

The Applicability of Civil RICO to Toxic Waste Polluters

INTRODUCTION

The hazardous waste¹ problem in the United States is enormous. The private and public sectors generate more than 260 million metric tons of hazardous waste annually, a quantity equal to more than 70 billion gallons.² Hazardous waste generators and management facilities are concentrated in manufacturing industries which account for 92% of the total quantity of toxic waste produced.³ Over half this country's toxic material is generated by the chemical industry, which produces such materials as plastics, fertilizers, synthetic fibers, medicines, detergents, cosmetics, pigments, paints, adhesives, pesticides, and numerous other organic and inorganic chemicals.⁴ Approximately 10% of all hazardous waste is produced by hospitals, schools, universities, and federal, state, and local governments.⁵ To date the E.P.A. estimates it is aware of more than 18,000 potentially hazardous sites.⁶ Even more disturbing are E.P.A. studies which conclude that environmentally unsound methods have been used to dispose of 90% of this country's hazardous waste.⁷

Adequate redress for injury caused by mismanagement of hazardous waste does not result from application of current statutory and common law theories of recovery. Victims of hazardous waste pollution theoretically have a legal right to relief, but from a practical standpoint, they usually remain uncompensated due to the fundamental nature of toxic injury. Tort law developed in order to address direct and identifiable injuries to individuals. Toxic injury, however, usually occurs years after exposure and can easily be confused with disease prompted by natural causes. Scientific knowledge is capable of determining how arms and legs break, but has not reached a level where it can trace the cause of carcinogenic, mutagenic, or teratogenic

1. A hazardous waste is defined as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." Resource Conservation and Recovery Act of 1976 § 103, 42 U.S.C. § 6903(5) (1982).

2. Thomas, *EPA Fights Hazardous Waste*, 10 EPA J. Oct. 1984, at 4.

3. *Id.*

4. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. SW-826, EVERYBODY'S PROBLEM: HAZARDOUS WASTE 15 (1980).

5. *Id.* at 14.

6. Thomas, *supra* note 2, at 4.

7. EVERYBODY'S PROBLEM: HAZARDOUS WASTE, *supra* note 4, at 14.

damage to one readily ascertainable source. The present state of the art is such that toxicologists and other chronic injury experts are not able to provide attorneys with the legal certainty the lawyer needs to gain a successful verdict.

Although no explicit federal cause of action exists for hazardous waste victims, one potentially promising cause of action for these victims, unexploited by litigants to date, is provided by the Racketeer Influenced and Corrupt Organizations Act (RICO).⁸ RICO can be used by waste victims to obtain relief from businesses engaging in improper waste disposal. Part I of this Note examines the inapplicability of common law remedies for chemical crime. Part II suggests that the civil provision of RICO is a flexible, federal approach through which certain toxic injury victims can achieve adequate relief. Part III addresses reform of the RICO statute.

I. TRADITIONAL TORT THEORY AND TOXIC INJURY: THE ILLUSION OF JUSTICE

The tremendous growth in American manufacturing industries since World War II has created both new scientific advancements and new societal problems. Common law unfortunately has not changed to accommodate the times. Today law and science conduct an uneasy partnership. Law demands proof, while science provides only probabilities.⁹ Since hazardous waste victims rely predominantly upon statistics and correlations to support their claims, few recover in the fault-based context of tort. Rules which developed to compensate immediate, individualized wrongs do not work when applied to toxic injury because toxic injury fails to fit traditional tort definitions.¹⁰

A. *Victim Barriers*

1. Causation

To recover civil damages under tort law, a plaintiff must establish the disputed facts by a preponderance of the evidence. If at the conclusion of the presentation of evidence it has not been proven more likely than not that the defendant's action caused the plaintiff's injury, the plaintiff will lose and go uncompensated.¹¹ The civil standard of proof is said to correspond to a

8. Organized Crime Control Act of 1970, 18 U.S.C. §§1961-1968 (1982 & Supp. III 1985).

9. See generally W. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* (1984) (dedicated to bringing the legal and scientific disciplines towards approachment).

10. Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 576-88 (1983).

11. MCCORMICK ON EVIDENCE 956-59 (E. Cleary 3d ed. 1984).

subjective certainty of more than 50%.¹² This standard developed so that both sides would share equally in the risk of error.¹³

Plaintiffs who believe they have been injured by toxic waste have difficulty meeting the civil burden of proof because injuries caused by toxic waste, like cancer or genetic damage, are of indeterminate causation.¹⁴ As a result of the indeterminate causation of toxic injury, toxic tort plaintiffs usually can establish only correlative rather than causal links between their injuries and the contaminant to which they were exposed.¹⁵

A plaintiff's evidence may show a correlation between an increase in the occurrence of a disease in a population exposed to a toxic substance, but such data offers little information as to the cause of the plaintiff's own injury. Correlation studies use data drawn from naturally occurring conditions with no control over either the circumstances in which the variables operate or the circumstances acting upon the variables. Unless the statistical increase is greater than 100%, it is more likely than not that the victim's particular injury was *not* caused by exposure to the defendant's contaminant.¹⁶

The principal drawback of correlation studies is the difficulty, if not

12. W. LOH, *supra* note 9, at 521-22.

13. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

14. For example, one contaminant exposure study found: "Although there *may be* a notable increase in the prevalence of subjective neurologic symptoms . . . or of peripheral nerve symptoms . . . they are so frequent in control subjects that they are of little significance. . . . [C]onception *seems to be* possible even in cases of overt poisoning." (emphasis added) Reggiani & Bruppacher, *Symptoms, Signs and Findings in Humans Exposed to PCBs and their Derivatives*, 60 ENVTL. HEALTH PERSP. 225, 230 (1985).

15. Note, *supra* note 10, at 583.

16. *Id.* at 584. The optimal research design is the controlled experiment by which all variables are controlled except for the one desired to be measured, i.e., contaminant exposure. Whatever result emerges, i.e., cancer, can then be attributed with confidence to the manipulated feature. Moral and ethical considerations prevent controlled toxic contamination experiments from being designed for humans. W. LOH, *supra* note 9, at 149. Thus, scientists can only study causation of toxic injury through human correlation studies. Most toxic waste contaminant studies reported in the literature have been characterized by one or more of the following shortcomings:

1. small study populations;
2. lack of accurate exposure data;
3. simultaneous exposure of workers to other potentially harmful chemicals; and
4. lack of control for confounding variables such as alcohol consumption or smoking patterns.

See Letz, *The Toxicology of PCBs—An Overview for Clinicians*, 138 W.J. MED. 534, 536 (1983). Researchers can design controlled experiments for animals, most notably rats. Shortcomings, however, occur because of the choice of control subject. Since rats are not human, animal-to-man extrapolations must be made. Perhaps there is something unique about the rat's mammalian structure that makes it more prone to certain types of cancer than man. Cancer affects different animals in different ways. For example, the dioxin LD50—lethal dose for 50% of the population—for guinea pigs is .6 micrograms per kilogram while the dioxin LD50 for hamsters is 500 micrograms per kilogram. This means hamsters are 10,000 times more susceptible to dioxin poisoning than guinea pigs, yet both are mammals. Environmental chemistry lecture by Dr. Ronald Hites, Indiana University, Bloomington, Indiana (Oct. 30, 1985).

impossibility, of specifying causal relationships with any reasonable certainty.¹⁷ The finding that cancer incidence rises with an increase in contaminant exposure¹⁸ may be a spurious rather than a true relationship, given the possibility of confounding effects of uncontrolled outside variables.¹⁹ One cancer study concluded: "there is too little epidemiological evidence available yet to evaluate the potential of PCBs as human carcinogens . . . two liver cancers and two lung cancers were reported but *smoking* and *drinking* patterns were not available."²⁰ Toxic injury is subject to chicken-and-egg problems of interpretation: toxic contaminants may cause injury, but the genetic or nutritional background of the individual may cause the same injury absent exposure to the contaminant.²¹ Given the widespread dissemination of carcinogenic material in the environment, it is nearly impossible for researchers to isolate the effects of one carcinogenic agent alone. The causal agents of toxic injuries are, therefore, often difficult if not impossible to determine.

An additional causation problem deals with who has been injured rather than how a particular chronic injury occurred. Recent products liability cases illustrate that if a judge must choose between a plaintiff and a group of manufacturers in the same market, of which one unknown manufacturer injured the plaintiff, the manufacturers as a group will be jointly and severally liable to the plaintiff.²² This type of situation involves indeterminate defendants. In toxic tort cases, however, the plaintiffs are indeterminate.²³ It may be known that a group of people has a certain type of cancer and that a portion of them developed the cancer from exposure to the defendant's waste, but it will not be known which victims within the overall group the defendant specifically injured.²⁴ This is because correlative epidemiological human studies and controlled animal studies typically are incapable of providing the requisite causation needed to meet the plaintiff's burden of proof. Shifting proof of causation to the defendant, however, does not serve principles of fairness. Carelessly shifting proof of causation to the defendant

17. W. LOH, *supra* note 9, at 149.

18. Some scientists believe that PCBs, which are highly toxic chemicals, may not actually initiate cancer but that they may act synergetically with other compounds, which are in the body or which are introduced into the body, to cause cancer. In PCB waste exposure cases, it could be argued that it is not more likely than not that the PCB exposure alone caused the victim's injury. See generally Perham, *Legacy of Poisons*, 4 EPA J. July-Aug. 1979, at 4 (dioxin exposure can cause chloracne in skin, but so can certain plant allergies).

19. W. LOH, *supra* note 9, at 153 (discusses causation difficulties in context of racial discrimination cases).

20. Letz, *supra* note 16, at 538 (emphasis added).

21. Note, *In Search of Adequate Compensation for Toxic Waste Injuries: Who and How to Sue*, 12 PEPPERDINE L. REV. 609, 618-20 (1985).

22. For a thorough analysis of the "indeterminate plaintiff" concept, see Note, *supra* note 10, at 582-83; Delgado, *Beyond Sindell: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881, 881-83 (1982).

23. Note, *supra* note 10, at 582.

24. *Id.* at 581-83.

would result in industries producing toxic waste being strictly liable for damage claims from the large percentage of the population which will develop cancer. Strict liability would result because no defendant could refute a plaintiff's claim that exposure to the defendant's waste promoted the plaintiff's cancer.²⁵

2. Statutes of Limitation

The statute of limitations for a tort action traditionally begins when a defendant commits a tortious act. The nature of toxic injury makes it unlikely that the toxic injury will manifest and be discovered before the expiration of the statutory period. Although leaking dumps may produce enormous quantities of leachate, contamination takes years to produce harm because groundwater which serves as the migration path for toxic leachate moves very slowly through soil.²⁶ Large distances, however, are traversed by toxic waste and much land area is affected with time.²⁷ The Environmental Protection Agency Office of Solid Waste estimates that an average land disposal site, 17 acres in size, with an annual infiltration of 10 inches of water, can produce 4.6 million gallons of leachate yearly, and can maintain this productivity for 50 to 100 years.²⁸ Contaminants from leaking dumpsites have even been found 50 miles away.²⁹ Furthermore, once there is contaminant exposure, most toxic injuries are chronic by nature, occur slowly over a victim's lifetime and are unobservable. Unlike acute effects, such as death or bleeding, chronic effects are characterized by long latency periods. An individual exposed to a toxic carcinogen as a child may fail to develop cancer for twenty or thirty years.³⁰ Statutes of limitation designed to further justice in cases involving acute injury create injustice when applied to cases involving chronic injury.³¹

25. Stranahan, *Toxic Torts: Compensating Victims of Hazardous Substances*, 4 ALICIA PATTERSON FOUND. REP. 19-22 (Summer 1983).

26. See, e.g., Note, *supra* note 10, at 580 n.21 (quotes the Council on Environmental Quality as stating that groundwater moves at a rate of a few tens of feet per year). No matter how much toxic waste leaches into an aquifer, it will still take years for the substance to reach nearby wells or farmland. Consequently, waste leaching does not translate into immediate exposure problems. See also I. TINSLEY, *CHEMICAL CONCEPTS IN POLLUTANT BEHAVIOR* 232-36 (1979) (general discussion of disposal of waste chemicals in landfills).

27. A. BLOCK & F. SCARPITTI, *POISONING FOR PROFIT: THE MAFIA AND TOXIC WASTE IN AMERICA* 52-53 (1985) (toxic contamination may not be discovered for many years but it will nonetheless travel considerable distances).

28. *Id.* at 53-54 (quoting a hazardous waste expert).

29. *Id.* at 53. Once groundwater becomes contaminated, rehabilitation is almost impossible. Chemicals get trapped in rock formations and stay in the same location for years, never decomposing or evaporating. One government report speculates that aquifers may hold contaminants for thousands of years, during which time they will continually spoil all groundwater which flows through the area. *Id.*

30. See, e.g., Letz, *supra* note 16, at 538-39. See generally S. EPSTEIN, *THE POLITICS OF CANCER* (1978) (excellent overview on cancer mechanisms and cancer causation).

31. See Note, *supra* note 21, at 620-22.

A recent trend within a few states has been to alter the date from which toxic tort causes of action commence. Some jurisdictions have adopted "discovery" rules in which tolling of the statute of limitations begins when a plaintiff discovers his injury and its possible causal connection to chemical exposure.³² Other states, including Indiana, have created discovery rules which toll the statute of limitations from the date the plaintiff knew or should have discovered that he or she suffered an injury or impairment, and that the injury was caused by the product or act of another.³³ This type of discovery rule incorporates a reasonable person standard. A different modification followed by still other states would commence toxic tort causes of action from the time the plaintiff knew or should have known of the injury, its cause, and the cause of action.³⁴ Some states have yet to adopt a discovery rule.

Discovery rule modifications to traditional statutes of limitation do not ultimately solve the limitations problem. These modifications emerge from case law rather than statutes.³⁵ Many courts undoubtedly will limit their adoption of a discovery rule to the precise factual pattern of the case meriting the modification. This means that plaintiffs will have to continue to litigate the limitations problem in order to try to extend the state's discovery rule to their own particular factual context. Thus, even under common law that has been modified to respond to the latency periods of chronic injury, plaintiffs will continue to encounter unfair barriers when commencing claims for toxic injury relief.

B. *Victim Proposals*

Some members of Congress have pushed for legislation which would compensate individuals suffering from hazardous waste injuries.³⁶ Most of the proposals would have either altered common law rules of liability and removed existing barriers to toxic tort litigation or implemented administrative compensation funds. Victim compensation proposals, however, consistently have been defeated.³⁷

32. Note, *supra* note 10, at 581 n.23.

33. See, e.g., *Barnes v. A. H. Robins Co.*, 476 N.E.2d 84 (Ind. 1985).

34. Note, *supra* note 10, at 581 n.23.

35. Recently, Congress amended the CERCLA statute to impose a federal discovery rule upon all state statutes of limitations for hazardous substances cases. See § 203 Superfund Amendments and Reauthorization Act (1986). Although Congress attempted to resolve part of the inadequacy of the common law for addressing latent injury, it should have instead created a federal cause of action and discovery rule for toxic injury victims rather than intrude upon each state's choice of common law. The fate of the CERCLA amendments is uncertain because the amendments are sure to be heavily contested by defendants on constitutional federalism grounds. See *Garcia v. San Antonio Metro Transit Auth.*, 105 S. Ct. (1985) (5-4 decision).

