THE SEVENTH CIRCUIT BESTOWS IMMUNITY FROM RICO PROSECUTIONS UPON ANTI-ABORTION PROTESTORS

National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3451 (U.S. Nov. 2, 1992) (No. 92-780)

In *National Organization for Women v. Scheidler*,[1] the Seventh Circuit concluded that violations of the Hobbs Act by anti-abortion activists do not constitute the economically-motivated predicate acts required for the imposition of liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO").[2]

The plaintiff[3] brought suit under RICO[4] against a coalition of anti-abortion groups[5] to prevent a nationwide campaign to close abortion clinics by using illegal means.[6] The district court granted the defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Proce-

1. 968 F.2d 612 (7th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3451 (U.S. Nov. 2, 1992) (No. 92-780).

2. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988).

3. Plaintiffs included the National Organization for Women ("NOW"), the Delaware Women's Health Organization, and Summit Women's Health Organization. 968 F.2d at 614. NOW sought class certification for itself, its women members, and other women who use or may use the services of targeted health centers. *Id.* at 615 n.3. The health-center plaintiffs sued on behalf of themselves and all similarly situated abortion clinics. *Id.* The district court deferred its ruling on the class certification issue pending resolution of defendants' motion to dismiss. *Id.* All pending motions were dismissed as moot when the court granted the motion to dismiss. *Id.*

4. *Id.* at 614. Plaintiffs' civil RICO suit was authorized by § 1964(c), which provides:

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

18 U.S.C. § 1964(c) (1988).

NOW also brought suit under the Sherman Antitrust Act, 15 U.S.C. § 1 (1988), and raised several pendant state claims. On appeal, however, the court found that Congress did not intend for the antitrust laws to apply to the defendants' activities. 968 F.2d at 623.

5. *Id.* at 615. The independent groups operated in concert under the aegis of the Pro-Life Action Network ("PLAN"). The named defendants included Pro-Life Action League, Pro-Life Direct Action League, Operation Rescue, and Project Life. *Id.* The remaining defendant, Vital-Med Laboratories, allegedly participated in a conspiracy to steal fetal remains for use at publicized burials. *Id.* at 616. *See infra* note 52.

6. 968 F.2d at 614. The complaint alleged that anti-abortion activists engaged in the following illegal activities to close women's health centers:

> extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference

dure 12(b)(6).[7] On appeal, the Seventh Circuit affirmed the district court and held that RICO requires either an economically-motivated enterprise or economically-motivated predicate acts.[8] The court ruled that the defendants' violations of the Hobbs Act could not substitute for the requirement that the defendants' predicate acts have an economic motivation.[9]

The harassment of women visiting abortion clinics by anti-abortion activists increased dramatically during the 1980s.[10] The renowned clinic "blitzes" of Operation Rescue, a pro-life organization, typify anti-abortion activists' increasingly violent tactics.[11] In response to this threat to a woman's right to visit an abortion clinic, abortion-rights advocates have turned to the federal courts for protection, bringing civil suits under several different laws, including RICO.[12]

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with centers' business relationships with landlords, patients, personnel, and medical laboratories.

Id. at 615.

7. *Id.* at 614. *See* National Org. for Women v. Scheidler, 765 F. Supp. 937, 945 (N.D. Ill. 1991). The district court held that plaintiffs failed to allege economic motive. *Id.* at 939. The court found that the supporters of the defendants' organization may have contributed to support external activity, but their contributions were not derived from a pattern of racketeering activity. *Id.* at 944.

8. 968 F.2d at 614.

9. *Id.* at 629.

10. Janice Mall, *About Women: Harassment of Abortion Clinics Growing*, L.A. TIMES, Apr. 26, 1987, § 6, at 6. The Alan Guttmacher Institute conducted a survey of nearly two-thirds of all abortion providers in the United States. The survey found that 47% of all abortion facilities experienced harassment in 1985. *Id.* Among non-hospital facilities that provide abortions, the figures were even more dramatic: 88% of these clinics reported at least one type of harassment and 73% reported illegal anti-abortion harassment. *Id.* The survey asked clinics to report on six different forms of illegal harassment. Forty-eight percent of the clinics reported bomb threats, 47% reported picketers blocking patients from entering the building, 29% reported invasions of their facilities by anti-abortion activists, 28% suffered vandalism, 22% reported jamming of telephone lines, and 19% responded that staff members had received death threats. *Id.*

