially the treble damage provision, would be effective in deterring organized crime from infiltrating businesses.\(^3^4\)

Unfortunately, civil RICO has not been as effective as anticipated. Of the hundreds of RICO cases litigated since 1970, few are private treble damage suits.\(^3^5\) Various reasons exist for civil RICO's dormancy. One reason is the civil bar's confusion over RICO. Lawyers do not understand the statute's joint criminal and civil nature. They do not know when the civil standards apply, how to use the civil remedies, and to what activities RICO extends.\(^3^6\) Finally, many lawyers are unaware that RICO even exists.

The primary reason for RICO's ineffectiveness is because Congress' basic assumption, that organized crime can be deterred from infiltrating businesses if the profit motive is stripped away, is questionable.\(^3^7\) Although racketeers undoubtedly pursue their trade for

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34. S. REP. No. 617, supra note 1, at 81. See also Long, supra note 18, at 209. The analogy between civil RICO and the antitrust laws breaks down when one goes beyond the economic context and examines the policies behind the two statutory schemes. Congress designed the antitrust treble damage provision to regulate competition. Blakey & Gettings, supra note 7, at 1016, n.29. The provision must be construed strictly to increase competition while eliminating unfair trade practices. If a court freely awarded treble damages against enterprises engaged in unfair trade practices, those enterprises conceivably could be ruined, decreasing competition and defeating the law's purpose which is to increase competition. Id. at 1042; Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 YALE L.J. 809, 852 (1977).

In contrast, Congress designed civil RICO to eliminate racketeering in business and to compensate victims of that racketeering, Blakey & Gettings, supra note 7, at 1042, although the statute's indirect effect may be to regulate competition. If a court freely awarded treble damages under civil RICO, and as a result, a business controlled by racketeering declared bankruptcy, RICO's general purpose would be furthered. Id. Thus, although the antitrust methods are effective in the racketeering context, antitrust's narrow interpretative standards, such as the standing requirement, are inappropriate to RICO's purpose and should not be followed. See infra text accompanying notes 81-110.

35. Less than 50 civil RICO suits were reported from 1970 to 1982. Strafer, Massumi & Skolnick, supra note 8, at 662 n.54. For a listing of these cases, see id. at 662 nn.54-57; Long, supra note 18, at 206 n.32. Many of these reported actions were dismissed as inappropriate. See infra note 110. Currently, numerous civil RICO actions are pending. See Sylvester, Civil RICO's New Punch, NAT'L L.J. 1 (Feb. 7, 1983).

36. Nathan, supra note 21, at 28. For a discussion on whether civil or criminal standards should apply to § 1964, see Note, supra note 13, at 1059-64. See ABA Section of Criminal Justice Report on RICO (Jan. 1982)(recommendations on reform of RICO).

37. Most lawyers, however, accept this underlying assumption. One commentator stated:

Organized crime is an economic phenomenon. It exists not for anything
power and profit, other motives exist. Racketeers also use legitimate businesses to gain respectability in the community, to launder "dirty" money, to legalize their activities, and to avoid tax prosecution. Thus, eliminating the profit will not necessarily eliminate these other motivations.

Even if Congress' assumption is correct, however, RICO, in its current form, will not deter racketeers. Racketeers operate by terror and corruption. These means, by which organized crime infiltrates the economy, are the real problems that RICO should address. Furthermore, the "bosses" are well insulated from any kind of prosecution. Finally, persons attempting to sue racketeers face enormous problems in proving that racketeering caused economic harm and injured the plaintiff. Civil RICO's real challenge now is not to eliminate a racketeer's profit motive, but to assist a plaintiff in overcoming these impediments to suit.

DIFFICULTIES ENCOUNTERED IN BRINGING A RICO CIVIL SUIT

The Fear of Reprisals

To recover treble damages in a civil RICO suit, the plaintiff must prove the following elements: the defendant engaged in racketeering; the defendant invested the racketeering returns in a business or entity with the intent to control such business or entity through the investment; and the plaintiff was injured due to the defendant's activity. Few people will sue a racketeer, however,
because organized crime "relies on physical terror and psychological intimidation, on economic retaliation and political bribery to terrorize its victims into silence." Organized crime maintains its "legitimate" businesses and organizations through terror by arranging for the torture, maiming, and killing of untrustworthy members, potential competitors, witnesses, and prosecutors. Because of these threats, victims of organized crime are afraid to inform police of their suspicions or evidence of infiltration attempts, much less institute their own suits.

Despite organized crime's regimen of terror, Congress believed that RICO's civil treble damage remedy, which offered both a lesser proof standard than criminal actions and a monetary incentive, would overcome plaintiffs' fear of reprisals. The treble damage provision, however, has not overcome that fear. Because suits are lengthy, inflation lessens any monetary gain. Moreover, even if treble damages create some incentive to sue, few plaintiffs are willing to risk their lives for the uncertain monetary gain. The government does not have the resources to protect all potential plaintiffs, witnesses, and informants. The lack of cases vividly illustrates civil RICO's ineffectiveness: no private person has brought a civil RICO suit against an organized crime figure. Thus, RICO has failed to overcome fear, the initial and most significant obstacle to fighting organized crime in the courts.


Recently, organized crime's tactics again were illustrated during the government's probe into Labor Secretary Donovan's alleged ties to organized crime. An important witness, Fred Furmo, was killed shortly before he was to testify. The government suspects that racketeers murdered him. Darkening Clouds over Donovan, Time Magazine June 28, 1982 at 44.
The Problem of Causation

If a plaintiff risks a treble damage suit against a racketeer, he must prove both that the defendant engaged in a pattern of racketeering and that the defendant used those racketeering activities to invest in or control an enterprise.\(^{47}\) Proving a pattern of racketeering is relatively easy. A pattern is at least two acts occurring within ten years of each other after 1970, RICO’s effective date.\(^{48}\) These racketeering acts must be interrelated, “connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts.”\(^ {49}\) For example, two letters sent through the mail as part of one fraudulent scheme constitutes racketeering activity.

Proving the causative link between the racketeering activity and the infiltrated enterprise is the plaintiff’s central proof problem in a RICO action. The plaintiff must prove that the defendant infiltrated or controlled the enterprise through the racketeering, and that the infiltration injured the plaintiff.\(^{50}\) Gathering sufficient evidence against a racketeer to prove these elements of a RICO violation is almost impossible. Organized crime threatens potential plaintiffs as well as informants. Few individuals, therefore, become

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47. 18 U.S.C. § 1962 (1976). The plaintiff must allege also that the enterprise affected interstate commerce. Id.


Section 3575 of the OCCA, enacted at the same time as RICO, defined a pattern of criminal conduct as embracing criminal acts “that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” 18 U.S.C. § 3575 (1976).

informants. Street workers never are told their "boss" identity. Racketeers force workers to remain loyal through a "code of non-disclosure" and through furnishing money and food for the workers' families. The racketeers use this secrecy and terror to insulate themselves from prosecution. In this context, disclosure understandably is considered suicidal. Those who do inform must request anonymity and protection by the government.

At trial, the plaintiff must produce witnesses to establish the racketeer's infiltration. Securing witnesses is at least as difficult as gathering evidence. Moreover, even if the plaintiff secures witnesses, racketeers often will try to bribe or threaten the witnesses, the judge, and the jurors. Like informers, these people must be protected from retaliation.

