

RECENT DEVELOPMENTS

RECENT DEVELOPMENTS IN CORPORATE AND WHITE COLLAR CRIME*

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I. RICO: REFORM ON THE HORIZON?

A. Defining a "Pattern": *H.J. Inc. v. Northwestern Bell Telephone Co.*

In *H.J. Inc. v. Northwestern Bell Telephone Co.*,¹ the Supreme Court continued its attempt² to meaningfully define the "pattern of racketeering activity" requirement of the Racketeer Influenced and Corrupt Organization Act (RICO).³ The Court provided some clarification, holding

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1. 109 S. Ct. 2893 (1989).

2. The Court made an earlier attempt to define "pattern of racketeering activity" in *Sedima, S.P.R.L. v. Imex Co.*, 473 U.S. 479 (1985). See *infra* notes 14-20 and accompanying text.

3. 18 U.S.C. §§ 1961-68 (1988). RICO is title IX of the Organized Crime Control Act of 1970

that a "pattern" does not require separate schemes.⁴ Nonetheless, its efforts should do little to appease those critics⁵ advocating a congressional amendment of RICO to remedy the vagueness inherent in the current statutory formulation. In a scathing concurrence, Justice Scalia openly denounced the statute's ambiguity and suggested that RICO's pattern requirement might be vulnerable to a constitutional challenge.⁶

RICO imposes criminal and civil liability on persons who engage in certain "prohibited activities,"⁷ which involve some connection with a "pattern of racketeering activity."⁸ RICO defines "racketeering activity" as "any act or threat involving" specified state-law crimes,⁹ any "act" indictable under specified federal statutes,¹⁰ and certain federal "offenses."¹¹ RICO's "definitions" section,¹² however, does not explain

(OCCA), Pub. L. No. 91-452, 84 Stat. 922. All RICO offenses require proof of a "pattern of racketeering activity" or a "collection of an unlawful debt." 18 U.S.C. § 1962 (1988). See *infra* note 8 and accompanying text.

4. For an analysis of the "separate schemes" approach rejected by the Court, see *infra* notes 24-26 and accompanying text. A "pattern" by definition, however, does require multiple predicate acts. See *infra* note 13 and accompanying text for a discussion of RICO's pattern requirement.

5. See, e.g., Blakely, *Alternative Legislative Proposals to the "RICO Reform Act of 1989"*, 5 Civ. RICO Rep. (BNA) No. 12, at 1 (Aug. 15, 1989) (RICO's author proposes modification of "pattern of racketeering" requirement, including minimum requirement of three acts of racketeering); *Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Legislation*, 5 Civ. RICO Rep. (BNA) No. 4, at 1 (June 20, 1989) (remarks of Antonio Califa, legislative counsel for the American Civil Liberties Union) (Civil RICO threatens first amendment rights); *Matthews Says RICO Bill Likely to Pass, Ensuring Continued Civil Litigation*; 5 Civ. RICO Rep. (BNA) No. 4, at 4 (June 20, 1989) (remarks of Arthur Matthews, Washington, D.C. attorney) (proposed amendment provides no clarification of existing RICO definitions, resulting in even more RICO litigation).

6. See *infra* note 51 and accompanying text.

7. The activities prohibited include: investing income derived from a pattern of racketeering in any business which engages in or affects interstate or foreign commerce; acquiring, through racketeering activity, an interest in any business which engages in or affects interstate or foreign commerce; or conducting the affairs of any business which engages in or affects interstate or foreign commerce through a pattern of racketeering activity. 18 U.S.C. § 1962 (1988).

8. *Id.* The statute also proscribes activities involving "the collection of an unlawful debt". See *supra* note 3.

9. 18 U.S.C. § 1961(1)(A) (1988) (includes state crimes punishable by more than one year of imprisonment that involve murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in dangerous drugs).

10. 18 U.S.C. §§ 1961(1)(B), (C), (E) (1988) (includes acts indictable under various statutes found in U.S. Code titles 18 (Crimes and Criminal Procedure) and 29 (Labor), and acts indictable under the Currency and Foreign Transactions Reporting Act (1988) Pub. L. No. 91-508, tit. II, 84 Stat. 1118 (1970) (codified at 31 U.S.C. §§ 5311-5326 (1982)).

11. 18 U.S.C. § 1961 (1)(D) (includes any offense involving fraud connected with a title 11 (bankruptcy) case, fraud in the sale of securities, or felonious acts involving narcotics or other dangerous drugs).

12. 18 U.S.C. § 1961 (1988).

clearly what constitutes a “*pattern* of racketeering activity,” defining a pattern as “at least two acts of racketeering activity” (predicate acts) within a 10-year period.¹³

Given RICO’s rather ambiguous definition of “*pattern*,” the Supreme Court has attempted to guide the lower federal courts’ efforts to develop a more meaningful standard. In *Sedima, S.P.R.L. v. Imrex Co.*,¹⁴ the Supreme Court provided four clues regarding the meaning of RICO’s “*pattern*” requirement.¹⁵ First, the statutory definition of “*pattern of racketeering activity*” implies that while two predicate acts are necessary, two acts alone may not be sufficient.¹⁶ Second, the Court found that “two isolated acts of racketeering activity,” “sporadic activity,” and “proof of two acts of racketeering activity without more” are insufficient to constitute a pattern.¹⁷ Third, RICO’s legislative history indicates a pattern results from the combination of continuity and relationship.¹⁸ Finally, the *Sedima* Court indicated that the definition of “*pattern of criminal activity*” in Title X of the Organized Crime Control Act (OCCA)¹⁹—a different title under the same Act creating RICO—may help in interpreting RICO’s pattern requirement.²⁰

Sedima’s “clues” however, did not prove very enlightening to the lower courts struggling with the concept of “*pattern*.” Following *Sedima*, the federal district courts and circuit courts of appeals produced numerous and widely conflicting interpretations of RICO’s “*pattern*” requirement.²¹ Congress, meanwhile, did nothing to clarify the term “*pat-*

13. 18 U.S.C. § 1961(5) (1988).

14. 473 U.S. 479 (1985).

15. The four clues originate from a footnote in *Sedima*, 473 U.S. at 496 n.14. Justice Scalia noted and numbered these clues in his concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone*, 109 S. Ct. 2893, 2906 (Scalia, J., concurring).

16. *Sedima*, 473 U.S. at 496 n.14.

17. *Id.* RICO’s legislative history supports this view. See S. REP. NO. 617, 96th Cong., 1st Sess. 158 (1969) (pattern not formed by “sporadic activity”); 116 CONG. REC. 18940 (1970) (statement of Sen. McClellan) (person cannot “be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses”).

18. *Sedima*, 473 U.S. at 496 n.14. The requirement of continuity and relationship means separate criminal acts must cover a continuum and must be related. *Id.* But cf. *infra* note 45 (Scalia’s criticism in *H.J. Inc.* of the Court’s continuity and relationship requirement).

19. 18 U.S.C. § 3575(e) (repealed 1987) (“[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.”).

20. 473 U.S. at 496 n.14. But cf. *infra* note 45 (Scalia’s criticism of the Court’s use of title X for guidance in defining RICO pattern).

21. See *H.J. Inc.*, 109 S. Ct. at 2898 n.2 (citing *Roeder v. Alpha Industries*, 814 F.2d 22, 30-31

tern" through legislation.²² Thus, in an attempt to reconcile the continuing widespread divergence in circuit positions, the Supreme Court granted certiorari in *H.J. Inc. v. Northwestern Bell Telephone Co.*²³

In *H.J. Inc.*, the Court reviewed an action by the Eighth Circuit Court of Appeals dismissing a RICO complaint because the acts comprising the alleged violation were not in furtherance of multiple schemes²⁴ and therefore were insufficient to establish a pattern of racketeering activity.²⁵

(1st Cir. 1987) (rejecting multiple scheme requirement; sufficient that predicates relate to one another and threaten to be more than an isolated occurrence); *United States v. Indelicato*, 865 F.2d 1370, 1381-84 (2d Cir. 1989) (en banc) (rejecting multiple scheme requirement; two or more interrelated acts with showing of continuity or threat of continuity sufficient); *Bartichek v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39-40 (3d Cir. 1987) (rejecting multiple scheme requirement; adopting case-by-case multifactor test); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987) (rejecting any mechanical test; single limited scheme insufficient, but a large continuous scheme should not escape RICO's enhanced penalties); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (two related predicate acts may be sufficient); *United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988) (two predicate acts potentially enough); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975-76 (7th Cir. 1986) (refusing to accept multiple scheme requirement as general rule; adopting multifactor test, but requiring that predicates constitute "separate transactions"); *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) (rejecting multiple scheme test; requiring two predicates separated in time that are not isolated events); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928-29 (10th Cir. 1987) (holding single scheme from which no threat of continuing criminal activity may be inferred insufficient); *Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (rejecting multiple scheme test; requiring that predicates be interrelated and not isolated events); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 789 (D.C. Cir. 1988) (requiring related acts that are not isolated events). See also *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) (requiring proof of multiple illegal schemes).

Justice Scalia referred to this divergence of opinion as "the widest and most persistent circuit split on an issue of federal law in recent memory." 109 S. Ct. at 2907. Two commentators remarked that after the inconsistency and confusion following *Sedima*, "pattern" had joined the class of legal abstractions where one could only say "I know it when I see it." Chepiga and LaMother, *The Continuing Evolution of the "Pattern" Concept in RICO Litigation: H.J. Inc. and Its Inevitable Progeny*, 153 Civ. RICO (PLI) 87, 110 (1989).

22. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2899 (1989).

23. 485 U.S. 958 (1988).

24. "Scheme" as used in Eighth Circuit opinions refers to a single goal or single fraudulent effort as in "influencing MPUC Commissioners" in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648, 650 (8th Cir. 1987) or "conversion of petroleum gas" in *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 258 (8th Cir. 1986).

25. *Id.* at 2898. In *H.J. Inc.*, Northwestern Bell Telephone Company customers brought a class action under RICO, alleging that the company gave members of the Minnesota Public Utilities Commission numerous bribes in return for the commissioners' approval of unfair and unreasonable rates, in violation of 18 U.S.C. §§ 1962(a)-(d). *Id.* at 2897. The plaintiffs sought an injunction and treble damages under RICO's civil liability provisions, §§ 1964(a) and (c). *Id.* The United States District Court for the District of Minnesota granted the telephone company's motion to dismiss for failure to state a claim upon which relief could be granted, 648 F. Supp. 419, 425 (D.Minn. 1986). The district court found the plaintiffs' failure to allege multiple illegal schemes mandated dismissal

The Supreme Court reversed, holding that multiple schemes are not a prerequisite to finding a pattern.²⁶ The Court then presented an analysis for determining what constitutes a “pattern of racketeering activity.”

The Court first concluded that Congress’ failure to provide a precise definition of a “pattern of racketeering activity” indicated that the pattern concept was broad²⁷ and to be applied flexibly.²⁸ The Court then turned to RICO’s legislative history for more specific guidance,²⁹ and found a congressional intent to require proof of (1) related predicates (2) that amount to, or pose a threat of, continued criminal activity.³⁰

To guide the lower courts in formulating a definition of “relatedness” under RICO, the Court advised looking to the definition of a pattern of criminal conduct in Title X of OCCA.³¹ That title provides that criminal conduct forms a pattern if it includes acts with the same or similar purposes, results, participants, victims, methods of commission, or that are otherwise interrelated.³²

under the Eighth Circuit’s decision in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). The Court of Appeals for the Eighth Circuit affirmed, *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987), stating that under Eighth Circuit precedent a single fraudulent scheme is insufficient to establish a pattern of racketeering activity. 109 S. Ct. at 2898. The Supreme Court granted certiorari to resolve the conflict between the Eighth Circuit’s “multiple scheme” interpretation and the interpretation of circuits that had rejected the multiple scheme requirement. 485 U.S. 958 (1988).

26. 109 S. Ct. at 2899. The Court also held that RICO’s pattern requirement does not require proof of an organized crime nexus, *id.* at 2905, and cannot be established merely by proving two predicate acts. *Id.* at 2899.

27. *Id.* at 2899. Unlike other provisions in RICO’s definitional section—which describe what various concepts “mean”—the definition of a “pattern of racketeering activity” merely states a minimum necessary condition for the existence of a pattern. *Id.* Section 1961(5) describes the phrase “pattern of racketeering activity” only as “requir[ing] at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of the prior act of racketeering activity.” 18 U.S.C. 1961(5) (1988). “This definition provides an extremely low threshold for satisfying the pattern” requirement, indicative of Congress’ broad approach to the pattern concept.

28. *Id.* at 2900 (from the relaxed limits to the pattern concept as defined in § 1961(5) and the absence of any textual identification of what sorts of patterns would satisfy § 1962, it is reasonable to infer that Congress intended a flexible approach).

29. The Court has also looked to legislative history in past RICO cases. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 486-490 (1985) (opinion of the Court), 510-519 (Marshall, J., dissenting), 524-527 (Powell, J., dissenting); *Russello v. United States*, 464 U.S. 16, 26-29 (1983); *United States v. Turkette*, 452 U.S. 576, 586-587, 589-593 (1981).

30. 109 S. Ct. at 2900. The Court merely reiterated *Sedima*’s requirement of continuity plus relationship. *See supra* note 18 and accompanying text.

31. 109 S. Ct. at 2900-01. *See supra* note 19 and accompanying text.

32. *Id.* at 2901, 18 U.S.C. § 3575(e) (repealed 1987). After quoting OCCA’s pattern requirement, the Court stated, “[w]e have no reason to suppose that Congress had in mind for RICO’s

In defining "continuity," the Court rejected a multiple scheme requirement,³³ stating that the concept of "scheme" was not included in the text or legislative history of RICO,³⁴ and that it brought a rigidity to the available methods of proving a pattern not present in the idea of "continuity" itself.³⁵

The Court proposed a more flexible approach, under which a plaintiff or prosecutor need only prove continuity of racketeering or the threat of such continuity in order to show a "threat of continuing racketeering activity."³⁶ Acknowledging the difficulty in formulating a general test for continuity, the Court announced that the requirement could be proven in a variety of ways under either a "closed-ended" or "open-ended" theory.³⁷ If the plaintiff or prosecutor could demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time, such proof would satisfy the requirement.³⁸ If the racketeering activity extended over only a brief time period, RICO liability would then depend upon the plaintiff or prosecutor establishing a threat of future continuing activity—or open-ended continuity.³⁹ The Court conceded that its approach to open-ended continuity necessitated a fact-specific inquiry, but offered two examples: predicate acts that involve a threat of repetition extending indefinitely into the future,⁴⁰ and predicates that are part of an ongoing entity's regular way of doing business.⁴¹

pattern of racketeering component any more constrained a notion of the relationships between predicates that would suffice." *Id.* The Court provided this same hint in *Sedima*, 473 U.S. at 496 n.14. See *supra* notes 19-20 and accompanying text. *But cf. infra* note 45 (Scalia's criticism of Court's definition of relatedness).

