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RICO - Seventh Circuit Review

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RICO—SEVENTH CIRCUIT REVIEW

ROBERT J. LABATE*

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RICO: THE SECOND GENERATION**

In the 1984-1985 term, the Seventh Circuit in American National Bank & Trust Co. v. Haroco, Inc. 1 re-examined the Racketeer Influenced and Corrupt Organizations Act in the context of civil litigation (hereinafter "civil RICO") 2 and rejected the “standing” limitations imposed by

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the Second Circuit in the trilogy of cases represented by *Sedima, S.P.R.L. v. Imrex Co., Inc.*

Significant portions of the Seventh Circuit’s analysis were subsequently adopted by the Supreme Court in *Sedima*, a 5-4 decision which permits civil RICO to be applied widely to business and securities fraud actions. Nonetheless, complex questions of statutory interpretation remain to be resolved by the lower courts.

It is this second generation of RICO cases, those where the broad applicability of the statute is assumed and where the controversy centers around specific statutory language, with which this article is concerned. The language of section 1962 (prohibited activities) is the source of many unresolved questions notably, what constitutes a “pattern” of racketeering activity, when is an “enterprise” liable and how must a person “conduct” the affairs of an enterprise.

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4. Section 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(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 subsection (a), (b), or (c) of this section.

5. Perhaps the most interesting example of this second generation approach to RICO is found in the position of American National Bank before the Supreme Court of the United States. In their written brief and later in oral argument, petitioners, American National Bank & Trust, abandoned the “standing” limitations set by the Second Circuit decision in *Sedima* (i.e. prior criminal conviction and racketeer injury) and chose a middle ground. They argued that they did not “conduct” the affairs of the enterprise as that word is used in § 1962(c). The Supreme Court chose not to address this issue and affirmed *Haroco* solely on its analysis of the racketeering injury requirement. Hence the “conduct” argument remains viable and is indicative of the controversy that continues within the Seventh Circuit regarding specific words and provisions. Brief for Petitioners, Summary of Argument, p. 9-10.

In contrast to both *decisions in Sedima and Haroco*, there is a middle ground which petitioners espouse that neither expands nor narrows the scheme of RICO. That middle
This article will review the Haroco decision, two other Seventh Circuit decisions and related district court decisions handed down during the 1984-1985 term. These cases demonstrate a consistency of interpretation within the Seventh Circuit on many issues. Divisions remain, however, and pleading a cause of action under RICO is often a complicated and uncertain task.  

PART I
THE SEVENTH CIRCUIT DECISIONS

The decision of the Seventh Circuit in Haroco is a bench mark opinion primarily because of its analysis of the "racketeering injury" requirement, an analysis that was quoted with approval by the Supreme Court. The Haroco opinion also addressed several additional issues: the relationship between a person and an enterprise; the specificity of pleading and the standard of proof applicable in a civil RICO action. Because the analytical framework of Haroco is applied to a host of interpretive questions, a close review of the Haroco decision is necessary.

A. Factual Background and District Court Decision in Haroco

In Haroco, the plaintiffs borrowed money from the American National Bank & Trust Co. of Chicago ("ANB"), and subsequently alleged that bank officials improperly calculated the rate of interest. The agreed rate of interest was 1% over ANB's "prime rate" defined as the rate of interest charged to the bank's largest and most credit worthy commercial borrowers for 90-day unsecured commercial loans. Plaintiffs complained that ANB's actual prime rate was lower than the rate quoted to them and that ANB, Walter E. Heller International Corporation (ANB's parent corporation) and Ronald J. Grayheck (an ANB officer and director) concealed this fact from them as part of a scheme to defraud the plaintiffs. To further this "scheme," defendants allegedly used the United States Postal Service for "delivery and receipt of notices to borrowers of changes in interest rates and payments of interest made to plaintiffs and other borrowers." Taken together, these allegations consti-
tuted the "predicate act" of mail fraud (18 U.S.C. section 1341) and formed the factual nucleus around which the other elements of RICO were fashioned. Pendant state claims for breach of contract, violation of the Illinois Consumer Fraud and Deceptive Practices Act and breach of fiduciary duty were also pled by plaintiffs.

The district court dismissed these claims, finding that plaintiffs failed to allege injuries arising from a uniquely RICO violation. This limitation on civil RICO actions, generally described as the "racketeering injury" requirement, requires the plaintiff to allege "something more or different than injury from predicate acts" (in this case mail fraud). Thus, injuries arising only from the alleged mail fraud were held not sufficient to establish a RICO claim. The district court found that an "overwhelming majority" of courts had accepted the racketeering injury requirement, and that the Seventh Circuit decision in Schacht v. Brown did not "stand as a barrier" to the adoption of this requirement because Schacht had distinguished those cases involving the racketeering injury requirement. On this basis, the district court dismissed the plaintiff's RICO action.

On appeal, the Seventh Circuit addressed three different arguments raised before the district court in defendants' motion to dismiss: First, whether the plaintiffs lacked standing because their injuries arose solely from the predicate act of mail fraud and not by reason of the RICO violation (the racketeering injury requirement); Second, whether plaintiffs failed to allege the necessary relationship between a person and an enterprise under 18 U.S.C. 1962(c); Third, whether allegations in a civil RICO complaint must be as specific as a criminal bill of particulars establishing "probable cause" that the defendants committed the predicate acts. The Seventh Circuit rejected all of these arguments.

11. ILL. REV. STAT. ch. 121-1/2 § 262.
12. Schacht, 711 F. 20 1343 (7th Cir. 1983).
13. "[T]his court rejects the suggestion that the Schacht decision stands as a barrier to this court adopting the persuasive and nearly universal position that a plaintiff's injury to be cognizable under RICO must be caused by a RICO violation and not simply by the commission of predicate offenses." Haroco, 577 F. Supp. at 114.
B. The Racketeering Injury Requirement

The Seventh Circuit noted the absence, at the district court level, of "a clear weight of authority" either for or against the racketeering injury requirement. The situation among the courts of appeal was even more complicated; courts on both sides of the issue claimed to follow the plain meaning of the statute. The Second Circuit's trilogy of cases represented by Sedima was the most comprehensive effort to date to define and justify the racketeering injury requirement and it was in the light of the Sedima opinions that the Seventh Circuit reexamined its own prior analysis of civil RICO. Thus the Haroco court stated:

We must examine in some detail both the precise holdings and the mode of statutory interpretation adopted in Schacht...this court upheld the RICO counts in Schacht against numerous challenges. The defendants' primary attack was that Congress did not intend to apply RICO to "garden variety" business fraud of security cases. Our treatment of that challenge in Schacht sets the tone for our analysis of RICO statutory issues here.

Accordingly, the court reaffirmed several principles established in earlier decisions involving civil RICO. First, Schacht specifically rejected the argument that RICO applied only to organized crime. Although criminal infiltration of business and injury to the marketplace were targets of the statute, they were by no means the only targets. Second, the court held that the language of the statute should be broadly construed. On this point, the court concluded:

In defining the key terms of the statute, such as "person", "enterprise", and "racketeering activity" and in leaving undefined such broad terms as "conduct" and "participate" Congress deliberately chose to employ broad terms which would defy judicial confinement...in response to suggestions that the statute be more narrowly tailored to prevent unexpected applications, Congress clearly preferred

17. The Seventh Circuit began its analysis of the "racketeering enterprise injury" requirement by carefully defining that portion of the statute in controversy.