The plaintiff faces further problems in proving causation between the racketeering activity and the enterprise depending on whether he sues under section 1962(a), (b), or (c). A plaintiff will sue under subsection (a) or (b) if an outsider attempts to take over the enterprise through racketeering. In contrast, a plaintiff will sue under subsection (c) if persons within the enterprise operate it through racketeering.

To recover under subsection (a) for an attempted takeover of an enterprise, a plaintiff must prove that racketeering money was invested either directly or indirectly in the enterprise. This requires the plaintiff to trace the money from the racketeering to the investment. Because racketeers can launder money easily, and

51. President's Report, supra note 1, at 462.
52. Id.
54. President's Report, supra note 1, at 463. Reprisals also occur in non-organized crime contexts. Congress recently passed legislation to compensate for and protect against these reprisals. See, e.g., 18 U.S.C. §§ 1512-1515 (dealing with retaliation and tampering with witnesses, victims or informers); id. §§ 3521-3524 (dealing with witness protection and relocation); id. § 3579 (granting restitution to crime victims).
55. For an excellent analysis of the proof necessary under civil RICO, see Long, supra note 18, at 228-33.
58. Long, supra note 18, at 229. One case interpreted § 1962(a) to allow evidence showing that either the racketeering income or its proceeds "allowed or facilitated" the defendant's takeover of plaintiff's business. United States v. McNary, 620 F.2d 621, 628-29 (7th Cir.
because organized crime insulates its activities by not keeping records and by holding anonymous bank accounts, direct tracing is very difficult. The plaintiff, therefore, may have little or weak evidence to prove causation. The nearly insurmountable evidence-collecting difficulties render section 1962(a) almost unusable.

In contrast, a plaintiff who brings an action under subsection (b) for an attempted takeover must prove only that racketeering acts were used to acquire or control an enterprise. Because subsection (b) does not require tracing, the plaintiff may have less difficulty obtaining evidence and therefore less difficulty proving causation.

The proof required in subsection (c), which prohibits operating an enterprise through racketeering, appears easiest to obtain because the plaintiff does not need to look outside the enterprise. A plaintiff must show only that a defendant employee or associate conducted an enterprise's affairs through racketeering. The courts, however, are split as to what type of relationship is required under subsection (c) between the racketeering activity and the enterprise such that the enterprise is considered conducted through racketeering.

1980).

60. President's Report, supra note 1, at 463.
63. Id. § 1962(c). The person infiltrating the enterprise must be distinct from the enterprise itself. Van Schaack v. Church of Scientology of Cal., Inc., 535 F Supp. 1125, 1136 (D. Mass. 1982).
64. Most courts liberally construe this connection and uphold any claim that alleges some infiltration. See infra text accompanying note 69. Some courts are stricter and require that the enterprise's essential functions be controlled by racketeering. See infra notes 65-68 and accompanying text. A minority of courts avoid the connection requirement altogether by construing RICO to apply exclusively to organized crime. See supra note 16. If a plaintiff alleges that the defendant is involved in organized crime, he alleges injury per se. The plaintiff does not need to prove the link between the illegal acts and the enterprise. The court in Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975), reached this conclusion, asserting that RICO's purpose and legislative history illustrated Congress' concern over organized crime. Id. at 113. Two other courts recently adopted this view. See Waterman Steamship Corp. v. Avondale Shipyards, 527 F Supp. 256 (E.D. La. 1981) (the statute's history reveals a clearly expressed intent that RICO should apply only to actions involving organized crime activities); Adair v. Hunt Int'l Resources Corp., 526 F Supp. 736 (N.D. Ill. 1981) (although
In *United States v. Ladmer*, for example, a civil RICO case concerning alleged illegal practices within a union, the United States District Court for the Eastern District of New York required that the racketeering activity be related to the enterprise's essential functions. The court reached this conclusion by examining RICO's remedies. Because RICO allows extreme remedies such as forfeiture, dissolution, reorganization, and treble damages, the court reasoned that the statute must be concerned only with an enterprise's essential activities rather than small irregularities committed in the course of otherwise lawful conduct. In *Ladmer*, the court therefore concluded that a RICO suit was inappropriate, because the alleged activity occurred only twice, and did not seem to have a significant relation to the rest of the union's conduct.

Most courts do not follow *Ladmer*, but instead interpret liberally the connection required between the racketeering and the enterprise. These courts state that racketeering must have some relation to the enterprise's activities, but it need not be connected criminal sanctions may be broadly applied, civil RICO is limited to suits against organized crime).

directly with the enterprise’s essential functions. This liberal approach is preferable to the approach in *Ladmer* because racketeers often use enterprises as fronts for unrelated illegal activities or, as in most white collar crime, the illegal activities drain the company of profits from its principal lawful activities.

The courts have formulated so many different standards that a potential plaintiff easily becomes confused as to the type of connection section 1962(c) requires. For example, the United States District Court for the Southern District of New York stated that the racketeering did not have to be part of the enterprise’s day-to-day operations,70 whereas the United States District Court for the Eastern District of Pennsylvania implied that the racketeering activity must further the enterprise’s purpose.71 Finally, the United States District Court for the District of Massachusetts implied that a sufficient connection existed only if an enterprise’s principals engaged in the racketeering, and the predicate offenses were related to the activities of the enterprise.72

Congress should define the connection required by section 1962(c) through statutory illustration, by giving the plaintiff concrete examples of the necessary relationship between racketeering and the enterprise. Congress already has defined some of RICO’s provisions by illustration.73 For example, section 1961’s definition of a person “includes any individual or entity capable of holding a legal or beneficial interest in property.”74 Some courts also have adopted the illustrative approach to defining particular requirements under RICO. In *United States v. Stofsky*75 and *United States v. Field*,76 the United States District Court for the Southern

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70. 461 F Supp. at 785-86.
74. Id. § 1961(3). Section 1961 also defines enterprise by illustration: “‘[E]nterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4) (1976). Significantly, the definition uses the word “includes,” a term of enlargement, not of limitation. Id. See Blakey & Gettings, supra note 7, at 1025.
District of New York used this approach. The court in *Field* stated that the defendants must perform the unlawful acts in the conduct of the enterprise's affairs, but the acts need not further the enterprise's interests, nor must they be authorized by the enterprise's principal agents. The court in *Stofsky* held that section 1962(c) required no particular relationship and illustrated various relationships satisfying the statute's requirements.

Plaintiffs and courts may find the illustrative approach less confusing and easier to apply than variants of the essential function test. Unfortunately, the illustrations could be read as limitations rather than as examples. The illustrations therefore should not be considered exclusive, but merely indicative of the types of relationships and connections triggering section 1962(c) coverage.