36. See CONGRESSIONAL QUARTERLY ALMANAC 311 (E. Patterson ed. 1984); Davis, *Liability Issues Remain Unsolved: 'Superfund' Bill Ready for Action by Senate*, 43 CONG. WEEKLY REP. 1150 (June 15, 1985); Note, *Remedies for Hazardous Waste Injuries*, 11 N. KY. L. REV. 435, 442 (1984); and Note, *supra* note 10, at 588-91.

37. See, e.g., CONGRESSIONAL QUARTERLY ALMANAC, *supra* note 36, at 311 (observes that

Opposition to toxic victim compensation has emerged in a variety of ways. The most vocal resistance has come from the powerful chemical, oil, and insurance industries.³⁸ Under Superfund,³⁹ which provides for the cleanup of hazardous waste dumpsites and chemical spills, chemical companies pay a tax on their products and they steadfastly oppose imposition of another tax to support waste victim funds. The insurance industry is allied with the chemical industry against waste victim legislation. Both suffer tremendously from present environmental statutory constraints. Insurance carriers which issue general liability coverage to the toxic waste industry are fearful that hazardous waste victim legislation would drive them into bankruptcy. The chemical companies fear that such legislation would burden them not only with more taxes but would prevent them from obtaining insurance.

Private interest groups oppose hazardous waste victim compensation as well as many parts of the federal government. Some bureaucrats and legislators believe toxic victim compensation is too costly or unwieldy. Others feel that toxic victim compensation is better considered in the context of a national program for health care and health insurance. Citizens currently do not have a specific statutory right to sue in federal courts for injuries received in toxic waste incidents and no victim administrative funds exist.⁴⁰ If the past is any indication of the future, waste victims will have to continue to rely upon inadequate common law for redress of toxic injury.

II. CIVIL RICO

One method by which plaintiffs suffering from toxic injury can try to avoid the inadequacy of common law theories of recovery and still sue dumpers, haulers, and generators of toxic waste is through the Racketeer Influenced and Corrupt Organizations Act (RICO).⁴¹ Although RICO section 1964(c) has gen-

House consistently defeats toxic victim compensation proposals); Davis, *supra* note 36, at 1150 (observes that Senate consistently defeats toxic victim compensation bills).

38. See *Victim Compensation Plans Criticized by Insurance Industry; Said 'Uninsurable,'* 14 Env't Rep. (BNA) 523-24 (July 29, 1983); See also *Chemical Industry Ultimately Will Request Victim Compensation System, Florio Predicts*, 15 Env't. Rep. (BNA) 575-76 (August 8, 1984).

39. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1980 & Supp. II 1984).

40. See Note, *supra* note 10 (proposes a model compensation scheme for toxic tort victims).

41. For additional commentary on RICO, consult the following: Batista, *The Uses and Misuses of RICO in Civil Litigation: A Guide for Plaintiffs and Defendants*, 8 DEL. J. CORP. L. 181 (1983); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 59 NOTRE DAME L. REV. 237 (1982); Campbell, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 SW. L.J. 925 (1982); Patton, *Civil RICO: Statutory and Implied Elements of the Treble Damage Remedy*, 14 TEX. TECH. L. REV. 377 (1983); Straffer, Massumi & Skolnick, *Civil RICO in the Public Interest: Everybody's Darling*, 19 AM. CRIM. L. REV. 655 (1982); and Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

eraged widespread commentary from courts and legal scholars concerning the unique opportunities of its private treble damages provision, the ramifications of RICO on polluters who infiltrate legitimate businesses for illegal profit have never been fully explored. A civil RICO action requires a violation of both 18 U.S.C. § 1962 and 18 U.S.C. § 1964. Section 1962, in relevant part, provides that it is unlawful for any person through a pattern of racketeering activity to directly or indirectly invest in, acquire or maintain any interest or control in, or to participate in, the conduct of any enterprise which engages in interstate commerce.⁴² Section 1964(c) gives a private treble damage action to any person injured in his business or property by reason of a violation of section 1962.⁴³

Civil RICO offers two potential advantages to victims of illegal toxic waste disposal. First, by avoiding tort theory, hazardous waste victims will not encounter the difficulty, if not impossibility, of showing that the illegal dumping of hazardous waste was the proximate cause of their latent injury.⁴⁴ Second, the latency periods associated with toxic injury, which might bar some waste victims' claims in some state courts, will never bar any waste victim's federal RICO claim.⁴⁵ The federal statute, however, is not an ideal solution that has been ignored for the last sixteen years. Civil RICO applies only to those hazardous waste victims who can ultimately prove racketeering activity as well as injury to business or property. These statutory limitations are not as restrictive as they first seem. Illegal activity by dumpers, haulers, and generators is evidenced by EPA estimates that only 10 percent of the total hazardous

42. 18 U.S.C. § 1962 provides:

(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. . . .

(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.

(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.

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

43. 18 U.S.C. § 1964(c) provides: "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."

44. See *infra* note 124 and notes 183-92 and accompanying text.

45. See *infra* notes 153-57 and accompanying text.

waste in the United States has been disposed of legally and safely.⁴⁶ In addition, the Supreme Court, in *Sedima, S.P.R.L. v. Imrex, Co.*, recently invalidated many of the limitations on RICO lawsuits set by lower courts.⁴⁷ Civil RICO is a powerful tool for toxic waste victims, and it remains unused by plaintiff lawyers in the toxic tort context. Since federal victims' compensation has yet to emerge, toxic waste victims need to be aware of all potential routes to compensation.

A. *Effect of "Person" on Standards of Liability in Section 1962*

One of the most heavily litigated elements of RICO is the "person" requirement. Only a "person" who is involved with racketeering activity may be liable under the racketeering law. Hazardous waste victims should name a corporation as the defendant "person" rather than an individual. This allows the RICO plaintiff to take advantage of the corporate deep pocket and to avoid forcing individual defendants into bankruptcy. Normally this presents no problem. When only one corporation, however, is involved in illegal waste disposal, the waste victim will want the corporation to qualify both as the "person" and the "enterprise," another section 1962(c) requirement.⁴⁸ If the waste victim is prohibited from identifying the corporation as both a "person" and an "enterprise" in pleading her case, then the victim will fail to state an adequate claim for RICO relief.

A corporation fulfills the requirements of both "person" and "enterprise" under section 1961. Section 1961(3) defines a "person" as including "any individual or entity capable of holding a legal or beneficial interest in property."⁴⁹ An "enterprise" includes "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."⁵⁰ RICO is silent as to whether the two terms are mutually exclusive. A corporation clearly satisfies the "enterprise" requirement and clearly satisfies the "person" requirement. The issue splitting the courts is whether the same corporation can be both a "person" and an "enterprise" simultaneously.

1. Section 1962(a)

Section 1962(a)⁵¹ states in relevant part that it is unlawful for any "person" who has directly or indirectly derived income from a pattern of racketeering activity to use or invest such income in the establishment or operation of

46. EVERYBODY'S PROBLEM: HAZARDOUS WASTE, *supra* note 4, at 15.

47. 105 S. Ct. 3275 (1985).

48. *See supra* note 42.

49. 18 U.S.C. § 1961(3) (1984).

50. *Id.* § 1961(4).

51. *See supra* note 42.

an enterprise affecting interstate commerce. No language within subsection (a) indicates whether "person" and "enterprise" must be kept distinct, or whether they may be the same entity.

A recent Seventh Circuit opinion indicates support for the enterprise-as-person concept under section 1962(a). In *Haroco v. American Nat. B. & T. Co. of Chicago*, the court in dictum observed that a corporation may be both the liable "person" and the "enterprise" under subsection (a) if the corporation received money from the alleged racketeering activity and if it also could be liable as a principal for those acts.⁵² The goal of RICO in reaching those who profit from racketeering⁵³ is realized by allowing the same corporation to serve as both defendant and "enterprise" because the corporation can be a "person" under subsection (a) only if it plays an active role as an initiator or beneficiary of racketeering. Treble damages cannot be assessed against a corporation "enterprise" under section 1962(a) unless corrupt corporate employees, officers, or agents "directly" or "indirectly" use illegal income in the company's "operation" or "establishment."⁵⁴ A corporation "enterprise" therefore cannot be given enhanced sanctions under subsection (a) unless the corporation in some way benefits from racketeering activity.

Several courts attempt to restrict the scope of section 1962(a). In *Kredietbank, N.V. v. Morris*,⁵⁵ the court rejected the *Haroco* court's reasoning that the "person" can be the same individual or entity as the "enterprise" under section 1962(a). In fact, the court ruled that the language in each subsection of section 1962 requires that the "person" never be the same as the "enterprise." The court's holding, however, is based on a superficial analysis of the language in section 1962. The court held: "the consistent use of the words 'person' and 'enterprise' in the statute represents an intention to distinguish between those actors throughout the statute."⁵⁶ The court failed to recognize that section 1961 of RICO defines a corporation as both a "person" and an "enterprise" and that the enterprise-as-person

52. 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 105 S. Ct. 3291 (1985) (per curiam). In *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397 (7th Cir. 1985), the court adopted the *Haroco* dictum by ruling that a corporation can serve as both a "person" and an "enterprise" under section 1962(a). See also *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28 (1st Cir. 1986) (court, in dicta, observed that the "person" and "enterprise" elements of section 1962(a) are not mutually exclusive).

53. According to the legislative history of RICO, RICO is designed to prevent the infiltration of legitimate businesses by racketeering activity. Congress wanted to reach both "legitimate" and "illegitimate" enterprises. See *United States v. Turkette*, 452 U.S. 576, 586-87 (1981). As will be seen, the careful and different ways in which Congress worded each subsection of section 1962 guarantee that innocent corporation "enterprises" will not be subject to RICO liability. Those corporation "enterprises" which benefit from racketeering activity, however, will be liable. Because of these statutory consequences, laundering of illegally-obtained money into "respectable" businesses is effectively deterred. If money which was derived from racketeering and funneled into a business could not be retrieved, RICO would be ineffective as a tool against crime.

54. See *supra* note 42.

55. No. 84-1903 slip op. (D.N.J. Oct. 11, 1985) (LEXIS, Genfed library, Dist. File).

56. *Id.*

concept must be analyzed with reference to the standards of liability outlined in each subsection.

Once the two failures in *Kredietbank* are accounted for, as seen in *Haroco*, there is no statutory requirement that a plaintiff plead a distinct "person" and "enterprise." In fact, if plaintiffs are not allowed to plead under section 1962(a) that a corporation "enterprise" is also a "person" then a single corporation who perpetrates racketeering activity and who funnels illegal funds into its business will go untouched. The *Haroco* ruling that a corporation may be both the "person" and the "enterprise" under section 1962(a) is the only correct reading of that subsection.

2. Section 1962(c)

a. "Person's" Employment by or Association With an "Enterprise"

Section 1962(c) is worded much differently than section 1962(a).⁵⁷ In order to invoke liability under subsection (c), a hazardous waste victim must establish that a "person" was employed by or associated with an "enterprise." This wording limits the expansive "person" definition in section 1961(4)⁵⁸ and illustrates that Congress meant for "person" and "enterprise" to be mutually exclusive under subsection (c).⁵⁹ If the corporation "enter-

57. See *supra* note 42, where section 1962(c) is cited in full. This Note does not discuss the enterprise-as-person concept under section 1926(b) because subsection (b) is inapplicable to racketeering acts which are grounded in an environmental context. Hazardous waste victims will never be able to use subsection (b) to sue toxic waste polluters because the racketeering activity prohibited by this subsection will never result in toxic injury to business or property. Section 1962(b) essentially forbids the takeover of an "enterprise" through illegal means. See *supra* note 42, where section 1962(b) is cited in full. For a discussion of the enterprise-as-person concept regarding section 1962(b), compare *Commonwealth of Pa. v. Derry Construction Co.*, 617 F. Supp. 940 (W.D. Pa. 1985) (no distinct pleading of "person" and "enterprise" required under section 1962(b)) with *Medallion TV Enter. v. SelecTV of California*, 627 F. Supp. 1290, 1294-95 (C.D. Cal. 1986) (distinct pleading of "person" and "enterprise" required under section 1962(b)).

58. Section 1961(4) permits a corporation to be the liable "person" under section 1962(a)-(c).

59. Most courts do not permit a corporate entity to be simultaneously both the "person" and the "enterprise" under subsection (c). See *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 800 (1986) (lists the Second, Third, Fourth, Seventh, Eighth, and Ninth Circuit as all rejecting the enterprise-as-person concept under section 1962(c)). Since *Bennett*, the First Circuit, in *Schofield*, also ruled that both the "person" and the "enterprise" must be distinct under subsection (c).

One court, however, has carried section 1962(c)'s distinctness requirement too far. In *Medallion*, the court refused to allow even a corporation "enterprise's" individual officers, employees, or agents to be the culpable "persons" under subsection (c). Since a corporation can not operate except through its officers, employees, and agents, the court reasoned that no one within the corporation "enterprise" could be a "person" for purposes of subsection (c) liability. In other words, officers, employees, and agents are not distinct from the corporation with which they associate. *Id.* at 1294-95.

Apparently, the *Medallion* court has forgotten about the significance of that legal fiction known as corporate identity. Once a group entity becomes incorporated, the group entity

prise" is allowed to be the "person" under subsection (c), then the corporation will incur treble liability even when its role in racketeering is passive rather than active. For instance, unless the "person" and "enterprise" elements under section 1962(c) are distinctly pleaded, a corporation can be punished for being either the injured target of an agent's racketeering or the vehicle by which an agent engages in racketeering for personal benefit. All statutory language aside, the goals of RICO are not furthered by placing treble damage liability on a corporation victimized by illegal conduct.⁶⁰

In addition, the liberal construction clause of RICO⁶¹ does not apply to section 1962(c) because no statutory ambiguity exists.⁶² Construing the subsection's words to permit the enterprise-as-person concept allows innocent corporations to be victimized four times—once by racketeering and three times by damages. Neither liberal nor strict construction is required when the words of subsection (c) are clear.⁶³

Some courts strain the language of section 1962(c) in order to hold that "person" and "enterprise" need not be distinctly pleaded. The Eleventh Circuit, in *United States v. Hartley*, allowed a corporation to be an "enterprise" and permitted an association "in fact" composed of the corporation and its agents to be the liable "person."⁶⁴ By viewing a corporation as two different entities in order to meet the requirements of subsection (c), the court reasoned that the "enterprise" element would remain an important statutory component.⁶⁵ The *Hartley* court's decision to permit an association "in fact" to be a "person" under subsection (c) directly contradicts the

becomes more than the sum of its parts. A corporation exists as a distinct entity which is separate from its members; a corporation can in its own name buy and dispose of property and sue and be sued. One of the best illustrations of a corporation's separate identity is the fact that it is a taxable entity, subject to a corporate income tax and a Superfund tax. In addition, a corporation's officers, employees, and agents are not liable for the debts of the corporation either. See generally W. KLEIN & J. COFFEE JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES*, 97-106, 172 (2d. ed. 1986) (analyzes the corporation as a fictional entity). Since a corporation has an existence separate and apart from that of its officers, employees, and agents, the *Medallion* court erred in not allowing a corporation "enterprises's" officers, employees, and agents to be "persons" under section 1964(c).

60. See *supra* note 53 for a discussion concerning the policy goals of RICO as evidenced by the statute's legislative history. See also *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 835 (D.C. Ill. 1985) (without relying on any theories of statutory construction, the court refused to allow a corporation "enterprise" to be a RICO "person" under subsection (c) because the corporation was the victim of fraud).

61. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

62. See Note, *supra* note 41, at 169-75, 185 n.60 (the liberal construction clause in RICO should apply only when a court has found an ambiguity in the statute).

63. *Id.* at 191 (the author concludes: "In the final analysis, the construction of RICO, . . . reduces to a commonsense reading of the statute. The words of the statute—the culmination of the legislative process—deserve the utmost deference.").

64. 678 F.2d 961, 989-90 (1982).

65. *Id.*

requirement in section 1961(3) that a liable "person" be able to hold a property interest. Associations "in fact" cannot hold legal or beneficial interests because they are not recognized by the law as legal entities.⁶⁶

A legal person or entity is a person or entity which the law recognizes as possessing rights as a distinct unit.⁶⁷ The law treats some groups as legal entities, such as corporations. Unlike an association "in fact," for example, corporations contractually organize. Associations "in fact" have no legal identity because they are not bound by any legal relationship.⁶⁸ In an association "in fact" only the individuals within the association can maintain ownership interests in property. Since associations "in fact" do not satisfy section 1961(4), and the wording of section 1962(c) requires a "person"- "enterprise" distinction, a corporation which is the victim or vehicle of racketeering by its officers, employees, or agents will not be subject to RICO liability under section 1962(c). Section 1962(c), as well as section 1962(a), exposes only those corporations or individuals who benefit from racketeering to treble damage liability.

b. Respondeat Superior

Under section 1962(c), some RICO plaintiffs plead individual defendants as "persons" and a corporation as the "enterprise" and then try to hold the corporation "enterprise" liable under state law agency principles.⁶⁹ These plaintiffs rely upon the state law theory of respondeat superior, which holds a principal civilly liable for any wrongful conduct committed by the principal's agents in the course of their employment.⁷⁰ The federal courts are sharply divided over whether state-created agency principles can be used to impose civil liability upon corporation "enterprises" under section 1962(c).⁷¹

66. In *State v. Sunbeam Rebekah Lodge*, 169 Ore. 253, 127 P.2d 726 (1942), a fraternal organization's inability to take title prevented the organization from inheriting a deed. The devise to the unincorporated association escheated to the state.

67. See *Haroco*, 747 F.2d at 401 ("[T]he nebulous association in fact does not itself fall within the RICO definition of 'person.' We doubt that an 'association in fact' can, as such, hold any interest in property or even be brought into court. In the association in fact situation, each participant in the enterprise may be a 'person' liable under RICO, but the association itself cannot be."). See generally J. CRANE & A. BROMBERG, *LAW OF PARTNERSHIP* 16-29 (1968) (discusses legal recognition of group entities).

68. See *supra* note 59 for a discussion concerning corporate identity.

69. See, e.g., *Schofield*, 793 F.2d at 32; *Inryco*, 615 F. Supp. at 835; *Bernstein v. IDT Corp.*, 582 F. Supp. 1079, 1083 (D. Del. 1984).

70. RESTATEMENT (SECOND) OF AGENCY § 261, comment a (1957).

71. Compare *Schofield*, 793 F.2d at 32-34 (respondeat superior does not apply to section 1962(c)) with *Bernstein*, 582 F. Supp. at 1083-84 (respondeat superior does apply to section 1962(c)) and *Hunt v. Weatherbee*, 626 F. Supp. 1097 (D. Mass. 1986) (recognizes that general agency principles may be used by RICO plaintiffs to impute liability to a corporation "enterprise").

but no federal court yet realizes that it does not possess federal question jurisdiction to hear the agency claim. Because Congress excluded "enterprises" from being "persons" liable under section 1962(c),⁷² federal courts do not have an independent basis of statutory jurisdiction over state law claims against a subsection (c) "enterprise" unless diversity of citizenship is present. In addition, federal courts may not exercise pendent jurisdiction over state law claims against a subsection (c) "enterprise" either.

Under the theory of pendent jurisdiction, a federal court possessing jurisdiction over a federal claim may also have jurisdiction over a state claim if the two claims both derive from a "common nucleus of operative fact" and normally would be expected to be adjudicated in one judicial proceeding.⁷³ In *United Mine Workers v. Gibbs*, the Supreme Court held that, as a matter of constitutional power, federal courts can exercise pendent jurisdiction if "the relationship between [the federal claim] and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"⁷⁴ Under *Gibbs*, as long as state and federal claims arise out of a "common nucleus of operative fact," only one Article III "case" exists. The Court has not determined whether one Article III "case" exists when a plaintiff asserts pendent jurisdiction over a state-created claim against a completely new party who is not involved in the federal claim,⁷⁵ but the Court has ruled that a new party may not be brought in under pendent jurisdiction to respond to a state claim if such joinder violates the congressional intent underlying the federal grant of jurisdiction.⁷⁶

In *Aldinger v. Howard*,⁷⁷ the Supreme Court held that for pendent jurisdiction to exist, a federal court must satisfy itself that, first, Congress extended, explicitly or implicitly, federal jurisdiction over a party or claim and, second, that all parties or claims constitute only one Article III "case." The plaintiff in *Aldinger* brought suit against an individual as well as a county under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and alleged that she was wrongfully discharged from employment. Jurisdiction over the federal civil rights claim was asserted under 28 U.S.C. § 1343(3), which gives federal district courts jurisdiction over section 1983 civil rights claims, and pendent jurisdiction was asserted to lie over the state-created respondeat superior claim against the county. The Court observed that the language in section 1983 excluded counties from ever being "persons" answerable to the

72. See *supra* notes 57-68 and accompanying text.

73. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

74. *Id.* Article III provides that federal courts are courts of limited jurisdiction, with jurisdiction extending only to diversity of citizenship and "cases" arising under the laws drafted by Congress. The Court's decision in *Gibbs* illustrates that the outer limits of a federal court's power are determined by how broadly an Article III "case" is to be defined.

75. This variation of traditional pendent jurisdiction is known as pendent party jurisdiction.

76. *Aldinger v. Howard*, 427 U.S. 1 (1976).

77. *Id.* at 17-19.

plaintiff.⁷⁸ Thus, no independent basis of federal jurisdiction existed over the county and consequently the Court ruled that the district court lacked power to extend pendent jurisdiction over the state claim against the county, who was not a party involved in the federal claim.⁷⁹

Surprisingly, every RICO plaintiff, RICO defendant, and federal court to this author's knowledge has assumed that jurisdiction exists for federal courts to adjudicate a state-created respondeat superior claim against an "enterprise" in conjunction with a federally-created section 1962(c) RICO claim against an "enterprise's" employees. In *Schofield v. First Commodity Corp. of Boston*, for example, a RICO plaintiff brought suit against commodity brokers under section 1962(c) claiming she was fraudulently induced to invest all her liquid assets in trading commodities futures, and she also claimed that the "enterprise," which was the commodities firm, was liable for the brokers' RICO violations under the doctrine of respondeat superior.⁸⁰ Jurisdiction over the state claim was assumed by both the district court and the First Circuit, but the facts in *Schofield* present the exact same jurisdictional issue present in *Aldinger*.

Under sections 1964(a) and (c) of RICO, the First Circuit possesses federal question jurisdiction over the commodities brokers, but unless there is pendent jurisdiction over the state-created respondeat superior claim against the "enterprise," the commodities firm, the appellate court can not decide the state claim. In *Schofield*, the First Circuit found that Congress excluded "enterprises" from being "persons" under section 1962(c) of RICO, but instead of following *Aldinger* and recognizing that it had no power to exercise pendent jurisdiction over the respondeat superior claim against the "enterprise," the First Circuit heard the claim and determined that respondeat superior could not be used to impute liability to the "enterprise." The First Circuit should not have decided that the state-created respondeat superior claim against the "enterprise" was improper but instead should have dis-

78. *Id.* at 16. The Court relied upon its decision in *Monroe v. Pape*, 365 U.S. 167 (1961), for this reading of § 1983, but the Court in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), later construed § 1983 to allow countries to be defendants.

79. Since the Court in *Aldinger* determined that Congress implicitly declined to extend federal jurisdiction over the county, the Court refused to address whether pendent party jurisdiction is constitutional under Article III. The Court noted: "But the question whether jurisdiction over the instant lawsuit extends not only to a related state-law claim, but to the defendant against whom that claim is made, turns initially, not on the general contours of the language in Article III, *i.e.*, 'Cases . . . arising under,' but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts." *Aldinger*, 427 U.S. at 16-17.

80. 793 F.2d 28. In reading the First Circuit's opinion, it appears that the plaintiff only sued First Commodity Corp. of Boston (FCCB), the commodities firm. The district court, however, resolved any ambiguity: "plaintiff argues- and although she has not pleaded these elements clearly- FCCB is the 'enterprise.' FCCB's brokers are the 'persons,' and, by *respondeat superior*, FCCB is liable for its brokers' violations of RICO." 638 F. Supp. 4, 8 D. Mass. 1985).

missed the state claim on the ground that joinder of an "enterprise" for purposes of asserting a state law claim not within federal diversity jurisdiction is outside the statutory jurisdiction of a federal court. In other words, the First Circuit should have heard only the plaintiff's RICO claim against the brokers and it should have left to a state court the task of determining whether respondeat superior can be used to impute liability to a section 1962(c) "enterprise."⁸¹

State courts, however, must refuse to apply respondeat superior to a section 1962(c) "enterprise." An "enterprise" which has been excluded from RICO liability by Congress should not be held liable under RICO merely because the facts giving rise to RICO liability against an employee of the "enterprise" also give rise to a state-created claim against the "enterprise." The language in section 1962(c) plainly prohibits application of agency principles to the RICO "enterprise." As seen earlier, the language in section 1962(c) prohibits a "person" from using an "enterprise" as a vehicle for a pattern of racketeering activity or from making an "enterprise" the target of a pattern of racketeering activity.⁸² Congressional intent is contravened if a state court allows RICO plaintiffs to use agency principles to by-pass the requirements of section 1926(c). In addition, the wording of section 1964(c), the civil suit provision, also rejects application of respondeat superior to a corporation "enterprise." Section 1964(c) allows victims to recover damages far in excess of actual injury. Civil RICO thus authorizes damages which are clearly punitive. General principles of agency law, however, do not condone imputing liability for punitive damages upon a principal.⁸³ Thus, when claims arise under sections 1962(c) and 1964(c), the language in both of these sections illustrates that

81. Since statutory considerations negate the existence of pendent party jurisdiction for a respondeat superior claim against an "enterprise" under section 1962(c) of RICO, a federal court will not have to address whether constitutional considerations also prohibit the exercise of pendent party jurisdiction. There is however conflict among the federal courts whether it is constitutional under Article III to exercise pendent party jurisdiction when there is no statutory evidence that Congress is against such jurisdiction. *Compare* *Hymer v. Chai*, 407 F.2d 136, 137 (9th Cir. 1969) ("Joinder of claims, not joinder of parties, is the object of the doctrine [of pendent jurisdiction]. It was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff asserting an independent federal claim growing out of the same operative facts.") with *Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F.2d 800, 811 (2d Cir. 1971) (with regard to cases involving pendent party jurisdiction, "the same facts are ultimately controlling with respect to both the state and federal claims; the desirability of having both claims tried in the same forum is self-evident.") See D. CURRIE, *FEDERAL COURTS* 219-20 (1982) for a discussion outlining the constitutional tension surrounding pendent party jurisdiction.

82. See *supra* note 42 and accompanying text.

83. See RESTATEMENT (SECOND) OF AGENCY § 217(c) which provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

respondeat superior must not be used to impute liability to the "enterprise."⁸⁴

In the antitrust context, the Supreme Court, in *American Society of Mechanical Engineers v. Hydrolevel Corp.*,⁸⁵ applied respondeat superior theory to an innocent corporation.⁸⁶ Some courts and commentators⁸⁷ believe that enough similarity exists between the private RICO remedy and the private antitrust remedies⁸⁸ for *American Society* to apply to civil RICO claims under section 1962(c). *American Society* should never be controlling for a RICO action premised upon section 1962(c) and respondeat superior. RICO cases are substantially different from antitrust cases. Not all instances of racketeering occur in commercial business contexts. RICO was deliberately drafted outside antitrust law because antitrust law contains difficult liability and standing requirements that are inappropriate for RICO purposes.⁸⁹ The language of sec-

(d) the principal or a managerial agent of the principal ratified or approved the act.

Under the Restatement of Agency, the activity of nonmanagerial employees will never subject an employer to punitive damages. Strict application of the Restatement to civil RICO section 1964(c) would, however, permit punitive damages to be imposed upon a corporation "enterprise" if the racketeering acts were committed by high-level employees. But the distinct "person"- "enterprise" requirement of section 1962(c) signals congressional intent that an "enterprise" which is an instrument or victim of racketeering must not be punished.

84. As seen *supra* note 52 and accompanying text, section 1962(a) contains no distinct "person"- "enterprise" requirement, and a single corporation can serve both as an "enterprise" and as a "person." The language of subsection (a) therefore does not prevent a RICO plaintiff from using respondeat superior to impute liability to an "enterprise" if the plaintiff chooses to plead the "enterprise" apart from the "person." However, agency principles only allow punitive damages to be awarded against principals whose managerial employees act wrongfully. See *supra* note 74. In order to reach the corporate deep pocket when nonmanagerial employees commit racketeering acts, the RICO plaintiff should plead the corporation as both the "person" and the "enterprise" under section 1962(a).

85. 456 U.S. 556 (1982).

86. As will be seen, congressional intent behind the drafting of the antitrust statutes is not undermined by allowing a corporation to be the liable "person." See *infra* notes 89-91 and accompanying text. For this reason, *American Society* can be distinguished from cases arising under civil RICO. In addition, the Supreme Court failed to recognize that the facts of *American Society* present the issue whether pendent party jurisdiction is constitutional under Article III. If presented with an argument that *American Society* is precedent for civil RICO actions based on section 1962(c), one should not only distinguish *American Society* on statutory grounds but also argue that pendent party jurisdiction is unconstitutional. See *supra* note 81.

87. See, e.g., Patton, *supra* note 41 at 388-89. Patton gave four reasons why the private antitrust remedy should be applicable to the private RICO remedy:

- (1) both laws were designed to compensate victims;
- (2) the treble damages provision within each law is crucial to the encouragement of private suits;
- (3) any limitation on the private remedy sections of either law inhibits private enforcement, intensifies agency burdens, and requires victims to shoulder losses when the individual wrongdoer is insolvent; and
- (4) Congress intended for RICO to be liberally construed.

Id. at 389. See also *Bernstein*, at 1083-84 (refers to *American Society* supporting the proposition that respondeat superior may be applied to section 1962(c) claims).