In this case we are concerned only with the conduct prohibited by subsection (c) in Section 1962 and not with provisions of subsection (a), (b) or (d). To allege a violation of section 1962(c), the plaintiff must allege that the defendant (1) was employed by or associated with (2) an enterprise engaged in, or the activities of which affected, interstate or foreign commerce, and (3) that the person conducted or participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity.

Id. at 387. With the elements of § 1962(c) firmly established, the court proceeded to discuss the controversy surrounding the racketeering injury requirement.

19. The organized crime nexus requirement, as initially proposed, was rejected by the vast majority of courts. See Note, Civil RICO: The Resolution of the Racketeering Enterprise Injury Requirement, 21 CAL. W.L. REV. 364, 366-68 n.23 (1985). Because no distinction is made between civil RICO and criminal RICO, heavy reliance is placed on criminal RICO decisions such as United States v. Turkette, 452 U.S. 576 (1981). But see Justice Powell's dissent in Sedima.
breadth to precision.\textsuperscript{20}

Third, the interpretation of RICO was guided by a practical consideration—there was no language in the statute that permitted "principled" judicial limitation. The court stated:

Further, even if Congress had meant to invite the courts to limit the broad reach of RICO, it provided few, if any, textual pegs which could permit courts to develop reasoned, consistent and principled limits without simply redrafting the statute.\textsuperscript{21}

Comparing these principles and past Seventh Circuit decisions with \textit{Sedima}, the \textit{Haroco} court found that the racketeering injury requirement proposed by the \textit{Sedima} court (and adopted by the \textit{Haroco} district court) simply revived the discredited "organized crime nexus requirement." Because a limitation of this type was not consistent with prior Seventh Circuit analysis of the language and purpose of RICO, the racketeering injury requirement was rejected.

The Seventh Circuit also closely examined another Second Circuit opinion, \textit{Bankers Trust}.\textsuperscript{22} The \textit{Haroco} court found that \textit{Bankers Trust} differed in significant ways from the \textit{Sedima} decision, but that it too was in conflict with \textit{Schacht}. In substance, \textit{Bankers Trust} required that each element of a section 1962 violation contribute to cause a separate injury to the plaintiff. Where the plaintiff could show only that the same injury arose from the predicate act (i.e. mail fraud, extortion, etc.) and the pattern of racketeering activity, he could not establish a RICO claim.\textsuperscript{23} The Seventh Circuit rejected this extended "but-for" test, noting that in past cases it had upheld RICO claims where the apparent injuries arose only from the predicate acts. The court explained:

In \textit{Schacht} . . . the plaintiff clearly alleged a pattern of racketeering activity, but the pattern itself, apart from the individual acts was not a but-for cause of the injuries. That is, the alleged injuries were no more than the sum of the injuries resulting from each fraud in the pattern or series. Under \textit{Bankers Trust}, RICO provides no remedy for such injuries resulting from only the individual acts of racketeering or the sum of the acts, and the Second Circuit would find no RICO claim in the \textit{Schacht} situation.\textsuperscript{24}

\textsuperscript{20} \textit{Haroco}, 747 F.2d at 398. The court also stated: "Indeed, the unifying thread of RICO's legislative development was a desire to avoid creating loopholes for clever defendants and their lawyers." \textit{Id.} at 380.
\textsuperscript{21} \textit{Id.} at 392.
\textsuperscript{22} \textit{Bankers Trust Co. v. Rhodes}, 741 F.2d 511 (2d Cir. 1984).
\textsuperscript{23} \textit{Id.} at 517-18. "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured by the pattern, and the pattern cannot be said to be the but-for cause of the injury [sic]." \textit{Id.} at 517. \textit{See also} Abrams, \textit{The Civil RICO Controversy Reaches the Supreme Court}, 13 \textit{Hofstra L. Rev.} 147, 161-63 (1985) for a more detailed account of the \textit{Bankers Trust} controversy.
\textsuperscript{24} 747 F.2d at 397.
Despite its rejection of the racketeering injury requirement, the Seventh Circuit made explicit that the "by reason of" language of section 1964(c) was not meaningless. The language imposed a proximate cause requirement on the plaintiff to show that a violation of section 1962 injured the plaintiff's business or property. The court continued:

A defendant who violates Section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured. This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straightforward reading of the statute as Congress intended it to be read.\(^{25}\)

Thus, the Seventh Circuit rejected all standing limitations not found in the statute. Again the court advised critics of RICO to seek relief from Congress, not from the courts:

RICO may be very broad, but there was nothing careless about its drafting. When Congress deliberately chooses to unleash such a broad statute on the nation, in the absence of constitutional prohibitions, complaints must be directed to Congress rather than to the courts.\(^{26}\)

In the light of clear congressional policy to create a broad sweeping statute, judicial intervention was prohibited.

C. Secondary Questions

Other issues were raised by defendants' motion to dismiss, and the Seventh Circuit chose to address those questions as well. Although the Haroco decision received a great deal of attention for its treatment of the racketeering injury requirement, the court's comments and holdings on these additional questions are also significant.

1. The Enterprise/Person Relationship

In its complaint, plaintiffs alleged that ANB was both the "person" and the "enterprise" under section 1962(c).\(^{27}\) In effect, ANB was accused of being "employed by" or being "associated with" itself, the specific prohibition of subsection (c). The defendants argued that ANB could not be both the "person" liable and the "enterprise" under section 1962(c). The Seventh Circuit Court of Appeals had never addressed this question and other circuits were divided.

In an earlier district court decision, Parnes v. Heinold Commodities, Inc.,\(^{28}\) Judge Shadur found that the language of section 1962(c) required

\(^{25}\) Id. at 398.
\(^{26}\) Id. at 399.
\(^{27}\) Id. Specific language of § 1962 is contained at supra note 4.
the "person" and the "enterprise" to be identified separately because the enterprise may very well be the victim of the racketeering activity. The Seventh Circuit agreed with this reasoning and with that of the Fourth Circuit opinion in *United States v. Computer Sciences Corp.* The *Haroco* court reasoned:

The use of the terms "employed by" and "associated with" appears to contemplate a person distinct from the enterprise. If Congress had meant to permit the same entity to be the liable person and the enterprise under section 1962(c), it would have required only a simple change in language to make that intention crystal clear. Also, we do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits.

The court recognized, however, that a corporation qualifies as a "person" under RICO. Given this, the court was "reluctant" to exonerate a corporation that might be a central figure in a criminal scheme, especially where "side kicks" would be subject to severe RICO penalties. The "wide net" policy of RICO appeared to be at odds with the limiting language of section 1962(c).

The solution to this problem, the court reasoned, was found in the statute itself, and specifically in the language of section 1962(a), which permitted a RICO action against a corporation-enterprise that was also a perpetrator of the scheme:

In our view, the tensions between these policies may be resolved sensibly and in accord with the language of section 1962 by reading subsection (c) together with subsection (a). As we read subsection (c) the "enterprise" and the "person" must be distinct. However, a corporation-enterprise may be held liable under subsection (a) when the corpo-

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29. 689 F.2d 1181, 1190-91 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); although *Computer Sciences* was a criminal RICO case, its reasoning was equally applicable to civil RICO cases. See *Haroco*, 747 F.2d at 400.

The RICO liability of the enterprise should depend on the role played. In our view, the plaintiffs here and the court in *Hartley* are correct when they argue that the corporate enterprise should be liable when it is the perpetrator, or the central figure in the criminal scheme. *Haroco*, 747 F.2d at 401.

30. *Haroco*, 747 F.2d at 400.