11. For a revealing biography of Operation Rescue's founder, Randall Terry, see Susan Faludi, *The Anti-abortion Crusade of Randall Terry: Operation Rescue's Jailed Leader and his Feminist Roots*, WASH. POST, Dec. 23, 1989, at C1. Operation Rescue spokespersons claim that they do not condone violence. *Id.* However, in the training tapes that Terry distributes, he suggests that it may be necessary to "physically intervene with violence . . . with force [because] that is the logical response to murder. [And] abortion is murder." *Id.* Terry's disciples have passionately followed his instructions to intervene with violence on many occasions. From 1977 to 1989, anti-abortion activists attempted to burn or bomb 117 clinics, threatened to bomb 250 clinics, invaded 231 clinics, and vandalized 224 clinics. Protesters have struck clinic employees with their cars and taken staff members hostage. *Id.* Some protesters have even kidnapped patients. *Id.*

12. In Bray v. Alexandria Womens Health Clinic, 113 S. Ct. 753 (1993), the United States Supreme Court invalidated the clinics' efforts to bring suit under the Ku Klux Klan Act of 1873, 42 U.S.C. § 1985(3) (1988) (prohibiting conspiracies to deprive "any person or class of persons of the equal protection of the laws"). Until then, the clinics had enjoyed mixed success under § 1985 in the

Section 1962(a) of RICO[13] makes it unlawful for any person to use income derived from a pattern of racketeering activity to establish or operate any enterprise[14] whose activities affect interstate commerce.[15] The language of RICO does not explicitly require that the enterprise

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lower federal courts. *See, e.g.*, New York State NOW v. Terry, 886 F.2d 1339, 1357-61 (2d Cir. 1989) (holding that abortion protestors acted within the scope of § 1985 when engaging in conspiracy to prevent women from obtaining access to abortion clinics), *cert. denied*, 495 U.S. 947 (1990); Roe v. Operation Rescue, 710 F. Supp. 577, 580-81 (E.D. Pa. 1989) (holding that women seeking abortions are entitled to protection under § 1985(3) and a conspiracy to deprive women access to abortion clinics is actionable under § 1985(3)); *but see* Roe v. Abortion Abolition Soc'y, 811 F.2d 931, 933-37 (5th Cir.) (holding that § 1985(3) protects class defined by common characteristics of those against whom conspiracy is aimed and that the defendants' religious beliefs about abortion were not sufficient), *cert. denied*, 484 U.S. 848 (1987); National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168, 1170-72 (C.D. Cal. 1989) (holding that subclass of women seeking to assert their right to abortion was not entitled under § 1985(3) to proceed against abortion protestors and women seeking abortion are not class needing special protection).

Clinics have also pursued claims under the Sherman Antitrust Act, 15 U.S.C. § 1 (1988). *See supra* note 4 and accompanying text discussing *Scheidler*; Barr v. National Right to Life Comm., 1981-2 Trade Cas. (CCH) ¶ 64,315, at 74,408 (M.D. Fla. 1981) (dismissing clinic doctor's claim against anti-abortion protectors' boycott of application for hospital privileges due to insufficient effect on interstate commerce); *see also* Dinah R. PoKempner, Note, *The Scope of Noerr Immunity for Direct Action Protestors: Anti-Trust Meets the Anti-Abortionists*, 89 COLUM. L. REV. 662, 670-677 (1989) (arguing that the Sherman Act applies to anti-abortion protestors).

13. 18 U.S.C. § 1962(a) provides in relevant part that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the 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.

18 U.S.C. § 1962(a) (1988).

14. Section 1961(4) defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1988).

15. *Id.* On October 15, 1970, President Nixon signed into law Title IX of the Organized Crime Control Act, commonly known as RICO. *Id.* President Nixon remarked that the omnibus legislation would provide federal law enforcement officials with the legal mechanism to "launch a total war against organized crime." Public Papers of the Presidents of the United States: Richard Nixon 846 (1970).

Congress originally intended that RICO be used exclusively to combat organized crime. *See* S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969) (stated purpose is the "elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."); 116 CONG. REC. 35,295 (1970) ("[RICO] . . . provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped and the process be reversed when such infiltration does occur.") (remarks of Rep. Poff, floor manager of the bill). *But see* Gilbert v. Prudential-Bache Sec., 769 F.2d 940, 942 (3d Cir. 1985) (noting that the Supreme Court "refused to read into civil RICO any requirement, unexpressed by Congress, that the statute be confined to situations implicating organized crime"). The Supreme Court has recognized that "in its private civil version,

have a profit-making motivation.[16] Furthermore, the Supreme Court has expressly declined to resolve the issue of whether Congress intended RICO to require an economic motivation.[17] Currently, three federal circuit courts of appeals require some form of economic motivation in order to force a defendant to incur criminal liability under RICO.[18] Yet, the

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RICO is evolving into something quite different from the original conception of its enactors." Sedima, S.P.R.L. v. Imprex Co., 473 U.S. 479, 499-500 (1985).

