CIVIL RICO: THE LEGAL GALAXY'S BLACK HOLE

by

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GENERAL OVERVIEW

Background

The Racketeer Influenced and Corrupt Organization (RICO) statute was enacted as part of the Organized Crime Control Act of 1970. Congress passed it in response to a growing concern over the pervasive influence of organized crime in America. The statute contains both criminal penalties and civil sanctions, and civil RICO actions are available to both the government and to private individuals. It is a complex, powerful, and controversial law. In its private civil version, RICO is evolving into something quite different from the original conception of its enactors. It offers a federal forum and mandatory treble damages with attorneys fees to successful plaintiffs. For these reasons, civil RICO claims are included with increasing frequency in conventional labor disputes, pension benefit claims, and wrongful discharge actions.

The civil portion of RICO provides a private civil action to injured persons and authorizes recovery of treble damages for injury sustained "by reason of a violation of § 1962." Section 1962 sets forth the prohibited activities. RICO specifically defines a number of terms, one of which is "racketeering activity." Each defined term has a particular meaning in the context of the statute. An understanding of the terms is essential to interpretation. "Racketeering activity" is defined as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense punishable" under federal law involving bankruptcy, security-fraud, or drug related activities. Specifically included in the list of racketeering activity are several types of labor related

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crimes, e.g., embezzlement of union funds, theft or embezzlement of pension funds, and unlawful payments and loans to labor unions. The inclusion of wire and mail fraud can bring many ordinary commercial transactions and, possibly, unfair labor practices not connected with organized crime, within the terms of RICO. A requirement of a RICO claim is that the defendant commit two or more of these acts of racketeering activity, commonly known as predicate acts, to establish a pattern.

While the focus of this paper is on the civil aspects of RICO, it is important to remember that Congress provided heavy criminal penalties, including imprisonment, fines, and forfeiture, for violation of these same provisions.\(^7\) Congress also provided for private suits in a far reaching civil enforcement scheme.\(^8\) The statute provides as follows:

Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefore in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.\(^9\)

Section 1962\(^{10}\) sets out the prohibited acts. These are summarized as follows:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate commerce.

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of (a), (b), or (c) . . .

For example, liability under § 1962(c), requires a plaintiff to show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.\(^{11}\)

RICO has so far survived all challenges based on its constitutionality. Both challenges based on first amendment claims and claims of a right to privacy in one's associations have been rejected.\(^{12}\) The statute is neither unconstitutionally

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\(^{10}\) 18 U.S.C. § 1962(a)-(d).

\(^{11}\) Sedima, 105 S. Ct. at 3285; Sun Savings & Loan Ass'n. v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987).

\(^{12}\) See, United States v. Dickens, 695 F.2d 765 (3rd Cir. 1982), cert. denied, 460 U.S. 1092 (1983); United States v. Rubio, 727 F.2d 786 (9th Cir. 1983).
ambiguous nor vague. It does not violate due process as unconstitutionally punishing the status of being a "reputed organized crime member," and does not violate the double jeopardy clause. Its forfeiture penalties do not violate the eighth amendment prohibition on cruel and unusual punishment.

In *Sedima v. Imrex*, the leading Supreme Court case interpreting RICO, the Court held the statute applicable not only to "organized crime," but also to ordinary commercial transactions. The case involved a business dispute over profits and net proceeds. Sedima, a Belgian corporation, had entered into a joint venture with Imrex Co. to provide electronic components to a Belgian firm. The buyer was to order parts through Sedima; Imrex was to obtain the parts in this country and ship them to Europe. The two companies were to split the net proceeds. Sedima became convinced that Imrex was presenting inflated bills and collecting for non-existent expenses. Sedima filed an action in federal district court in New York alleging common law claims of fraud and breach of contract, and RICO claims based on predicate acts of wire and mail fraud. Claiming injury in the amount of the alleged over-billing, Sedima sought treble damages and attorney fees. The lower court dismissed the RICO counts for failure to state a claim, holding that the complaint must allege a "RICO-type injury" which it defined as a racketeering or competitive injury analogizing to anti-trust law. A divided panel of the Second Circuit affirmed. The Supreme Court reversed, holding that a plaintiff in a private action need not prove a "racketeering injury" as opposed to an injury resulting from the predicate acts themselves. The Court further held that private actions are not limited to only defendants with prior convictions for predicate acts or criminal RICO violations. This ruling struck down the judicially-created limitation, which several lower courts imposed, requiring a prior criminal conviction as a prerequisite to civil RICO liability.

