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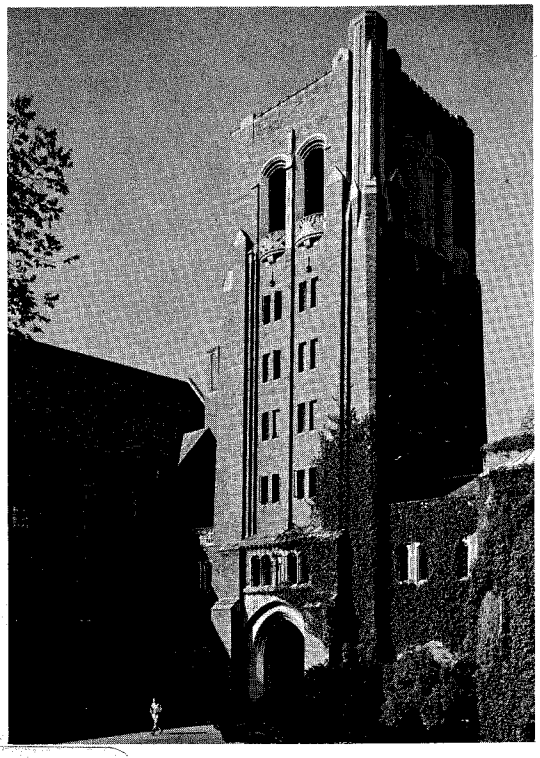

Techniques in the Investigation and Prosecution of Organized Crime

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Volume Two

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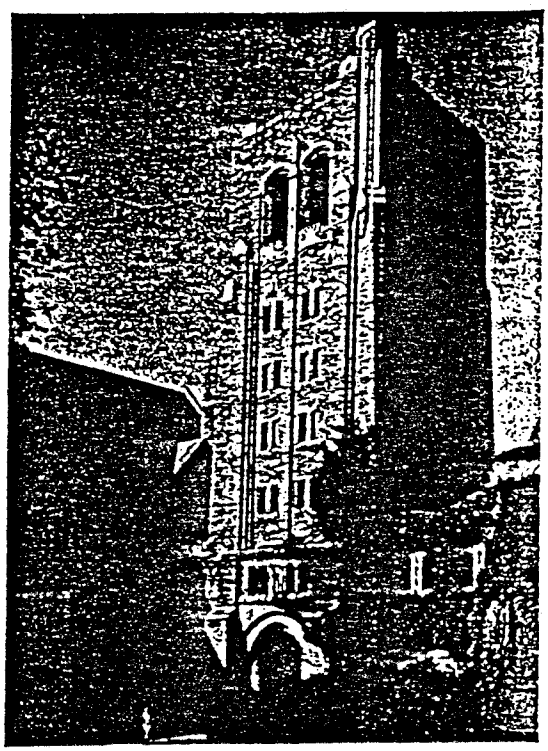

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PREFACE

This project seeks to present a comprehensive and up-to-date analysis of most issues confronting a RICO litigant. These materials represent the combined efforts of Cornell Law School Students supervised by the staff of the Cornell Institute on Organized Crime. The following students participated in researching, writing, and editing these materials.

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Cornell Law School
January, 1980

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CORNELL INSTITUTE ON ORGANIZED CRIME

TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME

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78855

RECOVERY OF THE COST OF SUIT, INCLUDING A REASONABLE ATTORNEY'S FEE

by

JoAnne Murphy

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SUMMARY

¶1 18 U.S.C. § 1964(c) and § 4 of the Clayton Act both provide for the recovery of the cost of suit, including a reasonable attorney's fee in a private treble damage action under RICO and the antitrust laws respectively. It is probable that § 1964(c) will be interpreted in a manner similar to § 4. Both share a common purpose: encouragement of private litigation through insulating the treble damage award from expenditures for legal fees.

¶2 Under § 4, the attorney's fee award accrues to the plaintiff and not to his attorney. This award must be incident to a successful prosecution for the recovery of damages. Antitrust claims that result in settlement do not come under § 4. Attorney's fees may be recovered, however, under the equitable fund doctrine in these cases. Recovery is also allowed for services rendered on appeal. No recovery, however, is allowed for successfully defending antitrust claims or counterclaims.

¶3 The amount awarded is within the discretion of the trial court reasonably exercised. Several factors are usually taken into consideration in determining a reasonable fee. These include the groups of factors listed in Noerr Motor and DR 2-106 as well as several individual factors.

Recently, however, the trend is to start with the number of hours spent, determine a reasonable hourly rate and then adjust that figure to reflect the contingent nature of success and the quality of the attorney's work.

¶4 The trial court will generally fix the amount awarded at an evidentiary hearing. The plaintiff may challenge that award on appeal.

¶5 The "cost of suit" is generally interpreted as those costs normally allowed under 28 U.S.C. § 1920 and Rule 54(d). The trial court has discretion in this area also.

I. RECOVERY OF THE COST OF SUIT, INCLUDING A REASONABLE ATTORNEY'S FEE UNDER RICO § 1964 (c)

A. STATUTORY LANGUAGE

¶6 18 U.S.C. § 1964(c)[1] provides for the recovery of the cost of suit, including a reasonable attorney's fee in a private treble damage action under RICO.

> Any person injured in his business or property by reason of a violation of section 1962 of this [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee.[2]

B. GENERALLY

¶7 This provision is a statutory exception to the American rule on attorneys' fees. The American rule requires each party to a lawsuit to bear the cost of its own lawyer.[3] During recent years, Congress enacted numerous similar statutory exceptions.[4] These statutes generally seek to encourage full enforcement of the underlying law through private litigation. Authorizing an award of reasonable attorneys' fees is designed to facilitate the private plaintiff's effective access to the judicial process.[5]

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[1] 18 U.S.C. § 1964(c) (1976).

[2] Id.

[3] For a general summary of the development of this rule, see Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247-62 (1975).

[4] E.g., Packers and Stockyards Act, 1921, § 309, 7 U.S.C § 210(f) (1976); Bank Holding Company Act Amendments of 1970, § 106(e), 12 U.S.C. § 1975 (1976). See also Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 303-15 (1977).

[5] H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).

¶8 At present, no court has dealt with the recovery of the cost of suit, including a reasonable attorney's fee under § 1964(c) Nevertheless, as Congress modeled § 1964(c) after § 4 of the Clayton Act,[6] it will most likely be interpreted in a similar manner.

[6]15 U.S.C. § 15 (1976).

II. RECOVERY OF THE COST OF SUIT, INCLUDING A REASONABLE ATTORNEY'S FEE UNDER § 4 OF THE CLAYTON ACT

A. STATUTORY LANGUAGE

¶9 § 4 of the Clayton Act[7] authorizes a court to award treble damages plus the cost of suit, including a reasonable attorney's fee to a successful plaintiff. Its statutory language is nearly identical to § 1964(c).

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)[8]

B. ATTORNEYS' FEES

1. PURPOSE OF ALLOWING RECOVERY

¶10 Recovery of a reasonable attorney's fee is mandatory under § 4.[9] The purpose of allowing such recovery is to insulate the treble damage recovery from expenditure for legal fees.[10]

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[7] Id.

[8] Id.

[9] Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 531 n. 2 (3d Cir.), cert. denied, 429 U.S. 825 (1976); Pollock & Riley, Inc. v. Pearl Brewing Co., 362 F. Supp. 335, 336 (W.D. Tex. 1973), aff'd, 498 F.2d 1240 (5th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

[10] Perkins v. Standard Oil Co., 474 F.2d 549, 553, cert. denied, 419 U.S. 940, amended on other grounds, 487 F.2d 672 (9th Cir. 1973); Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 88-89 (1st Cir. 1969); Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 157, 159-60 (S.D.N.Y. 1972).

This interpretation supports Congress' intent that § 4 encourage private litigation by making access to the courts as feasible and rewarding as possible.[11] By encouraging private litigation, § 4 was also meant to contribute to the maintenance of a competitive economy.[12] Furthermore, obligating the antitrust violator to pay attorneys' fees serves a deterrent to violations of the antitrust laws[13] in addition to serving as a present penalty.[14]

2. ACTUAL FEES RECEIVED BY ATTORNEYS

¶11 The court-awarded amount often bears little relationship to the actual fee received by the attorney. According to the statutory language, the sum determined by the court accrues to the plaintiff and not to his attorney.[15] The attorney's actual fee is based upon an agreement negotiated between the plaintiff and his attorney prior to the action. In most cases, this agreement includes a percentage share of the recovery. It may also

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[11] 21 Cong. Rec. 2612 (1890).

[12] In re Clark Oil & Refining Corp. Antitrust Litigation, 422 F. Supp. 503, 510 (E.D. Wis. 1976).

[13] Cf., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977) (Section 4 of the Clayton Act deters wrongdoing).

[14] Farmington Dowel Products Co. v. Forster Mfg. Co., supra note 10 at 90. See also Shires v. Magnavox Co., 432 F. Supp. 231, 235 (E.D. Tenn. 1976), where the court held that treble damages and a reasonable attorney's fee are not assessable against the estate of a deceased defendant due to their punitive nature. The amount of single damanges, however, was assessable against the defendant's estate.

[15] Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 52 (1976), aff'd in part & rev'd in part on other grounds, 567 F.2d 1316 (5th Cir. 1978); Farmington Dowel Products Co. v. Forster Mfg. Co., supra note 10, at 88; First Iowa Hydro Electric Coop. v. Iowa-Illinois Gas & Electric Co., 245 F.2d 630, 632 (8th Cir. 1957).

include a retainer and some or all of the court-awarded amount. Generally, it is the agreed upon percentage of recovery that represents the primary monetary incentive for the plaintiff's lawyer.[16] The court, however, still retains jurisdiction over the percentage and amount of fees received by attorneys in these suits.[17] It is within the court's general powers to prevent excessive fees regardless of the arrangement by which the fee is obtained.[18]

3. TRIAL WORK

a. REQUIREMENT THAT THE AWARD BE INCIDENT TO A SUCCESSFUL PROSECUTION FOR THE RECOVERY OF DAMAGES

¶12 As a general rule, an award of attorney's fees under § 4 can be made only incident to a successful prosecution for recovery of damages.[19] Consequently, no award is allowed for time spent on unsuccessful damage claims.[20] Should the work bear on

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[16] Alioto, The Economics of a Treble Damage Case, 32 Antitrust L.J. 87, 93 (1966); Comment, Attorneys' Fees in Individual and Class Action Antitrust Litigation, 60 Cal. L. Rev. 1656, 1673 (1972).

[17] Farmington Dowel Products Co. v. Forster Mfg. Co., supra note 10, at 87-88.

[18] Id.

[19] Baughman v. Cooper-Jarrett, Inc., supra note 9; City of Detroit v. Grinnell Corp., 495 F.2d 448, 459 (2d Cir. 1974).

[20] DeFilippo v. Ford Motor Co., 516 F.2d 1313, 1321 (3d Cir.), cert. denied, 423 U.S. 912 (1975). But see, Finley v. Music Corp. of America, 66 F. Supp. 569, 571 (S.D. Cal. 1946) where the court held the plaintiff entitled to an attorney's fee award under 15 U.S.C. § 15 if he establishes a right of recovery under that section, even if his proof of damages is too conjectural to support a damage award.

both successful and unsuccessful claims, that work may be taken fully into account.[21]

¶13 Similarly, no attorneys' fees may be recovered for time spent seeking injunctive relief under § 4.[22] Such fees are recoverable under § 16 of the Clayton Act as amended in 1976.[23] Section 16 provides that the court shall award the cost of suit, including a reasonable attorney's fee where injunctive relief is awarded.[24]

b. SETTLEMENT OF ANTITRUST CLAIMS

¶14 Where settlement occurs prior to judgment, attorneys' fees may not be awareded under § 4[25] Although this precludes the individual plaintiff from recovering attorneys' fees, the equitabl fund doctrine may be used to allow recovery in class actions.[26]

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[21] Kane v. Martin Paint Stores, Inc., 439 F. Supp. 1054, 1057 (S.D.N.Y. 1977), aff'd, 578 F.2d 1368 (2d Cir. 1978).

[22] Phillips v. Crown Central Petroleum Corp., 426 F. Supp. 1156, 1171 (D. Md. 1977); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 482 (S.D.N.Y. 1970), modified on other grounds, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973).

Some courts also award attorneys' fees under § 4 where the defendant successfuly prosecutes an antitrust counterclaim to the plaintiff's patent infringement claim. Acme Precision Products, Inc. v. American Alloys Corp., 347 F. Supp. 376, (W.D. Mo. 1972), rev'd on other grounds, 484 F.2d 1237 (8th Cir. 1973).

[23] 15 U.S.C. § 26 (1976).

[24] Id.

[25] City of Detroit v. Grinnell Corp. supra note 19, at 468-69; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 164 (3d Cir. 1973) (Lindy I).

[26] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 110 (3d Cir. 1976) (Lindy II); City of Detroit v. Grinell Corp., supra note 19, at 469; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973) (Lindy II).

Under this doctrine, attorneys' fees are awarded only for services that conferred a benefit upon the class represented.[27] The benefit conferred need not be pecuniary.[28] Further, the equitable fund doctrine allows not only the plaintiff, but also his attorney, standing to file a claim or challenge an award on appeal.[29]

c. NO RECOVERY FOR SUCCESSFUL DEFENSE OF ANTITRUST CLAIMS OR COUNTERCLAIMS

¶15 Attorneys' fees may not be awarded to a successful defendant in a private antitrust action.[30] Such an award would dampen the incentive to bring private suits and constitute a penalty should the plaintiff fail to win his case.[31] Similarly, there can be no recovery for a plaintiff who successfully defends an antitrust counterclaim.[32] Presumably, recovery in this situation

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[27] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 111 (3d Cir. 1976) (Lindy II); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973) (Lindy I); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680-90 (D. Minn. 1975).

[28] Merola v. Atlantic Richfield Co., 515 F.2d 165, 169-70 (3d Cir. 1975); Arenson v. Board of Trade of Chicago, 372 F. Supp. 1349, 1356 (N.D. Ill. 1974).

[29] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 110 (3d Cir. 1976) (Lindy II); City of Detroit v. Grinnell Corp., supra note 19, at 469; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F. 2d 161, 165 (3d Cir. 1973) (Lindy I).

[30] Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649, 651 (3d Cir. 1967), cert. denied, 377 U.S. 916 (1964).

[31] Id.

[32] Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 483 (S.D.N.Y. 1970), modified on other grounds, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973); Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 489 (E.D. Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966).

would have the same dampening effects. Further, recovery in these situations would be inconsistent with the punitive purpo of awarding legal fees under § 4.[33]

4. APPELLATE WORK

a. RECOVERY FOR APPELLATE WORK ALLOWED

¶16 Appellate work done in a successfully prosecuted anti-trust action in compensable under § 4 of the Clayton Act.[34] The district court will generally fix the amount of the award after hearing evidence as to the nature and extent of services rendered on appeal.[35] Appellate courts may also award attorneys' fees under § 4 for such services.[36]

5. AMOUNT OF AWARD WITHIN THE TRIAL COURT'S DISCRETION

¶17 As a general rule, the amount to be awarded as attorneys' fees under § 4 is within the discretion of the trial court reasonably exercised.[37] That award will not be disturbed by an appellate court unless the trial court commits an abuse of discretion.[38] An abuse of discretion occurs where the trial

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[33] Farmington Dowel Products Co. v. Forster Mfg. Co., supra note 10 at 90.

[34] Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970).

[35] Id.

[36] E.g., Carpa, Inc. v. Ward Foods, Inc., supra note 15, at 55-56.

[37] E.g., Volasco Products Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661, 667 (6th Cir.), cert. denied, 382 U.S. 904 (1965).

[38] Id.

court errs as a matter of law by utilizing improper standards or procedures in determining a reasonable fee.[39] The judgment of the trial court, however, should not be lightly set aside.[40]

¶18 Under special circumstances, an appellate court may have more than its usual latitude in determining whether the trial court abused its discretion. In Twentieth Century Fox Film Corp. v. Goldwyn,[41] the court stated that it may

> ... have somewhat more latitude in determining whether there has been an abuse of discretion than would be true in the usual case, since the judge who fixed the fee came into the case after most of the legal services had been rendered.[42]

¶19 Similarly, in Perkins v. Standard Oil Co.,[43] the appellate court undertook a broader than usual review where it reviewed the district court's appraisal of services rendered on appeal in another court.[44] The court stated that it need not accord the district court's decision

> the deference that would be given to decisions which involved matters within the "first-hand" knowledge of the District Court and which come within its special competence.[45]

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[39] Merola v. Atlantic Richfield Co., 493 F.2d 292, 295 (3d Cir. 1974).

[40] William H. Rankin Co. v. Associated Bill Posters, 42 F.2d 152, 156 (2d Cir.), cert. denied, 282 U.S. 864 (1930).

[41] 328 F.2d 190 (9th Cir.), cert. denied, 379 U.S. 880 (1964).

[42] Id. at 221.

[43] 474 F.2d 549, cert. denied, 412 U.S. 940; amended on other grounds, 487 F.2d 672 (9th Cir. 1973).

[44] Id. at 552.

[45] Id.

Further, the district court judge who made the award was not the original trial judge and

> necessarily lacked the trial judge's intimate knowledge of the proceedings, the issues in the original suit, and the intricacies in the presentation of these issues on the appeal.[46]

6. FACTORS CONSIDERED IN DETERMINING AMOUNT OF AWARD

a. TRIAL WORK

¶20 Generally, a court will take a number of factors into consideration in deciding upon a reasonable attorney's fee. Two groups of factors are frequently cited. The first group is the list of factors enunciated in Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference[47] (Noerr Motor). The second group is listed in DR 2-106 of the A.B.A. Code of Professional Responsibility.[48]

¶21 The list in Noerr Motor includes:

1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the government;
2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel;
3) time and labor spent;
4) magnitude and complexity of the litigation;
5) responsibility undertaken;
6) the amount recovered; and
7) the knowledge the Court has of the conferences, arguments that were presented, and work shown by the record to have been done by attorneys for the plaintiff prior to trial.[49]

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[46] Id.

[47] 166 F. Supp. 163 (E.D. Pa. 1958), aff'd, 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds, 365 U.S. 127 (1961).

[48] ABA Code of Professional Responsibility DR 2-106.

[49] Noerr Motor Freight, Inc. v. Eastern Railroad President's Conference, 166 F. Supp. 163, 168-69 (E.D. Pa. 1958), aff'd, 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds, 365 U.S. 127 (1961).

¶22 The court noted that the reasonableness of an attorney's fee can only be determined with reference to a particular case.[50] The test to be applied was that amount which, in the opinion of the trial judge, after considering the above factors, would be a reasonable charge for the services of plaintiff's counsel.[51]

¶23 These factors have been referred to and utilized by a majority of the circuits, including the third, fourth, seventh, eighth and ninth circuits.[52] Courts in the second circuit also recognized these factors but considered the major factors to be the complexity of problems presented, the skill of counsel, and the measure of success achieved by counsel.[53] The other factors cited in Noerr Motor were considered to be subsidiary to these and while helpful in evaluating them, did not constitute a basis for fixing the fee.[54] In Farmington Dowel Products, Co. v. Forster Mfg. Co.,[55] the first circuit agreed that the seven Noerr

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[50] Id. at 168.

[51] Id. at 170.

[52] Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 390 n. 15 (8th Cir.), cert. denied, 419 U.S. 836 (1974); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 70 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 221 (9th Cir.), cert. denied, 379 U.S. 880 (1964); Locklin v. Day-Glo Color Corp., 378 F. Supp. 423, 426-27 (N.D. Ill. 1974); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258, 302-03 (M.D. Pa. 1965), vacated on other grounds, 377 F. 2d 776 (3d Cir. 1967), aff'd in part and rev'd in part on other grounds, 392 U.S. 481 (1968).

[53] Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 157, 160 (S.D.N.Y. 1972); Trans World Airlines, Inc. v. Hughes, supra note 32, at 484.

[54] Id.

[55] 421 F.2d 61 (1st Cir. 1969).

Motor factors are appropriate ones but do not constitute an all-inclusive list.[56]

¶24 DR 2-106[57] states another group of factors frequently cited.[5] The list in DR 2-106 includes:

> 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause;
> 2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likly to arise out of the transactions, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients;
> 3) the customary charges of the Bar for similar services;
> 4) the amount involved in the controversy and the benefits resulting to the client from the services;
> 5) the contingency or the certainty of the compensation; and
> 6) whether casual or for an established and constant client

¶25 The overlap between this group and that in Noerr Motor is considerable.[60] Moreover, some courts, particularly in the fifth

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[56] Id. at 89.

[57] Supra note 48.

[58] American Can Co. v. Ladoga Canning Co., 44 F.2d 763, 772 (7th Cir. 1930), cert. denied, 282 U.S. 899 (1931); Union Leader Corp. v. Newspaper of New England, Inc., 218 F. Supp. 490, 492 (D. Mass. 1963), set aside on other grounds sub nom Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir.), cert. denied, 379 U.S. 931 (1964); Osborn v. Sinclair Refining Co., 207 F. Supp. 856, 864 (D. Md. 1962), rev'd on other grounds, 324 F. 2d 566 (4th Cir. 1963); Bal Theater Corp. v. Paramount Film Distributing Corp., 206 F. Supp. 708, 716-18 (N.D. Cal. 1962).

[59] See Osborn v. Sinclair Refining Co., supra note 58.

[60] Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 89 (1st Cir. 1969).

circuit, consider factors from both groups.[61]

¶26 Some cases have stressed individual factors in determining a reasonable fee. These factors include the amount recovered,[62] the quality of counsel,[63] the difficulty of the case,[64] the private fee arrangement,[65] whether the case had a public benefit,[66] the reputation of the bench and bar,[67] and time spent by counsel,[68] including an hourly rate of compensation.[69]

¶27 The amount recovered is taken into consideration by all of the circuits.[70] It is seldom, however, considered to be the sole

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[61] Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339, 1349 (S.D. Tex, 1976); Wynn Oil Co. v. Purolator Chemical Corp., 391 F. Supp. 522, 524-25 (M.D. Fla. 1974).

[62] E.g., Trans World Airlines, Inc. v. Hughes, supra note 32, at 484.

[63] E.g., Union Leader Corp. v. Newspaper of New England, Inc., supra note 58, at 493.

[64] E.g., Advance Business Systems & Supply Co. v. SCM Corp., 415 F. 2d 55, 70 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

[65] E.g., Farmington Dowel Products Co. v. Forster Mfg. Co., supra note 60, at 88.

[66] Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 157, 162 (S.D.N.Y. 1972).

[67] Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, 570 (7th Cir. 1951), cert. denied, 342 U.S. 909 (1952).

[68] E.g., Trans World Airlines v. Hughes supra note 32, at 482.

[69] E.g., DeFilippo v. Ford Motor Co., 378 F. Supp. 456, 470-71 (E.D. Pa. 1974), aff'd in part and rev'd in part on other grounds, 516 F. 2d 1313 (3d Cir.), cert. denied, 423 U.S. 912 (1975).

[70] Supra note 62. See also, e.g., Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F. 2d 383, 390 (8th Cir.), cert. denied, 419 U.S. 836 (1974); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 70 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

determinative factor.[71] Nevertheless, several courts recognized that in some cases, a percentage of the damages recovered may alone be a reasonable basis for awarding a fee.[72] In most instances, the reasonableness of the award is measured against the amount of single damages awarded.[73] But where the amount of single damages is small, the award for attorneys' fees may be greater in amount if reasonable under all the circumstances.[74]

¶28 The quality of counsel is almost always considered relevant. Several cases stressed the fact that plaintiff's attorneys were highly competent. These include cases from the First,[75] Third,[76] Fifth[77] and Ninth[78] Circuits. Similarly, the diffi-

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[71] But see Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir. 1961), cert. denied, 371 U.S. 801 (1962).

[72] Union Leader Corp. v. Newspaper of New England, Inc., supra note 58, at 493; Noerr Motor Freight, Inc. v. Easter Railroad Presidents Conference, supra note 49, at 170. Neither case, however, actually relied on the percentage theory alone.

[73] Milwaukee Towne Corp. v. Loew's, Inc., supra note 67, at 571; Trans World Airlines, Inc. v. Hughes, supra note 32, at 484.

[74] Morning Pioneer, Inc. v. Bismarck Tribune Co., supra note 70; Advance Business Systems & Supply Co. v. SCM Corp., supra note 70; Locklin v. Day-Glo Color Corp., supra note 52, at 428.

[75] Union Leader Corp. v. Newspaper of New England, Inc., supra note 58, at 493.

[76] Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1181 (W.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978).

[77] Cook v. Ralston Purina Co., 366 F. Supp. 999, 1013-14 (M.D. Ga. 1973).

[78] Bal Theatre Corp. v. Paramount Film Distributing Corp., 206 F. Supp. 708, 718 (N.D. Cal. 1962).

culty of the case has also been stressed as a major determinative factor.[79]

¶29 The private fee arrangement between the plaintiff and his attorney is generally held not relevant to the determination of a reasonable fee.[80] Several courts, however, do consider it relevant in that the amount awarded should not exceed the amount actually received by the attorney.[81]

¶30 The time spent by counsel is considered in virtually every case.[82] For example, a court may consider whether the hours claimed represent unnecessary duplication of effort and reduce the amount awarded accordingly.[83]

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[79] Supra note 64. See also, e.g., Milwaukee Towne Corp. v. Loew's, Inc., supra note 67, at 57-71, where the court found the case not difficult; Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 702 (9th Cir. 1977), vacated on other grounds, 437 U.S. 322 (1978), where the court found the case unusually complex.

[80] Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 88 (1st Cir. 1969); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 570 (7th Cir. 1951), cert. denied, 342 U.S. 909 (1952).

[81] Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339, 1351 (S.D. Tex. 1976); Vandervelde v. Put & Call Brokers & Dealers Ass'n., 344 F. Supp. 157, 161 (S.D.N.Y. 1972); Gossner v. Cache Valley Dairy Ass'n., 307 F. Supp. 1090, 1091 (D. Utah 1970).

[82] E.g., significant attention was paid to the time spent by counsel in Trans World Airlines v. Hughes, supra note 32, at 482, and Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n of America, 393 F.2d 75, 77 (9th Cir.), cert. denied, 393 U.S. 938 (1968).

[83] Computer Statistics, Inc. v. Blair, supra note 81, at 1350.

¶31 Recent decisions appear to be altering the traditional approaches of Noerr Motor and DR 2-106 in fixing a reasonable attorney's fee.[84] Under these traditional approaches, the number of hours spent and the attorney's normal billing rate were factors whose importance did not exceed such other factors as the complexity of the case or the skill of counsel.[85] Indeed, some courts gave these factors less consideration than other factors such as those mentioned above.[86]

¶32 Recent cases, however, have set down a method of calculation for the trial court to follow in computing attorneys' fees. This method was best described in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.[87]

¶33 The trial court should first inquire into the hours spent by the plaintiff's attorneys—how many hours were spent in what manner (e.g, discovery, oral argument) and by which attorneys (e.g. partners, associates).[88] The next step is

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[84] DeFilippo v. Ford Motor Co., supra note 69, at 470.

[85] Osborn v. Sinclair Refining Co., supra note 58; Noeu Motor Freight, Inc. v. Eastern Railroad Presidents Conference, supra note 49.

[86] Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 483 (S.D.N.Y. 1970), modified on other grounds, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973); Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra note 52, at 303.

[87] 540 F.2d 102 (3d Cir. 1976) (Lindy II); 487 F.2d 161 (3d Cir. 1973) (Lindy I).

[88] Supra note 87, 487 F.2d at 167.

valuation of those services. The trial court should determine a fair, normal hourly rate for each attorney based on his experience, standing, and skill.[89] This rate may vary for different activities.[90]

¶34 The amount reached in this manner, the lodestar figure, may then be adjusted either upward or downward to reflect special considerations.[91] These special considerations generally include the contingent nature of success and the quality of the attorney's work.[92] The trial court should make specific findings of fact as to each.[93]

¶35 In considering "the contingent nature of success," the trial court should appraise the probability of success as of the time of filing suit.[94] Important factors here include the complexity of the case, the probability of the defendant's liability, an evaluation of the damages, the number of hours risked without guarantee of payment, and the amount of out-of-

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[89] Id.

[90] Id.

[91] Supra note 87, 540 F.2d at 118; supra note 87, 487 F.2d at 168. See also Wynn Oil Co. v. Purolator Chemical Corp., 391 F. Supp. 522, 524-25 (M.D. Fla. 1974).

[92] Supra note 87, 540 F.2d at 117; supra note 87, 487 F.2d at 168. This resulted in four times the normal billing rate in Arenson v. Board of Trade of Chicago, 372 F. Supp. 1349, 1358 (N.D. Ill. 1974).

[93] Supra note 87, 540 F.2d at 117.

[94] Id.

pocket expenses advanced.[95] In considering "the quality of the attorney's work," the court should only adjust the lodestar figure to take account of an unusual degree of skill, be it unusually poor or unusually good.[96] Factors to evaluate here include the quality of work observed, the complexity and novelty of the issues presented, and the recovery obtained.[97]

¶36 This method has been widely adopted in cases involving class action settlements.[98] Moreover, several courts recently held this method applicable in cases involving awards under § 4 of the Clayton Act.[99] In Defilippo v. Ford Motor Co.,[100] the court recognized that the attorneys' fees awarded under § 4 are not the same as those awarded from the fund recovered

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[95] Id.

[96] Id. at 118.

[97] Supra note 87, 540 F.2d at 118; supra note 87, 487 F.2d at 168.

[98] E.g., Grunin v. International House of Pancakes, 513 F.2d 114, 127 (8th Cir.), cert. denied, 423 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448, 470-73 (2d Cir. 1974); Liebman v. J.W. Petersen Coal & Oil Co., 63 F.R.D. 684, 690-91 (N.D. Ill. 1974). See also DeFilippo v. Ford Motor Co., supra note 69, at 470.

[99] Pitchford Scientific Instruments Corp. v. Pepi, Inc., supra note 76, at 1177; Kane v. Martin Paint Stores,Inc., 439 F. Supp. 1054, 1055 (S.D.N.Y. 1977). aff'd, 578 F.2d 1368 (2d Cir. 1978); Phillips v. Crown Central Petroleum Corp., 426 F. Supp. 1156, 1170 (D. Md. 1977); Wynn Oil Co. v. Purolator Chemical Corp., supra note 91, at 524; DeFilippo v. Ford Motor Co., supra note 69, at 470.

[100] 378 F. Supp. 456, 470 (E.D. Pa. 1974), aff'd in part & rev'd in part on other grounds, 516 F.2d 1313 (3d Cir.), cert. denied, 423 U.S. 912 (1975).

for a plaintiff class pursuant to a court's general powers under Rule 23.[101] A § 4 award accrues directly to the plaintiff and usually does not represent what the attorney will actually receive.[102] In contrast, the class action award is based upon recovery in quantum merit and does determine how much the attorney will receive.[103] The court concluded, however, that the Lindy method is the only rational basis for arriving at a reasonable attorney's fee under either situation.[104]

b. APPELLATE WORK

¶37 In Perkins v. Standard Oil Co.,[105] the Supreme Court held that § 4 of the Clayton Act authorizes the recovery of attorneys' fees for services performed at the appellate stages of a successful private action.[106] On appeal after remand, the Ninth Circuit noted that the amount allowed should generally be less than that allowed for services at the trial level.[107] The court reasoned that an appeal is not a separate lawsuit

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[101] Fed. R. Civ. P. 23.

[102] Supra notes 15 & 16.

[103] Supra note 100. See also Springer, Fee Awards in Antitrust Litigation, 44 Antitrust L.J. 97, 98 (1974-1975).

[104] Supra note 100.

[105] 399 U.S. 222 (1970).

[106] Id. at 223.

[107] Perkins v. Standard Oil Co., 474 F. 2d 549, 553, cert. denied, 412 U.S. 940, amended on other grounds, 487 F. 2d 672 (9th Cir. 1973).

but rather a continuation of a lawsuit which has already progressed considerably.[108] Furthermore, the amount allowed need not fully reimburse the plaintiff for his legal fees on appeal.[109] Rather, the question should be what contribution the defendant should make toward the fees of plaintiff's counsel.[110] Accordingly, the award should be neither extravagant nor parsimonious, but reasonable within the exercise of sound discretion.[111]

¶38 The court also considered the factors referred to in Noerr Motor.[112] They were found to be of doubtful or no relevance in determining a reasonable fee for appellate services.[113] Recognizing the different natures of services rendered on appeal and at trial, the court stated that

> [a]nti-trust litigation is most complex at the initial stages ... . Appellate services, on the other hand, are of a derivative nature, performed within the frame of the case as developed at trial.[114]

Accordingly, fees found to be excessive for appellate services were reduced to reasonable amounts.[115]

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[108] Id.

[109] Id.

[110] Id.

[111] Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 55-56 (1976), aff'd in part & rev'd in part on other grounds, 567 F. 2d 1316 (5th Cir. 1978).

[112] Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, supra note 49.

[113] Perkins v. Standard Oil Co., supra note 107, at 552.

[114] Id.

[115] Id. at 554-55.

7. PROCEDURAL POINTS

a. EVIDENTIARY HEARINGS

¶39 Attorneys' fees under § 4 of the Clayton Act should be awarded after the court has held an evidentiary hearing.[116] At this hearing, the plaintiff's attorneys should present evidence as to the nature and extent of services rendered.[117] Generally, counsel must be prepared to submit a detailed record of the time spent on the case.[118] Mere listing of hours, however, will not suffice in the absence of supporting affidavits or proof in court.[119]

¶40 Expert testimony may be used but is not necessary to establish the value of an attorney's services.[120] Should

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[116] Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970); City of Detroit v. Grinnell Corp., supra note 98, at 468; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 169 (3d Cir. 1973) (Lindy I).

[117] Id.

[118] City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1391 (S.D.N.Y. 1972), aff'd in part, rev'd in part on other grounds & dismissed in part, 495 F.2d 448 (2d Cir. 1974); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., supra note 116, at 167. See also DeFilippo v. Ford Motor Co., supra note 100, where the court placed the burden of showing the number of hours spent and the normal billing rate on the attorney seeking the award where the Lindy method of calculating attorneys' fees is used; Pitchford Scientific Instruments Corp. v. Pepi, Inc., supra note 76, at 1179, where the court held that the time spent litigating the amount awarded as a reasonable fee may be included in that award.