Use of civil RICO has expanded dramatically since its enactment. Prior to 1985, courts issued 270 RICO decisions. Courts decided only 3% of these cases in the 1970s, 2% in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO 5 n.21 (1991). Litigants have initiated RICO claims against individuals, American and foreign corporations, partnerships, labor unions, receivers, churches, colleges and universities, municipal officials, municipal organizations, estates, and political party organizations. *Id.* at 177-79 (citations omitted).

16. Section 1961(1) defines a litany of predicate racketeering acts. Several lack an inherent economic motive: murder; obstruction of justice; retaliation against a witness; and receipt of narcotics. 18 U.S.C. § 1961(1) (1988). *See generally* Adam D. Gale, Note, *The Use of Civil RICO Against Anti-Abortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341 (1990) (discussing the legislative history of RICO and the lack of the economic-motive requirement in the statutory language). *See also* Mary L. Perry, Note, *Judicial Creation of an Economic Requirement Under RICO: Time to Dismantle the Barricade*, 68 WASH. U. L.Q. 1021, 1036-38 (1990) (arguing that the statutory language of RICO does not support limiting the Act to enterprises with an economic motive).

17. The Supreme Court denied certiorari in Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). *McMonagle* presented the Court with the issue of whether RICO liability may be imposed in the absence of a profit-making element. *Id.* In his dissent from the denial of certiorari, Justice White noted that the circuits disagreed on the economic-motivation requirement and stated that he would grant certiorari to resolve the conflict. *Id.*

The Court has refused to add other requirements to RICO when the statutory language is silent. Sedima, S.P.R.L. v. Imprex Co., 473 U.S. 479 (1985). In *Sedima*, the Court addressed whether § 1962(c) of RICO required an additional racketeering injury.

Section 1962(c) provides:

> 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.

18 U.S.C. § 1962(C) (1988).

The Court rejected this contention and concluded that the statute did not contemplate such an "amorphous" requirement. The Court held that a violation of § 1962(c) requires: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Id.* at 496. In an explanatory footnote, the Court dismissed the lower court's concern about overstepping the intent of Congress: "[G]iven the plain words of the statute, we cannot agree with the court below that Congress could have no " 'inkling of [§ 1964(c)'s] implications.' " *Id.* at 495 n.13.

18. *But see supra* note 17 (discussing *McMonagle*). *See also* United States v. Hartley, 678 F.2d 961, 990-91 (11th Cir. 1982) (explaining that the proper inquiry is whether the enterprise conducted affairs through a pattern of racketeering activity, not whether profit resulted), *cert. denied*, 459 U.S. 1170 (1983); United States v. Thordarson, 646 F.2d 1323, 1328-29 & n.10 (9th Cir.) (explaining that RICO proscribes criminal conduct without regard to the objectives of the individuals engaging in the conduct), *cert. denied*, 454 U.S. 1055 (1981).

Seventh and the Third Circuit differ on whether predicate acts which constitute violations of the Hobbs Act permit a court to ignore the economic-motivation requirement.

In *United States v. Ivic*,[19] the Second Circuit became the first of the circuits to impose an economic-motive requirement for RICO convictions. In *Ivic*, the court reversed the RICO convictions of four Croatian nationalists.[20] The court concluded that because RICO sections 1962(a) and 1962(b)'s use of the term "enterprise" clearly referred to an organized profit seeking venture, the court must give the same meaning to the term "enterprise" when used in subsection (c) of the statute.[21]

Cognizant of RICO's liberal construction clause,[22] the court nevertheless characterized political activity, at least when devoid of any financial motive, as beyond the contemplated reach of RICO.[23] The court concluded that RICO excludes groups that do not generate a profit because the Act only applies to organizations that produce revenue to infiltrate legitimate businesses.[24] Absent proof that an enterprise or its predicate

19. 700 F.2d 51 (2d Cir. 1983).

20. *Id.* at 53. The defendants were convicted of attempting to murder a political opponent and bombing a dance studio and travel agency. *Id.* at 53-55. The court held that the defendants had political rather than economic motivations. *Id.* at 61.