33. 109 S. Ct. at 2901 ("[i]t is implausible to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes") (emphasis in original).

34. *Id.* The Court stated its distaste for "introducing a new and perhaps more amorphous concept into the analysis that has no basis in text or legislative history" (quoting *Bartichek v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3d Cir. 1987)).

35. 109 S. Ct. at 2901.

36. *Id.*

37. *Id.* at 2902.

38. *Id.* ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. . ."). The Court believed this "over a substantial period of time" test reinforced Congress' concern with long-term criminal conduct. *Id.* *But cf. infra* note 45 (Scalia's criticism of Court's closed-ended concept).

39. *Id.*

40. *Id.* (providing example of hoodlum selling "insurance" to storekeepers to cover window breakage, where hood tells proprietors he will visit each month to collect "premium").

41. *Id.* (providing the following examples: predicates attributed to the operation of a long-term association that exists for criminal purposes—the proverbial "organized crime;" predicates that are a

The opinion hinted at the vagueness problems inherent in its “pattern” analysis, noting that the Court could not fix in advance the concepts of continuity and relationship with such a clarity that it would always be apparent whether a “pattern” exists in a particular case.⁴² The Court also expressed its desire for more congressional guidance: the development of its continuity and relationship concepts “must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act’s intended scope.”⁴³

In a separate concurrence,⁴⁴ Justice Scalia criticized the Court’s pattern analysis,⁴⁵ but ultimately decided that the problem lay not in the Court’s efforts⁴⁶ to define a pattern, but in RICO’s failure to provide

regular way of conducting a legitimate business that does not exist for criminal purposes; predicates that are a regular way of conducting or participating in an ongoing and legitimate RICO “enterprise”).

42. *Id.* Applying its analysis to the facts of *H.J. Inc.*, the Court held the relationship requirement could be satisfied because the acts of bribery were alleged to be related by a common purpose to influence the commissioners’ approval of unfair rates. *Id.* at 2906. The Court also concluded the continuity requirement could be satisfied by the plaintiffs’ claim of frequent predicate acts over a six-year period (closed-ended), or by the threat of continued activity if the alleged bribes constituted the defendant’s regular way of doing business, or the regular way of conducting or participating in the conduct of an alleged and ongoing RICO enterprise—the Minnesota Public Utilities Commission itself (open-ended). *Id.* Therefore, the Court held the Court of Appeals erred in affirming the District Court’s dismissal of the claim for failure to plead “a pattern of racketeering activity,” and reversed and remanded the case for further proceedings. *Id.*

43. *Id.* at 2902.

44. 109 S. Ct. at 2906-09 (Scalia, J., concurring in the judgment). Scalia was joined by Justices Rehnquist, O’Connor, and Kennedy.

45. Scalia believed that the Court did little more than re-offer *Sedima*’s four clues with only the additional caveat that Congress intended a “flexible approach.” *Id.* at 2907. He also criticized the Court’s continuity and relationship requirements for being garnered from merely a “snippet from the legislative history” and for proving valueless in defining a “pattern.” *Id.* at 2907.

Regarding the Court’s concept of relatedness, Scalia noted that instead of looking to 18 U.S.C. § 3575(e) for guidance, normal rules of statutory construction dictate that if Congress included a definition of pattern in OCCA but not in RICO, the Court should presume Congress intended to exclude the application of OCCA’s definition to RICO. *Id.* at 2907. Scalia added that § 3575(e)’s vague text provided no help in clarifying the relatedness requirement. *Id.*

Turning to the Court’s continuity analysis, Justice Scalia lambasted the Court’s closed-ended concept. After complaining that he did not understand the idea, the Justice stated that—contrary to the Court’s test—a RICO pattern should cover just a few months of racketeering activity. Otherwise, criminals receive a free period from RICO prosecution. *Id.* at 2908. As for the concept of open-ended continuity and its requirement of a “threat of continuity,” Scalia stated that the Court’s rejection of a multiple-scheme requirement made it more difficult for potential defendants to know whether they are covered by RICO; the “threat of continuity” test will prove difficult both to follow and to apply. *Id.* Scalia agreed, however, with the Court’s holding that a RICO “pattern” does not require proof of multiple schemes. *Id.* at 2909.

46. *Id.* at 2908 (“It is, however, unfair to be so critical of the Court’s efforts, because I would be

clear guidance on what activity is sufficient to constitute a "pattern of racketeering activity."⁴⁷ Justice Scalia charged that *H.J. Inc.* added nothing to prior Court attempts to define "pattern," but rather increased RICO's vagueness by adding the "threat of continuity" requirement.⁴⁸ Scalia, therefore, predicted that after *H.J. Inc.*, the split in the circuits over what constitutes a RICO pattern would continue.⁴⁹ Deeming this vagueness intolerable given the severity of RICO's penalties,⁵⁰ the Justice forecast RICO's vulnerability to a constitutional challenge for vagueness:⁵¹ "That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented."⁵²

The Court's decision in *H.J. Inc.* is significant for several reasons, and should add to the current pressure on Congress to clarify RICO's defini-

unable to provide an interpretation of RICO that gives significantly more guidance concerning its application.").

47. *Id.* (Although clear from prologue of RICO that Congress intended the word "pattern" in the phrase "pattern of racketeering activity" to require something more than the mere existence of multiple predicate acts, "[W]hat that something more is, is beyond me.").

48. See *supra* note 45 for Scalia's criticism of the Court's "threat of continuity" requirement.

49. 109 S. Ct. at 2908.

50. RICO's criminal penalties include fines and/or imprisonment of up to 20 years (or for life if the violation is based on a predicate act for which the maximum penalty includes life imprisonment), and forfeiture of any interest in property acquired through racketeering activity. 18 U.S.C. § 1963 (1988).

51. The federal constitutional doctrine of vagueness requires a penal statute to define clearly its prohibitions or risk violations of the fifth amendment guaranty against deprivations of life, liberty, or property without due process of law. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (vague laws fail to give fair warning and open the door for arbitrary and discriminatory enforcement). A statute that fails to give such fair warning is deemed "void for vagueness." *Id.* In the absence of first amendment considerations, vagueness challenges cannot be decided generally but must be determined as applied to the facts of a particular case. See *United States v. Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts at hand."). See also *New York v. Ferber*, 458 U.S. 747, 767 (1982) (person to whom statute constitutionally can be applied is prohibited from "challenging that statute on ground it may conceivably be applied unconstitutionally to others in situations not before the Court"). The applicable standard requires that a statute be found unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harris*, 347 U.S. 612, 617 (1954). This vagueness standard is based on the principle that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.*

Applied to RICO's "pattern" requirement, the vagueness doctrine might invalidate RICO for failure to give persons of ordinary intelligence fair notice that their conduct constituted a "pattern of racketeering."

52. *Id.* at 2909.

tion of a "pattern of racketeering activity."⁵³ First, the Court's rejection of a multiple scheme requirement should make it easier for plaintiffs to plead and prove private RICO actions, resulting in the filing of more civil RICO cases and increased exposure for legitimate businesses.⁵⁴ This result could lead Congress to reconsider whether it really wants an increased use of RICO for private actions.⁵⁵

Second, the Court in *H.J. Inc.* once again⁵⁶ openly expressed its desire that Congress rewrite the statute, citing its own difficulty in determining Congress' intended meaning of RICO's "pattern of racketeering activity" requirement.⁵⁷

53. See *supra* note 5 and accompanying text.

54. See, e.g., *RICO Attorneys Respond to Court's Opinion in H.J. Inc.*, 5 Civ. RICO Rep. (BNA) No. 6, at 3 (July 4, 1989) [hereinafter *Attorneys Respond*] (comments of Philip Lacovara, Chairman of the Coalition for RICO Reform) (Court's definition of "pattern" will rule out only one narrow category of cases in which a pattern is based on several nearly simultaneous predicate acts). But see 109 S. Ct. at 2899 (Court also rejects a broad interpretation of pattern whereby pattern could be established merely by proving two predicate acts).

Notwithstanding the concern over an increase in RICO cases filed, such an increase does not necessarily lead to an increase in successful RICO claims. See e.g., *Attorneys Respond, supra*, at 4 (comments of Andrew Weissman) (since *Sedima*, only one of every three RICO complaints survives a motion to dismiss, and *H.J. Inc.* will decrease that number further).

55. See *Attorneys Respond, supra* note 54, at 3 (comments of Irvin Nathan). See also *Rehnquist Urges Congress to Curtail Federal Civil Suits*, 4 Civ. RICO Rep. (BNA) No. 36, at 3 (Feb. 14, 1989) (Chief Justice Rehnquist, in a speech to American Bar Association's House of Delegates, suggests Congress should curtail sharply certain civil actions under RICO to relieve serious overloading of federal court system). But c.f. *Bill to Limit Civil RICO Scope Introduced in House, Senate*, 4 Civ. RICO Rep. (BNA) No. 38, at 2 (Feb. 28, 1989) (In response to proposed RICO Reform Act of 1989, which would eliminate treble damages where state or federal securities law provided a remedy, consumer advocate Ralph Nader stated, "[t]his legislation weakening RICO comes at the worst possible time—in the middle of an unprecedented corporate crime wave." Nader cited recent episodes of savings and loan fraud, commodities fraud, and Pentagon procurement scandals, and concluded, "[t]his is no time for members of Congress to be soft on corporate crime").

56. See, e.g., *Sedima*, 473 U.S. at 499 (Court's opinion that only congressional reform can mitigate RICO's breadth).

57. 109 S. Ct. at 2899. The Court's attempt at clarification has itself met with much criticism from the bar. See *Attorneys Respond, supra* note 54, at 3 (comments of Quentin Riegel) (four years after the Court in *Sedima* placed the responsibility for clarification of RICO firmly on Congress, the situation has gotten worse—in Scalia's opinion, "intolerable"); *id.* (comments of Mike Hunter) (legislative action needed to clarify congressional intent because *H.J. Inc.* makes a confusing situation even worse); *id.* (*H.J. Inc.* decision shows Court lacks sufficient guidance from Congress); *id.* at 4 (comments of Tom Thomas) (*H.J. Inc.* a "shovel case" in which Court said to Congress, "We're not going to change it. You wrote it, you change it").

The vagueness of the Court's decision is demonstrated further by the disagreement in the legal community over whether *H.J. Inc.* is good or bad for legitimate business and the defense bar. Compare *Attorneys Response, supra* note 54, at 3-4 (comments of Andrew Weissman) (noting belief of RICO amendment's proponents that *H.J. Inc.* broadened RICO's pattern requirement and will lead to more suits and greater exposure for business) with *id.* (comments of Andrew Weissman) (belief

Third, Justice Scalia in his concurrence threw down the gauntlet to the defense bar to challenge RICO complaints on constitutional grounds.⁵⁸ This development should lead to inevitable attack on RICO's pattern requirement as unconstitutionally vague in violation of due process.⁵⁹ Given that RICO has thus far been able to withstand constitutional challenges,⁶⁰ and that Scalia's vagueness concerns were not adopted by a majority of the Court, however, those anticipating RICO's invalidation on vagueness grounds should not become too optimistic. Nonetheless, this combination of the above three ramifications, each highlighting the shortcomings inherent in the current definition of a pattern of racketeering activity, may lead Congress to grant the Court's wish and to clarify at last RICO's key "pattern of racketeering activity" requirement.

B. Forfeiting Attorney's Fees

Under the Racketeer Influenced and Corrupt Organizations Act

that *H.J. Inc.* will limit the use of RICO because, in addition to invalidating the restrictive multiple scheme requirement, it also cut back on the broader definitions of "pattern" prevalent in circuits where any two related predicate acts were sufficient to establish a pattern) *and id.* at 4 (belief that the examples the Court provided of sufficient "continuity," each of which involved either open-ended conduct or a showing that the offenses constituted the entity's ongoing business, are more restrictive than the existing approaches in a number of jurisdictions, including the Second, Third, Fifth, Ninth and D.C. Circuits). See *supra* note 21 for the various circuit's current "pattern" requirements.

58. See *supra* notes 51-52 and accompanying text. See, e.g., *Attorneys Respond*, *supra* note 54, at 3 (comments of John C. Fricano) (predicting that the defense bar will "pick up this gauntlet with a vengeance," leading to a flurry of amended complaints and delays in settlements).

59. See *supra* note 51 and accompanying text. See also *Attorneys Respond*, *supra* note 54, at 3 (comments of Mark Reinhardt) (*H.J. Inc.* attorney's belief that in light of Scalia's opinion, defense counsel would be committing malpractice if they did not challenge RICO's constitutionality).

60. Prior to *H.J. Inc.*, courts universally rejected vagueness challenges to RICO's "pattern of racketeering requirement." See, e.g., *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982) (a person of average intelligence "could not help but realize that they would be criminally liable for participating in 'any enterprise' . . . 'through a pattern of racketeering activity'"); *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) ("Pattern of racketeering activity" not unconstitutionally vague as applied to two offenses indictable under interstate transportation statute); *United States v. Stofsky*, 409 F. Supp. 609, 612 (S.D.N.Y. 1973) (pattern element not vague because elements of required predicate offenses are clearly defined), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

Several vagueness challenges to RICO's pattern requirement have met defeat even after *H.J. Inc.* See *United States v. Angiulo*, Nos. 86-1331, 89-1212, 89-1800 (1st Cir. March 8, 1990) (LEXIS, Genfed library, Usapp. file) (RICO "pattern" element not void for vagueness; persons of ordinary intelligence would realize that murder conspiracies and gambling and loansharking operations of an organized crime family constituted a pattern of racketeering activity); *Minpeco, S.A. v. Hunt*, 724 F. Supp. 259, 260 (S.D.N.Y. 1989) (refusing to follow Scalia's concurrence in *H.J. Inc.*, noting that it spoke only for three other Justices and did not constitute a formal development of the law).