31. By way of footnote 18, the *Haroco* court expressed its approval of the *Hartley* analysis of corporate liability. The *Hartley* court stated "[a]ppellants complain that Treasure Isle's corporate status, allowing for the government's alleged 'emasculation of the enterprise element' is 'particularly grievous' in view of the doctrine of corporate liability. Since a corporation is liable for the acts of its agents and employees. It permits an employee's activities to serve as proof of the two predicate acts required by § 1962(c). This is simply a reality to be faced by corporate entities. With the advantage of incorporation must come the appendant responsibilities." *Hartley*, 678 F.2d at 988-89 n.43. See also Dwyer and Kelly, *Vicarious Liability under the Racketeer Influenced and Corrupt Organizations Act*, 21 C.W. L. Rev. 324 (1985).

32. But Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble damage proceedings—the price of eliminating all possible loopholes. *Sutliff, Inc. v. Donovan Co.*, 727 F.2d 648, 654 (7th Cir. 1984).
ration is also a perpetrator.\textsuperscript{33}

Where a corporation-enterprise uses the proceeds of a pattern of racketeering activity to its own benefit, it is subject to the penalty of civil RICO under section 1962(a). But where a corporation-enterprise is "merely the victim, prize or passive instrument of racketeering" it is not liable for injuries under civil RICO. This interpretation links corporate liability to benefit, whether direct or indirect.

Despite this analysis of section 1962(a), the \textit{Haroco} court found that plaintiffs had waived any claim that they may have had under section 1962(a) by failing to raise or argue such a claim earlier. However, the complaint, based solely on section 1962(c), was sufficient because plaintiffs had claimed that ANB conducted, through a pattern of racketeering activity, the affairs of its parent corporation, Heller. Because ANB and Heller were separate companies (though ANB was a subsidiary), there existed some separate and distinct existence for the "person" and the "enterprise," and plaintiffs were permitted to maintain their section 1962(c) action against ANB.\textsuperscript{34}

2. Lack of Specificity

Under this general heading, Grayheck and Heller International launched a two-front offensive. First, they argued that the plaintiffs' complaint did not allege that either defendant acted with the requisite fraudulent intent.\textsuperscript{35} The court disagreed for despite the ambiguity of the complaint, the pleadings of intent were sufficient as against ANB. Because the fraudulent intent of ANB was sufficiently pled, its alleged fraudulent intent would also satisfy the statutory requirement for its parent corporation, Heller.

The second defense was based upon the decision of the district court in \textit{Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.}\textsuperscript{36} Defendants argued that the allegations of a civil RICO complaint must be as specific as a criminal bill of particulars and must establish probable cause to believe that the defendant committed the predicate and racketeering offenses. The Seventh Circuit rejected this restrictive pleading requirement for several reasons. Under such a standard the trial court would have difficulty evaluating the reliability of evidence under a Rule

\textsuperscript{33} \textit{Haroco}, 747 F.2d at 401-2.

\textsuperscript{34} Note the distinction between antitrust principles and RICO policy drawn by the court. \textit{See Bankers Trust}, 741 F.2d 511 (2d Cir. 1984).

\textsuperscript{35} \textit{Haroco}, 747 F.2d at 403.

12 motion to dismiss. Further, it would impose a difficult and impractical burden upon civil plaintiffs. In a criminal case, grand juries have significant investigative powers and resources that civil plaintiffs lack. Moreover, in the pleading stage of a civil RICO case, such a standard would impose too heavy a burden upon plaintiffs.\textsuperscript{37}

In dicta, the court noted that the RICO statute does not specify a standard of proof for use in civil actions,\textsuperscript{38} but that prior decisions had applied an ordinary civil standard to pleadings in civil RICO cases. The appropriate standard of proof in civil RICO actions had not yet been firmly decided and the court observed that a “beyond reasonable doubt” standard could address “some of the legitimate concerns about unfair stigmatization of defendants as ‘racketeers’ and other abuses of RICO’s criminal dimensions.”\textsuperscript{39} At the pleading stage, however, such stringent specificity was not required.\textsuperscript{40}

3. The \textit{McCullough} Codicil

In early 1985, the Seventh Circuit in \textit{McCullough v. Suter},\textsuperscript{41} considered a related issue—whether a \textit{sole proprietorship} can be an “enterprise” with which its \textit{proprietor} can be “associated” within the meaning of section 1962(c) of RICO. This issue was again one of first impression and the Seventh Circuit resolved this question in a manner that permits section 1962(c) to be applied quite broadly.

The defendant, Suter, was sued by McCullough and a bank for using the mails to defraud coin investors. After a bench trial, the district court found that Suter, using the name National Investment Publishing Company, had defrauded the plaintiffs in the amount of $14,000 and awarded the plaintiffs treble damages plus attorney’s fees under the civil damages provision of the RICO statute.

On appeal, the defendant argued that there was \textit{no distinction} between Suter, the proprietor (the alleged “person”), and National Investment Publishing Company, the proprietorship (the alleged “enterprise”) as required by the \textit{Haroco} interpretation of section 1962(c).

The appellate court rejected this argument, finding that the proprietorship employed several individuals and that this fact was sufficient to

\textsuperscript{37} \textit{Haroco}, 747 F.2d at 404.
\textsuperscript{38} \textit{Id}.
\textsuperscript{39} See the \textit{Haroco} court’s brief discussion of the \textit{in terrorem} use of RICO, supra note 1 at 387-91.
\textsuperscript{41} 757 F.2d 142 (7th Cir. 1985).
establish the proprietorship-enterprise as "separate and distinct" from
the proprietor/person. The "separate and distinct" requirement of sec-
tion 1962(c) was satisfied and the RICO conviction was affirmed.42

In its discussion, the court noted that, like a proprietorship a one-
man corporation also would be subject to liability under section 1962(c).
By adopting the corporate form, the "one-man band" gets certain legal
protections but his corporation-enterprise "is just the sort of legal shield
for illegal activity that RICO tries to pierce." The court concluded its
analysis with this comment:

[If the man has employees or associates, the enterprise is distinct from
him, and it then makes no difference, so far as we can see, what legal
form the enterprise takes. The only important thing is that it be either
formally (as when there is incorporation) or practically (as when there
are other people besides the proprietor working in the organization)
separable from the individual.43

Hence, the court's solution, from a practical view, permits RICO to
be applied to all but a very few corporation-enterprises.44

D. The Distress Flag

Late in the 1984-85 term, the Seventh Circuit issued its opinion as to
whether a state governmental unit, enforcing state law, had standing to
use the federal courts to take advantage of RICO's attractive federal rem-
edies. This question was presented in Illinois Department of Revenue v.
Phillips.45

In its complaint, the Illinois Department of Revenue alleged that the
defendant understated his receipts from the sale of gasoline and un-
derpaid his sales tax. The plaintiffs' RICO claim alleged that the defend-
ant, "associated with" his gasoline stations, "conducted" their affairs
through a 'pattern of racketeering activity' and used the mails to trans-
mit fraudulent state tax returns.46

The defendant moved to dismiss the RICO complaint arguing that
the Department of Revenue as a state governmental unit enforcing state
law, could not seek damages under RICO. The district court granted the
motion reasoning that "RICO should not become a vehicle for federal

42. McCullough, id. at 144.
43. Id.
44. See Chicago HMO, 622 F. Supp. 489 (N.D. Ill. 1985), which discusses McCullough. See
also United States v. Roberts, 749 F.2d 404 (7th Cir. 1984), cert. denied, 105 S. Ct. 1770 (1985), in
which the court held that assets of a majority shareholder that are mingled with a corporation,
owned by that shareholder, may be forfeited pursuant to a RICO conviction.
45. 771 F.2d 312 (7th Cir. 1985).
46. Id. at 313.
jurisdiction and damages in state sales tax cases." 47 Except for the standing issue, the district court found that the complaint adequately set forth the elements of a cause of action under RICO.