21. *Id.* at 60-61. The court invoked the proposition that "[w]hen the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in other places." *Id.* at 60 (citing United States v. Nunez, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 930 (1978)). *See* Turkette v. United States, 452 U.S. 576, 581 (1981) (rejecting an *ejusdem generis* approach to interpreting RICO's statutory provisions); Perry, *supra* note 16, at 1036-78 (discussing *Turkette*).

As additional support for its holding, the court relied upon the title of the Act and interpreted the terms "corrupt" and "racketeer influenced" as connoting money making activities. *Ivic*, 700 F.2d at 61. " 'The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.' " *Id.* (quoting United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631 (1818)).

22. RICO's liberal construction clause provides that "the provisions of this title shall be liberally construed to effectuate its remedial purposes." The Second Circuit perceived its holding as entirely consistent with this directive because the court believed that RICO's "remedial purposes" would not be furthered if the statute covered terrorist activities. *Ivic*, 700 F.2d at 65 n.8.

23. *Id.* at 63.

24. *Id.* In this pre-*Sedima* decision, the court relied upon RICO's legislative history. 700 F.2d at 62-63. Applying the rationale of United States v. Turkette, 452 U.S. 576 (1981), the court concluded that RICO applies only to organizations which generate monies to serve as a "springboard into the sphere of legitimate enterprise." *Ivic*, 700 F.2d at 63 (quoting *Turkette*, 452 U.S. at 593). While *Turkette* defined "enterprise" as encompassing illegitimate organizations, the Second Circuit perceived nothing in RICO to suggest that it reaches every such organization, "even one whose animating long-term purpose and predicate crimes are political rather than pecuniary. Indeed, the rationale of *Turkette* points decidingly the other way." *Id.*

acts have a financial purpose,[25] the *Ivic* court deemed section 1962(c) not applicable.[26]

In *United States v. Bagaric*, the Second Circuit distinguished its holding in *Ivic* by stating that an economic motivation does not have to constitute the predominant purpose motivating a RICO defendant's predicate acts or enterprise.[27] *Bagaric* also involved Croatian nationalists, but in addition to their terrorist acts, the defendants also extorted money from individuals unsympathetic to the Croatian's cause.[28] Seeking to avoid needless politicization of trials, the Court rejected the notion that *Ivic* required an economic motive paramount to all others.[29] The Second Circuit concluded that courts should characterize an enterprise according to its function rather than its structure.[30] The court held that when applying RICO to non-profit enterprises, a court could find an economic motivation through a pattern of racketeering activity.[31] Thus, in *Bagaric*, the Second Circuit held that either the enterprise or the defend-

25. 700 F.2d at 61 n.6. The *Ivic* court recognized the defendants' non-pecuniary goals of eliminating political opponents and winning publicity, but deferred judgment on the applicability of RICO to organizations that extort money to further political objectives. *See infra* text accompanying note 33 (discussing predicate acts with tangential economic purpose that further political objectives).

26. 700 F.2d at 65.

27. 706 F.2d 43 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

28. *Id.* at 48. In upholding the convictions, the court reasoned that "whether appellants extorted money for the long-term political purpose of effecting the separation of Croatia from Yugoslavia . . . or whether [this] is an issue they care about not at all, the effect of their activities on the national economy is identical . . . This effect is accomplished [by] whatever considerations compel the creation and execution of an extortion scheme." *Id.* at 54.

29. *Id.* at 54. The court expressed concern that an inquiry to determine whether pecuniary objectives superseded accompanying political or religious motives would only serve to "patronize the jury and to add a distracting element of emotionalism to the proceedings. It would authorize the admission of evidence of political beliefs, racial animosity, and family or blood feuds as justification for criminal acts." *Id.* at 54-55.

30. *Id.* at 56.

31. *Id.* The court held that § 1964(a) appears to contemplate application of RICO to enterprises which, for example, are not themselves profit making, or which reinvest all their funds." *Id. Cf. Turkette*, 452 U.S. at 580-81 (concluding that, in § 1964(a), use of the word "any" in a clause dealing with unions and individuals that were associated in fact signaled a congressional intent to impose no restriction upon associations embraced by the definition).