(RICO)⁶¹ and the Continuing Criminal Enterprise Statute (CCE),⁶² a convicted criminal defendant forfeits to the United States any property derived from the criminal violation.⁶³ The Department of Justice maintains that "property" includes property used or intended to be used to pay attorney's fees.⁶⁴ Accordingly, prosecutors often seek restraining orders preventing transfer of such property to attorneys as payment for legal services.⁶⁵ Alternatively, prosecutors seek post-conviction forfei-

61. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988). Congress enacted RICO as title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

62. Continuing Criminal Enterprise Statute, 21 U.S.C. § 848 (1988). The CCE provision was enacted as a part of title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Pub. L. No. 91-513, § 408, 84 Stat. 1265.

63. 18 U.S.C. § 1963(a) (1988) (RICO forfeiture provision); 21 U.S.C. § 853(a) (1988) (CCE forfeiture provision). CCE provides a good example:

Any person convicted of a violation of this subchapter . . . punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation[.]

21 U.S.C. § 853(a) (1988).

64. Note, *Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It*, 63 Notre Dame L. Rev. 535, 536 (1988) (citing UNITED STATES DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, §§ 9-111.000-700 (1986), reprinted in 38 Crim. L. Rep. (BNA) 3001-08 (Oct. 2, 1985)). See also, Brickey, *Attorneys' Fee Forfeitures: On Defining "What" and "When" and Distinguishing "Ought" from "Is"*, 36 EMORY L.J. 761, 762 (1987).

65. See Note, *supra* note 64, at 536. Under 18 U.S.C. § 1963(c) (1988), all right title, and interest in property subject to forfeiture under 18 U.S.C. § 1963(a) vests in the United States at the time the act giving rise to the forfeiture occurs. This provision also allows the prosecution to attack property transferred to third parties unless they are bona fide purchasers for value without reasonable cause to believe the property was subject to forfeiture at the time of purchase. *Id.*

The statute allows for an injunction or restraining order to be issued in order to preserve the availability of the property for forfeiture and prevents the transfer of funds to an attorney, even to pay for the legal services. This restraining order can be issued after an indictment or information has been filed which charges a RICO violation and alleges that the property will be subject to forfeiture upon conviction. Alternatively, a restraining order can be issued *prior* to the filing of an indictment if, after notice to the defendant and an opportunity for a hearing, the prosecutor can show (i) a substantial probability the U.S. will prevail on the issue of forfeiture and a failure to issue the order will result in the destruction of the property or that the property will somehow be made unavailable for forfeiture; and (ii) the need to preserve the availability through the order outweighs the hardship to the defendant. 18 U.S.C. § 1963(d)(1) (1988).

The prosecutor can also seek a temporary restraining order, issued without notice or opportunity for hearing, if the prosecutor can show probable cause the property would be subject to forfeiture upon conviction and that notice will jeopardize the availability of the property for forfeiture. 18 U.S.C. § 1963(d)(2) (1988).

ture of attorney's fees already transferred to counsel.⁶⁶

The defense bar has raised a number of responses to such action. Defense attorneys argue: (1) Congress impliedly intended these statutes to exempt attorney's fees from forfeiture;⁶⁷ (2) these statutes, interpreted to include attorney's fees, violate a defendant's sixth amendment right to counsel of choice,⁶⁸ because no attorney will represent a RICO or CCE defendant knowing that the fee is potentially forfeitable;⁶⁹ and (3) forfeiture of attorney's fees violates a defendant's right to a fair trial under the due process clause of the fifth amendment.⁷⁰

1. *Statutory Construction of Forfeiture Provisions: United States v. Monsanto*

Under the CCE, a court legitimately may issue a pretrial restraining order to preserve a defendant's assets for forfeiture. The lower courts were in disagreement⁷¹ over whether the statute⁷² should be interpreted to allow a defendant to use these restrained assets⁷³ to pay legitimate attorney's fees.⁷⁴ The Supreme Court recently resolved the dispute in *United States v. Monsanto*.⁷⁵ The Court held that the forfeiture provisions of CCE contains no exemption, express or implied, for assets with

66. Note, *supra* note 64, at 536.

67. Wade, *Feds in Your Pocket: Attorney's Fee Forfeiture and Attorney Disqualification Under RICO*, 10 Crim. Just. J. 217, 221 (1988).

68. *Id.*

69. Brickey, *supra* note 64, at 769.

70. Wade, *supra* note 67, at 221-22.

71. Compare *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988) (no statutory exemption for attorney's fees) with *United States v. Thier*, 801 F.2d 1463, 1474 (5th Cir. 1986) (exemption for attorney's fees authorized by statute).

72. The Comprehensive Forfeiture Act of 1984 (CFA) added or amended forfeiture provisions for two classes of violations under federal law, RICO offenses and CCE offenses. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 301, 98 Stat. 1837, 2040 (1984) (codified at 21 U.S.C. § 853 (1988)). The CFA is a criminal forfeiture statute; civil forfeitures are covered under 21 U.S.C. 881 (1988).

73. The property is seized or frozen (restrained) prior to trial and before any judicial determination of the defendant's guilt or innocence. See *supra* notes 63 (language of the CCE's forfeiture provision) and 65.

74. All courts agree the restrained assets cannot be used to pay "sham" attorney's fees. See, e.g., *United States v. Rogers*, 602 F. Supp. 1332, 1348 (D. Colo. 1985) ("An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture . . . This does not, however, mean that assets transferred to a lawyer as part of a sham will not be subject to forfeiture").

75. — U.S. —, 109 S. Ct. 2657 (1989).

which a defendant wishes to retain an attorney.⁷⁶

In *Monsanto*, the defendant was indicted under various RICO, CCE, narcotics,⁷⁷ and firearm charges.⁷⁸ The indictment sought forfeiture of assets amassed through illegal activity.⁷⁹ The district court entered an *ex parte* restraining order prohibiting Monsanto from transferring or encumbering these assets.⁸⁰ Monsanto moved to vacate the order, but the district court refused.⁸¹ Monsanto appealed and a panel of the Second Circuit held that the attorney's fees were not exempt from forfeiture.⁸²

76. *Monsanto*, — U.S.—, 109 S. Ct. at 2665.

77. The indictment alleged conspiracy to distribute narcotics, in violation of 21 U.S.C § 846 (1982). *United States v. Monsanto*, 836 F.2d 74, 76 (2d Cir. 1987), *rev'd*, — U.S.—, 109 S. Ct. 2665 (1989).

78. Monsanto was indicted on four counts of illegal possession of firearms under 18 U.S.C. Appendix § 12022(a)(1982). This provision was later repealed. *Monsanto*, 836 F.2d at 76 & n.1. See Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459 (1986).

79. The assets included real property valued at \$365,000 and \$35,000 in cash. The \$35,000 in cash were not included in the restraining order. The record does not disclose whether Monsanto had the \$35,000 in his possession, or what impact it might have had on his ability to retain counsel of choice. *Monsanto*, 836 F.2d at 76 n.2.

80. This order was made pursuant to the CFA. 21 U.S.C § 853(e)(1)(A) (1988) provides:

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of [§ 853] for forfeiture under this section—

(A) Upon the filing of an indictment or information charging a violation . . . for which criminal forfeiture may be ordered under [§ 853] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section[.]

81. *Monsanto*, 836 F.2d at 76. Monsanto argued that Congress did not intend the CFA provisions to apply to assets needed to pay legitimate attorney's fees and, even if the statute did apply to those assets, it would violate his sixth amendment right to counsel of choice. *Id.*

Nevertheless, the district court acknowledged the result of the order was to render Monsanto indigent. *Id.* at 76, n.2. The court refused to hold the forfeiture provisions unconstitutional as applied to attorney's fees or to hold Congress intended attorney's fees to be exempt from the provision; it did allow Monsanto to use the restrained assets to pay counsel of choice pursuant to "allowance" rates established by the Criminal Justice Act. *Id.* at 76.

That Act provides:

Any attorney appointed pursuant to this section . . . shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding \$60 per hour for time expended in court or before a United States Magistrate and \$40 per hour for time reasonably expended out of court. . . . 18 U.S.C 3006A(d)(1) (1988).

82. *Monsanto*, 836 F.2d at 80. The court found that the plain language of the statute contains no exemption for attorney's fees; the plain language must prevail because the legislative history is ambiguous. *Id.* at 78-80. The panel held, however, that notice and a pretrial hearing are constitutionally required prior to government restraint of assets needed to pay attorney's fees. *Id.* at 83. The government had the burden of showing probable cause that the assets would be subject to forfeiture. *Id.* The case was remanded prior to its rehearing en banc, and the district court, after holding the

On rehearing *en banc*, a sharply divided court⁸³ vacated its earlier opinion and ordered the district court to permit Monsanto to use the restrained assets to pay legitimate attorney's fees.⁸⁴

The Supreme Court granted certiorari⁸⁵ because the Second Circuit's decision created a conflict among the Courts of Appeals over the statutory and constitutional issues.⁸⁶ The Court used the *Monsanto* case to decide the statutory issue,⁸⁷ and a companion case, *Caplin & Drysdale Chartered v. United States*,⁸⁸ to answer the constitutional question.

The Court reasoned that the language of section 853(a) is plain and unambiguous.⁸⁹ The section provides that a person subject to the provi-

required hearing, concluded that the government had met its burden. *Monsanto*, — U.S. —, 109 S. Ct. at 2661.

Other courts that have required a similar prior-restraint hearing have diverged over the government's burden of proof. Compare *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1987) ("[G]overnment must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the [CCE] statute and two, that the profits . . . are subject to forfeiture[.]") with *United States v. Thier*, 801 F.2d 1463, 1470 (5th Cir. 1986) (indictment itself is a "strong showing" for continuing the restraint order although it is not irrefutable).

The Supreme Court did not address whether due process requires a hearing before imposition of a pretrial restraining order because Monsanto received a hearing. *United States v. Monsanto*, — U.S. —, 109 S. Ct. at 2666 n.10. The Court, therefore, also did not address the government's burden of proof at such a hearing, although the Court did conclude that the restraint of Monsanto's assets, based on probable cause, was proper. *Id.* The government's burden of proof for a temporary restraining order is demonstration of "probable cause to believe that the property . . . would, in event of conviction, be subject to forfeiture . . . and that provision of notice [to the party against whom the order is sought] will jeopardize the availability of the property for forfeiture." 21 U.S.C. § 853(e)(2) (1988). See 18 U.S.C. 1963(d)(2) (1988) (parallel RICO forfeiture provision).

83. The *en banc* court voted 8-4 in favor of modifying the order. The majority was divided as to the proper approach to use in resolving the question. Three of the judges believed the order violated the sixth amendment, *United States v. Monsanto*, 852 F.2d 1400, 1402 (2nd Cir. 1988) (*per curiam*), *rev'd*, — U.S. —, 109 S. Ct. 2657 (1989); three questioned it on statutory grounds, *id.* at 1405-06; and two held it violated the due process clause. *Id.* at 1411-12.

84. *Id.* at 1402.

85. — U.S. —, 109 S. Ct. 363 (1988).

86. See, e.g., *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (by its language, the statute applies to attorney fees; application to attorneys fees does not violate sixth amendment); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988) (statute applies to attorney's fees; not unconstitutional); *United States v. Jones*, 837 F.2d 1332, *reh'g granted*, 844 F.2d 215 (5th Cir. 1988) (property pledged by defendant to attorney for services exempt from statute).

87. *Monsanto*, — U.S. —, 109 S. Ct. at 2665. See *supra* notes 29-31 and accompanying text.

88. 109 S. Ct. 2646 (1989) (decided the same day). See *infra* notes 102-132 and accompanying text.

89. For the statute's language, see *supra* note 63. In construing a statute, the Court first looks to the language itself and need not look further if the language is plain and unambiguous. *United States v. Turkette*, 452 U.S. 576 (1981). The Court pointed out that Congress could not have chosen stronger or clearer language to express its intent. *Monsanto*, 109 S. Ct. at 2662.

sion "shall forfeit . . . any property" derived from the criminal activity, and that upon conviction, the court shall order forfeiture of this property.⁹⁰ The statute provides a broad definition of property when describing those assets subject to forfeiture.⁹¹ The Court concluded that there was no basis from which to exempt assets intended for use as attorney's fees from the mandatory nature of the statute and its broad definition of property.⁹² It confirmed this understanding with legislative history and comparisons with other sections of the statute.⁹³

Although section 853(a) contains no express exemption for attorney's fees, the defendant contended that the restraining provision, section 853(e)(1)(A),⁹⁴ should be interpreted to include this exemption. The de-

90. The court, in imposing sentence on such person, "shall order, . . . that the person forfeit to the United States all property described in this subsection." 21 U.S.C. § 853(a) (1988) (emphasis added). The Court relied on the mandatory language used by Congress. *Monsanto*, — U.S. —, 109 S. Ct. at 2662.

91. *Id.* The statute defines the assets subject to forfeiture as: "real property . . . tangible and intangible personal property, including rights, privileges, interests claims, and securities." 21 U.S.C. § 853(b) (1988).

92. *Monsanto*, — U.S. —, 109 S. Ct. at 2662. Even the *amicus curiae* brief for the American Bar Association, arguing against forfeiture, conceded the statute broadly covers all property acquired through illegal activity and could find no specific exemption for attorney's fees. *Id.*

In spite of this plain language, the defendant urged the Court to create an exemption for attorney's fees because the statute does not include them expressly in the forfeiture provision. *See supra* notes 63, 90. For the definition of property, *see supra* note 91. The Court quickly dismissed this argument by analogy. The statute and the legislative history do not expressly include money to pay stockholder's fees, laundry bills, or country club dues as subject to forfeiture; yet none seriously could argue for these fees' exemption. *Id.* at 2663.

93. Congress has refused to act on repeated suggestions by the defense bar for the exemption urged by Monsanto. *See, e.g., Attorney's Fees Forfeiture: Hearing Before the Senate Committee on the Judiciary*, 99th Cong., 2d Sess., 148-213 (1986), cited in *Monsanto*, — U.S. — n.9, 109 S. Ct. at 2662 n.9; *Forfeiture Issues: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary*, 99th Cong., 1st Sess., 187-242 (1985) cited in *Monsanto*, — U.S. —, 109 S. Ct. at 2662 n.9.

Additionally, in the same law which adopted § 853, Congress expressly exempted attorney's fees from forfeiture in the provisions concerning collateral profits (e.g., from books, movies or television productions about the crime). *See* 18 U.S.C. §§ 3681(C)(1)(b)(ii) (1988). This inclusion clearly indicated to the Court that Congress understood what it was doing when it failed to include a similar exemption in § 853; Congress intended attorney's fees to be subject to forfeiture. *Monsanto*, — U.S. —, 109 S. Ct. at 2664.