[119] Merola v. Atlantic Richfield Co., 493 F.2d 292, 294 n. 7 (3d Cir. 1974).

[120] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., supra note 116, at 169.

such testimony be submitted, the courts are not bound by it.[121] Indeed, the court may base the award upon only the record and its own expert knowledge without any specific testimony as to the reasonable value of the services rendered.[122]

b. STANDING TO CHALLENGE

¶41 A successful plaintiff has a statutory right to an award of attorneys' fees under § 4.[123] This gives the plaintiff standing to challenge the granting or failure to grant of such an award.[124] The plaintiff's attorney, however, has no statutory right under § 4; he, therefore, has no standing to challenge the award.[125]

c. APPELLATE REVIEW

¶42 On appeal, the party who seeks review of the attorney's fee award has the burden of clearly demonstrating error as to

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[121] Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 859 (8th Cir.), cert. denied, 343 U.S. 942 (1952).

[122] Id.

[123] Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 531 n. 2 (3d Cir.), cert. denied, 429 U.S. 825 (1976); Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 86-87 n. 57 (1st Cir. 1969).

[124] Farmington Dowel Products Co. v. Forster Mfg. Co., supra note 123.

[125] Id. In the case of a class action settlement, both the plaintiff and his attorney have a cause of action. See supra note 29.

[126] E.g., South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 794 (6th Cir. 1970), cert. denied, 402 U.S. 983 (1971); Armco Steel Corp. v. North Dakota, 376 F.2d 206, 212 (8th Cir. 1967).

the factual basis of the award or abuse as to the discretional margin in its allowance.[126] Where appellate review is even a remote possibility, plaintiff's attorneys should request the trial court to hold a hearing on the matter of attorneys' fees.[127] A record of this hearing should be included in the printed record filed with the appellate court to facilitate that court's review.[128] Without such a record, the appellate court will have no basis for determining whether the party seeking review has met his burden.[129] Further, where appellate review is sought by the plaintiff, he should not attempt to raise the matter during the course of the defendant's appeal.[130] Rather, the plaintiff should file an appeal or cross-appeal of his own.[131]

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[127] North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189, 196-97 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966).

[128] Armco Steel Corp. v. North Dakota, supra note 126. The court noted that without a record of the trial court's hearing on the matter, it could not hold a $72,500 award legally incapable of being reasonable.

[129] Id.

[130] North Texas Producers Ass'n v. Metzger Dairies, Inc., supra note 127. The court noted that in absence of a cross-appeal, an appellate court could not enlarge the rights of the plaintiff/appellee.

[131] Id.

C. COSTS

1. MANDATORY RECOVERY BY SUCCESSFUL PLAINTIFF

¶43 Recovery of the cost of suit by a successful plaintiff is mandatory under § 4.[132] The court must first determine the proper relevance of particular costs,[133] and may then exercise its discretion on whether to allow them.[134] Many of the larger items of costs under § 4 are discretionary and may be disallowed by the court.[135] The court, however, should not parsimoniously exercise its broad discretionary power in allowance or disallowance of costs.[136]

¶44 The "cost of suit" is interpreted by the courts to mean

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[132] Pollock & Riley, Inc. v. Pearl Brewing Co., 362 F. Supp. 335, 337 (W.D. Tex. 1973), aff'd, 498 F.2d 1240 (5th Cir. 1974), cert. denied, 420 U.S. 992 (1975); Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872, 900 (E.D. Pa. 1973). See also Lewis v. Pennington, 400 F.2d 806, 819 (6th Cir.) (no express provison for costs where plaintiff fails to prove his antitrust claims), cert. denied, 393 U.S. 983 (1968).

[133] Pollock & Riley, Inc. v. Pearl Brewing Co., supra note 132 (jury has no part in the matter of awarding costs).

[134] Ledge Hill Farms, Inc. v. W.R. Grace & Co., 230 F. Supp. 638, 641 (S.D.N.Y. 1964).

[135] Leslie One-Stop in Pennsylvania, Inc. v. Audiofidelity, Inc., 33 F.R.D. 16, 17 (S.D.N.Y. 1963).

[136] Advance Business Systems & Supply Co. v. SCM Corp., 287 F. Supp. 143, 162 (D. Md 1968), aff'd, 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

those normally allowed under 28 U.S.C. § 1920[137] and Rule 54(d) of the Federal Rules of Civil Procedure.[138] Consequently, § 4 does not allow a plaintiff to recover all the expenses incurred in preparing and trying a case.[139] When costs are sought for items not listed in a federal statute, the plaintiff should obtain the district court's approval in advance of trial.[140]

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[137] 28 U.S.C.A § 1920 (1966 & Supp. 1979).

> A judge or clerk of any court of the United States may tax as costs the following:
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[138] Fed. R. Civ. P. 54(d).

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court. See Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.), cert. denied, 379 U.S. 880 (1974); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 586-87 (10th Cir. 1961), cert. denied, 371 U.S. 801 (1962).

[139] Brookside Theatre Corp. v. Twentieth Century Fox Film Corp., 11 F.R.D. 259, 265 (W.D. Mo. 1951), modified on other grounds, 194 F.2d 846 (8th Cir.), cert. denied, 343 U.S. 942 (1952).

[140] Id. at 267.

This may be accomplished by an application to the district court for an approving order or during pre-trial conference.[141]

¶45 Examples of items that have been allowed as costs include paralegal services,[142] electronic data retrieval services (e.g., Lexis),[143] and the cost of reproducing documents.[144] Examples of items that have been disallowed include stenographer's minutes,[145] accounting fees,[146] long distance toll calls,[147] expert witness fees,[148] and personal expenses of counsel.[149]

¶46 Under Rule 54(d),[150] the prevailing party is entitled to

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[141] Id.

[142] Dorey Corp. v. E. I. DuPont deNemours & Co., 426 F. Supp. 944, 949 (S.D.N.Y. 1977); Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339, 1352 (S.D. Tex. 1976).

[143] Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1178 (W.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978).

[144] Twentieth Century Fox Film Corp. v. Goldwyn, supra note 138, at 224.

[145] Straus v. Victor Talking Mach. Co., 297 F. 791, 807 (2d Cir. 1924).

[146] Twentieth Century Fox Film Corp. v. Goldwyn, supra note 138, at 224; Union Carbide & Carbon Corp. v. Nisley, supra note 138, at 586.

[147] Brookside Theatre Corp. v. Twentieth Century Fox Film Corp., supra note 139, at 265. Contra, Dorey Corp. v. E. I. duPont deNemours & Co., supra note 142 (toll calls allowed as costs; no objections made to application for reinbursement).

[148] Ott v. Speedwriting Publishing Co., 518 F.2d 1143, 1149 (6th Cir. 1975); Trans World Airlines, Inc. v. Hughes, supra note 86, 449 F.2d at 81; Brookside Theatre Corp. v. Twentieth Century Fox Film Corp., supra note 139, at 267.

[149] Brookside Theatre Corp. v. Twentieth Century Fox Film Corp., supra note 139, at 268.

[150] Supra note 138.

costs unless the court otherwise directs.[151] Consequently, should the defendant prevail, costs will be assessed against the plaintiff.[152] A defendant may make an application to the court to require the plaintiff to post security for these costs.[153] Whether or not to require such security is a matter of discretion for the court.[154] Generally, security will be required only when the lawsuit is of dubious merit and the plaintiff's financial responsibility is questionable.[155]

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[151] Ledge Hill Farms, Inc. v. W.R. Grace & Co., supra note 134, at 640-41.

[152] Fed. R. Civ. P. 54(d), supra note 138.

[153] Minneapolis Gasoline & Fuel Co. v. Ethyl Gasoline Corp., 38 F. Supp. 454, 454 (S.D.N.Y. 1941).

[154] Leslie One-Stop in Pennsylvania, Inc. v. Audiofidelity, Inc., supra note 135; Minneapolis Gasoline & Fuel Co. v. Ethyl Gasoline Corp., supra note 153.

[155] State Wide Enterprises, Inc. v. United States Gypsum Co., 238 F. Supp. 604, 606 (E.D. Mich. 1965). See also Leslie One-Stop in Pennsylvania, Inc. v. Audiofidelity, Inc., supra note 135, where the lawsuit was not obviously without merit, and the amount that would be ultimately taxed as costs could not be predicted, but the court required security as plaintiff was a mere corporate shell without a business or assets.

III. APPLICABILITY OF CASE LAW UNDER § 4 OF THE CLAYTON ACT TO RICO § 1964(c)

A. SIMILAR INTERPRETATION LIKELY

¶47 As RICO § 1964(c)[156] was modeled after § 4 of the Clayton Act, the courts are likely to interpret both in a similar manne The purpose behind awarding the cost of suit, including a reasonable attorney's fee, is the same under both statutes.[157] In authorizing such awards, Congress sought to encourage privat litigation and deter violations of the underlying substantive offenses.[158] In all likelihood, the case law under § 4 will be applied to similar cases under RICO § 1964(c).

¶48 One key difference between RICO and § 4 should be noted. Attorney fees were disallowed under § 4 for the obtaining of injunctive relief, as noted above. It would ap[illegible]r, however, that the different statutory context of RICO, where the injunctive authorization appears in (a), and the right to sue and the value of special recovery appears in (c), the courts will authorize recovery of fees and costs in both kinds of litigation under RICO.

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[156] 18 U.S.C. § 1964(c) (1976).

[157] See ¶¶6,9 supra.

[158] See ¶7, supra.

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INSTITUTING A RICO CIVIL TREBLE DAMAGES ACTION: JURISDICTION, VENUE, SERVICE OF PROCESS, PLEADING AND PARTIES

By

Michael S. Smith

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Summary

¶ 1 Title IX of the Organized Crime Control Act of 1970, the Racketeer Influenced and Corrupt Organizations Statute,[1] provides a civil forum for a person injured by reason of a violation of its criminal provisions. Any person so injured may sue in the appropriate federal district court and receive, if successful, treble damages plus a reasonable attorney's fee.[2]

¶ 2 Since the statute was enacted in 1970, there have been four reported private, civil, treble damages actions brought pursuant to RICO.[3] It follows that any analysis of the statute will be severely hampered by the scarcity of reported case law. This task is aided somewhat by the RICO statute's close resemblance, at least in the area of civil procedure, to the federal antitrust laws.[4] Through interpretation of applicable antitrust

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[1] 18 U.S.C. §§ 1961 et. seq, (1976) [hereinafter cited as RICO].

[2] 18 U.S.C. § 1964(c) (1976):

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

[3] See, e.g., Farmer's Bank v. Bell Mortgage Co., 452 F. Supp. 1278 (D. Del. 1978); King v. Vesco, 342 F. Supp. 120 (N.D. Cal. 1972). Both cases deal with the issues of improper venue. Neither produced a reported decision on the merits.

The dearth of activity produced by the civil provisions of the statute may be the result of ignorance by the public and the legal profession of its potential usefulness.

[4] See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 reprinted in [1970] U.S. Code Cong. & Ad. News 4007, 4034.

Section 1965 contains broad provisions regarding venue and process, which are modeled on present antiturst legislation.

provisions, a comprehensive, albeit tentative, analysis of the civil procedure of the RICO statute is possible. These materials will discuss the procedure by which a civil plaintiff injured by reason of a violation of the RICO statute may initiate the action in federal court.

I. Where Can The Action Be Commenced?

A. Subject-Matter Jurisdiction

1. Federal Question

¶ 3 The federal courts are courts of limited jurisdiction. They may hear only those controversies the Constitution and Congressional enabling legislation permit.[5] In a civil action, the federal district courts have jurisdiction over the subject matter of the controversy if there is a "federal question" involved,[6] or if all the parties reside in different states.[7]

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[5] See C. Wright, Federal Courts, § 7 at 17 (3d ed. 1976); 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure, Jurisdiction § 3522 (1976) [hereinafter cited as Fed. Prac. and Pro.]

[6] 28 U.S.C. § 1331(a) (1976):

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States, . . .

[7] 28 U.S.C. § 1332(a) (1976):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, . . . and is between -
> (1) citizens of different states;
> (2) citizens of a state and citizens or subjects of a foreign state;
> (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; . . . .

With some exceptions, the amount in controversy must exceed $10,000.[8]

¶ 4 A valid civil action brought pursuant to the RICO statute necessarily involves a federal question.[9] The statute itself grants original jurisdiction to the United States distrcit courts if suit is brought pursuant to its provisions.[10] The jurisdiction of the federal courts is probably exclusive. While it has not been ruled on, the federal courts are held to have exclusive jurisdiction over the analogous antitrust provisions.[11]

2. Amount in Controversy

¶ 5 It is unclear whether the amount in controversy in a civil case brought under RICO must exceed $10,000. Analogous provisions in the antitrust laws expressly grant jurisdiction regardless of amount in controversy.[12] RICO is silent on

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[8] 28 U.S.C. §§ 1331(a), 1332(a) (1976). Exceptions to this general rule are discussed infra at ¶¶ 5-6.

[9] 28 U.S.C. § 1331(a) (1976); see note 6, supra.

[10] 18 U.S.C. § 1964(c) (1976):

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

[11] Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 287 (1922); Engelhardt v. Bell & Howell Co., 327 F.2d 30, 35 (8th Cir. 1964); L.S. Good & Co. v. H. Daroff & Sons, Inc., 263 F. Supp. 635, 643 (N.D.W. Va. 1967).

If a RICO or antitrust claim is erroneously brought in state court, the only remedy is dismissal. A court cannot transfer a case to another court if it lacks subject matter jurisdiction. General Inv. Co. v. Lake Shore & Mich. S. Ry. Co., id. at 288. See ¶¶ 55-58, supra.

[12] 15 U.S.C. § 15(a) (1976).

that issue. Title 28, section 1331(a) of the United States Code requires the jurisdictional minimum amount in federal question cases,[13] yet a large number of federal statutes grant jurisdiction to the district courts, regardless of amount in controversy in many areas that would normally fall under the general federal question statute.[14]

¶ 6 No jurisdictional amount requirement exists in cases brought under section 1337 of Title 28.[15] Section 1337 reads:

> The district courts shall have original jurisdiction of any civil action or proceeding arising, under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.[16]

The RICO statute is a regulation of interstate commerce.[17] Al-

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[13] See note 6 supra.

[14] C. Wright, Federal Courts, § 32 at 123 (3d ed. 1976).

[15] Felter v. Southern Pac. Co., 359 U.S. 326, 329 n.4 (1959); Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 840 (4th Cir. 1974).

[16] 28 U.S.C. § 1337 (1976).

[17] United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). ("Section 1964 is a valid exercise of Congress' authority to regulate commerce.")

United States v. Forsythe, 429 F. Supp. 715, 720 (W.D. Pa.), rev'd on other grounds, 560 F.2d 1127 (3d Cir. 1977). United States v. Frumento, 426 F. Supp. 797, 802 (E.D. Pa. 1976), aff'd, 552 F.2d 534 (3d Cir.), aff'd, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978).

Further, the commerce clause nexus is defined very broadly. The court in Murphy v. Colonial Fed. Sav. and Loan Ass'n, 388 F.2d 609, 615 (2d Cir. 1967) emphasized this liberal interpretation. "But to found jurisdiction upon § 1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one."

But see the Consumer Product Safety Act, § 23(a) 15 U.S.C. § 2072(a) (1976). Although an exercise of Congress's power to regulate commerce, a jurisdictional amount is expressly required. The RICO statute contains no such explicit reference to the amount-in-controversy requirement of 28 U.S.C. § 1331.

though the issue has not been litigated, it appears that cause of action under RICO is actionable whether or not the amount in controversy exceeds $10,000.[18]

3. Pendent Jurisdiction

¶ 7 Article III of the Constitution grants the federal courts jurisdiction to adjudicate "cases or controversies."[19] Federal courts, however, are not limited to deciding "issues," but may hear an entire cause of action even if some parts of it concern non-federal issues.[20] A party may simultaneously assert a federal claim and a state claim in federal court if certain criteria are satisfied.

¶ 8 The test formulated by the Supreme Court in United Mine Workers v. Gibbs[21] is followed in most cases. In Gibbs, the plaintiff brough suit in federal court against the union alleging a federal claim of violation of the Taft-Hartley Act and a state claim of unlawful conspiracy. Although the federal claim was dismissed, the Supreme Court held that the district court retained jurisdiction to decide the state claim.[22]

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[18] As a practical matter, the amount in controversy problem will seldom arise. The treble damages provision reduces the actual amount needed by one-third, and the nature of a claim under RICO will probably involve a substantial sum. See, e.g., Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978) (3 3/4 million damages claim); King v. Vesco, 342 F. Supp. 120 (N.D. Cal. 1972), (Damages in excess of one billion dollars plus attorney's fees).

[19] U.S. Const. art. 3, § 2.

[20] Osborn v. Bank of United States, 9 Wheat. 738, 823 (1824); C. Wright, Federal Courts, § 19 at 72 (3d ed. 1976).

[21] 383 U.S. 715 (1966).

[22] Id. at 729.

¶ 9 In a two-step analysis, the Court first required the allegation of a "substantial" federal claim to confer jurisdiction over other non-federal issues.[23] Further,

> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.[24]

¶ 10 The requirements that the claims derive from a common nucleus of operative fact and be such that a plaintiff would ordinarily be expected to try them all in one proceeding, are generally interpreted as separate requirements, both of which must exist to establish pendent jurisdiction.[25] Even so, the test is not hard to satisfy. Even a tenuous factual nexus between the claims has been held sufficient.[26] Pendent jurisdiction over a state claim which arises out of an alleged pattern of racketeering activity would not be hard to establish.[27]

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[23] Id. at 725. See generally, 13 Fed. Prac. and Pro., supra note 5, at Jurisdiction § 3564.

[24] U.M.W. v. Gibbs, 383 U.S. at 725.

[25] See Almenares v. Wyman, 453 F.2d 1075, 1083 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972); Ferguson v. Mobil Oil Corp., 443 F. Supp. 1334, 1340-91 (S.D.N.Y. 1978); 13 Fed. Prac. and Pro., supra note 5, Jurisdiction § 3567 n.27.

[26] See, e.g., Rauch v. United Instruments, Inc., 405 F. Supp. 435, 442, amended, 405 F. Supp. 442, (E.D. Pa. 1975); 13 Fed. Prac. and Pro., supra note 5, Jurisdiction § 3567, n.28.

[27] A cause of action alleging a pattern of mail or securities fraud, for example, would satisfy the RICO requirements as well as a claim based on common law fraud or state securities laws. See, e.g., Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1279 (D. Del. 1978).

¶ 11 Whether or not there is power to exercise pendent jurisdiction in a particular case is a threshold determination. But the propriety of hearing such state claims is always within the discretion of the trial judge.[28] Whether pendent jurisdiction was properly assumed remains open throughout the litigation.[29] In determining the propriety of assuming pendent jurisdiction, the court should balance judicial economy, convenience, and fairness to the litigants[30] with such factors as jury confusion,[31] predominance of state issues,[32] and avoiding unnecessar decisions of state law.[33]

¶ 12 "Pendent party" jurisdiction permits a plaintiff to join a defendant over whom no independent grounds of federal jurisdiction exists when the plaintiff's claim against that defendant derives from a common nucleus of operative fact to

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[28] U.M.W. v. Gibbs, 383 U.S. at 726. ("[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right.")

[29] Id. at 727.

[30] These advantages may be gained by not severing the state claim. See Blake v. Town of Delaware City, 441 F. Supp. 1189, 1205 (D. Del. 1977) (fairness to parties and judicial economy); Ferland v. Orange Groves of Fla., Inc., 377 F. Supp. 690, 709 (N.D. Fla. 1974) (same); Crowell v. Pittsburgh & L.E.R. Co., 373 F. Supp. 1363, 1312 (E.D. Pa. 1974) (judicial economy); Birdwell v. Hazelwood School Dist., 352 F. Supp. 613, 625 (E.D. No. 1972) (convenience and fairness to the litigants).

[31] Moor v. County of Alameda, 411 U.S. 693, 716 (1973), U.M.W. v. Gibbs, 383 U.S. at 727.

[32] U.M.W. v. Gibbs, 383 U.S. at 7260727; Myers v. American Leisure Time Enterprises, Inc., 402 F. Supp. 213, 215 (S.D.N.Y. 1975), aff'd 538 F.2d 312 (2d Cir. 1976).

[33] U.M.W. v. Gibbs, 383 U.S. at 726.

the plaintiff's claim against the original defendant. The state of the law concerning the joining of otherwise non-joinable parties is unsettled. The Supreme Court in Aldinger v. Howard[34] refused to permit pendent party jurisdiction in a federal civil rights action where the plaintiff sought to join the county itself as a pendent party to the action, even though the plaintiff's state claim against the county arose out of the same facts giving rise to the federal claim against the county officers. The Court, however, expressly refused to hold that pendent party jurisdiction was per se impermissable.[35] According to at least one commentator, however, the signal was clear that "courts should go slowly in exercising such jurisdiction."[36]

4. Ancillary Jurisdiction

¶ 13 A federal district court, in acquuring jurisdiction over a "case or controversy" in its entirety may, as an incident to the plaintiff's claim, acquire subject-matter jurisdiction over non-federal issues asserted in counterclaims, cross-claims and

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[34] 427 U.S. 1 (1976).

[35] Id. at 18. Indeed, the Court indicated that pendent party jurisdiction would be most appropiate for federal claims over which the federal courts have exclusive jurisdiction. RICO is such a statute.

[36] 13 Fed. Prac. and Pro., supra note 5, Jurisdiction § 3567, Supp. p. 295. In Aldiryer v. Howard, the Court warned:

> If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if the parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence. 427 U.S. at 18.

third-party claims.[37] Since the rationale and justification for this doctrine is the same as that for pendent jurisdiction,[38] it follows that the test employed is similar. A federal court has power to decide an ancillary claim if the defendant's claim against a third party, or the plaintiff himself, is an outgrowth of the same aggregate core of facts which is determinative of the plaintiff's claim.[39] As a general rule, ancillary jurisdiction extends to compulsory counterclaims,[40] cross-claims,[41] and impleader of third-party defendants.[42]

B. Jurisdiction Over the Person

¶ 14 In theory, a federal district court has in personam jurisdiction over any party who has "minimum contacts" with some

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[37] 13 Fed. Prac. and Pro., supra note 5, Jurisdiction § 3523.

[38] Judicial economy, convenience and fairness to the parties.

[39] See generally 13 Fed. Prac. and Pro., supra note 5, Jurisdiction at § 3523.

[40] Mayer Paving & Asphalt Co. v. Gen. Dynamics Corp., 486 F.2d 763, 771 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974). For an anlaysis of compulsory counterclaims, see ¶¶ 118-122 infra. Permissive counterclaims generally require independent jurisdictional grounds. See, e.g., United States ex rel D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1080 (2d Cir. 1970), cert. denied, 400 U.S. 102 (1971).

[41] White v. Matthews, 420 F. Supp. 882, 889 (D.S.D. 1976). See ¶¶ 123-126 infra.

[42] United States ex rel. Payne v. United Pac. Ins. Co., 472 F.2d 792, 794 cert. denied, 411 U.S. 982 (1973). See ¶¶ 127-130 infra.

part of the United States, regardless of the particular state involved.[43] Where no federal statute authorizes otherwise, however, the federal courts follow the rules of the state in which the district court sits.[44] But, when a federal statute does provide rules regarding amenability to suit, these statutory provisions are followed.[45]

¶ 15 The RICO statute contains broad requirements for personal jurisdiction and venue.[46] If suit is brought in the district where the defendant resides, is found, has an agent, or transacts his affairs, the court has jurisdiction over the person of the

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[43] Robinson v. Railroad Labor Bd., 268 U.S. 619, 622 (Brandeis, J.) (Congress has the power "to provide that the process of every district court shall run in every part of the United States."); Cryomedics Inc. v. Spembly, Ltd., 397 F. Supp. 287, 291 (D. Conn. 1975); First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 736 (E.D. Tenn. 1962).

Contra, Scott v. Middle E. Airlines Co., S.A., 240 F. Supp. 1, 4 (S.D.N.Y. 1965). "Thus in order to acquire jurisdiction over the responedent it must be found that the respondent has sufficient ties not merely with the United States but with the state of the forum to make jurisdiction over it consistent with 'our traditional conception of fair play and substantial justice.' International Shoe Co. v. Washington, . . . 326 U.S. [310] . . . 320 [(1945)]."

[44] Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963). See 4 Fed. Prac. and Pro., supra note 5, Civil § 1075 n.50 (1969).

[45] Black v. Acme Markets, Inc., 564 F.2d 681, 684 (5th Cir. 1977); Fraley v. Chesapeake & Ohio Ry. Co., 397 F.2d 1, 4 (3d Cir. 1968); Edwards v. Gulf Miss. Marine Corp., 449 F. Supp. 1363, 1368 (S.D. Tox. 1978).

[46] See 18 U.S.C. § 1965(a) (1976):

> Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

Cf., Pac. Tobacco Corp. v. Am. Tobacco Corp., 338 F. Supp. 842, 844 (D. Or. 1972) (Under the parallel antitrust statute, 15 U.S.C. § 22 (1976), venue and personal jurisdiction are virtually congruent).

defendant, and venue[47] is proper in that district. It is possible, however, to bring a RICO suit in a district court where venue is proper, but where personal jurisdiction over the defendant is absent.[48] Although the RICO provisions for personal jurisdiction and venue are identical, the venue provisions can be read in conjunction with the general federal venue statute.[49] This statute lays proper venue in the district where the cause of action arose.[50] If a defendant's only contact with the forum is that the claim arose there,[51] personal jurisdiction over him will not exist.

¶ 16 Since state rules regarding amenability to suit may be employed in federal courts even in federal questions cases,[52] a

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[47] See ¶¶ 19-58 infra for an analysis of venue.

[48] Cf., Abrams v. Bendix Home Appliances, 96 F. Supp. 3, 5 (S.D.N.Y. 1951) (Venue in an antitrust action may be proper in a district, although corporation may not be subject to service of process there).

[49] Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280-81 (D. Del. 1978). Cf., Pure Oil Co. v. Suarez, 384 U.S. 202 (1966) (Venue provisions of federal antitrust statute supplemented by 28 U.S.C. § 1391(b)).

[50] 28 U.S.C. § 1391(b) (1976) reads:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

See ¶¶ 43-46 infra for interpretation of the "where the claim arose" requirement.

[51] I.e., the defendant does not reside, is not found, has no agent, or does not transact his affiars in the forum state.

[52] Black v. Acme Markets, Inc., 564 F.2d 681, 684 (5th Cir. 1977); Hoffman Motors Corp. v. Alfa Romeo S.p. A., 244 F. Supp. 70, 78 (S.D.N.Y. 1965); Metropolitan Sanitary Dist. v. General Elec. Co., 35 F.R.D. 131, 135-56 (N.D. Ill. 1964); Fed. R. Civ. P. 4(d)(7), 4(c).

plaintiff should be able to take advantage of the "long-arm statute" of the state in which the district court is sitting.[53] Many such statutes permit extra territorial service upon an out-of-state defendant if the cause of action arose in the state, or if a tort was committed in the state.[54] It is at least arguable that a cause of action under RICO would sound in tort.[55]

¶ 17 A RICO plaintiff may take advantage of the liberal service provision of section 1965(d)[56] only if suit is brought in

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[53] See, e.g., Cal. Civ. Proc. Code § 410.10 (West 1973); Ill. Ann. Stat. ch.110, § 17 (Smith-Hurd Supp. 1979); N.Y. Civ. Prac. Law § 302 (McKinney 1972).

[54] E.g., Ill. Ann. Stat. ch. 110, § 17 (Smith-Hurd Supp. 1979):

> (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from doing any of such acts:
> . . .
> (b) The commission of a tortious act within this state;
> . . .

[55] Since a private civil cause of action under RICO is based upon criminal activities, and courts generally classify such suits as torts, the RICO action will probably be classfied as a tort action. The award of treble damages to a successful plaintiff is no bar to this classification as private antitrust suits for treble damages have been interpreted as tort actions. See, e.g., Simpson v. Union Oil Co., 311 F.2d 764, 768 (9th Cir. 1963), rev'd on other grounds, 377 U.S. 13 (1964).

[56] 18 U.S.C. 1965(d) (1976):

> All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

See ¶¶ 61-66 infra for a more detailed analysis of this provision.

the proper court pursuant to the requirements of section 1965(a).[57]

¶ 18 Section 1965(b) is perhaps the most interesting and potentially far-reaching procedural device of the RICO statute.[58] This provision authorizes the court, if the interests of justice require, to serve and join parties over whom the court would not ordinarily have personal jurisdiction, and where venue would normally be improper. The suit, however, must initially be brought in a proper court for at least one defendant. Section 1965(b) authorizes "other parties" to be joined and brought before the court. It does not authorize initiating a suit in an improper court.[59]

C. Venue

1. Generally

¶ 19 A court of proper venue is a statutorily prescribed geographical location where a cause of action may be initiated.

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[57]The service of process provisions of the antitrust laws do not apply if the action is brought in a court without personal jurisdiction over the party to be served. See, Goldlawr, Inc. v. Heiman, 288 F.2d 579, 581 (2d Cir. 1961), rev'd on other grounds, 369 U.S. 463 (1962) ("In other words, the extra-territorial servio privilege [of the parallel antitrust statute] is given only when the other requirements are satisfied."). See also Chemical Specialties Sales Corp. - India Div. v. Basic Inc., 296 F. Supp. 1106, 1109 (D. Conn. 1968).

[58]18 U.S.C. § 1965(b) (1976):

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice requrie that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

[59]For analysis of § 1965(b), see ¶¶ 47-50 infra.

The requirements are based on conceptions of fairness to the parties and convenience of trial.[60]

¶ 20 With limited exceptions, RICO venue requirements[61] parallel the antitrust provisions.[62] Under the RICO and antitrust statute themselves, the requirements for venue and personal jurisdiction are identical.[63] In any action under RICO, venue is proper and personal jurisdiction over the defendant exists in the district court for the district "in which such person resides, is found, has an agent, or transacts his affairs."[64]

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[60] See Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U.S. 147, 168 (1939).

[61] The venue requirements for a cause of action under the RICO statute are set out in 18 U.S.C. § 1965(a) (1976):

> Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

[62] H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58, reprinted in [1970] U.S. Code Cong. & Ad. News 4007, 4034:

> Section 1965 contains broad provisions regarding venue and process, which are remodeled on present antitrust legislation.

See, 15 U.S.C. § 15 (1976):

> Any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the district in which the defendant resides, is found, or has an agent;

15 U.S.C. § 22 (1976):

> Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; . . .

[63] Pacific Tobacco Corp. v. America Tobacco Co., 338 F. Supp. 842, 844 (D. De. 1972) (antitrust); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 94, aff'd 461 F.2d 1261 (9th Cir. 1972) (antitrust).

[64] 18 U.S.C. § 1965(a) (1976).

Both the RICO and antitrust venue provisions, however, are supplemented by the general federal venue statute.[65] Venue is therefore proper in the judicial district in which the claim arose, even though personal jurisdiction might not exist there.[66]

¶ 21 Before proceeding to an analysis of the individual venue requirements, it will be useful to compare the civil and criminal venue rules. RICO is most effective when its civil remedies and criminal sanctions are pursued in conjunction with one another. The venue requirements, however, are not the same; a civil action may very well be improper in the same court where the defendants were properly tried and convicted of the criminal charges.

¶ 22 Rule 18 of the Federal Rules of Criminal Procedure is the basic federal venue provision. It provides that criminal prosecutions may be pursued in the judicial district in which the crime was committed.[67] This rule is supplemented by several

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[65] 28 U.S.C. § 1391(b) (1976):

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defenants reside, or in which the claim arose, unless otherwise provided by law.

See Pure Oil Co. v. Suarey, 384 U.S. 202, 205 (1966) (Supreme Court held that special venue statutes are to be supplemented and read in conjunction with the general venue statute); Farmer's Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978) (Special venue provision in the RICO statute is supplemented by 28 U.S.C. § 1391(b)).

[66] See ¶ 15 supra.

[67] Fed. R. Crim. P. 18:

> Except as otherwise prevented by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

specialized venue statutes. The most important for RICO prosecutions is section 3237 of Title 18 of the United States Code.[68] A crime committed in more than one district may be prosecuted in any district in which the offense was begun or completed.[69] A crime involving the use of the mails, or transportation in interstate or foreign commerce may be prosecuted in any district "from, through, or into which such commerce or mail matter moves."[70]

¶ 23 The venue of a criminal RICO prosecution necessarily depends upon the substantive violations alleged. For example, if the defendant was indicted for engaging in a "pattern" of mail fraud, then, under section 3237(a), he may be tried in any district in which the mail matter moved.[71] If the defendant was indicted for engaging in a "pattern" of interference with interstate commerce in violation of section 1951 of Title 18 of the United

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[68] 18 U.S.C. § 3237(a) (1976):

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

[69] Id.

[70] Id.

> Any offense involving the use of the mails, or transportation is interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

[71] Id.

States Code,[72] then he may be prosecuted in any district where commerce was affected.[73] Conspiracies may be prosecuted in any district in which any overt act in furtherance of the conspiracy was committed by any of the conspirators.[74]

¶ 24 It is clear that there is a larger number of alternative forums available to the civil RICO plaintiff than are available to the criminal prosecutor. A criminal defendant may not be prosecuted in the state of his residence if the crime was not committed there, or the effects of the crime did not touch the forum. Even so, the civil plaintiff cannot assume that a proper criminal forum is per se permissible in a civil action.[75] Venue

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[72] 18 U.S.C. § 1951 (1976):

> Interference with commerce by threats or violence
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. . . . .

[73] United States v. Floyd, 228 F.2d 913, 918 (7th Cir. 1956), cert. denied, 351 U.S. 938 (1956).

> [W]e think it plain that it was the intention and p pose of Congress to authorize the laying of venue in any District wherein commerce is affected, . . . irrespective of defendants' residence and the place where the coercive threats were made.

Accord, United States v. Gray, 573 F.2d 513, 517 (7th Cir. 1978).

[74] Hyde v. United States, 225 U.S. 347, 362, (1912); Finley v. United States, 271 F.2d 777, 781 (5th Cir. 1959), cert. denied, 362 U.S. 979 (1960).