The Problem of Establishing Injury: Standing

Section 1964(c) allows anyone "injured in his business or property by reason of a violation of section 1962" to sue for treble damages. The section's wording is clear and broad, but some courts interpret the term "injured" narrowly to prevent plaintiffs from recovering under RICO for state offenses and common law frauds. Restricting the type of injury required under RICO limits a plain-

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77. 432 F Supp. at 58.
79. The recent decision of the United States Court of Appeals for the Eleventh Circuit in United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), may ease RICO's causation difficulties. In *Hartley*, the court held that when a corporation conspires with its employees to engage in corrupt acts for a common purpose, in this case to defraud the military, the corporation can be both the defendant and the enterprise. If the defendant and the enterprise are the same, the plaintiff establishes the relationship between the defendant's acts and the enterprise almost by definition. The plaintiff then must prove only how the defendant corrupted the enterprise. Thus, the plaintiff's causation burden is lessened significantly.
tiff’s standing to bring a treble damage action. Civil RICO’s purpose, however, is broad and remedial, and a restrictive standing requirement frustrates this purpose. More importantly, a restrictive standing requirement prevents otherwise willing plaintiffs from instituting treble damage suits.

The courts that restrictively interpret RICO’s injury requirement find support in antitrust decisions that limit application of the Clayton Act’s treble damage provision. A private antitrust plaintiff has standing to sue only if he suffers competitive injury. Because Congress modeled RICO’s treble damage provision after the treble damage provision in the Clayton Act, a court deciding a civil RICO case appears justified in similarly restricting RICO’s treble damage provision.

For example, in North Barrington Development Inc. v. Fanslow the United States District Court for the Northern District of Illinois analogized RICO to the antitrust laws and limited civil RICO suits to plaintiffs who alleged competitive injuries. Fanslow involved an alleged fraud in a real estate development contract. The court noted that because RICO’s purpose was to prevent interference with free competition, only indirect victims who must compete with enterprises engaged in racketeering have standing to sue for treble damages under section 1964(c). Otherwise, the court noted, every bad faith contract breach or common law fraud with a connection to interstate commerce would be transformed into a RICO suit.

The court in Fanslow had a legitimate concern because the plaintiff attempted to receive treble damages for a mere breach of contract, which alone is not a RICO violation. The court thus en-

82. Pub. L. No. 91-452 § 904, 84 Stat. 947 (1970) stated that “[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes.”
85. 547 F Supp. 207 (1980).
86. Id. at 211. For a variation on the competitive injury requirement, see Van Schaick v. Church of Scientology of Cal., Inc., 535 F Supp. 1125 (D. Mass. 1982), where the court concluded that § 1964(c) required plaintiffs to show commercial injury. Although such a requirement is broader than a competitive injury requirement in application, id. at 1136-37, it is not as broad as racketeering injury. See infra notes 87-97 and accompanying text. For a criticism of Van Schaick, see Strafer, Massumi & Skolnick, supra note 8, at 705-06.
sured that RICO did not engulf areas traditionally reserved to the states. In Fanslow, however, the court unnecessarily restricted private civil RICO actions by relying too heavily on judicially imposed limitations on the antitrust laws. RICO's goals are very different than those promoted by the antitrust laws. Congress designed antitrust laws primarily to increase competition, not to compensate victims. In contrast, RICO focuses on compensating victims and preventing corrupt practices within a business. Liberalized standing requirements under RICO would permit additional suits and presumably would reduce corruption in business and deter racketeers from infiltrating legitimate businesses. RICO's primary purpose is not to increase competition, although the statute may do so indirectly. Limiting standing to indirect victims bars suits by plaintiffs whose businesses are ruined directly through extortion, stock takeover, forced bankruptcies, or scams—offenses that Congress specifically prohibited under section 1962(b). A broader standing requirement therefore furthers RICO's underlying policies.

Courts interpreting RICO's standing requirement broadly argue that the statute's remedial purpose dictates unrestricted standing. The United States District Court for the Northern District of Ohio asserted this view in a securities fraud case, Hanna Mining Co. v. Norcen Energy Resources, Ltd. The court in Hanna rejected the argument that it should interpret civil RICO as narrowly

87. For an argument that, absent explicit congressional curtailment, RICO should be interpreted as broadly as possible and include common law frauds, see Note, supra note 18. See also D'iono v. Adomnio, No. 82-0735 (M.D. Pa. Dec. 30, 1982) (available on LEXIS); Hanna Mining Co. v. Norcen Energy Resources, Ltd., [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982).

88. Blakey & Gettings, supra note 7, at 1042. See supra note 34.

89. See id. See also Strafer, Massumi & Skolnick, supra note 8, at 694-95, in which the authors define the difference between antitrust and RICO as the difference between preservative and purgative relief. See generally Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982).

90. Section 1962(b) states that "[i]t shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in interstate commerce." 18 U.S.C. § 1962(b) (1976) (emphasis added). For the definition of racketeering, see infra note 8.


as the antitrust laws, stating that the two statute’s purposes were "so divergent that no reasonable comparison can be made." Because Congress wishes RICO to be interpreted broadly to effectuate its remedial purposes, the court concluded that standing should not be restricted.

The court’s interpretation in Hanna also is extreme. Because the court imposed no restriction on section 1964(c)’s injury requirement, the court allowed RICO to exceed its limited purposes, and permitted plaintiffs to recover for injury caused only from the underlying racketeering. The statute does not prohibit racketeering activities, but prevents economic injuries resulting therefrom. Arguably, Congress wanted to rid the nation of organized crime; however, it chose in RICO to prevent racketeering infiltration of the economy. The statute’s wording demonstrates its focus: section 1964(c) authorizes suit by “any person injured in his business by reason of a violation of section 1962.” The latter section prohibits the use of racketeering activities or funds to acquire or maintain an enterprise.

If Congress had intended for RICO to compensate victims who suffer racketeering injuries not related to economic ventures, Congress could have worded section 1964 to refer to section 1961(1), which defines racketeering activity. Congress clearly intended to confine RICO’s application to the economic sphere. Courts must therefore be wary of applying RICO without limitation.

In Landmark Savings & Loan v. Loeb, Rhodes, Hornblower Co., the United States District Court for the Eastern District of Michigan reached a balance in interpreting the scope of RICO’s injury requirement by focusing on section 1964(c)’s reference to section 1962. The court correctly noted that because section 1964(c) requires that a plaintiff be injured by reason of a section

93. Id. at 93,737.
94. Id. at 93,737-39. For a discussion of RICO’s remedial purpose, see supra note 82 and accompanying text.
96. Id. See also Comment, supra note 18, at 934.
98. Id. § 1962.
99. Id. § 1961(1).
1962 violation, standing under RICO requires “something more or different than injury from predicate acts . . .” Observing that the plaintiff in an antitrust action must allege an antitrust or competitive injury, the court in *Landmark* stated that a plaintiff under RICO similarly must allege a “racketeering enterprise injury.” Although the court never expressly defined racketeering injury, it implied that the definition encompassed all injuries that RICO was intended to prevent, including competitive injuries, and direct injuries from scams, extortion, forced bankruptcies, and fraudulent stock takeovers.

The court’s approach in *Landmark* fully realizes RICO’s intent. Its flexibility allows plaintiffs to bring treble damage actions under section 1964(c) for all injuries resulting from section 1962 violations. Yet, this interpretation screens out meritless RICO suits, and thus prevents plaintiffs from attempting to recover damages for violations of the predicate offenses alone.