88. See Clayton Act § 4, 15 U.S.C. § 15 (1982); Sherman Antitrust Act, §§ 1,2, 15 U.S.C. §§ 1,2 (1982).

tion 1962(c) differs markedly from that of antitrust law. As seen, the wording of section 1962(c) illustrates that "person" and "enterprise" are to be distinct. In *American Society*, the action on appeal was brought under standards of liability in the Sherman Antitrust Act.⁹⁰ The antitrust standards do not contain restrictive language similar to that found within section 1962(c).⁹¹ The Supreme Court applied agency principles in *American Society* because the Sherman Antitrust Act does not statutorily restrain the Court from using respondeat superior theory.

c. "Conduct . . . Through" Requirement of Section 1962(c)

Besides the enterprise-as-person concept, section 1962(c) is involved in another controversy pertaining to its "person" element. In order for a RICO violation to occur under section 1962(c), the "person" must either directly or indirectly conduct or participate in the conduct of the "enterprise" through a pattern of racketeering activity.⁹² Several judges have construed the "conduct . . . through" language to mean that a RICO "person" is subject to subsection (c) liability only when the plaintiff establishes that the "person" participated in the operation or management of the "enterprise;" others have held nonmanagerial employees to qualify as "persons" liable under RICO.⁹³

89. In 1969 the American Bar Association Section of Antitrust Law studied the question of whether antitrust law ought to be extended as a weapon against organized crime. The Report concluded:

By placing the antitrust-type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided . . . [T]he use of antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause' . . . [T]he [ABA] Section of Antitrust Law recommends that [organized crime] legislation be enacted as an independent statute and not be included in the Sherman Act, or any other antitrust law.

S. 1623 and S. 1624, 91st Cong., 1st Sess., 115 CONG. REC. 6995 (1969).

90. 15 U.S.C. §§ 1, 2 (1982).

91. Under §7 of the Sherman Antitrust Act, "person" includes corporations and associations existing by law, and §§ 1,2, the antitrust standards of liability, contain no language which restricts the expansive definition of "person." A corporation fits within the "person" definition of the Sherman Antitrust Act whether the corporation is a victim or a target of antitrust violations. § 4 of the Clayton Act, which provides for a private cause of action, reads like the Sherman Antitrust Act.

92. See *supra* note 42 where § 1962(c) is cited in full.

93. Compare *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.), cert. denied, 464 U.S. 1008 (1983) (RICO "person" must be involved in the operation of the affairs of the "enterprise"); *United States v. Mandel*, 591 F.2d 1347, 1375, vacated on other grounds, 602 F.2d 653 reh'g denied, 609 F.2d 1076, (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980) (RICO "person" must operate or manage the "enterprise's" business); *Agristor Leasing v. Meuli*, 634 F. Supp. 1208, 1223-24 (D. Kan. 1986) (RICO "person" must play an active role in the management of the

If the "person" must significantly control the "enterprise" before subsection (c) can apply, then only corrupt, high-level officials who are located within the "enterprise's" infrastructure can qualify as RICO defendants, and lower level employees who engage in racketeering would be able to avoid RICO liability.

The language in section 1962(c), however, does not require that a "person's" degree of racketeering participation in the "enterprise" must be managerial in nature. One does not have to *directly conduct* an "enterprise's" affairs through a pattern of racketeering before liability can be imposed under section 1962(c), although such activity would meet the "conduct . . . through" requirement. According to the language of section 1962(c), a "person" also violates subsection (c) whenever he or she *indirectly participates* in the operation of an "enterprise" through a pattern of racketeering. This latter subsection (c) standard of liability is selectively ignored by those courts which require a high level of participation by the "person" in the "enterprise's" affairs. The "indirect participation" language of section 1962(c) subjects all nonmanagerial employees of the "enterprise," as well as non-employees who have minimum contacts with the "enterprise," to the prohibitions of section 1962(c). RICO plaintiffs therefore are not required to plead that RICO defendants occupied any role in the operation, management, or creation of the "enterprise." The "conduct . . . through" requirement would be met if a hazardous waste victim can show that an outside environmental consulting firm or a law firm prepared and disseminated false environmental statements concerning a now bankrupt corporation's waste disposal practices.⁹⁴

3. Summary

The previous few pages analyzed the effect the "person" element has upon the standards of liability in sections 1962(a) and (c). We have seen that Congress' choice of words in RICO prevents a corporation from incurring treble damage liability unless the corporation benefitted from the "person's" pattern of racketeering activity. When only one corporation is involved in a pattern of racketeering and it is the vehicle or target of a pattern of racketeering by corporate insiders, the plaintiff must use section 1962(c) and can reach only the corporate insiders' individual assets. If, however, a hazardous waste

RICO "enterprise") *with* *Bank of Am. v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) (word "conduct" in § 1962(c) means nothing more than performance of activities helpful or necessary to the "enterprise's" affairs); *Virden v. Graphics One*, 623 F. Supp. 1417, 1428-29 (D.C. Cal. 1985) (RICO § 1962(c) does not require that the "person" participate in the operation or the management of the "enterprise").

94. See *Bank of America*, 782 F.2d at 970 ("The complaint alleges sufficient participation to withstand a 12(b)(6) motion. The banks have alleged that defendants assisted in the preparation and dissemination of false financial statements. These financial statements were helpful to [the enterprise] because they allegedly induced the banks to lend money to the enterprise.").

victim can establish that a single corporation played an active role in a pattern of racketeering activity, the victim, without resorting to respondeat superior, can reach corporate assets by using the enterprise-as-person concept allowed by section 1962(a).⁹⁵ RICO waste victims should be able to establish that the corporation "enterprise" benefitted by playing an active role in the pattern of racketeering which injured the waste victim. Since legitimate hazardous waste disposal costs thousands of dollars, it is hard to imagine any situation in which the illegal dumping of toxic wastes by corporate officers, employees, or agents will not directly or indirectly benefit the corporation "enterprise." Most hazardous waste disposal scenarios will involve either a corporation illegally removing its own wastes or a corporation which illegally profits from hauling or disposing the wastes of other businesses. If the victim is unable to use section 1962(a), the preferable section, and must instead rely on section 1962(c), the "conduct . . . through" requirement of subsection (c) at least allows the victim to name as the liable "person" anyone whose racketeering activities involve the "enterprise."

B. Racketeering Activity⁹⁶

1. Mail and Wire Fraud

RICO encompasses a vast array of federal and state offenses in section 1961⁹⁷ but the predicate acts most relevant to toxic waste RICO litigation

95. Section 1962 also contains a subsection (d) which provides that it "shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." This subsection was not analyzed with subsections (a) and (c) because subsection (d) incorporates the provisions of all the other subsections.

96. Before *Sedima*, 105 S. Ct. 3275, some lower courts required RICO plaintiffs to prove that the RICO defendant was previously convicted of a prohibited activity under § 1962. In *Sedima* the Supreme Court rejected a prior conviction requirement for RICO plaintiffs and held that the list of prohibited racketeering activities in § 1961 consists not of acts for which the defendant has been convicted, but of acts for which the defendant could be convicted. *Id.* at 3283. The word "conviction" does not appear anywhere in §§ 1961, 1964(c), or 1962.

The lower court in *Sedima*, held that unless RICO contained a prior conviction requirement, the plaintiff would have to establish predicate act violations beyond a reasonable doubt. *Id.* at 3282. It suggested that juries would be confused by the application of both criminal and civil burdens of proof in one action. The Supreme Court was unconvinced that predicate acts alleged under the private remedy § 1964(c) have to be established with reference to criminal standards of liability: "[Just because] the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction." *Id.* at 3283. The Supreme Court did not conclusively decide the standard of proof issue. Its strong dicta, however, suggests that private plaintiffs need establish a pattern of racketeering activity under RICO by only a preponderance of the evidence.

97. As used in § 1961 of RICO, "racketeering activity" means:

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is

are mail fraud⁹⁸ and wire fraud.⁹⁹ Before relating these two federal statutes to hazardous waste RICO litigation, a general discussion of mail and wire fraud is warranted. Except for differences in the type of communication

chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to interstate transportation of stolen property), section 2320 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

A close reading of the different types of federal crimes which constitute racketeering activity under section 1961 indicates that mail and wire fraud are the most likely to be committed by persons engaged in fraudulently concealed hazardous waste disposal.

98. 18 U.S.C. § 1341, the mail fraud statute, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

99. 18 U.S.C. § 1343, the wire fraud statute, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

used by a defendant, the mail and wire fraud statutes are identical and may be construed together.¹⁰⁰ An analysis of the mail fraud statute therefore is applicable to the wire fraud statute. Requisite elements for establishing substantive mail fraud counts are first, a scheme to defraud, and second, the use of the mails to execute or further the scheme.¹⁰¹

The first requirement, a scheme to defraud, connotes some degree of planning by a perpetrator. The plaintiff consequently must establish that the defendant acted with intent to defraud.¹⁰² A materially false statement contained in a document sent through the mails clearly constitutes a fraudulent misrepresentation.¹⁰³ A person similarly engages in false misrepresentation when he or she assigns to an article qualities which the article does not possess.¹⁰⁴

In the absence of direct evidence, circumstantial evidence may be used to establish specific and actual intent to defraud.¹⁰⁵ The scheme of defraud element does not require that the scheme be fraudulent on its face, but the scheme must involve some sort of fraudulent misrepresentation or omission reasonably calculated to deceive persons of ordinary prudence and comprehension.¹⁰⁶ The fact that no misrepresentation of any fact exists is immaterial; it is necessary only to prove that a scheme is reasonably calculated to deceive.¹⁰⁷ Fraudulent deception thus can occur even when the words themselves do not deceive. Arrangements of words or the circumstances in which words are used may convey a false and deceptive appearance.¹⁰⁸ It is also unlawful for a defendant to print "half-truths" or to omit facts necessary to make the statements in light of the circumstances under which they are made not misleading.¹⁰⁹

100. *United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977).

101. *United States v. Allen*, 554 F.2d 398 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977). *See also United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983); *United States v. Murr*, 681 F.2d 246 (4th Cir.), *cert. denied*, 459 U.S. 973 (1982); *United States v. Shelton*, 669 F.2d 446 (7th Cir.), *cert. denied*, 456 U.S. 934 (1982); *Mandel*, 591 F.2d 1347.

102. *DeMier v. United States*, 616 F.2d 366 (8th Cir. 1980).

103. *United States v. Reid*, 533 F.2d 1255 (D.C. Cir. 1976).

104. *United States v. New South Farm and Home Co.*, 241 U.S. 64 (1916). *See also United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) (claims or statements in advertising may go beyond mere puffing and enter realm of fraud where product will inherently fail to do what is claimed for it).

105. *Phillips v. United States*, 356 F.2d 297 (9th Cir. 1965), *cert. denied*, 384 U.S. 952 (1966). *See also DeMier*, 616 F.2d 366 (In mail fraud prosecution, implicit finding by jury that defendant specifically intended to defraud was supported by substantial, direct, and circumstantial evidence).

106. *United States v. Van Dyke*, 605 F.2d 220 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979).

107. *Lustiger v. United States*, 386 F.2d 132 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). *See also Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967) (scheme may be fraudulent even though no affirmative misrepresentation of fact be made).

108. *Gusow v. United States*, 347 F.2d 755 (10th Cir.), *cert. denied*, 382 U.S. 906 (1965).

109. *United States v. Townley*, 665 F.2d 579 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982). *See also United States v. Curtis*, 537 F.2d 1091 (10th Cir.), *cert. denied*, 429 U.S. 962 (1976) (fraudulent representations may be effected by deceitful statements or half-truths or the concealment of material facts).

Reckless disregard for truth or falsity is sufficient to sustain a mail fraud conviction. An awareness of a high probability of fraud, coupled with shutting one's eyes to avoid learning the truth, may in some instances amount to fraudulent intent.¹¹⁰ Good faith is a complete defense to an allegation of intent to defraud, but no matter how firmly the defendant may believe in a plan, his or her belief will not justify baseless, false, or reckless representations.¹¹¹

The second requirement of the mail fraud statute, the mailing element, contains two factors to be proved. The plaintiff must, first, establish that the defendant "caused" the use of the mails and, second, the plaintiff must demonstrate that the use was for the purpose of executing the scheme to defraud.¹¹² The Mail Fraud Act, as a result, does not reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud. One "causes" use of the mails when he or she performs some act in which it is reasonably foreseeable that the mails will be used.¹¹³ A defendant need not place any matter in the mail; the defendant need only have a reasonable basis to foresee that his actions would result in the use of the mails.¹¹⁴ It is enough if the defendant knows that letters are likely to be mailed, and the letters are in fact mailed. The next factor, use of the mails in execution of the scheme to defraud, requires that the mailings occur before the scheme terminates. Mailings taking place after the scheme's objectives have been accomplished, or before the scheme has begun, are not sufficiently related to the scheme to support mail fraud liability.¹¹⁵

In *United States v. Maze*, the Supreme Court held that a defendant who made unlawful purchases with a stolen credit card could not be convicted under the Mail Fraud Act because the alleged fraud had occurred prior to

110. *United States v. Schaflander*, 719 F.2d 1024 (9th Cir. 1983). See also *United States v. Themy*, 624 F.2d 963 (10th Cir. 1980).

111. *Mandel*, 591 at F.2d 1347. See also *United States v. Dick*, 744 F.2d 546, 551 (7th Cir. 1984) (reckless disregard for truth or falsity is sufficient to sustain conviction for mail fraud, and notwithstanding defendant's claim of confusion or ignorance, mistakes and discrepancies in written and reported telephone bids proved his knowing and intentional participation in the scheme to defraud); *United States v. Boyer*, 694 F.2d 58, 59 (3d Cir. 1982) ("Reckless indifference is the equivalent of intentional misrepresentation 'because you may not recklessly represent something as true which is not true even if you don't know it if the fact you don't know it is due to reckless conduct on your part.'").

112. *United States v. Martino*, 648 F.2d 367, *reconsidered in part sub. nom.* *United States v. Holt*, 650 F.2d 651 (5th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982). See also *United States v. Roylance*, 690 F.2d 164 (10th Cir. 1982).

113. *United States v. Georgalis*, 631 F.2d 1199 (5th Cir. 1980), *reh'g denied*, 636 F.2d 315 (5th Cir. 1981) There is no requirement of a "but for" relationship between use of the mails and execution of a scheme to defraud. It is not necessary that use of the mails rather than some other means of communication was essential, or that the scheme could not have succeeded "but for" the mailings. *United States v. Patrick Petroleum Corp. of Mich.*, 703 F.2d 94 (5th Cir. 1982).

114. *United States v. Otto*, 742 F.2d 104 (3d Cir. 1984).

115. *United States v. Maze*, 414 U.S. 395 (1974).

the mailing of the credit card bills and because the mailing increased the defendant's chances of apprehension.¹¹⁶ The Court observed that a mailing which increases the probability of a defendant's detection cannot be a mailing in furtherance of a scheme to defraud.¹¹⁷ Mailings made after the fruits of the scheme have been received are not always outside of the proscription of the statute.¹¹⁸

RICO litigants should note that the civil remedy section of RICO requires an injury to business or property by reason of a section 1962 violation.¹¹⁹ Hazardous waste victims using mail or wire fraud as predicate acts therefore must prove actual injury and a successful scheme to defraud because section 1964(c) adds these requirements.

2. Application of the Predicate Offenses of Mail and Wire Fraud to the Toxic Waste Context

The Mail and Wire Fraud Acts are extremely helpful for establishing racketeering activity in toxic waste cases for purposes of RICO. For years, scientific fraud has plagued this nation; a lot of the information which the government buys or requires from the private sector is either fraudulent or useless.¹²⁰ Crime pays in science for two reasons. First, it is difficult to

116. *Id.* at 402.

117. *Id.* at 403.