[75] For example, if a mail fraud/RICO trial was properly conducted in the state of New York because defendant mailed a letter into the state, civil venue in New York might be improper. The mailing of one letter might satisfy 18 U.S.C. § 3234(a), but fail to satisfy the requirements of a "weight of the contacts" analysis. See ¶¶ 43-46, infra.

decisions must be made on theindividual facts of each case.

2. Elements

¶ 25 A civil plaintiff can satisfy the RICO venue requirements in six different ways. Venue is proper in the federal district court of the district where all defendants reside, have agents, are found, or transact their affairs.[76] Venue is also proper in the district in which the cause of action arose.[77] Finally, upon a showing that justice requires, venue is proper in any district in the United States once venue as to any one defendant has been initially established.[78]

a. Residence

¶ 26 Establishing the residence of the parties is perhaps the easiest venue requirement to satisfy. A majority of circuits hold that for individuals, "residence" for venue purposes is the same as "citizenship" for jurisdictional purposes.[79] An individual is considered to be a citizen of a particular state if that person is domiciled in the state and is a citizen of the United States.[80] A person's domicile is often defined as the place

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[76] 18 U.S.C. § 1965(a) (1976).

[77] 28 U.S.C. § 1391(b) (1976).

[78] 18 U.S.C. § 1965(b) (1976).

[79] See, e.g., King v. Wall & Beaver St. Corp., 145 F.2d 377, 379 (D.C. Cir. 1944); R.S. Mikesell Assocs. v. Grand River Dam Auth., 442 F. Supp. 229, 231 (E.D. Okla. 1977); Ott v. United States Bd. of Parole, 324 F. Supp. 1034, 1037 (W.D. Mo. 1971).

[80] Gilbert v. David, 235 U.S. 561, 569 (1915); Factor v. Pennington Press, Inc., 230 F. Supp. 906, 909 (N.D. Ill. 1963).

where he has his home and principal establishment and to which he always intends to return whenever he is away.[81]

¶ 27 Three circuits, however, have declined to equate residence and citizenship.[82] These courts consider the existence of citizenship as "cogent evidence" of residence but "not necessarily one and the same thing."[83] These circuits seek to prevent potential defendants from living in one state and having legal domicile in another, thereby avoiding suit in the state in which he actually lives. The majority of decisions, however, are contra.[84]

¶ 28 The residence of a corporation is defined in section 1391(c) of Title 28.[85] Under RICO, however, the "doing business" element of section 1391(c) is unimportant, since a plaintiff may bring suit in the district where the defendant "transacts his affairs." In antitrust litigation, this requirement is often interpreted more broadly than the "doing business" test of section 1391(c).[86] Under any analysis, if a defendant is "doing business"

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[81] Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974); Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972).

[82] Kahane v. Carlson, 527 F.2d 492, 494 (2d Cir. 1975); Arley v. United Pac. Ins. Co., 379 F.2d 183, 185 n.7 (9th Cir. 1967); Townsend v. Bucyrus-Erie Co., 144 F.2d 106, 108 (10th Cir. 1944).

[83] Townsend v. Bucyrus-Erie Co., 144 F.2d at 108.

[84] See C. Wright, Federal Courts § 26, at 99 (3d ed. 1976) "The fact of residency must be coupled with a finding of intent to remain indefinitely."

[85] 28 U.S.C. § 1391(c) (1976):

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

[86] Friedman v. United States Trunk Co., Inc., 30 FRD 148, 150 (S.D.N.Y. 1963).

sufficient to satisfy section 1391(c), he is "transacting business" sufficient to meet the requirements of section 1965(c).[87] Since the state where a corporation is either licensed to do business or is incorporated is a matter of public record,[88] bringing suit against a corporation in the district where it resides should not be difficult.

¶ 29 If natural persons are made defendants to the action, it is their residence at the time the action is commenced, not the time the cause of action accrued which is determinative.[89] A corporation is generally deemed to reside in the state where it does business.[90] Since, for venue purposes, a corporation may be sued in a state if it was doing business there at the time the cause of action arose,[91] a corporation's residence, insofar as the corporation does business there, is determined as of that date.

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[87] See ¶¶ 37-42 infra, for an analysis of the "transacting business" requirement of § 1965(a).

[88] Such information can be found in periodicals such as Moody's Industrial Manual: American and Foreign, 1954- ; Dun and Bradstreet, Inc..

[89] Parham v. Edwards, 346 F. Supp. 968, 969 n.1 (S.D. Ga. 1972), aff'd per curiam 470 F.2d 1000 (5th Cir. 1973). Cf., McNello v. John B. Kelly, Inc., 283 F.2d 96, 99 n.1 (3d Cir. 1960) (Jurisdiction).

[90] 28 U.S.C. § 1391(c) (1976). See Upjohn Co. v. Finch, 303 F. Supp. 241, 254 (W.D. Mich 1969); Standard Ins. Co. v. Insbell, 143 F. Supp. 910, 912 (E.D. Tex 1956). But see McLouth Steel Corp. v. Jewell Coal & Coke Co., 432 F. Supp. 10, (E.D. Tenn. 1976).

[91] Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc., 343 F.2d 7, 12 (8th Cir. 1965). For an analysis of the "doing business" requirement, see ¶¶ 37-42, infra.

¶ 30 It is a generally acknowledged exception that public officials sued in their official capacity reside for venue purposes, in the forum where they perform their official duties.[92] Ironically, such officials may not be citizens of that state for diversity of citizenship purposes.[93]

b. Found

¶ 31 Two separate and distinct conceptions of "found" emerge from antitrust and RICO case law. First, an entity, most commonly a corporation or business, is "found" in a particular district where it is "doing business" of such substantial character and extent as to establish actual presence.[94] The quantum of business necessary to satisfy this requirement is conceded by most authority to be greater than that necessary to meet the "transacting business" test.[95] Therefore, as is the case with corporate residence, the "doing business" element of the "found"

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[92] Butterworth v. Hill, 114 &.S. 128, 132 (1885); Buffalo Teachers Fed'n, Inc. v. Helsky, 426 F. Supp. 828, 829 (S.D. N.Y. 1976).

[93] Lewis v. Splashdam By-Prods. Corp., 233 F. Supp. 47 (N.D. Va. 1962). (John L. Lewis was held to be a citizen of Illinois, even though he had lived in Alexandria, Virginia for 30 years pursuant to his position as President of the United Mine Workers).

[94] United States v. Scophony Corp., 333 U.S. 795, 818 (1948); Brown v. Berenson, 432 F.2d 538, 544 (5th Cir. 1970) (dicta); In re Chicken Antitrust Litigation, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975); Redmond v. Atlantic Coast Footbal League, 359 F. Supp. 666 (S.D. Ind. 1973); Haskell v. Aluminum Co., 14 F.2d 864, 867 (D. Mass. 1926).

[95] Grappone, Inc. v. Subaru, Inc., 403 F. Supp. 123, 128 (D.N.H. 1975); Learning Systems, Inc. v. Levin, 351 F. Supp. 532, 533 (E.D. Mo. 1972) ("[A] corporation may be held to 'transact business' in a district even though its activities were such that it could not be held to be 'found' in that district."); Stern Fish Co. v. Century Seafoods, Inc., 254 F. Supp. 151, 153 (E.D. Pa. 1966) ("F'[F]ound' requires more contact within the jurisdiction than does . . . 'transacts business'").

requirement is irrelevant for purposes of choosing a proper forum in which to bring a private treble damages action under RICO. As the court sitting in the district in which the defendant "transacts his affairs" is a court of proper venue,[96] and the transacts business test is easier to satisfy, a RICO plaintiff need only establish business contacts sufficient to pass that test.[97]

¶ 32 The second definition of the found requirement, however, is important for a plaintiff bringing a RICO action. A defendant is "found" in a jurisdiction if he is validly served with process there.[98] In essence, venue is proper in the district where the plaintiff "catches" the defendant.[99] Since Pennoyer v. Neff,[100] it has been elementary civil procedure that if a defendant is personally served with process while physically present in a state, however temporarily, the courts sitting in

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[96] See 18 U.S.C. § 1965(a) (1976), supra at note 61.

[97] See ¶¶ 37-42, infra.

[98] Switzer Bros., Inc. v. Chicago Cardboard Co., 252 F.2d 407, 411 (7th Cir. 1958).

[99] Thoburn v. Gates, 225 F.2d 613, 614 (S.D.N.Y. 1915) (Hand, J.)

> Section 7 of the Sherman Act, [superceded by 17 U.S.C. 15, 69 Stat. 283, c.283 § 3, July 7, 1955] in providing that defendant may be served where 'found,' . . . . meant to remove the existing limitations upon the venue of actions between diverse citizens and to permit the plaintiff to sue the defendant wherever he could catch him with a process good where executed.

[100] Pennoyer v. Neff, 95 U.S. 714 (1877).

that state have in personam jurisdiction over him.[101] Section 1965(a) merely grants those courts proper venue as well.

c. Has an Agent

¶ 33 Venue is proper in the federal district court sitting in the district in which the defendant has an agent.[102] Although no rigid tests have been created for determining when an individual is held to be an agent of a defendant,[103] courts look primarily to the amount of control exercised by the supposed principal, and the extent to which the public is led to believe that it is dealing with the supposed agent.[104] In most cases, courts have held that the existence of legally authorized and specifically appointed agents or representatives of a defendant suffices to lay proper venue in a particular district.[105] If the agent is under close control or supervision of the principal, an agency relationship may be found.[106] Yet, courts generally hold that a manufacture

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[101] Id., at 724.

[102] 18 U.S.C. § 1965(a) (1976).

[103] See, e.g. Naifeb v. Ronson Art Metal Works, 111 F. Supp. 491, 493 (Okla. 1953) (In determining whether venue has been established in an antitrust action, each case must be governed by its own peculiar set of facts.) See also Riss and Co. v. Ass'n of Western Railways, (159 F. Supp. 288, 293 (D.D.C. 1958).

[104] Note, Venue in Private Antitrust Suits, 1962 N.Y.U. L. Rev. 268, 287-288.

[105] Country Maid Inc. v. Haseotes, 299 F. Supp. 633, 639 (1969) ("registered agent"); Ozdoba v. Verney Brunswick Mills, Inc., 152 F. Supp. 139, 140-41 (N.Y. 1946) ("managing or general agent authorized by appointment or by law") (dicta).

[106] Goldlawr v. Schubert, 169 F. Supp. 677, 682 (E.D. Pa. 1958), aff'd on other grounds, 276 F.2d 614 (3d Cir. 1960), rev'd on other grounds 369 U.S. 463 (1962) ("scrupulous control"); Riss and Co. v. Ass'n of Western Railways, 159 F. Supp. 288 (D.D.C. 1958) (Strict and direct supervision; agent could not act without pricipal's approval).

distributor relationship alone will not establish a principal-agent relationship.[107] According to the only civil RICO case to have discussed this issue, an agent's appointment must relate in some manner to the underlying cause of action if the agent is initially appointed for a limited purpose.[108]

¶ 34 In dicta, the court in King v. Vesco [109] restricted the "agent" provision to individuals, stating that it had "no application as against a corporate defendant."[110] Analogizing to the antitrust laws the court stated that the term "has an agent" was added to the venue provision of the Clayton Act in 1914 to expand the concept of "found" in the case of individual defendants, just as "transacts business" broadened the definition of "found" in the case of corporate defendants.[111] If a corporate agent's presence or activity in a district was insufficient to constitute "transacting business," venue would be improper as to the corporate defendant. On the other hand, an agent of an individual served in a district would suffice to bring the principal into the district as a defendant, no matter how temporary the agent's presence.

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[107] Javelin Corp. v. Uniroyal, Inc., 360 F. Supp. 251, 252 (N.D. Cal. 1973); Mebco Realty Holding Co. v. Warner Bros. Pictures, 45 F. Supp. 340, 341 (N.J. 1942).

[108] King v. Vesco, 342 F. Supp. 120, 123 (N.D. Cal. 1972) (Corporate defendant's formal consent to service of process or the California Corporations Commissioner in a proceeding arising out of the sale of securities does not satisfy the agency requirement as "[t]he instant suit does not arise out of or in connection with any security issue of ICC."

[109] 342 F. Supp. 120 (N.D. Cal. 1972).

[110] Id. at 123.

[111] Id. at 122. See Goldlawr, Inc. v. Schubert, 169 F. Supp. 677, 681 (E.D. Pa. 1958), aff'd on other grounds, 276 F.2d 614 (3d Cir. 1960), rev'd on other grounds, 369 U.S. 463 (1962).

¶ 35 The court's decision is an unwarranted restriction of the plain language of the RICO statute. Presumably Congress would have explicitly distinguished between individuals and corporations had it intended that there be a distinction. Under the antitrust laws it is clear that such a distinction was intended and the statute was expressly written to further the objective.[112] Although modelled after the antitrust laws, the RICO statute should not be blindly analogized unless the inference is warranted.

¶ 36 The theory that every co-conspirator is regarded as the agent of every other co-conspirator for the purpose of laying venue is generally repudiated.[113] The rule now is that venue must be properly established for each defendant.[114]

d. Transacts Affairs

¶ 37 Venue is proper in the district court for the district in which the defendant "transacts his affairs."[115] Congress added the "transacting business" requirement to the antitrust venue

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[112] 15 U.S.C. § 22 (corporation) expressly omits the term "has an agent." 15 U.S.C. 15 ("persons" other than corporations) contains the term "has an agent" but expressly omits the term "transacts business."

[113] The trend away from the co-conspiratorial theory of agency began with Mr. Justice Frankfurter's dicta in Banker's Life & Cas. Co. v. Holland, 346 U.S. 379, 386 (1953) (dissenting opinion). It has now been rejected by almost every lower court to have litigated the issue. See, e.g. H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Labs., 384 F.2d 97, 98 (2d Cir. 1967); Bertha Building Corp. v. National Theatres Corp., 248 F.2d 833, 836 (2d Cir. 1957), cert. denied, 356 U.S. 936; Williams v. Canon, Inc., 432 F. Supp. 376, 382 (S.D. Cal. 1977).

[114] See generally, 15 Fed. Prac. & Pro., supra note 5, Jurisdiction at § 3807. Note, however, the availability of 18 U.S.C. § 1965(b). The court may, on a showing that justice requires, join other parties over whom venue and personal jurisdiction would normally be improper. For an anlaysis of this section, see ¶¶ 47-50, infra.

[115] 18 U.S.C. § 1965(a) (1976).

provisions to broaden a plaintiff's choice of forums in order to relieve persons injured by a violation of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs."[116] Through liberal construction, this requirement has developed the broadest connotations for venue purposes of all antitrust statutes.[117]

¶ 38 For a defendant to transact business in a particular district he must regularly carry on business of a substantial and continuous character in that district.[118] More than mere "episodic transactions" are necessary.[119] The "substantiality" of the "transacts business" requirement is construed in the ordinary and practical everyday commercial sense, from the average businessman's point of view.[120] The "transacting business" require-

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[116] United States v. Socophony Corp. of America, 333 U.S. 795, 806 7 n.16 (1948) (citing Eastman Kodak); Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359, 373-374 (1927).

[117] Commonwealth Edison Co. v. Federal Pacific Elec. Co., 208 F. Supp. 936, 940 (N.D. Ill. 1962). The only case to discuss this requirement in a RICO context held that the terms "transacts his affairs" (RICO) and "transacts business" (antitrust) were intended to be synonomous. King v. Vesco, 382 F. Supp. 120, 124 (N.D. Cal. 1972).

[118] United States v. Scophony Corp. of America, 333 U.S. 795 807 (1948); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Brandt v. Renfield Importers, Ltd., 278 F.2d 904 (8th Cir.), cert. denied, 364 U.S. 911 (1960).

[119] Id. 333 U.S. 795 at 819; 278 F.2d 904 at 910. See also B.J. Semel Associates, Inc. v. United Fireworks Mfg. Co., 385 F.2d 827 (D.C. Cir. 1965); Harco v. Ithaca Gun Co., 309 F. Supp. 585 (D. Utah 1969); School District of Philadelphia, Commonwealth of Pa. v. Kurtz Bros., 240 F. Supp. 361 (E.D. Pa. 1965).

But see Courtesy Chevrolet Inc. v. Tennessee Walking Horse Breeders' and Exhibitors Ass'n of America, 344 F.2d 860 (9th Cir. 1964) (one act may be enough to fulfill venue requirements of sections 12-27 of this title).

[120] United States v. Scophony Corp. of America, 333 U.S. 795 810 (1948).

ment is easier to satisfy than the "found" requirement[121] and many courts hold that it is also easier to satisfy than the "doing business" requirement of the general federal venue statute.[122]

¶ 39 As the broad and generalized requirements suggest, there is no singular definitive test of "transacting business" for purposes of establishing venue under the antitrust laws.[123] The test, however, is not totally subjective, determined only by the whim of the trial judge or jury. There are certain qualitative and quantitative factors that courts use to determine whether the contacts between the defendant and the district are substantial enough to satisfy the test.

¶ 40 If a defendant directly sells or purchases substantial quantities of merchandise from a particular state, most courts consider the defendant to be transacting business sufficient to subject him to the court's jurisdiction and venue.[124] It is not necessary that the business transactions relate to the under-

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[121] Grappone v. Subaru of America, Inc., 403 F. Supp. 123, 128 (D. N.H. 1975); Stern Fish Co. v. Century Seafoods, Inc., 254 F. Supp. 151, 153 (E.D. Pa. 1966).

[122] Athletes Foot of Delaware, Inc. v. Ralph Libonati Co., 445 F. Supp. 35 (D. Del. 1977), Friends of Animals, Inc. v. American Veterinary Medical Ass'n, 310 F. Supp. 620, 622 (S.D.N.Y 1970); Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp., 291 F. Supp. 252 (E.D. Pa. 1968). But see Bd. of County Commns. of Custer County v. Wilshere Oil Co., 523 F.2d 125 (10th Cir. 1975) (in dicta, the court stated that the terms were synonomous); Dixie Carriers, Inc. v. National Maritime Union of America, AFL-CIO, 35 F.R.D. 365 (S.D. Tex. 1964).

[123] In re Chicken Antitrust Litigation, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975).

[124] See, e.g., Black v. Acme Markets, Inc., 564 F.2d 681 (10th Cir. 1977); Frederick Cinema Corp. v. Interstate Theatres Corp., 413 F. Supp. 840 (D.D.C. 1976); In re Chicken Antitrust Litigation, 407 F. Supp. 1285 (N.D. Ga. 1975).

lying cause of action.[125] That a very large corporation sells or purchases a very small and insignificant percentage of their total sales or purchases in a state is usually irrelevant.[126] Other factors include the continuity and regularity of the business transactions[127] and the extent of solicitation and promotion within the district.[128] National advertising alone which finds its way into a particular state has been held insufficient to lay proper venue under the "transacting business" test.[129]

¶ 41 Antitrust plaintiffs often attempt to establish that a defendant transacted business in a particular district through the activities of a subsidiary, affiliate, or distributor. The nature of the relationship between the alleged parent and subsidiary must be similar to that of the agent-principal, discussed above. A recent district court case, in finding that a subsidiary's presence in the district was sufficient to lay proper venue for the

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[125] Bd. of County Commns. of the County of Custer v. Wilshire Oil Co., 523 F.2d 125 (10th Cir. 1975); In re Chicken Antitrust Litigation, 407 F. Supp. 1285, 1292 (N.D. Ga. 1975).

[126] In re Chicken Antitrust Litigation, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975) (Dollar amount must be viewed from the point of view of the average businessman, not a multi-billion dollar corporation).

But see Lippa and Co. v. Lenox, Inc., 305 F. Supp. 175, 180-81 (D. Vt. 1969) (In determining the substantiality of the commercial nexus, the best approach is to consider the dollar volume of business done in light of the corporation's objectives and the effect of business within the state).

[127] In re Chicken Antitrust Litigation, id. at 1291; Grappone Inc. v. Subaru of America, 403 F. Supp. 123, 130 (D. N.H. 1975); Lippa & Co. v. Lenox Inc., id. at 177.

[128] Datamedia Computer Service, Inc. v. AVM Corp., 441 F.2d 604, 608 (5th Cir. 1971); ABC Great States, Inc. v. Globe Ticket Co., 310 F. Supp. 739, 742 (N.D. Ill. 1970).

[129] Albert Levine Associates v. Bertoni & Cotti, 309 F. F. Supp. 456, 460 (S.D.N.Y. 1970).

parent, analyzed this issue in close detail and set out ten factors to consider when determining whether the activities of a subsidiary should be regarded for venue purposes as the activities of the parent.[130] Where the subsidiary company, however, maintains a separate legal identity, and is generally independent from the parent company, courts are reluctant to hold that the subsidiary's presence in a district will suffice to lay proper venue for the parent.[131] Depending upon the nature of the relationship, many courts hold that the presence of a distributor in a district is sufficient for the supplier to be found "transacting business" for venue purposes.[132]

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[130] Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd., 402 F. Supp. 262, 327-28 (E.D. Pa. 1975) ((1) Performance by subsidiary of business activity that, but for the elaborate scheme, the absent corporation would perform directly by its own branch office and/or agents; (2) Existence of a partnership in world-wide business competition between absent corporation or the corporation that is present; (3) Capacity of absent corporation to influence decisions of subsidiary; (4) Part the subsidiary plays in overall business activityof the absent corporation; (5) Existence of integrated sales scheme involving manufacturing, trading and sales corporations; (6) Status of subsidiary as a marketing aim of absent corporation; (7) Use by subsidiary of trademark owned by parent; (8) Transfer of personnel; (9) Presence of common marketing image; (10) Granting of exclusive distributorship to subsidiary.)

[131] O.S.C. Corp. v. Toshiba America, Inc., 491 F.2d 1064, 1066 (9th Cir. 1974); Phillip Gall and Son v. Garcia Corp., 340 F. Supp. 1255, 1259 (E.D. Ky. 1972).
See also King v. Vesco, 342 F. Supp. 120, 124 (N.D. Cal. 1972) ("It is well established by cases construing the venue provisions of the Clayton Act that the mere fact a subsidiary transacts business within a given judicial district does not in and of itself constitute the parent's transacting business with that district.")

[132] Brandt v. Renfield Importers, Ltd., 278 F.2d 904, 911 (8th Cir.), cert. denied, 364 U.S. 911 (1960) (defendant held transacting business); Fox-Keller Inc. v. Toyota Motor Sales, U.S.A., Inc., 338 F. Supp. 812, 815 (E.D. Pa. 1972) (defendant held not transacting business in forum); Albert Levine Associates v. Bertoni & Cotti, 309 F. Supp. 56, 460 (S.D.N.Y. 1970) (defendant held not transacting business in forum); L.C. O'Neil Trucks Dty. Ltd. v. Pacific Car & Foundry Co., 278 F. Supp. 839 D. Hawaii 1967) (defendant transacting business)

¶ 42 There is a clear split in authority as to when a corporation must be transacting business in order for venue to lie. Many cases hold that if a corporation is transacting business at the time the cause of action accrued, then venue over it is proper, whether or not it is still transacting business when the complaint is filed.[133] Others hold that the defendant must be transacting business at the time the action is commenced.[134] At least one case has qualified the time of determining proper venue by making it dependent on whether the business transactions related to the cause of action.[135]

e. Where the Cause of Action Arose

¶ 43 A plaintiff bringing a civil cause of action under the RICO statute may also take advantage of the general federal venue statute.[136] Section 1391(b) allows a federal question suit to be brought in the district where the cause of action arose.[137] In

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[133] Bd. of County Commrs. v. Wilshire Oil Co., 523 F.2d 125 (10th Cir. 1975); Eastland Constr. Co. v. Keasby Mattison Co., 358 F.2d 777 (9th Cir. 1966). See note 91, supra.

[134] Redmond v. Atlantic Coast Football League, 359 F. Supp. 666 (S.D. Ind. 1973); Hawkins v. National Basketball Ass'n, 288 F. Supp. 614 (E.D. Pa. 1968); Stern Fish Co. v. Century Seafoods, Inc., 254 F. Supp. 157 (E.D. Pa. 1966); School District of Philadelphia Com. of Pa. v. Kurtz Bros., 240 F. Supp. 361 (E.D. Pa. 1965); Sunbury Wire Rope Mfg. Co. v. United States Steel Corp., 129 F. Supp. 425 (E.D. Pa. 1955).

[135] In re Chicken Antitrust Litigation, 407 F. Supp. 1285, 1292-93 (N.D. Ga. 1975) (Where cause of action was not directly related to corporate defendants' various transactions of business within the district, defendants d to be transacting business in the district at the time the suit was filed to be subject to venue provisions of this section, and their earlier business transactions were merely matters to be considered in determining nature and continuity of their transactions in the district).

[136] 28 U.S.C. § 1391 (1976).

[137] Id.

antitrust and RICO violations, however, the cause of action often arises in more than one district by involving more than one substantive violation or more than one party.[138]

¶ 44 Federal courts have resolved this problem with two different tests. THe majority of jurisdiction in an antitrust context,[139] and the only civil RICO case to discuss section 1391(b) have employed a "weight of the contacts" analysis.[141]

> The Court will look to the place where in venue is claimed to exist and determine on the basis of sales, injury, conspiratorial meetings, and overt acts pursuant to such meetings whether defendants and plaintiffs have such a significant relationship to the place in question so as to hold that the claim arose there.[142]

¶ 45 Courts have generally rejected the theory that the situs of the injury is determinative of the origin of the cause

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[138] Cf., Foster, Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts, 47 F.R.D. 73, 78 (1969).

> I am somewhat concerned that determination of where the claim arose unnecessarily invited litigation over a difficult procedural concept and may also be of only limited utility in multi-party actions.

See also Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 141 (N.D. Ill. 1977).

[139] Shires v. Magnavox Co., 74 F.R.D. 373 377 n.7 (E.D. Tenn. 1977).

[140] Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1281 (D. Del. 1978).

[141] The "weight of the contacts" analysis was also employed in a corporate mis-management case (British-American Insurance Co., Ltd. v. Lee, 403 F. Supp. 31, 36 (D. Del. 1976)), a case brought under the Civil Rights Act of 1866, (Jimenez v. Piere, 315 F. Supp. 365, 367 (S.D.N.Y. 1970)), and in a case alleging the deprivation of free speech, privacy, due process, and 4th Amendment protection against unreasonable searches and seizures (Kipperman v. McCone, 422 F. Supp. 860, 877 (N.D. Cal. 1976).

[142] Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp., 309 F. Supp. 1053, 1056 (E.D. Pa. 1969).

of action.[143] Now the place where the injury occurred is one factor among many contacts to be weighed. The character of the cause of action alleged is often determinative of the place where the claim arose. For example, if the violations alleged are clearly tortious, courts often emphasize the situs of the injury.[144] When the conspiracy is alleged, many courts focus on the place or places where overt acts pursuant to the conspiracy occurred,[145] the place or places where conspiratorial meetings were held,[146] and the place or places where the injury occurred.[147] If the injury was

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[143] See, e.g., California Clippers, Inc. v. United States Soccer Footbal Ass'n, 314 F. Supp. 1057, 1063 (N.D. Cal. 1970).

[144] See, e.g., Iranian Shipping Lines, & S.A. v. Moriates, 377 F. Supp. 644, 648 (S.D.N.Y. 1974); Albert Levine Associates v. Bertoni & Cotti, 309 F. Supp. 456 461 n.9 (S.D.N.Y. 1970) Note, however, that both cases considered other contacts important.

[145] Athletes Foot of Delaware v. Ralph Libonati Co., 445 F. Supp. 35, 45 (D. Del. 1977); Redmond v. Atlantic Coast Football League, 359 F. Supp. 666, 670 (S.D. Ind. 1973) ("[P]laintiff has failed to introduce any substantial evidence of overt acts in the Southern Districts of Indiana by the Atlantic Coast Football League or the individual defendants which constitute a significant and substantial element of the offenses."); ABC Great States Inc. v. Globe Ticket Co., 310 F. Supp. 739, 743 (N.D. Ill. 1970). This factor was emphasized in a case brought under the RICO statute. In Farmers Bank v. Bell Mortgage Co., 452 F. Supp. 1278, 1280 (D. Del. 1978), the court held that the plaintiff must allege

> That each participant in the conspiracy, as to whom the impropriety of venue in a particular district is asserted, has engaged in some significant or substantial act pursuant to the conspiracy in that district. Id. at 1281.

[146] Athletes Foot of Delaware v. Ralph Libonati Co., id. at 45; Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 141 (N.D. Ill. 1977); United States Dental Institute v. American Association of Orthodontists, 396 F. Supp. 565, 574 (N.D. Ill. 1975).

[147] United States Dental Institute v. Orthodontists, id. at 574; Iranian Shipping Lines, S.A. v. Moraites, 377 F. Supp. 644 (S.D.N.Y. 1974).

reasonably foreseeable to occur in the district, the situs of the injury is given added weight.[148]

¶ 46 One difficulty with the "weight of the contacts" analysis is that, at least theoretically, there is only one place where "the contacts weigh most heavily."[149] The American Law Institute and at least two federal circuits attempted to avoid that limitation on venue.[150] Even so, most courts are unwilling to limit the place where the claim arose to one district, even using a "weight of the contacts" analysis.[151] If substantial contacts exist between the cause of action and a plaintiff's chosen forum,

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[148] Goggi Corp. v. Outboard Marine Corp., 422 F. Supp. 361 (S.D.N.Y. 1976); Iranian Shipping Lines, S.A., v. Moriates, id.

[149] Philadelphia Housing Authority v. American Radiator and Standard Corp., 291 F. Supp. 252, 260 (E.D. Pa. 1968).

[150] The ALI proposal allows suit in a district in which "a substantial part of the event or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." ALI, Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft 1969, §§ 1303(a)(1), 1314(a)(1), 1326(a)(1) and Commentary. This approach was cited approvingly in Gardner Engineering Corp. v. Page Engineering, Co., 484 F.2d 27, 33 (8th Cir. 1973) and Commercial Lighting Products Inc. v. Industrial Lighting Products Co., 537 F.2d 1078, 1080 (9th Cir. 1976). Note, however, that neither case was brought under the antitrust laws.

[151] Mclouth Steel Corp. v. Jewell Coal and Coke Co., Inc., 432 F. Supp. 10 (E.D. Tenn. 1976) (The court intimated that venue would have been proper both in Tennessee (overt acts in pursuance to this alleged conspiracy) and Michigan (injurious effects felt by plaintiff)); Goggi Corp. v. Outboard Marine Corp., 422 F. Supp. 361 (S.D.N.Y. 1976) (Venue would have been proper in Illinois (injurious actions committed there) as well as in New York (plaintiff's corporate residence, injury to plaintiff in New York, etc.)). United States Dental Institute v. American Association of Orthodontists, 396 F. Supp. 565, 574 (N.D. Ill. 1975) (Venue might have been proper in Texas and Missouri as well as in Illinois, as the alleged conspiratorial meetings took place in both states, and the injury occurred in Illinois).

most courts will find proper venue there, even if another district has more significant contacts.[152]

f. Discretionary Nationwide Service of Process and Venue

¶ 47 If venue is properly laid for at least one defendant, and the plaintiff cannot acquire either personal jurisdiction or proper venue over other defendants in the same court, he should attempt to take advantage of the discretionary nationwide service of process and venue provisions of section 1965(b).[153] While this provision was also modeled after the antitrust laws, RICO is broader in scope. The analogous provisions of the antitrust statutes[154] are limited to government suits; they do not apply to private actions.[155] The RICO provision applies to "any action under section 1964,"[156] private or governmental.

¶ 48 In the antitrust field, this issue has been infrequently

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[152] See Manatee Cablevision Corp. v. Pierson, 433 F. Supp. 571 (D. D.C. 1977). See also 15 Fed. Prac. & Pro., supra note 5, Jurisdiction at § 3806. Generally, the courts have not been consistent, nor have they applied sound legal analysis. In most cases "the court states the facts about a particular claim and announces that it did or did not arise in a particular district, without explaining how the conclusion flowed from the facts." Id. at 33-34.

[153] 18 U.S.C. 1965(b) (1976) reads:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

[154] 15 U.S.C. §§ 5, 10, 25 (1976).

[155] Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 467 (1945); Albert H. Cayne Equipment Corp. v. Union Asbestos and Rubber Co., Inc., 220 F. Supp. 784 (S.D.N.Y. 1963).

[156] 18 U.S.C. § 1965(b) (1976).

litigated. In Farmers Bank v. Bell Mortgage Co.,[157] a RICO plaintiff failed to take advantage of this provision. Ironically, the court called the plaintiff's attention to the availability of section 1965(b) as a means to establish venue.[158] The utility of this provision, especially in the context of a private action, is obvious. If the plaintiff can bring suit in a court where personal jurisdiction and venue is proper as to only one defendant, and then bring in as many co-defendants as "justice requires," the plaintiff's choice of forums has been significantly expanded. ¶ 49 The substantive requirements of this provision are unclear. The court in Farmers Bank indicated that a plaintiff seeking to employ section 1965(b) must meet at least two requirements. First, there must be personal jurisdiction and proper venue over at least some of the defendants.[159] Second, the plaintiff must make a showing that "there is no other district in which there is venue over all the defendants."[160] Presumably if there were such a district, the court would dismiss the action as

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[157] 452 F. Supp. 1278 (D. Del. 1978).

[158] Id. at 1282 n.8.

> If plaintiff can make a proper showing that the claim arose as to other defendants in this district, and that there is no other district in which there is venue over all the defendants, this court may find that the ends of justice require it to exercise venue over Pennington.

[159] Id.

[160] Id.

to the party sought to be joined.[161]

¶ 50 The term "interests of justice" has not been given significant substantive interpretation even in the antitrust context. The limited factual settings where courts have typically allowed venue "in the interests of justice" are particularly appropriate in the RICO context. Although far from overwhelming in precendential value, at least two cases have held that it is the approved practice to make all co-conspirators, whether or not jurisdiction would ordinarily be proper, parties-defendant to the bill.[162] The court in United States v. Standard Oil Co.[163] held that any party with an interest in the controversy should be made a party to the

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[161] It is unclear whether the court is making the inability to sue all defendants in a single forum a substantive requirement of 1965(b), or merely a factor in this court's discretionary analysis of the "interests of justice" taking into account the facts of this particular case. If the former, a civil RICO plaintiff's options are severely reduced, as the district where the claim arose would presumably be an available forum where all defendants to the cause of action could be served. Since the requirement, as stated is clearly dicta, the RICO plaintiff should not be disuaded from arguing that venue is proper under 1965(b) even if an alternative forum exists. This view is supported by United States v. Standard Oil of New Jersey, 152 F. 290, 296 (E.D. Mo. 1907), aff'd, 221 U.S. 1 (1911).