Finally, Monsanto urged the Court to invoke a general canon of statutory construction which admonishes courts to construe statutes to avoid constitutional questions and problems. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). The Court pointed out that these canons only apply in close cases or when the statutory language is ambiguous. In the case at bar, the statute is clear, comprehensive, and unambiguous; these canons of statutory construction, therefore, have no application. *Monsanto*, — U.S. —, 109 S. Ct. at 2664.

94. Upon application of the United States, the court may enter a restraining order or injunc-

fendant argued that the permissive language of this section⁹⁵ allows the district court to employ traditional principles of equity—balancing of hardships—before actually restraining the defendant's assets.⁹⁶ This balancing test would tip the scales in favor of the defendant's use of his assets for attorney's fees.⁹⁷ The Court rejected this argument because it failed to consider the categorical nature of section 853(a) and how the entire statute works as a unit.⁹⁸

Any discretion given district courts in section 853(e) relates only to how they preserve the availability of the property for forfeiture.⁹⁹ There is no exemption from section 853's forfeiture or pre-trial restraining order provisions for assets that a defendant wishes to use to pay attorney's fees. The purpose of the statute was to enforce the adage "crime does not pay."¹⁰⁰ Congress did not intend to modify this saying to read "crime

tion, . . . or take any other action to preserve the availability of property described in subsection (a) of [§ 853] for forfeiture under this section:

(A) upon the filing of an indictment or information charging a violation . . . for which criminal forfeiture *may* be ordered under [§ 853] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section[.]

21 U.S.C. § 853(e)(1) (1988) (emphasis added).

95. Section 853(e)(1)(A) uses the permissive language "may" in describing the courts' power to issue a restraining order or injunction. *See supra* note 94. Section 853(a), however, mandates the forfeiture of assets derived from the criminal activity through the use of the verb "shall." *See supra* note 63.

96. *Monsanto*, — U.S. —, 109 S. Ct. at 2664-65.

97. Judge Winter made this argument in his concurrence in the Second Circuit's en banc opinion. *United States v. Monsanto*, 852 F.2d 1400, 1406 (2d Cir. 1988) (Winter, J., concurring). Judge Winter further concluded that, notwithstanding § 853(c), the government could not subsequently seize money actually used to pay attorney's fees. The Supreme Court rejected Winter's conclusion because it would nullify § 853(c), which provides that "all right, title, and interest in [forfeitable] property . . . vests in the United States upon the commission of the act giving rise to the forfeiture[.]" 21 U.S.C. § 853(c) (1988). *Monsanto*, — U.S. —, 109 S. Ct. at 2665. The Court refused to allow the defendant to use governmental property for his own private purposes. *Id.*

98. *Monsanto*, 109 S. Ct. at 2665. *See infra* notes 99-100 and accompanying text.

99. *Id.* *See* 21 U.S.C. § 853(e) (1988), *supra* note 94. the trial court *may* enter a restraining order if the government requests one. It *need not* enter one on its own initiative. The district court need not enter a restraining order if a bond or some other means is available to preserve the availability of the property for forfeiture. Therefore, § 853(e) is not mandatory. This section, however, does not affect the type of property subject to forfeiture, *see supra* note 91, nor the requirement that the court order forfeiture upon conviction, *see supra* note 63. *Monsanto*, — U.S. —, 109 S. Ct. at 2665.

100. *Monsanto*, — U.S. —, 109 S. Ct. at 2665. The congressional purpose behind the CCE was to remove an incentive for crime by forcing the forfeiture of *all* assets acquired through criminal activity. This forfeiture attempts to destroy the economic base of the criminal organization. Without the forfeiture provisions, the criminal organization easily continues, simply replacing the convicted individual. *See* S. Rep. No. 98-224, 98th Cong., 1st Sess. 13 (1983) ("Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows, . . . [T]he

does not pay, except for attorney's fees."¹⁰¹

2. *Constitutionality of Forfeiture Provisions: Caplin & Drysdale, Chartered v. United States*

The lower courts have also disagreed over whether either the sixth¹⁰² or fifth¹⁰³ amendment prohibits Congress from subjecting attorney's fees to forfeiture. The Supreme Court recently answered these questions in *Caplin & Drysdale, Chartered v. United States*.¹⁰⁴ There the Court held that the failure of the CCE's forfeiture provision to exempt attorney's fees from forfeiture did not render the statute unconstitutional under

conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact. . . ."). See also *Senate Comm. on the Judiciary, Report on Comprehensive Crime Control Act of 1984*, S. REP. NO. 98-225, 98th Cong., 1st Sess. 191 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374. Cf. *Russello v. United States*, 464 U.S. 16, 28 (1983) (the Court, construing RICO: "The broader goal [of RICO] was to remove the profit from organized crime by separating the racketeer from his dishonest gains.").

101. *Monsanto*, — U.S. —, 109 S. Ct. at 2665.

102. The sixth amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." The right to counsel includes the right to a fair opportunity to secure counsel of defendant's choice. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

This right is conceivably restricted by Congress' attempt in the CCE to restrain assets intended for use in securing counsel. Compare *United States v. Unit No. 7 & Unit No. 8 of Shop in the Grove Condominium*, 853 F.2d 1445 (8th Cir. 1988) (statute so interpreted violates sixth amendment) and *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1987) (en banc) (same), *rev'd*, 109 S. Ct. 2457 (1989) and *United States v. Truglio*, 660 F. Supp. 103 (N.D. W.Va. 1987) (statute interpreted to exempt attorney's fees because literal reading would violate sixth amendment) and *United States v. Estevez*, 645 F. Supp. 869 (E.D. Wis. 1986) (same) and *United States v. Figueroa*, 645 F. Supp. 453 (W.D. Pa. 1986) (same) and *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985) (same) and *United States v. Rogers*, 602 F. Supp. 1332 (D. Col. 1985) with *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989) (statute so interpreted does not violate sixth amendment) and *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (same) and *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988) (same); and *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc) (same), *aff'd sub nom. Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989). See also *supra* notes 68-69.

103. The fifth amendment guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." The due process clause requires a "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The petitioner in *Monsanto* argued that forfeiture of attorney's fees impermissibly would upset the balance of forces by allowing a prosecutor selectively to exclude skilled defense counsel. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) (quoting Brief for petitioner at 43-44). See also *Wade, Feds In Your Pocket: Attorney's Fee Forfeiture and Attorney Disqualification Under RICO*, 10 Crim. Just. J. 217 (1988).

104. — U.S. —, 109 S. Ct. 2646 (1989).

either the sixth or fifth amendment.¹⁰⁵

In *Caplin & Drysdale*, Christopher Reckmeyer was charged with running a massive drug importation and distribution scheme in violation of the CCE.¹⁰⁶ The district court entered a restraining order¹⁰⁷ forbidding Reckmeyer from transferring any of the potentially forfeitable assets.¹⁰⁸ Notwithstanding the restraining order, the defendant paid the law firm Caplin & Drysdale for pre-indictment legal services.¹⁰⁹ The defendant subsequently entered a plea agreement.¹¹⁰ In accordance with the plea agreement, the district court entered an order forfeiting virtually all of the defendant's assets, including those used to pay attorney's fees.¹¹¹ Caplin & Drysdale filed a petition seeking an adjudication of its third-party interest in the assets.¹¹² The firm argued that the statute's failure to provide an exemption from forfeiture for assets used to pay an attorney rendered the legislation unconstitutional.¹¹³ The district court agreed and granted the relief sought.¹¹⁴ The Court of Appeals reversed, finding the statute constitutional.¹¹⁵

Before the Supreme Court, Caplin & Drysdale claimed that the statute placed an impermissible burden on the defendant's sixth amendment rights because the burden on the defendant's right to counsel of his

105. *Id.* at 2656, 2657.

106. *Id.* at 2649. Reckmeyer plead guilty to violating 21 U.S.C. § 848 (1982 & Supp. V (1987)), by engaging in a continuing criminal enterprise. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1193 (E.D. Va. 1986).

107. *Id.* The District Court acted pursuant to the pretrial restraining order provision 21 U.S.C. § 853(e)(1)(A) (1988). See *supra* note 80.

108. *Caplin & Drysdale*, 109 S. Ct. at 2649.

109. *Id.* at 2650.

110. *Id.*

111. *Id.*

112. *Id.* Caplin and Drysdale filed the petition pursuant to 21 U.S.C. § 853(n)(6)(B), under which third parties may petition for a hearing to adjudicate their interest in the forfeited assets.

113. The firm based this argument on the sixth amendment. *Reckmeyer*, 631 F. Supp. 1191, 1193-94 (E.D. Va. 1986).

114. *Id.* at 1195. After finding that the statute's forfeiture provisions did not encompass attorney's fees, the district court stated in dictum that the statute violated the sixth amendment by depriving defendant of his right to obtain counsel of his choice, and by creating conflicts of interest between defendants and his counsel. *Id.* at 1196. The court also asserted that the statute would violate the fifth amendment under the government's reading, by upsetting the balance of powers between defendant and the government. *Id.* at 1197-98.

115. *Caplin & Drysdale*, 109 S. Ct. at 2650. The Court of Appeals for the Fourth Circuit first heard the case as *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), in which it affirmed the trial court. The Fourth Circuit then agreed to hear the case en banc, and reversed its previous panel decision. *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub. nom.*, *Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989).

choice outweighed the government's interest in the forfeitable assets.¹¹⁶ The Supreme Court disagreed, holding that the forfeiture statute does not impermissibly burden a defendant's sixth amendment right to retain counsel of his choice.¹¹⁷

The Court reasoned that no sixth amendment violation results if the possibility of forfeiture prevents the defendant's preferred attorney from taking the defendant's case.¹¹⁸ The holding is grounded on the assertion that an impecunious defendant has no right to counsel of choice.¹¹⁹ From this principle, the Court noted first that a defendant has no right to use assets that do not belong to him.¹²⁰ Under the forfeiture statute, title to the forfeitable assets vests in the government as of the date of the criminal act.¹²¹ Second, the Court reasoned that even if forfeiture of assets impairs a defendant's ability to hire counsel, it does not render the action unconstitutional. The full exercise of many constitutional rights

116. *Caplin & Drysdale*, 109 S. Ct. at 2651, 2653. "[T]he right to retain counsel of one's choosing is not absolute. . . [but] must be carefully balanced against the public's interest in the orderly administration of justice." *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981). See also *United States v. Phillips*, 699 F.2d 798, 801-02 (6th Cir. 1983); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978).

117. *Caplin & Drysdale*, 109 S. Ct. at 2655-56.

118. *Id.* at 2652-53. The Court argued that defendant possessing sufficient non-forfeitable assets can still hire the attorney of his choice. *Id.* at 2652. Even a defendant with only forfeitable assets may be able to hire the attorney of his choice on the hope of recovering potentially forfeitable assets. *Id.*

119. *Id.* at 2651-52.

120. By analogy, the Court reasoned that the government does not violate the sixth amendment if it seizes the proceeds of a bank robbery and refuses to permit the defendant to use them to pay for his defense. *Id.* at 2653. Petitioner sought to distinguish this situation by arguing that the bank's claim to the robbery proceeds rests on "pre-existing property rights," while the Government's claim rests on a "penal statute," which is merely a mechanism for preventing fraudulent conveyances. *Id.* The Court rejected this argument, finding the government's property rights under the relation-back provision substantial. Under that provision, "[a]ll right, title and interest in property [described in § 853(a)] vests in the United States upon the commission of the act giving rise to forfeiture . . ." 21 U.S.C § 853(c) (1988).

121. 21 U.S.C. § 853(c) (1988). See also 18 U.S.C 1963(c) (1988) (RICO relation-back provision). Because the language in the RICO and CCE forfeiture provisions are essentially identical, the courts have freely considered the interpretation of one as applying to the other. *Wade, Feds in Your Pocket: Attorney's Fee Forfeiture and Attorney Disqualification Under RICO*, 10 Crim. Just. J. 217, 220 (1988) (citing *United States v. Figueroa*, 643 F. Supp. 453, 455 (W.D. Pa. 1986)). *Caplin & Drysdale* did not claim that Congress lacked the power to vest title in the government, a power long recognized by the courts. *Caplin & Drysdale*, 109 S. Ct. at 2653. See *United States v. Stowell*, 133 U.S. 1 (1890) (operation of a similar forfeiture provision for violation of Internal Revenue Code vested all right, title, and interest in United States).

often depends on a defendant's financial wherewithal;¹²² likewise, forfeiture only impairs a defendant's ability to exercise fully his right to counsel.¹²³ A defendant may no more use someone else's assets to protect his sixth amendment rights than use them to protect any other constitutional right.¹²⁴

Caplin & Drysdale also sought to minimize the government's interest in forfeiture. Recognizing that the purpose of forfeiture is to dispossess from drug dealers the proceeds of their wrong-doing, the defendant proposed that this purpose has been achieved once the proceeds have been paid to an attorney, diminishing the government's continued interest in forfeiture.¹²⁵ The Court, however, found other substantial government interests in the proceeds: forfeited proceeds may be used to support law enforcement¹²⁶ or returned to those wrongfully deprived of them.¹²⁷ The government also has a substantial interest in lessening the economic power of organized crime and drug enterprises—an interest furthered by the deprivation of expensive legal counsel.¹²⁸

The Supreme Court also refused to find fee forfeiture a facial violation of the due process clause of the fifth amendment.¹²⁹ Caplin & Drysdale argued that fee forfeiture was a facial violation because prosecutors wrongfully may attempt to impose forfeiture on persons who should not be subjected to that punishment.¹³⁰ The Court rejected this argument,

122. The Court noted the exercise of the right to speak, practice one's religion, or travel, depend on one's financial resources. *Caplin & Drysdale*, 109 S. Ct. at 2654.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* See 28 U.S.C. 524(c) (1982 & Supp. III (1987)) (establishing the Department of Justice Assets Forfeiture Fund).

127. *Caplin & Drysdale*, 109 S. Ct. at 2654. See 21 U.S.C. § 853(n)(6)(A) (1988). Where the government pursues this restitutionary end, its interest in forfeiture is substantial. *Id.*

128. *Id.* at 2654-55. A major purpose of the RICO and CCE forfeiture provisions was to lessen the economic power of organized crime and drug enterprises. *Id.* at 2654 (citing, *Russello v. United States*, 464 U.S. 16, 27-28 (1983)). See *supra* note 100. The Court posited that part of organized crime's economic power manifests itself in the ability to retain high-priced legal services. *Id.* at 2655.