However, anti-abortion groups control the disposition of large sums of money. Operation Rescue acknowledged the receipt of $300,000 in donations for 1989. Faludi, *supra* note 11, at C1. Others estimate that Operation Rescue annually receives over $1 million in donations. *Id.* One donor alone, Rev. Jerry Falwell, publicly contributed $10,000. *Id.* During the summer of 1988, searchers of an Operation Rescue hotel room in Atlanta discovered $50,000 in cash stuffed in a dresser drawer. *Id.*

ant's predicate acts of racketeering must have some financial purpose.[32]

Two years later, in *United States v. Ferguson*,[33] the Second Circuit further relaxed the requisite economic nexus between an enterprise and independent predicate acts. In *Ferguson*, members of the Black Liberation Army robbed armored trucks to obtain money to further their activities.[34] Affirming the defendants' RICO convictions, the court concluded that when the enterprise and the predicate acts are the same, a plaintiff can use the same evidence to prove both elements of a RICO violation.[35] Thus, in order to impose RICO liability a court need only find that the predicate acts have some type of economic motivation.[36] In *United States v. Flynn*,[37] the Eighth Circuit explicitly agreed with *Ivic*'s holding that a RICO defendant must operate an "enterprise"[38] toward an economic goal.[39] The Eighth Circuit, however, required proof of an economic motive, independent of the commission of predicate acts.[40] In

32. *Bagaric*, 706 F.2d at 56-57. In contrast to *Bagaric*, the *Ivic* court held that the enterprise itself needed an economic motive. *See* Gale, *supra* note 16, at 1351 ("Thus, when *Bagaric* dismissed the importance of focusing on the enterprise, it left no statutory language basis on which to ground the economic motive requirement."). *See also infra* notes 33-37 and accompanying text.

33. 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985).

34. *Id.* at 853. The court found that "the defendants' activities centered around the commission of economic crimes." *Id.* The self-professed political revolutionaries perpetrated several armored truck robberies and murdered guards and police officers at the scene of the crimes. *Id.* They used the proceeds to support fellow enterprise members and maintain safehouses for members who were evading apprehension. *Id.* In *Ferguson*, the court addressed the *Ivic* court's refusal to extend RICO's coverage to terrorist organizations which commit predicate acts to further their activity. *Id.* *See supra* note 25 and accompanying text.

35. *See supra* note 25 and accompanying text. *See also Bagaric*, 706 F.2d at 57; *Turkette* 452 U.S. at 583. In *Ferguson*, the court explicitly rejected the defendants' claim that an "enterprise was not proven independent of the predicate acts." 758 F.2d at 853. In support of its conclusion, the court noted the presentation of other relevant evidence that established the existence of an enterprise. This evidence included: testimony regarding the Black Liberation Army's structure, ongoing strategy and planning sessions, and connections among the criminal predicate acts. *Id.*

In essence, the court reiterated the *Bagaric* court's "elucidation" of *Ivic*. The court found nothing in RICO that requires proof that the motivating force behind the defendants' actions was a "significant economic purpose." ABRAMS, *supra* note 15, at 133.

36. *See* Gale, *supra* note 16, at 1369.

37. 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).

38. The Eighth Circuit's definition of enterprise contains three elements: "(1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering." *Id.* at 1051.

39. *Id.* at 1052. The *Anderson* court first articulated this conclusion. United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980). *See infra* note 40.

40. *See Anderson*, 626 F.2d at 1372. In *Anderson*, the lower court convicted two county judges under RICO for defrauding the county citizens. *Id.* at 1361-62. The court stated in dictum that "enterprise," as used in § 1961(4), must "exist[ ] for the purpose of maintaining operations directed

Flynn, the defendant was charged with three predicate acts of murder and attempted murder.[41] Although none of these crimes had an overt economic motivation, the court nevertheless sustained the defendant's RICO conviction because the enterprise's intent to gain control of a local labor union promoted an economic purpose independent from the predicate acts.[42]

In *Northeast Women's Center v. McMonagle*,[43] the Third Circuit obviated the need for an explicit economic motivation in civil RICO actions premised on predicate offenses in violation of the Hobbs Act.[44] The defendants, anti-abortion activists, engaged in increasingly violent protests at an abortion clinic.[45] Forswearing statutory interpretation, the court focused on the plaintiff's novel use of the Hobbs Act[46] to serve as a pred-

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toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.'" *Id.* at 1372 (quoting 18 U.S.C. § 1961(4)). Because the "enterprise" had no independent existence apart from the commission of the predicate acts, the *Anderson* court reversed the defendants' convictions. *Id.* at 1369, 1375.

In congruence with *Ivic*, the Eighth Circuit also found that the term "enterprise" should be interpreted uniformly throughout § 1962. "Congress . . . employed the identical term in all three subsections [of § 1962] and defined the term in section 1961 without differentiation according to the provision in which it appeared. Uniform definition thus appears more consistent with legislative intent." *Id.* at 1366 n.12. *But see* United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) (explaining that "[e]nterprise" in subsections (b) and (c) has a different meaning than in subsection (a)), *cert. denied*, 420 U.S. 925 (1975).