> . . . The question presented by the petitioner . . . was, not in which court the ends of justice required the complainant to choose to institute its suit, but whether or not in this suit the ends of justice required that the nonresident defendants should be brought in.

[162] United States v. Standard Oil Co. of New Jersey, 152 F. 290, 296 (E.D. Mo. 1907), aff'd 221 U.S. 1 (1911); United States v. Central States Theatre Corp., 187 F. Supp. 114, 143 (D. Neb. 1960).

[163] 152 F. 290 (E.D. Mo. 1967), aff'd 221 U.S. 1 (1911).

suit, if authorized by Congress.[164] The co-conspirator theory of agency, discussed above, has no application to this provision. co-conspirators are regularly joined in an action under section 1965(b) regardless of previous contacts with the forum, the advantages presented by this section are significant. Since a pattern of racketeering activity involves a series of deliberate violations of substantive law, a conspiracy to engage in the pattern is almost endemic to the scheme. This issue, however, has not been litigated in the RICO context and a plaintiff seeking to join a co-conspirator should not rely blindly on this theory.

3. Transfer of Venue

¶ 51 28 U.S.C. section 1404(a) allows the court, in the interests of justice and for the convenience of the parties and witnesses, to transfer a case from the court in which venue was initially proper to another forum where it might have been brought.[165] The court

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[164] Id. at 296.

> Hence, in every suit in which the power to acquire jurisdiction of the subject matter and of the parties is conferred upon the court, the duty is imposed upon it, if its discharge is invoked by the complainant, to summon and hear, before decision, not only every indespensable party, but every necessary party within reach of its process, every party who has an interest in the controversy, and who ought to be made a party to the suit in order that the court may finally adjudicate the whole matter, although if he were not amenable to process, final justice might be administered between the other parties without his presence.

[165] 28 U.S.C. § 1404(a) (1976) reads:

> For the convenience of the parties and witnesses and in the interests of justice, a district court may transfer any civil action to any other district where it might have been brought.

The term "any civil action" has been subject to some controversy. In 1949, the Supreme Court held that § 1404(a) applies as well to those cases for which there is a special venue statute. See Ex parte Collett, 337 U.S. 55 (1949).

give great weight to a plaintiff's original choice of forum and will not disturb it unless the defendant can prove by a preponderance of facts that the balance of inconvenience weighs heavily in his favor.[166] The moving party also has the burden of proving that venue is proper in the transferee court.[167] Many cases hold that the burden on the moving party is reduced in class actions or shareholder derivative actions.[168]

¶ 52 In an often cited opinion, the Southern District of New York in United States v. General Motor Corp.[169] summarized some of the factors which should be considered when deciding the propriety of transfer.

> The principle desiderata are: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; cost of obtaining attendance of witnesses; possibility of a view, if appropriate; and all

[166] Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947) (". . . unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); William A. Smith Contracting Co., Inc. v. Travelers Indemnity Co., 467 F.2d 662 (9th Cir. 1972); Mayer v. Development Corp. of America, 396 F. Supp. 917 (D. Del. 1975); Bayly Mfg. Co. v. KoraCorp Industries Inc., 298 F. Supp. 600 (D. Colo. 1969) (Additional weight given to plaintiff's choice of forum if he chooses the district in which he resides); United States v. General Motors Corp., 183 F. Supp. 858, 861 (S.D.N.Y. 1960) (A "clear and convincing showing of substantial hardship would suffice.") Cf., Rogers v. N.W. Airlines Inc., 202 F. Supp. 309, 312 (S.D.N.Y. 1962) ("[W]hile plaintiff's selection of forum is entitled to be given great weight, when plaintiff sues in a jurisdiction which is neither plaintiff's nor defendant's home forum, and the place of suit has no connection with the matter in controversy, plaintiff's choice of forum will be given little weight.")

[167] Leesona Corp. v. Duplan Corp., 317 F. Supp. 290, 296 (D. R.I. 1970); Ackert v. Ausman, 198 F. Supp. 538, 540 (S.D.N.Y. 1961), mandamus denied, 299 F.2d 65 (2d Cir. 1962).

[168] See, e.g., Bogus v. American Speech & Hearing Ass'n, 389 F. Supp. 327, 330 (E.D. Pa. 1975); Polin v. Conductron Corp., 340 F. Supp. 602, 605 (E.D. Pa. 1972).

[169] 183 F. Supp. 858, (S.D.N.Y. 1960).

> other practical problems that would make the trial of a case easy, expeditious, and inexpensive. In appraising the factors of public interest, it is also appropriate to give some consideration to the relative state of trial calendar congestion in the districts involved.[170]

¶ 53 If the motion to transfer is made by the defendant, the transferee court must apply the law of the transferor court, so that the change in forum will only be geographical.[171] For example, a defendant would not be able to take advantage of a shorter statute of limitations. A transfer motion under 1404(a) is always addressed to the court's discretion.[172] Indeed, the judge's decision should not be overturned unless a clear abuse of discretion is shown.[173]

¶ 54 The statute allows transfer to the district "where it might have been brought."[174] Consequently, a plaintiff cannot transfer a case to a district where the defendants were not subject to service of process.[175] In Hoffman v. Blaski,[176] the Supreme Court narrowed the confines of the statute even further by holding that a defendant could not transfer a case to a district in which

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[170] Id. at 860. See also Polin v. Conductron Corp., 340 F. Supp. 602, 605 (E.D. Pa. 1972). In Van Dusen v. Barrack, 376 U.S. 612, 643-645 (1964), the Supreme Court emphasized the importance of factors such as the relative ease and practicality of trying cases in alternative forums, and the location and availability of needed witnesses.

[171] Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

[172] 15 Fed. Prac. & Pro., supra n.5, Jurisdiction at § 3847.

[173] Ford Motor Co. v. Ryan, 182 F.2d 329, 331 (2d Cir.) cert. denied, 340 U.S. 841 (1940) ("At best the court must guess, and we should accept his guess unless it is too wild.")

[174] 28 U.S.C. § 1404(a) (1976).

[175] Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950) (L. Hand, J.).

[176] 363 U.S. 335 (1960).

venue would have been improper at the beginning of the action.[177] Theoretically, venue is never improper if the defendant waives objection. However, any other interpretation would have promoted forum shopping by the defendant, at least insofar as denying the plaintiff the opportunity to choose a forum which is not the most convenient.

4. Cure of Venue Defects

¶ 55 Even if suit is brought in a court of improper venue, a court may transfer the action to a court in which it could have been brought initially, if the interests of justice require.[178] To bring a motion under section 1406, venue must be improper. If the forum is merely inconvenient, the proper motion is to transfer under section 1404(a).[179]

¶ 56 Under section 1406, the court has the option of transferring the case or of dismissing the action.[180] In most cases, however, the courts conclude, in the absence of a compelling showing in

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[177] Id. at 342-43.

[178] 28 U.S.C. § 1406(a) (1976) reads:

> The district court of a district in which is filed a case laying venue in the wrong division shall dismiss, or if in the interests of justice, transfer such case to any district or division in which it could have been brought.

[179] Note: Transfer under § 1406(a) is somethimes granted where the suits were brought in courts of proper venue but subject to dismissal for lack of personal jurisdiction. See Dubin v. United States, 380 F.2d 813 (5th Cir. 1967); Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967); Price v. Skessel, 415 F. Supp. 306 (E.D. Mich. 1976). But see contra Shong Ching Lau v. Change, 415 F. Supp. 627 (E.D. Pa. 1976). Courts have held that where venue is doubtful, the court may transfer the case under § 1406(a) without deciding the propriety of venue. Clayton v. Swift & Co., 132 F. Supp. 154 (E.D. Va. 1955).

[180] 15 Fed. Prac. & Pro., supra n.5, Jurisdiction at § 3827.

opposition, that it is in the interests of justice to transfer rather than dismiss.[181] The argument is especially compelling when an expired statute of limitations bars the plaintiff from bringing another action in an alternate forum.[182] Some courts, however, will not allow transfer absent an affirmative showing by the plaintiff that the interests of justice would be served by transfer rather than dismissed.[183]

¶ 57 A court may not order transfer under section 1406 unless it has jurisdiction over the subject matter of the controversy.[184] This requirement is irrelevant to a properly plead cause of action under RICO brought in a federal district court. It is not necessary that the transferee court have personal jurisdiction over the defendants. The Supreme Court in Goldlawr, Inc. v. Heiman[185] resolved that problem by holding:

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[181] Transfer rather than dismissal has been recommended as the preferable procedure by the American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Official Draft, 1969, p.224. See, e.g., Dayton Casting Co. v. Full Mold Process, Inc., 404 F. Supp. 670 (S.D. Ohio 1975) (Interests of justice did not require dismissal.)

[182] Goldlawr, Inc. v. Heiman, 369 U.S. 463, (1962), Corbe v. Sameiet M.S. Song of Norway, 572 F.2d 77 (2d Cir. 1978); Dubin v. United States, 380 F.2d 813, (5th Cir. 1967).

[183] See, e.g., Lowery v. Estelle, 533 F.2d 265 (5th Cir. 1976); Mulcahy v. Guerther, 416 F. Supp. 1083 (D. Mass. 1976); Eccles v. United States, 396 F. Supp. 792 (D.N.D. 1975).

[184] First National Bank of Chicago v. United Air Lines, 190 F.2d 493 (7th Cir. 1951), rev'd on other grounds, 342 U.S. 396; Raese v. Kelly, 59 F.R.D. 612 (N.D. W. Va. 1973).

[185] 369 U.S. 463 (1962).

> The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.[186]

This is especially important for a cause of action brought under RICO; if venue is improper, by definition the court does not have personal jurisdiction over the defendant.[187]

¶ 58 When venue is improper to some, but not all of the defendants, the court has several options under section 1406. The court could, in the interests of justice, transfer the entire case to a court where venue is proper as to all defendants.[188] It might sever the action and transfer only those defendants for whom venue was improper,[189] or dismiss the action as to those defendants.[190] In a cause of action under the RICO statute, the court has the further alternative of joining those defendants for whom venue is "improper" pursuant to the provisions of section 1965(b).[191] The plaintiff must affirmatively show that the interests of justice require joinder.

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[186] Id. at 466.

[187] 18 U.S.C. § 1965(a) (1976) states the requirements both for proper venue and personal jurisdiction. See ¶ 20, supra.

[188] Tiernan v. Westex Transp., Inc., 243 F. Supp. 566 (S.D.N.Y. 1965).

[189] Illinois v. Harper & Row Publishers, 308 F. Supp. 1207, 1211 (N.D. Ill. 1969), aff'd on other grounds sub nom., 400 U.S. 348 (1971).

[190] M. Dear Kaufman, Inc. v. Warnaco, Inc., 299 F. Supp. 722 (D. Conn. 1969).

[191] 18 U.S.C. § 1965(b) (1976). See ¶¶ 47-50, supra.

II. How Can The Action Be Commenced?

A. Service of Process

1. Generally

¶ 59 The purpose of service of process is to give notice to the defendant that he is being sued.[192] Rule 4 of the Federal Rules of Civil Procedure serves a dual purpose. It prescribes the geographical limits of valid service,[193] and details the manner in which process may be served.[194]

¶ 60 Under Rule 4(c), if a suit is brought, for example, in the Southern District of New York, and if the plaintiff is not authorized otherwise by a federal or state statute, process may be served only within the territorial limits of New York State. However, it is very rarely the case that a state or federal statute does not authorize otherwise.[195] State long-arm statutes are often available, allowing service of process outside the territorial boundaries of the state if certain criteria are met.[196] Many federal statutes, including RICO, authorize service of process beyond the territorial limits of the state in which the

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[192] S.E.C. v. Beisinger Indus. Corp., 552 F.2d 15 (1st Cir. 1977); Crooms v. Greyhound Corp., 287 F.2d 95 (6th Cir. 1961); Chemical Specialty Sales Corp., Ind. Div. v. Basic, Inc., 296 F. Supp. 1106 (D. Conn. 1968). See generally, 4 Fed. Prac. & Pro., supra n.5, Civil at § 1063. ("The primary function of Rule 4 is to provide the mechanisms for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.")

[193] Fed. R. Civ. P. 4(f).

[194] Fed. R. Civ. P. 4(a-d), (g-i).

[195] See ¶ 16, supra.

[196] 4 Fed. Prac. & Pro., supra n.5, Civil at § 1068.

court is sitting.[197] When a cause of action is based on a federal statute and brought in federal court, the provisions of that statute are used to determine where process may be served.[198]

2. RICO

¶ 61 The RICO statute permits service of process on a defendant in any district in which he resides, is found, has an agent, or transacts his affairs.[199] This provisions is misleading. It does not prescribe the requirements for personal jurisdiction although such requirements are often phrased in terms of "amenability to service of process." It merely provides that once suit is bought in a proper court pursuant to section 1965(a), defendants may be served with process in the specified locations.[200] In this light, the provision is redundant. If a defendant can be served wherever he is found or has an agent (who is authorized to receive service of process), the place where he transacts his affairs,

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[197] 18 U.S.C. § 1965(d) (1976):

> All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

See also, 4 Fed. Prac. Pro., supra n.5, Civil at § 1075.

[198] Fraley v. Chesapeake & Ohio R. Co., 397 F.2d 1, 3-4 (3d Cir. 1968); D. Amburn v. Harold Forster Industries, Ltd., 423 F. Supp. 1302 (E.D. Mich. 1976); 4 Fed. Prac. & Pro., supra n.5, Civil at § 1117. See also Fed. R. Civ. P. 4(e).

[199] 18 U.S.C. § 1965(d) (1976).

[200] Interpreting the parallel provision of the antitrust statute (15 U.S.C. §22 (1976)), the court in Goldlawr, Inc. v. Heiman, 288 F.2d 579, 581 (2d Cir.), rev'd on other grounds, 369 U.S. 463 (1961), held that "the extraterritorial service privilege is given only when the other requirements are satisfied."

for example, is irrelevant.[201]

¶ 62 Although the rules that govern the geographical limitations to valid service of process are either prescribed by federal statute or governed by state law, when a cause of action is brought pursuant to a federal statute that does not provide for the manner of service, service should be effected according to Rule 4.[202] A RICO plaintiff, therefore, must look to the relatively straightforward procedures prescribed by Rule 4. If these procedures are followed, service is effective whether or not the defendant receives the summons; due process does not require that the defendant actually receive notice.[203]

¶ 63 Rule 4(d) permits service of process on an individual defendant other than an incompetent person or infant by (1) delivering a copy to him personally;[204] (2) leaving copies at his dwelling place or usual place of abode with some person of suitable age and discretion residing therein;[205] or (3) delivering

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[201] A plaintiff could not, for example, bring suit in a forum with no contacts with either the defendant or the cause of action, serve him with process where he transacts his affairs, and claim that the court has personal jurisdiction over him. However, if suit is initially brought in a proper forum, it makes no difference where defendant transacts his affairs for purposes of service of process, as the plaintiff can serve the defendant wherever he can catch him.

[202] See The Advisory Committee Note to the 1963 amendment to Rule 4(e), reprinted in The Appendix to the Federal Rules of Civil Procedure. See also, 4 Fed. Prac. & Pro., supra note 5, Civil at § 1117, ("Thus, the use of a federal statute to make extraterritorial service under Rule 46 actually may necessitate the application of one or more of the provisions in Rule 4(d) or Rule 4(i).")

[203] Smith v. Kincaid, 249 F.2d 243 (6th Cir. 1957).

[204] Fed. R. Civ. P. 4(d)(1).

[205] Id.

copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.[206] A plaintiff may serve process on a domestic or foreign corporation or upon a partnership or other unincorporated association subject to suit under a common name by (1) delivering a copy of the summons and complaint to an officer,[207] a managing or general agent,[208] or any other agent authorized by appointment or by law to receive service of process;[209] and (2) if the agent is one authorized by statute to receive service and the statute so requires, by mailing a copy to the defendant.[210]

3. Service of Subpoenas

¶ 64 It is unclear whether the broad service of process provision of section 1965(d) applies to subpoenas of witnesses. The term "process," in its most typical sense, is interpreted as the "means of compelling the defendant to appear in court."[211]

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[206] Id. Actual appointment for the express purpose of receiving process is generally required, although such appointment may be implied. See United States v. Davis, 38 F.R.D. 424 (N.D.N.Y. 1965).

[207] Fed. R. Civ. P. 4(d)(3).

[208] Id.

[209] Id.

[210] Id.

[211] Blackstone, Commentaries *279; Executive Air Services, Inc. v. Beech Aircraft Corp., 254 F. Supp. 415, 417 (D. Puerto Rico 1966).

A broader reading of "process" defines it as "a means whereby the court compels compliance with its demands."[212] At least one state court has specifically included a subpoena ad testificandum within the scope of the term "process."[213]

¶ 65 Arguably, Congress intended that section 1965(d) apply to service of subpoenas, as well as to service of the summons and complaint. First, the RICO statute itself provides for liberal construction.[214] Most sources indicate that a "narrow" reading of the term "process" defines it as applicable to summons and complaint only.[215] Liberally construed, process refers to any means by which "the court compels compliance with its demands."[216] Second, the service of process provision is immediately preceded by section 1965(c) which provides for service of subpoenas on

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[212] Lobrovich v. Georgison, 144 Cal. App.2d 567, 571, 361 P.2d 460, 464 (1956). Cf., Executive Air Services, Inc. v. Beech Aircraft Corp., id. at 417. ("'Latu Sensu,' the term 'judicial process' includes within its meaning all of the acts of the court, from the commencement of the action unti, its final adjudication.")

[213] DuPont v. Bronston, 362 N.Y.S.2d 471, 473, 46 A.D.2d 369, 371 (Sup. Ct. 1974) ("'The subpoena to appear, referred to in some jurisdictions as a summons, is consistently defined in all jurisdictions having a statutory definition as a process in the name of the body or person authorized to issue it requiring attendance at the time and place it specifies.'") (quoting 1 N.Y. Adv. Comm. Rep. 357 [1957] (emphasis added)).

[214] The Organized Crime Control Act of 1970, § 904(a), 84 Stat. 947 (1970). "The provisions of this title shall be liberally construed to effectuate its remedial purposes."

[215] Executive Air Services, Inc. v. Beech Aircraft Corp., 254 F. Supp. 415, 417 (D. Puerto Rico 1966) ("In a narrower sense, process is the manner through which a defendant is brought before the bar to answer a complaint filed against him.")

[216] Lobrovich v. Georgison, 144 Cal. App.2d 567, 571, 301 P.2d 460, 464 (1956).

witnesses in civil or criminal actions brought by the United States.[217] It seems clear that Congress intended that private actions not be limited by the geographical confines of the preceding section.[218]

¶ 66 Under section 1965(c), to subpoena a witness who lives in another district and more than one hundred miles from the court, the United States must secure the judge's authorization on a showing of good cause.[219] If section 1965(d) is interpreted to include service of subpoenas, a private litigant, plaintiff or defendant, would be able to secure service on any witness wherever he resides,

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[217] 18 U.S.C. § 1965(c) (1976) reads:

> In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

This section parallels the antitrust provision almost exactly, including the limitation that the action must be commenced by the United States. See 15 U.S.C. § 23 (1976).

[218] Congress attempted to amend § 1965(c) on two separate occasions. Although the Senate approved the amendments both times, (see 118 Cong. Rec. 29368-29371 (1972); 119 Cong. Rec. 10317-10320 (1973)), they were rejected by the House. The amendment would have deleted the term "instituted by the United States" from § 1965(c). The section would thereby have applied to both government and private suits. As the law now stands, the limitations of subpoena power exist only with respect to government suits. Private actions are arguably controlled by § 1965(d).

[219] 18 U.S.C. § 1965(c) (1976). See n.217 supra.

is found, has an agent or transacts his affairs.[220] If section 1965(d) is interpreted to apply only to the procedure for bringi a defendant before the court however, a party seeking to subpoena a witness must follow the guidelines set out in Rule 45(d) and (e).[22] The geographical requirements of this rule are almost identical to those of the subpoena provisions in section 1965(c), with the exception that the court is not permitted, upon a showing of good cause, to authorize nationwide service of subpoenas.[222]

B. Pleadings

1. Generally

¶ 67 The drafts of the Federal Rules of Civil Procedure emphasized the decreasing importance of strict pleading rules in modern civil litigation.[223] The basic function of the modern pleading is to inform the opposing party of the nature of the claim or defense being asserted against him, and with few exceptions, tha is all the federal courts require.[224] As a decision on the merits is the desired end, courts avoid, if possible, a dismissal based on technical and unnecessary pleading requirements.[225] Detailed

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[220] 18 U.S.C. § 1965(d) (1976).

[221] Fed. R. Civ. P. 45(d), (e). Service is to be made in a manner prescribed by Rule 45(c). See generally, 9 Fed. Prac. & Pro., supra note 5, Civil at §§ 2451-2463.

[222] Fed. R. Civ. P. 45(c).

[223] C. Wright, Federal Courts, § 66 at 308 (3d ed. 1976); Advisory Comm. 1955 Report, Rule 8(a)(2).

[224] Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Paul M. Harrod Co. v. A.B. Dick Co., 204 F. Supp. 580, 584 (N.D. Ohio 1962) ("If the complaint states a claim in terms clear enough to enable the defendant to file a responsive pleading, that is sufficient.").

[225] Buchanan v. General Motors Corp., 64 F. Supp. 16 (S.D.N.Y. 1946), aff'd 158 F.2d 728 (2d Cir. 1947).

actual statements and evidence need not be pleaded; if the opposing party seeks more information than the pleading contains, liberal discovery procedures are available.[226] The law is settled that the rule is the same in treble damage actions.[227]

2. Complaint

¶ 68 Service of the summons and complaint commences the action.[228] Rule 8(a) requires the plaintiff to plead three basic allegations in the complaint. He must allege that the court has subject-matter jurisdiction over his claim; he must allege all of the essential elements of his cause of action; and he must demand the relief to which he deems himself entitled.[229]

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[226] Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1946); Package Closure Corp. v. Sealright Co., 141 F.2d 972, 979 (2d Cir. 1944).

[227] Package Closure Corp. v. Sealright Co., id. at 978.

> To impose peculiarly stiff [pleading] requirements in treble damages suits will be to frustrate Congressional intent. * * * We see no reason whatever to believe that the Supreme Court intended its liberal rules governing pleadings to be inapplicable to a suit for treble damages.

To avoid the potential abuse of the "windfall" of a successful trebel damage action, in the past courts required stricter pleading rules in antitrust cases. This was especially true regarding the necessity of pleading more detailed facts that Rule 8(a) demands. See, e.g., Baim & Blank, Inc. v. Warren Connelly Co., 19 F.R.D. 108, 109 (S.D.N.Y. 1956). This view is now, at least theoretically, repudiated. See United States v. Employing Plasterers Ass'n, 347 U.S. 186, 188 (1954); New Home Appliance Center v. Thompson, 250 F.2d 881, 883 (10th Cir. 1957).

[228] Fed. R. Civ. P. 3.

[229] Fed. R. Civ. P. 8(a).

¶ 69 If the jurisdictional allegation is insufficient, the complaint is fatally defective, and the court must either dismiss the action or grant leave to amend to cure the deficiency.[230] The basis of subject-matter jurisdiction in a claim brought under the RICO statute is the existence of a federal question. The plaintiff, therefore, should allege, pursuant to Official Form 2(b) or (c), that the claim "arises under the Organized Crime Control Act of 1970, 84 Stat. 943, Title 18, § 1964 (c), as hereinafter more fully appears."[231] Of course the plaintiff must allege more than a conclusory statement that the claim arises under the statute. An allegation that the RICO statute has been violated is insufficient, without facts supporting it, to establish jurisdiction.[232] As a general rule, the allegations of the complaint determine the jurisdiction of the federal courts. If a complaint alleges a claim arising under a federal statute, the district court has jurisdiction to hear the case regardless of whether the

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[230] Matherly v. Lamb, 414 F. Supp. 364, 366 n.1 (E.D. Pa. 1976); Spain v. United States, 397 F. Supp. 15, 16 (M.D. La. 1975). For an analysis of amendments, see ¶¶ 131-141, infra.

[231] See Official Form 2(c).

[232] Beeler v. United States, 338 F.2d 687, 689 (3d Cir. 1964) ("It is well settled that the recitation of a statute can neither deprive a court of jurisdiction nor confer jurisdiction upon it. It is the operative facts pleaded which alone can do that.") See, also (in the antitrust context), Northland Equities Inc. v. Gateway Center Corp., 441 F. Supp. 259, 264 (E.D. Pa. 1977):

> The complaint alleges that the cause of action arises, inter alia, under 'the Antitrust Laws of the United States.' The mere reference to the antitrust laws without any hint of the basis of the claim is insufficient under Rule 8(a). . . . [T]he complaint . . . does not give fair notice of what plaintiff's claim is, and the grounds upon which it rests.

plaintiff ultimately wins or loses on the merits.[233]

¶ 70 It is probably unnecessary to allege that the amount in controversy exceeds $10,000.[234] But since the issue has never been litigated in this context and since it will not be a major problem in mosts cases brought under the RICO statute,[235] a prudent plaintiff should allege the minimum amount if possible.[236] The complaint need not contain allegations of proper venue or the existence of personal jurisdiction.[237] If challenged, the plaintiff can demonstrate proper venue or the existence of personal jurisdiction by submitting affadavits.[238]

b. Pleading the Cause of Action

¶ 71 The complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[239] The plaintiff must allege every essential element of his cause of action.[240] The function of the pleading, however, is to put

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[233] Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 305-308 (1923).

[234] See ¶¶ 5-6, supra.

[235] See note 12, supra.

[236] See Official Form 2(b).

[237] See The Advisory Committee's Note to Official Form 2.

> Since improper venue is an affirmative dilatory defense, it is not necessary for plaintiff to include allegations showing the venue to be proper.

Chambers v. Blichle, 312 F.2d 251 (2d Cir. 1963) (personal jurisdiction); Croney v. Louisville & N.R. Co., 14 F.R.D. 356, 358 (S.D.N.Y. 1953) (venue).

[238] Fed. R. Civ. P. 43(e).

[239] Fed. R. Civ. P. 8(a)(2).

[240] United States v. Employing Plasterers' Ass'n., 347 U.S. 186, 188 (1954); Radovich v. National Football League, 352 U.S. 445, 453 (1957). 2A Moore's Federal Practice ¶ 8.17 [3] at 1746.

theopposing party on notice, not to construct a record for trial. Thus, an elaborate and detailed recitation of the facts is unnecessar and undesirable.[241]

¶ 72 The complaint must allege that the defendant violated the RICO statute.[242] Consequently, a careful reading of the prohibited activities listed in section 1962 is crucial. For example, the "enterprise" that the defendant has allegedly "invested in"[243] "acquired or maintained any interest or control in,"[244] or "associated

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[241] Fed. R. Civ. P. 8(e)(1):

> Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

In Fulton Co. v. Beaird-Poulan, Inc., 54 F.R.D. 604, 609 (N.D. Miss. 1972), the court ordered the plaintiff in an antitrust case to amend his complaint so as to make it "simple, concise and direct."

> Although this suit is an antitrust action and requires plaintiff to state with clarity his claim for relief, it is not contemplated that plaintiff set forth in the complaint a detailed history of his relationship with defendant covering a span of twenty years, nor include therein details of an evidentiary nature, conclusory allegations or analogous references.

See also Louisiana Farmers' Protective Union v. Great Atlantic and Pacific Tea Co. of America, 131 F.2d 419, 422 (8th Cir. 1942):

> It is not necessary to set out in detail the acts complained of or the circumstances from which the pleader draws his conclusions that violations of the acts of Congress have occurred and the pleader has been damaged.

[242] 18 U.S.C. § 1964(c) (1976):

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

[243] 18 U.S.C. § 1962(a) (1976).

[244] 18 U.S.C. § 1962(b) (1976).

with,"[245] must have been engaged in, or its activities must have affected, interstate or foreign commerce.[246] In his complaint, therefore, the plaintiff must allege an interstate commerce connection and cite facts supporting it.[247] In most cases, insufficient factual allegations are not fatal and are remediable by amendment.[248] Also, complaints filed in federal court are construed very liberally. In general, a court will grant a motion to dismiss for failure

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[245] 18 U.S.C. § 1962(c) (1976).

[246] 18 U.S.C. § 1962(a-c) (1976).

[247] Bryan v. Stillwater Board of Realtors, 578 F.2d 1319, 1323 (10th Cir. 1977):

> It is the rule that in pleading the requisite anticompetitive effect in a federal antitrust suit, there must be some allegation of ultimate facts sufficient to show restraint on interstate commerce.

It will be easier to establish the required commerce connection in a complaint alleging a violation of the RICO statute than one alleging a violation of the Clayton or Sherman Acts. Under the antitrust laws, it is necessary to allege and prove that the transactions complained of are actually in interstate commerce (Clayton Act) or affect interstate commerce (Sherman Act). See Willard Dairy Corp. v. National Dairy Products Corp., 309 F.2d 943, 946 (6th Cir. 1962), cert. denied, 373 U.S. 934 (1963). Under § 1962, it is only necessary to allege and prove that the "enterprise" specified "is engaged in or the activities of which affect" interstate commerce. The defendant's conduct itself ("pattern of racketeering activity") need not affect interstate commerce.

[248] Louisiana Farmers' Protective Union v. Great Atlantic and Pacific Tea Co. of America, 131 F.2d 419, 422 (8th Cir. 1942)

> To sustain the court below the appellees contend that the appellant has pleaded merely conclusions of law, setting forth in the words of the statute, a conspiracy among the appellees to establish a monopoly in interstate trade in strawberries, and that the complaint is barren of allegations concerning the acts of appellees constituting the alleged violations of law. It is conceded that more than this is required of the pleader in a civil action under the statute in question, but the complaint here is not so deficient in its allegations of ultimate facts as to justify its dismissal without leave to amend.

to state a claim upon which relief can be granted only if the claim on its face is "wholly frivolous."[249]

¶ 73 In pleading a cause of action, a plaintiff must make certain allegations with more specificity than is normally required by Rule 8(a). For example, the general rule is that an allegation of conspiracy must be well-substantiated with ultimate facts.[250] Allegations of fraud must be made with particularity; conclusory allegations of fraud are insufficient to meet the requirements of Rule 9(b).[251] This mandate of particularity, however, does not require the pleader to allege evidentiary facts, or to go into

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[249] Hart v. B.F. Kieth Vaudeville Exchange, 262 U.S. 271, 274 (1923) (Holmes, J.). See ¶¶ 97-98, infra.

[250] McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659, 663 (8th Cir. 1962) ("[A] general allegation of conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action."); Adams v. American Bar Ass'n., 400 F. Supp. 219, 223 (E.D. Pa. 1975) ("[T]he federal courts do require that plaintiff specify with at least some degree of particularity the overt acts [in furtherance of the conspiracy] which defendants allegedly engaged in. A bare-bones statement of conspiracy under the antitrust laws without any supporting facts permits dismissal.") See also Vermilion Foam Products Co. v. General Electric Co., 386 F. Supp. 255, 258 (E.D. Mich. 1974).

[251] Fed. R. Civ. P. 9(b):

> In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity. Malice, intent, inowledge, and other condition of mind of a person mau be averred generally.

See Bosse v. Crowell, Collier and MacMillan, 564 F.2d 602, 611 (9th Cir. 1977); Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972) ("A complaint cannot escape the charge that it is entirely conclusory in nature merely by quoting such words from the statutes as 'artifices, schemes, and devices to defraud'..."); Temple v. Haft, 73 F.R.D. 49, 53 (D. Del. 1976).

excessive detail or complexity.[252] A pleading is generally held to state a valid cause of action for fraud if it identifies "the circumstances constituting fraud so that defendants can prepare an adequate answer from the allegations,"[253] or if it is of "sufficient factual specificity to provide assurance that the plaintiff has investigated the alleged fraud, and reasonably believes a wrong has occurred."[254] Failure to plead with sufficient particularity renders the complaint subject to dismissal.[255]

¶ 74 To bring a private, treble damage action under RICO, the plaintiff must allege and prove that he is statutorily entitled to sue. Section 1964(c) gives "[a]ny person injured in his business or property by reason of a violation of section 1962" the right to sue.[256] Without standing to sue, the plaintiff may not bring his action in federal court.[257]

75 It is unclear whether a plaintiff bringing a claim under RICO must meet the minimum Article III standing requirements, or

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[252] Bosse v. Crowell, Collier and MacMillan, id.; Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973); Temple v. Haft, id.

[253] Walling v. Beverly Enterprises, 476 F.2d 393, 297 (9th Cir. 1973). See also Bosse v. Crowell, Collier, and MacMillan, id. at 611; 5 Fed. Prac. & Pro., supra note 5, Cibil at § 1296.

[254] Temple v. Haft, 73 F.R.D. 49, 53 (D. Del. 1976).

[255] Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972).

[256] 18 U.S.C. § 1964(c) (1976).

[257] Frothingham v. Mellon, 262 U.S. 447, 488 (1923)

> The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result

whether he must prove a more restrictive version of that requirement adopted specifically for antitrust actions.[258]

¶ 76 Under either test, the plaintiff must allege and prove that he was in fact injured.[259] He must also allege that he was injured "by reason of a violation of section 1962."[260] The antitrust standing requirements and the general Article III requirements diverge on the causation element. Under the test for constitutional standing developed in Warth v. Seldin,[261] the plaintiff must allege facts from which it reasonably could be inferred that had it not been for defendant's alleged violations, there is a substantial probability that the plaintiff would not have been injured.[262]

¶ 77 The antitrust standing requirement demands that plaintiff meet the Warth v. Seldin test, but in addition, the plaintiff must

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> of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

[258] See Standing Rules and the RICO Treble Damage Action, supra, where a good argument is advanced that the standing rules applicable to antitrust should not be analogized to a private cause of action under RICO. See ¶¶ 46-50.

[259] See Warth v. Seldin, 422 U.S. 490, 501 (1975);

> The plaintiff . . . must allege a distinct and palpable inj y to himself, even if it is an injury shared by a larger class of other possible litigants.

[260] 18 U.S.C. § 1964(c) (1976) (emphasis added).