In so holding, the Court emphasized that the RICO statute is to be read broadly, and found that RICO's history, its language, or considerations of policy did not support the prior conviction limitation. Indeed, every indication was to the contrary.

Specific Requirements

1. Pattern

The pattern consists of a series of predicate acts. In discussing the require-
ment that the plaintiff must prove a "pattern of racketeering activity" as one of the elements of its case, the Court in Sedima recognized that the statute requires at least two acts to constitute a pattern. Two of the acts must have been committed within ten years of each other. However, the Court stated that the word "requires" is not synonymous with the word "means." That is to say that while two acts are necessary, they may not be sufficient. The Court explained:

The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one single 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

The Court noted that Congress indicated that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Another group of courts, including the Eighth Circuit, has held that more than one fraudulent or criminal scheme is necessary to establish a pattern. Thus, four mailings sent over a period of months to cover up a series of alleged kickbacks would show one criminal scheme. In those courts where only one scheme is required, the mailings would demonstrate continuity plus relationship, and pose a threat of continuing activity. As such, the acts would comprise a pattern for the purpose of maintaining a civil RICO claim.

20§ 1961(5). The statute of limitations for all civil RICO actions is four years, by analogy to the Clayton Act, but the court has chosen not to decide the appropriate time for accrual of a RICO claim. See, Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759, 2767 (1987).
21Sedima, 105 S. Ct. at 3285 & n.14.
22Id.
23Bank of America National Trust & Savings Ass'n v. Touche Ross & Co., 782 F.2d 966, 971 (1st Cir. 1986); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985); Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987); Morgan v. Bank of Waukegon, 804 F.2d 970, 975 (7th Cir. 1986) (predicate acts must constitute "separate transactions" to form a pattern). Compare Yellow Bus Lines v. Union Local 639, 839 F.2d 782, 789 (D.C. Cir. 1988); (acts of vandalism and intimidation in pursuit of a unitary goal). See also, United States v. Ianniello, 808 F.2d 184, 189-91 (2nd Cir. 1986), cert. denied, 107 S. Ct. 3230 (1987) (criminal case rejecting an effort to require two separate schemes).
2. Enterprise

The issue of what constitutes the enterprise must also be properly alleged in order to state a RICO claim. The statutory definition states that an enterprise "includes any individual, partnership, cooperation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The enterprise may be an association strictly for criminal purposes without any legitimate goals.

RICO does not require that the alleged racketeering conduct be the conduct of the alleged enterprise. It only requires that the defendant directly or indirectly conduct or participate in the affairs of the enterprise through a pattern of racketeering activity. In other words, there must be a "nexus" between the enterprise and the racketeering activity. A strike for recognition of the union as a collective bargaining representative is an activity sufficiently related to the company's ongoing role as a business enterprise and employer to establish the requisite nexus.

Depending on the section of RICO alleged, the same entity may be both the plaintiff and the enterprise. Some courts have held that the enterprise may also be a defendant in the RICO case and that a corporation may conspire with its own officers, agents, and employees, but others have not allowed this practice.

Logic alone may dictate that one entity may not serve as both the enterprise and the person who participates in the enterprise through a pattern of racketeering activity. However, exceptions to the non-identity rule may be made where the organization is created solely for illegal purposes and where corrupt directors or controlling partners operate it to the detriment of third parties. Where union employees engage in a pattern of unlawful or corrupt acts in the conduct of the union's affairs, they may properly be RICO defendants without regard to whether the union (the enterprise) itself is corrupt, whether the union authorized the acts, or whether the union benefited from the actions.

29Sun Savings & Loan Ass'n, 825 F.2d at 194 & n.6; Yellow Bus Lines, 839 F.2d at 789-90.
32Yellow Bus Lines, 839 F.2d at 790, discussing United States v. Hartley, 678 F.2d 961.
3. Injury

The Court in *Sedima* perceived no separate "racketeering injury" requirement and noted that "racketeering activity" consists of no more and no less than commission of a predicate act.\(^{33}\) If a defendant engages in a pattern of racketeering in a manner forbidden by the statute and if the racketeering activities injure plaintiff in his business or property, plaintiff has a civil RICO claim.