On appeal, the Department of Revenue analogized their standing under RICO to that permitted under the federal antitrust laws, and argued that a broad reading of the statutory language permitted standing to state governmental units. 48 The Seventh Circuit was not wholly satisfied by the plaintiff's analogy to antitrust law, citing its decision in Schacht where it had discussed the distinctions between the RICO and antitrust statutes. Of greater precedential value were three RICO decisions that permitted suits by state governmental units. 49 In each of these cases, the courts assumed without discussion that a state governmental unit could be a proper RICO plaintiff.

Although the court found that each of these cases involved "a more typical type of racketeering activity" (bribery of county officials and rigging of state bidding schemes), they found no basis for distinguishing these cases. Noting that the Seventh Circuit has been in the forefront of liberal RICO interpretation, the court found that it was in reluctant agreement with the Department of Revenue.

The court concluded with a note of concern for the importation of state claims into federal court, a result inherent in RICO's language and purpose. In surprisingly strong language, it suggested that Congress take action to limit what it considered to be the ever-widening application of the RICO statute:

Although we have doubts about the application of RICO to the facts of this case we cannot say that it does not come within the framework of the statute. . . . perhaps we can take solace in the fact that the Illinois Department of Revenue promised in oral argument that such tax collection cases will be few, but we doubt, once the cause of action is established, that this will be true. We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as the one before us. 50

47. Id. at 316.
48. Id. at 314.
50. Illinois Dep't of Revenue, 771 F.2d at 317.
RICO—PART II
DISTRICT COURT DECISIONS

During the 1984-1985 term civil RICO was the subject of more than a dozen published opinions by the district courts. These decisions represent second generation cases, decided after the Seventh Circuit's decision in *Haroco*; they assume the broad applicability of RICO. The issues addressed are largely those of statutory interpretation, and collectively these decisions give clarity and definition (at least within the Seventh Circuit) to the most controversial language. But questions continue to arise.

The district courts specifically considered the following issues: the sufficiency of pleadings under Rule 9(b) in multi-defendant litigation; the effect of Rule 11 on the *bona fides* of RICO claim; the scope of mail fraud; the definition of "pattern" of racketeering activity; the statute of limitations applicable in RICO actions; the availability of equitable relief; venue and standing under section 1964(c). On many of these issues a consensus is developing within the Seventh Circuit. There is still controversy, however, on issues such as the definition of pattern, the scope of mail fraud and the equitable relief available under the RICO statute. Each of the above issues, will be briefly examined below to expose the emerging direction of RICO interpretation.

A. Sufficiency of Pleadings Under Rule 9(b) in Multi-Defendant Litigation

Federal Rule 9(b) requires that, for allegations of fraud, "the circumstances constituting fraud or mistake shall be stated with particularity."51 In *Schacht*, the Seventh Circuit held that Rule 9(b) should be read together with Rule 8 (the notice pleading requirement), and is satisfied by a "brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants."52 However, recent district court decisions indicate that in multi-defendant pleadings, additional requirements exist. The complaint must inform each defendant of its role in the fraudulent schemes, its relationship to the enterprise and the predicate acts it allegedly committed.

51. FED. R. CIV. PR. 9(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally. See also Note, Pleading Securities Fraud Claims with Particularity Under Rule 9(b), 97 HARV. L. REV. 1432 (1984).
In *Cashco Oil Co. v. Moses* the court, in a *sua sponte* ruling, dismissed the complaint because of "obvious defects." One such defect was that the complaint attempted to collectively allege the racketeering activity of the various defendants. The court rejected this approach and insisted that the allegations be specific as to each defendant:

Collectivizing "defendants" in the alleged pattern of activity . . . will not suffice. As to each defendant—a 'person' in Section 1961 terms—the pattern and the involved 'enterprise' must be identified. Only such an identified person, having the requisite statutorily-defined relationship with an enterprise, can be sued as a RICO defendant.

In *McKee v. Pope Ballard Shepard & Fowle, Ltd.*, the court discussed this standard at greater length. Relying upon *Lincoln National Bank* and several Second Circuit decisions, the court found that "the identity of those making the representations is crucial" and that the complaint cannot lump multiple defendants together. The court continued:

The Court must have some description of the times, dates, parties, and contents of misrepresentations which underlie the alleged fraudulent scheme. This is especially true in a RICO action, in which two predicate acts must be alleged.

The court specifically noted that the requirements of Rule 9(b) were directed, in part, to prevent plaintiff's use of liberal federal discovery procedures to search for fraud that might have occurred.

The same construction of Rule 9(b) was adopted in *Bruss Co. v. Allnet Communication Services, Inc.*, *Otto v. Variable Annuity Life Insurance Co.*, and *Harris Trust and Savings Bank v. Ellis*. In *Bruss*, the court found that the complaint failed to specify "any act by any particular defendant through which the fraud was carried out" and commented that individual defendants cannot be "lumped together" under Rule 9(b). Further, where allegations are based on "information and belief," these allegations must be accompanied by a statement of facts upon

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54.  Id. at 71.
59.  Id. at 932.
60. 606 F. Supp. 401 (N.D. Ill. 1985).
63. "Moreover, when there are allegations of a fraudulent scheme with multiple defendants, the complaint must inform each defendant of the specific fraudulent acts which constitute the basis of the action against each particular defendant." *Bruss Co.*, 606 F. Supp. at 405. *See also* Bolingbrook Properties II v. Irvin, No. 84 C 10480 (N.D. Ill. Aug. 5, 1985).
which the belief is founded.64

In *Otto*, the allegations describing the enterprise in plaintiff’s complaint against thirty-five defendants were held to be defective. The complaint failed to specify the involvement of each defendant in the fraudulent activity and the *Otto* court refused to allow collective allegations.65

In *Harris*, the court found that plaintiff’s mail fraud allegations against multiple defendants were insufficient for failing to “state who caused what to be placed in the mails in furtherance of the alleged scheme to defraud and when such mailing was made.”66 The *Harris* court, like the courts in *Bruss* and *Otto*, relied upon *Lincoln National Bank* and *D&G Enterprises*67 thus demonstrating the consistent analysis among district courts of multi-defendant pleadings.

During the 1985-1985 term, only a single published district court decision strayed from this analysis of Rule 9(b). In *Banowitz v. State Exchange Bank*,68 the court found that *Lincoln National Bank* was modified where the multiple defendants were all corporate insiders and where the facts were particularly within the defendants’ knowledge. This decision is inconsistent with *D&G Enterprises* which held that allegations of fraud claimed to be particularly within the defendants’ knowledge, and made on “information and belief,” were required to be accompanied by a statement of facts upon which the belief is founded.69 The consensus within the Seventh Circuit is that pleadings must allege specific predicate acts against each defendant and must specify each defendant’s role with respect to the enterprise.

**B. The New Effect of Rule 11**

For years, district courts have cautioned those who alleged RICO as an afterthought, and those who paid little attention to the specific elements of the statute. A possible sanction now emerges in the “improper

64. *Bruss Co.*, 606 F. Supp. at 405 (citing Duane v. Altenburg, 297 F.2d 515, 518 (7th Cir. 1962), and D & G Enter. v. Continental Ill. Nat’l Bank and Trust Co. of Chicago, 574 F. Supp. 263, 267 (N.D. Ill. 1983)).