129. *Id.* at 2656-57. The *Caplin & Drysdale* court noted that, in the context of this case, it was unsure whether the fifth amendment added any protection other than that provided by sixth amendment. "[W]hile '[t]he Constitution guarantees a fair trial through the Due Process Clauses . . . it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)).

130. *Id.* at 2657. According to this argument, a prosecutor might wrongfully append a charge of forfeiture to a RICO indictment, and thereby exclude any defense counsel that would be skilled adversaries. *Caplin & Drysdale* argued that this would upset the balance of power between the government and the accused in violation of the fifth amendment. *Caplin & Drysdale* further argued

reasoning that the Constitution does not forbid the imposition of an otherwise permissible criminal sanction—such as forfeiture—merely because in some cases it may be abused.¹³¹ Although the Court refused to find the statute a per se violation of due process, it left open the possibility that a defendant may prevail on a claim that the statute, as applied, violates his due process rights.¹³²

3. Conclusion

What effect will the *Monsanto* and *Caplin & Drysdale* decisions have on the law?¹³³ The *Monsanto* opinion effectively puts to rest the question whether the forfeiture provisions include assets that the defendant intends to use to pay attorney's fees.¹³⁴ The *Caplin & Drysdale* opinion forecloses challenges to these provisions on the grounds that they per se violate the sixth amendment¹³⁵ or due process clause.¹³⁶ Other legal challenges to these provisions, however, loom on the horizon. For instance, the provisions may be open to a challenge based on the first amendment. The defendant's association with counsel to communicate ideas in the courtroom should require courts to subject the provisions to the rigors of strict scrutiny under the first amendment.¹³⁷ A fourth amendment challenge based on process due for seizure of property has

that this imbalance left the statute per se unconstitutional, because specific instances of prosecutorial misconduct would be virtually impossible to prove. *Id.*

131. "The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it . . . invalid." 109 S. Ct. at 2657 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

132. Due process claims of prosecutorial misconduct remain cognizable in specific cases. *Id.* at 2657. In this case, petitioner made no such allegation. *Id.*

133. The decisions have already invoked a reaction from the defense bar. The National Association of Criminal Defense Lawyers (NACDL) has unveiled a program to counteract the impact of these decisions on the law. The NACDL is calling for the appointment of a National Task Force on the Preservation of the Adversary System, composed of criminal-defense lawyers and constitutional scholars, to lessen the impact of attorney-fee decisions. A second task force will lobby Congress to amend the provisions. The NACDL has requested a conference with the Department of Justice to develop clearer forfeiture guidelines. Additionally, the NACDL is calling for a massive public education program on how *Monsanto* and *Caplin & Drysdale* abridge individual rights. Fricker, *Dirty Money* 75 A.B.A. J. 60, 66 (Nov. 1989).

134. See *supra* notes 65-101 and accompanying text.

135. See *supra* notes 116-128 and accompanying text.

136. See *supra* notes 129-131 and accompanying text.

137. See Winick, *Forfeiture of Attorney's Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid it*, 43 U. Miami L. Rev. 765 (1989).

also been suggested.¹³⁸

The desirability of including attorney's fees in the forfeiture provisions as a matter of social policy will continue to be the subject of debate. The Justice Department maintains that fairness dictates there is no reason to place the drug dealer in a better position than an indigent defendant simply because he has economic power resulting from his ill-gotten gains.¹³⁹ The defense bar, however, contends that the decisions will have "devastating consequences on the Bill of Rights and the legal system as a whole."¹⁴⁰ It believes that the provisions, so construed, "represent a further milestone on the road to the complete stripping away of a citizen's rights in America."¹⁴¹ Whether or not the decisions represent a setback to the presumption of innocence, any further action on the question will likely rest with Congress alone.

C. *The RICO Reform Act of 1989*

Pending legislation known as the Racketeer Influenced and Corrupt Organizations Reform Act of 1989¹⁴² (RICO Reform Act) marks the third time in the last four years¹⁴³ that Congress has attempted to amend

138. See Note, *supra* note 64, at 555 ("probable cause requirement of the fourth amendment defines the procedure or process due for seizure of persons or property in a criminal case.").

139. *United States v. Monsanto*, — U.S. —, 109 S. Ct. 2657, 2665 (1989); Fricker, *supra* note 133, at 64 (statement of Michael Olmsted, special counsel to the Assistant Attorney General for Criminal Cases) ("[T]he drug dealer [should be put] in the same position as the person who has stolen a pocketbook."). See also *United States v. Meinster*, No. 79-105-CR-JKL (S.D. Fla. 1988) (after the defendant paid his attorney, only \$16,000 of \$775,000 remained for forfeiture when convicted).

140. Fricker, *supra* note 133, at 66 (quoting Neil Sonnett, president of the NACDL). The complex questions presented by CCE and RICO cases demand quality counsel; the threat of not being paid will drive these attorneys from the defense bar. *Id.* at 64.

141. *Id.* at 63 (quoting Anthony R. Cueto, Executive Director of the New York State Association of Criminal Defense Lawyers). See also *Id.* (quoting defense attorney Jack T. Lipman) (the decisions wreak "havoc on the attorney-client relationship"); *Id.* at 64 (quoting Neil Sonnet) ("[S]tripping defendants of their lawyers while they are still presumed innocent is a whole different matter from stripping convicted drug defendants of profits. . . . [P]re-indictment or pre-conviction forfeitures . . . will not only drive attorneys out of the practice but prevent defendant from obtaining proper counsel."); *Id.* at 66 (quoting criminal-defense lawyer Stephen Komie) (The *Monsanto* decision is "the scourge of the Supreme Court").

142. H.R. 1046, 101st Cong., 1st Sess., 135 Cong. Rec. E460 (daily ed. Feb. 22, 1989) and S. 438, 101st Cong., 1st Sess., 135 CONG. REC. S1653 (daily ed. Feb. 23, 1989) [hereinafter RICO Reform Act] were introduced jointly into Congress on February 22, 1989 by Representatives Frederick Boucher (D-Va) and George Gekas (R-Pa) in the House and Senators Dennis DeConcini (D-Ariz) and Orrin Hatch (R-Utah) in the Senate. For the legislation it would amend, see Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68 (1988) [hereinafter RICO].

143. See L.A. Daily J., May 4, 1989, at 24, col. 2 ("Despite strong support, however, RICO

the civil action provisions under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁴⁴ Although Congress enacted RICO as a tool for use against organized crime,¹⁴⁵ the statute recently has gained notoriety for its use in ordinary commercial litigation.¹⁴⁶ Under RICO's present civil provisions, a private right of action is available in federal court for any person "injured in his business or property"¹⁴⁷ as a result of a RICO violation.¹⁴⁸ A prevailing plaintiff can automatically recover treble damages, court costs, and attorney's fees.¹⁴⁹ The proposed reform legislation would not bar RICO's use in civil suits, but instead would attempt to limit the scope of civil RICO in response to what critics view as an overabundance of "abusive" litigation.¹⁵⁰

reform legislation failed in the final days of the 99th Congress in 1986, and again in the closing days of the 100th Congress in 1988").

144. 18 U.S.C. § 1964 (1988).

145. The Congressional Statement of Findings and Purpose reports:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

18 U.S.C § 1961 (1988). *See also* 135 CONG. REC. S1655 (daily ed. Feb. 23, 1989) (statement of Sen. Hatch) ("The avowed purpose of RICO was to decrease the incidence of, and act as a deterrent to, organized crime").

146. Senator Hatch, introducing the RICO Reform Act of 1989 in a speech before the Senate stated:

The civil provisions of the RICO statute, available to private plaintiffs, like the rest of RICO, were intended to combat the infiltration of legitimate businesses by organized crime. . . . Nowhere do the purposes of the legislation outlined by Congress mention private business litigation. The only reason RICO contained civil provisions at all was that some of its authors were concerned about limited enforcement capability on the part of the Government in the fight against organized crime. . . . Congress intended the private civil action to be linked to 'racketeering activity' in order to enhance law enforcement against organized crime. [Section 1964(c)] was not intended to create a vehicle for treble damage recoveries in ordinary commercial and business litigation.

135 CONG. REC. S1655 (daily ed. Feb. 23, 1989).

147. 18 U.S.C. § 1964(c) (1988).

148. 18 U.S.C. § 1962 (1988).

149. 18 U.S.C. § 1964(c) (1988).

150. *See* 135 CONG. REC. S1652 (daily ed. Feb. 23, 1989) (statement of Sen. DeConcini) ("The legislation's purpose is to restore the usefulness and effectiveness of the RICO statute that existed prior to the explosion of abusive and harassing lawsuits filed in the 1980's RICO has been undercut and thwarted by the misuse of RICO by plaintiffs and their attorneys who have employed RICO to extort and blackmail defendants by bringing a RICO action every time they are involved in a commercial dispute."); 135 CONG. REC. E460 (daily ed. Feb. 22, 1989) (statement of Rep. Boucher) ("The availability of civil RICO treble damages has dramatically upped the ante in commercial litigation and leveraged substantial settlements on less than substantial allegations.").

See also N.Y. Times, Mar. 12, 1989, § 3, at 2, col. 3 (city ed.)

The law's broad civil suit provisions cast a net so wide that virtually any commercial dispute becomes a candidate for civil RICO jurisdiction. Practically every kind of contro-

Congress enacted RICO as part of the Organized Crime Control Act of 1970¹⁵¹ to help federal prosecutors combat organized crime.¹⁵² RICO contains approximately forty offenses defined as "racketeering activity," which may serve as predicates to a RICO violation.¹⁵³ RICO's criminal sanctions¹⁵⁴ apply if the prosecution proves that the defendant was involved in an "enterprise"¹⁵⁵ that engaged in a "pattern"¹⁵⁶ of criminal conduct involving the predicate offenses. RICO also provides civil remedies for private racketeering suits.¹⁵⁷ As a result of the broad definition of RICO's pattern requirements,¹⁵⁸ lax pleading rules,¹⁵⁹ and the wide

versy, from the common to the bizarre, has been the basis for civil RICO litigation. While the statute has been used in divorce, inheritance, and landlord-tenant disputes, and in controversies among church members, the vast majority of its applications are neither comical nor of limited economic consequence.

But see Blakey, *Study of Allegations of Litigation Abuse*, 5 Civ. RICO Rep. (BNA) No. 4, at 4-14 (June 20, 1989) (analyzing the Business/Labor Coalition for Civil RICO Reform's list of 53 "abusive" cases, and concluding that the existing law adequately "weeds out" the truly abusive cases).

151. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1988)).

152. *See* Congressional Statement of Findings and Purpose, *supra* note 145. *See also* 135 Cong. Rec. S1652 (daily ed. Feb. 23, 1989) (statement of Rep. DeConcini):

The racketeer influenced and corrupt organizations statute was enacted in 1970 at a time when Congress was increasingly worried about the power and influence of organized crime. Congress had devoted much time and attention to studying the activities of organized crime syndicates and their efforts to infiltrate legitimate businesses and unions. The result of these studies was the Organized Crime Control Act of 1970. Title IX of that act was RICO.

153. 18 U.S.C. § 1961(1) (1988) (listing the felonies which qualify as predicate acts under the statute).

154. 18 U.S.C. § 1963 (1988). Criminal sanctions include fines, imprisonment for not more than 20 years (or for life if violation includes predicate offense with a maximum penalty of life) and forfeiture of property acquired through racketeering activity.

155. 18 U.S.C. § 1961(4) (1988). RICO's broad definition of enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* *See* Wisotsky, *Civil RICO In A Nutshell*, 82 Fla. B.J., Nov. 1988, at 49 (author discusses several problems involved in proving the enterprise element).

156. 18 U.S.C. § 1962 (1988). The pattern requirement under RICO requires the commission of at least two predicate offenses over a 10-year period. The Supreme Court recently addressed the definition of pattern in *H.J., Inc. v. Northwestern Bell Telephone Co.*, — U.S. —, 109 S. Ct. 2893 (1989). For an analysis of the Court's holding see *supra* section I.A. of this project. *See also* Wisotsky, *supra* note 155, at 51 (author discusses several problems involved in proving the pattern element).

157. *See supra* notes 146-49 and accompanying text. *See also* Wisotsky, *supra* note 155, at 49 ("[RICO] is a hybrid statute in which the same misconduct gives rise to both civil and criminal liability."); 135 CONG. REC. S1655 (daily ed. Feb. 23, 1989) (statement of Sen. Hatch) ("[T]he provisions for private civil suit were included in RICO to provide economic victims of organized crime adequate redress for their injuries.").

158. *See supra* note 156. *See also* 135 CONG. REC. S1655, S1666 (daily ed. Feb. 23, 1989) (statement of Sen. Hatch) (For example, "alleging that a business has breached the Federal mail fraud

variety of possible predicate offenses,¹⁶⁰ the amount of ordinary business and commercial civil RICO litigation at the federal level has exploded.¹⁶¹ Plaintiffs may institute civil RICO suits to take advantage of the possibility of obtaining treble damages,¹⁶² or for the "potential use of the term 'racketeer' as a club in obtaining settlements."¹⁶³

The RICO Reform Act of 1989, currently pending in Congress,¹⁶⁴ attempts to amend RICO to clarify and limit its application in civil suits resulting from alleged "racketeering" activity.¹⁶⁵ The most significant reforms in the proposal include the addition of new predicate offenses,¹⁶⁶ the limitation of remedies in the majority of commercial disputes to actual damages and attorney's fees, with the retention of automatic treble damages in only a few specifically defined cases,¹⁶⁷ and the creation of a special class of plaintiffs¹⁶⁸ who may recover discretionary punitive dam-

and wire fraud statutes made it easy for plaintiffs, including business plaintiffs, to bring their litigation within the ambit of the civil RICO provisions. . . . [T]wo fraudulent mailings or uses of the wires occurring within 10 years of each other might lead to civil RICO liability.").

159. See 135 CONG. REC. E460 (daily ed. Feb. 22, 1989) (statement of Rep. Boucher):

The pleading requirements are so minimal that virtually any contract dispute becomes a candidate for civil RICO jurisdiction. If the plaintiff alleges the existence of a contract dispute and can demonstrate that the mails or the telephone were used on several occasions either in forming or breaching the contract and if the plaintiff is willing to allege fraud, as is often the case in commercial disputes, the pleading requirements for a civil RICO case are met.