Recently, the United States District Court for the Central District of California, in *Harper v. New Japan Securities International, Inc.*, agreed with the *Landmark* holding that the plaintiff must allege a “racketeering injury” to sue under section 1964(c). The court, in dismissing a RICO securities fraud claim, reasoned that although RICO and the antitrust laws serve different purposes, the analogy to antitrust is a logical point of departure for interpreting RICO. Additionally, Congress did not intend to provide treble damages for violations of the predicate offenses alone, because the statute states clearly that recovery is contingent on injury suffered by reason of a violation of section 1962. The court therefore concluded that although RICO expands the reme-

102. 527 F Supp. at 208. For a list of RICO’s predicate offenses, see supra note 8 and accompanying text.
103. 527 F. Supp. at 208-09.
104. Id. at 209. Again, illustration probably is the best method to define difficult concepts. See supra notes 73-78 and accompanying text. For a view stating that racketeering injury is indistinguishable from competitive injury, see Hanna Mining Co. v. Norcen Energy Resources, Ltd., [1982 Transfer Binder] Fed. Sec. L. REP. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982); Note, supra note 18, at 1110 n.51.
105. 545 F Supp. 1002 (C.D. Cal. 1982).
106. Id. at 1007.
dies available against racketeering, a "racketeering injury" limitation is necessary to keep the remedy within the bounds of the statute's original intent.\textsuperscript{108}

Courts are confused about RICO's injury requirement because they do not understand civil RICO's purpose. Congress intended for all persons injured by racketeering infiltration into businesses to recover and thus prevent further corruption. Focusing on "racketeering injury"\textsuperscript{109} in an economic context effectuates that intent and encourages private plaintiffs, alone or in class actions, to bring civil RICO suits whenever they suffer injury from racketeering schemes.\textsuperscript{110}

**REFORMING RICO: STATE PARENS PATRIAE ACTIONS**

The three major impediments to a civil RICO action—reprisals, causation, and standing—can be overcome by individual plaintiffs, 108. 545 F Supp. at 1008. See also Gitterman v. Vitoulis, No. 82 Civ. 5908 (S.D.N.Y. Dec. 30, 1982) (available on LEXIS).

109. The ABA Section of Criminal Justice suggests replacing the term "racketeering activity" with the less "pejorative" term "criminal activity" to eliminate the stigma of being labeled a "racketeer." ABA Section of Criminal Justice Report on RICO (Jan. 1982). This change would not require using a different term than "racketeering injury" to define the type of injury RICO contemplates. The bar could eliminate all stigmas by substituting a neutral term such as "RICO injury."

110. One other impediment to a civil RICO action is the recent proliferation of meritless civil RICO cases which are dismissed at the pleading stage. These claims cause many judges to view RICO claims with suspicion. See Sylvester, supra note 35, at 22. Consequently, many courts closely scrutinize and narrowly interpret RICO claims, see supra text accompanying notes 65-68 & 80-90, raising the risk that valid RICO actions will be dismissed. The RICO claims that courts generally dismiss, however, usually allege common law fraud rather than racketeering schemes. A disappointed investor, who may or may not have a racketeering claim, will plead under civil RICO because he potentially can receive treble damages. See Salisbury v. Chapman, 527 F Supp. 577, 580-81 n.6 (N.D. Ill. 1981) (RICO claim dismissed because if allowed, it would cause RICO "to swallow up the whole of alleged common law fraud even without the necessary elements of a fraud claim"); Adair v. Hunt Int'l, 526 F Supp. 736 (N.D. Ill. 1981) (RICO not an alternative remedy to real estate misrepresentation); North Barrington Dev. Inc. v. Fanslow, 547 F Supp. 207, 211 (N.D. Ill. 1980) (If allowed, "every bad faith breach of contract or common law fraud would be transformed into a RICO suit."). See also Alton v. Alton, No. 82 Civ. 0795 (S.D.N.Y. July 9, 1982) (fraud in divorce settlement not an offense RICO intended to prevent).

Congress did not intend to preempt a common law fraud or government corruption action under RICO unless the fraud was perpetrated as part of a pattern to take over or maintain a business. 18 U.S.C. § 1964(c) (1976). For a contrary view, see Note, supra note 18 (because of the mail and wire fraud provisions, RICO is broad enough to encompass common law fraud).
but only with great effort. Congress could reduce these impediments and consequently strengthen RICO's enforcement powers by amending RICO to provide for a state parens patriae action as an additional remedy. A state parens patriae action is a state suit brought on its citizens' behalf in federal court to recover damages occurring because a federal statute is violated. Because a parens patriae action is brought on a citizen class' behalf and provides aggregate remedies, it resembles a class action; however, unlike a class action, a presumption exists that the citizen cannot bring an action on his own.

In the antitrust area, Congress amended section four of the Clayton Act to provide for a state parens patriae action in Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This Act provided a practical and effective remedy for private individuals injured by antitrust violations who were effectively denied relief due to evidentiary, procedural, and financial obstacles. RICO is modelled on the antitrust laws and contains similar private enforcement problems. The Hart Act thus can serve as a model for reforming RICO, while taking into account the different purposes of RICO and the antitrust law.

The Hart Act allows a state attorney general to bring a civil suit in federal district court in the state's name, as parens patriae, to recover monetary damages for injuries to its citizen's property because of a violation of the Sherman Antitrust Act. The court can


112. Parens patriae means literally "parent of the country" and traditionally refers to the state's role as guardian of persons who cannot take care of themselves. Black's Law Dictionary 1003 (rev. 5th ed. 1979).


117. 15 U.S.C. § 15c(a)1 (1976). The amendments affect the Sherman Antitrust Act of
award the state treble damages plus costs.\footnote{118} To prevent delaying tactics, or other abuses by either the state attorney general or the defendant, the Hart Act authorizes a court to award interest on the recovery.\footnote{119} Furthermore, the court has discretion to award the defendant attorney's fees if the state acts in bad faith.\footnote{120}

The Hart Act also permits measurement of damages in the aggregate by statistical sampling methods.\footnote{121} Consequently, although the state must prove direct injury, the court need not assess each individual claim.\footnote{122} The court may distribute damages at its discretion through various methods, including an individual or fluid recovery,\footnote{123} or by depositing the recovery with the state either as general revenue or with stipulations.\footnote{124}

Unlike a class action, the Hart Act permits the state to notify the defendant by publication unless such notice would deny the defendant due process.\footnote{125} Like class actions, a potential plaintiff may elect to exclude himself from the action and any relief that the state may recover.\footnote{126} The final judgment is res judicata to any later action brought by participating parties,\footnote{127} and the court must approve settlements to ensure fairness for all parties.\footnote{128}

Applying the parens patriae action to RICO may be an effective solution to RICO's obstacles. Parens patriae is a discretionary enforcement remedy employed only when a plaintiff encounters severe evidentiary and cost barriers, similar to those encountered in RICO actions.\footnote{129} Furthermore, a parens patriae action is a complex class action type suit, and necessarily appropriates limited state

\footnote{1890, 15 U.S.C. §§ 1-7 (1976).}
\footnote{119. Id.}
\footnote{120. 15 U.S.C. § 15c(d)2 (1976). The court may award attorney's fees if the state attorney general acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." Id.}
\footnote{121. Id. § 15d.}
\footnote{122. Id.}
\footnote{123. For a discussion of fluid recoveries, see infra notes 190-97 and accompanying text.}
\footnote{124. 15 U.S.C. § 15e (1976).}
\footnote{125. Compare id. § 15c(b)1 with Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (individual notice is required in consumer class actions).}
\footnote{127. 15 U.S.C. § 15c(b)3 (1976).}
\footnote{128. Id. § 15c(c).}
\footnote{129. See supra note 112 and accompanying text.}
resources. This Note, therefore, will evaluate whether parens patriae actions will further RICO's underlying substantive policies, mesh with RICO remedies, prove superior to alternative private actions, and overcome RICO's three major impediments: fear of reprisals, proof of causation, and establishing standing by proof of injury.