65. “In fact, the complaint is devoid of any factual allegations concerning particular defendants. The complaint’s conclusory allegations, which merely attribute fraudulent representations to thirty-five defendants collectively, are not specific enough to satisfy Rule 9(b).” (emphasis in original) *Otto*, 611 F. Supp. at 89-90.


purpose” language of revised Rule 11.70

In two cases, Miller v. Affiliated Financial Corp.,71 and Cashco Oil Co. v. Moses,72 the district courts warned that Rule 11 imposes a more stringent “objective” standard on parties than previously applied. Sanctions may be imposed against those parties and attorneys when the court determines that pleadings are not well grounded in fact, are not warranted by existing law or a good faith argument for extension, modification or reversal of existing law and are interposed for an “improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The language of footnote 3 in Cashco was particularly direct:

Parties and lawyers cannot simply reach for the brass ring of treble damages in every case, on the theory that if unsuccessful they can always fall back on their single damages claim. This text paragraph’s reference to Rule 11 should be kept in mind as to each of the problems referred to in this opinion.73

This warning applies not only to plaintiffs, but also to defendants who file counterclaims in the belief that “a good offense is the best defense.”74 In Miller, the court upheld part of defendant’s counterclaim but cautioned against frivolous claims:

[D]efendants and their counsel would do well to be mindful of the po-

70. See In re TCI Ltd., 769 F.2d 441, 446 (7th Cir. 1985); Bertz, Pursuing a Business Fraud RICO Claim, 21 CAL. W.L. REV. 247, 269-72 (1985) for a discussion of the ethical considerations and possible sanctions for frivolous use of RICO. Rule 11 - Signing of Pleadings, Motions, and Other Papers; Sanctions:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

(As amended Apr. 28, eff. Aug. 1, 1983).

72. Cashco, 605 F. Supp. 70.
73. Cashco, id. at 71 n.3.
tential sting contained in now-revised Rule 11, in 28 U.S.C. § 1927 and in the inherent judicial power to deal with abuses of the justice system.\textsuperscript{75}

Exactly how much sting is contained in revised Rule 11 will be determined by its acceptance and use by the courts. But lawyers for civil RICO litigants should recognize the potential hazards of pleading first and asking questions later.

C. The Predicate Acts—Mail Fraud and Wire Fraud

Mail fraud and wire fraud are typically pled as the RICO “predicate acts,”\textsuperscript{76} and defendants often attack the RICO claim by challenging the sufficiency of mail and wire fraud allegations and the applicability of the mail and wire fraud statutes to the facts of the particular situation.

The scope of the mail fraud statute, 18 U.S.C. § 1341, is quite broad. The basic elements of a mail fraud offense comprise: (1) the intentional devising of a scheme to defraud, and (2) use of the mails for the purpose of executing the scheme.\textsuperscript{77} The Seventh Circuit’s prior interpretation of the mail fraud statute, has been described as “expansive,”\textsuperscript{78} and this liberal interpretation is similarly applied to wire fraud, which was patterned on the mail fraud statute.\textsuperscript{79} In the 1984-85 terms several courts discussed the requisite pleading of mail fraud. At least two district courts found mail fraud pleadings to be insufficient, and a third court accepted some limitation on the reach of the mail fraud statute.

In Cashco Oil Co. v Moses,\textsuperscript{80} the court addressed the “obvious defects” of the plaintiff’s complaint \textit{sua sponte}, and found the plaintiffs’ allegations of mail fraud to be insufficient:

To sustain the conversion of a breach of contract . . . or breach of fiduciary obligation . . . claim into a mail or wire fraud claim (the predicate offense for RICO purposes), Cashco must prove promissory fraud—knowingly false statements of future intentions\textsuperscript{81} . . .

\begin{itemize}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} See Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 157 (1985) which found that mail fraud was pled as the sole predicate offense in 44% of civil RICO cases. An additional 13% of civil RICO cases were based primarily on mail fraud allegations.
\item \textsuperscript{78} See Morano, \textit{The Mail Fraud Statute: A Procrustean Bed}, 14 J. MAR. L. REV. 45, 56 (1980); for a very thorough review of the history and use of the mail fraud statute, see also Rakoff, \textit{The Federal Mail Fraud Statute (Part I)}, 18 DUQ. L. REV. 771 (1980).
\item \textsuperscript{80} Cashco, 605 F. Supp. at 71.
\item \textsuperscript{81} Id.
The district court opinion in *Systems Research, Inc. v. Random, Inc.* addressed the issue of pleading of mail and wire fraud more expansively. In *Systems Research*, the defendants argued that the complaint failed to identify each of the mailings and telephone conversations used in furtherance of the fraud.

The *Systems Research* court began its discussion of this issue with a review of the general principles for pleading fraud. Citing to the familiar language of *Tomera v. Galt* it stated:

Rule 9 must be read together with Rules 8(a)(2), 8(e)(1), and 8(f), Federal Rules Civil Procedure. Rule 8 requires that a plaintiff gives through his pleadings notice to defendant of the nature of his claims. It urges the plaintiff to make known his claims simply and concisely in short, plain statements. With these principles in mind, the purpose of Rule 9 becomes clear. Rule 9 lists the actions in which slightly more is needed for notice. In a fraud action, a plaintiff need also state "with particularity" the circumstances constituting the fraud.

Continuing its opinion, the court found that both *Tomera* and *Haroco* provided guidance on the issue of particularity:

First, there must be adequate notice to the defendant of the charges against him to allow him to plead. Second, the pleadings must establish enough of a "bare bones" scheme to defraud to exceed conclusory allegations. There is a fine distinction between a faulty, conclusory pleading and one that is consistent with our system of pleading and its emphasis on notice rather than fact or issue pleading.

By these standards, the plaintiff's complaint was held to adequately allege a "scheme to defraud." It contained a date upon which the scheme began, a general description of what occurred and the names of the individuals and companies involved.

Defendants also challenged that the complaint failed to allege that the scheme to defraud was "furthered by" the use of the mails and wires. Here they relied upon *County of Cook v. Midcon Corp.* a decision in which the plaintiffs were required to allege the contents and the exact dates of the mailings involved.

The *Systems Research* court found the pleadings sufficient, and expressed some disagreement with the stringent *Midcon* standards. The complaint, though not specifying the contents of each mailing, sufficiently described the "business context" in which the mailings occurred. These allegations left little question, in the court's view, that the mailings

82. 614 F. Supp. 494.
83. *Id.* at 497-98 (quoting *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975)).
84. *Id.* at 498.
and telephone calls were solicitous in nature and sufficiently connected with the use of the mails and wires.

As for the "exact date" of each mailing or telephone call, the court found that this degree of specificity, though required in criminal indictments, did not apply to the civil standards under Rule 9(b). But even under the more stringent standard the complaint was sufficient:

In any event, plaintiffs here have alleged the subject matter, parties contacted, and an approximate date on which the scheme began. Such allegations are sufficient under the more stringent standards in *Cobb* and *Strauss*.86

The *Systems Research* opinion is a primer on pleading mail and wire fraud and is consistent with most opinions during the 1984-85 term.87

In contrast with the *Systems Research* opinion, the court in *Spiegel v. Continental Illinois National Bank*88 dismissed the complaint because the alleged mailings were not made "in furtherance of" the scheme to defraud and were not within the reach of the mail fraud statute. The complaint alleged that the bank, several bank officials and others used a pattern of mail fraud to hide the bank's use of trust income for its own benefit.89 The underlying facts require explanation.