As an example, a civil RICO claim may be sufficiently alleged where the claim is that a bank and several of its officers fraudulently charged excessive interest rates on loans. Plaintiff's interest rate was pegged to the bank's prime rate, and the bank had lied to plaintiff with respect to the prime rate. Consequently, the rate charged to plaintiff was too high. If this scheme to defraud was carried on through the mails, i.e., if several letters were sent in furtherance of the scheme, a RICO claim is stated through the predicate acts of mail fraud.\(^{34}\) The mailings constitute the pattern of racketeering activity by means of which the defendants conducted, or participated in the conduct of, the bank's operations. Even if the only injuries alleged were the excessive interest charges themselves, this is enough to allege a claim.

However, the injury must be more than incidental. So, where the union claims only injuries consisting of attorneys fees and costs related to decertification proceedings alleged to have been unlawfully influenced by the defendant employer, no RICO damages are stated, and the RICO action cannot be maintained.\(^{35}\) This injury must be economic or property related, not personal; and claims of emotional distress are not cognizable under RICO.\(^{36}\)

**APPLICATION TO LABOR LAW**

*Union, Management Relations*

A clear target of RICO, as seen from the legislative history and government prosecutions, was the infiltration of organized crime into labor unions.\(^{37}\) Several of the listed predicate acts deal directly with labor related crimes.\(^{38}\) Government prosecutions of labor racketeering within locals of the Teamsters and several other unions\(^{39}\) have frequently set the stage for subsequent civil RICO actions.

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\(^{33}\) *Sedima*, 105 S. Ct. at 3284-85.

\(^{34}\) *American National Bank & Trust Co. v. Haraco*, Inc., 105 S. Ct. 3291 (1985) (per curiam) (decided on the same day as *Sedima* and affirmed the 7th Circuit, see, 747 F.2d 384, 398 (7th Cir. 1984)).


In *United States v. Local 560 of Intern. Broth. of Teamsters*, the government claimed that several individual defendants, "the Provenzano group," allegedly acquired an interest in and effectively dominated Teamsters Local 560 through a pattern of racketeering activities, including murder and extortion, in violation of 18 U.S.C. § 1962(b), (c) and (d). The district court concluded that Local 560 was a "captive labor organization" and enjoined certain defendants from any further contacts with Local 560, removed the current members of the Local's Executive Board and replaced the Board with a temporary trusteeship until free elections could be held. The Third Circuit affirmed this action.

The persons alleged to be injured were the members of the union, and the property interest was alleged to be Labor Management Relations Act (LMRA) and the Labor Management Reporting & Disclosure Act (LMRDA) guaranteed union rights. The injury was accomplished through a series of systematic acts of intimidation which included the June, 1961 murders of Anthony Castellitto, the August, 1961, appointment of Salvatore Provenzano to the position of trustee formerly occupied by Castellitto, the September, 1961, appointment of Salvatore Briguglio, the alleged murderer or Castellitto, as business agent, to name only a few. The government sought only injunctive and equitable remedies as relief. The district court's analysis of the RICO elements differed in part from that of the government which had referred to Local 560 as the "enterprise." The lower court found that the Provenzano group was the enterprise for the purposes of § 1962(c), and rejected the notion that LMRDA remedies are the exclusive remedies available in combating the extortion of a member's rights under that statute.

On appeal, the defendants argued a number of issues. The court held *inter alia* that extortion of a membership's statutory labor rights constituted a Hobbs Act violation and was a predicate act. Defendants claimed that LMRDA rights are intangible property rights and only extortion of tangible property is cognizable as a Hobbs's Act violation. The court rejected this argument stating that a membership's intangible property right to democratic participation in the affairs of the union is properly considered extortable "property" for purposes of the Hobbs Act. The defendants also argued what the government's burden of proof should...
be in a civil RICO action (where remedies are sought pursuant to §1964). The appellate court held that the standard of proof for the government is the "preponderance of the evidence." It specifically rejected the standards of "beyond a reasonable doubt" and "clear and convincing." Additionally, the court held that even though the union appointments were in technical compliance with union officer eligibility, the appointments still could serve as predicate acts.