160. See *supra* note 153 and accompanying text.

161. See *Wisotsky, supra* note 155, at 49, 52 n.6. See also *infra* note 196.

162. See *supra* note 149 and accompanying text.

163. *Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Litigation*, 5 Civ. RICO Rep. (BNA) No. 4, at 2 (June 20, 1989) (comments of Rep. Hughes).

164. See *supra* note 142. As of October 30, 1989, H.R. 1046 had been referred to the House Subcommittee on Crime and S. 438 had been referred to the Senate Committee on the Judiciary.

165. See *supra* note 150 (statement of Sen. DeConcini). See also 135 CONG. REC. S1656 (daily ed. Feb. 23, 1989) (statement of Sen. Hatch) ("The bill . . . curtails the abuses of RICO in the area of garden variety litigation between businesses").

166. S.438, 101st Cong., 1st Sess., § 2 (1989). The Reform Act adds one state law predicate offense (prostitution involving minors) to 18 U.S.C § 1961(a)(A). The Reform Act deletes six federal law predicate offenses, but adds thirty-two new federal predicate offenses. The wide variety of additions include: acts indictable under § 32 (relating to destruction of aircraft or aircraft facilities); section 81 (relating to arson); section 2277 (relating to vessels); section 2331 (relating to terrorist acts abroad); any offense under § 134 of the Truth in Lending Act; and any offense under § 586(b)-(k) of the Internal Revenue Code (relating to firearms control).

167. S.438, 101st Cong., 1st Sess., §§ 4(c)(1)(A),(5)(A) (1989) (limiting treble damage awards to government entities and persons whose business or property is destroyed by a defendant convicted of a predicate act).

168. The special class of plaintiffs is limited to 1) certain units of local government; 2) certain tax-exempt persons and organizations, certain indenture trustees, certain pension funds, and certain investment companies if injured by conduct proscribed by section 21(d)(2)(A) of the Securities Ex-

ages up to double the amount of actual damages.¹⁶⁹ The legislation's proponents deleted a controversial retroactivity clause which would have applied the reform measures—subject to certain limitations—to all pending RICO litigation.¹⁷⁰

Supporters of the proposed reform¹⁷¹ claim that civil RICO in its present form has produced a proliferation of "abusive" litigation of a type that RICO's drafters never intended.¹⁷² They allege that the appeal of treble damages and the lax pleading requirements¹⁷³ are the most significant contributors to the explosion of civil RICO litigation.¹⁷⁴ In addition, supporters of the bill assert that both the threat of treble damages and the potential stigma of being labelled a "racketeer" have caused many businesses to settle unwarranted suits.¹⁷⁵ Supporters also argue that the unbridled use of civil RICO has threatened the exercise of funda-

change Act of 1934 (15 U.S.C. § 78 u(d)(2)(A)); and 3) natural persons if the injury occurred in connection with the purchase or lease for personal or noncommercial use or investment of a product, investment, service or contract for personal or noncommercial use or investment and neither state or federal securities or commodities laws supply a remedy for the claim. *Id.* (emphasis added).

169. S. 438, 101st Cong., 1st Sess., § 4(c)(2)(C) (1989).

170. S. 438, 101st Cong., 1st Sess., § 8 (1989). *See Retroactivity Provision in RICO Bill To Be Withdrawn By DeConcini In Markup*, 5 Civ. RICO Rep. (BNA) No. 18, at 1 (Oct. 3, 1989) (The bill's sponsors in the House and Senate stated that one of the reasons for their decision was the "numerous comments and extensive testimony in Senate hearings opposing the retroactive application of the proposed changes in RICO").

171. Supporters of the proposed reform include the securities and commodities industries, accounting profession, the Business/Labor Coalition, AFL-CIO, ACLU, American Bankers Association, and the ABA. *Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Legislation*, *supra* note 163, at 1. Note that not all of these groups support the legislation as it now exists in its entirety, but all agree that substantial reform is necessary. *Id.*

172. *See supra* note 150. *See also RICO Termed Essential Tool to Combat 'Plague of Fraud'*, 4 Civ. RICO Rep. (BNA) No. 47, at 5 (May 2, 1989) ("[T]he RICO reforms are needed because civil RICO claims are being used in suits against businesses in ways Congress did not intend when it enacted the statute. Threats of RICO claims, with treble damages, are being used to force businesses to settle civil claims they otherwise would not settle"). *But see Blakey, supra* note 150 (author's study refutes allegations of abuse in the use of civil RICO).

173. *See Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Legislation*, *supra* note 163, at 1 ("innocent organizations and individuals can be brought into a RICO suit on the criminal acts of another due to the liberal pleading requirements and the loose definition of 'enterprise' and 'pattern of racketeering'").

174. *See supra* note 161.

175. *See supra* notes 150, 163 and accompanying text. *See also* S. 438, 101st Cong., 1st Sess. § 4(c)(10) (1989) (legislation prohibits the use of the term "racketeer" in a civil RICO action unless the plaintiff alleges a crime of violence); 135 Cong. Rec. E460 (daily ed. Feb. 22, 1989) (statement of Rep. Boucher) ("Ordinary and respected businessmen and women, whose reputations are often their principal stock in trade, have been branded as racketeers simply because they have become embroiled in a commercial dispute").

mental constitutional rights such as freedom of speech.¹⁷⁶

Opponents of the proposed reform¹⁷⁷ argue that the elimination of treble damages in the majority of civil suits would weaken a valuable enforcement mechanism that such suits provide and would lessen the corresponding deterrent effect on those who might engage in racketeering activities.¹⁷⁸ Critics also view the RICO Reform Act as special interest legislation¹⁷⁹ that fails to remedy the alleged abuses inherent in certain types of civil RICO litigation.¹⁸⁰ For example, the bill exempts securities and commodities fraud from punitive damages where state or federal laws provide a remedy for the type of conduct on which the case is based.¹⁸¹ Additionally, critics contend the proposed reform excludes the

176. See 135 Cong. Rec. § 14010 (daily ed. Oct. 24, 1989) (statement of Sen. Humphrey): Perhaps the most alarming abuse of RICO has been the threat it is presenting to freedom of speech. There has recently been a rash of civil RICO actions being used to suppress demonstrations and public protests which have nothing at all to do with racketeering activity. . . . The mere filing of these multimillion-dollar treble damage suits can have an enormous chilling effect on political protest groups, which simply do not have the financial and legal resources to cope with such suits.

See also *Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Legislation*, *supra* note 163, at 1 (June 20, 1989) (quoting Antonio Califa, legislative counsel for the ACLU) ("The stricter pleading requirements, narrowing of the availability of treble damages, changing the level of proof, and the elimination of the perjorative term 'racketeer' will help curb some of the First Amendment abuses engendered in current RICO law").

177. Opponents of the proposed reforms include insurance and security regulators, consumer advocates and the Department of Justice. *Bill to Limit Civil RICO Scope Introduced in House*, *Senate*, 4 Civ. RICO Rep. (BNA) No. 38, at 2 (Feb. 28, 1989); *Bill Would Curb Enforcement, Justice, State Regulators Say*, 4 Civ. RICO Rep. (BNA) No. 48, at 3 (May 9, 1989).

178. See *RICO Termed Essential Tool to Combat 'Plague of Fraud'*, 4 Civ. RICO Rep. (BNA) No. 47, at 5 (May 2, 1989) ("The civil RICO statute, with its treble damages provision, is an essential tool that allows the private bar to help overburdened government enforcement agencies deal with the 'plague of fraud' in industries such as banking, securities, and defense").

179. The special interest charge is primarily against the securities and commodities industry, exempted from the Act's damage provision if sued by a natural person and if state or federal securities or commodities laws supply a remedy. See *supra* note 168 and accompanying text. See *N.Y. Times*, Oct. 6, 1988, at 19, col. 1 ("It makes no sense to exempt commodities and securities frauds when these seem rampant").

180. See Blakey, *Possible Amendments to "The RICO Reform Act of 1989" (H.R. 1046)*, 5 Civ. RICO Rep. (BNA) No. 11, at 1 (Aug. 8, 1989) ("The most telling objection that can be made to the provisions of the proposed legislation is that little or no relation exists between the allegations of abuse (frivolous suits) and the provisions supposedly designed to remedy them. . . . In fact, some allegations of abuse (abortion protest litigation) are hardly touched by the supposed reforms. Time after time, the baby (the basic design of RICO to vindicate the rights of victims of crime) is being thrown out with the bath water (supposed litigation abuses)").

181. See S. 438, 101st Cong., 1st Sess., § 4(c)(2)(B)(iii) (1989); Blakey, *supra* note 180, at 5 ("Even more troubling is the securities and commodities exception to consumer fraud"); See also S. 438 101st Cong., 1st Sess., § 4(c)(7)(A) (1989) (proposed reform also provides insurers and other regulated businesses with an affirmative defense that they relied in good faith on an "action, ap-

most appropriate group of plaintiffs from instituting investment fraud private civil RICO suits.¹⁸² As a result, most critics conclude that the legislation "goes well beyond the rationale of the allegations of misuse."¹⁸³

Critics of the bill have offered a substantial number of options either to replace the RICO Reform Act¹⁸⁴ or simply to strengthen some areas of the legislation that they contend the drafters did not address adequately.¹⁸⁵ Although persons on both sides of the reform issue agree that the existing statutory definitions and predicate offenses require further refinement in order to narrow RICO's overly broad scope,¹⁸⁶ the reform bill actually adds new predicate offenses.¹⁸⁷ Other suggestions which ad-

proval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law"); *House Judiciary Witnesses, Including ABA, Debate Pending RICO Reform Bill*, 52 Banking Rep. (BNA) No. 25, at 1320 (June 19, 1989) (reform legislation "creates procedural roadblocks to protect regulated industries by allowing them to delay trial through an 'affirmative defense' that they acted in reliance on the action or inaction of a regulatory agency").

182. See S. 438, 101st Cong., 1st Sess., § 4 (1989). See also Blakey, *supra* note 180, at 4 ("Under the provisions of the proposed legislation, only the following limited class may sue: units of local government; natural persons; charities; undenied trustees; pension funds; and investment companies It ought to include individuals and entities that need special protection because of their relative vulnerability or because they represent others who fall into that class"); *Bill Would Curb Enforcement, Justice, State Regulators Say*, *supra* note 177, at 3 ("it is 'unconscionable' to limit those who can bring investment fraud private civil RICO actions to 'natural persons' to the exclusion of investment companies, pension funds, banks, savings and loan associations, and other potential plaintiffs. These are the entities most likely to be victims of marketplace fraud and best suited and financed to take action against it").

183. Blakey, *supra* note 180, at 4 (Aug. 8, 1989) ("Ostensibly, the purpose of the proposed legislation is to curtail general commercial fraud litigation under RICO. As such, it would make more sense directly to limit—subject to carefully drafted exceptions—such legislation between commercial entities").

184. See Blakey, *Alternative Legislative Proposals to "The RICO Reform Act of 1989"*, 5 Civ. RICO Rep. (BNA) No. 12, part 2, at 1 (Aug. 15, 1989) (the author, a professor at Notre Dame Law School, drafted two potential legislative alternatives to the present reform bill). See also *RICO Reform Merits Second Look, House Subcommittee Panel Says*, Sec. Week, at 6 (Aug. 28, 1989) (Chairman of the House Subcommittee on Crime, Rep. William Hughes (D-N.J.) expressed interest in drafting an alternative piece of legislation "that would not gut civil RICO").

185. See *infra* notes 186-90 and accompanying text.

186. See *Bill Would Curb Enforcement, Justice, State Regulators Say*, *supra* note 177, at 3 (people have "suggested that the subcommittee take a broader look at both the civil and criminal provisions to determine exactly what conduct the law should cover").

187. See *supra* note 166; see also *Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Legislation*, *supra* note 5, at 2 ("the addition of new predicate acts, as called for by H.R. 1046, 'just complicates things further'"); *Mathews Says RICO Bill Likely to Pass, Ensuring Continued Civil Litigation*, 4 Civ. RICO Rep. (BNA) No. 39, at 6 (Mar. 7, 1989) ("The proposed legislation doesn't provide any clarification of existing statutory definitions of 'pattern of racketeering activity' or 'enterprise' . . . [resulting] in even more RICO litigation"). But see Blakey, *supra* note 180 (author

dress the concern of "abusive" litigation include: using federal prosecutors to screen private complaints;¹⁸⁸ imposing sanctions for frivolous suits;¹⁸⁹ and assessing attorney's fee against plaintiffs in private racketeering suits if the RICO claim is "not substantially justified."¹⁹⁰

The proposed legislation includes numerous compromises meant to placate both the business and consumer lobbies.¹⁹¹ As a result, the bill is presently quite complex¹⁹² and fails to address some of the more serious shortcomings of the original civil RICO.¹⁹³ Although some measures may be necessary to limit civil RICO, it is imperative that reform not remove RICO's ultimate deterrent effect on organized and white collar crime.¹⁹⁴ Indeed, one commentator suggested an amendment that "embodies neither the interest of the plaintiff nor the defendant, but of the public."¹⁹⁵

The ultimate, overall effect of the RICO Reform Act on subsequent civil RICO litigation is difficult to predict. The elimination of treble damages in most private civil RICO suits may result in fewer cases of

calls for the addition of even more crimes, in particular, hazardous waste offenses, as predicate offenses).

188. See *New Justice Authority Proposed to Screen Private RICO Claims*, 4 Civ. RICO Rep. (BNA) No. 49, at 5 (May 16, 1989) ("Establishing a central authority in the Department of Justice to screen private civil RICO claims and bar those that fail to meet certain minimal standards could curb inappropriate uses of the statute. . . . [T]he standard for private RICO cases should be whether a criminal prosecutor, working 'in a world of unlimited resources,' would have filed charges").

189. See *id.* at 6 (Professor Blakey claims that Federal Rules of Civil Procedure 11 (sanctions on attorneys for frivolous filings) and 56 (court imposed sanctions when affidavits are made in bad faith) are sufficient to deter frivolous cases).

190. *Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Legislation*, *supra* note 163, at 3 (The ABA, among others, suggested the change of assessing "attorney's fees against plaintiffs who don't prevail on the merits in business-to-business suits").

191. See *The L.A. Daily J.*, May 4, 1989, at 1, col. 5 ("If this bill were to be a straight treble-damages for governmental entities and actual damages for everybody else, it would be a two-page bill. . . . But because the consumer lobby demanded that they be treated differently than everybody else, you have exceptions to their exceptions").