The plaintiff was the sole beneficiary of a trust and the bank was the corporate trustee. Sometime after the trust was established, the plaintiff wanted to act as the sole trustee but the bank refused to yield its position and several state court actions ensued. The bank obtained a declaratory judgment in its favor, and while the state court appeal was pending, the plaintiff sued the bank in federal court. Jurisdiction was based upon RICO and the complaint alleged that the bank converted trust funds by transferring trust income to principal on a quarterly basis.

The initial federal court action (Spiegel I) was dismissed when the district court found that the plaintiff had alleged only one predicate act, mail fraud. Eight days later, the plaintiff filed another action in federal court (Spiegel II) that alleged two additional acts of mail fraud. These additional acts consisted of two letters sent to plaintiff's lawyer discussing the transfer of assets and the deduction of fees and expenses.

The court found that the scheme alleged by plaintiff was outside the intended embrace of the mail fraud statute. The letters themselves con-
tained no false statements or omissions, and only concerned the bank's position in the state law action. In its opinion, the court stated:

Congress could not have intended that the mail fraud statute sweep up correspondence between attorneys, dealing at arm's length on behalf of their parties, concerning an issue in pending litigation, especially where the presiding judge is aware of the alleged scheme and will ultimately rule on the acts in question . . . subjecting the letters in issue to the mail fraud statute would chill an attorney's efforts and duty to represent his or her client in the course of pending litigation. It also would, as it did here, give birth to collateral suits.90

Borrowing from a decision of the District Court for the Southern District of New York,91 the court expressed its belief that Congress did not intend to apply the mail fraud statute to allow such collateral suits where alternative remedies exist. The court warned that its decision was not intended to immunize attorneys who were principals in a fraudulent scheme.92 Rather, its decision rested upon policy considerations, “including protecting the attorney-client relationship, preventing collateral litigation, and respecting concerns of comity.”93

As an alternative basis supporting its decision, the court found that these mailings were made after the scheme had reached its fruition. The mailings were not made to promote the scheme, to accept the proceeds of the scheme or to facilitate concealment of the scheme. Given this, the mailings were not made “in furtherance of” the scheme and could not support allegations of mail fraud.94

The court’s conclusion that the letters were not “in furtherance of” the alleged scheme, is analytically consistent with prior decisions by the Court of Appeals.95 But, their conclusions that Congress did not intend the mail fraud statute to reach correspondence of this type and that the mailings fell “outside the scope of the mail fraud statute” are unique.

The Seventh Circuit interprets the mail fraud statute quite broadly.96 In addition, it has rejected the argument that the mail fraud statute may be limited simply because it overlaps with other federal statutes.97 In United States v. Weatherspoon, the court of appeals stated:

90. Spiegel, id. at 1089.
92. Spiegel, 609 F. Supp. at 1089-90. See also Singh, No. 84C 6049 (N.D. Ill. Jan. 15, 1985), where the court found no immunity for attorneys: “A license to practice law may not be used by an attorney to protect himself from the consequences of illegal or unlawful conduct”).
94. Id. at 1090; see also McKee, 604 F. Supp. at 930-32.
95. See United States v. Wormick, 709 F.2d 454, 461-63 (7th Cir. 1983) and the cases cited therein.
96. See Morano, supra note 76, at 65-70.
97. See United States v. Weatherspoon, 581 F.2d 595, 599-600, (7th Cir. 1978) (discussing
After all, the mail fraud statute proscribes different conduct and requires proof of different elements than the false statement statute, and Congress has the right to authorize additional sanctions for abuse of the mails in connection with a scheme to defraud the government even though the fraud may be separately punished under another federal statute. 98

Whether other courts will be willing to follow the language of Spiegel and exclude letters written by attorneys in the context of pending litigation is uncertain, particularly in light of the Seventh Circuit's expansive reading of the mail fraud statute. It is more likely that courts will focus their examination of pleadings on the issue of whether the mailings were "in furtherance of" the alleged scheme.

The sufficiency of mail fraud allegations should be determined by the type of analysis exemplified by the opinion in Systems Research 99 Pleadings are adequate when they notify each defendant of the charges against it and which provide a "bare bones" description of the scheme to defraud.

D. Pattern of Racketeering Activity

In Sedima, the United States Supreme Court noted that the failure of Congress and the courts to develop a meaningful concept of "pattern" was partially responsible for the "extraordinary" uses to which civil RICO has been put.100 In response, one district court in Northern Trust/O'Hare v. Inryco,101 redefined the concept of "pattern" in a manner that replaced the traditional "relatedness" test of prior Seventh Circuit opinions with a "continuity plus relationship" formulation.

The traditional Seventh Circuit approach to the "pattern" requirement is exemplified by the approach taken in United States v. Kaye,102 which focused largely on the interrelatedness of the predicate acts. Citing to a district court opinion,103 the Kaye court stated:

In common usage, the term "pattern" is applied to a combination of qualities or acts forming a consistent or characteristic arrangement. Use of the term "pattern" in connection with two racketeering acts

United States v. Henderson, 386 F. Supp. 1048 (S.D.N.Y. 1974) and the applicability of mail fraud to acts also made criminal by other federal statutes).

98. Weatherspoon, 581 F.2d at 600.
100. Sedima, 741 F.2d 482. The Seventh Circuit subsequently decided the issue in Lipin Enter., Inc. v. Lee, No. 85-2772 (7th Cir. Oct. 9, 1986) and Morgan v. Bank of Waukegan, No. 85-2675 (7th Cir. Oct. 23, 1986) (accepting the "continuity plus relationship" formulation and rejecting the more than one scheme to form a pattern requirement).
102. 556 F.2d 855 (7th Cir. 1977).
committed by the same person suggest that the two must have a greater interrelationship than simply commissioned by a common perpetrator.\textsuperscript{104}

In \textit{United States v. Weatherspoon} the Seventh Circuit again commented on the meaning of "pattern":

To save the statute from "void for vagueness" attacks, at least two district courts have construed a "pattern of racketeering activity" to require a showing that the two indicatable acts be connected by a common scheme, plan or motive.\textsuperscript{105}

Likewise, in \textit{United States v. Starnes},\textsuperscript{106} the court appeared to require something more than simply the commission of two predicate acts but not a great deal more:

When two or more of those acts are connected to each other in some logical manner so as to effect an unlawful end, a pattern of racketeering exists.\textsuperscript{107}

In \textit{Northern Trust}, the district court, \textit{sua sponte}, addressed the "pattern" issue in the wake of the recent Supreme Court decision in \textit{Sedima}. None of the defendants had raised this particular issue in their motion to dismiss.

The \textit{Northern Trust} court began its opinion with a review of the language of the statute, noting that only in section 1961(5) is the concept of "pattern" addressed. That section states:

\begin{quote}
[P]attern of racketeering requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of an act of racketeering activity."
\end{quote}

The court also noted that prior interpretations of the "pattern" requirement differed. Some courts of appeal, notably the Second and Fifth Circuits,\textsuperscript{108} required no relatedness of the predicate acts, while the Seventh Circuit imposed the requirement of some "relatedness" in order to adequately plead "pattern."\textsuperscript{109}

A third interpretation, represented by \textit{United States v. Moeller},\textsuperscript{110}
found that both the logic and the legislative history required a showing of similar racketeering acts occurring in different criminal episodes. In light of the recent Supreme Court opinion in Sedima, and the specific language contained in the legislative history, the Northern Trust court chose to apply the Moeller analysis. The Northern Trust court seized upon the “continuity plus relationship” language of the Senate Report:

The concept of ‘pattern’ is essential to the operation of the statute . . . the target of Title IX is thus not sporadic activity. The infiltration of legitimate business 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 pattern.111 (emphasis added).