Currently, much speculation and controversy exists regarding the government's alleged plans to place in trusteeship via a civil RICO action not just one Teamsters local, but the entire union, following the indictment of its President Jackie Presser. As of the date of this paper, such action has not been filed.

In addition to government actions, private parties are bringing civil RICO claims against unions. Following the criminal conviction of Eugene Boffa, Sr., owner of a trucking company, and Francis Sheeran, head of Teamsters Local 326, for various criminal RICO violations, the affected employees who had lost their jobs filed a suit for breach of the collective bargaining agreement, breach of the union's duty of fair representation and violation of RICO. The defendants were the union, Boffa's company, and Inland Container to which Boffa's company had previously leased drivers. The court held the RICO claim viable, although the remainder of the claims were barred because of the hybrid §301 action's six-month statute of limitations.

Preemption and Exclusivity

Although NLRB jurisdiction generally preempts the jurisdiction of both state and federal courts, there is a question whether RICO claims are preempted from federal court review where the alleged predicate acts are also unfair labor practices.

The NLRB is vested with primary jurisdiction to determine what is and is not an unfair labor practice. Federal courts do not have jurisdiction over activity which is arguably subject to §7 or §8 of the NLRA and they must defer to the exclusive competence of the National Labor Relations Board.

Port a scheme to deprive employees of Section 7 rights under the NLRA, 29 U.S.C. § 157, as Congress did not intend ULPs to have criminal consequences. Boffa may be of limited precedential value in light of the subsequent Supreme Court decision in United States v. McNally, 107 S. Ct. 2875 (1987). See discussion, infra.

46780 F.2d at 279 & n.12 relying on Santosky v. Kramer, 455 U.S. 745, 754.
47780 F.2d at 286.
The trend appears to be that unless the claim is directly premised upon a violation of Section 302, the specifically denominated predicated act in the RICO statute, a predicate act which is also an unfair labor practice will be held preempted.

In one example, a hotel and restaurant worker's union contended that the employer, Pier 66, influenced its employees to petition the NLRB seeking the decertification of the union as their exclusive bargaining agent, and monetarily induced them to do so by offering promotions, wage increases, and other benefits. These alleged bribes would violate § 302(a)(3) of the LMRDA, federal RICO laws, and state right to work laws. They also are unfair labor practices under § 8(a)(1), forbidding employer interference with employees' rights to organize and bargain collectively. The union filed an unfair labor practice charge against the employer. The NLRB investigated the charges, but found no evidence of impermissible employer assistance with the decertification effort and refused to issue a complaint. The union's appeal to the General Counsel was denied. The union then filed both a motion for reconsideration and new claims with the Board, as well as a civil RICO action in U.S. District Court. The district court granted the defendant employer's motion for summary judgment finding that the RICO action was simply a means of circumventing the NLRB's unfavorable decisions regarding the unfair labor practice charges.

A similar result was reached in Butchers' Union Local No. 498 v. S. D.C. Inv., Inc., where the court found that all claims except those directly premised on § 186 (§ 302) were preempted. Plaintiff labor union's attempt to organize employees of S.D.C. was thwarted by S.D.C.'s immediate recognition of the National Maritime Union (NMU) as the bargaining representative at S.D.C.'s new slaughterhouse operation. Two days after recognition, S.D.C. executed a collective bargaining agreement with NMU. Joined as defendants in the civil RICO action against S.D.C. and NMU were the lawyers who had represented the employer. The individual defendants were officers of S.D.C. and agents of NMU, as well as partners, members and employees of the law firms. Plaintiffs alleged that recognition of NMU was part of a conspiracy to reduce labor costs, maximize profits for S.D.C., and enrich both NMU and the law firm defendants. Plaintiffs claimed that the law firm engaged in hiring and paying organizers of NMU (payments made in the form of travel expenses, reimbursements for meals, hotel and autos, as well as direct payments of wages). They alleged as predicate acts violations of 29 U.S.C. § 186 (unlawful payments to labor organizers under § 302) and mail and wire fraud.