41. *Flynn*, 852 F.2d at 1047.

42. *Id.* at 1052. Several commentators have posited that because the predicate acts in *Flynn* did not have an independent economic objective, the Eighth Circuit failed to answer the question whether it would allow a RICO conviction against an enterprise if the predicate acts did not have an economic purpose. Thus, the court's apparent approval of this proposition is dictum. *See* Gale, *supra* note 16, at 1353 (asserting that because the court found that the enterprise had an economic goal its statement that an enterprise must be directed toward an economic goal was dictum); Perry, *supra* note 16, at 1033 n.92 (arguing "that the *Flynn* decision did not resolve the question whether the Eighth Circuit would allow a RICO claim against an enterprise without an economic goal if the predicate acts did have an economic orientation").

43. 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). *See supra* note 17 (discussing Justice White's dissent from the Supreme Court's denial of certiorari).

44. 868 F.2d at 1350. For the text of the Hobbs Act, *see infra* note 46.

45. *Id.* at 1345. The defendants illegally entered the clinic on four occasions, knocked down and injured employees, threw medical supplies on the floor, and harassed patients. Ultimately, some of the staff resigned and the clinic lost its lease, forcing it to move to another location. *Id.* at 1346-47.

46. *Id.* at 1348. The plaintiff alleged that the defendants' interference with the clinic's right to operate its business violated the Hobbs Act. *Id.* A violation of the Hobbs Act is among the predicate acts listed in § 1961(1)(b). Specifically, 18 U.S.C. § 1961 provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so

icate offense under RICO.[47] The court noted that imposing liability under the Hobbs Act does not require a finding of an economic motivation.[48] The Third Circuit emphasized that the statutory language of RICO permits a plaintiff to establish a pattern of racketeering activity by demonstrating that the defendant committed any act indictable under the Hobbs Act.[49] Thus, when violations of the Hobbs Act constitute the predicate offenses, the Third Circuit held that RICO does not require an economically-motivated predicate act or enterprise for the imposition of civil liability.[50]

In *National Organization for Women v. Scheidler*,[51] the Seventh Circuit held that when the defendant's predicate acts consist of violations of the Hobbs Act, the plaintiff still must prove that either these predicate acts or the defendants' enterprise has an economic motivation before a court can impose civil liability under RICO.[52] In *Scheidler*, the court

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to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . . ."

18 U.S.C § 1961(1)(b) (1988).

Basically, "the Hobbs Act thus requires proof (1) that the defendant took or obtained tangible or intangible property by wrongful use of actual or threatened force, violence, or fear and (2) that the defendant's conduct obstructed, delayed or affected commerce." *See* ABRAMS, *supra* note 15, at 286. The definition of property under the Hobbs Act is expansive. *See, e.g.*, Stirone v. United States, 361 U.S. 212, 215 (1960) (explaining that the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence"); United States v. Tropiano, 418 F.2d 1069, 1075-76 (2d Cir. 1969) (explaining that "property" under the Act, "includes in a broad sense, any valuable right considered as a source or element of wealth," including "a right to solicit business"), *cert. denied*, 397 U.S. 1021 (1970); *McMonagle*, 868 F.2d at 1350 (explaining that "rights involving the conduct of business are property rights"); Town of West Hartford v. Operation Rescue, 915 F.2d 92, 101 (2nd Cir. 1990) (discussing the broad definition of property in the Hobbs Act).

47. *Id.* at 1348, 1350.

48. *Id.* at 1350 (citations omitted).

The Third Circuit also rejected defendant's contention that civil RICO does not apply to politically motivated actions. *Id.* at 1348. Justifiably concerned with the First Amendment ramifications, the court recognized that the First Amendment " 'does not shield from governmental scrutiny practices which imperil public safety peace or order.' " *Id.* (quoting United States v. Dickens, 695 F.2d 765, 772 (3d Cir.), *cert. denied*, 460 U.S. 1092 (1983)).

49. *Id.* at 1350 (citing 18 U.S.C. § 1961(1)(B)).

50. *Id.*

51. 968 F.2d 612 (7th Cir. 1992), *petition for cert. filed*, 61 U.S.C.W. 3451 (U.S. Nov. 2, 1992) (No. 92-780).