**Parens Patriae's Effect on RICO's Substantive Policies**

Parens patriae suits, like class actions, promote important judicial policies. For example, parens patriae suits increase judicial efficiency, prevent inconsistent results, and avoid multiple suits.\(^{130}\) Additionally, parens patriae would further the substantive policies underlying RICO.\(^{131}\)

Parens patriae suits will further RICO's substantive compensatory policies. For example, a private plaintiff may wish to institute a RICO action to recover for his injury. Currently, that person may decide not to sue, because the claim may be too small or the problems establishing the necessary proof may be too great.\(^{132}\) If a parens patriae remedy is available, the private plaintiff can petition the state to seek redress. Because the state brings the action and is able to aggregate small claims, a parens patriae suit spreads the cost among the taxpayers and puts the litigation burden on the state. Parens patriae actions thus will lower individuals' litigation costs which will cause more people to seek redress for RICO violations.

Additionally, parens patriae actions presumably will deter racketeers from infiltrating legitimate businesses. Because the state pays for the action and carries the burden of proof, parens patriae suits will encourage more complaints, resulting in more victories for racketeering victims who normally do not have the resources to prove their RICO case.\(^{133}\) The realization that the state, in addi-

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132. Additionally, parens patriae is an equitable action that the plaintiff can bring only if the remedy at law is inadequate. Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972); Malina & Blechman, supra note 111, at 213.
133. Malina & Blechman, supra note 111, at 213. Prospective plaintiffs still may fear reprisal if they sue. For a discussion of how a RICO parens patriae statute could lessen that
tion to the individual, can force organized crime to pay civil damages for its criminal activities thus may discourage racketeering activity 134

Parens Patriae: Integration with Existing RICO Remedies

Parens patriae actions may duplicate or clash with RICO's structural remedies. 135 For example, the state may bring a parens patriae action to divest the defendant of his interest in an enterprise. The action would achieve the same result as a divestment suit which RICO currently affords the states as well as the federal government. 136 In structural suits such as this, parens patriae would be a duplicative remedy, leading to judicial waste and confusion.

Additionally, in a parens patriae action, the state acts for its citizens. 137 RICO, however, arguably authorizes individuals to sue for monetary compensation, not for structural relief. 138 A divestment parens patriae action therefore may violate RICO's congressional command. Finally, RICO's private remedies primarily assist racketeering victims in obtaining compensation, which structural remedies cannot accomplish. Therefore, a divestment parens patriae action would not fulfill RICO's articulated purpose of compensation. Because a RICO parens patriae action would be created mainly to assist victims to obtain compensation, and a structural remedy focuses on other RICO goals, Congress should limit the parens patriae remedy to civil RICO treble damages complaints. 139

Parens patriae actions will further RICO's compensatory and structural policies if a state combines in one action a parens patriae suit with its own structural claim. Furthermore, a joint action would promote judicial economy 140 The structural claim aims at preventing future harm, while the parens patriae claim focuses on compensating past injuries.

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134. See infra notes 165-73 and accompanying text.
135. See infra note 143.
136. See supra text accompanying note 12.
138. See infra note 111.
139. See supra note 13.
The state, however, due to its limited resources and its interest in a permanent remedy, may emphasize its structural claim over the compensatory parens patriae claim. Such deemphasis of the parens patriae claim could result in inadequate representation of citizens by the state. Consequently, injured citizens may feel compelled to accept unfair settlements from the defendants rather than risk uncertain relief in a suit where they feel inadequately represented.\textsuperscript{141} Congress, therefore, should allow courts to determine whether the state is compromising RICO's compensatory policies for state fiscal economy or administrative convenience. If so, the court should deny a joint parens patriae judicial structural suit.\textsuperscript{142}

\textsuperscript{141} As in class actions, parens patriae settlements are subject to court approval. Compare Fed. R. Civ. P 23(e) with 15 U.S.C. § 15c(c) (1976). This policy protects the interests of all parties engaged in complex litigation and also ensures consistency between settled and adjudicated suits. See Comment, Class Actions, 89 Harv. L. Rev. 1318, 1360 (1976). See also Manual for Complex Litigation, pt. 1 (5th ed. 1981).

Neither Fed. R. Civ. P 23(e) nor 15 U.S.C. § 15c(c) contains any standard by which a court can measure protection or consistency. The United States District Court for the District of Maryland, in In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D. Md. 1979), considered two major factors which courts subsequently have followed. These factors can also be applied to proposed RICO parens patriae settlements. The first factor is whether the proposed settlement is fair and a result of an arms-length bargain. Id. at 315. See also Percodani v. Riker-Maxson Corp., 50 F.R.D. 473, 477 (S.D.N.Y. 1970). The second factor is whether the settlement is adequate. 83 F.R.D. at 315-19. In determining adequacy, a court should weigh the settlement against plaintiff's case, plaintiff's difficulties of proof, anticipated costs, likelihood of recovery (the defendant's ability to pay), and the extent of opposition to the settlement. Id. at 316. Adequate settlements are difficult to achieve because the interests represented are diverse, and somebody's interests, either the state's or the private person's, may be compromised. See Comment, supra, at 1537.

\textsuperscript{142} Although the state is suing on its citizens' behalf, the state naturally will push for its interests over private concerns. For example, a state attorney general, eager to wipe out corruption, may seek structural relief exclusively without regard for the individual damage claims. See, e.g., Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976). The state attorney general also may agree to a settlement scheme that gives the state a disproportionate share. See Comment, supra note 141, at 1553.

If the state settles, a court should determine whether the private parties are satisfied, or whether they merely accepted the settlement due to their inability to bring suits. See Woods v. O'Brien, 78 F Supp. 221 (D. Mass. 1948). See generally Sullivan, Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status, 123 Pa. L. Rev. 822 (1975).
The Superiority of Parens Patriae to Alternative Private Actions

To be an effective reform, parens patriae suits not only must further RICO’s substantive policies, but also should be superior to existing private remedies that do not deplete state resources. Because individual actions are ineffective in deterring racketeering,143 the only remaining private alternative to a RICO parens patriae action is the class action. Federal Rule of Civil Procedure 23(b)(3) authorizes class actions if common questions of law or fact predominate over individual issues and if a class action is superior to other available means of resolving the controversy.144 The class action may be the only feasible course open to private citizens suffering minor racketeering injuries.145