54 Local 355, 599 F. Supp. at 761.
5729 U.S.C. § 157 (1975) [Section 7 of the NLRA].
59 Id. at 1003.
The defendants argued that the claims were preempted under the NLRA. Plaintiffs claimed injuries resulting from three acts: (1) unlawful recognition of NMU; (2) execution of the collective bargaining agreement with NMU; and (3) S.D.C.'s failure to hire the locals' members. Because these acts are chargeable as unfair labor practices, the court, relying on San Diego Bldg. Trades, supra, found preempted those claims where the factual resolution was within the exclusive jurisdiction of the NLRB, i.e., where the resolution depended upon whether recognition of NMU was lawful, whether a collective bargaining agreement was executed, and whether S.D.C. deliberately refused to hire members of a local. However, the § 302 claims survived the preemption challenge. The court stated that the exclusive jurisdiction of the NLRB is not without statutorily created exceptions allowing for causes of action in federal court, e.g., §§ 301 and 303. Congress clearly provided that the violation of § 302 suffices to predicate civil liability under RICO and the claims grounded on such activities were not preempted, even if the proof of such claims would require resolution of labor law questions.

The court considered and rejected the holding and reasoning of Pier 66, where the plaintiff union had complained that the employer's monetary inducements for decertification violated § 302 and where the court held the violations were "nothing more than an unfair labor practice." The S.D.C. court noted that the Pier 66 decision seemed to be based on whether § 302 provided for civil or criminal relief. The S.D.C. court stated that that distinction misconstrued the nature of the appropriate inquiry. RICO provides monetary damages if a defendant engages in conduct indictable under § 302. Thus, "the fact that § 186 itself does not provide for monetary damages appears simply irrelevant."

The S.D.C. court found that the claims of wire and mail fraud, where the underlying fraud was a question within the exclusive jurisdiction of the NLRB, were preempted. The court analogized to the preemption of Employee Retirement Income Security Act (ERISA) claims in Laborer's Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete, Inc. In that case, the trust fund claimed that the employer had failed to make contributions to the fund as required under the terms of an expired collective bargaining agreement. The only reason the employer would have been liable for the contributions was because of a "labor law requirement" that employers continue contributions.

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60 Id. at 1005.
61 Id. at 1006-07.
62 Id. at 1009.
63 Id. at 1010-11. The court stated that § 186 was different from mail and wire fraud predicate acts and the inclusion of § 186 violations as a specific predicate act suggested that Congress was being selective as to what activities were being removed from the exclusive jurisdiction of the labor law. The court stated: "The violation of no other labor statute constitutes a RICO predicate act." Id. at 1009. Whatever the validity of its conclusion, the court is clearly in error in that statement. Violations of 29 U.S.C., § 501(c) (embezzlement from union fund), 18 U.S.C. § 664 (embezzlement from pension and welfare funds), and 18 U.S.C. § 1951 (Hobbs Act), are all specific predicate acts listed in the statute.
during collective bargaining. Because labor law was solely determinative of the
issue of the employer's liability and the duty to make payments was a consequence
of the broader duty to protect the collective bargaining process, the claim was
within the jurisdiction of the NLRB and plaintiff's ERISA claims were preemp-
ted. In affirming the Ninth Circuit, the Supreme Court rejected the government's
argument that the narrow scope of the remedies under the NLRA justified district
court jurisdiction of the ERISA claims and allowance of attorney's fees, pre-
judgment interest, and liquidated damages. The court noted that Congress
evidenced no intention to provide ERISA plan trustees with a preferred procedure
for an employer's violation to bargain with the union.

When considering the issue of NLRB jurisdiction, other courts have reached
somewhat different results in the wire and mail fraud area.65 A RICO predicate
act of mail fraud66 has been held to support a scheme to deprive union members
of "the honest and faithful" services of union officials as provided for in 29 U.S.C.
§ 501,67 but may not support a scheme to deprive employees of rights created by
Section 7 of the NLRA. The argument that a violation of union rights under Sec-
tion 7 is a RICO predicate act because of the "remedial nature of the [NLRA]
and the primacy of the NLRB in resolving unfair labor practice disputes" was
specifically rejected.68 The NLRB has been held not to have primary jurisdiction
over the democratic rights created by § 411 and enforced by § 412 of the LMRDA.69
Section 412 gives union members a direct cause of action against the union and
its officers for infringement of their Section 411 rights, and predicate acts grounded
on these rights are not preempted.70