The Northern Trust court reasoned that prior Seventh Circuit opinions, as discussed above, had not placed proper emphasis on the separate requirement of pattern as an independent component of a RICO claim. Breaking with these prior holdings, the district court stated:

Sedima thus clearly creates a whole new ballgame. With such an unmistakable signal from the Supreme Court, this court is no longer obligated to follow contrary Court of Appeals opinions. Although Trustee’s ‘pattern’ allegations satisfied the approach taken in Starnes and Weatherspoon, they clearly fail to satisfy Sedima’s ‘continuity plus relationship’ formulation.112

The Northern Trust opinion, decided July 29, 1985, came too late to have an impact on other district court decisions during the 1984-85 term. But it will be significant as courts decide whether to accept or reject this new formulation. Several other district courts, following Northern Trust, have dismissed RICO complaints for failure to adequately allege a “pattern” of racketeering activity113 yet several other courts, and one circuit court, have rejected the idea that Sedima changes prior analysis.114

Other district court decisions during the 1984-85 term which discussed “pattern” do not provide much, if any, limitation on civil RICO. In Banowitz v. State Exchange Bank,115 defendants contended that the

114. See R.A.G.S. Coutune, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) and Aetna Casualty & Surety Co. v. Levy, No. 83 C 3566 (N.D. Ill. Nov. 7, 1985) which found that the Seventh Circuit reaffirmed the traditional “relatedness” formulation in Illinois Dep’t of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985). But see Medical Emergency Serv. Ass’n v. Foulke, 633 F. Supp. 156 (N.D. Ill. 1986), appeal docketed, No. 86-1174 (7th Cir. Feb. 5, 1986) which found that Phillips was not inconsistent with Northern Trust.
pleadings failed to allege a pattern of racketeering activity because the complaint did not adequately plead mail, wire or securities fraud. In a brief analysis, the court disagreed:

The Seventh Circuit observed that RICO’s terms are very broad. For example, where plaintiffs in commercial fraud cases allege only two acts of mail fraud, that constitutes a "pattern of racketeering activity" and mail fraud consists of using the mails for the purpose of executing a scheme or artifice to defraud.116 

Because the plaintiffs had alleged at least two predicate acts, the court found their pleading to sufficiently allege a "pattern."117

Until the Seventh Circuit addresses the question of what constitutes a "pattern" of racketeering activity, controversy will continue among the district courts in the wake of Sedima and Northern Trust.118

E. Statute of Limitations

The RICO statute contains no express statute of limitations and court opinions vary widely on the appropriate time limit for the bringing of civil RICO actions. Many courts look to the state statute of limitations most analogous to the predicate act alleged by the plaintiff. Others apply a uniform statute.

In Electronic Relays (India) Pvt. Ltd. v. Pascente,119 the district court, relying heavily upon the Supreme Court decision in Wilson v. Garcia,120 chose a "uniform" time (also referred to as "unified") period for all civil RICO actions, regardless of predicate act, and selected section 13-202121 (a two year limitation) as the most appropriate Illinois limi-

116. Id. at 1470.
118. See also REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION BANKING AND BUSINESS LAW 193-208 (1985); Trak Microcomputer Corp. v. Wearne Bros., No. 84 C 7970 (N.D. Ill. Oct. 25, 1985) (where the Inyco "Continuity Plus Relationship" is accepted but the court rejects the notion that a "pattern" of racketeering activity cannot be established with respect to a single fraudulent scheme.
121. ILL. REV. STAT. ch. 110 §§ 13-202, 13-205 states:
§ 13-202. Personal injury—Penalty. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversion, except damages resulting from murder or the commission of a Class X felony and the perpetrator thereof is convicted of such crime, shall be commenced within 2 years next after the cause of action accrued but such an action against a defendant arising from a crime committed by the defendant in whose name an escrow account was established under the "Criminal Victims' Escrow Account Act" shall be commenced within 2 years after the establishment of such account.
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The district court's selection of section 13-202 is consistent with the district court ruling in *Taylor v. Central States, South East and South West Area Pension Fund*; although it is inconsistent with *Willcutts v. Jefferson Trust & Savings Bank of Peoria*, a decision that applied the five year limitation of common law fraud as the most appropriate state limitations for the predicate offense of mail fraud. Many courts, outside the Seventh Circuit, have rejected uniform limitation of Civil RICO actions because the predicate acts that give rise to a RICO claim can vary significantly. This approach, however, allows for inconsistent interpretations and uncertainty among litigants.

Prior Seventh Circuit experience with the Civil Rights Act and the Supreme Court decision in *Wilson* indicate a preference for the uniform limitation approach. The analysis of the court in *Electronics Relays* with regard to uniformity is compelling, and is likely to be followed by other district courts. Nevertheless, the two year limitation is controversial and may be viewed as contrary to the remedial purposes of

tracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

122. In a motion for reconsideration, plaintiff argued that § 13-205 (five year statute of limitations for "all civil actions not otherwise provided for") was more appropriate than § 13-202. The two year limitations period, it asserted, would be applicable only for claims that sought treble damages but would not be appropriate where plaintiffs sought only equitable relief, or chose not to seek treble damages. Further, the five year statute of limitations had been held by Illinois courts to be appropriate to all rights of action created by statute. *Electronic Relays*, 610 F.Supp. at 655. The *Electronic Relays* court rejected plaintiff's contentions. Equitable actions, it found, are "simply not subject to a statute of limitations." The court continued:

If an equitable action is regarded as exclusive of rather than concurrent with an action at law, then it is governed not by any statute or limitations, but only by the doctrine of latches. . . . If, on the other hand, an action under Sec. 1964(a) is regarded as concurrent to an action for damages under Sec. 1964(c) (and, given the wording of Section 1964(c), that would apparently always be true for private litigants), then "equity will withhold its remedy if the legal right is barred by the local statute of limitations"), and that is so even if a litigant forebears from requesting the legal relief. *Id.*

The court concluded that the plaintiffs concerns for uniformity could not arise and noted that recent district court decisions held that private litigants may not sue under § 1964(a). *Id.* at 665 n.2.

123. Nos. 83 C 2206 and 83 C 6283, slip op. at 5-6 (N.D. Ill. Nov. 6, 1984).
124. No. 84-2006 (C.D. Ill. Apr. 21, 1982).
126. McKirdy, supra, note 122 at 290-91.
F. Equitable Relief Under Section 1964(a)

The leading decision concerning private equitable relief available under RICO is *Kaushal v. State Bank of India*. Where the district court analyzed section 1964 at length and concluded that equitable relief was not available to private litigants:

In the case of Private RICO, there are no "strong indicia" in the structure of Sec. 1964, in its legislative history, in the absence of explicit language of exclusivity in subsection (c), or in any combination of those elements of Congress' intent to infer private equitable remedies under RICO. In fact the evidence points precisely in the opposite direction.\(^{130}\)

This position was also taken in *Miller v. Affiliated Financial Corp.* There the court struck several paragraphs of plaintiff's prayer for relief, which asked for declaratory judgment, an order compelling return of property, and an injunction on the basis that equitable relief is not available to private RICO litigants.\(^{132}\) In footnote 15, the *Miller* court noted that there was a possible inconsistency between *Kaushal* and another recent district court decision, *DeMent v. Abbott Capitol Corp.* The *DeMent* court read *Kaushal*, and other cases, to deny injunctive relief to private parties. However, the *DeMent* court described the equitable rescission sought by plaintiffs as compensatory in nature and, to that extent, permitted under civil RICO:

That Congress did not intend for a private party to obtain such drastic forms of relief [i.e. injunction] does not mean that it intended to bar a private party from compensation for harm done due to a RICO violation merely because the relief is characterized as "equitable."\(^{134}\) (emphasis in original).