118. *Otto*, 742 F.2d at 104. See also *Schaflander*, 719 F.2d at 1025 (evidence that defendants made numerous misrepresentations and that they used mailings as part of the scheme to lull investors into a false sense of security was sufficient to sustain a mail fraud conviction); *United States v. Sampson*, 371 U.S. 75, 78 (1982) (lulling letters designed to postpone detection meet the requirement that the mails be used for the purpose of executing a fraudulent scheme); *United States v. Pearlstein*, 576 F.2d 531, 537 (3d Cir. 1978) (evidence of deliberate use of false and misleading statements in promotional statements combined with fabricated excuses and "lulling" letters was clearly sufficient to permit, if not compel, a jury to conclude that there was a fraudulent scheme).

119. See *supra* note 42 for text of § 1926 cited in full.

120. See Marshall, *The Murky World of Toxicity Testing*, 220 Sci. 1130 (1983) (This is an excellent report concerning four research scientists on trial for fraud in a case that has cast doubt on the safety of 200 marketed pesticides. An E.P.A. summary of Industrial Bio-Test laboratories, where the alleged fraud occurred, shows that of 1205 key experiments for the F.D.A., from which approval was given for many drugs and pesticides, only 214 experiments were valid.) See also *Pennsylvania Landfill Operator Fined*, 17 Env't Rep. (BNA) 495 (Aug. 1, 1986) (A western Pennsylvania landfill operator pleaded guilty to four criminal charges of illegally dumping chemical wastes. The landfill operator, who was licensed by the government, admitted that he illegally dumped contaminated leachate into two holding tanks and then pumped the leachate from the tanks through a piping system into a stream, which ultimately flowed into a state park); *Kentucky Oil Refiner to Pay \$762,000 Fine, Agrees to Improve Compliance Under Water Act*, 17 Env't Rep. (BNA) 436 (July 18, 1986) (A Kentucky oil company agreed to pay \$762,500 in fines for alleged Clean Water Act violations. Among plant conditions documented in the consent decree were discharges of toxic pollutants which were not covered by any of the plant's dumping permits, as well as failure to follow Clean Water Act reporting requirements.); *Appeals Court Upholds \$1.2 Million Fine for Company's Discharge Permit Violations*, 17 Env't Rep. (BNA) 109 (May 30, 1986) (The Fourth Circuit ruled

expose manipulation or concealment of data. Second, businesspersons and scientists are not stereotypical criminals. Falsification, suppression, and destruction of scientific data by individuals regularly occurs when profitable products or processes, or the dumping of toxic materials, must be government approved.¹²¹ Scientific or chemical fraud is extremely easy to commit. It occurs with only minor reporting fudges or shoddy use of respected methodology or concealment of illegal hazardous waste dumpings. The hazardous waste industry is inextricably tied to the science sector because information about hazardous substances, ranging from toxicity to leachability, must come from scientists. Since the cost of legitimate disposal can run thousands of dollars per barrel of waste,¹²² the hazardous waste industry is a fertile breeding ground for corporate fraud.

There is an economic double-incentive for businesses to engage in illegal waste disposal. First, generators of toxic chemicals continually produce hazardous substances and thus constantly face high disposal costs. Many times it is in their economic interest to personally engage in illegitimate disposal or to hand over toxic materials to corrupt haulers and claim ignorance of

that a Virginia pork processing plant can be fined \$1,285,322 for violating its pollutant discharge permit. The Fourth Circuit affirmed a lower court ruling which held the pork processing plant liable for 666 violations of its pollutant discharge permit. The permit violations were due to inadequate biological and chlorination systems, and were compounded by the plant's failure to rapidly respond to known permit violations); *Houston Refiner Faces \$2.5 Million Fine for Exceeding Gas Lead-Content Standards*, 17 Env't Rep. (BNA) 37 (May 9, 1986) (Houston's Gulf States Oil & Refining Co. was fined \$2,573,090 by E.P.A. for allegedly exceeding allowable levels of lead in fuels produced during 1983-1984. Moreover, two ex-officials of the company face federal charges for criminally violating the Clean Air Act by knowingly submitting to E.P.A. false lead additive reports); *New York Fines SCA Chemical Services for Violations of Hazardous Waste Regulations*, 16 Env't Rep. (BNA) 2242 (April, 18, 1986) (SCA Chemical Services Inc. was fined \$105,000 by New York state for violating its permits' monitoring, reporting, and dumping requirements); *Water Company Fined \$600,000 for Dumping Acids, Paint Sludge Into Los Angeles Sewer*, 16 Env't Rep. (BNA) 817 (Sept. 6, 1985) (A municipal court levied a \$600,000 penalty upon Arrowhead Water Co. of Los Angeles after the firm pleaded no contest to charges of dumping paint sludge and acids into the city's sewer system); *Jail Sentence Imposed on Manager*, 16 Env't Rep. (BNA) 817 (Sept. 6, 1985) ("The manager of a precious metals extracting plant was sentenced to 60 days in jail after pleading no contest to one count of dumping cyanide and acids into [Los Angeles'] sewer system").

121. See Marshall, *supra* note 120, at 1130 (Adrian Gross, a former FDA investigator who launched a federal investigation of Industrial Bio-Test, said he became suspicious about the research laboratory and its scientists' data because IBT's data were "unbelievably clean," proving the safety of the laboratory products too convincingly. Going over some of IBT's raw data, Gross saw a term he had never come across before. "TBD, TBD, I kept seeing it and I wondered, what the hell is that?" Gross recalled. It stood for "too badly decomposed." There was total breakdown in animal care at IBT yet no studies that were submitted to the government reflected what had happened. *Id.* at 1131.). See also Schneider, *Faking It*, THE AMICUS J. 14, 14-21 (Spring 1982) (discusses the fraud at IBT laboratories). See generally A. BLOCK & F. SCARPITTI, *supra* note 27 (outlines the extent to which organized crime has infiltrated the waste disposal industry).

122. A container the size of a garbage can filled with PCBs can cost \$10,000 to remove from a site. RYON, *Toxic Waste: Past Misuse that Haunts the Present*, L.A. Times, Nov. 3, 1985, Part VII, at 1, col. 3.

the subsequent illegal dumping. Second, haulers and treaters of hazardous waste have an incentive to contract for toxic waste and then cut costs through illegitimate disposal. Five congressional hearings, which include FBI informant testimony, indicate that criminal activities, such as mail and wire fraud, occur regularly within industries involved with hazardous waste.¹²³

Toxic waste victims owning contaminated land and farms situated near leaking waste sites should be able to establish mail or wire fraud violations by either the waste dumper, the waste generator, or both.¹²⁴ It is not easy to run a business without using the telephone or the mail. Generators, haulers and disposers of toxic material all communicate hazardous waste information at least to the government if not the public. Before and during discovery, the RICO plaintiff should search for any evidence of written or oral communications that falsely represented waste practices as being safer than the

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123. (1) Profile of Organized Crime: Great Lakes Region: *Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. (1984) (considers the problem of illegal hazardous waste disposal and related investigatory operations in Indiana, Illinois, and Ohio);
(2) Profile of Organized Crime: Mid-Atlantic Region: *Hearings Before the Permanent Subcomm. on Investigations of Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. (1983) (background on organized crime's 1950-1960's involvement in the commercial sanitation industry; evidence of organized crime control of major solid and toxic waste disposal industries in New York and New Jersey; examples of deficiencies in State and Federal toxic waste disposal enforcement);
(3) EPA's Law Enforcement Authority: *Hearing Before the Subcomm. on Oversight and Investigation of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) (review of extent of organized crime involvement in hazardous waste disposal industry);
(4) Organized Crime Links to the Waste Disposal Industry: *Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981) (examination of FBI informant allegations tying a major disposal firm with organized crime and illegal hauling and disposal of toxic material); and
(5) Organized Crime and Hazardous Waste Disposal: *Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 96th Cong., 2d Sess. (1980) (overview of investigations into organized crime infiltration of toxic waste businesses).

124. BLOCK & SCARPITTI, *supra* note 27, at 278-308 (provides a national overview of the ways in which waste is illegally disposed). A toxic waste victim can be a corporation as well as an individual. In order to get rid of toxic material, generators of hazardous waste usually have to contract with transporters and waste treatment facilities. If a transporter or a treatment facility disposes of a generator's waste illegitimately, the generator is liable, along with the transporter and treatment facility, for all removal costs and damage to natural resources. See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607 (1980). A generator of hazardous waste, such as IBM, General Motors, or Dow Chemical, can bring a RICO claim against transporters or treatment facilities who contract with the generator for legitimate waste disposal and who then illegally dump the generator's waste and pocket the high disposal fees charged to the generator. In such a situation, the generator suffers business injury because the generator is liable for the illegitimate dumping. In addition, business injury would also result in the form of damage to reputation due to public outrage over the dumping of the generator's waste. See *infra* notes 183-93 and accompanying text for a discussion of the RICO requirement of injury to business or property from an individual rather than a corporate perspective.

company knew them to be or that concealed health and environmental information known to the company about its hazardous substances. Companies dealing with hazardous waste are required under the Resource Conservation and Recovery Act¹²⁵ to document everything that happens to their waste, by mailing reports to the E.P.A. Potential RICO litigants should look for mailings that distort scientific studies to favor the company and that underestimate incidents of careless and illegitimate dumping. Hazardous waste victims also should examine closely all company letters dealing with hazardous waste licensing or hazardous waste disposal contracts in order to uncover falsely detailed descriptions of waste disposal. Additionally, if a company does not file a required RCRA report on its hazardous waste and the E.P.A. calls the company in order to determine why the report was not sent, any communication by the company to the Agency is subject to the Wire Fraud Act's prohibitions.¹²⁶

Determining whether a communication signifies a scheme to defraud requires evidence that the defendant acted with reckless disregard for the truth or falsity of its hazardous waste representations. A person acts recklessly as to a material element of an offense when he consciously ignores a substantial and unjustifiable risk that the material element exists or will result from his actions.¹²⁷ The risk must be of such a degree and nature that, considering the purpose and nature of the person's conduct and the circumstances known to him, disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding citizen would observe if that citizen were in the risk-taker's position.¹²⁸ An injured waste victim is likely to convince a jury of a defendant's "recklessness" if the victim can show that the defendant engaged in careless disposal of leachable waste which is known to be highly toxic, if not lethal, to some mammals. Such evidence indicates a disregard for the consequences of hazardous waste disposal and an indifference to the safety of life, limb, and property of others.

Unless the plaintiff has complained personally to the defendant generator or disposer, evidence of fraud will most likely come from communication

125. See 42 U.S.C. §§ 6922, 6923, 6924 (1976) of the Resource Conservation and Recovery Act. See *infra* note 206 for more background on these sections of RCRA.

126. See, e.g., *United States v. Soteras*, 770 F.2d 641 (7th Cir. 1985) (telephone calls made for the purpose of executing a scheme to defraud violate the Wire Fraud Act); *United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983) (in prosecution for wire fraud, circumstantial evidence that telephone calls were made for the purpose of committing wire fraud is sufficient to sustain a conviction); *United States v. Davanzo*, 699 F.2d 1097 (11th Cir. 1983) (evidence that telephone calls were intended to further a scheme to defraud was sufficient to sustain the defendants' wire fraud convictions even though the telephone conversations included opinions on the scheme's feasibility and the scheme was later abandoned); *United States v. Martin*, 611 F.2d 801 (10th Cir.), *cert. denied*, 444 U.S. 1082 (1979) (circumstantial evidence, including testimony that a telephone was used in connection with all grain shipments made on behalf of the company, was sufficient to permit an inference that an interstate call was made in connection with fraudulent grain shipment).

127. MODEL PENAL CODE § 2.02 (1985).

128. *Id.*

between the defendant(s) and the government. Mail fraud claims by waste victims exist even if a defendant mails misleading waste information to or omits relevant disposal data from its response to government inquiries. In *United States v. Mandel*, the Fourth Circuit observed:

[F]raudulent nondisclosure or concealment of facts may be evidence to support a conviction [under] the mail fraud statute . . . when there has been a fraudulent statement of facts, or a deliberate concealment thereof, to a public body. The scheme to defraud can be said to encompass not only the receipt of the illicit benefit, but also the deprivation of the public of the right to have its officials act on other than false information.¹²⁹

The hazardous waste victim need not receive the defendant's fraudulent mailings because the Mail Fraud Act requires only that the mails be used in an attempt to execute a conceived scheme.¹³⁰ Section 1964(c) of RICO, however, requires plaintiffs to show injury and, therefore, the success of the scheme to defraud. The plaintiff can meet the requirements of section 1964(c) without ever seeing the defendant's fraudulent mailings to the government. All that is necessary is that the corporation lull the government into inaction with the result that the corporation is allowed to carelessly dispose of leaking toxic waste.¹³¹

Hazardous waste victims must use caution in pleading mail or wire fraud under RICO¹³² because Federal Rule of Civil Procedure 9(b) requires that fraudulent circumstances be stated with particularity.¹³³ Rule 9(b) does not require that all elements of an offense which includes fraud be pleaded with specificity¹³⁴ but it does require particularity concerning the time, place, and content of the alleged misrepresentation(s).¹³⁵ Malice, intent, and other mental conditions are elements that may be pleaded in a general manner.¹³⁶ Rule

129. 591 F.2d at 1364.

130. *United States v. Sorce*, 308 F. 2d 299 (1962), *cert. denied*, 377 U.S. 957. *See also* *United States v. International Term Papers, Inc.*, 477 F.2d 1277, 1279 (1st Cir. 1973) (under mail fraud statute it is not necessary that the mailing be between the perpetrator and victim. Any mailing in connection with a scheme is enough.)

131. In *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), the court refused to dismiss a RICO claim for indirect injury resulting from the defendant's mailing of false property reports to individuals other than the plaintiffs. The plaintiff property owners were not directly injured by the defendant developer's acts of mail fraud. However, the plaintiffs alleged sufficient RICO injury by claiming that their maintenance costs increased due to the defendant's use of fraudulently-gained funds for things other than property improvements. *See also* *Pandick v. Rooney*, 632 F. Supp. 1430, 1433 (N.D. Ill. 1986) (To state a claim under civil RICO, the plaintiff need not allege that he or she was the target of fraudulent predicate acts as long as the plaintiff was the victim of an illegal operation of the enterprise).

132. Allegations of location of allegedly false statements as being a "pamphlet," "promotional material," or "a typical life-care contract," and allegations of representations of "various other defendants" for allegedly false statements under civil RICO were not sufficiently particular to satisfy Federal Rule of Civil Procedure 9(b). *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982), *rev'd in part, aff'd in part*, 710 F.2d 1361, *cert. denied*, 104 S. Ct 527 (1983).

133. *See* FED. R. CIV. P. 9(b).

134. *Seville Indus. Mach. Corp. v. Southernmost Mach. Corp.*, 742 F.2d 786 (3d Cir. 1984).

135. *McGinty v. Beranger Volkswagen Inc.*, 633 F.2d 226, 228 (1st Cir. 1980).

136. FED. R. CIV. P. 9(b).

9(b) should be read in conjunction with Federal Rule of Civil Procedure 8(a), which allows pleading of short and plain statements of fact and claim.¹³⁷ These two federal rules were designed in order to give defendants fair notice of the allegations against them. Plaintiffs need only plead facts which will place the defendant on notice of the activity alleged to be fraudulent. If a waste victim is initially unable to find sufficient RICO evidence to meet Rule 9(b), she can always commence a common law tort claim in order to use discovery procedures to uncover evidence of mail or wire fraud and then amend the complaint to state a RICO claim if evidence of fraud is found.