[261] 422 U.S. 491 (1975).

[262] Id. at 504.

show that the injury to his business or property interests[263] was proximately caused by the defendants' conduct.[264] The proximate cause requirement is composed of two elements. First, there must be a causal connection between the injury and the alleged violation such that the violation is a substantial factor in the occurrence of the damage.[265] Second, the illegal act must be linked to a plaintiff engaged in activities intended to be protected by the antitrust laws.[266] Since the RICO statute was intended to

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[263] Recently, courts have begun to adopt a broader and more flexible approach to the character of a "business or property interest." Under the old rule, only commercial injury satisfied this requirement. See, e.g., Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641, 644 (D.N.J. 1960). The Supreme Court, however, recently held that such consumer allegations constitute injury to "business or property" within the meaning of the antitrust laws. Reiter v. Sonotone Corp., 47 U.S.L.W. 4672 (June 12, 1979). There is no reason to believe that thenarrow approach of the past will be adopted for civil plaintiffs alleging a RICO violation. Note, however, that a private plaintiff will not be able to recover treble damages for personal injury caused by a violation of the RICO statute. Cf., Hammon v. United States, 267 F. Supp. 420, 432 (D. Mont. 1967) (antitrust).

[264] Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 500 (10th Cir. 1978)

> To establish standing to maintain a private antitrust action . . . , a plaintiff must meet a two-pronged test. First, he must allege injury to his 'business or property' within the meaning of the Act and, second, he must show proximate causation--that the injury directly resulted from a violation of the antitrust laws.

[265] Id.

[266] Reibert v. Atlantic Richfield Company, 471 F.2d 727, 731 (10th Cir. 1973), cert. denied, 411 U.S. 938 (1973).

protect "any person" injured by a violation,[267] the second element of the proximate cause issue is irrelevant to a plaintiff bringing a RICO action. The first prong may be significant, however, if the courts follow the antitrust approach. The Supreme Court held that only direct, primary purchasers have standing to bring a private antitrust action for treble damages against a defendant allegedly involved in an overpricing scheme.[268] If that type of requirement is extended to private RICO actions, a plaintiff's right to sue will be severely limited.

¶ 78 Generally, courts agree that the pleading stage is not the proper time to determine the standing question, epecially the issue of proximate cause.[269] The plaintiff should have the opportunity

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[267] 18 U.S.C. § 1964(c) (1976). The threshhold question of whether the plaintiff is a "person" entitled to sue is answered in the statute itself. A "person" is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1976). It is possible for a state to sue under the civil provisions of the antitrust laws (and presumably under the RICO statute) if it can show that its own commercial interests were damaged. However, it may not sue for treble damages in 'parens patriae' on behalf of its injured citizens in the absence of injury to itself. See Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972). See also The Organized Crime Control Act of 1970, § 904(a), 84 Stat. 947 (1970). "The provisions of this title shall be liberally construed to efeectuate its remedial purposes."

[268] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968); accord, Illinois Brick Co. v. Illinois, 431 U.S. 420 (1977).

[269] Louisiana Farmers' Protective Union v. Great Atlantic and Pacific Tea Co., 131 F.2d 419 (8th Cir. 1942); Data Digests, Inc. v. Standard & Poors Corp., 43 F.R.D. 386, 388 (S.D.N.Y. 1967)

> Whatever the current status of the causation rules may be, however, it is clear that under recent cases that the causation issue should not be resolved at this stage of the action. With the matter only at the pleading stage, Linker [plaintiff] should not be deprived of the opportunity to develop his claim.

to use discovery procedures, which often will help develop the facts necessary to establish causation. In addition, if the plaintiff does not allege proximate cause, courts are liberal in granting leave to amend.[270] In antitrust cases, plaintiffs are often defeated due to lack of standing, yet rarely are those cases dismissed at the pleading stage.[271]

3. Pre-Answer Motions

¶ 79 Any time before the defendant serves an answer to the complaint, he may make numerous notions as provided by Rule 12.[272] The defendant may move to dismiss the action for lack of subject-matter jurisdiction,[273] lack of jurisdiction over the person,[274] improper venue,[275] insufficiency of process,[276] insufficiency of service of process,[277] failure to state a claim upon which relief can be granted,[278] or failure to join an indispensable party.[279]

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[270] See, e.g., Stokes Equipment Co. v. Otis Elevator Co., 340 F. Supp. 937, 942 (E.D. Pa. 1972). See also ¶¶ 131-141, infra.

[271] Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386, 388 n.14 (S.D.N.Y. 1967) (cases cited).

[272] Fed. R. Civ. P. 12. See 5 Fed. Prac. & Pro. supra note 5, Civil at § 1342 at 516.

[273] Fed. R. Civ. P. 12(b)(1).

[274] Fed. R. Civ. P. 12(b)(2).

[275] Fed. R. Civ. P. 12(b)(3).

[276] Fed. R. Civ. P. 12(b)(4).

[277] Fed. R. Civ. P. 12(b)(5).

[278] Fed. R. Civ. P. 12(b)(6).

[279] Fed. R. Civ. P. 12(b)(7).

If the complaint is so vague and ambiguous that the defendant is unable to answer, he may move for a more definite statement before filing his answer.[280] If the defendant believes matter in the complaint is "redundant, immaterial or scandolous," he may move the court to strike the material from the pleading.[281]

¶ 80 With the exception of motions to dismiss for lack of subject-matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to join an indispensable party, all of the preceding defenses are waived if the defendant makes a pre-answer without joining all defenses then available to him in that motion.[282] For example, if the defendant makes a motion to dismiss for failure to state a claim and does not include in that motion the defense of improper venue, he may not raise that defense thereafter by motion or in the answer. Similarly, if any defense other than the three mentioned above,[283] is not made either by motion or answer, that defense is waived.[284] The Federal Rules dissolved the distinction between 'special' and 'general' appearances.[285] A defendant may assert the defense of lack of personal jurisdiction by motion or by answer without subjecting himself to the court's jurisdiction, and he need no longer

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[280] Fed. R. Civ. P. 12(e).

[281] Fed. R. Civ. P. 12(f).

[282] Fed. R. Civ. P. 12(g); Fed. R. Civ. P. 12(h)(1)(A).

[283] Lack of subject-matter jurisdiction (12(b)(1)), failure to state a claim (12(b)(7)), and failure to join an indispensable party (12(b)(7)).

[284] Fed. R. Civ. P. 12(h)(1)(B).

[285] See, e.g., Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir. 1944), cert. denied, 322 U.S. 740.

appear specially to do so.[286]

a. Lack of Subject-Matter Jurisdiction

¶ 81 A defendant will probably assert a motion to dismiss for lack of subject-matter jurisdiction in a RICO action when he believes the complaint does not allege a substantial federal question,[287] or when the amount in controversy does not meet the jurisdictional minimum.[288] This motion challenges the court's authority to hear the case.[289] The defense of lack of subject-matter jurisdiction cannot be waived and is assertable by any interested party, including the court on its own motion,[290] at any time,[291] either in the answer[292] or in the form of a suggestion to the court prior to final judgment.[293]

¶ 82 A motion to dismiss due to lack of subject-matter jurisdiction may take two forms. The motion may raise an objection to

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[286] Id.

[287] See ¶ 69, supra.

[288] See ¶ 70, supra.

[289] Trinanes v. Schulte, 311 F. Supp. 812, 813 (E.D.N.Y. 1970).

> It is a well-established principal that jurisdiction of the subject matter is an absolute prerequisite for the continuance of an action in the District Court and in the absence of the same the Court must dismiss the action.

[290] The court may raise the objection even on appeal. See Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

[291] Capron v. Van Noorden, 2 Cranch (6 U.S.) 126 (1804).

[292] McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

[293] Griffin v. Matthews, 310 F. Supp. 341 (D. N.C. 1969), aff'd per curiam 423 F.2d 272 (4th Cir. 1970).

the complaint itself. If the complaint fails to allege that the federal court has jurisdiction over the action, the court must either dismiss the case or grant leave to amend.[294] Normally, if the complaint is defective, the court will grant leave to amend unless the complaint appears incurable on its face.[295]

¶ 83 The defendant may also raise a 12(b)(1) motion to object to the court's substantive lack of jurisdiction, regardless of the technical sufficiency of the complaint. In a case brought under the RICO statute, an objection to a substantive lack of jurisdiction will necessarily involve the issue of whether the plaintiff has alleged a violation of the statute. The defendant may submit affadavits to support his position, and conversely, the plaintiff may establish the existence of jurisdiction through extra-pleading material.[296] Nevertheless, if a jurisdictional decision is dependent upon a decision on the merits, courts will often forego a preliminary determination of jurisdiction and proceed to trial on the merits.[297]

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[294] See note 230, supra.

[295] Harrison v. Local 54 of American Federation of State, County and Municipal Employees, AFL-CIO, 518 F.2d 1276, 1284 n.4 (3d Cir. 1975), cert. denied, 423 U.S. 1042.

[296] In Land v. Dollar, 330 U.S. 731, 735 n.4 (1947) the court stated:

> But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, Judicial Code § 37, 28 U.S.C. § 80, Fed. R. Civ. P. 12(b), the court may inquire, by affadavits or otherwise, into the facts as they exist. [citations omitted].

[297] Land v. Dollar, id.; Schramm v. Oakes, 352 F.2d 143, 149 (10th Cir. 1965); Fireman's Find Insurance Co. v. Railway Express Agency, 253 F.2d 78, 784 (6th Cir. 1958). If the rule were otherwise, the merits of

¶ 84 If a court grants a motion to dismiss before a full hearing, it is not a decision on the merits and therefore has no res judicata

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> a controversy could be summarily decided, partly on affadavits without the right of cross-examination, under the guise of determining the jurisdictional issues . . .

Because the issues raised are many times the same in federal question cases, the substantive validity of the claim is often confused with the question of whether or not the claim arises under federal law. The general rule was stated by the Supreme Court in Wheeldin v. Wheller, 373 U.S. 647 (1963):

> To determine whether a federal question is involved, the court must look to see whether the complaint purports to state a claim under federal law, regardless of the actual validity of the claim.

See also Baker v. Carr, 396 U.S. 186 (1962); Neal v. Brim, 506 F.2d 6, 9 (5th Cir. 1975): (A complaint "purports to state a claim under federal law" unless the claim is obviously "frivolous" or "devoid of merid.")

However, in City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973), theSupreme Court dismissed a civil rights action on its own motion after a full trial for lack of subject-matter jurisdiction. The Court held that since a municipality was not a "person" within the meaning of the statute providing a cause of action for deprivation of civil rights the court lacked jurisdiction. This result appears contrary to the general rule. A possible answer is that since neither party raised the objection at any stage of the proceeding, and since the Court could not dismiss the case for failure to state a claim (12(b)(6)) on its own motion, the result was important enough to warrant an expansion of the 12(b)(1) motion. How far the courts will carry Kenosha's procedural holding is unclear. It has been followed in a number of cases. See, e.g., City of Charlotte v. Local 660, International Association of Firefighters, 426 U.S. 283, 284 n.1 (1976); Aldinger v. Howard, 427 U.S. 1, 5 (1976). However, most cases are using Kenosha only as authority for the narrow proposition that a district court does not have jurisdiction to hear a case brought by or against a municipality under 42 U.S.C. § 1983, as a municipality is not a "person" within the meaning of the statute. Expansion of this proposition to other issues seems clearly possible. However, courts have not done so. See, e.g., Apton v. Wilson, 506 F.2d 83, 96 (D.C. Cir. 1974), where the court came to an opposite conclusion on a very similar issue.

"The District of Columbia, citing the holding that a municipality is not a "person" liable under 42 U.S.C. § 1983, argues that similarly a municipality may not be sued on a claim for damages arising directly under the Constitutuion. . . . . Even as to the District, the question goes not to the District Court's jurisdiction but to the merits, whether plaintiff has stated a claim against the District of Columbia. . . . Failure to state a claim does not deprive the District Court of jurisdiction under 28 U.S.C. § 1331(a)." Id. at n.16.

effect.[298] If jurisdiction is exclusive to the federal district courts, however,[299] the plaintiff would have no alternative forum in which to bring the action, and the dismissal would be permanent in effect.

¶ 85 The burden of proof is on the party asserting jurisdiction.[300] The plaintiff must show that he has alleged a valid claim under the RICO statute; his claim cannot be "frivolous."[301] If challenged, he must prove that the allegation of the minimum jurisdictional amount was made in good faith.[302]

b. Lack of Personal Jurisdiction

¶ 86 Rule 12(b)(2) permits the defendant to challenge the existence of the court's personal jurisdiction over him. A RICO defendant challenging the court's personal jurisdiction must allege that he does not reside, is not found, does not have an

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[298] See, e.g., Hitt v. City of Pasadena, 561 F.2d 606 (5th Cir. 1977).

[299] See ¶ 4, supra.

[300] Thomson v. Gaskill, 315 U.S. 442 (1942); Save Our Cemetaries, Inc. v. Archdiocese of New Orleans, Inc., 568 F.2d 1074 (5th Cir.), cert. denied, 99 S. Ct. 120 (1978); Mortensen v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 n.16 (3d Cir. 1977).

[301] Neal v. Brim, 506 F.2d 6, 9 (5th Cir. 1976); Brown v. Bronstein, 389 F. Supp. 1328, 1331 (S.D.N.Y. 1975):

> Jurisdiction exists unless the claim is obviously frivolous, plainly unsubstantial, or so insubstantial, implausible, foreclosed by prior decisions of this court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits. [footnotes omitted.]

Buchler v. United States, 384 F. Supp. 709 (E.D. Cal. 1974); see, note 297, supra.

[302] St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938).

agent, or does not transact his affairs in the forum where the action was brought.[303] The plaintiff has the burden of proving that personal jurisdiction exists when a 12(b)(2) motion is raised.[304]

¶ 87 When the defense of lack of personal jurisdiction is asserted by motion, it must be made before the answer is served, although it can be asserted in the answer itself.[305] The defense is waived if not asserted by motion or responsive pleading.[306] Raising a permissive counterclaim[307] will also constitute a waiver.[308] When considering a motion to dismiss for lack of personal jurisdiction, the court may receive and examine affadavits;[309] "matters of jurisdiction . . . [are] very often not apparent on the face of the summons and complaint."[310] A successful 12(b)(2) motion usually results in the dismissal of the action.[311] The decision is not a

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[303] 18 U.S.C. § 1965(a) (1976). See ¶¶ 14-18, supra.

[304] Forsythe v. Overmeyer, 576 F.2d 779, 781 (9th Cir.), cert. denied, 99 S. Ct. 188 (1978).

[305] Croney v. Louisville & Nashville Railway Co., 14 F.R.D. 356, 358 (S.D.N.Y. 1953).

[306] Fed. R. Civ. P. 12(h).

[307] Fed. R. Civ. P. 13(b).

[308] See, e.g., North Branch Products, Inc. v. Fisher, 179 F. Supp. 843, 846 (D.D.C.); rev'd on other grounds, 284 F.2d 611 (D.C. Cir. 1960), cert. denied, 365 U.S. 827 (1961).

[309] Fed. R. Civ. P. 43(e).

[310] Washington Institute on the Federal Rules, Proceedings, 74 (1938), quoted in, 5 Fed. Prac. and Pro., supra note 5, Civil § 1351 at 566.

[311] See, e.g., Read v. Ulmer, 308 F.2d 915, 917 (5th Cir. 1962). Note, however, that the court has, in the interests of justice, transferred a case to a proper forum under 28 U.S.C. § 1406(a), even though venue was proper. See cases cited at note 179, supra.

final judgment however, and the plaintiff may re-institute the action in a forum where personal jurisdiction is present.[312]

c. Improper Venue

¶ 88 The defendant may move to dismiss the action for lack of venue.[313] The elements of this defense are almost identical to the defense of lack of personal jurisdiction.[314] Some cases have held that the burden of proof is on the defendant challenging venue.[315] Most antitrust actions, however, as well as the only civil RICO case to have squarely confronted the issue, have held that plaintiff has the burden of proving venue and jurisdiction.[316] The party with the burden of proof must establish that the cause of action was (or was not) brought in the district in which the defendant resides, is found, has an agent, or transacts his affairs.[317]

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[312] 5 Fed. Prac. and Pro., supra note 5 at Civil § 1351 at 568.

[313] Fed. R. Civ. P. 12(b)(3).

[314] The personal jurisdiction and venue requirements are set out in 18 U.S.C. § 1965(a) (1976). See ¶ 15, supra.

[315] United States v. Orshek, 164 F.2d 741, 745 (8th Cir. 1947); United Rubber Workers of America v. Lee Rubber & Tire Corp., 269 F. Supp. 798, 715 (D.N.J. 1967), aff'd 394 F.2d 362 (3d Cir.), cert. denied, 393 U.S. 835 (1968).

[316] See King v. Vesco, 342 F. Supp. 120, 125 (N.D. Cal. 1972) (RICO); Redmond v. Atlantic Coast Football League, 359 F. Supp. 666, 669 (S.D. Ind. 1973) (antitrust); Flank Oil Co. v. Continental Oil Co., 277 F. Supp. 357, 361 (D. Colo. 1967) (antitrust). A second RICO civil action implicitly accepted this holding. See Farmers' Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978).
Wright and Miller support this interpretation. See 5 Fed. Prac. and Pro., supra note 5, Civil at § 1352 at 570.

[317] 18 U.S.C. § 1965(a) (1976). See ¶¶ 26-30, supra (residence); ¶¶ 31-32, supra (found); ¶¶ 33=36, supra (has an agent); ¶¶ 37-42 (transacts business).

Venue is also proper in the district where the cause of action arose.[318] If venue is proper for at least one defendant, other defendants over whom venue is improper may be brought into the action if the interests of justice require.[319]

¶ 89 It is unlikely that a 12(b)(3) motion will be successful under a RICO action considering the wide selection of alternative forums, the availability of transfer under 28 U.S.C., section 1406,[320] and the joinder provisions of 18 U.S.C., section 1965(b). Despite these provisions, two out of the four reported civil treble damage actions brought under the RICO statute involved motions to dismiss for improper venue.[321] As a challenge to personal jurisdiction, a venue objection is waived by failing to assert it by motion, or in a responsive pleading.[322] In addition, asserting a pre-answer motion which fails to include a venue objection waives this defense.[323]

¶ 90 If venue is proper in a chosen forum, but inconvenient to one or more defendants, the court may order a transfer under 28 U.S.C., section 1404.[324] In addition, if it appears that a

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[318] 28 U.S.C. § 1391(b) (1976). See ¶¶ 43-46, supra.

[319] 18 U.S.C. § 1965(b) (1976). See ¶¶ 47-50, supra.

[320] See ¶¶ 55-58, supra.

[321] King v. Vesco, 342 F. Supp. 120 (N.D. Cal. 1972) (dismissed); Farmers' Bank of the State of Delaware v. Bell Mortgage Co., 452 F. Supp. 1278 (D. Del. 1978) (Judgment deferred pending plaintiff's application).

[322] United Rubber Workers of America v. Lee Rubber & Tire Corp., 269 F. Supp. 708, 714 (D.N.J. 1967), aff'd, 394 F.2d 362 (3rd Cir.), cert. denied, 393 U.S. 835 (1968).

[323] Fed. R. Civ. P. 12(b) and 12(h)(1)(A). See Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 (2d Cir. 1966).

[324] See ¶¶ 51-54, supra.

defendant's venue objection will be successful, the plaintiff can move to transfer the case to a forum in which it might have been brought.[325]

d. Insufficiency of Process

¶ 91 The form of the summons may be objected to under a Rule 12(b)(4) motion. This motion challenges the plaintiff's compliance with Rule 4(b),[326] or any applicable provision dealing with the content of the summons.[327] A dismissal will be granted only if the defect is prejudicial. Otherwise the court will allow the plaintiff to amend.[328]

e. Insufficiency of Service of Process

¶ 92 A motion to dismiss for insufficiency of service of process,[329] challenges the manner or procedure of service;[330] it does not dispute the court's power to adjudicate the controversy.[331] Appropriate objectives include non-receipt of the summons,[332] absence of a valid agency relationship between the defendant and

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[325] 28 U.S.C. § 1406(a) (1976). If the statute of limitations has expired, the court will generally grant the motion, unless bad faith is obvious. See, e.g., Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962) and cases cited at note 183, supra.

[326] Fed. R. Civ. P. 4(b).

[327] See 4 Fed. Prac. and Pro., supra note 5, Civil at §§ 1087-1088.

[328] 5 Fed. Prac. and Pro., supra note 5, Civil at § 1353 at 582.

[329] Fed. R. Civ. P. 12(b)(5).

[330] 5 Fed. Prac. and Pro., supra note 5, Civil at § 1353 at 578.

[331] Id. at 578-79.

[332] Yox v. Durgan, 298 F. Supp. 1365 (E.D. Tenn. 1969).

the party served,[333] or any other failure to comply with applicable service requirements.[334] The 12(b)(5) objection is personal and may not be raised by the court on its own motion.[335]

¶ 93 The defense is waived if not asserted by motion or in a responsive pleading in the same manner as the defenses of improper venue or lack of personal jurisdiction.[336] The motion, however, is not limited by the same time constraints. Rule 12(a) affords the defendant 20 days after service of the summons to answer or otherwise plead. In Kadet-Kruger & Co. v. Celanese Corporation of America,[337] however, the court held that Rule 12(a) allows the defendant 20 days to answer after a "legally permissable" summons has been served. Therefore, a defective summons will toll the 20 day period and extend the time for interposing the defense.[338]

¶ 94 The serving party has the burden of proving its validity.[339] A challenge to the sufficiency of the form or the manner of service, however, must be specific as to the alleged defect.[340]

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[333] See, e.g., Apex Pool Equipment Corp. v. Venetian Pools, Inc., 52 F.R.D. 48, 49 (S.D.N.Y. 1971).

[334] See, e.g., Fed. R. Civ. P. 4.

[335] United Service Automobile Ass'n v. Germantown Savings Bank, 449 F. Supp. 901, 905 (E.D. Pa. 1978).

[336] Fed. R. Civ. P. 12(g), 12(h)(1). See nn. 306 and 322, supra.

[337] 216 F. Supp. 249 (N.D. Ill. 1963). See also Seamon v. Pittsburgh Brewing Co., 25 F.R.D. 209, 210 (N.D. Ohio 1960).

[338] Kadet-Kruger & Co. v. Celanese Corp. of America, 216 F. Supp. 249, 250 (N.D. Ill. 1963).

[339] Shires v. Magnavox Co., 74 F.R.D. 373, 377 (E.D. Tenn. 1977); Adams v. American Bar Ass'n., 400 F. Supp. 219, 222 (E.D. Pa. 1975).

[340] Travelers Insurance Co. v. Panama-Williams, Inc., 424 F. Supp. 1156, 1157 (N.D. Okla. 1976).

If the record does not reveal any defect in the process or service, and none is apparent on the face of the summons, the court will deny the defendant's motion.[341]

¶ 95 Motions to dismiss under Rules 12(b)(4) or 12(b)(5) may also be treated as motions to quash service of process if it is reasonably clear that the plaintiff will be able to properly serve the defendant.[342] Courts are given broad discretion in deciding whether to dismiss or merely to quash the service.[343] The difference between dismissal and quashing service, however, is practically insignificant. If the case is dismissed, the plaintiff usually reinstitutes the suit with the defect corrected. When process is quashed, only the service need be repeated.

f. Failure to State a Claim Upon Which Relief Can Be Granted

¶ 96 A motion to dismiss for failure to state a claim upon which relief can be granted challenges the substantive sufficiency of the plaintiff's allegation.[344] For the purposes of this motion, the moving party accepts all allegations of the complaint, and still denies that plaintiffs are entitled to relief as a matter of law.[345] Consistent with the liberal pleading requirements of

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[341] Id. See also Williams v. Vick Chemical Co., 279 F. Supp. 833, 836 (S.D. Iowa 1967).

[342] See, e.g., Hill v. Sands, 403 F. Supp. 1368, 1370 (N.D. Ill. 1975).

[343] Stevens v. Security Pacific National Bank, 538 F.2d 1387, 1389 (9th Cir. 1976).

[344] 5 Fed. Prac. and Pro., supra note 5, Civil, § 1356 at 590.

[345] Warth v. Seldin, 422 U.S. 490, 400-01 (1975) (when a defendant moves to dismiss, thecomplaint's substantive allegations of violation are taken as true.)

Rule 8(a), a 12(b)(6) motion will be granted only if the pleading fails to meet the standard of "a short and plain statement of the claim showing that the pleader is entitled to relief."[346] The defense is available to challenge the legal sufficiency of any pleading, be it the original complaint, a cross-claim, counter-claim, or third-party claim.[347] While the motion must be made before a responsive pleading is filed, the defense is not waived by failure to do so, and may be asserted at any time, even during trial.[348]

¶ 97 Courts view this motion with disfavor and will rarely grant it.[349] The liberal pleading policies of Rule 8 support this position.[350] Further, courts are hesitant to dismiss a case on the pleadings without giving the plaintiff a chance to have his claim determined on the merits.[351] Only "wholly frivolous" complaints will be dismissed under a 12(b)(6) motion.[352]

¶ 98 The test of the legal sufficiency of a complaint under a

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[346] Fed. R. Civ. P. 8(a).

[347] 5 Fed. Prac. and Pro., supra note 5, Civil, § 1356 at 590.

[348] See Fed. R. Civ. P. 12(h)(2). Note: Even if a party fails to assert this defense, the court, sua sponte, may dismiss an action for failure to state a claim. See Dougherty v. Harpers Magazine Co., 537 F.2d 758, 761 (3d Cir. 1976).

[349] See, e.g., Madison v. Purdy, 410 F.2d 99, 101 (5th Cir. 1969); Williams v. Wheeling Steel Corp., 266 F. Supp. 651, 654 (N.D. W. Va. 1967).

[350] Hepperle v. Johnson, 544 F.2d 201, 202 (5th Cir. 1976); Sullivan v. United States, 428 F. Supp. 79, 80-81 (E.D. Wis. 1977).

[351] 5 Fed. Prac. and Pro., supra note 5, Civil, § 1356 at 599; Bredehoeft v. Cornell, 260 F. Supp. 557 (D. Or. 1966).

[352] Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271, 274 (1923) (Holmes, J.).

12(b)(6) motion to dismiss was set out in Conley v. Gibson.[353]

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[354]

The complaint's sufficiency is viewed in a light most favorable to the plaintiff; every doubt is resolved in his favor.[355] A defendant's likelihood of success on the merits should not influence the court to grant the motion.[356] Ultimate success will be determined on the proof,[357] and a doubtful case with minimal legal sufficiency can be disposed of on a motion for summary judgment.[358]

¶ 99 Unless an affirmative defense clearly appears on the face of the complaint, a court will usually deny a motion to dismiss for failure to state a claim.[359] For example, if the complaint clea

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[353] 355 U.S. 41 (1957).

[354] Id. at 45-46 (footnote omitted). See cases applying the Conley standard cited in 5 Fed. Prac. and Pro., supra note 57 at Civil § 1357 at 600-01 n.72.

[355] Sherman v. Yakahi, 549 F.2d 1287, 1290 (9th Cir. 1977); Stephenson v. Gaskins, 539 F.2d 1066, 1068 (5th Cir. 1976); Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975).

[356] Easterly v. Advance Stores, Co., 432 F. Supp. 7, 8 (E.D. Tenn. 1976).

[357] Sixth Cander Corp. v. Township of Evesham, County of Burlington, 420 F. Supp. 709, 720 (D.N.J. 1976).

[358] Reeves v. City of Jackson, Mississippi, 532 F.2d 491, 494 (5th Cir. 1976).

[359] Blum v. Probate Court of Chittenden County, Vermont, 575 F.2d 50, 53 (2d Cir. 1978), vacated on other grounds, 590 F.2d 407 (2d Cir. 1979); Leon v. Aetna Life and Cas. Co., 448 F. Supp. 698, 699 n.1 (E.D. Pa. 1978).

shows that the statute of limitations has run, the claim will be dismissed.[360] This is particularly true for RICO claims, since the running of the limitations period for statutory causes of action extinguishes the remedy as well as the right.[361] If, however, an element of the plaintiff's cause of action must be plead with particularity,[362] courts will analyze a complaint with scrutiny and dismiss if the necessary degree of specificity is not achieved.[363]

¶100 Even if the court determines that the complaint fails to state a claim, the plaintiff may employ the liberal amendment policy of the Federal Rules.[364] A plaintiff may amend his complaint once as a matter of course, and anytime after with the court's permission.[365] Courts will usually permit amendments except when

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[360] Rauch v. Day and Night Manufacturing Corp., 576 F.2d 697, 702 (7th Cir. 1978); Horn v. Burns & Roe, 536 F.2d 251, 253 (8th Cir. 1976).

[361] Chambliss v. Coca-Cola Bottling Corp., 274 F. Supp. 401, 408 (E.D. Tenn. 1967), aff'd 414 F.2d 256 (6th Cir. 1969), cert. denied, 397 U.S. 916 (1970) (Securities Act of 1933, Securities Exchange Act of 1934).

[362] Fraud must be plead with more specificity than required for other allegations. See Fed. R. Civ. P. 9(b). It is the general rule that conspiracy must be substantiated to some degree of particularity with ultimate facts. See ¶ 73, supra.

[363] 5 Fed. Prac. and Pro., supra note 5, Civil, § 1357 at 610-11.

[364] Fed. R. Civ. P. 15. See ¶¶ 131-141, infra, for an anlaysis of Rule 15.

[365] Id. Rule 15(a).

it appears to a certainty that the plaintiff cannot state a claim.[366]

¶101 Courts are split on whether a dismissal for failure to state a claim is a judgment on the merits and deserves res judicata effect or merely procedural.[368] Even if the judgment is final, however, it will only bar the plaintiff from instituting the same claim again. A careful re-drafting of the complaint to state a cause of action would not be foreclosed unless the statute of limitations had run.

¶102 Courts allowing affadavits and other pretrial data[369] to support a defendant's motion to dismiss for failure to state a claim must convert that motion into one for summary judgment and permit both parties to submit supporting material.[370] The court

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[366] Fed. R. Civ. P. 15(a): ". . . and leave [to amend] shall be freely given when justice so requires." See, e.g., Griggs v. Hinds Junior College, 563 F.2d 179, 180-81 (5th Cir. 1977); Car-Freshener Corp. v. Auto Aid Manufacturing Corp., 438 F. Supp. 82, 86 (N.D.N.Y. 1977); Fairyland Amusement Co. v. Metromedia, Inc., 413 F. Supp. 1290, 1293 (W.D. Mo. 1976).

[367] Shaw v. Merritt-Chapman & Scott Corp., 554 F.2d 786, 789 (6th Cir.), cert. denied, 434 U.S. 852 (1977); Gissen v. Tackman, 401 F. Supp. 310, 312 (D.N.J. 1975), vacated on other grounds, 537 F.2d 784 (3d Cir. 1976); Restatement (Second) of Judgments § 48 and comment (Tent. Draft No. 1 1973).

[368] Crawford v. City of Houston, Texas, 386 F. Supp. 187, 190 (S.D. Tex. 1974); Local 4076 v. United Steelworkers of America, AFL-CIO, 327 F. Supp. 1400, 1402 (W.D. Pa. 1971).

[369] Memoranda of points and authorities, briefs and oral arguments are not considered extra-pleading material for the purposes of conversion. See United States General, Inc. v. Schroeder, 400 F. Supp. 713, 715 (E.D. Wis. 1975).

[370] Fed. R. Civ. P. 12(b):

> * * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall ge given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

has complete discretion in deciding whether to admit extra-pleading material.[371] An important consideration is whether the material facilitates the just disposition of the action.[372] Once the conversion to summary judgment is completed, the moving party must also prove that no genuine issue of material fact exists and he is entitled to a judgment as a matter of law.[373]

g. Failure to Join a Party

¶103 Under Rule 12(b)(7), a court may dismiss an action for failure to join a party. The basis of the motion is an alleged failure to comply with the requirements of Rule 19.[374] The court must decide whether the absence of a particular party would prohibit giving complete relief to those parties before the court, or would prejudice the absent party himself. The motion should be granted if "equity and good conscience" require the absent parties' presence.[375]

¶104 Under the RICO statute, this motion will be raised very rarely. The court will join a party found indispensable if it can

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[371] 5 Fed. Prac. and Pro., supra note 5 at Civil § 1366 at 678.

[372] 5 Fed. Prac. and Pro., supra note 5, Civil at § 1366 at 679.

[373] Id. at 683. For a further discussion of summary judgment, see 10 Fed. Prac. and Pro., supra note 5 at Civil §§ 2711-42.

[374] See ¶¶ 151-163, infra, for an analysis of Rule 19.

[375] See 1966 Advisory Committee's Note to Rule 19(b).

> When a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed.

acquire personal jurisdiction over him and venue is proper. If venue is improper or personal jurisdiction lacking, the court must, in the usual case, balance and weigh the factors enumerated in Rul 19(b) to determine whether in equity and good conscience the action should be dismissed. The RICO statute, however, allows nationwide service of process and venue if the interests of justice require.[376] Since courts are hesitant to grant such a motion in most cases,[377] and the statute itself provides the machinery for avoiding dismissal, a court will, in most cases, join the absent party.

¶105 The defense of improper joinder is not waived by failure to assert it by motion or in the answer;[378] it is available throughout the trial.[379] The moving party must show that in "equity and good conscience" the court should dismiss the action.[380]

h. More Definite Statement

¶106 If a pleading to which a responsive pleading is permitted is so vague and ambiguous that the opposing party cannot frame a responsive pleading, he may move for a more definite statement under Rule 12(e).[381] This procedure is not a discovery process;

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[376] 18 U.S.C. § 1965 (b) (1976).

[377] 5 Fed. Prac. and Pro., supra note 5 at Civil § 1359 at 628. ("The courts are loathe to grant motions to dismiss of this type.")

[378] Fed. R. Civ. P. 12(h)(2).

[379] Kimball v. Florida Bar, 537 F.2d 1305, 1307 (5th Cir. 1976).

[380] See, e.g., Meyerding v. Villaume, 20 F.R.D. 151, 153 (D. Minn. 1957).