From a practical standpoint, the conflict is not serious because the consensus to date is that injunctive relief is not available to private parties under RICO. Equitable rescission is another matter, and on this point *Kaushal* and *DeMent* are squarely in conflict.

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128. *See* Davis v. Smith, 635 F. Supp. 459 (N.D. Ill. 1985) which anoted 4 5-year statute of limitations for civil RICO, based on Illinois statutes of limitation governing fraud, as most consistent with RICO's purposes.


130. *Id.* at 584.


132. *Id.* at 994.


134. *Id.* at 1384.
Several district courts in the 1984-85 term discussed the venue provisions found in 18 U.S.C. § 1965. Each found that this provision was intended to liberalize the existing venue provisions of 28 U.S.C. § 1391(b) and applied a similar analysis. The court in *Ideal Stencil and Tape Co. v. Merchiori* found that venue was proper pursuant to section 1391(b) (venue is proper where the "claim arose"), however, the court dismissed the complaint, with leave to amend, for failure to state a claim for relief under section 1962.

In *Payne v. Marketing Showcase, Inc.*, venue was found to be improper under section 1965(a) because plaintiff failed to show that there was venue over each defendant, due to his own contacts with the Northern District of Illinois, as opposed to those of a co-defendant.

Plaintiff argued that venue was also proper under section 1391(b) (as the district where "the claim arose") because the RICO injuries occurred in the Illinois district. The court disagreed, finding that the "weight of the contacts" overwhelmingly pointed to the Southern District of New York. The court relied upon the analysis of the Supreme Court in *LeRoy v. Great Western United Corp.*, and concluded that the place of injury, while significant, was not determinative. The Southern District of New York was proper because "any scheme to defraud plaintiff of her commissions must have taken place in New York." Moreover, New York was where the defendant officers worked and lived, where all pertinent correspondence and communication originated, where the principal witnesses lived and where all relevant documents were located.

In *So-Comm, Inc. v. Reynolds*, the court found that venue was proper both in the Northern District of Illinois and in the Southern District of Ohio. However, it granted defendants' motion to transfer to Ohio based upon a balancing of the convenience of the parties, the convenience of the witnesses and the interests of justice. Specifically, the court found:

The Ohio forum is clearly more convenient for the majority of witnesses involved in this litigation. Additionally, the compulsory process, assuring attendance of unwilling witnesses, is available to more

witnesses in the Ohio forum.\textsuperscript{142}

The court found venue proper under both sections 1965(a) and 1391(b). Nonetheless, the plaintiff’s claim was transferred to the Southern District of Ohio on the basis of this balancing test.

\textbf{H. Standing}

On a question of first impression, (and decided prior to the Seventh Circuit opinions in \textit{Illinois Department of Revenue} and \textit{Carter v. Berger})\textsuperscript{143} the district court in \textit{O'Donnell v. Kusper},\textsuperscript{144} held that a taxpayer had no standing to bring a RICO action on behalf of an injured governmental entity where the plaintiff failed to allege any fraud or malfeasance on the part of the county official responsible for bringing a RICO action. The plaintiff was an Illinois taxpayer who sued the County Clerk, five printing companies, the Board of Commissioners and others, complaining that contracts for the printing of election ballots were let without complying with public notice and sealed competitive bidding requirements.\textsuperscript{145}

In reaching its conclusion, the court found no case that had addressed this issue nor that had determined whether a \textit{shareholder} had standing to maintain a RICO action on behalf of an injured corporation.\textsuperscript{146} For its analysis, the court reviewed two antitrust decisions of the Eighth and the Fourth Circuits.\textsuperscript{147} Both cases denied standing to a taxpayer to bring a derivative antitrust action on behalf of the city absent any allegations of official misconduct. In footnote 3, the \textit{O'Donnell} court stated that it would have no hesitation in denying plaintiff standing were he to bring his action in his own behalf.\textsuperscript{148}

Finally, the court denied plaintiff’s request to substitute the allegedly injured corporation, Omega Graphics, as a plaintiff in his stead. The standing of Omega Graphics was considered by the court to be no

\textsuperscript{142} So-Comm, \textit{id.} at 667.
\textsuperscript{143} Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985) (indirect or derivative injuries are not compensable under the RICO statute). The \textit{Carter} decision, which based its decision on analogies to anti-trust law, has now settled this issue within the Seventh Circuit.
\textsuperscript{145} \textit{Id.} at 620-21.
\textsuperscript{146} Subsequently, the Sixth Circuit in \textit{Warren v. Mfr. Nat'l Bank of Detroit}, 759 F.2d 542 (6th Cir. 1985) held that a shareholder could not bring a civil RICO action, in his individual capacity, for injuries apparently inflicted on a corporation. The \textit{Warren} decision was based on anti-trust cases that applied "with equal force" to a civil RICO action. The court cited, with approval, \textit{Gallagher Canon, U.S.A.}, 588 F. Supp. 108, 110-11 (N.D. Ill. 1984).
\textsuperscript{147} Cosentinto v. Carver-Greenfield Corp., 433 F.2d 1274 (8th Cir. 1970) and Ratliff v. Burney, 657 F.2d 640 (4th Cir. 1981). These precedents were different than those relied upon by the \textit{Warren} court but they had the common thread of antitrust.
\textsuperscript{148} \textit{O'Donnell}, 602 F. Supp. at 624 n.3.
better than that of the plaintiff, and if Omega Graphics sought to sue in its own right, its interest would be different from that of a directly injured party. Substitution was therefore improper under Rule 25.149

The court's analysis, in which it borrowed from antitrust law, is important to future litigants. Although the Schacht and Illinois Department of Revenue opinions found significant differences between the purposes of the antitrust statute and that of RICO,150 they both recognized the importance of antitrust law as a starting point. The interpretation of RICO by district courts continues to draw on antitrust law, as well as general principles of statutory interpretation.151

CONCLUSION

During the 1984-1985 term, the Seventh Circuit resolved the controversy over the "racketeering injury" requirement and its discussion of the enterprise/person relationship in Haroco and the standing requirement in Phillips set the tone for analysis by the lower courts. District courts are consistent in their approach to the review of pleadings, but are inconsistent in their application of the mail fraud statute and the statute of limitations; reflecting the national controversy, the district courts within the Seventh Circuit remain sharply divided over the "pattern" requirement. RICO is a statute in transition which changes in complexion and complexity with each new decision from the Seventh Circuit Court of Appeals. Despite consensus in many areas, the controversy will continue as RICO is applied to an ever increasing number of defendants in the context of commercial fraud actions.

149. Id. at 624.
150. Schacht, 711 F.2d at 1358: "Anti-trust law and policy are increasingly concerned with market efficiency rather than with effects of concentrated market power."
151. Although not discussed in text, the district court in Campbell v. A.H. Robins, 615 F. Supp. 496 (W.D. Wis. 1985) found that RICO applied only to injury to his property or business, not personal injury.