192. See *supra* note 166 and accompanying text (discussing added predicate offenses); note 168 and accompanying text (discussing special class of plaintiffs for punitive damages). See also *The L.A. Daily J.*, *supra* note 191 (the bill creates "a byzantine hierarchy of categories for RICO plaintiffs and defendants Whatever reform may or may not be achieved in the process, the end product will likely provide myriad complexities and uncertainties for practitioners to study and litigate and for courts to ponder and interpret.").

193. See *supra* notes 158-63 and accompanying text.

194. See *N.Y. Times*, Oct. 6, 1989, at 19, col. 1 ("Reducing damages would reduce deterrence. It makes no sense to exempt commodities and securities frauds when these seem rampant.") *quoted in* Blakey, *supra* note 180, at 2.

195. See *Blakey*, *supra* note 180 (the author agrees that some reform is necessary but believes the present legislation inadequate).

private or commercial litigation. Whether this is desirable as a matter of public policy is beyond the scope of this discussion. Significantly, Congress has not actually found substantiation for claims of "abusive" litigation in any hearings thus far.¹⁹⁶ Without such a finding, restricting treble damages in civil RICO suits may not be the best way to fine-tune the statute because of the undeniable deterrent value in this remedy.¹⁹⁷

Ironically, the number of civil RICO suits may actually increase under the RICO Reform Act. The bill's sponsors chose to include twenty-seven new predicate offenses that significantly broaden RICO's scope.¹⁹⁸ This increase in the number of predicate offenses—coupled with the already lax pleading requirements,¹⁹⁹ which the bill's sponsors did not amend—may significantly increase civil RICO litigation.²⁰⁰ Finally, the bill would transform a forty-eight word section creating a civil RICO remedy into a sixteen page monstrosity of complex and undefined legal parameters.²⁰¹ The bill, if enacted, likely will contribute to increased litigation, because these complex provisions will require extensive litigation to test their application and scope.

Perhaps the best avenue of reform would be to clarify the definition of the "pattern" and "enterprise" requirements for private civil suits, liberally impose sanctions for frivolous suits, and reduce the amount of damages that a plaintiff could receive if relying exclusively on mail or wire

196. See *Supporters of RICO Bill Deny Opposition Charges of 'Special Interest' Legislation*, *supra* note 163, at 2 ("Rep. John Conyers (D-Mich) flatly stated that the alleged 'wave' of RICO cases 'simply doesn't exist'"); Blakey, *supra* note 150, at 6 ("Between December 1979 and January 1988, approximately 1,910,520 cases were filed in the federal district courts. Of that number, approximately 2,742 were RICO filings"); *RICO Termed Essential Tool to Combat 'Plague of Fraud'*, 4 Civ. RICO Rep. (BNA) No. 47, at 5 (May 2, 1989) ("Public Citizen, a consumer public interest group that opposes elimination of treble damages, questioned business' claims of RICO abuses in settlements of civil suits. No documentation of the alleged abuses has been presented before Congress or elsewhere").

197. See *supra* note 188-190 and accompanying text.

198. See *supra* note 166.

199. See *supra* note 159.

200. Also, the proposed legislation does not address the recent suits instituted by or against political and other protest groups. See, e.g., *Eveland v. Director of Central Intelligence Agency*, 843 F.2d 46 (1st Cir. 1988) (plaintiff, challenging conduct of U.S. foreign policy in the Middle East, brought a civil RICO action against the CIA and its director); *Northeast Women's Center Inc. v. McMonagle* 868 F.2d 1342 (3d Cir. 1988) (plaintiff abortion clinic brought civil RICO action against anti-abortion protestors); *Christian Populist Party v. Secretary of State*, 650 F. Supp. 1205 (E.D. Ark. 1987) (plaintiffs brought civil RICO action against the State of Arkansas challenging the state election statute).

201. See *The L.A. Daily J.*, May 4, 1989, at 24, col. 1.

fraud in commercial litigations.²⁰² Such a solution would retain the deterrent effect of the private enforcement mechanism and provide a fair remedy for victims, eliminating the threat of meritless suits. In any event, Congress should consider other reform options offered on both sides of the debate before passing the pending legislation.

II. THE MAIL FRAUD STATUTE: EXPANDING ITS SCOPE

Congress and the Supreme Court have recently expanded the scope of the federal Mail Fraud Statute²⁰³ (section 1341), which proscribes use of the mails in connection with undefined schemes to defraud, or schemes to obtain money or property by fraud.²⁰⁴ First, in 1988, Congress expanded the class of schemes section 1341 prohibits to include schemes to deprive another of the intangible right of honest services.²⁰⁵ Second, in 1989, the United States Supreme Court in *Schmuck v. United States*²⁰⁶ relaxed the standard of relatedness required to satisfy section 1341's mailing requirement to include incidental mailings in ongoing schemes.²⁰⁷ Both actions should increase the already abundant use of section 1341 by federal prosecutors, who regard the mail fraud statute as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuinsinart—and our true love."²⁰⁸

202. See *supra* notes 158-60, 188-90 and accompanying text.

203. 18 U.S.C. § 1341 (1988).

204. Section 1341 provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so [uses the mails or causes them to be used], shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Id.

205. Congress had not previously defined § 1341's phrase "scheme or artifice to defraud." See *supra* note 204. In 1988, Congress added § 1346 to Title 18 of the United States Code as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1988)). Section 1346 provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." 18 U.S.C. § 1346 (1988). For a discussion of this new provision, see *infra* notes 209-34 and accompanying text.

206. 109 S. Ct. 1443, *reh'g denied*, 109 S. Ct. 2091 (1989). For a discussion of *Schmuck*, see *infra* notes 245-60 and accompanying text.

207. The elements of a mail fraud offense include: "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira v. United States*, 347 U.S. 1, 8 (1954).

208. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771 (1980). "We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come

A. *The Intangible Rights Doctrine: The Law After 18 U.S.C § 1346*

In *McNally v. United States*,²⁰⁹ the Supreme Court overturned four decades of lower court precedent that established the intangible rights doctrine,²¹⁰ holding that section 1341 did not protect citizens' intangible right to honest government.²¹¹ The Supreme Court interpreted section

home to the virtues of 18 U.S.C § 1341, with its simplicity, adaptability, and comfortable familiarity, it understands us and, like many a foolish spouse, we like to think we understand it." *Id.* at 771.

209. 483 U.S. 350 (1987).

210. The intangible rights doctrine originated some forty years before the *McNally* decision. In 1941, the Fifth Circuit suggested in dicta that the corruption of a public fiduciary constituted a scheme to defraud the public under the mail fraud statute. *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941), *cert. denied*, 313 U.S. 574 (1942). *Shushan* involved the defendant's scheme to obtain a public contract on favorable terms by bribing a public official. *Id.* In *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942), a federal district court held that the corruption of a private fiduciary relationship could likewise constitute a scheme to defraud in violation of the mail fraud statute. In *Proctor & Gamble*, the defendants bribed a competitor's employees to obtain trade secrets from their employer. The court stated this scheme defrauded the competitor of its lawful right to loyal and honest employees. Many commentators characterize these two decisions as the cornerstones of the mail fraud intangible rights doctrine. *See, e.g., Coffee, From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 128-30 (1981); Note, *McNally v. United States: Intangible Rights Declared a Dead Letter*, 37 CATH. U.L. REV. 851, 853 (1988).

Since these decisions, every appellate court addressing the issue interpreted the disjunctive language of § 1341 to include schemes to defraud individuals, or the government of intangible rights. *McNally*, 483 U.S. at 358. In one such decision, *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974), the Eighth Circuit affirmed the mail fraud convictions of two candidates for duty offices. The mail fraud convictions arose out of the candidates' attempts to obtain absentee ballots for fictitious voters. *Id.* at 762. The indictment charged the defendants with scheming to defraud the public of "certain intangible political and civil rights." *Id.* at 765. The court focused on the statute's disjunctive phrasing of its prohibitions against "scheme[s] . . . to defraud, or for obtaining money or property." The court concluded that the statute reached two species of schemes: 1) schemes to defraud and 2) schemes to obtain money or property by means of false or fraudulent pretenses. *Id.* at 764. The Eighth Circuit reasoned that defendants' activities constituted a scheme to defraud. *Id.* at 765.

Following the *States* decision, the intangible rights doctrine came into widespread use. *Mail Fraud: Termination of the "Intangible Rights" Doctrine—McNally v. United States*, 107 S. Ct. 2875 (1987), 11 HARV. J.L. & PUB. POL'Y 286 (1988). Federal prosecutors targeted political corruption as a major federal law enforcement priority and attacked such corruption with the Mail Fraud Statute. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPPERDINE L. REV. 321, 332 (1983). *See, e.g., United States v. Holzer*, 816 F.2d 304 (7th Cir.), *vacated* 484 U.S. 807 (1987) (county judge); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (state political party leader); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *vacated*, 862 F.2d 1067 (4th Cir. 1988) (Governor of Maryland) (post-*McNally* motion successful).

Prosecutors also successfully attacked election fraud under the intangible rights theory. *See, e.g., United States v. Girdner*, 754 F.2d 877 (10th Cir. 1985) (candidate for state legislature); *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984) (candidate for sheriff).

211. 483 U.S. at 360. The defendants in *McNally* were politically active in the Democratic Party in Kentucky. *Id.* at 352. Governor Carroll appointed Hunt as chairman of the state Democratic

1341 to protect only property rights.²¹² It considered the language and history of section 1341 as well as Supreme Court precedent²¹³ and concluded that section 1341 codified the common understanding of “defraud” as referring exclusively to a deprivation of property through deceit.²¹⁴

Party with de facto control over selection of the agencies from which the state would purchase its insurance. *Id.* Hunt negotiated with the Wombwell Insurance Company that, in exchange for that company’s continued selection as the procuring agent for the state’s workmen’s compensation insurance, the company would share its commissions with other companies Hunt specified. *Id.* Hunt designated, among others, a company that he and defendants Gray and McNally owned and operated. *Id.* at 353. Hunt pled guilty to mail and tax fraud and the court sentenced him to three years in prison. *Id.* Federal prosecutors charged defendants Gray and McNally with mail fraud “based on the mailing of a commission check to Wombwell by the insurance company from which it had secured coverage for the state.” *Id.* The indictment alleged that the defendants had devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the State’s affairs conducted honestly, and (2) to obtain money and property through false pretenses and the concealment of material facts. *Id.* The jury convicted the defendants, and the court of appeals affirmed the conviction based on the intangible right to honest and impartial government. *Id.* at 355.

212. *Id.* at 360.

213. The Court considered the original language of the statute which prohibited only “any scheme or artifice to defraud.” 483 U.S. at 356. Examining the “sparse legislative history,” the Court concluded § 1341’s original purpose was to protect people from schemes to deprive them of their money or property. *Id.* The Court then considered the first Supreme Court interpretation of the statute, *Durland v. United States*, 161 U.S. 306 (1896), which held that courts should construe the phrase “any scheme or artifice to defraud” broadly “insofar as *property rights* are concerned, but did not indicate that the statute had a more extensive reach.” 483 U.S. at 356 (emphasis added). The Court acknowledged Congress’ 1909 amendment to § 1341 which added the disjunctive language “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” *Id.* However, the Court believed the addition of this second phrase was not intended to make a distinction between general schemes to defraud and schemes to defraud of property, but to make it “unmistakable that the statute reached false promises . . . as to the future as well as other frauds involving money and property.” *Id.* at 359.

214. 483 U.S. at 359. The Court applied the doctrine of lenity, which provides, “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.” *Id.* at 359-60 (citations omitted). The Court, therefore, read the statute as “limited in scope to the protection of property rights” rather than “constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials . . .” *Id.* at 360.

In dissent, Justice Stevens attacked the majority’s disregard for § 1341’s disjunctive phrasing. 483 U.S. at 364-65 (Stevens, J., dissenting). Justice Stevens asserted that the statute’s language, through the use of the term “or,” made clear that each prohibition was independent. *Id.* A person could violate the first clause by devising a scheme or artifice to defraud without violating the second clause by seeking to obtain money or property through false pretenses. *Id.* at 365.

After *McNally*, defendants and convicted parties flooded the federal courts with motions to dismiss active prosecutions or vacate past convictions premised on the intangible rights theory. *See, e.g., United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989) (mail fraud and RICO convictions vacated); *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989) (mail fraud conviction vacated);

The Supreme Court clarified its *McNally* holding in *Carpenter v. United States*.²¹⁵ *Carpenter* involved a scheme in which the defendants used advance information about the contents and publication schedule of an influential *Wall Street Journal* column as a basis for stock trading.²¹⁶ The *Carpenter* defendants, indicted for mail fraud, argued that a publication's interest in prepublication confidentiality was an "intangible consideration," outside the reach of section 1341.²¹⁷ The Court rejected the defendants' argument and characterized the publication schedule and column contents as intangible *property* fully within the scope of section 1341.²¹⁸ The Court noted that "[c]onfidential business information has long been recognized as property,"²¹⁹ and explained that its *McNally* holding did not limit section 1341's scope to tangible as distinguished from intangible property.²²⁰ The Court further clarified its holding regarding intangible property, explaining that an entity need not suffer a loss of money or property as a result of the improper use of its confidential information to establish a violation of the statute.²²¹ Thus, after *Car-*

United States v. Kato, 878 F.2d 267 (9th Cir. 1989) (conviction upheld because insufficient mail fraud charge contained every element of conspiracy to defraud government); United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989) (mail fraud and RICO convictions vacated); United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988) (former Governor of Maryland's ten-year old mail fraud and RICO convictions vacated); United States v. Saly, No. 86-67CR(1), slip op. (E.D. Mo. July 6, 1989) (first conviction set aside post-*McNally*; after retrial, indictment dismissed for failure to allege property violation of mail fraud statute).

215. 108 S. Ct. 316 (1987).

216. Defendant Winans co-wrote the "Heard on the Street" column for the *Wall Street Journal*. 108 S. Ct. at 318-19. Winans conspired with other defendants to provide them prepublication information and the publication schedule of the column. *Id.* at 319. The information allowed the conspirators to trade on stocks in anticipation of the columns impact on the market. *Id.* In a four month period the conspirators net profits from the stock trades were about \$690,000. *Id.* After a bench trial, the court convicted the defendants of securities fraud and mail fraud. *Id.*

The fraud that triggered § 1341 was not that perpetrated against the innocent parties who traded stocks with the conspirators. The prosecutors alleged that defendants perpetrated a mail fraud against the *Wall Street Journal* based on the conspirators' use of the *Journal's* confidential information. 108 S. Ct. 320. The Court found that the *Journal's* use of the wires and mails to print and distribute its papers satisfied the § 1341 mailing element. *Id.* at 322.