Courts permit plaintiffs to use class actions under civil RICO.146 Rule 23(c)(2) directs courts to ensure to all class members the best notice practicable under the circumstances.147 Formerly, courts interpreted that requirement to include any communication, including publication, reasonably calculated to give actual notice.148 In 1974, however, the Supreme Court reexamined the notice issue in Eisen v. Carlisle & Jacquelin.149 The Court interpreted Rule 23(b)(3) to require individual notice to all class members who reasonably could be identified regardless of the burden on the representative plaintiff.150 This notice requirement prevents many

143. See supra text accompanying notes 43-110.
145. To certify a class action, a court must consider the following factors: whether the class is so large that joinder is impracticable; whether common questions of law or fact exist; whether the representative plaintiff's claims are typical of the class; and whether the representative plaintiff will fairly and adequately protect the whole class' interests. Fed. R. Civ. P 23(a). The action also must satisfy Fed. R. Civ. P 23(b).
146. See, e.g., Cullen v. Margiotta, 618 F.2d 226 (2d Cir. 1980) (political contributions extorted as condition for civil service and promotion can be compensated by class suit); Hines v. City Finance Co. of Eastover Inc., 474 F.2d 430 (D.C. Cir. 1972) (collecting unlawful debts against plaintiff class violated § 1962).
150. Until Eisen, the Court apparently held that due process' two components, notice and an opportunity to be heard, were fulfilled if the class was adequately represented, Hensberry v. Lee, 311 U.S. 32 (1940), and reasonable notice was given, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Eisen required individual notice even if the class were represented adequately. The opinion, however, could be interpreted as requiring individual notice only when the class probably would not be represented adequately. See gener-
plaintiffs from instituting Rule 23(b)(3) class action suits because it adds oppressive investigatory and service costs for the representative party. These prohibitively high costs would similarly discourage RICO class actions.

The *Eisen* notice requirement, however, does not apply to antitrust parens patriae actions. The Hart Act specifically permits notice by publication unless such notice would deny a person due process. This provision is similar to the old, more flexible class action notice interpretation. Thus, the state in a parens patriae suit is not burdened with the costs or the administrative problems of sending individual notice.

Allowing an identical notice requirement in RICO parens patriae actions is justifiable. The purpose of both antitrust and RICO suits is to make compensation more readily available to victims of anticompetitive activity and racketeering. A flexible notice requirement aids in achieving that goal.

Two other factors make parens patriae superior to class actions for complex RICO suits. First, in class actions, the court must certify that the class and the issues raised satisfy the express prerequisites to the action. This process often is long and extremely complex, especially if the class is largely undefined, as is possible in a RICO context. In contrast, no certification is required in an antitrust parens patriae action; the state must show only that the persons on whose behalf it is suing are citizens and were injured directly by the antitrust violations. This procedure is simpler,
faster, and cheaper than the extensive class action certification process. Again, a RICO parens patriae action should follow this procedure, designed to expedite citizens’ claims.

Second, the Hart Act permits the court to aggregate damages after the state proves a direct injury to its citizens caused by antitrust activity. Such judicial discretion avoids the necessity of each plaintiff proving his individual injury in court. In contrast, a Rule 23(b)(3) class action requires class plaintiffs to prove their individual injury. This requirement lessens the effectiveness of a class action, because the suit becomes essentially a multiparty action in which time is not saved and judicial economy is not advanced. Because a RICO plaintiff faces proof, complexity, and cost problems similar to those in antitrust suits, the aggregation provision is a preferred remedy.

Furthermore, parens patriae suits include all the safeguards of class actions. A person may opt out of the parens patriae suit, as in a Rule 23(b)(3) class action. Thus, a citizen injured more extensively by racketeering activity and possessing the resources to sue individually for treble damages under section 1964(c) may do so without being bound by the parens patriae action. Additionally, extensive court involvement in the action protects citizens against unfair settlements. To protect the defendant, the final judgment in a parens patriae action, as in a Rule 23(b)(3) class action, is res judicata as to any claim brought by a person who did not opt out. Finally, in parens patriae actions, both the defendant and the state are protected through court sanctions from delays and other abuses.

A RICO parens patriae action also may encourage more complaints of RICO violations than a Rule 23(b)(3) class action because the state carries the costs and the burden of proof. A private person with a small claim often is unwilling or unable to gather the requisite proof for a RICO action. In contrast, the state’s use of

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161. Id. § 15c(b)3. See also Keene v. United States, 81 F.R.D. 653 (S.D. W Va. 1979).
163. Malina & Blechman, supra note 111, at 213, 217.
its investigative and financial resources through a parens patriae action increases the probability that the plaintiffs will prevail, the citizens will be compensated, and the racketeer will be deterred.\textsuperscript{164} Considering parens patriae’s streamlined methods, procedural safeguards, and use of state resources to conduct a suit, a RICO parens patriae action is superior to a class action, the only feasible private remedial alternative.

\textit{Parens Patriae Strengthens RICO’s Enforcement Powers}

Both theoretically and practically, a parens patriae action appears to be an effective enforcement mechanism for RICO. The statute already is complex, however, and potential plaintiffs fear retribution if they institute legal proceedings. Parens patriae actions, therefore, must address RICO’s serious retribution problem and simplify its confusing causation and standing requirements to justify its addition to the statute.

Pervasive fears of retribution surround any organized crime investigation or prosecution.\textsuperscript{165} The individuals’ fears, however, are mitigated in a parens patriae action because the state brings the suit and investigates the claim on behalf of the injured citizens. The injured citizens are not named in the action; therefore, anonymity initially protects individuals from threats racketeers otherwise might make.\textsuperscript{166}

The injured persons nonetheless may have to identify the defendant, assist in discovery, and testify at the trial.\textsuperscript{167} The state, however, is in a position to protect these persons against any threats. It can arrange to change people’s names or relocate them if necessary.\textsuperscript{168} If victims wish to maintain their identities and their businesses, the state can provide undercover investigators to conduct

\textsuperscript{164} Id. at 213.
\textsuperscript{166} The state maintains the action in its name. See supra notes 110-12 and accompanying text.
\textsuperscript{167} Lynch & Phillips, supra note 165, at 62, 65.
scam operations.¹⁶⁹ These state scams insulate the business owners from the parens patriae action because only the agents testify at the trial.

The protection that a state gives to persons in a parens patriae action is limited only by the resources that a state is willing to expend. A state has incentives to expend the necessary resources because corrupt influences damage both the state's economy and its revenues.¹⁷⁰ Racketeer-controlled businesses raise prices, prevent competition, and seldom pay taxes on their illicit profits.¹⁷¹ Eliminating the corrupt practices thus would strengthen the state's economy and increase its revenues.

Moreover, because RICO is a federal statute, a state can coordinate its protection with the federal protection provided in other titles of the Organized Crime Control Act.¹⁷² Such cooperation already is encouraged among the Justice Department, state or local attorneys general, and organized crime task forces.¹⁷³ No single government or agency can shoulder the entire anti-racketeering responsibility; coordinating state and federal efforts reduces each government's burdens. Through a parens patriae action, a state can assist in anti-racketeering activities, bring additional resources into the controversy, and protect its citizens from retribution.