C. Pattern

Hazardous waste victims must establish that they have been injured by a "pattern" of racketeering activity. One mail or wire fraud violation concerning waste disposal practices by a company fails to satisfy the "pattern" element within RICO. Section 1961(5) defines a "pattern" of racketeering activity as requiring at least two acts of racketeering activity, one of which occurred after October 5, 1970, the year of the ratification of RICO, and the last of which occurred within ten years of the commission of a prior racketeering act.¹³⁸ The statutory language of section 1961(5) suggests that several racketeering incidents must occur before a "pattern" materializes; two acts might not suffice. Reason and common sense compel the conclusion that the term "pattern" does not mean isolated or accidental occurrences but rather incorporates regular and repeated activity. The Senate Report on RICO supports this inference by characterizing "pattern" as having "continuity plus relationship."¹³⁹ In a footnote in *Sedima*, the Supreme Court referred to the Senate Report's definition of "pattern" as a test for determining when a "pattern" is produced.¹⁴⁰

1. Relationship Element

Neither the Senate Report on RICO nor the Supreme Court in *Sedima* provide any indication as to the type of racketeering activity relationship which must be pleaded in order to adequately meet the "pattern" requirement

137. See *Pandick*, 632 F. Supp. at 1436 (Rule 9(b), requiring fraud to be pleaded with particularity, applies to civil RICO pleadings, as does liberal, notice-pleading philosophy of the Federal Rules of Civil Procedure).

138. 18 U.S.C. § 1961(5) (1982).

139. S. REP. NO. 91-617, 91st Cong., 1st Sess. 158 (1969), quoted in *Sedima*, 105 S. Ct at 3285 n.14.

140. In *Sedima*, 105 S. Ct. at 3285 n.14, the Supreme Court analyzed the legislative history of RICO and elaborated upon the "pattern" element: "The target of [RICO] is . . . not sporadic activity. The infiltration of legitimate businesses normally requires more than one '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."

of RICO.¹⁴¹ The federal courts are in dispute concerning what the racketeering activity must be related to in order for a "pattern" to emerge. The controversy is whether a RICO plaintiff can plead only that the defendant's racketeering acts are related to the activity of the "enterprise" or whether the plaintiff must additionally plead that the defendant's racketeering acts are themselves related. In other words, is there enough relatedness of racketeering activity for a "pattern" to develop when a victim is injured by an "enterprise" which commits one act of mail fraud and one act of bribery or can a "pattern" develop only if an "enterprise" commits one type of racketeering, like several acts of mail fraud? Section 1962 provides the answer.¹⁴² The language in section 1962, proscribing association with an "enterprise" "through" or "from" a pattern of racketeering activity, requires only that the predicate offenses be related to the affairs or conduct of the "enterprise."¹⁴³ There is no statutory basis in RICO, as some courts have found, for a nexus requirement between the predicate acts themselves. Courts should find therefore only two requirements for establishment of the "relationship" criterion of the "pattern" element under RICO. First, two acts of racketeering must be independently established. Second, each prohibited activity must be then connected to the affairs of the "enterprise."

In most instances hazardous waste victims who invoke RICO will only be able to use mail or wire fraud as the predicate acts of racketeering; hazardous waste victims, for the most part, will not be involved in fact situations where the victims are injured by two different, unrelated acts of racketeering, such as one act of bribery and one act of mail fraud. As a result, whenever RICO plaintiffs injured by toxic waste allege several acts of mail, or wire, fraud, they will always be able to show that the predicate acts were related to each other as well as to the "enterprise." The plaintiff's complaint, then, should reflect both levels of relatedness in order to meet all tests of relationship used by the courts in determining whether a "pattern" exists.

141. The only enlightenment given by the Supreme Court on the type of "pattern" relationship required was when the Court quoted 18 U.S.C. § 3575(e) (1982):

[C]riminal 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.

The court suggested that the language in 18 U.S.C. § 3575(e) *may* be useful in interpreting other sections of RICO. *Sedima*, 105 S. Ct at 3285 n.14. The Court, however, did not indicate whether racketeering acts must be related both to each other and to the "enterprise," or whether the acts can be related only to the "enterprise" or can be related only to one another.

142. See *supra* note 42 which cites § 1962 in full.

143. Several courts only require RICO plaintiffs to show that the defendant's predicate acts were related to the affairs of the "enterprise." In *United States v. Cauble*, 706 F.2d 1322, 1331-33 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984), the court recognized that predicate acts only need to have some effect on the "enterprise" in order to form a "pattern." Thus, if a defendant committed mail fraud, a predicate offense, and also obstructed a criminal investigation, another predicate offense, a "pattern" of racketeering activity would not exist unless these two racketeering acts affected the "enterprise" in some fashion. See *United States*

2. Continuity Element

The legislative history of RICO, as well as *Sedima*, require that racketeering activity be continuous as well as related in order to create a "pattern."¹⁴⁴ Courts interpret the continuity requirement in three different, conflicting ways. A few courts regard several predicate acts as sufficient evidence of a threat of continuing activity.¹⁴⁵ Some courts, however, require numerous predicate offenses executed over time in order to establish continuity of racketeering activity.¹⁴⁶ Still other courts require multiple episodes of criminal activity, and these courts all view predicate acts performed in execution of one proscribed offense to be one episode of criminal activity.¹⁴⁷ Obviously, the multiple

v. Dennis, 458 F. Supp. 197, 199 (E.D. Mo. 1978) (defendant's employment by General Motors plant and unlawful debt collection on the plant's premises failed to establish relatedness nexus), *aff'd*, 625 F.2d 782 (8th Cir. 1980). The *Cauble* court observed that the requisite effect upon the "enterprise" may be direct, as in the deposit of funds into the "enterprise's" bank account, or the effect can be indirect, as in maintaining the "enterprise's" present customers. *Cauble*, 706 F.2d at 1333 n.24. *See also Martino*, 648 F.2d at 381, 403 (RICO proscribes the furthering of the "enterprise," not the predicate acts—predicate acts therefore must be related only to the affairs of the "enterprise"); *Zerman v. E.F. Hutton & Co.*, No. Civ. 4527 (MP), slip op. (S.D.N.Y. Feb. 26, 1986) (Second Circuit dismissed all but one of the plaintiff's claims of misrepresentation. In an attempt to establish a "pattern" of racketeering activity, the plaintiff referred to Hutton's well-publicized guilty plea for overdrawing its bank accounts. The allegation that Hutton engaged in an overdrafting scheme was insufficient to establish a "pattern" of racketeering activity because there was no relationship between Hutton's overdrafting and the plaintiff's misrepresentation claim).

Many courts impose a stricter pleading requirement for the "pattern" relationship than the one used in *Cauble*. These other courts hold that a "pattern" is produced only by related racketeering acts that are also related to the "enterprise." *See, e.g., Pandick*, 632 F. Supp. at 1435 ("The proximity in time, the identity of the culprits and the similarity of the alleged securities violations establish a sufficient relationship among the predicate acts."); *Ackerman, Jablonski, Porterfield & DeTure v. Alhadeff*, No. C85-2274V, slip op. (W.D. Wash. April 16, 1986) ("[P]laintiffs have alleged that Anderson has committed fraud and securities violations in its participation in the . . . offering. This offering lends the required relationship to the separate predicate acts."); *Medallion*, 627 F. Supp. at 1296 (relatedness of predicate offenses established through proof of common perpetrators or victims, or similar purposes, results, or methods of commission); *Inryco*, 615 F. Supp. at 828 ("pattern" connotes similarity, thus the predicate acts must be connected with each other). These courts which hold that racketeering acts must be both related to each other as well as to the "enterprise" wrongly restrict the scope of RICO. Such a view is unsupported by the statutory language in § 1962 of RICO.

144. *See Sedima*, 105 S. Ct. at 3285 n.14; S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969).

145. *See, e.g., R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (two acts of mail fraud committed five months apart, though part of a single fraudulent scheme, constitute a "pattern"); *Volckmann*, No. C-85-4209 (WHO), slip op., (continuity of racketeering activity exists when two or more acts of mail or securities fraud occur).

146. In *Alexander Grant & Co. v. Tiffany Industries*, 770 F.2d 718, 719 n.1 (8th Cir. 1985), the court observed that the continuity "pattern" requirement is satisfied by an amended complaint alleging 58 acts of mail and wire fraud, which were all committed by the same individuals using the same fraudulent method. *See also Philatelic Found. v. Kaplan*, No. 85 Civ. 8577 (RWS), slip. op., (S.D.N.Y. May 9, 1985) (328 predicate acts committed in order to defraud an individual illustrate continuing activity); *Bank of America*, 782 F.2d at 971 (nine separate acts of mail and wire fraud, involving the same parties over a three year period, for the purpose of convincing a bank to extend credit satisfies the "pattern" requirement).

147. *See Modern Settings, Inc. v. Prndential-Bache Securities*, 629 F. Supp. 860, 864 (S.D.N.Y. 1986) ("Each of the multiple sales involved in the liquidation may indeed violate the securities

episode test is the most stringent interpretation of the continuity "pattern" requirement.

Judge Shadur, in *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*,¹⁴⁸ was one of the first to espouse a multiple episode test. He stated:

[The word "pattern"] connotes a multiplicity of events. Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'¹⁴⁹

Under a multiple episode test, a "pattern" of racketeering activity emerges only when a RICO "person" perpetrates fraud upon more than one victim in separate encounters while following the same method in each encounter.¹⁵⁰

Those courts requiring multiple episodes in order to show continuity of racketeering activity define "pattern" in an unduly restrictive manner. To be sure, evidence of multiple episodes establishes a "pattern" of racketeering activity, but limiting the scope of RICO to multiple episodes leaves out much racketeering activity which is both continuous and related. The Supreme Court in *Sedima* stated that courts must refrain from imposing restrictions on RICO that do not clearly flow from the federal statute's plain language.¹⁵¹

Continuity of racketeering activity refers to *either* multiple episodes or multiple acts. The essence of one criminal episode is that it consists of many racketeering violations.¹⁵² Thus, the very fact that an episode exists

laws; however, each is but part of a single transaction. . . . There is no pattern of racketeering activity in the liquidation alone, regardless of the number of sales required to consummate it."); *Professional Assets Management, Inc. v. Penn Square Bank, N.A.*, 616 F. Supp. 1418, 1421 (W.D. Okla. 1985) (a "single unified transaction," though consisting of several "constituent actions," is not a pattern); *Agristor*, 634 F. Supp. at 1226 (mailings of allegedly fraudulent materials were an effort to further the defendant's sales. This entails only a single scheme and does not establish a pattern of racketeering activity).

148. 615 F. Supp. 828.

149. *Id.* at 831.

150. *Id.* at 831-33. See *Papagiannis v. Pontikis*, 108 F.R.D. 177, 179 (N.S. Ill. 1985) (a person injured by a defendant's racketeering activity can use evidence of other predicate acts against other victims to prove the existence of a "pattern").

151. Before *Sedima*, many courts read a "racketeering injury" or a "competitive injury" requirement into the RICO statute. These courts required plaintiffs to establish not only injury to business or property, as mandated by § 1964(c), but *also* to prove that the injury occurred by conduct that RICO was designed to deter. 105 S. Ct at 3284-87. The Court chastised the lower courts for creating new, additional RICO requirements, and the Court upheld a less restrictive reading of RICO: "Any recoverable damages occurring by reason of a violation of Section 1962(c) will flow from the commission of the predicate acts. . . . Such damages include, *but are not limited to*, the sort of competitive injury for which the dissenters would allow recovery." *Id.* at 3286 n.15 (emphasis added). The Supreme Court cautioned courts to read RICO broadly and to leave any alterations of "perceived" defects in the statute to Congress. *Id.* at 3287.

152. See, e.g., *Inryco*, 615 F. Supp. at 832 ("the common sense interpretation of the word 'pattern' implies acts occurring in *different criminal episodes*") (emphasis added); *Medallion*, 627 F. Supp. at 1297 ("a 'pattern' of racketeering activity must include racketeering acts

err in their interpretation of "pattern" only insofar as they rule that one episode, or numerous acts, do not also establish continuity of racketeering activity.

In order to determine whether continuity of racketeering activity is present in future illegal waste disposal cases, RICO plaintiffs are forewarned that courts may use evidence of (1) ongoing schemes, or episodes, as well as (2) evidence of numerous¹⁵³ predicate acts.¹⁵⁴ Hazardous waste victims however should be able to meet both these tests for continuity. In a typical hazardous waste situation involving mail or wire fraud, a polluter will have repeatedly mailed over time fraudulent environmental reports to several agencies. A new episode of mail fraud is produced each time an agency engages in new licensing or a new investigation of the polluter. Each separate licensing or investigation should involve several uses of the mail by the polluter. Hazardous waste victims are advised to plead, whenever possible, that several episodes of mail or wire fraud, which consisted of numerous acts in execution of each episode, transpired. If a victim can do this, then the "pattern" allegations should survive any motion to dismiss.

3. Statute of Limitations Considerations Reflected by the "Pattern" Element

By using RICO, toxic tort victims can avoid the statute of limitations problems which still linger in some common law jurisdictions. As seen earlier, toxic tort injury is latent injury which usually occurs long after many state limitation periods expire.¹⁵⁵

Congress chose not to specify in RICO any limitation on when a private civil action may be brought. When a federal statute does not contain a limitations period, the federal courts apply the most analogous state statute of limitations.¹⁵⁶ Although state law is referred to in order to determine the

sufficiently unconnected in time and substance to warrant consideration as separate criminal episodes").

153. Two predicate acts are insufficiently numerous to constitute a "pattern." In *Sedima*, the Court observed that "in common parlance two of anything do not generally form a 'pattern.'" *Id.* at 105 S. Ct at 3285 n.14. Thus, cases like *R.A.G.S.*, 774 F.2d 1350, and *Volckmann*, No. C-85-4209 (WHO), slip. op., which hold that two related acts of mail fraud are sufficient to create a "pattern" wrongfully stretch the language of RICO. At a minimum, three predicate offenses must occur in order for the threat of continuing activity to be established. See *Schiller & Schmidt, Inc. v. Wallace Computer Serv., Inc.*, No. 85C 4415, slip. op. (N.D. Ill. May 23, 1986) (three related mail fraud acts against one victim produces a "pattern" of racketeering activity).

154. Combining proper "relatedness" analysis, see *supra* notes 141-44 and accompanying text, and proper "continuity" analysis, minimal compliance with the "pattern" element of RICO occurs when a defendant over a ten year period commits three *different* predicate offenses against three *different* victims.

155. See *supra* notes 26-31 and accompanying text. Cancer can take decades to develop and migration of wastes onto property is very slow.