217. The defendants argued that the conspirators' activities did not violate the mail or wire fraud statutes because the players did not obtain any money or property from the *Journal* as require under *McNally*. 108 S. Ct. at 320.

218. *Id.* at 320. The Court held that the conspirators defrauded the *Journal* of its confidential information and thus out of property. *Id.* at 321-22.

219. *Id.* at 320 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984); *Dirks v. SEC*, 463 U.S. 646, 653 n.10 (1983); *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-51 (1905)).

220. *Id.*

221. *Id.* at 321. Petitioners argued that because they had not interfered with the *Journal's* use of

penter, the Supreme Court sanctioned mail fraud convictions involving schemes to deprive persons of judicially recognized intangible property rights, but not those involving schemes to deprive persons of other intangible rights.

Congress addressed this development in 1988 by enacting section 1346.²²² Section 1346 expressly extends the protections of the mail and wire fraud statutes to the "intangible right of honest services."²²³ With section 1346, Congress plainly intended to overrule *McNally* and revive the intangible rights theory.²²⁴ What is not clear, however, is whether sections 1341 and 1346 now protect the entire spectrum of intangible rights.

The clearest case is one like *McNally* in which the scheme consists of payments to a government official in exchange for favorable treatment.²²⁵ This type of scheme, corrupting a public fiduciary, deprives the citizenry of its collective right to honest service from its government officials and is the most likely type of fraud Congress targeted in section 1346.²²⁶ Analogous schemes exist in the private sector. Courts have found union officials, who have private fiduciary obligations to their unions, guilty of defrauding their unions by accepting kickbacks.²²⁷ One could argue forcefully that both situations above result in the deprivation of "honest services," acts now specifically prohibited by sections 1341 and 1346.

Whether section 1346 covers cases not involving the corruption of

its information, they had not harmed the Journal. *Id.* The Court rejected petitioners' arguments that a loss of money or property was a necessary element of a scheme to defraud based on intangible property. *Id.* The Court found it sufficient that the conspirators deprived the Journal of its right to exclusive use of its information. *Id.*

222. Pub. L. No. 100-690, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1988)).

223. 18 U.S.C § 1346 (1988). For the text of this section see *supra* note 205.

224. No House or Senate Report accompanied Congress' passage of § 1346. However, Representative John Conyers, the floor sponsor of § 1346, submitted comments on the amendment's purpose. 134 CONG. REC. H11251 (daily e.d October 21, 1988). Representative Conyers stated, "This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. . . . Thus it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property." *Id.*

225. In *McNally*, the government official solicited the bribe but the effect was the same; the citizens were deprived of the official's honest service.

226. See *supra* note 224 (comments of Representative John Conyers indicating purpose of § 1346 was to overturn *McNally*).

227. See, e.g., *United States v. Zauber*, 857 F.2d 237 (3d Cir. 1988), *cert. denied sub. nom.*, *Scotto v. United States*, 109 S. Ct. 1340 (1989). The district court in *Zauber*, in an unpublished opinion, found union pension fund trustees and general counsel guilty of defrauding the fund of the right to honest and faithful employees. The Third Circuit vacated the mail fraud conviction as based on intangible rights theory. *Id.*

public or private fiduciaries is less clear. For example, a more difficult case involves election fraud where campaign workers use the mails to falsify votes, thus defrauding the citizenry of its right to an honest election.²²⁸ An even tougher question would involve schemes to defraud individuals of their right to privacy.²²⁹ Both of these scenarios were prohibited by pre-*McNally* interpretations of the Mail Fraud Statute.²³⁰

On its face, section 1346 does not refer to these types of schemes.²³¹ The only legislative history available for section 1346, however, suggests these schemes should be included. Representative Conyers, floor sponsor of section 1346,²³² commented, "This amendment is intended merely to overturn the *McNally* decision. *No other change in the law is intended.*"²³³ Because all of the schemes described above were prohibited by the pre-*McNally* Mail Fraud Statute, once section 1346 overturns *McNally*, section 1341 may again cover those fact patterns.²³⁴

228. This situation is distinct from the facts of *McNally* because the candidate is not yet elected. As such, she and her workers may not yet owe the public the duty of "honest services."

229. Examples of such fraud might include tricking the post office into giving information regarding private individuals. See *infra* note 230. Here, unlike any of the previous examples, there is not even an allegation that the fraudulent acts will lead to dishonest services.

230. See, e.g., *United States v. Clapps*, 732 F.2d 1148 (3d Cir.) (Mail Fraud Statute applies to party chairman), *cert. denied* 469 U.S. 1085 (1984); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) (Mail Fraud Statute covers candidates for city office); *United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979) (wire fraud conviction related to bogus talent agency designed to seduce women); *United States v. Louderman*, 576 F.2d 1383, (9th Cir. 1978) (debt collectors convicted of wire fraud for misrepresenting themselves to the telephone company and the post office in order to obtain information that deprived subscribers and boxholders of their privacy). Although the *Condolon* and *Louderman* cases involved wire fraud, they are also relevant to mail fraud because the mail and wire fraud statutes are nearly identical in wording. Compare 18 U.S.C. § 1343 (1988) with 18 U.S.C. § 1341 (1988). Also, both are affected by § 1346.

231. Section 1346 defines § 1341's "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." The "honest services" language implies a fiduciary relationship, not a right to an honest election or right to privacy.

232. "[W]hile the comments of a sponsor are not determinative of legislative intent, congressional intent may be inferred from statements of a sponsor on the floor." *United States v. Berg*, 710 F. Supp. 438, 442 (E.D.N.Y. 1989) (citations omitted). Such inferred intent may of necessity be particularly strong in the case of § 1346, because no other Congressman spoke on the section and no House or Senate Report was produced. *Id.*

233. 134 Cong. Rec. H11251 (daily ed. October 21, 1988) (emphasis added).

234. Notwithstanding the legislative history behind § 1346, discussed *supra* at text accompanying note 233, the new provision on its face would not appear to cover the non-elected candidate or the privacy deprivation hypothesized in note 231 above. Nevertheless, one could make an argument that these scenarios should receive Mail Fraud Statute protection. The language of § 1346 is not restrictive; the provision merely says a "scheme or artifice to defraud" includes schemes to deprive another of the intangible right of honest services. The statute as written still does not address other intangible rights. Because a court would therefore need to look to the legislative history of the Mail

B. Incidental Mailings In Ongoing Schemes: Schmuck v. United States

While Congress, through section 1346, expanded the scope of the Mail Fraud Statute's scheme element, the Supreme Court, in *Schmuck v. United States*,²³⁵ expanded the scope of the mailing element to include incidental mailings in ongoing schemes. Prior to *Schmuck*, the Court several times addressed the issue of whether a mailing was sufficiently closely related to the defendant's scheme to bring his conduct within the Mail Fraud Statute's mailing element.²³⁶ In *Kann v. United States*,²³⁷ the defendants set up a dummy corporation that issued the defendants fraudulent checks. They cashed the checks at local banks, and the local banks mailed the checks to the drawee bank for collection. The Court found these mailings insufficient to meet the mailing requirement: the schemes had reached "fruition" when the defendants received the money irrevocably and "[i]t was immaterial to [the defendants], or to any consummation of the scheme, how the bank that paid or credited the check would collect from the drawee bank."²³⁸

Again in *Parr v. United States*,²³⁹ the Court held the mailing insufficiently related to the scheme to meet the Statute's mailing element. In *Parr*, the defendants used their employer's credit card without authorization. The mailing at issue was the card issuer's mailing of collection invoices to the defendants' employer. The Court held these mailings were insufficiently connected to the execution of the scheme because it was immaterial to the defendants how the credit card issuer went about collecting its payment.²⁴⁰

Finally, in *United States v. Maze*,²⁴¹ the Court once again held the mailings too unrelated to meet the Statute's requirement. *Maze* also involved a defendant's unauthorized use of a credit card. The two mailings

Fraud Statute and § 1346 for guidance, it would find Congress' intent to overturn *McNally*. See *supra* note 233 and accompanying text. The court might then decide Congress intended in § 1346 to overturn *McNally*'s broad holding—that all intangible rights not deemed to be property rights are not protected.

235. 109 S. Ct. 1443 (1989).

236. The Mail Fraud Statute requires a mailing *for the purpose of* executing a scheme or artifice to defraud. See *supra* note 207.

237. 323 U.S. 88 (1944).

238. *Id.* at 94.

239. 363 U.S. 370 (1960).

240. *Id.* at 393.

241. 414 U.S. 395 (1974).

at issue were the proprietors' mailing of card invoices to the issuing bank, and the bank's mailing of a bill to the credit card owner.²⁴² The Court viewed these mailings as merely account adjustments on which the success of the defendant's scheme did not depend in any way. In fact, the Court noted, the defendant probably would have preferred to have the invoices misplaced and never mailed at all.²⁴³

In *Schmuck v. United States*,²⁴⁴ the Court upheld a used-car distributor's mail fraud conviction related to an odometer tampering scheme.²⁴⁵ This time the court held that the defendant Schmuck satisfied the mailing element when the unwitting dealers, who bought the altered cars from Schmuck,²⁴⁶ mailed title-application forms necessary to complete sales²⁴⁷ to retail customers.²⁴⁸ The Court reasoned that Schmuck's scheme had not reached fruition until the dealers completed the retail sale of the altered vehicles, because if the dealers could not resell the cars, Schmuck could not continue to sell tampered cars to the dealers.²⁴⁹ The Court asserted that a mailing satisfied the mailing element when it was "incident to an essential part of the scheme . . . or a step in the plot."²⁵⁰

In *Schmuck* the Court distinguished the mailings at issue from those held not to satisfy the mailing element in *Kann*, *Parr*, and *Maze*.²⁵¹ The *Schmuck* Court characterized the mailings in the earlier cases as involving "post-fraud accounting among potential victims of the various

242. *Id.*

243. *Id.*

244. 109 S. Ct. 1443 (1989).

245. *Id.* at 1450.

246. Several of the dealers purchased from Schmuck on a consistent basis over a period of about 15 years. *Id.* at 1448.

247. To complete the resale of each car, the dealer would mail a title-application for to the Wisconsin Department of Transportation on behalf of his customer. *Id.* at 1445-46. The receipt of a Wisconsin title was a prerequisite to completing the resale; without it, the dealer could not transfer title and the customer could not obtain Wisconsin tags. *Id.* at 1446.

248. *Id.* at 1448. Schmuck argued that prosecutors may predicate mail fraud only on a mailing that affirmatively assists the perpetrator in carrying out his fraudulent scheme. *Id.* at 1447. Schmuck asserted that a mailing, routine and innocent in and of itself, could not satisfy the mailing element. *Id.* The Court disagreed with Schmuck's characterization of the mailings at issue and with his description of mail fraud law. *Id.*

249. The transactions at issue involved twelve cars. *Id.* at 1448.

250. *Id.* at 1447 (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). At least one commentator has invited the courts to treat the mailing requirement as nothing more than "an overt and jurisdictional act." Rakoff, *supra* note 208, at 821.

251. 109 S. Ct. at 1448-49. For a discussion of these cases, see *supra* notes 237-243 and accompanying text.

schemes.”²⁵² The long-term success of each fraud did not turn on these “post-fraud” mailings.²⁵³ The Court concluded the long-term success of Schmuck’s fraud, however, depended on the mailing of the title-registration forms. The mailing was an essential step in passing title to retail purchasers, and “failure in this passage of title would have jeopardized Schmuck’s relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended.”²⁵⁴

In a strong dissent, Justice Scalia²⁵⁵ criticized the Court’s attempt to distinguish the mailings at issue from those in *Kann*, *Parr*, and *Maze*.²⁵⁶ Scalia maintained that, analogous to these cases, Schmuck’s fraud was complete with respect to each car when he pocketed the dealer’s money. “It was as inconsequential to him whether the dealer resold the car as it was inconsequential to the defendant in *Maze* whether the defrauded merchant ever forwarded the charges to the credit card company.”²⁵⁷ Scalia noted that in *Kann*, the Court rejected the government’s proposed theory of ongoing fraud²⁵⁸ that was identical to the theory the *Schmuck* majority adopted.²⁵⁹

C. Conclusion

With the enactment of section 1346, federal prosecutors once again have the means of attacking corrupt government officials and private fiduciaries through the use of the Mail Fraud Statute.²⁶⁰ One must wait to see whether imaginative prosecutors and courts will look to Representative Conyers’ remarks²⁶¹ as a source of authority²⁶² to stretch sections 1346’s “honest services” language to cover the full spectrum of fraudulent schemes, including election fraud and privacy rights.²⁶³

252. 109 S. Ct. at 1449.

253. *Id.*

254. *Id.*

255. Justices Brennan, Marshall, and O’Connor joined in the dissent.

256. 109 S. Ct. at 1454 (Scalia, J., dissenting).

257. *Id.*

258. The government’s theory was that the defendants intended to continue to issue fraudulent checks through their dummy corporation. The clearing of these first checks, therefore, was essential to their ability to cash future checks. *Kann*, 323 U.S. at 95. The *Kann* Court concluded, however, that the check-clearing transactions “were merely incidental and collateral to the scheme and not part of it.” *Id.*

259. 109 S. Ct. at 1454 (Scalia, J., dissenting). See *supra* note 47 and accompanying text.

260. See *supra* notes 225-27 and accompanying text.

261. See *supra* text accompanying note 233.

262. See *supra* note 232 and accompanying text.

263. See *supra* notes 228-234 and accompanying text.

A prosecutor's success under *Schmuck* will depend on her ability to characterize the scheme as an ongoing one, incomplete in the absence of the alleged mailing.²⁶⁴ The prosecutor must "combin[e] all of the individual transactions into a single scheme,"²⁶⁵ and allege that the success of each subsequent transaction depended upon the mailing incidental to the previous transactions. Given federal prosecutors' affection for the Mail Fraud Statute,²⁶⁶ it is safe to predict that they will apply the Court's strategy lesson and reach frauds accompanied by only incidental mailings.

264. See *supra* notes 244-254 and accompanying text.

265. 109 S. Ct. at 1454 (Scalia, J., dissenting).

266. See *supra* note 208 and accompanying text.