State parens patriae actions also may assist plaintiffs in establishing the causative link between the racketeering activity and the enterprise, especially when racketeers use resources received from racketeering to infiltrate an enterprise in violation of section 1962(a).¹⁷⁴ Again, the use of state resources in parens patriae actions is pivotal. Normally, under section 1962(a), the plaintiff can-

not identify the racketeer-derived money to establish the link between the racketeering and the injury; the plaintiff often must rely on meager and unpersuasive evidence.\textsuperscript{175} The state has resources and power to overcome evidence-gathering obstacles created by organized crime.

First, the state, unlike private citizens, could infiltrate organized crime through undercover agents.\textsuperscript{176} Instead of relying on sparse or nonexistent records, the agents could gather evidence first-hand. Furthermore, the agents could discover illegal resources that allow the racketeers to invest laundered money in enterprises.\textsuperscript{177} The state could trace money through a racketeer's laundering process by marking the money or noting its serial numbers. Additionally, the state could elicit cooperation from local banks and the federal and local governments. Thus, the state could obtain substantial and persuasive evidence to establish the causative link between racketeering and the injuries.

Parens patriae actions avoid the current interpretive standing problems surrounding a private civil RICO suit. Although individuals must prove either competitive or racketeering injury,\textsuperscript{178} the state need prove only that the persons injured are state citizens, that the state suffered some concrete injury, and that damage to the economy or to individuals has resulted.\textsuperscript{179} For the state to prove that the persons injured are citizens is a simple procedural task.\textsuperscript{180} The state then must establish that concrete injury occurred

\begin{footnotes}
\item[175] \textit{Presidents Report}, \textit{supra} note 1, at 463.
\item[176] \textit{But see} Note, \textit{supra} note 169, at 966 n.127.
\item[177] Federal agents have been effective in infiltrating organized crime. For example, one agent worked for five years as a gangster for the Bonanno Family. He so gained their confidence that a leader promised to make him a family member. Because this agent infiltrated the family, the government was able to bring a major RICO conspiracy suit against them. For an account of his testimony at the trial, see \textit{The New York Times}, Aug. 3, 1982, at A1, col. 1; \textit{id.}, Aug. 4, 1982 at B1, col. 6; \textit{id.}, Aug. 5, 1982 at B1, cols. 5-6; \textit{id.}, Aug. 6, 1982 at B1, col. 1.
\item[178] \textit{See supra} notes 80-110 and accompanying text.
\item[180] One potential problem exists regarding citizenship. A person may attempt to gain citizenship in a state solely to participate in a parens patriae action. Even if that person succeeds in doing so, the court should not permit him to share in any recovery unless he suffered the same injury as other citizens.
\end{footnotes}
to its general economy or to specific individuals. 181 In a parens patriae action, the state benefits from a presumption of concrete injury if it proves that racketeering harmed its general economy 182

Racketeering injury to the state can occur in two ways. First, racketeers who infiltrate an industry injure the general economy by artificially raising prices and eliminating competition. Second, racketeers who infiltrate a business cause injury to specific individuals and thereby indirectly harm the general economy 183 Thus, when a state pleads and proves the existence of racketeering infiltration, it also pleads and proves that the state's economy suffered a concrete injury The state, therefore, can establish standing without a special showing of injury. 184

Finally, the state must prove only aggregate damages, 185 or the total damages suffered by state citizens. The court calculates this amount using statistical methods. 186 Judicial economy and procedural simplicity are the policies underlying aggregate damages. 187 Each citizen need not prove the extent of his individual injury; only that the injury exists. Moreover, justice does not suffer for this efficiency Aggregate damages usually accurately reflect the injury suffered because the court uses modern statistical methods. 188 Parens patriae thus simplifies standing requirements by eliminating the need to prove individual injury and damages.

By allowing private citizens to use state resources, parens patriae actions lower the impediments to civil RICO suits. Citizens, unable

181. Fem, supra note 115, at 1211. The concrete injury requirement ensures that the plaintiff has a genuine grievance against the defendant and will litigate the matter forcefully. Id. The requirement is similar to an individual proving pecuniary damage. 497 F Supp. at 223-24. See also Malina & Blechman, supra note 111, at 221-22. For a criticism that this is an overbroad reach of the states' power, see Malina & Blechman, supra note 111, at 217.


183. Id. at 1212.

184. For a view that establishing state standing is difficult and that the courts may require special showings, see Hawaii v. Standard Oil Co., 405 U.S. at 263 n.14; Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945); Malina & Blechman, supra note 111, at 221.


186. Id.

187. Fem, supra note 115, at 1228.

188. Id. at 1227. See 15 U.S.C. § 15d (1976). See also MANUAL FOR COMPLEX LITIGATION § 2.71 (5th ed. 1981). Samples and survey results are accepted as reliable in business and in science, and may be offered in evidence as proof concerning the subject to which they relate. FED. R. EVID. 703.
to obtain evidence for their RICO claim, could petition the state to bring a parens patriae action. Civil RICO's failure to encourage private enforcement against corrupt practices mandates a reform like parens patriae if the statute is to accomplish its remedial purpose.

ISSUES RAISED BY RICO PARENS PATRIAE ACTIONS

Although parens patriae actions correct some of civil RICO's deficiencies, these actions also create their own problems. In particular, parens patriae raises three serious issues: whether the fluid recovery provision violates either the defendant's or the plaintiff's due process; whether the costs involved are burdensome to the state; and whether issue preclusion applies to parens patriae actions.\(^\text{189}\)

189. A RICO parens patriae action may violate other constitutional provisions. For example, an action may violate constitutional federalism principles that dictate separation between the states and the federal government. See W. BENNETT, AMERICAN THEORIES OF FEDERALISM 88 (1964). A violation occurs only if a state official institutes a parens patriae action against a federal agency, because states usually cannot sue the federal government or its agents acting within their authority. Kansas v. United States, 204 U.S. 331 (1907). A plaintiff state, however, may sue a federal official in his individual capacity for money damages when that official acts either beyond his authority or unconstitutionally. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). See generally Land v. Dollar, 330 U.S. 731 (1947); United States v. Lee, 106 U.S. 196 (1882). Because personal damage judgments against government officials do not interfere directly with the government's functions, parens patriae damage actions against those officials would not violate sovereign immunity. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). In the rare case, therefore, when a state sues a federal official for corrupt practices, the suit does not violate the constitutional directive against state intrusion into the federal government. Id.

The federal government, however, may sue a state. Normally, a state is immune from suit under the eleventh amendment. U.S. CONST. amend. XI. The Supreme Court nevertheless held that this immunity does not extend to suits arising under the Constitution which the federal government institutes against a state. United States v. Texas, 143 U.S. 621 (1892). States impliedly waived their immunity from suit by the federal government when they accepted the Constitution. See United States v. Texas, 143 U.S. 621 (1892). See also Parden v. Terminal R.R. of the Ala. State Docks Dep't, 377 U.S. 184 (1964) (by empowering Congress to regulate interstate commerce, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation).

Due Process

A parens patriae fluid recovery provision might be challenged on due process grounds. In fluid recoveries the court aggregates and statistically assesses damages. The court then gives any relief to the state, which either distributes the award to injured individuals or allocates it to general revenue or other specified funds. Fluid recoveries arguably violate the defendants' due process rights because such recoveries do not require the plaintiffs to prove individual injury. Additionally, the plaintiffs' due process rights may be violated when the recovery is awarded to the state rather than to the injured plaintiffs.