All predicate acts of mail fraud or wire fraud in the context of any scheme
to deprive persons of intangible rights may be suspect following the Supreme
Court's decision in United States v. McNally.71 That case held that the mail fraud
statute does not prohibit schemes to defraud people of their intangible rights to
honest and impartial government. Some earlier decisions affirming criminal con-
victions of union officials for mail fraud in furtherance of a scheme to defraud
the union of their "honest and faithful services" have been vacated in light of
McNally and remanded for further consideration.72 However, where the scheme
can be interpreted to have an economic or other property basis, RICO claims will

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67Although the mailing may be a valid predicate act for RICO, a scheme to defraud a union of the intangible
rights to the honest and faithful services of its officials does not appear to be viable following the Supreme
Court's decision in United States v. McNally, 107 S. Ct. 2875, 2879 (1987), where the Court held that the mail
fraud statute does not prohibit schemes to defraud people of their intangible rights to honest and impartial
government.
68Boffa, 688 F.2d at 927.
70United States v. Teamsters Local 560, 780 F.2d at 282 & n.16.
71107 S. Ct. 2875 (1987); see supra note 31.
still be viable.\textsuperscript{73} Subsequent cases have explained \textit{McNally} and held that the mail fraud statute still reaches schemes involving intangible property rights.\textsuperscript{74} Confidential business information is within reach of the statute, and a scheme to defraud does not require a monetary loss.\textsuperscript{75} Thus, predicate acts involving mailings in furtherance of such a scheme should still be valid.

Nevertheless, predicate acts related to mail fraud in the context of economic or property loss remain troublesome. Bankruptcy fraud is one of the specifically prohibited acts in the RICO statute. Rejection of collective bargaining agreements in plans of reorganization in bankruptcy may present questions of preemption, jurisdiction, and estoppel.\textsuperscript{76} Where rejection of agreements occurs with related companies, a union may claim RICO violations, alleging that acquisition of the companies, followed by filing bankruptcy based on misrepresentations constitutes a pattern of racketeering activity and states a RICO claim. Although each bankruptcy resulted in court-approved rejection of collective bargaining agreements, the union may argue that the concommitant loss of union members' jobs should be cognizable as an injury under RICO.

However, if the RICO action is merely a device to avoid the proper jurisdiction of the bankruptcy courts, the NLRB, and federal appellate courts, the doctrines of res judicata and collateral estoppel may bar it. Res judicata and collateral estoppel will generally not be a successful bar to RICO claims, for the reason that the doctrines require that a party have had a full and fair opportunity to litigate the claims in a proper forum.\textsuperscript{77} Further, RICO has been modeled after the antitrust laws.\textsuperscript{78} Res judicata does not bar a plan of confirmation from subsequent attack on the grounds that it violates antitrust laws, and analogously, a claim should not be barred from attack on the grounds that it violates RICO.

This conclusion has a detrimental effect on concepts of judicial economy and a party's reliance on legal process and court judgments. Where a party has relied on acquisition and operation of a business pursuant to orders of the bankruptcy court, it may later be compelled to litigate previously unraised claims of fraud in a civil RICO action. Although troubling, this conclusion appears to follow from the Supreme Court's holding in \textit{Sedima} and the statute's legislative history.

The Second Circuit's opinion in \textit{Sedima} recognized "the extraordinary, if not outrageous," uses to which civil RICO has been put.\textsuperscript{79} However, in revers-

\textsuperscript{73} United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987).
\textsuperscript{74} Carpenter v. United States, 108 S. Ct. 316 (1987).
\textsuperscript{75} Id.
\textsuperscript{77} See \textit{In re} Turner, Bankr. Case No. 584-501 (N.D. Ohio, White, J.) (Bankruptcy court an improper forum in which to litigate RICO claims) (unpublished opinion); Cook County v. Midcon Corp., 773 F.2d 892, 908 (7th Cir. 1985) (RICO action not barred where only some aspects of an allegedly fraudulent scheme were at issue in a prior suit) (\textit{dicta}).
\textsuperscript{79} 741 F.2d at 487.
ing the appellate court, the Supreme Court stated:

It is not for the judiciary to eliminate the private action in situations where Congress has provided it . . . . The ‘extraordinary’ uses to which RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular, the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of pattern . . . .