[381] Fed. R. Civ. P. 12(e).

it exists merely to enable a party to respond to the pleading. If the opposing party believes that the pleading does not state a claim, he should move to dismiss under Rule 12(b)(6), regardless of its lack of clarity. Nevertheless, courts rarely dismiss an action for vagueness. If there is any chance that a more definite statement of the claim might correct an insufficiency, courts will grant the 12(e) motion.[382]

¶107 In a RICO context, a defendant might move for a more definite statement if allegations of fraud or conspiracy, for example, were not stated with sufficient particularity to enable the defendant to respond.[383] For example, where the original complaint in an antitrust case insufficiently alleged standing, the district court granted defendant's 12(e) motion but denied a motion to dismiss for failure to state a claim.[384] The defendant should raise a motion for a more definite statement before a responsive pleading is filed,[385] although courts have extended that time period in certain situations.[386]

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[382] See, e.g., Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429, 431 (6th Cir. 1971); U-Profit, Inc. v. Bromley Ltd., 54 F.R.D. 60, 66 (E.D. Wis. 1971).

[383] For other applications see Arpet, Ltd. v. Homans, 390 F. Supp. 908, 912 (W.D. Pa. 1975) (securities fraud); Serpa v. Jolly King Restaurants, Inc., 62 F.R.D. 626, 635 (S.D. Cal. 1974) (motion denied as defendant's were capable of responding.)

[384] Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F. Supp. 696, 700 (D. Colo. 1975).

[385] Fed. R. Civ. P. 12(e): ". . . he may move for a more definite statement before interposing his responsive pleading . . . ."

[386] 5 Fed. Prac. and Pro., supra note 5, Civil, § 1378 at 766-67.

i. Motion to Strike

¶108 A motion to strike under Rule 12(f) is available to eliminate any redundant, immaterial, impertinent, or scandalous matter from any pleading.[387] It also permits the plaintiff to challenge any insufficient defense asserted in the defendant's answer.[388] This motion does not seek dismissal; material objected to is merely stricken from the pleading.

¶109 Since motions to strike are often asserted merely as dilatory tactics, 12(f) motions are in disfavor and rarely granted.[389] Courts will only strike material which is false and unrelated to the subject matter of the action, and which is prejudicial to the adverse party.[390] A court will grant a motion to strike an insufficient defense only if thelegal insufficiency of the defense is clearly apparent.[391]

¶110 Allegations of a prior criminal case where the defendant

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[387] Fed. R. Civ. P. 12(f).

[388] Id. Whether to strike material from pleading is always within the court's broad discretion, and may be exercised on the court's own motion at any time. Payne v. Howard, 75 F.R.D. 465, 467-68.

[389] Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977); St ands Over Bull v. Bureau of Indian Affairs, 442 F. Supp. 360 (D. Mont. 1977), appeal dismissed, 578 F.2d 799 (9th Cir. 1978); Rechsteiner v. Madison Fund Corp., 75 F.R.D. 499, 505 (D. Del. 1977); Pessin v. Keenland Ass'n., 45 F.R.D. 10, 13 (E.D. Ky. 1968) ("Such motions are considered as time wasters and are not favored.")

[390] FRA, Sp. A. v. Surg-O-Flex of America, Inc., 415 F. Supp. 421, 427 (S.D.N.Y. 1975); U.S. Dental Inst. v. American Ass'n. of Orthodontists, 396 F. Supp. 565, 583 (N.D. Ill. 1975).

[391] May Dep't Stores Co. v. First Hartford Corp., 435 F. Supp. 849, 855 (D. Conn. 1977).

entered a consent judgment or plea of nolo contendere, however, are routinely stricken.[392] This is important to consider when pleading a cause of action under the RICO statute. The essential allegations of a prior criminal proceeding under RICO will, in most cases, be identical to the allegations of the civil cause of action. Therefore, even thoughreferences to such prior action might be relevant to the underlying claim, any reference to the proceeding will be stricken if a conviction was obtained on a plea of nolo contendere.

4. The Answer

a. General

¶111 If a plaintiff's claim is not disposed of by pre-answer motion, the defendant must respond by filing an answer.[393] If the defendant does not make any pre-answer motions, he must file the answer within 20 days from service of the summons and complaint.[394] If a motion was made but was denied or postponed, the defendant must file his or her answer within 10 days after notice of the court's action.[395]

¶112 The purpose of the answer is to put in issue the material allegations of the plaintiff's complaint and to give the opposing

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[392] See, e.g., Perl-Mack Homes Inc. v. Mobile Concrete, Inc., 338 F. Supp. 886, 888 (D. Colo. 1972). For a discussion of the admissability of nolo contendere pleas and consent judgments in subsequent civil antitrust proceedings see, Annot., 10 ALR Fed. 328 (1972). See also Data Processing Financial and Gen. Corp. v. Int'l Business Machs. Corp., 430 F.2d 1277 (8th Cir. 1970).

[393] Fed. R. Civ. P. 7(a).

[394] Fed. R. Civ. P. 12(a).

[395] Id.

party reasonable notice of the controverted claims.[396] The opposing party must state the defense, whether denials or affirmative defenses, in short and plain terms; he must address his defense to each assessment upon which he relies.[397] According to Rule 8(d), failure to deny an allegation in a pleading to which a responsive pleading is required results in the admission of that allegation.[398] Allegations requiring no responsive pleading are considered denied if they are not responded to.[399] A defendant may amend poorly framed responses.[400] The defendant may state as many defenses as he has and may do so hypothetically or in the alternative.[401]

b. Denials

¶113 A party may deny the allegations of a complaint specifically, or, in good faith,[402] enter a general denial.[403] He may also deny an averment by claiming that he is "without knowledge or information sufficient to form a belief as to the truth

[396] See, Mitchell v. Wright, 154 F.2d 924, 926 (5th Cir.), cert. denied, 329 U.S. 733 (1946); 5 Fed. Prac. and Pro., supra note 5, Civil, § 1261 at 264.

[397] Fed. R. Civ. P. 8(b). The answer is also governed by Rules 8(e) and 8(f) which require that all pleadings be "simple, concise, and direct" and shall be "construed so as to do substantial justice."

[398] Fed. R. Civ. P. 8(d).

[399] Id.

[400] Fed. R. Civ. P. 15. See ¶¶ 131-141.

[401] Fed. R. Civ. P. 8(e)(2).

[402] A general denial is subject to the requirements of Rule 11, which sets the standard of good faith in pleading. Fed. R. Civ. P. 11.

[403] Fed. R. Civ. P. 8(b). A general denial has the effect of denying all averments in the complaint.

of an averment."[404] Lack of first-hand knowledge is not enough. He must also lack information upon which he could reasonably form a belief concerning the truth of the allegations.[405] If the information is within the defendant's control or easily available--i.e. a matter of public record or information commonly known to the community--this form of denial is unavailable.[406]

¶114 Although not expressly authorized by Rule 8(b), if the responding party is without first-hand knowledge of the truth of the allegations asserted against him, but has sufficient information to form a belief concerning those averments, he may make a denial based upon "information and belief."[407] These types of denials are appropriate where the information is acquired from third-parties, usually attorneys or corporate agents.[408] Denials based upon information and belief are also subject to a requirement of good faith, and a court may grant a motion to strike if it is

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[404] Id. A denial based upon lack of knowledge or information is also subject to a good faith requirement. If the court finds that the responding party intended the pleading to be evasive or in bad faith, it may strike the relevant part or consider the allegation ineffective as a denial. The court may also grant leave to amend. See Nieman v. Bethlehem Nat'l Bank, 32 F. Supp. 436, 436-37 (E.D. Pa. 1939), aff'd 113 F.2d 717 (3d Cir. 1940).

[405] Squire v. Levan, 32 F. Supp. 437, 438 (E.D. Pa. 1940); Nieman v. Bethlehem Nat'l Bank, 32 F. Supp. 436, 437-38 (E.D. Pa. 1939), aff'd, 113 F.2d 717 (3d Cir. 1940).

[406] Greenbaum v. United States, 360 F. Supp. 784, 787-88 (E.D. Pa. 1973); David v. Crompton & Knowles Corp., 58 F.R.D. 444, 446 (E.D. Pa. 1973). Note, however, that only a reasonable time is required in order to determine the truth or falsity of the opposing party's claim.

[407] 5 Fed. Prac. and Pro., supra note 5, Civil, § 1263 at 276.

[408] Id. at 277.

convinced that bad faith was present.[408a]

c. Affirmative Defenses

¶115 The defending party must assert affirmative defenses in the answer for the court to consider them.[409] Once interposed, the responding party can present evidence at trial in support of his position. If omitted from a responsive pleading, however, the defenses, with certain exceptions,[410] are deemed waived.[411] Rule 8(c) lists 19 affirmative defenses but this list is not exhaustive.[412]

¶116 Most of the affirmative defenses enumerated in Rule 8(c) will not be applicable under RICO. Nevertheless, a defendant could properly assert the defense of res judicata, estoppel, or the expiration of statute of limitations. The equitable defenses

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[408a] Id.

[409] Fed. R. Civ. P. 8(c).

[410] See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Foundation, 402 U.S. 313 (1971) (Pleadings were allowed to be amended to allege collateral estoppel upon partial overruling of a Supreme Court holding that the defense was unavailable in patent infringement suit).

[411] Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc., 513 F.2d 407, 419-20 n.92 (D.C. Cir. 1975); Heller v. Smither, 437 F. Supp. 1, 2 (M.D. Tenn. 1977), aff'd 578 F.2d 1380 (6th Cir. 1978).

[412] Fed. R. Civ. P. 8(c): ". . . and any other matter constituting an avoidance or affirmative defense. . . " Wright and Miller list an additional 37 "affirmative defenses" which federal courts have interpreted as such. See 5 Fed. Prac. and Pro., supra note 5 at Civil § 1271 at 305-311.

of "in pari delicto"[413] and "unclean hands"[414] are generally unavailable in private, treble damage actions under the antitrust laws.[415] Where the plaintiff is alleged to have been a "knowing, willing and knowledgeable participant" in the alleged violation of the antitrust laws,[416] however, or where an illegal conspiracy alleged by plaintiff would not have been formed but for plaintiff's cooperation, and his degree of participation was equal to that of any other defendant and a substantial factor in the formation of the conspiracy,[417] the defense of in pari delicto has been sustained.[418]

5. Judgment on the Pleadings

¶117 After responsive pleadings are filed, either party may make a motion for judgment on the pleadings pursuant to Rule 12(c).[419]

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[413] The defense of in pari delicto refers to the situation in which the plaintiff himself was a party to the complained-of of activity. L. Sullivan, Handbook of the Law of Antitrust 783 (1977).

[414] "Unclean hands" is a more general defense which alleges that the plaintiff participated in allegedly illegal activity unrelated to the claim being asserted. Id. at 785.

[415] See, e.g., Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 140 (1968); Memorex Corp. v. International Business Machs. Corp., 555 F.2d 1379, 1381 (9th Cir. 1977); Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1126-32 (S.D. Tex. 1976).

[416] General Beverage Sales Co.-Oshkosh v. East Side Winery, 396 F. Supp. 590, 593 (E.D. Wis. 1975).

[417] Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 279 (9th Cir. 1976), cert. denied, 431 U.S. 938 (1977).

[418] See also Premier Electrical Constr. Co. v. Miller-Davis Co., 422 F.2d 1132, 1138 (75h Cir.), cert. denied, 400 U.S. 828 (1970).

[419] Fed. R. Civ. P. 12(c).

This motion is addressed to the merits of the claim or defense as revealed on the face of the pleadings. It is applicable only where all issues of fact are uncontroverted and only questions of law remain.[420] The utility of this procedural device in a RICO context is limited. A well-pleaded complaint pursuant to the RICO statute necessarily alleges a substantive violation of the law. Consequently, defendants are unlikely to concede all of thematerial factual allegations of the plaintiff's claim in order to make such a motion.

6. Counterclaims

a. Complusory Counterclaims

¶118 A defendant may assert any claim against the plaintiff in his answer whether or not it relates in any way to the original claim.[421] The defendant must, however, assert certain claims available to him at the time the answer is served. These claims must arise out of the same transaction or occurrence that is the subject matter of the plaintiff's claim.[422] In addition, they must not require for adjudication the presence of third parties over

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[420] George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977); King v. Gemini Food Services, Inc., 438 F. Supp. 964, 966 (E.D. Va. 1976), aff'd, 562 F.2d 297 (4th Cir. 1977), cert. denied, 434 U.S. 1065 (1978); 5 Fed. Prac. and Pro., supra note 5, § 1368.

[421] Fed. R. Civ. P. 13(b).

[422] Fed. R. Civ. P. 13(a). There are two exceptions to the general mandate of Rule 13(a).

> * * * But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his cliam by attachment or other process by which the court

whom the court cannot acquire jurisdiction.[423] Such counterclaims are barred if not timely interposed in the answer or in an amended answer.[424]

¶119 The concept of "transaction or occurrence" has not set definition. The Supreme Court, however, in Moore v. New York Cotton Exchange,[425] established what has become the majority approach for defining "transaction or occurrence."

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all servicable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all

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> did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13. Id.

[423] Id.

[424] Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1 (1974); Pipeliners Local Union No. 798, Tulsa Oklahoma v. Ellerd, 503 F.2d 1193, 1198 (10th Cir. 1974); 6 Fed. Prac. and Pro., supra note 5, Civil, § 1417. See Fed. R. Civ. P. 13(f).

[425] 270 U.S. 593 (1926).

particulars, the same as those constituting the defendant's counterclaim.[426]

The phrase "logical relationship" is interpreted broadly. A counterclaim is logically related to the subject-matter of an opposing party's claim when separate trials would involve a substantial duplication of time and effort.[427] Should the presence of both the original claim and the counterclaim in one trial prejudice the opposing party or result in confusion, however, the court may order separate trials.[428]

¶120 Compulsory counterclaims are held to fall within the court's ancillary jurisdiction as long as the court has subject-matter jurisdiction over the original action.[429] Consequently, the defendant is not required to establish independent jurisdictional

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[426] Id. at 610.
Wright and Miller suggest four different tests.
(1) Are the issues of fact and law raised by the claim and counterclaim largely the same?
(2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim?
(3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
(4) Is there any logical relation between the claim and the counterclaim?
6 Fed. Prac. and Pro., supra note 5, Civil, § 1410 at 42.

[427] See Southern Const. Co. v. Pickard, 371 U.S. 57, 60 (1962); Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 532 (5th Cir. 1974).

[428] Fed. R. Civ. P. 13(i); Fed. R. Civ. P. 42(b); Fed. R. Civ. P. 54(b).

[429] Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961).

grounds or satisfy the minimum jurisdictional amount.[430]

¶121 The majority rule holds that the institution of the plaintiff's original suit tolls the statute of limitations for compulsory counterclaims.[431] A defendant may, therefore, assert any counterclaim that would have been timely if brought at the initiation of the plaintiff's suit, regardless of whether the statute of limitations has expired in the interim. If a counterclaim would not have been timely, most courts hold that although the defendant is barred from seeking affirmative relief, he may use the counterclaim defensively to theextent that it defeats or diminishes the plaintiff's recovery.[432]

¶122 Permissive counterclaims, best described as counterclaims that are not compulsory, do not "relate back" to the filing of the original complaint. A party may not assert a permissive counterclaim if the applicable statute of limitations has run at the time.[433]

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[430] Kirby v. American Soda Fountain Co., 194 U.S. 141, 146 (1904); Phillips Petroleum Co. v. Hazlewood, 409 F. Supp. 1193, 1197 (N.D. Tex. 1976), aff'd on other grounds, 534 F.2d 61 (5th Cir. 1976). Note that independent jurisdictional grounds must exist for a valid permissive counterclaim. Chance v. County Bd. of School Trustees of McHenry County, Illinois, 332 F.2d 971, 973 (7th Cir. 1964).

[431] Telex Corp. v. International Business Machines Corp., 367 F. Supp. 258, 359 (N.D. Okla. 1973) (dicta), aff'd in part, rev'd in part on other grounds, 510 F.2d 894 (10th Cir. 1975), cert. denied, 423 U.S. 802; Azada v. Carson, 252 F. Supp. 988, 989 (D. Hawaii 1966).

[432] See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft 1969, pp. 258-59.

[433] McGovern v. Martz, 182 F. Supp. 343, 349 (D. D.C. 1960); Walker v. Pilkerton, 82 F. Supp. 321, 322 (D. D.C. 1949).

7. Cross-Claims

¶123 The policy of avoiding multiple litigation by resolving an entire controversy in a single adjudication is furthered by the availability of cross-claims.[434]

¶124 The cross-claim is a demand for affirmative relief between co-parties. A claim that merely raises a defense to an opposing parties' claim is not a cross-claim.[435] A party may not assert a cross-claim against an adversary[436] or party who has withdrawn or been eliminated from the action.[437] Unlike a compulsory counter-claim, failure to assert a cross-claim in the original action does not bar future action. The claim is preserved and may be instituted independently.[438] A party, however, may not assert a cross-claim if the claim bears no logical relationship to the subject matter of the original action, a counterclaim, or property that is the subject matter of the original action.[439]

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[434] Lyons v. Marrud, Inc., 46 F.R.D. 451, 453 (S.D.N.Y. 1968). See Fed. R. Civ. P. 13(g).

[435] Dunbar & Sullivan Dredging Co. v. John R. Jurgenson Co., 396 F.2d 152, 153 (6th Cir. 1968).

[436] United States ex rel. Westinghouse Electrical Supply Co. v. Nicholas, 28 F.R.D. 8, 10 (D. Minn. 1961). An affirmative claim against an opposing party is a counterclaim governed by Rule 13(a) or 13(b).

[437] See Combs v. Continental Casualty Co., 59 F. Supp. 507, 509-10 (N.D. Ala. 1944).

[438] Augustin v. Mughal, 521 F.2d 1215, 1216 (8th Cir. 1975).

[439] Fed. R. Civ. P. 13(g).

¶125 Most courts interpreting the "transaction or occurrence" requirement of Rule 13(g) employ the same analysis used for compulsory counterclaims.[440] Thus, if the cross-claim bears some "logical relationship" to the main action (many of the same factual and legal issues presented in themain action) a party may assert it against a co-party.[441]

¶126 Cross-claims fall within the ancillary jurisdiction of the federal courts.[442] It is, therefore, necessary to assert independent jurisdictional grounds.[443] The "case or controversy" requirement is clearly satisfied by a transaction or occurrence which is the subject-matter of the original claim.[444]

8. Impleader

¶127 After a defendant has been named in a civil action, he may implead a third-party "who is or may be liable to him for all

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[440] See White v. Matthews, 420 F. Supp. 882 (D.S.D. 1976); LASA Per L'Industria Del Marmo Societa Per Azion v. Southern Builders, Inc., 45 F.R.D. 435, 440 (W.D. Tenn. 1967), rev'd on other grounds sub nom., LASA Per L'Industria Del Marmo Societa Per Azion v. Alexander, 414 F.2d 143 (6th Cir. 1969). See ¶¶ 119-120, supra.

[441] First Tennessee National Bank, Chattanooga v. FDIC, 421 F. Supp. 35 (E.D. Tenn. 1976); Fireman's Fund Insurance Co. v. Trobaugh, 52 F.R.D. 31 (D. Okla. 1971).

[442] 3 Moore's Federal Practice, ¶ 13.36 at 13-925-13-926 (1979). See ¶ 13, supra.

[443] Consolo v. Federal Maritime Commission, 383 U.S. 607, 617 n.14 (1966); Fairview Park Excavating Co. v. Al Monzo Construction Co., 560 F.2d 1122 (3d Cir. 1977); Dunbar & Sullivan Dredging Co., v. John R. Jurgenson Co., 396 F.2d 152, 153 (6th Cir. 1968); Home Insurance Co. v. Ballenger Corp., 74 F.R.D. 93 (N.D. Ga. 1977).

[444] The same reasoning applies to compulsory counterclaims and the two should be treated the same for jurisdictional purposes.

or part of the plaintiff's claim against him."[445] This procedure enables the court to dispose of multiple claims arising from the same facts expeditiously and economically in one action.[446] The use of impleader is limited to two situations: (1) "where the third-party's liability is in some way dependent on the outcome of the main claim";[447] or (2) where the third-party is or may be secondarily liable to the original defendant (be it in the form of contribution, indemnity, or subrogation).[448] Rule 14(a) is not a proper vehicle for seeking affirmative relief, even if the defendant's claim against the third party is logically related to the subject-matter of the original action. The nature of impleader is exclusively remedial.

¶128 Impleader is available to any defending party, including original defendants and plaintiffs defending against counterclaim.[449]

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[445] Fed. R. Civ. P. 14(a).

[446] See Colton v. Swain, 527 F.2d 296 (7th Cir. 1975); LASA del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969).

[447] 6 Fed. Prac. and Pro. supra note 5, Civil, § 1446 at 246. See also Gaines v. Sunray Oil Co., 539 F.2d 1136, 1139 n.7 (8th Cir. 1976).

[448] Id. See also, Brogle v. South Carolina Electric and Gas Co., 509 F.2d 1216 (4th Cir. 1975) (indemnity); Reese v. AMF-Whitely, 420 F. Supp. 985 (D. Neb. 1976) (contribution); Liberty Bank & Trust Co. of Savannah v. Interstate Motel Developers, Inc., 346 F. Supp. 888 (S.D. Ga. 1972) (subrogation).

[449] Fed. R. Civ. P. 14(b).

The third party plaintiff need not obtain the court's permission if the third party defendant is served within ten days from the filing of the original answer.[450] After that time, leave must be obtained. Leave will usually be granted unless bringing the third-party defendant in will prejudice other parties to the action or delay or confuse the existing action.[451]

¶129 Impleader falls within the ancillary jurisdiction of the federal courts, making independent grounds for subject-matter jurisdiction unnecessary.[452] Nevertheless, the court must have personal jurisdiction over the third-party defendant in order to hear the controversy.[453] The rule regarding service of process on third-party defendants is broader than for other defendants. Rule 4(f) authorizes service of process anywhere within 100 miles of the courthouse, whether or not the place of service is within the forum state.[454]

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[450] Fed. R. Civ. P. 14(a). Note, however, that the court may be forced to rule on the propriety of impleader if the third-party defendant moves to strike the third-party complaint. Therefore, the question of whether or not a party may implead a third-party is still addressed to the court's discretion.

[451] See, e.g., B & B Investment Club v. Kleinert's, Inc., 391 F. Supp. 720 (E.D. Pa. 1975) (impleader allowed); Kopan v. George Washington University, 67 F.R.D. 36 (D. D.C. 1975) (impleader denied).

[452] United States ex rel. Payne v. United Pacific Insurance Co., 472 F.2d 792, 794 (9th Cir. 1973), cert. denied, 411 U.S. 482; Ross v.Penn. Central Transp. Co., 433 F. Supp. 306 (W.D.N.Y. 1977).

[453] See, e.g., Hospes v. Burmite Division of Whittaker Corp., 420 F. Supp. 806, 810 (S.D. Miss. 1976); Security National Bank v. Ubex Corp., 404 F. Supp. 471, 472 (S.D.N.Y. 1975).

[454] Fed. R. Civ. P. 4(f). See ¶¶ 59-63, supra, for an analysis of the service of process requirements for "first-party" defendants.

RICO, however, authorizes service of process upon any person wherever he resides, is found, has an agent or transacts his affairs.[455] Consequently, the expansion of permissable service under the Federal Rules is irrelevant. In order for the court to hear an impleaded RICO claim, the forum must be in a district where the third-party defendant resides, is found, has an agent, or transacts his affairs.[456]

¶130 Venue provisions do not apply to third-party actions.[457] Such actions are maintainable regardless of venue requirements, as long as the court has personal jurisdiction over the impleaded party.[458] Once the third-party defendant is properly before the court, the original plaintiff may assert "any claim against [him] arising out of the transaction or occurrence which is the subject-matter of the plaintiff's claim against the third-party plaintiff."[459]

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[455] 18 U.S.C. § 1965(d) (1976).

[456] Id. Note the availability of 18 U.S.C. § 1965(b)(1976) whereby a court may order nationwide service of process in the interests of justice. See ¶¶ 47-50, supra.

[457] First National Bank of Minneapolis v. White, 420 F. Supp. 1331, 1338 (D. Minn. 1976); Garner v. Enright, 71 F.R.D. 656 (E.D.N.Y. 1976).

[458] Note, however, that a court may take venue considerations into account in exercising its discretion to decide whether to deny impleader or to sever the third-party claim. See United States v. Acord, 209 F.2d 709 (10th Cir.), cert. denied, 347 U.S. 975 (1954).

[459] Fed. R. Civ. P. 14(a). See also Lopez v. Oldendorf, 545 F.2d 836 (2d Cir. 1976). The claim is usually asserted by amending plaintiff's complaint.

¶131 The liberal pleading policy of the Federal Rules is clearly reflected in Rule 15. Availability of amendments maximizes the number of controversies decided on the merits and minimizes the impact of pleading mistakes. Under Rule 15, a party may amend the pleadings to reflect matters overloooked or unknown when the original pleading was drafted.[460] Amendments generally reflect changes which took place prior to the filing of the original pleading since matters which happen after the date of the original pleading may be added as supplemental pleadings.[461]

¶132 Any pleading may be amended once without the court's permission up until the responsive pleading is served.[462] After that time, amendments are permitted by leave of the court, "and leave shall be freely given when justice so requires."[463] Leave to amend is normally granted.[464] Denials, on the other hand, are often held

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[460] See Weinberger v. Retail Credit Co., 498 F.2d 552, 554 n.4 (4th Cir. 1974).

[461] Fed. R. Civ. P. 15 (d). See ¶¶ 142-144, infra.

[462] Fed. R. Civ. P. 15(a).

[463] Id.

[464] See, e.g., Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Foman v. Davis, 371 U.S. 178 (1962). Penn Galvanizing Co. v. Lukens Steel Co., 65 F.R.D. 80, 81 (E.D. Pa. 1974):

> [s]ince the desired end is a decision on the merits, rather than a decision by procedure, a court in the exercise of its discretion should allow an amendment which states a proper subject of relief if it does not appear that the amendment comes as the result of undue delay or bad faith, or that the amendment would unduly prejudice the opposing party or parties in the case.

subject to reversal as abuses of discretion.[465]

¶133 Denying leave to amend is especially unwarranted in antitrus and RICO actions. First, both involve complex legal issues and entail analyzing voluminous facts in the defendant's possession.[466] Second, "Congress has determined that private litigation serves a useful and valuable role in the antitrust field, and the courts if at all possible should not impair this role by placing unnecessar strict pleading requirements on the parties involved.[466a]

¶134 The procedure for obtaining leave to amend is typically a motion addressed to the court's discretion.[467] Oral requests in open court are also possible.[468] Leave to amend is usually sought

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[465] See Foman v. Davis, id.; Harkless v. Sweeny Independent School District of Sweeny, 554 F.2d 1353 (5th Cir. 1977); United Steelworkers of America AFL-CIO v. Mesker Bros. Industries, Inc., 457 F.2d 91, 94 (8th Cir. 1972); Sixth Camden Corp. v. Township fo Enesham, County of Burlington, 420 F. Supp. 709 (D.N.J. 1976).

[466] Penn. Galvanizing Co. v. Lukens Steel Co., 65 F.R.D. 80, 81 (E.D. Pa. 1974).

[466a] Id. at 81. The legislative history of RICO evinces a clear Congressional perception of the same value of private litigation in deterring racketeering activities. See introductory remarks of Sen. Hruska to Senate Bill S.1623 in 115 Cong. Rec. 6993-94 (1969); Relating to the Control of Organized Crime in the United States: Hearings on S.30 and Related Proposals Before Subcomm. on the Judiciary, 91st Cong., 2d Sess. 687 (July 23, 1970) (letter from Charles H. Rogovin).

[467] This motion, like all motions, must conform to the requirement of Rule 7(b) which provides that the motion shall be made in writing and shall state with particularity the grounds upon which the motion is based and shall set forth the relief or order sought.

[468] Spence v. Utah Construction Co., 293 F.2d 34 (9th Cir. 19

correct defective jurisdictional allegations,[469] insufficiently stated claims or defenses,[470] add new claims or defenses,[471] add, subtract or drop parties,[472] or increase the amount of damages sought.[473] All pleadings enumerated in Rule 7(a) are amendable.[474] A plaintiff in a RICO action should be allowed to amend his complaint to correct insufficient standing allegations, insufficient allegations of an "enterprise's" effect on interstate commerce, lack of specificity in allegations of fraud or conspiracy, or any other defect which relates to the substantive cause of action.

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[469] See, e.g., Eisler v. Stritzler, 535 F.2d 148 (1st Cir. 1976); Kelly v. Kentucky Oak Mining Co., 491 F.2d 318 (6th Cir. 1974); Lombard v. Board of Education of the City of New York, 407 F. Supp. 1166 (S.D.N.Y. 1976).

[470] Warth v. Seldin, 422 U.S. 490 (1975); Dupree v. Hertz Corp., 419 F. Supp. 764 (E.D. Pa. 1976); Auspach v. Bestline Products, Inc., 382 F. Supp. 1083 (N.D. Cal. 1974).

[471] Foman v. Davis, 371 U.S. 178 (1962); Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972); Davis v. Smith, 431 F. Supp. 1206 (S.D.N.Y. 1977)

> It is reasonable to assume that a plaintiff alleging a cause of action under the RICO statute could amend his complaint to allege a violation of the Securities Act, for example, if it became clear that he would not prevail in proving a RICO violation.

[472] Prescription Plan Service Corp. v. Franco, 552 F.2d 493 (2d Cir. 1977) (dropping a party); Goodman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (substitution of parties); Gaines v. Anderson, 421 F. Supp. 337, 339 n.1 (D. Mass. 1976) (addition of parties).

[473] Zatina v. Greyhound Lines, Inc., 442 F.2d 238 (8th Cir. 1971); Hagl v. Jacob Stern & Sons, 396 F. Supp. 779, 784 (E.D. Pa. 1975).

[474] Rule 15(a) applies to the complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint and third party answer, and pursuant to court order, a reply to an answer or third-party answer. See Fed. R. Civ. P. 7(a).

¶135 When an amendment changes the original claim or defense the applicable statute of limitations for the new claim must be considered. The new claim or defense will relate back to the date of the original pleading if it arose out of the same "conduct, transaction, or occurrence" set forth in that pleading.[475] If the amendment adds a new claim not related to the original cause of action, however, it will be subject to the applicable statute of limitations and may be barred if the time limit has expired.[476]

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[475] Fed. R. Civ. P. 15(c):

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amendment pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

For example, amendments curing a defective allegation of subject matter jurisdiction, venue or personal jurisdiction will relate back. Defective standing allegations or any other insufficiency in stating the original claim under the RICO statute will also relate back.

Since a federal district court hearing a RICO case will most probably apply the applicable state statute of limitations, the question of choice of law may arise. Specifically, will the liberal amendment policy of Rule 15(c) apply, or will the state rule on relation-back of amendments be employed? The majority view holds that even in diversity cases, the rule established in Hanna v. Plummer, 380 U.S. 460 (1965) governs. In that case, the Supreme Court held that if a Federal Rule spoke directly to the issue in controversy, that Rule would prevail over a conflicting state rule. A small number of cases have ignored the Hanna mandate and applied the state law in diversity cases. However, the clear indication is that in a RICO-type case, even though a state statute of limitations is applied, federal law will govern the amendment policy in federal courts. The state interest is practically non-existent; their statute of limitations is applied almost fortuitously. Since a majority of cases have held that in a diversity case where the corresponding state rule is stricter than Rule 15(c), the federal rule will apply, a fortiori the federal rule will apply in federal court on a federally created right.

[476] See, e.g., Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973); Campbell v. A.C. Petersen Farms, Inc., 69 F.R.D. 457 (D. Conn. 1975).

¶1136 Courts are concerned with whether the defendant is put on notice with the original pleading. If the new claim is derived from a common core of operative facts so as to put the defendant on notice that the addition of new facts or claims is not unlikely, the new cause of action will relate back to the date of the original pleading.[477] For example, plaintiffs bringing securities fraud actions could amend

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[477] Tiller v. Atlantic Coastline Railroad Co., 323 U.S. 574, 581 (1945);

> There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.

Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1300 (5th Cir. 1971), cert. denied, 404 U.S. 1047:

> Appellees were neither surprised nor prejudiced, as their extensive fact-finding and myriad defense marshalling testifies.

Zagurski v. American Tobacco Co., 44 F.R.D. 440, 442-443 (D. Conn. 1967):

> The defendant has had notice from the beginning that plaintiff is trying to enforce a claim for damages sustained from smoking the cigarettes it manufactured and marketed. It is not unreasonable to require it to anticipate all theories of recovery and prepare its defense accordingly.

Barthel v. Stamm, 145 F.2d 487, 491 (5th Cir. 1944), cert. denied, 324 U.S. 878:

> Limitation is suspended by the filing of a suit because the suit warns the defendant to collect and preserve his evidence in reference to it. When a suit is filed in federal court under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or relief prayed or the law relied on will not be confined to their first statement.

their complaints to claim a violation of the RICO statute (alleging identical facts) and that cause of action would relate back to t date of the original complaint.[478]

¶137 Subject to certain requirements, Rule 15(c) permits amendments charging the parties against whom the claim is asserted to relate back to the date of the original pleading.[479] The gravaman of the requirements is reasonable notice to the added party.[480] To relate back, the amended claim must also arise out of the same conduct, transaction, or occurrence set forth or attempted to be set forth inthe original complaint.[481] The word "change" has been liberally construed so that amendments adding or dropping parties are held to fall within the scope of Rule 15(c).[482]

¶138 Courts split in their interpretation of Rule 15(c) section (1). Many courts hold that the party to be added must only have notice of the possibility of a claim against him gleaned through a

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[478] Cf., Martin v. Virgin Islands National Bank, 455 F.2d 985 (3d Cir. 1972); Gridley v. Sayre & Fisher Co., 409 F. Supp. 1266, 1271 (D.S.D. 1976). But see Pendrell v. Chatham College, 386 F. Supp. 341, 345 (N.D. Pa. 1974).

[479] Fed. R. Civ. P. 15(c).

[480] The requirement of adquate notice has constitutional implications. A party added after the applicable statute of limiations had expired who did not have notice that the claim had been erroneously filed against the wrong party could raise a potentially successful procedural due process defense. See, e.g., Thomas v. Home Credit Co., 133 Ga. App. 602, 211 S.E.2d 626 (1974).