156. See, e.g., *Wilson v. Garcia*, 105 S. Ct. 1938, 1942 (1985). In *Wilson*, the Court described two approaches to borrowing of state statute of limitations. A court can either uniformly characterize all claims arising under the federal statute for limitations period purposes and then apply

length of the statute of limitations for the federal statute, the Supreme Court, in *Rawlings v. Ray*,¹⁵⁷ held that federal law determines the date from which the limitations period begins to run. The federal courts consistently apply a discovery rule to civil RICO actions, holding that the "borrowed" state limitations period begins to toll when the victim either knows or should know that injury to business or property has occurred.¹⁵⁸ As long as waste victims have been injured by a "pattern" of racketeering activity and they plead a civil RICO claim, they are assured of obtaining the benefit of this federal discovery rule.¹⁵⁹

D. Enterprise

Hazardous waste victims must establish that the defendants' "pattern" of racketeering activity affected or operated through an "enterprise." The

the most analogous state statute of limitations to every claim or it can look to the specific facts of each case and then choose which limitations period is most analogous to the plaintiff's claim. *Id.* at 1943. In *Wilson*, the Court's concern for uniformity led it to choose the first approach. It selected New Mexico's personal injury statute of limitations to govern all claims arising under § 1983 of the Civil Rights Act of 1871. *Id.*

Under RICO, a federal court can choose to apply different limitations periods depending upon the type of predicate offense alleged or it can determine which state limitations period most nearly characterizes a RICO claim. In *Wilson*, the Court held that selection of a uniform limitations period for all § 1983 actions was required by the legislative history of the Civil Rights statute. *Id.* at 1945-49. Courts confronted with RICO claims are going to have to determine which borrowing approach to use. To date, some courts have followed a *Wilson* line of reasoning while others apply varying limitations periods depending upon the type of predicate offense alleged. *Compare* *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429, 431 (D. Colo. 1984) ("Whether RICO is regarded as a right and remedy created entirely by statute, or as a remedy for injury to property, none of the more specific Colorado statutes of limitation seems to cover it. . . . In *McKay*, the Tenth Circuit held that the Colorado residuary statute of limitations . . . applied to Section 1983 claims because no other Colorado statute seemed appropriate. I conclude similarly that [the same three year residuary limitations period] applies to civil RICO claims") *with* *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 684-85 (N.D. Ind. 1982) (Indiana courts apply Indiana's six year fraud limitations period when RICO plaintiffs allege mail or wire fraud).

157. 312 U.S. 96 (1941).

158. *See, e.g.*, *Bowling v. Founders Title Co.*, 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1516 (1986); *Alexander v. Perkin Elmer Corp.*, 729 F.2d 576, 577 (8th Cir. 1984); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984).

159. The "pattern" element within RICO permits ten years between predicate offenses. *See supra* note 138 and accompanying text. With most toxic injury, it is possible for the defendant's predicate offenses to occur closely together and for the injury to remain latent many years after the "pattern" of racketeering ended. The discovery rule modification applied by federal courts in civil RICO actions prevents the plaintiff's claim from being time-barred until the plaintiff's injury develops. However, if the plaintiff's toxic injury happens to manifest during the defendant's "pattern" of racketeering activity, the "borrowed" state limitations period will begin to run from the time the plaintiff first knew or should have known of the manifestation. In this type of situation, the limitations period will not run from the time of the defendant's last predicate offense. Thus, if a plaintiff is aware of an injury from a "pattern" of racketeering in year one, the limitations period begins to run from year one, even though RICO allows ten years for a "pattern" to develop. *See Bowling*, 773 F.2d at 1178 (state statute of limitations begins to run when plaintiff knows or has reason to know of an injury, not after commission of the last predicate act); *Compton*, 732 F.2d at 1432-33 (mere continuance of a conspiracy beyond the date when injury transpired does not delay accrual of the limitations period).

definition of "enterprise" in RICO is extremely broad. Section 1961(4) states that an "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."¹⁶⁰ Thus, two categories of "enterprises" are present under section 1961(4): legal entities and factual entities.

The existence of an "enterprise" under RICO is a separate element of the statute and must be pleaded apart from the "pattern" of racketeering activity. In *United States v. Turkette*, the Supreme Court held that an "enterprise" is not a "pattern" of racketeering activity.¹⁶¹ The Court noted that: "[I]n order to secure a conviction under RICO, the Government must prove both the existence of a 'enterprise' and the connected 'pattern of racketeering activity' . . . While the proof used to establish the separate elements may in particular cases coalesce, proof of one does not necessarily establish the other."¹⁶² Where legal entities are involved, proof of the "enterprise" element should not be problematic. Evidence of legal existence, such as articles of incorporation, capacity to sue and be sued, or government licensing, is sufficient to show the discrete identity of an "enterprise." Difficulty arises when a plaintiff attempts to establish the existence of a factual entity separate and apart from the racketeering "pattern" in which the entity engaged.

A RICO "enterprise" must be more than the sum of its predicate racketeering acts, or else the "enterprise" concept loses meaning as a viable statutory component.¹⁶³ To establish independent existence of a factual entity, many courts, including the Supreme Court, impose three requirements upon the plaintiff. The association must be a group of individuals associated together for the common purpose of engaging in a course of conduct; there must be an ongoing organization, and there must be various associates functioning as a continuing unit.¹⁶⁴

Toxic waste plaintiffs generally will be concerned only with proof of legal entities. Since organized crime, an association "in fact," has infiltrated legitimate legal entities, such as the hazardous waste disposal industry,¹⁶⁵ it will be unlikely that a RICO waste victim will be injured solely by groups which associate only "in fact." Organized crime, however, is not completely

160. 18 U.S.C. § 1961(4) provides: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

161. 452 U.S. 576, 583 (1981).

162. *Id.*

163. *Compare Medallion*, 627 F. Supp. at 1294 (the "enterprise" must have an existence separate and apart from the "pattern" of racketeering activity in which it engaged) *with* *United States v. Weinstein*, 762 F.2d 1522, 1536-37 (11th Cir. 1985) (upheld the application of RICO to situations in which the "enterprise" is nothing more than the sum of the individual predicate offenses).

164. 452 U.S. at 583.

165. *See supra* notes 123-24 and accompanying text. *See also infra* notes 197-98 and accompanying text.

responsible for illegal dumping nationwide. As seen earlier, many manufacturers of hazardous waste, when faced with high costs of legitimate dumping,¹⁶⁶ resort to illegal waste disposal.¹⁶⁷ In 1980, the E.P.A. registered approximately 60,000 firms as toxic substance generators.¹⁶⁸ The national hazardous waste problem clearly originates within legal entities. By presenting evidence of corporate or legal existence, RICO waste plaintiffs should encounter little difficulty in establishing the existence of the "enterprise" separate from the "pattern" of racketeering activity in which the "enterprise" engaged.

E. Interstate Commerce

Under section 1962¹⁶⁹ the activity of the "enterprise" must affect interstate commerce.¹⁷⁰ The requisite nexus between the "enterprise" and interstate commerce need only be minimal.¹⁷¹ In regard to toxic waste cases, RICO "enterprises" will affect commerce beyond state boundaries. During organized crime hearings, Senator Warren Rudman, vice chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, commented that interstate commerce is adversely affected by illicit toxic dumping. He observed:

I am painfully aware of what happens when hazardous waste . . . gets transported across State lines. [I] found in the last few years that my State of New Hampshire had become . . . the dumping ground for toxic wastes from [other] States It is my belief that this [toxic waste] battle . . . is an interstate problem.¹⁷²

Most hazardous waste moves from a generator, through a transporter, and on to a treatment facility.¹⁷³

If the "enterprise" is a generator which illegally disposes of its own waste, a RICO plaintiff can prove an interstate commerce effect by showing that the supplies used in creating the waste originated outside of the generator's state.¹⁷⁴ This same proof will satisfy the interstate element if the "enterprise"

166. See *supra* note 122.

167. See A. BLOCK & F. SCARPITTI, *supra* note 121, at 190-221.

168. *Id.* at 48.

169. See *supra* note 42 which cites § 1962 in full.

170. *United States v. Groff*, 643 F.2d 396, 400 (6th Cir. 1981), *cert. denied*, 454 U.S. 828 (1981) (to satisfy the interstate commerce element, it is the "enterprise" and not the individual defendant which must engage in or affect interstate commerce); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (activity of the "enterprise" and not each predicate act of racketeering must have an effect on interstate commerce).

171. *Rone*, 598 F.2d at 573.

172. *Profile of Organized Crime: Great Lakes Region*, *supra* note 123, at 235.

173. *Id.* at 479.

174. See, e.g., *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981) (supplies used in defendant's bookmaking operations which originated outside Maryland provided a sufficient nexus between the "enterprise" and interstate commerce to invoke § 1962).

is a hauler of toxic waste. If the "enterprise" is a hauler, the plaintiff can also strengthen the interstate commerce nexus by producing evidence of interstate waste travel.¹⁷⁵ If the "enterprise" is a waste treatment facility, the plaintiff should be able to produce similar evidence, and show also that storage space was provided for toxic materials produced out of state.¹⁷⁶

F. By Reason Of

A hazardous waste victim must be injured in his business or property "by reason of" a violation of section 1962 in order to obtain standing to sue under section 1964(b).¹⁷⁷ Some courts stringently interpret the "by reason of" language in section 1964(c) in order to narrow the scope of liability under section 1962. *Heritage Insurance Company of America and Prestige Casualty Co. v. First National Bank of Cicero*¹⁷⁸ is a recent case in which the scope of section 1962(a) was narrowly restricted by a court's use of the "by reason of" language in section 1964(c). The court held that claims under subsection (a) must allege an investment injury as well as injury to business and property. According to the majority's reasoning, plaintiffs injured by a "person's" predicate acts do not have a claim under section 1962(a) unless their business or property injury also resulted from the "person's" use of money which was illegally obtained from the predicate acts.

The *Heritage* court attempts to rewrite section 1962(a) and section 1964(c). Section 1964(c) provides a private RICO cause of action to anyone victimized by reason of a section 1962 violation. Section 1962(a) prohibits "persons" from using or investing, directly or indirectly, money derived from a pattern of racketeering activity in the operation or establishment of an enterprise. A "person" therefore violates section 1962(a) by both committing racketeering acts and then funnelling the illegal gain into the enterprise. The *Heritage* court erroneously concludes that a "person" can only violate sections 1962 and 1964(c) by injuring a plaintiff through the "person's" use of the racketeering profits. There are, however, other instances in which a defendant may violate sections 1962 and 1964(c). For example,

175. See, e.g., *United States v. Mannino*, 635 F.2d 110, 118 (2d Cir. 1980) (the interstate commerce nexus is strengthened by the dispatch of couriers from the Northeast to Florida to pick up drug shipments).

176. See, e.g., *United States v. Nerone*, 563 F.2d 836, 850-51 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978) (By providing rental space for trailers manufactured out of state, the "enterprise" indirectly fostered interstate sales of mobile homes. Proof of the sales established the necessary connection, for purposes of § 1962, between the "enterprise" and interstate commerce.).

177. 18 U.S.C. § 1964(c) provides:

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.

178. 629 F. Supp. 1412 (N.D. Ill. 1986).

a "person" also violates these sections by injuring a plaintiff through a pattern of racketeering activity and then using the illegally-obtained funds in the operation of the enterprise. By requiring that plaintiffs must plead an investment injury under section 1962, the *Heritage* court rewrote subsection (a) and performed a legislative, rather than judicial, function.

In *Sedima*,¹⁷⁹ the Supreme Court rejected the Second Circuit's similar attempt to rewrite another section of RICO, section 1964(c). The Second Circuit required RICO plaintiffs to show, in addition to business or property injury, injury caused by an activity which RICO was designed to deter.¹⁸⁰ In referring to the language in all subsections of section 1962, the Court observed first, if a defendant engages in a racketeering pattern in a manner forbidden by section 1962, and second, the racketeering pattern injures the plaintiff's business or property, the plaintiff has a claim for treble damages under section 1964(c).¹⁸¹ Thus, the Court found "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."¹⁸² Just as there is no room in the wording of RICO for a racketeering injury requirement, there is no room in its wording for the *Heritage* court's investment injury requirement either.

G. Business or Property Injury¹⁸³

Once a section 1962 violation is established, the RICO plaintiff must produce evidence that the violation injured his business or property.¹⁸⁴ Since the injury requirement in RICO is not restricted to narrow "racketeering" concepts,¹⁸⁵ it should receive an expansive interpretation by the courts. Toxic

179. 105 S. Ct. 3284-85.

180. *Id.*

181. *Id.* at 3285.

182. *Id.*

183. A controversial issue currently splitting the courts is whether injunctive relief is available to private plaintiffs in a RICO action. Compare *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (1983) (while treble damages can be awarded in a civil RICO action, equitable remedies are unavailable) and *Dement v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1381-83 (N.D. Ill. 1984) (injunctive relief unavailable to civil RICO plaintiffs) with *Chambers Development Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Penn. 1984) (equitable relief is available to private parties under RICO). See also *Cort v. Ash*, 422 U.S. 66 (1975), and *Middlesex County Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), for a discussion concerning implied right of action.

Hazardous waste victims in need of injunctive relief do not need to argue for an implied right of action under RICO § 1964. Almost every federal environmental statute contains a citizen's suit provision which provides equitable remedies for private plaintiffs. See, e.g., Clean Air Act, 42 U.S.C. § 7604; Federal Water Pollution Control Act, 33 U.S.C. § 1365; § 4911; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972; Toxic Substances Control Act, 15 U.S.C. § 2619; and Safe Drinking Water Act, 42 U.S.C. § 3005-8. No federal environmental statute allows a private plaintiff to sue polluters for personal injury damages.

184. See *supra* note 44 where 18 U.S.C. § 1964(c) is cited in full.

185. See *supra* notes 178-82 and accompanying text for discussion concerning the Supreme Court's rejection of a racketeering injury requirement in RICO.

injury manifests itself in many ways. In a study of 350 waste disposal sites, the E.P.A. determined that leaking waste had destroyed nearby water supplies and groundwater.¹⁸⁶ The E.P.A. also observed that toxic leachate had contaminated both humans and animals.¹⁸⁷

A farmer can claim a business, as well as a property, injury if his cattle accumulate toxic contaminants or die from waste exposure. If his cows, pigs, and chickens possess high concentrations of toxic substances within their tissue, the farmer will not be able to sell any milk, pork, beef, poultry, or eggs. Farmers should also claim business injury for loss of irrigation supplies as well as for loss of crops when both become contaminated by toxic leachate. Farmers and nonfarmers alike can claim property and business damages if their land accumulates hazardous waste. Once land is contaminated by hazardous substances it becomes unsalable since it will remain contaminated for decades. Most toxic chemicals have complex, molecular structures which resist environmental degradation.¹⁸⁸ PCBs, one type of hazardous waste, may be active toxic agents for years.¹⁸⁹

RICO has a potential disadvantage for some hazardous waste victims who contemplate filing racketeering claims. Personal injury is unrecoverable under the statute.¹⁹⁰ Plaintiffs, however, should not be easily discouraged. If a victim incurs RICO damage to both his person and property or business, there exists a strong possibility that the property or business damage recovery will be substantial enough to compensate for personal injury as well. For example, if the plaintiff proves each RICO element and establishes that his land is worth X amount, or that it will cost X amount to clean up the property, the plaintiff will recover 3X amount under the treble damages provision. For every dollar of property or business that is injured through the defendant's racketeering, two dollars will accrue in punitive damages. If a waste victim were to gain \$200,000 under civil RICO for contaminated

186. EVERYBODY'S PROBLEM: HAZARDOUS WASTE, *supra* note 4, at 1-8.

187. *Id.* In 1972, waste containing hexachlorobenzene (HCB) was disposed of in a landfill in Louisiana. The HCB vaporized and subsequently accumulated in cattle over a 100 square mile area. The cattle had to be destroyed, representing a direct economic loss of over \$380,000. In 1976, an Indiana family consumed milk contaminated with twice the maximum concentration of PCB considered safe by the F.D.A. The milk came from the family cow, which had been grazing in a pasture fertilized with the City of Bloomington's sewage sludge. The sludge contained high levels of PCBs from a local manufacturing plant and as such contaminated the farmland for decades. The farm family in this latter case incurred both property and business injuries.