Thus it appears that the courts must await legislative modification to limit RICO actions.

**Arbitrability of RICO Claims**

The Supreme Court recently held in *Shearson/American Express v. McMahon*\(^8\) that RICO claims are arbitrable. The case arose out of a brokerage agreement. The customers of the brokerage firm filed suit in federal district court alleging claims for violation of the anti-fraud provision in § 10(b) of the Securities and Exchange Act and SEC Rule 10 b-5 and RICO. Defendants moved to compel arbitration. The Court held that both the RICO claims and the Exchange Act fraud claims were arbitrable, noting that there was nothing in either the RICO statute or its legislative history even arguably to evince congressional intent to exclude civil RICO claims from the dictates of the federal arbitration act.\(^9\) The defendants' argument of irreconcilable conflict between arbitration and the purposes underlying RICO were found to be without merit. The Court relied on its earlier decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*\(^8\) a case holding antitrust claims arising out of international commercial transactions arbitrable. RICO's complexity is not sufficient to ward off arbitration. The adaptability of arbitration and access to an arbitrator's expertise was found to rebut the view that an arbitral tribunal could not properly handle the issues. Neither does the overlap between criminal and civil RICO, nor the public interest in its enforcement preclude arbitration.\(^4\)

Formerly, a plaintiff with labor-related statutory claims of ERISA and RICO was not required to exhaust arbitration remedies available on the ERISA claims.\(^8\) The reasoning was based on public policy, and the right of aggrieved employees to maintain actions in federal court, even where the underlying claims of wrongful discharge were subject to mandatory and binding arbitration.\(^6\) In holding that

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\(^8\) *Sedima*, 105 S. Ct. at 3287.
\(^1\) 107 S. Ct. 2332 (1987).
\(^2\) Id. at 2338; See generally 9 U.S.C. § 1, et. seq.
\(^3\) 473 U.S. 614 (1985).
\(^4\) *Price*, 107 S. Ct. at 2344.
arbitration was not required, the court cited cases where arbitrators were powerless to grant the aggrieved employees the broad range of relief authorized. However, in cases of civil RICO actions brought by non-government plaintiffs, relief is probably limited to money damages and not injunctive or other equitable remedies.\(^8\)

The Third Circuit had held before the Supreme Court's decision in *McMahon* that some RICO claims were arbitrable and others were not depending on the kinds of predicate acts alleged.\(^8\) This decision was vacated and remanded for reconsideration in light of *McMahon*.

Thus, it appears that RICO claims in a labor context are arbitrable, if they arise under the arbitration agreement between the parties. The fact that they are complex and may ask for broad relief will not bar an arbitrator from resolving them.

**The Future of RICO**

The breadth of RICO's reach continues to evolve. The Supreme Court has struck down judicial attempts to limit RICO's scope which required prior criminal convictions of defendants and "racketeering type" injuries. The statute has been held clearly applicable to ordinary commercial transactions and is to be applied broadly, in the absence of congressional modification.

The holding that civil RICO claims are arbitrable may slow the momentum for congressional reform of RICO, which in large part the securities industry had pushed.

Nevertheless, several legislative modifications are now before Congress although most Congress watchers are not optimistic for their passage.\(^8\) Court watchers expect the Supreme Court to take a case in the next year on the pattern requirement to resolve the split in the circuits. Professor Robert Blakey, one of the drafters of the original statute, has stated that the "trashy cases" are gone, and that judges may soon start imposing Rule 11 sanctions on plaintiffs who bring frivolous RICO claims.\(^9\) The Department of Justice is on record as favoring legislation which would greatly restrict the ability of private parties to bring civil

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\(^9\)Id.
RICO claims. The Judicial Conference of the United States is also in favor of restricting the reach of civil RICO.

Like the black hole in space, a small celestial body with an intense gravitational field, RICO is a source of vast federal power to pull in those voyagers who venture near its parameters. Although in some contexts the concept of prosecutorial discretion limits the reach of the statute, no such shield is found in private civil RICO actions. Some courts have attempted to direct the reach of the statute to those for whom it was originally intended, but in Sedima such limitations were disallowed. Thus, it remains for Congress to modify the statute, or RICO, like the U.S.S. Enterprise, will continue to boldly go where no man has gone before.