[481] Fed. R. Civ. P. 15(c).

[482] Vieser v. Harvey Estes Construction Co., 69 F.R.D. 370 (D. Okla. 1975) (party dropped); Mitchell v. Hendricks, 68 F.R.D. 564, 566 (E.D. Pa. 1975).

awareness of the facts giving rise to the lawsuit.[483] On the other hand, some courts require that the party to be added have actual notice of the institution of the lawsuit itself.[484] Even if the party knew or should have known of the possibility of a lawsuit arising from known facts, these courts will not allow the pleadings to relate back if the party was unaware of the actual initiation of the original cause of action. This interpretation seems unduly restrictive. A party with knowledge of facts giving rise to a cause of action as well as the knowledge that but for mistake, he would be the party sued, is not prejudiced by being added to the action after the statute of limitations has expired.

¶139 Rule 15(b)[485] furthers the policy of deciding a case on its merits and not on the pleadings. If all parties are aware that an issue is being litigated and therefore have an opportunity to assert a defense or theory of recovery. The absence of that issue from the pleadings is irrelevant.

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[483] See, e.g., Snoqualmie Tribe of Indians ex rel. Skykonish Tribe of Indians v. United States, 372 F.2d 951, 961 (Ct. Cl. 1967); White v. Lundeberg Maryland Seamanship School, Inc., 57 F.R.D. 128 (D. Md. 1972); Schwarzwalder v. Hamilton, 56 F.R.D. 606 (N.D. Pa. 1972); Meredith v. United Air Lines, 41 F.R.D. 34 (S.D. Cal. 1966) (Discussed in Fed. Prac. and Pro., supra note 5, Civil, § 1498 at 507-508.) See also Note, Federal Rule of Civil Procedure 15(c): Relation-Back of Amendments, 57 Minn. L. Rev. 83 (1972).

[484] See, Craig v. United States, 413 F.2d 854 (9th Cir. 1969), cert. denied, 396 U.S. 987; Francis v. Pan American Trinidad Oil Co., 392 F. Supp. 1252 (D. Del. 1975); Stephens v. Balkamp, Inc., 70 F.R.D. 49 (E.D. Tenn. 1975).

[485] Fed. R. Civ. P. 15(b).

¶140 Whether or not a party has "consented" to try an issue is the subject of much litigation. An express stipulation of cons presents few problems.[486] In addition, implied consent is usually found where the party allows introduction of evidence without objection,[487] or where the party objecting to the amendment introduces evidence relating to the new issue.[488] Nevertheless, if the material introduced by the objecting party is relevant to other issues being tried and there is no indication that the purpose of such material is to assert the claim or defenses in issue courts generally hold that no implied consent is shown.[489] Most courts, however, will deny a motion to amend under Rule 15(b) if the opposing party would be prejudiced in its opportunity to prepare and contest the unpleaded issue.[490]

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[486] See Nat G. Harrison Overseas Corp. v. American T g Titan, 516 F.2d 89 (5th Cir. 1975), opinion modified per curiam, 520 F.2d 1104 (5th Cir. 1975).

[487] Howard v. Green, 555 F.2d 178 (8th Cir. 1977); Agricultural Services Ass'n, Inc. v. Ferry-Morris Seed Co., 551 F.2d 1057 (6th Cir. 1977); Dell v. Heard, 532 F.2d 1330 (10th Cir. 1976).

[488] Hicks v. United States, 486 F.2d 325 (10th Cir. 1973), cert. denied, 416 U.S. 938; Federal Savings & Loan Insurance Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973).

[489] Browning Debenture Holders' Commission v. Dasa Corp., 560 F.2d 1078 (2d Cir. 1977); Schultz v. Cally, 528 F.2d 470 (3d Cir. 1975).

[490] Monod v. Futura, Inc., 415 F.2d 1170, 1174 (10th Cir. 1969):

> The test of consent should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.

¶141 Whether or not an issue was tried by express or implied consent is left to the court's discretion. Such a ruling should not be reversed except upon a clear showing of abuse.[491] If the court determines that the issue was fairly litigated, it must grant the party leave to amend.[492] A party may assert a motion to amend the pleadings to conform to the proof at any time throughout the proceedings.[493] If the issues are tried by express or implied consent, however, total failure to amend is irrelevant. Timing of the motion under such circumstances causes little concern.

10. Supplemental Pleadings

¶142 Rule 15(d) permits parties to supplement their pleadings with transactions, occurrences, or events which took place after the original pleading was filed.[494] A supplemental pleading may set forth new facts in order to update or expand the original claim.[495]

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[491] Browning Debenture Holders' Commission v. Dasa Corp., 560 F.2d 1078 (2d Cir. 1977); Cole v. Layrite Products Co., 439 F.2d 958 (9th Cir. 1971).

[492] International Harvester Credit Corp. v. East Coast Truck, 387 F. Supp. 820 (S.D. Fla. 1975).

[493] Bobrick Corp. v. American Dispenser Co., 377 F.2d 334 (9th Cir. 1967) (pre-trial); Esquire Restaurant, Inc. v. Commonwealth Insurance Co., 383 F.2d 111 (7th Cir. 1968) (during trial); Standard Title Insurance Co. v. Roberts, 349 F.2d 613 (8th Cir. 1965) (close of testimony); Monod v. Futura, Inc., 415 F.2d 1170 (10th Cir. 1969) (After verdict or judgment); Emich Motor Corp. v. General Motors Corp., 229 F.2d 714 (7th Cir. 1956), rev'd on other grounds 340 U.S. 558 (on remand).

[494] Fed. R. Civ. P. 15(d).

[495] United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, 419 U.S. 834.

It may, therefore, change the theory of recovery.[496] Similarly, defenses may be supplemented, changed or added;[497] new parties may be added,[498] and defects may be cured.[499]

¶143 The court must approve all supplemental pleadings. Unlike amendments, there is no provision for supplemental pleading as a matter of course.[500] Criteria for determining whether supplemental pleading is appropriate are the same as those for amendments.[501]

¶144 Rule 15(c), which governs issues concerning relation-back of amendments, does not address supplemental pleadings. Even so, most courts hold that Rule 15(d) is subject to the same relation-back

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[496] See, e.g., General Investment Co. v. Ackerman, 37 F.R.D. 38 (S.D.N.Y. 1964) (changed original allegation of fraud to claim in tort).

[497] See Slavenburg Corp. v. Boston Insurance Co., 30 F.R.D. 123 (S.D.N.Y. 1962); Kimmel v. Yankee Lines, Inc., 125 F. Supp. 702 (W.D. Pa. 1954), aff'd 224 F.2d 644 (3d Cir. 1955).

[498] Griffin v. County School Board, 377 U.S. 218 (1964).

[499] Fed. R. Civ. P. 15(d): ". . . Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. . . . "

[500] This distinction is practically irrelevant as the chances of prejudicing an opposing party are slight, given the short period of time allowed for amendments as a matter of course. Also, a party can move to strike an "unauthorized" supplemental pleading, thereby invoking the discretionary powers of the court.

[501] Motion to supplement a pleading will generally be granted if doing so would further the efficient and just disposition of the entire controversy and would not prejudice the rights of any parties to the action. See, e.g., Bell v. United States Department of Defense, 71 F.R.D. 349 (D. N.H. 1976); Smith Kline & French Laboratories v. A.H. Robins Co., 61 F.R.D. 24 (E.D. Pa. 1973).

test prescribed by Rule 15(c).[502] Thus, a supplemental pleading alleging a new claim arising from a different transaction or occurrence than did the original claim will probably not relate back.[503] Should the supplemental pleading, however, contain allegations arising out of the same aggregate core of facts that gave rise to the original claim such that the opposing party is on notice and should be prepared to defend against all claims arising out of those facts, the claim should relate back to the date of the original pleading.[504]

C. The Pre-Trial Conference

¶145 Under Rule 16,[505] the court may, in its discretion, call a pre-trial conference to familiarize the parties and the court with the issues actually involved. Such conferences reduce the danger of surprise, and enable the upcoming trial to progress smoothly and predictably.[506] Rulings on the propriety of amendments, supplemental pleadings and joinder of claims and parties are routinely decided in pre-trial conferences.[507] Pre-trial conferences also lay the founda-

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[502] Security Insurance Co. of New Haven v. United States for Use of Haydis, 338 F.2d 444 (9th Cir. 1964); Fujii v. Dulles, 224 F.2d 906 (9th Cir. 1955). But see contra, Slavenburg Corp. v. Boston Insurance Co., 30 F.R.D. 123 (S.D.N.Y. 1961). (Supplemental pleadings do not relate back.) See Bates v. Western Electric, 420 F. Supp. 521, 526 (E.D. Pa. 1976).

[503] Blau v. Lamb, 191 F. Supp. 906 (S.D.N.Y. 1961).

[504] See cases cited at note 502, supra. See also 6 Fed. Prac. adn Pro., supra note 5, Civil § 1508 at 556.

[505] Fed. R. Civ. P. 16.

[506] Wallin v. Fuller, 476 F.2d 1204 (5th Cir. 1973); Clark v. Pennsylvania R.R. Co., 328 F.2d 591, 594 (2d Cir. 1964), cert. denied, 377 U.S. 1006.

[507] See, e.g., Caplan v. Sturge, 35 F.R.D. 176, 177 (E.D. Pa. 1964).

tion for settlements and avoid the necessity of a full trial.[508] With the decreasing emphasis on pleading technicalities in federal courts. The pre-trial conference has become increasingly important and valuable.[509]

¶146 Once a pre-trial conference is scheduled, appearance by each party's attorney is mandatory.[510] Should the plaintiff's counsel fail to appear, the court may dismiss the action under Rule 41(b) for failure to prosecute.[511] Most courts require that counsel for each party prepare a pre-trial memoranda, outlining the legal theory and issues in contention.[512] The court can then

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[508] Mott v. City of Flora, 3 F.R.D. 232 (E.D. Ill. 1943).

[509] See, Rosenberg, The Pretrial Conference and Effective Justice 5 (1964) cited in 6 Fed. Prac. and Pro., supra note 5, Civil, § 1523 at 574.

> The pretrial conference improves the caliber of dispute resolution in five ways. It 1) increases the chance that the case will be well presented at trial; 2)results in having the evidence well-presented more frequently; 3) eliminates trial surprise; 4) in the opinion of judges and lawyers involved, promotes a fairer trial; and 5) promotes the settlement process.

[510] Identical Corp. of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977); Padovain v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961).

[511] J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976); Moore v. Kibbe, 400 F. Supp. 1367 (E.D.N.Y. 1975).

[512] Mansbeck v. Ostrowski, 384 F.2d 970 (D.C. Cir. 1967), cert. denied, 390 U.S. 966; Ramsey v. Melton National Bank and Trust Co., 33 F.R.D. 324 (W.D. Pa. 1963).

determine what matters should be considered in the conference itself. If adopted, this memorandum may be binding at trial.[573]

¶147 Under Rule 16, the court must issue a pre-trial order reciting the action taken at the conference.[514] This order controls the future course of the litigation by limiting the issues for trial.[515] A trial court is not obliged to consider any matter not contained in the pre-trial order.[516] For example, if a stipulation or agreement regarding a factual issue is made at the conference and subsequently incorporated in the pre-trial order, the issue stands determined as if it had been fully litigated at trial.[517] Nevertheless, the binding nature of the pre-trial order lies within the court's discretion.[518] If strict enforcement in a particular case would result in injustice, the court may use its discretion and allow material not contained in the order to be presented at trial.[519]

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[513] See, e.g., Laird v. Air Carrier Engine Service, Inc., 263 F.2d 948, 953-54 (5th Cir. 1959). Courts, however, have been fairly liberal in allowing amendments to pre-trial memoranda. See Hunt v. Pennsylvania R. Co., 41 F.R.D. 349 (E.D. Pa. 1966).

[514] Fed. R. Civ. P. 16.

[515] Id.

[516] Simonsen v. Barlo Plastics Co., 551 F.2d 469 (1st Cir. 1977); Pakech v. American Export-Isbrandtser Lines, Inc., 69 F.R.D. 534 (E.D. Pa. 1976) (evidence excluded).

[517] Mull v. Ford Motor Co., 368 F.2d 713, 716 (2d Cir. 1966); United States v. Sommers, 351 F.2d 354, 357 (10th Cir. 1965).

[518] Davis v. Duplantis, 448 F.2d 918, 921 (5th Cir. 1971); Hooper v. Guthrie, 390 F. Supp. 1327 (W.D. Pa. 1975).

[519] See, e.g., Stahlin v. Hilton Hotels Corp., 484 F.2d 580 (7th Cir. 1973); Brooks v. Wooton, 355 F.2d 177 (2d Cir. 1966).

Similarly, if the interests of justice so require, witnesses not listed in the pre-trial order may also be allowed.[520] On the other hand, the pre-trial order may be modified or amended to prevent "manifest injustice."[521]

III. Parties: Who May Sue; Who May Be Sued?

A. Real Party in Interest

¶148 Rule 17(a) requires that the action be brought in the name of the party who possesses the substantive legal right being asserted.[522] The rule protects individuals from the harassment of multiple-suits brought by parties not bound by principles of res judicata.[523] The rule should be liberally construed,[524] and failure

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[520] Peter Eckrick and Sons, Inc. v. Selected Meat Co., 512 1158 (7th Cir. 1975); Galard v. Johnson, 504 F.2d 1198 (7th Cir. 1974).

[521] Stahlin v. Hilton Hotels Corp., 484 F.2d 580 (7th Cir. 1973); Chatzicharalambus v. Detit, 430 F. Supp. 1087 (D. La. 1977).

[522] Fed. R. Civ. P. 17(a). See Iowa Public Service Co. v. Medicine Bow Coal Co., 556 F.2d 400, 404 (8th Cir. 1977); Jones v. National Emblem Insurance Co., 436 F. Supp. 1119 (E.D. Mich. 1977).

[523] Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1208 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976); Rackley v. Board of Trustees of Orangeburg Regional Hospital, 35 F.R.D. 516, 517 (D. S.C. 1964) ("The purpose of this rule is to enable the defendant to present his defenses against the proper persons, to avoid subsequent suits, and to proceed to finality of judgment."). See also Advisory Committee's Note to the 1966 Amendment to Rule 17(a), reprinted in 39 F.R.D. 84-85.

[524] Fitzgerald v. Kriss, 10 F.R.D. 51, 54 (N.D.N.Y. 1950).

o join the real party in interest is not grounds for dismissal.[525] In federal question cases where federal statutes create a substantive right of action, courts must look to the federal law to determine the real party in interest.[526]

B. Joinder of Claims and Remedies

1. Claims

¶149 With the exception of claims excluded by subject-matter jurisdictional limitations,[527] a plaintiff may join all his claims against a defendant in federal court.[528] A party may assert alternative claims for relief; consistency among the claims is unnecessary.[529] Of course, each claim must meet all of the pleading requirements. Further, if the claims are based on different transactions, Rule 10(b) requires that they be stated separately to facilitate clear presentation.[530]

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[525] Fed. R. Civ. P. 17(a). See Advisory Committee's Note to the 1966 Amendment of Rule 17(a), reprinted in 39 F.R.D. 84-85. "Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed."

[526] 6 Fed. Prac. and Pro., supra note 5, Civil at § 1544 at 650.

[527] See ¶¶ 3-13, 69-70, 81-85, supra. Note, that if the original plaintiff and defendant in a RICO cause of action are of diverse citizenship, subject-matter jurisdiction over a joined claim will exist regardless of raising a federal question, provided the $10,000 amount in controversy is established.

[528] Fed. R. Civ. P. 18(a). See Southeastern Industrial Tire Co. v. Duraprene Corp., 70 F.R.D. 585 (E.D. Pa. 1976).

[529] Fed. R. Civ. P. 8(e)(2). See Peter Kiewit Sons' Co. v. Summit Construction Co., 422 F.2d 242, 271 (8th Cir. 1969); Hughes v. Kaiser Jeep Corp., 40 F.R.D. 89 (D.S.C. 1966).

[530] Fed. R. Civ. P. 10(b).

2. Remedies

¶150 Rule 18(b) authorizes the joinder of two claims where if each was asserted independently, it would be necessary to adjudicate one successfully before proceeding to an adjudication of the other.[53] This rule enables a party to secure relief in a single action, thereby promoting judicial efficiency and economy.[532] In practice, Rule 18(b) is used primarily in the situation where a plaintiff institutes an affirmative claim for money owed and joins to it a claim to set aside a fraudulent conyeyance.[533] For purposes of bringing a cause of action under the RICO statute, Rule 18(b) is of little significance.

C. Joinder of Parties

1. Persons to Be Joined if Feasible

¶151 Rule 19[534] marks an important exception to the principal that the plaintiff has the right to decide who shall be made parties to the action. If considering the entire situation, the court feels that the action should not proceed without an absent party, the court shall order that party joined, or if that is impossible, dismiss the action.[535] This rule protects the interests of absent persons,

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[531] Fed. R. Civ. P. 18(b).

[532] 6 Fed. Prac. and Pro., supra note 5, Civil at § 1590.

[533] See, e.g., Nowell v. Dick, 413 F.2d 1204 (5th Cir. 1969); Nelsen v. Maiden, 402 F. Supp. 1307 (E.D. Tenn. 1975).

[534] Fed. R. Civ. P. 19.

[535] Id.

as well as parties already before the court, from multiple litigation and inconsistent judicial determination.[536] In addition, judicial economy--avoiding needless repetition of claims--is furthered.[537]

¶152 An absent party shall be joined in the action in either of two situations. First, if complete relief cannot be accorded among those already parties, "the party shall be joined."[538] Second, if an absent party claims "an interest relating to the subject of the action and is so situated" that his absence may impair or impede his ability to protect his interest,[539] or if any of the parties already present will run the risk of incurring double, multiple, or otherwise inconsistent obligation by reason of his claimed interest," the party shall be joined if possible.[540]

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[536] Schutten v. Shell Oil Co., 421 F.2d 869, 871 (5th Cir. 1970); Smith v. Mandel, 77 F.R.D. 405, 408 (D.S.C. 1975).
The desire to protect the rights of parties not before the court has constitutional implications. Thus, the court in Osborne v. Campbell, 37 F.R.D. 339, 342 (S.D. W. Va. 1965) held that the principal beneficiary of a will was an indispensable party. "[T]o adjudicate her rights in her absence would not only be inconsistent with equity and good conscience, but [would be] a violation of due process."

[537] See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); International Union of Operating Engineers, Local 103, AFL-CIO v. Irmscher & Sons, Inc., 63 F.R.D. 394, 397 (N.D. Ind. 1973).

[538] Mandina v. Lynn, 357 F. Supp. 269, 277 (W.D. Mo. 1973). See also Prestenback v. Employers' Insurance Co., 47 F.R.D. 163, 166 (E.D. La. 1969).

[539] Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975); O'Brien v. Continental Illinois National Bank & Trust Co., 443 F. Supp. 1131 (N.D. Ill. 1977), modified on other grounds, 593 F.2d 54, (7th Cir. 1979).

[540] Allied Chemical Corp. v. Strouse, Inc., 53 F.R.D. 588 (E.D. Pa. 1971) (Joinder not compulsary as absent party's claims would be barred by the statute of limitations); FTC v. Manager, Retail Credit Co., Miami Branch Office, 357 F. Supp. 347, 354 (D. D.C. 1973), rev'd on other grounds, 515 F.2d 988 (D.C. Cir. 1975) ("The possibility that Respondent may become subject to a later suit by consumers for releasing their files pursuant to a court order is remote at best.")

2. Factors Determining the Indispensability of an Absent Party

¶153 A court may not join an absent party if doing so would destroy the subject-matter jurisdiction of the court.[541] A party may not be joined if he is not subject to service of process,[542] or if his joinder would render venue improper and the party objects.[543] If a party falls into one of the categories listed in Rule 19(a), but cannot be joined for any of the above reasons, the court must determine whether in "equity and good conscience" the case should proceed without him.[544] Rule 19(b) lists four factors to assist the court in making this distinction.[545]

3. Joinder in the Interests of Justice: RICO

¶154 In the RICO context, a court need rarely make a Rule 19(b) analysis. First, if theperson to bejoined is an "interested party" within the scope of Rule 19(a), then his interest in the action

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[541] Fed. R. Civ. P. 19(a).

[542] Id.

[543] Id.

[544] Fed. R. Civ. P. 19(b).

[545] Id.

> . . . The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

necessarily be logically connected with the transaction or occurrences which gave rise to the original claim. Therefore, his joinder, even if rendered necessary by the existence of a non-federal claim, would fall within the pendent jurisdiction of the federal courts.[546] Joining such a party in a RICO claim will not destroy the subject matter jurisdiction of the federal court.

¶155 Second, if the party to be joined does not reside, is not found, has no agents, or does not transact his affairs in the forum state,[547] the party seeking joinder may petition the court for nationwide service of process under section 1965(b).[548] Under this provision, the court can, if the interests of justice require, join parties residing in any district in the United States.[549] Since federal courts are reluctant to dismiss a cause of action for nonjoinder of indispensable parties and will generally deny the motion if the defect can be cured,[550] the "interests of justice" should in most cases demand nationwide service.

¶156 Of course, the court must still determine whether an absent party falls within the scop of Rule 19(b).[551] Here, however, the

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[546] For analysis of pendent jurisdiction, see ¶¶ 7-12, supra.

[547] If none of these conditions is met, the court does not have personal jurisdiction over the defendant. See ¶¶14-18, supra.

[548] 18 U.S.C. § 1965(b) (1976).

[549] Id. For an analysis of this provision, see ¶¶ 47-50, supra.

[550] Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); Macklin v. Butler, 553 F.2d 525, 531 (7th Cir. 1977); Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 452 (D. D.C. 1978).

[551] Fed. R. Civ. P. 19(b).

alternatives are not as severe. Instead of deciding whether to dismiss an action or let it proceed without the party in question, the court contemplating a motion to join a party to a RICO action need only decide whether or not to join the party. The action will proceed with or without him.

4. Pleading Reasons for Non-Joinder

¶157 Since a court will probably never dismiss a RICO action for failure to join an indispensable party, compliance with the requirement of Rule 19(c) will not result in a tactical dilemma for the pleader. This rule requires that the pleading list the person's names within the pleader's knowledge who are described in Rule 19(a)(1)-(2).[552] In most cases, a listing of "necessary" parties not joined and the reasons for non-joinder would provide the opposing party with all the information necessary to move for dismissal under Rule 12(b)(7).[553] This problem will not arise in the RICO context. Since the possibility of dismissal is extremely slight, the defendant will probably not assert that defense.

5. Class Actions

¶158 The joinder requirements of Rule 19 do not apply to class actions.[554] Without this exception, the utility of class actions would be severely compromised.[555]

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[552] Fed. R. Civ. P. 19(c).

[553] See, e.g., Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964).

[554] Fed. R. Civ. P. 19(d).

[555] See RICO Class Actions, infra.

6. Permissive Joinder

¶159 Rule 20(a) permits joinder of all persons in a single action who are asserting or defending against any right to relief jointly, severally, or in the alternative which arises out of the same transaction, occurrence, or series of transactions or occurrence which present a common question of law or fact.[556] Permissive joinder promotes trial convenience and efficiency and expedites the final determination of controversies.[557] This rule permits joinder of parties whose presence would be procedurally convenient, but not essential to the court's disposition of the claim before it.[558] Each plaintiff's right remains distinct, as if the claims had been brought independently.

¶160 For the court to allow joinder, the cause of action asserted or defended by the joined party must relate to or arise out of the same transaction or occurrence that gave rise to the original action.[559] Second, some question of law or fact must be common to all parties.[560] The court will not permit joinder unless both

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[556] Fed. R. Civ. P. 20(a).

[557] League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977); Kuechle v. Bishop, 64 F.R.D. 179 (N.D. Ohio 1974); Fair Housing Dev. Fund Corp. v. Burke, 55 F.R.D. 414 (E.D.N.Y. 1972).

[558] Arrington v. City of Fairfield, Alabama, 414 F.2d 687, 693 (5th Cir. 1969); State of California ex rel. State Air Resources Bd. v. Dept. of Navy, 431 F. Supp. 1271, 1281 (D. Cal. 1977).

[559] Fed. R. Civ. P. 20(a); Nassau County Ass'n of Insurance Agents, Inc. v. Aetna Life and Casualty Co., 497 F.2d 1151 (2d Cir.), cert. denied, 419 U.S. 968 (1974); Martinez v. Safeway Stores, Inc., 66 F.R.D. 446 (N.D. Cal. 1975).

[560] Fed. R. Civ. P. 20(a); Mosley v. General Motors Corp., 497 F.2d 1330 (8th Cir. 1974); Lanier Business Products v. Grayman Co., 342 F. Supp. 1200 (D. Md. 1972).

requirements are satisfied.[561] The "transaction or occurrence" test is flexible and employed on a case by case basis.[562] The general approach is the same as the "logical relationship" test employed for purposes of deciding whether a counter-claim is compulsory, or whether a cross-claim is assertable.[563] Courts often find that claims arise out of the same transaction or occurrence if the probability of overlapping proof and duplicate testimony indicat that separate trials would constitute an unecessary waste of judicia time and energy.[564] Similar considerations apply in deciding whethe a common question of law or fact exists as to all parties in the action.

¶161 If joinder of a party pursuant to Rule 20(a) might tend to embarrass, delay, put to expense, or prejudice other parties to the action, the court may, in its discretion, sever the joined party and order a separate trial.[565]

¶162 The joinder of parties under Rule 20 will not destroy the

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[561] League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977). Note, however, that even if the party's claim or defense does not arise out of the same transaction or occurrence giving rise to the original claim or defense, if there is a common question of fact or law, separate actions may be consolidated under Rule 42(a).

[562] See Mosley v. General Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974).

[563] See ¶¶ 118-126, supra.

[564] See Mesa Computer Utilities, Inc. v. Western Union Computer Utilities, Inc., 67 F.R.D. 634, 637 (D. Del. 1975).

[565] Fed. R. Civ. P. 20(b).

subject-matter jurisdiction of the federal court.[566] Nevertheless, proper venue must be preserved, and the court must have personal jurisdiction over the joined party.[567] Again, however, the provision for nationwide service of process is available if the moving party can show that the interests of justice require joinder.[568]

7. Misjoinder of Parties

¶163 Rule 21 states that a case will not be dismissed because of the misjoinder of parties.[569] Parties are misjoined when the claims asserted by or against the joined party are not logically related to the original claim or do not present a common questions of law or fact.[570] If a party is improperly joined, the court may drop that party,[571] or the claim by or against him may be severed and proceded with separately.[572] The court may invoke Rule 21 on its own ini-

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[566] The criteria for proper joinder under Rule 20 correspond exactly to the requirements for ancillary jurisdiction of federal courts. If the right to relief asserted or defended against by the joined party arises out of the same transaction or occurrence which gave rise to the original action, and some question of law or fact is common to all parties. The requirements for ancillary jurisdiction are satisfied. See ¶ 13, supra. See generally, 7 Fed. Prac. and Pro., supra note 5, Civil at § 1659.

[567] 7 Fed. Prac. and Pro., supra note 5, Civil at § 1659.

[568] 18 U.S.C. § 1965(b) (1976).

[569] Fed. R. Civ. P. 21. This rule only refers to "misjoinder" of parties. A case may be dismissed due to failure to join a party under Rule 19.

[570] Parties are therefore misjoined when the requirements of Rule 20(a) are not satisfied. See Condosta v. Vermont Elec. Coop. Inc., 400 F. Supp. 358, 366 (D. Vt. 1975); Kenvin v. Newburger, Loeb & Co., 37 F.R.D. 473 (S.D.N.Y. 1965).

[571] Celanese Corp. v. Vandalia Warehouse Corp., 424 F.2d 1176 (7th Cir. 1970).

[572] Fed. R. Civ. P. 21.

tiative,[573] and the grant or denial of a motion to add or drop a party lies in the sole discretion of the trial judge.[574]

D. Intervention

1. Generally

¶164 Intervention is the procedure by which a person not named as a party to the action may come into it in order to protect his interest in the outcome of the controversy.[575] If certain requirements are satisfied, a party may intervene as a matter of right.[576] Intervention of right under Rule 24(a) involves only a question of law whereas permissive intervention under Rule 24(b)[577] is addressed to the court's discretion.[578]

2. Intervention of Right

¶165 A party may intervene as a matter of right if a federal statute confers an unconditional right to do so.[579] In the RICO

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[573] Gentry v. Smith, 487 F.2d 571 (5th Cir. 1973).

[574] Williams v. Hoyt, 556 F.2d 1336 (5th Cir. 1977), cert. denied, 435 U.S. 946 (1978).

[575] 3B Moore's Federal Practice ¶ 24.02 (1979).

[576] Fed. R. Civ. P. 24(a).

[577] Fed. R. Civ. P. 24(b).

[578] See Medd v. Westcott, 32 F.R.D. 25, 28 (N.D. Iowa 1963).

[579] Fed. R. Civ. P. 24(a). For example, 28 U.S.C. § 2403 (1976) grants the United States an unconditional right to intervene in any proceeding in federal court in which the constitutionality of an Act of Congress affecting the public interest is called into question. In order to have this right, neither the United States, nor any officer, agency, or employee may already be a party. Section 2403(b) grants the states the same right when a state statute is constitutionally challenged.

context, no federal statute unconditionally or conditionally authorizes intervention. Therefore, for a person to have a right of intervention he must claim "an interest relating to the property or transaction which is the subject of the action" and he must be "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."[580]

¶166 The prospective intervenor must have a significant interest in the controversy.[581] It is generally accepted that intervention of right requires that there be "a direct, substantial, legally protectable interest in the proceedings."[582] Interests in property, including the recovery of money, have been held sufficient.[583] A court should allow intervention of right if the judgment or decree would be binding on the proposed intervenor.[584] Further, courts

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[580] Fed. R. Civ. P. 24(a).

[581] Donaldson v. United States, 400 U.S. 517 (1971). "What is obviously meant [by Rule 24(a)(2)] is a significantly protectable interest." Id. at 531.

[582] Hobson v. Hansen, 44 F.R.D. 18, 24 (D. D.C. 1968). See also In re Penn. Central Commercial Paper Litigation, 62 F.R.D. 341 (S.D.N.Y. 1974), aff'd without opinion 515 F.2d 505 (2d Cir. 1975)

> [A]n interest, to satisfy the requirements of Rule 24(a)(2), must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit.

Id. at 346.

[583] Mendenhall v. M/V Toyota Naru No. 11, 551 F.2d 55 (5th Cir. 1977).

[584] In re Penn. Central Commercial Paper Litigation, 62 F.R.D. 341, (S.D.N.Y. 1974), aff'd without opinion, 515 F.2d 505 (2d Cir. 1975). (No direct interest since the judgment was not binding).

have been willing to extend the zone of interests beyond their "myopic fixation" on concepts such as "property" or "bound by judgment." Other interests may be important enough to satisfy the requirements of Rule 24(a), but no strict definitional tests are possible.[585] The policy behind Rule 24 would allow intervention

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[585] See 7A Fed. Prac. and Pro., supra note 5, Civil, § 1908 at 509-10, quoting Smuck v. Hobson, 408 F.2d 175, 179-180 (D.C. Cir. 1969) (Chief Judge Bazelon):

> The decision whether intervention of right is warranted thus involves an accomodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending. Since this task will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides. * * * [T]here is no apparent reason why an "economic interest" should always be necessary to justify intervention. The goal of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" may in certain circumstances be met by allowing parents whose only "interest" is the education of their children to intervene. In determining whether such circumstances are present, the first requirement of Rule 24(a)(2), that of an "interest" in the transaction, may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others.
>
> This does not imply that the need for an "interest" in the controversy should or can be read out of the rule. But the requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention. If barriers are needed to limit extension of the right to intervene, the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task. If those requirements are met, the nature of his "interest" may play a role in determining the sort of intervention which should be allowed--whether,

of right, assuming other criteria are met, if the "prospective intervenor appears to have a sufficient state in the outcome and enough to contribute to the resolution of the controversy."[586]

¶167 The prospective intervenor must also show that "he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.[587] The court must view the party's inability to protect interest from a practical standpoint; his interest is not limited to those situations where res judicata would bar a subsequent suit.[588] A case's future impact in terms of stare decisis has been held sufficient to establish a practical inability on the part of a would-be intervenor to protect his rights in a future lawsuit.[589] Intervention of right has also been granted in other situations where the prospective intervenor could not practically protect his rights. No rigid tests were employed. Rather the courts looked to the facts of each case and made determinations on an individual basis.[590]

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for example, he should be permitted to contest all issues, and whether he should enjoy all the prerogatives of a party litigant.
Citing Nuesse v. Camp., 385 F.2d 694, 700 (D.C. Cir. 1967).

[586] State of Utah v. American Pipe & Construction Co., 50 F.R.D. 99, 102 (C.D. Cal. 1970); modified on other grounds, 473 F.2d 580 (9th Cir. 1973); aff'd, 414 U.S. 538 (1974).

[587] Fed. R. Civ. P. 24(a)(2).

[588] See Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1967); Atlantis Development Corp. v. United States, 379 F.2d 818, 823-24 (5th Cir. 1967).

[589] Atlantis Development Corp. v. United States, id. at 824. The court noted, however, that the impact of stare decisis will not always justify intervention of right.

[590] See, e.g., Natural Resources Defense Council, Inc., v. United States Nuclear Regulatory Commission, 578 F.2d 1341 (10th Cir. 1978); Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977).

¶168 The party opposing intervention must establish that the prospective intervenor's interests are adequately represented by existing parties.[591] The intervenor is not burdened with showing the inadequacy of representation, as he was prior to the 1966 amendment.[592] The burden of proof is now on the opposing party.

¶169 It is generally acknowledged that a party is not adequately represented in the following cases: (1) where there is collusion between the representative of the prospective intervenor's interest and the opposing party; (2) where the representatives has or represents an interest adverse to the intervenor; or (3) where the representative fails to fulfill his duty.[593] Although cases have held to the contrary,[594] the three situations are not exclusive. "The wide variety of cases that come to the courts make it unlikely that there are three and only three circumstances that would make representation inadequate and suggest that 'adequacy of representation is a very complex variable indeed.'[595]

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[591] Fed. R. Civ. P. 24(a)(2).

[592] United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978); Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n., 578 F.2d 1341 (10th Cir. 1978).