188. See I. TINSLEY, *supra* note 26, at 149-54. See also C. W. FETTER, JR., APPLIED HYDROGEOLOGY 366 (1980) (Table 10.2 lists chemicals and biological contaminants which cause groundwater contamination).

189. I. TINSLEY, *supra* note 26, at 153.

190. Some states have enacted racketeering laws which cover personal injury as well as injury to business or property. See, e.g., IDAHO CODE § 18-7801 to -7805 and UTAH CODE § 76-10-1601 to -08 (both specifically allow for personal injury recovery). Indiana allows recovery for injury without limiting the type of injury required. See INDIANA CODE §§ 34-4-30.5-1 to 6; § 35-45-6-1, -2.

property, or loss of business, \$400,000 would remain to be applied to personal injury, emotional distress, or fear of cancer.

Under RICO, hazardous waste victims should not encounter causative difficulty in establishing business or property injury. Tests are available for measuring organic pollutants in the environment. Analytical chemists can determine the levels of accumulated man-made toxins in a variety of substances, including soil, air, water, blood, and tissue.¹⁹¹ Although a plaintiff will have difficulty using data from these tests to prove personal injury causation, he will have no problem in establishing harm to his business or property.¹⁹²

H. Organized Crime Connection

Some courts suggest that it is outrageous to bring racketeering charges against legitimate business people.¹⁹³ They believe RICO is meant to be used only against organized crime and consider organized crime to be a readily identifiable body consisting of criminal syndicates like the Mafia. This theory indicates that Congress limited the use of RICO to infiltration of legitimate businesses by individuals associated with organized crime and that any other use of the statute is burdensome, stigmatizing, and contrary to congressional intent.

The Supreme Court and the legislative history of RICO, however, indicate that hazardous waste victims do not need to establish organized crime affiliation with RICO defendants. In *Turkette*, the Court ruled that the "enterprise" element encompasses both legitimate as well as illegitimate businesses.¹⁹⁴ Elaborating on the *Turkette* doctrine, the Supreme Court, in *Sedima*, addressed the Second Circuit's concern that civil RICO was being used against respected, legitimate businesses.¹⁹⁵ The Court recognized that legitimate businesses are capable of performing illegal acts and are not immune from subsequent criminal or civil enforcement.¹⁹⁶

When courts or commentators advocate narrow constructions of RICO they intend to fight a battle in a judicial forum which they convincingly lost in a legislative forum. In both *Turkette* and *Sedima* the Supreme Court recognized that civil RICO embodies a conduct-based approach to racket-

191. See I. TINSLEY, *supra* note 26, at 153.

192. The indeterminate plaintiff problem, *see supra* note 23 and accompanying text, does not exist when business or property, rather than personal, injury is involved. It may be impossible to determine which individuals did or did not contract cancer from exposure to a defendant's chemicals, but by performing a few tests, it is relatively easy to determine whose land or farm animals have accumulated hazardous waste.

193. See *Sedima*, 105 S. Ct. at 3287 (Court noted that the Second Circuit's restrictive readings of RICO were prompted by the Circuit's distress at the fact that RICO is being used as a tool in everyday fraud cases).

194. *Turkette*, 452 U.S. 576 (1981).

195. *Sedima*, 105 S. Ct. at 3285-87.

196. *Id.*

earing and is intended to be a flexible tool through which infiltration of legitimate businesses by organized criminal activity can be prevented and deterred. RICO therefore makes unlawful any participation in racketeering activity no matter who engages in it, whether the individual be a Godfather, a Harvard business school graduate, a hazardous waste disposer, or all three.

Although the Supreme Court held that no organized crime ties need to be established by litigants, hazardous waste contamination cases often do involve stereotypical organized crime elements. Hearings in 1981 before the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce probed organized crime's links to the toxic waste industry.¹⁹⁷ Congressman John D. Dingell, chairman of the Subcommittee, concluded:

It is appalling enough when disposers of hazardous waste, through inadvertence or ignorance, recklessly poison the environment and endanger the public health. But it is considerably more disturbing when generators, haulers, and disposers—in order to avoid the cost of legitimate disposal—engage in the practice of illicit dumping for profit. In the course of the inquiries of the subcommittee, we have developed information linking organized crime to the illegal dumping of toxic substances. This comes as no surprise. In fact, it was predictable, given the lucrative nature of this activity.¹⁹⁸

Toxic waste disposal cases, therefore, fit perfectly within the structure and purpose of RICO.

III. RICO REFORM

Within the past year, especially since the Supreme Court's decision in *Sedima*, critics of RICO have begun to complain that the federal statute's scope, with regard to mail or wire fraud, should be narrowed by Congress because the statute wrongly engulfs and federalizes garden-variety state fraud cases. The Mail and Wire Fraud Acts when used as predicate offenses do federalize many state business frauds, but unlike any other predicate offenses, these two Acts alone are capable of implementing the goals of RICO to the hazardous waste industry, an industry which is regulated heavily on the federal

197. See *Organized Crime Links to the Waste Disposal Industry*, *supra* note 123.

198. *Id.* at 1. See *Report Profiling Violators of Waste Law Said Not Representative of All Illegal Acts*, 17 *Env't. Rep.* (BNA) at 463-64 (July 7, 1986). A 1986 report which profiles successfully prosecuted hazardous waste violators in four Northeastern states reveals that four recent cases in New Jersey involved individuals allegedly connected with Mafia crime families. As a result of the report, Maryland's assistant attorney general in charge of the state's Hazardous Waste Strike Force is looking further into the possibility of organized crime involvement in hazardous waste law violations in Maryland. The report, however, also notes that most environmental law offenders are not traditional Mafia-types, but are businesspeople who turn to chemical crime in order to increase profits or remain competitive. Hazardous waste law violators thus comprise the two groups Congress wished to thwart with RICO: (1) organized crime families; and (2) racketeers who "launder" illegal gain through legitimate business.

level. Most of the other predicate offenses listed in RICO, such as prostitution or gambling, have nothing to do with illegal toxic waste disposal.¹⁹⁹

The E.P.A.'s enforcement record against toxic waste polluters who launders illegal profits through legitimate businesses is poor.²⁰⁰ A primary reason illegal disposers are not convicted is because of insufficient public funds and administrative time to enforce existing state and federal environmental regulations. As more and more hazardous waste is churned out by society and as the costs of legitimate disposal increase, the potential for infiltration of the waste disposal industry by corrupt individuals or entities increases. If the underlying societal policies for enacting RICO are to have any effect, private citizens must be able to sue toxic waste polluters.

During the 99th Congress (1985-86), eight different bills were introduced in order to restrict the scope of RICO, and, although no RICO reform resulted, the bills generated considerable enthusiasm.²⁰¹ The most sweeping reform of RICO would be to narrow the statute's breadth by deleting mail and wire fraud from the definition of "racketeering activity" in section 1961(1) of RICO. A lot of civil RICO claims, especially those involving state consumer frauds, are based upon mail and wire fraud.²⁰² In wishing to avoid placing every state consumer fraud claim in federal court, Congress has a valid reason to prevent mail and wire fraud from being predicate offenses. However, as seen, violations of hazardous waste laws by organized crime or legitimate businesspeople generally will support a civil RICO action only if mail and wire fraud are permitted to be defined as "racketeering activity." If mail or wire fraud are deleted from RICO and no other changes are made to the statute, then RICO cannot be used by private plaintiffs to strengthen en-

199. See *supra* note 97.

200. See INSIDE EPA, July 18, 1986 at 15-16 (New study by the congressional Office of Technology Assessment charges that federal monitoring of hazardous waste transportation is "poorly coordinated and defined." The OTA observed that no thorough record of hazardous waste movement exists, even though Congress and the E.P.A. require industries involved with hazardous waste to document a Resource Conservation and Recovery Act "manifest." [Background Note: RCRA, in 42 U.S.C. § 6903(12) (1976), defines the term "manifest" as follows: "the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage." RCRA §§ 6922, 6923 and 6924 require use of a manifest system by generators of hazardous waste, transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage, and disposal facilities.] The OTA found no complete flow records in any E.P.A. region.)

201. See 1 Cong. Index (CCM) 14,301 (1985-86) (only one Senate bill, S.2907, involved RICO reform during 1985-1986); 2 Cong. Index (CCM) 28291, 28316, 28374, 28424, 28448, 28454, 28458 (1985-86) (H2517, H2943, H3985, H4892, H5290, H5391, and H5445 were House bills which called for RICO reform). See also Strasser, *Prospects Improve in Congress for RICO Changes*, Nat'l L.J., Aug. 18, 1986, at 5, col. 1. The "Enactments-Vetoes" section of 1 Cong. Index 8707 (1985-86) indicates that no RICO reform bill was enacted into law during either session of the 99th Congress.

202. See *Sedima*, 105 S. Ct. at 3287 n.16 (Court cited an ABA Task Force Report which found that of 270 civil RICO cases surveyed, 37 percent involved common-law fraud in a business or commercial context).

vironmental enforcement against infiltration of the waste disposal industry by polluters wishing to launder illegal gain.

Congress can restrict the scope of RICO to prevent federalizing state business fraud claims and still promote treble damage enforcement challenges against toxic waste polluters and organized crime syndicates who launder large profits made from illegal waste disposal through legitimate businesses which they have infiltrated. First, Congress could remove the mail and wire fraud statutes from the list of prohibited offenses in section 1961 of RICO. Second, Congress could include as predicate offenses the two enforcement provisions in the Resource Conservation and Recovery Act (RCRA), which require permits for hazardous waste disposal and which prohibit false reporting to the E.P.A. of hazardous waste records.²⁰³ Under RCRA, generators, transporters, and treaters of hazardous waste are required to maintain records which elaborately chart the "cradle to grave" life cycle of all their hazardous wastes.²⁰⁴ Additionally, those who treat, store, or dispose of hazardous waste must apply for and be issued permits.²⁰⁵ The enforcement provisions in RCRA make it a crime to inaccurately furnish hazardous waste information to the E.P.A. and to fraudulently alter any records concerning the movement of hazardous waste.²⁰⁶ By allowing the enforcement provisions of RCRA to be

203. The two enforcement provisions of RCRA are found in 42 U.S.C. § 6928(d), (e) (1976). See *infra* note 206 where subsections (d) and (e) are cited.

204. See 42 U.S.C. §§ 6922, 6923 and 6924 (1976) of RCRA which outline recordkeeping standards applicable to generators of hazardous waste, transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage, and disposal facilities. The enforcement sections of RCRA, see *infra* note 206, provide the standards of liability for violations of §§ 6922, 6923 and 6924.

205. See 42 U.S.C. § 6925 (1976) of RCRA which requires owners and operators of facilities used for treating, storing, or disposing of hazardous waste to apply for and receive a solid waste disposal permit. The enforcement sections of RCRA, see *infra* note 206, provide the standards of liability for violations of § 6925.

206. The two enforcement provisions, which the author recommends be incorporated as predicate offenses when mail and wire fraud are deleted from RICO are in 42 U.S.C. § 6928 (1976) of RCRA and they provide:

(d) Criminal penalties.

Any person who—

(1) knowingly transports any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under section 6925 of this title (or section 6926 of this title in case of a State program), or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act,

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—

(A) without having obtained a permit under section 6925 of this title (or section 6926 of this title in the case of a State program) or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act; or

(B) in knowing violation of any material condition or requirement of such permit;

(3) knowingly makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of compliance with this subchapter; or

(4) knowingly generates, stores, treats, transports, disposes of, or otherwise

predicate offenses under RICO, Congress could streamline RICO and still prevent polluters from infiltrating legitimate waste disposal businesses. However, until Congress is willing to incorporate violations of the enforcement provisions of RCRA into the definition of "racketeering activity" in

handles any hazardous waste (whether such activity took place before or takes place after October 21, 1980) and who knowingly destroys, alters, or conceals any record required to be maintained under regulations promulgated by the Administrator under this subchapter shall, upon conviction, be subject to a fine of not more than \$25,000 (\$50,000 in the case of a violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine or not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(e) Knowing endangerment.

Any person who knowingly transports, treats, stores, or disposes of any hazardous waste identified or listed under this subchapter—

(1)(A) in violation of paragraphs (1) or (2) of subsection (d) of this section, or

(B) having applied for a permit under section 6925 or 6926 of this title, and knowingly either—

(i) has failed to include in his application material information required under regulations promulgated by the Administrator, or

(ii) fails to comply with the applicable interim status regulations and standards promulgated pursuant to this subchapter, who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, and

(2)(A) if his conduct in the circumstances manifests an unjustified and inexcusable disregard for human life, or

(B) if his conduct in the circumstances manifests an extreme indifference for human life, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than 2 years, or both, except that any person who violates paragraph (2)(B) of this subsection shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment for not more than 5 years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than \$1,000,000.

Section 6928(e) is further defined in § 6928(f):

(f) Special rules.

For the purposes of subsection (e) of this section—

(1) A person's state of mind is knowing with respect to—

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information. . . .

Section 6928(d) would be one predicate act and § 6928(e) would be another, completely separate, predicate act.

RICO, mail and wire fraud should remain as prohibited offenses under section 1961.²⁰⁷

CONCLUSION

Private parties in hazardous waste cases encounter strong barriers to recovery under traditional tort theory. The common law developed to mete out justice for immediate, individualized, and identifiable harm. Toxic injury which is characterized by indeterminate causation and long latency periods is a modern harm which did not exist during the development of many common law theories of recovery. Tort principles by their narrow historical focus are ill-equipped to address environmental problems.

Hazardous waste victims can obtain compensation for their toxic injuries by using civil RICO against culpable polluters. The Supreme Court repeatedly has eliminated lower court barriers which restrict the scope of the racketeering law. As it becomes more expensive for manufacturing industries to legitimately dispose of their chemical waste, the potential for illicit dumping increases. Congressional hearings suggest that organized crime already has infiltrated the toxic waste disposal industry. Civil RICO allows private citizens to bring enforcement and compensation actions against toxic waste polluters.

To state a civil RICO claim, a hazardous waste victim must meet two statutory burdens. First, he must allege a violation of section 1962, the substantive provision of RICO. Section 1962(a)-(c) makes it unlawful for any person through a pattern of racketeering activity to directly or indirectly invest in, acquire or maintain an interest, or participate in an enterprise which is engaged in interstate commerce. Second, standing to sue under section 1964(c) must be established. To satisfy this burden, the hazardous waste victim must allege that he was injured in his business or property by reason of a section 1962 violation. Since RICO allows recovery by a showing of racketeering violations, it avoids many of the difficulties inherent in the common law and has the potential to be a major new weapon in hazardous waste litigation.

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207. When Congress first drafted RCRA, years ago, it did not provide for civil actions by private plaintiffs for damages. Time has shown that without private prosecutors, government agencies are unable to quell hazardous waste law violations. See *supra* note 199, concerning E.P.A.'s inadequate environmental enforcement. By incorporating the enforcement sections of RCRA into RICO, Congress could give private plaintiffs an efficient means to combat chemical crime and still safeguard defendants from frivolous suits. If "racketeering activity" means any act which violates the enforcement sections of RCRA, then a plaintiff will only be able to sue for damages when he or she can establish, first, all the elements of RICO and, second, all the elements of the enforcement sections of RCRA used as predicate offenses. In this way, defendants will be protected from a deluge of strike suits which might occur if a private damages remedy were just amended into RCRA directly.