Fluid recoveries allow the state to prove aggregate damages. Thus, defendants may not know whether the money owed is proportionate to the damage caused. The use of precision statistical methods, however, generally ensures that aggregate damage calculations are accurate. Moreover, most inaccuracies stem from the defendants who, in an effort to insulate themselves from suit, deliberately neglect to keep records. Because accurate statistical methods can be used, and because defendants often cause any inaccuracies, fluid recoveries usually will not violate defendants' due process rights.

Plaintiffs also might challenge fluid recoveries on due process grounds when the recovery goes to the state rather than to the injured plaintiffs. This due process challenge has some basis because the state has no interest in guaranteeing that a private group


191. Fein, supra note 115, at 1227.

192. Id.


194. "[C]onceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946).

The state might violate the defendant's rights if it uses the aggregate damage procedure to avoid collecting easily available evidence. In that case, the court can penalize the state for bad faith and also require the state to prove individual damage. Malina & Blechman, supra note 111, at 213.

receives a stated sum of money. If a state brings a parens patriae action on the general public's behalf, no single person suffered a specific injury and a general fluid recovery is appropriate. If a state brings a parens patriae action on behalf of an individual, however, the remedy should provide methods for the injured individual to recover damages. Specifically, the individual should be allowed either to opt out and file his own suit, or to petition the court for his portion of the recovery. Such provisions would prevent fluid recoveries from violating the individual victim's due process rights.

Cost to State

A parens patriae action may not be attractive to most states because the state must bear all the costs of the suit. These costs include investigatory expenses, expenses to protect racketeering victims, administrative costs, and attorney fees. Unless money is available, the funds for these expenses must come from general revenues. These costs, however, can be minimized if the state retains all or part of the parens patriae fluid recoveries. Thus, the funds would benefit all citizens including injured individuals. Moreover, the state does not have to bear the whole loss if joint actions are instituted with the federal government. For example, the state could deposit the money in an anti-racketeering fund to investigate and prosecute other RICO offenses. Conceivably, state anti-racketeering efforts could become entirely self-supporting. A state then could institute more actions because RICO suits would not compete for general state funds. Finally, eliminating corruption through RICO parens patriae actions will strengthen the economy and increase revenues.

196. Malina & Blechman, supra note 111, at 214.
198. See supra text accompanying notes 165-77.
201. See supra text accompanying notes 170-73.
Issue Preclusion

RICO parens patriae actions must address the question of issue preclusion, which bars relitigation of issues already adjudicated. To preclude reconsideration, the issue must have been necessary to the first action's resolution, and must be the same in both suits. Additionally, the first suit must have provided the defendant with a full and fair opportunity to litigate the issue and must have resulted in a valid final judgment. Because issue preclusion avoids relitigation, the doctrine encourages judicial economy and prevents inconsistent results. Currently, section 1964(d) states that a criminal RICO conviction estops the defendant from denying the essential allegations of the criminal offense only in subsequent civil proceedings initiated by the government. Defendants have argued that Congress intended to prevent private plaintiffs from invoking issue preclusion in a civil RICO action brought after the criminal conviction, because section 1964(d) refers only to subsequent proceedings initiated by the government. Some commentators therefore believe that Congress should expand section 1964(d) to include an issue preclusion rule for private civil RICO actions.

Codification of issue preclusion, however, is unnecessary because recent judicial precedent indicates that the doctrine applies auto-

204. Id. at 326, 331. See Thau, supra note 202, at 1082.
205. See supra note 204.
206. One commentator disputes the judicial economy rationale. He asserts that when a nonparty to the first action capitalizes on the first judgment by bringing the subsequent civil action, suits that otherwise would not be brought are encouraged. Thau, supra note 202, at 1083-84.
209. See Nathan, supra note 21, at 28.
matically in civil actions following criminal convictions. Application of the doctrine will not prejudice the defendant; the elements of the offense are the same and were proved beyond a reasonable doubt in the criminal prosecution. The defendant therefore had ample opportunity and incentive to defend vigorously in the first action.

In a recent private civil RICO case, *Anderson v. Janouch*, the United States District Court for the Western District of Washington invoked issue preclusion despite section 1964(d)'s apparent limitation. In *Anderson*, the court applied the doctrine based on public policy rationales. The court first noted that issue preclusion is a traditional common law doctrine, and therefore a statute's silence did not abrogate the doctrine. Second, the court emphasized civil RICO's broad remedial construction and Congress' intent that civil remedies should supplement, not supersede, any common law remedies. The court therefore concluded that issue preclusion applied in private civil RICO proceedings that follow criminal convictions. Although the question is unsettled, the better view would allow issue preclusion in civil actions that follow criminal convictions.

If the state brings both the initial criminal action and the subsequent civil parens patriae action, the case for issue preclusion becomes stronger. The parties in both actions are identical and are bound automatically by the first judgment.

210. The Supreme Court held in *Ashe v. Swenson*, 397 U.S. 436 (1970), that issue preclusion applies in criminal cases. Subsequently, the Court in *Blonder Tongue Laboratories Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), abandoned the mutuality of estoppel rule, which prevented a party in the second action from invoking issue preclusion unless that party also was a party in the first action. Because of these developments, nonparties to initial criminal actions can invoke issue preclusion in the subsequent civil action. See Thau, *supra* note 202, at 1086-95.


212. 543 F Supp. 1124 (W.D. Wash. 1982).

213. 543 F Supp. at 1128.

214. Id. at 1129.

215. Id.


218. When the parties are the same in both actions, mutuality exists. Issue preclusion, therefore, automatically applies. See *supra* note 210.
patriae actions, however, a prior suit is prima facie evidence in subsequent civil proceedings,\textsuperscript{219} providing only a rebuttable presumption of the defendant's liability. A court in a second proceeding therefore may readjudicate the issue. Judicial economy is not maximized by relitigation; moreover, inconsistency results if the defendant is convicted in the criminal RICO case, but is held not liable in the civil RICO action. Although issue preclusion might apply despite a statutory prima facie limitation on prior actions, the doctrine was designed to preempt the prima facie doctrine.\textsuperscript{220} Consequently, Congress should not include a prima facie rule in any RICO amendment providing for a parens patriae action.

**CONCLUSION**

Congress promulgated civil RICO to combat organized crime's infiltration into the national economy. Unfortunately, difficulties in proving causation and injury, and fear of reprisals seriously curtail the statute's efficiency. Congress should reform civil RICO by providing a state parens patriae action. Admittedly, a parens patriae provision would not be a panacea for all the ailments plaguing civil RICO plaintiffs. Because of limited resources, a state may institute parens patriae action only against major racketeering activities, leaving without remedy many potential plaintiffs who lack resources to bring their own actions. Additionally, parens patriae may create constitutional challenges, causing delays and increasing costs.

Civil RICO's failures and problems may indicate that a civil statutory scheme cannot combat criminal corruption. Nevertheless, until Congress decides to repeal RICO, the statute should be improved by adding the state parens patriae action, which would overcome many obstacles to a civil RICO recovery.

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\textsuperscript{220} The prima facie evidence rule was incorporated in the antitrust laws long before issue preclusion rules became liberalized. Issue preclusion has superseded the prima facie rule because it is more effective in protecting against relitigation of issues.