52. *Id.* at 629. *See supra* note 6 (listing the allegations in the complaint of defendants' illegal activities).

During clinic "blitzes," protestors used a method called "lock and block" in which they pour glue into clinic locks, and individual protestors lock themselves to clinic doors. 968 F.2d at 615. In addition, at least two defendants entered a laboratory providing pathology and sanitary disposal services to clinics and stole approximately 4000 aborted fetuses, "individually packaged and labeled

endorsed *McMonagle's* recognition of Hobbs Act violations as predicate RICO offenses.[53] However, the court expressly refused to allow Hobbs Act predicate offenses lacking an economic motivation to serve a substitute for the economic-motivation requirement.[54] Using the language of section 1962 to support its conclusion,[55] the court interpreted Congress' use of the term "enterprise" as limiting the application of RICO to entities possessing an economic motivation.[56] Anticipating such a conclusion, the plaintiffs argued that the Hobbs Act violations had an economic motivation because the defendants intended the activities to increase the plaintiffs' cost of operating the clinic.[57] Dismissing this inference, the court reasoned that the defendants committed their acts of extortion to force the plaintiffs to close the clinics.[58] Notwithstanding the acknowledgement that the defendants' activities resulted in a negative economic effect to the plaintiffs, the court refused to equate that adverse effect with the economic-motive requirement first formulated in *Ivic*.[59]

The court also held that the contributions received by the anti-abor-

... with the names of the mothers, doctors, dates and places the abortions were performed." *Id.* at 616.

53. *Id.* at 629-30. The Seventh Circuit does not require that the defendant profit economically from the extortion to sustain a Hobbs Act conviction. *See* United States v. Anderson, 716 F.2d 446 (7th Cir. 1983) (affirming a Hobbs Act conviction of anti-abortion activist who kidnapped a physician to stop him from performing abortions); *see also* Town of West Hartford v. Operation Rescue, 915 F.2d 92, 102 (2d Cir. 1990) ("Whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under the Act.") (quoting United States v. Clemente, 640 F.2d 1069, 1079-80 (2d Cir.), *cert. denied*, 454 U.S. 820 (1981).

54. 968 F.2d at 629-30. The court stated that notwithstanding its agreement with the Third Circuit's reading of the Hobbs Act, it refused to concur in its conclusion that "in circumstances involving a non-economic enterprise conducting non-economic acts, plaintiffs may invoke the provisions of RICO." *Id.*

55. *Id.* at 629.

56. *Id.* In reaching this conclusion, the court relied directly on the Second Circuit's interpretation of § 1962(a) and (b) in *Ivic*. *See Ivic*, 700 F.2d at 61.

57. *Schiedler*, 968 F.2d at 620. Anti-abortion protests interfere with the conduct of abortion clinic business and thus have a direct economic impact. *See, e.g., McMonagle*, 868 F.2d at 1346-47 (abortion clinic forced to install sophisticated security system to deter repeated trespasses by anti-abortion demonstrators); American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656, 658-61 (1985) (physicians refused to work at clinics under same management as clinic that was target of protest); *see* PoKempner, *supra* note 12, at 665-68 ("Protests that seek to interfere with the conduct of business force abortion clinics to invest more heavily in security measures, insurance, and litigation, and make it more difficult for clinics to retain qualified personnel. When protestors succeed in increasing clinic costs or forcing clinics out of regional markets, the effect may be to restrain competition to the detriment of consumers.") (footnotes omitted).

58. 968 F.2d at 630.

59. *Id.*

tion activists did not constitute sufficient economic motivation to satisfy the requirement that a predicate act have an economic objective.[60] The plaintiffs acknowledged the indirect nature of the contributions; however, they argued that this was sufficient because section 1962(a) included indirect finding of enterprises.[61] Rejecting this interpretation of section 1962(a), the court held that the weak causal connection between the defendants' predicate acts and their receipt of donations did not constitute the requisite economic motivation.[62]

The court concluded that for the purposes of section 1962(a), income is that which the defendants would not have received "but for" their racketeering conduct.[63] Applying this "but for" test, the court held that the donations received by the defendant did not constitute income within the meaning of section 1962(a).[64]

The court next determined that the Pro-Life Action Network ("PLAN")[65] as an enterprise failed to possess an economic motivation pursuant to section 1962(c).[66] The Seventh Circuit held that when *neither* the enterprise *nor* the racketeering acts have an economic motivation, a court should not impose civil RICO liability.[67] Although the court acknowledged the Supreme Court's concern of facilitating enforcement of RICO,[68] the court asserted that its holding only defined the elements of RICO rather than imposing additional requirements on plaintiffs or prosecutors to prove RICO violations.[69]

The Seventh Circuit's refusal to recognize the similarities between economic motivation and economic impact is shortsighted.[70] First, the

60. *Id.* at 625.

61. *Id.* *See supra* note 13 for the text of § 1962(a).

62. 968 F.2d at 625. "That reprehensible criminal and tortious conduct results incidentally in donations to support it, is more a comment on the nature of defendants' supporters than on the purpose of the defendant's acts." *Id.* at 630.

63. 968 F.2d at 625.

64. *Id.* The shortcoming was inadequate pleading rather than faulty logic. However, based upon the tenor of the opinion, if the plaintiffs alleged a direct nexus between predicate acts and contributions, the court most likely would not have sustained a RICO conviction.

65. *See supra* note 5.

66. 968 F.2d at 626. The Seventh Circuit adopted the Eighth Circuit's definition of "enterprise." *See Anderson*, 626 F.2d at 1372; *see also supra* notes 35-40. *But see Bagaric*, 700 F.2d at 57 (concluding that proof of enterprise and predicate acts are functionally equivalent).

67. 968 F.2d at 626 (emphasis added).

68. *See supra* note 17.

69. 968 F.2d at 629.

70. Trapped within the outdated *Ivic* paradigm, the court attempted to justify its conclusion by

court's reliance on the *Ivic*[71] framework allowed the court to ignore the exponential growth of civil RICO suits during the last decade.[72] Although commentators have described RICO's language as complicated and mysterious,[73] the Supreme Court has held that courts should interpret and apply RICO broadly.[74]

Second, the Seventh Circuit failed to extend the *Ivic* line of cases to its logical conclusion.[75] As the Second Circuit recognized in *Bagaric*, the effect of extortion activities on the national economy rather than the intent of the extortionist determines the applicability of RICO.[76] Given its reluctance to limit the scope of civil RICO,[77] the Seventh Circuit logically should have expanded the economic-motivation requirement to encompass economic impact.[78]

Finally, section 1961(1) expressly defines racketeering activity as encompassing Hobbs Act violations.[79] Despite the Seventh Circuit's recognition of this definition,[80] the court insisted upon proof of an economically motivated enterprise when violations of the Hobbs Act constitute the predicate acts. Yet, RICO itself imposes no such requirement.[81]

The *Scheidler* decision is an unwarranted restriction of an inherently expansive statute. Any belated attempt to curtail RICO's civil applica-

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noting that "[n]one of the cases discussing an economic motive requirement adopt the plaintiffs' theory that raising victim's costs satisfies the requirement." *Id.*

71. *See supra* notes 19-26 and accompanying text.

72. *See supra* note 15.

73. *See* Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 644 (D. Alaska 1982); Sam Roberts, *Legal Maneuvering Transforms Gang Into Racketeers*, N.Y. TIMES, Aug. 11, 1988, at B1; Jed S. Rakoff, *Spirit of Enterprise*, N.Y. L.J., Nov. 13, 1986, at 1.

74. *Sedima*, 473 U.S. at 497-98.

75. *See supra* notes 19-36 and accompanying text.

76. *See Bagaric*, 706 F.2d at 54.

77. 968 F.2d at 629. *See, e.g.*, Morgan v. Bank of Waukegan, 804 F.2d 970, 975-76 (7th Cir. 1986) (multiple schemes not required for pattern of racketeering activity); Schacht v. Brown, 711 F.2d 1343 (7th Cir.) (rejecting argument that RICO is limited to organized crime), *cert. denied*, 464 U.S. 1002 (1983).

78. RICO's legislative history supports this proposition. *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970), *reprinted in* 1970 U.S.C.C.A.N. 1072 ("Organized crime . . . annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption."); S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969) ("[T]he time has come for a frontal attack on the subversion of our economic system by organized criminal activities."); *see* Gale, *supra* note 16, at 1367.

79. *See supra* note 46 and accompanying text.

80. *Scheidler*, 968 F.2d at 629.

81. *See supra* note 16.

tion disregards Congress' deliberate policy choices to defy judicial confinement.[82] Absent constitutional restrictions, Congress rather than the judiciary should address any difficulties or discontentment with RICO's sweeping application.

Frans J. von Kaenel

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82. *See* Haroco v. American Nat'l Bank & Trust, 747 F.2d 384, 398-99 (7th Cir. 1984). *See* also *supra* notes 15, 17.