[593] Stadin v. Union Electrical Co., 309 F.2d 912, 919 (8th Cir. 1962) (Blackman, J.), cert. denied, 373 U.S. 915.

[594] Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir. 1967); Peterson v. United States, 41 F.R.D. 131, 133 (D. Minn. 1966). In so holding, these cases commit a fundamental logical error. It is one thing to say that three specified situations constitute inadequate representation. It is quite another to hold, as these cases did, that representation is adequate if those three situations do not exist.

[595] 7A Fed. Prac. and Pro., supra note 5, Civil, § 1909 at 524, citing Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 748 (1968).

¶170 The prime consideration is a comparison of the interest of the would-be intervenor and the interest of the representative. Clearly if they are adverse, representation will be inadequate.[596] At the same extreme, if the prospective intervenor's interest is not represented at all by existing parties to the action, the court will allow intervention of right, assuming other requirements were satisfied.[597] On the other end of the spectrum, a prospective intervenor would have a difficult time countering the opposing party's showing that the interest of the representative were identical to those of the intervenor.[598] Cases that fall between the two poles require a consideration of all factors involved, however courts should allow intervention absent a clear showing of adequacy of representation.[599]

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[596] State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, 429 U.S. 1121; Smith v. Clark Sherwood Oil Field Contractors, 457 F.2d 1339 (5th Cir. 1972), cert. denied, 409 U.S. 980.

[597] Adams v. Matthews, 536 F.2d 417, 418 (D.C. Cir. 1976); Hodgson v. Carpenters Resilient Flooring Local Union No. 2212, 457 F.2d 1364 (3d Cir. 1972).

[598] Penick v. Columbus Educational Ass'n., 574 F.2d 889 (6th Cir. 1978); Associated Industries of Alabama, Inc. v. Train, 543 F.2d 1159 (5th Cir. 1976). Of course, the interviewer might succeed if he could establish collusion between the existing parties, or lack of diligent effort on the part of the erst-while representative. See Commonwealth of Virginia v. Westinghouse Electrical Corp., 542 F.2d 214 (4th Cir. 1976) (collusion) International Mortgage and Investment Corp. v. Von Clemm, 301 F.2d 857 (2d Cir. 1962) (lack of diligence).

It is usually assumed that the United States adequately represents the public interest in antitrust suits. See, e.g., United States v. Hartford-Empire Co., 573 F.2d 1 (6th Cir. 1978).

[599] Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972); National Farm Lines v. ICC, 564 F.2d 381 (10th Cir. 1977). See also Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 748 (1968).

3. Permissive Intervention

¶171 Rule 24(b) authorizes the court, in its discretion, to allow intervention if a statute of the United States confers a conditional right of intervention, or when the prospective intervenor's claim or defense has a question of law or fact in common with the main action.[600] In the RICO context, no federal statute confers a conditional right to intervene.[601] The "common question of law of fact" test is easy to apply. If there is no common issue, courts must deny intervention.[602] If there is, the rule is satisfied, and the court may, in its discretion, permit or deny intervention based upon considerations of possible delay or prejudice.[603]

¶172 Permitting intervention will always cause a delay in the proceedings.[604] The court must balance and weigh the disadvant[illegible]s

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[600]Fed. R. Civ. P. 24(b).

[601]Examples of conditional authorization of intervention are The Civil Rights Act of 1964, (Attorney General may, in the court's discretion, intervene in a civil rights case upon a showing of general public importance), 26 U.S.C. § 7424 (1976) (Intervention by the United States in cases where it is asserting a tax lien), 28 U.S.C. §2323 (1976) (Intervention by communities, associations, corporations, firms and individuals in actions involving review of ICC orders), etc.

[602]Liberty Mutual Insurance Co. v. Pacific Indemnity Co., 76 F.R.D. 656 (N.D. Pa. 1977); Martinez v. Safeway Stores, Inc., 66 F.R.D. 446 (N.D. Cal. 1975).

[603]Fed. R. Civ. P. 24(b).

[604]Crosby Steam Gage & Value Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1743) ("Additional parties always take additional time.").

of the delay with the advantages to be gained by intervention. In a recent Ninth Circuit case,[605] the court enumerated a comprehensive list of factors which the court may consider in deciding on the propriety of intervention under Rule 24(b).

> If the trial court determines that the initial conditions for permissive intervention under Rule 24(b)(1) or 24(b)(2) are met, it is then entitled to consider other factors in making its discretionary decision on theissue of permissive intervention. These relevant factors include the nature and extent of the intervenor's interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case. The court may also consider whether changes have occurred in thelitigation so that intervention that was once denied should be re-examined, whether the intervenor's interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.[606]

¶173 The court may condition its authorization to intervene by imposing limitations or requirements on the prospective intervenor.[607] If intervention is denied, the court may allow the applicant to submit a brief as amicus curiae.[608]

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[605] Spangler v. Pasadena City Bd. of Education, 552 F.2d 1326 (9th Cir. 1977).

[606] Id. at 1329. (citations omitted).

[607] See 7A Fed. Prac. and Pro., supra note 5, Civil at § 1922.

[608] See Brewer v. Republic Steel Corp., 513 F.2d 1222 (6th Cir. 1975); United States v. Massachusetts Maritime Academy, 76 F.R.D. 595 (D. Mass. 1976).

¶174 Rule 24(c) requires the prospective intervenor to serve by motion all of the parties to the action in the court in which the action is pending pursuant to the provision of Rule 5.[609] He may follow the approved manner set out in Official Form 23.[610] The motion must state the grounds upon which the party seeks intervention and must be "accompanied by a pleading setting forth the claim on defense for which intervention is sought."[611] The pleading must comply with the requirements of the pleading rules.[612] The intervenor's claim must be initiated within the applicable statute of limitations period; the relevant date is the filing of the motion to intervene.[613]

¶175 Whether the motion to intervene is permissive or a matter or right,[614] it must be made in a "timely" fashion.[615]

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[609] Fed. R. Civ. P. 24(c).

[610] Official Form 23, Motion to Intervene as a Defendant Under Rule 24.

[611] Fed. R. Civ. P. 24(c).

[612] See Fed. R. Civ. P. 7-16.

[613] Farris v. Sears, Roebuck & Co., 415 F. Supp. 594 (N.D. Ky. 1976); Braxton v. Virginia Folding Box Co., 72 F.R.D. 124, 126 (E.D. Va. 1976).

[614] Even though motions to intervene must in both cases be "timely," courts have adopted different standards, depending upon which type of intervention is sought. In general, more flexibility is given to applications for intervention of right than is given permissive intervention. See, e.g., Alaniz v. Tillie Lewis Foods, 572 F.2d 657 (9th Cir. 1978); Neville v. EEOC, 511 F.2d 303 (8th Cir. 1975).

[615] See Fed. R. Civ. P. 24(a) and (b). See also National Ass'n. for the Advancement of Colored People v. State of New York, 413 U.S. 345, 366-369 (1973).

whether or not this requirement has been complied with is within the court's discretion.[616] The most important factor a court must consider in deciding whether it should dismiss an "untimely" application, is whether the delay in the proceedings will cause prejudice to the parties already before the court.[617] Indeed, the Fifth Circuit stated that this consideration "may well be the only significant [one] when the proposed intervenor seeks intervention of right."[618] Another consideration involves the question of whether the prospective intervenor was in a position to seek intervention at an earlier stage in the case.[619] Motions to intervene after judgment usually fail for the reasons that: (1) the rights of the existing parties would usually be prejudiced; and (2) intervention at this late stage would "substantially interfere with the orderly processes of the court."[620]

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[616] Alaniz v. Tillie Lewis Foods, 572 F.2d 657 (9th Cir. 1978); Stallworth v. Monsanto Co., 558 F.2d 257, 266 (5th Cir. 1977).

[617] Alaniz v. Tillie Lewis Foods, id.; SEC v. Tipco, Inc., 554 F.2d 710 (5th Cir. 1977).

[618] McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970).

[619] Moten v. Bricklayers, Masons & Plasterers International Union of America, 543 F.2d 224 (D.C. Cir. 1976); Iowa State University Research Foundation, Inc. v. Honeywell, Inc., 459 F.2d 447 (8th Cir. 1972).

[620] McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1072 (5th Cir. 1970).

Nevertheless, intervention after judgment has been allowed in a significant number of cases.[621]

¶176 Since permissive intervention does not require that the claim or defense asserted by the intervenor arise out of the same transaction, occurrence, event or series of transactions, occurrences, or events that gave rise to the original action, but only that it have a common question of law or fact, it is possible that a party intervening in a RICO action would not fall within the pendent or ancillary jurisdiction of the federal courts.[622] Realistically, this situation will rarely, if ever, arise. If, however, the prospective intervenor cannot establish independent jurisdictional grounds, and his claim does not arise out of the aggregate core of facts which gave rise to the oruginal RICO claim so as to engage the ancillary jurisdiction of the federal courts, the court will not allow intervention.

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[621] See, e.g., Fleming v. Citizens For Albermarle, Inc., 577 F.2d 236 (4th Cir. 1978); Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., 365 F. Supp. 1105 (E.D. Pa. 1973), aff'd 506 F.2d 735 (3d Cir. 1974).

[622] It is clear that intervention of right falls within the ancillary jurisdiction of the federal courts, especially in federal question cases. The prospective intervenor must claim an interest relating to the transaction that is the subject of the action. Therefore, this claim necessarily arises out of the same transaction or occurrence which gave rise to the original claim. Not requiring independent jurisdictional grounds also furthers the fundamental principal of ancillary jurisdiction - namely "considerations of judicial economy and fairness to the litigants". See ¶ 13, supra.

APPENDIX I

SELECTED PROVISIONS FROM THE FEDERAL RULES OF CIVIL PROCEDURE

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

Rule 4. Process

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) By Whom Served. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpœna may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical

employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) **Same: Service Upon Party Not Inhabitant of or Found Within State.** Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) **Territorial Limits of Effective Service.** All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)–(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

(g) **Return.** The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service.

(h) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) **Alternative Provisions for Service in a Foreign Country.**

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1) (D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods to time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)—(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h) (2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rule 14. Third-Party Practice

(a) When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) **Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) **Capacity to Sue or Be Sued.** The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a). As amended Dec. 27, 1946, effective March 19, 1948; Dec. 29, 1948, effective Oct. 20, 1949.

(c) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

Rule 25. Substitution of parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Rule 43. Evidence

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

(b) Scope of Examination and Cross-Examination. (Abrogated effective July 1, 1975.)

(c) Record of Excluded Evidence. (Abrogated effective July 1, 1975.)

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

(f) Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. As amended Dec. 27, 1946, effective March 19, 1948.

(c) Service. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

VII. JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783. As amended Dec. 29, 1948, effective Oct. 20, 1949.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

APPENDIX II

SAMPLE PLEADINGS FROM A RICO TREBLE DAMAGES ACTION

[Farmers Bank v. Bell Mortgage Co.
452 F. Supp. 1278 (D. Del. 1978)]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FARMERS BANK OF THE STATE OF DELAWARE, a Delaware corporation,

Plaintiff,

v.

BELL MORTGAGE CORPORATION, a Florida corporation; BELL MORTGAGE CORPORATION OF JACKSONVILLE, FLORIDA, a Florida corporation; BELL MORTGAGE CORPORATION OF VIRGINIA, INC., a Virginia corporation; WHITEHALL ASSOCIATES, LTD., a Delaware corporation; ASTROLOGICAL ASSOCIATES, LTD., a Delaware corporation; BELL ASSOCIATES, INC., a Delaware corporation; BELL SERVICES, INC., a Delaware corporation; BELEN, INC., a Delaware corporation; BODY-MAGIC WEIGHT CONTROL CENTERS, LTD., a Delaware corporation; C. WENTWORTH SMITH ASSOCIATES, INC., a Delaware corporation; CAPITAL PLANNING CORPORATION, a Florida corporation; CENTRAL ENTERPRISES, INC., a Delaware corporation; CORDELE ENTERPRISES, INC., a Delaware corporation; GUIRO ENTERPRISES, INC., a Delaware corporation; MEMORIAL DISCOUNT CORP., a Delaware corporation; MONDAY CORPORATION, INC., a Delaware corporation; NATIONAL HOROSCOPE, INC., a Delaware corporation; NORTHEASTERN ASSOCIATES, INC., a Delaware corporation; ORANGE DEVELOPMENT CORPORATION, a Delaware corporation; PROVIDENT FINANCIAL CORPORATION OF DELAWARE, a Delaware corporation; REGENCY FIGURE & FITNESS CLUB, INC., a Delaware corporation; REGENCY FIGURE & FITNESS CLUB OF DANBURY, INC., a Delaware corporation; TODAY'S WOMAN FIGURE SALON, INC., a Delaware corporation; UNITED HELPING HAND INTERNATIONAL, INC., a Delaware corporation; UNITED OPERATING CORPORATION, a Delaware corporation; UNIVERSAL GYM EQUIPMENT CO., INC., a Delaware corporation; WHITNEY, STONEHILL & LAWLER, LTD., a Delaware corporation; RAUL ARANGO; SIXTO R. ARANGO; DORIS CANTOR; MILTON CANTOR; SAUL CANTOR; ANDRES CASTRO; CARRIDAD CASTRO; NATHAN H. COHEN; SAMUEL ELLENSON; DIANE GIGLIA; STACY CHARLES GRAYBEAL; DIANA HEADLEY; THOMAS W. HEADLEY; WILLIAM R. HESTER, JR.; JOHN KILLEBREW; SIDNEY KONIGSBERG; JOSE LAMAS; LYLE L. LATHROP; FRANK LIEBERT; LEANNE ORLOVE; JAMES D. PENNINGTON; ROBERT S. PENNINGTON; ROBERT M. PRICE; and MARIE L. STACHOWSKI;

Defendants.

Civil Action

No. 76-122

FILED

MAR 26 2 28 PM '76

CLERK, U.S. DISTRICT COURT
DISTRICT OF DELAWARE

COMPLAINT

Plaintiff, Farmers Bank of the State of Delaware, ("Farmers"), hereby files its complaint and alleges upon information and belief as follows:

1. This action is brought for damages to Farmers as a result of a fraud perpetrated on it by the defendants and unknown others in connection with the sale, commencing about October, 1973, of certain forged mortgage notes and Trust Indenture notes.

2. This Court has jurisdiction of this action under Section 22(a) of the Securities Act of 1933, as amended ("Securities ct"), 15 U.S.C. § 77v(a); under Section 27 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), 15 U.S.C. § 78aa; under Section 1964 of the Organized Crime Control Act ("Organized Crime Act"), 18 U.S.C. § 1960, et seq.; under Sections 1331 and 1337, Title 28, 28 U.S.C. §§ 1331 and 1337; and under the principles of pendant jurisdiction.

3. Plaintiff brings this action under and pursuant to Sections 5(a), 5(c), 12 and 17(a) of the Securities Act, 15 U.S.C. § 77e(a), 77e(c), 771 and 77q(a); Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(b), and the Rules and Regulations promulgated thereunder by the Securities and Exchange Commission (the "SEC"); 18 U.S.C. § 1964; and common and statutory law. These violations were committed in furtherance of a conspiracy between and among defendants and others with the object of defrauding Farmers of its assets.

4. Jurisdiction and venue are predicated on Section 22(a) of the Securities Act, § 27 of the Exchange Act, and Sections 1964(a) and 1965(a) of the Organized Crime Act, in that certain defendants are residents of, are found within,

have agents within, or transact their affairs in the District of Delaware and acts and transactions constituting violations hereinafter alleged took place in this District. Jurisdiction for the non-federal claims hereinafter alleged is predicated on the principles of pendant jurisdiction.

5. In connection with the acts and conduct alleged as the basis for this action, Defendants, directly and indirectly, used the means and instrumentation of interstate commerce and of the mails in connection with and in furtherance of the acts complained of.

THE PARTIES

6. Plaintiff Farmers is a publicly held corporation organized and existing under the laws of the State of Delaware with its principal offices in Wilmington, Delaware. Farmers is engaged in the banking business with branch establishments throughout the State of Delaware.

7. Defendant Bell Mortgage Corporation ("Bell") is a corporation organized and existing under the laws of the State of Florida. Its principal office is located at 3383 Northwest Seventh Street, Miami, Florida. Bell is in the business of mortgage brokering throughout the United States.

8. Bell Mortgage Corporation of Jacksonville, Florida, Inc. ("Bell of Jacksonville") is a corporation organized and existing under the laws of the State of Florida. Its principal office is located at 1974 San Marco Boulevard, Jacksonville, Florida. Bell of Jacksonville is a wholly owned subsidiary of Bell.

9. Bell Mortgage Corporation of Virginia, Inc. ("Bell of Virginia") is a corporation organized and existing under the

laws of the State of Virginia. Its registered agent is Lyle L. Lathrop, and its registered office is located at 281 Independence Boulevard, Suite 103, Virginia Beach, Virginia. Bell of Virginia is a wholly owned subsidiary of Bell and also is in the business of mortgage brokering.

10. Whitehall Associates, Ltd. ("Whitehall") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Nathan H. Cohen, and its registered office is at 1301 North Harrison Street, Wilmington, Delaware.

11. Astrological Associates, Ltd. ("Astrological") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

12. Bell Associates, Inc. ("Bell Associates") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

13. Bell Services, Inc. ("Bell Services") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

14. Belen, Inc. ("Belen") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

15. Body-Magic Weight Control Centers, Ltd. ("Body-Magic") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

16. C. Wentworth Smith Associates, Inc. ("Smith Associates") is a corporation organized and existing under the laws of

the State of Delaware. Its registered agent is Marie L. Stachowski.

17. Capital Planning Corporation ("Capital") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Robert M. Barnes, III.

18. Central Enterprises, Inc. ("Central") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

19. Cordele Enterprises, Inc. ("Cordele") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

20. Guiro Enterprises, Inc. ("Guiro") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

21. Memorial Discount Corporation ("Memorial") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

22. Monday Corporation, Inc. ("Monday") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

23. National Horoscope, Inc. ("National") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

24. Northeastern Associates, Inc. ("Northeastern") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

25. Orange Development Corporation ("Orange") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

26. Provident Financial Corporation of Delaware ("Provident") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Whitehall Associates, Ltd.

27. Regency Figure & Fitness Club, Inc. ("Regency") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

28. Regency Figure & Fitness Club of Danbury, Inc. ("Regency--Danbury") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

29. Today's Woman Figure Salons, Incorporated ("Today's Woman") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

30. United Helping Hand International, Inc. ("United") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

31. United Operating Corporation ("United Operating") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

32. Universal Gym Equipment Co., Inc. ("Universal Gym") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

33. Whitney, Stonehill & Lawler, Ltd. ("Whitney") is a corporation organized and existing under the laws of the State of Delaware. Its registered agent is Marie L. Stachowski.

34. Sixto R. Arango at all material times was a director of Bell.

35. Raul Arango at all material times was Vice President and a director of Bell.

36. Doris Cantor at all material times was a director of Bell of Virginia.

37. Milton Cantor at all material times was a director of Bell of Virginia.

38. Saul Cantor at all material times was a director of Bell of Virginia.

39. Andres Castro at all material times was President and a director of Bell Mortgage Corporation. He was also a guarantor of the notes assigned to Farmers.

40. Carridad Castro at all material times was a co-guarantor of the notes assigned to Farmers.

41. Nathan H. Cohen at all material times was President and a director of Whitehall Associates, Ltd.

42. Samuel Ellenson at all material times was the attorney for Bell of Virginia.

43. Diane Giglia at all material times was an employee and office manager for Bell of Virginia.

44. Stacy Charles Graybeal at all material times was an employee of Bell of Jacksonville.

45. Diana Headley at all material times was an employee of Bell of Jacksonville.

46. Thomas W. Headley at all material times was an employee of Bell of Jacksonville.

47. William R. Hester, Jr., at all material times was Secretary and Treasurer of Bell of Jacksonville.

48. John Killebrew at all material times was an accountant of Bell.

49. Sidney Konigsberg at all material times was President and a director of Bell of Jacksonville.

50. Jose Lamas at all material times was Secretary and a director of Bell.

51. Lyle L. Lathrop at all material times was an employee of Bell of Virginia.

52. Frank Liebert at all material times was an employee of Bell of Jacksonville.

53. Leanne Orlove at all material times was an employee of Bell.

54. James D. Pennington at all material times was an employee of Bell of Jacksonville.

55. Robert S. Pennington at all material times was an employee of Bell of Jacksonville.

56. Robert M. Price at all material times was Vice President and a director of Whitehall Associates, Ltd.

57. Marie L. Stachowski at all material times was Secretary and a director of Whitehall Associates, Ltd.

HISTORY OF DEFENDANTS' FRAUDULENT ACTIVITIES

58. In approximately October 1973, defendants Robert M. Price ("Price") and Nathan H. Cohen ("Cohen") approached Charles R. Haddock ("Haddock") and Ralph W. Barrow ("Barrow"), employees of Farmers, and claimed to be representatives of Bell.

59. Price and Cohen told Haddock and Barrow that Bell, Bell of Jacksonville and Bell of Virginia were interested in offering certain mortgages to Farmers as short-term investments. They further suggested that Farmers might be interested in holding these mortgages for investment purposes.

60. About one week later, Cohen, Price, Andres Castro ("Castro") and Raul Arango ("Arango") met with representatives of Farmers to further outline their investment proposal. These defendants asked Farmers to become, and Farmers did thereafter become, one of the "warehousers" or "wholesalers" for Bell's, Bell of Virginia's and Bell of Jacksonville's mortgages in the mortgage market.

61. As a warehouser or wholesaler, pursuant to defendants' proposal and standard mortgage market pactice, Farmers was to receive from the mortgage broker a packet consisting of a certified copy of a mortgage, mortgage note, title policy, and other documents prior to granting a draw against a revolving line of credit established by it as the warehouse bank for the mortgage company or otherwise paying for the mortgage. If, as the warehouse bank, it was satisfied with the documents as presented, Farmers was to draw a check in the name of the mortgage broker or place in the broker's account sufficient funds less a discount to cover the loan made by the broker to the mortgagee. The broker would then send to the warehouse bank the original mortgage note along with an assignment of the note from the mortgagee broker to the bank. The warehouse bank holds the mortgage and note as a short-term investment, drawing interest on the broker's line of credit until the broker makes final placement of the mortgage with a permanent investor or lender, such as a savings and loan institution or a savings bank. The permanent lender then purchases the original mortgage note and assignment by making payment to the warehouse bank.

62. On October 26, 1973, as a result of the representations of Cohen, Price, Castro and Arango to Farmers, a Credit Committee of Farmers approved a $500,000 line of credit to Bell, Bell of Jacksonville, and Bell of Virginia for the purpose of acquiring mortgages and trust indenture notes. Following approval of this line of credit, these mortgage securities began to be sent from Florida and Virginia to Farmers, where they were held as short-term investments until such time as placed by Bell with long-term investors.

63. In late October 1973, Cohen, Price, Castro, Arango and Guillermo Iglesias ("Iglesias") met with Farmers to discuss procedures for handling Farmers' mortgage acquisitions and to execute certain notes and guarantees. At about this time the line of credit established for these acquisitions was guaranteed by Castro and his wife, Carridad Castro ("Mrs. Castro").

64. In February 1974, Castro and Bell arranged and paid for a trip to Miami, Florida by Haddock and Barrow. While in Miami, Castro proposed to Haddock and Barrow that Farmers increase its line of credit from $500,000 to $1,250,000. As a result of the representations of Castro and other Bell representatives, on February 22, 1974, a Credit Committee Report was prepared recommending the increase. The increased line of credit for acquisition of Bell's mortgage securities was thereafter approved.

65. Throughout the period from October 1973 until January 1975, when the fraud was discovered, upwards of twenty checking accounts were maintained at Farmers for Bell, Bell of Jacksonville and Bell of Virginia, including escrow accounts. These accounts, funded by Farmers' payments for Bell's mortgage securities, were used in connection with the mortgage business conducted in Florida and Virginia and as conduits to channel the defrauded sums from Farmers.

66. The mortgage securities were, throughout the period, assigned by Bell to Farmers. They were mailed or otherwise delivered to Farmers through interstate commerce from either Virginia or Florida. These mortgage securities, generally, were then held by Farmers until resold by Bell to one of Bell's long-term investors.

67. Sometime during this period, the exact date being unknown to Farmers, the defendants conspired to forge certain mortgages and to assign those forged securities to Farmers, and in fact did forge said mortgages and assign them to Farmers.

68. In order to induce Farmers to continue to place funds in their line of credit, defendants concealed from Farmers that said mortgages were forgeries. They continued to falsely represent that they were assigning legally prepared and executed documents to Farmers and, in reliance on defendants' representations and documents, Farmers continued to pay monies into defendants' line of credit.

69. In January 1975, Farmers discovered that approximately 46 of the mortgages which it held, representing an investment of over $1.25 million, were forgeries. As a result, Farmers has been defrauded of in excess of $1.25 million and has been damaged in an as yet undetermined amount.

70. Defendants, through Bell, Bell of Virginia and Bell of Jacksonville, were in the business of selling the mortgage securities which are the subject of this litigation to various investors, in addition to Farmers, throughout the country.

71. The sellers, Bell, Bell of Virginia and Bell of Jacksonville, by endorsement of the mortgage notes, guaranteed payment on the mortgage securities to Farmers and the other investors. These investors, including Farmers, expected to make money solely as the result of the efforts of Bell, Bell of Virginia, Bell of Jacksonville and others.

72. Defendants failed to register said mortgage securities pursuant to the Securities Act or the Exchange Act.

73. The fraudulent practices and devices utilized by the Defendants in connection with and in order to effectuate

the aforesaid sale of the mortgage securities and otherwise defraud Farmers and other purchasers of said securities consisted of, among other things, the following false representations by Defendants, knowing them to be false when made, and the following concealment of and the failure to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading to Farmers:

a. Defendants failed adequately to disclose their intention, plan and conspiracy to defraud Farmers by selling it the forged mortgage notes and securities;

b. Defendants failed adequately to disclose that neither Bell, Bell of Jacksonville, nor Bell of Virginia were qualified to do business in Delaware;

c. Defendants failed adequately to disclose that certain individual Defendants had criminal arrest records and in some cases were convicted criminals;

d. Defendants failed adequately to disclose that certain individual Defendants were desirous of channeling the funds fraudulently obtained from Farmers to foreign countries for their own benefit;

e. Defendants failed adequately to disclose the true financial conditions of Bell, Bell of Jacksonville and Bell of Virginia;

f. Defendants failed adequately to disclose that Bell, Bell of Jacksonville, Bell of Virginia, Whitehall, Astrological, Bell Associates, Bell

Services, Belen, Body-Magic, Smith Associates, Capital, Central, Cordele, Guiro, Memorial, Monday, National, Northeastern, Orange, Provident, Regency, Regency - Danbury, Today's Woman, United, United Operating, Universal Gym, and Whitney were dominated and controlled by the individual defendants and operated exclusively for their benefit with funds fraudulently obtained from Farmers and/or through a pattern of racketeering activity as defined by 18 U.S.C. § 1961(1)(D) and (5).

g. Defendants falsely represented and failed to disclose that the transactions, whereby Farmers would purchase and hold Bell's mortgage securities until resold to long-term investors were designed to defraud Farmers, Bell's other warehouse banks, Bell's long-term investors and Bell's mortgagees;

h. Defendants falsely represented and failed to disclose that approximately 46 mortgages sold to Farmers contained false signatures and notary seals and were, in fact, forgeries.

74. In connection with and in furtherance of the aforesaid, Defendants engaged in acts and conduct which they combined and agreed to do as aforesaid, and each of the Defendants acquiesced, encouraged, cooperated, aided, abetted and/or assisted in the effectuation of such combination and conspiracy.

75. Defendants Sixto R. Arango, Raul Arango, Doris Cantor, Milton Cantor, Saul Cantor, Andres Castro, Carridad Castro, Nathan H. Cohen, Samuel Ellenson, Stacy Charles Graybeal, Diana Headley, William R. Hester, Jr., John Killebrew, Sidney Konigsberg, Jose Lamas, Lyle L. Lathrop, Frank Liebert,

Leanne Orlove, James D. Pennington, Robert S. Pennington, Robert M. Price and Marie L. Stachowski are, and were at all material times herein, controlling persons of the Defendants Bell, Bell of Jacksonville, Bell of Virginia, Whitehall, Astrological, Bell Associates, Bell Services, Belen, Body Magic, Smith Associates, Capital, Central, Cordele, Guiro, Memorial, Monday, National, Northeastern, Orange, Provident, Regency, Regency - Danbury, Today's Woman, United, United Operating, Universal Gym, and Whitney within the meaning of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

76. Absent the fraudulent and illegal activities of the Defendants set forth above, Farmers would not have acquired the forged mortgage securities and been defrauded of in excess of $1.25 million.

77. By reason of the aforesaid acts and conduct, Farmers has suffered damages in an undetermined amount occasioned by the fraud of the Defendants.

FIRST CAUSE OF ACTION - VIOLATIONS OF THE FEDERAL SECURITIES LAWS

78. Farmers here repeats and realleges each and every allegation set forth in paragraphs 1 through 77.

79. Farmers alleges that during a period from approximately October 1973, the exact date being unknown to Farmers because of Defendants' fraudulent concealment, to the present, all Defendants engaged in an unlawful combination, conspiracy and course of conduct, pursuant to which the Defendants, among other matters, employed devices, schemes and artifices to defraud, and engaged in transactions, practices and courses of business which operated as a fraud and deceit upon Farmers.

80. Defendants' actions were in violation of Sections 5(a),

5(c), 12 and 17(a) of the Securities Act, 15 U.S.C. §§ 77e(a), 77e(c), 771 and 77q(a), and of Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.

81. The purpose and effect of Defendants' activities were to defraud and otherwise cost Farmers in excess of $1.25 million.

SECOND CAUSE OF ACTION - VIOLATIONS OF THE ORGANIZED CRIME CONTROL ACT OF 1970

82. Farmers here repeats and realleges each and every allegation of paragraphs 1 through 81.

83. Defendants, through their above-described transactions in forged mortgage securities with Farmers and other investors and their use of fraudulently and illegally obtained monies therefrom, have engaged in a pattern of racketeering activity as defined by 18 U.S.C. § 1961(1)(D) and (5) and have, therefore, engaged in activities prohibited by 18 U.S.C. § 1962.

84. Farmers has been injured in its business and property by reason of defendants' violation of 18 U.S.C. § 1962.

THIRD CAUSE OF ACTION - BREACHES OF FIDUCIARY DUTY

85. Farmers here repeats and realleges each and every allegation of paragraphs 1 through 84.

86. Jurisdiction of this Count is based on pendent jurisdiction.

87. The acts and transactions set forth in this Count constitute breaches of fiduciary duties owned by Defendants to Farmers. Defendants knowingly participated in these breaches.

88. By reason of the aforesaid breaches of fiduciary duties by Defendants, Farmers has sustained and will continue to sustain substantial damages in an amount which is presently undetermined.

FOURTH CAUSE OF ACTION -
COMMON LAW FRAUD

89. Farmers here repeats and realleges each and every allegation of paragraphs 1 through 88.

90. Jurisdiction of this Count is based on pendant jurisdiction.

91. The acts and transactions set forth in this Count constitute the common law tort of fraud by the Defendants. Defendants knowingly participated in the aforesaid fraud.

92. By reason of the aforesaid fraud, Farmers has sustained and will continue to sustain substantial damages in an amount which is presently undetermined.

WHEREFORE, Plaintiff demands:

A. The judgment be entered against the Defendants and each of them and in favor of Farmers, with interest and the cost of this suit, including reasonable attorneys' fees;

B. The judgment be entered against each of the Defendants in the sum of $3.75 million, in accordance with 18 U.S.C. § 1964, plus costs and reasonable attorneys' fees; and

C. Such other relief as this Court may deem just and proper.

Dated: March 26, 1976

JAMES L. HOLZMAN

Wayne N. Elliott
James L. Holzman
John H. Small
Prickett, Ward, Burt & Sanders
1310 King Street
Wilmington, Delaware 19801
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Case No. CIV 76-122

FARMERS BANK OF THE STATE OF DELAWARE, a Delaware corporation,

Plaintiff,

vs.

BELL MORTGAGE CORPORATION, a Florida corporation; et al,

Defendant.

A N S W E R

COMES NOW the Defendant, SIDNEY KONIGSBURG, by and through his undersigned attorney, and does file this, his Answer and alleges as follows:

1. Defendant respectfully denies the jurisdiction of the above styled Court as expressed in paragraphs number 1 through 5, inclusive, of the Complaint filed herein for lack of knowledge as to the acts upon which said jurisdictional grounds are predicated.

2. Defendant states that to the best of his knowledge the allegations contained in paragraph number 7 are true to the best of his knowledge, but that his direct involvement with and/or and ability to know directly about Bell Mortgage Corporation ceased some time prior to October, 1972.

3. Defendant denies for lack of knowledge or for lack of present knowledge the allegations of fact contained in paragraph numbers 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56 and 57.

4. Defendant denies specifically that he was either president or a director of the corporation referred to as Bell of Jacksonville during the period of time contemplated by this cause.

5. Defendant specifically states that he was shown as a director and president of Bell of Jacksonville merely for purposes of incorporation and that he requested his removal from the corporation shortly after its incorporation and that he ceased to have any function within that corporation shortly after its incorporation and that he ceased to have access to the corporate books, privy to the decision

making processes of the corporate officers, influence over business decisions or of the corporation and direct or personal knowledge concerning the dealings or business practices of the corporation.

6. Defendant states that he had assumed that all official documents relating to Bell of Jacksonville had been corrected to reflect his withdrawal from involvement with that corporation per his request prior to October of 1972 and that since that time he has learned that official records may reflect otherwise only since the dissolution of said corporation and by virtue of difficulties which have arisen as a result of the alleged acts of that corporation and/or its officers and agents, including this action.

7. Defendant denies the allegations of fact contained in paragraphs number 58, 59, 60, 61, 62, 63, 64, 65, 66, 69, 70, 71, 72, 73 (a through h, inclusive), 76 and 77 for lack of knowledge and demands strict proof thereof.

8. Defendant specifically denies that at any time from October 1973 until January 1975 or at any other time before or since that time period did he or anyone else in his presence conspire to forge mortgages or to assign forged securities to the Plaintiff or to any other individual, corporate or otherwise, and does further deny any knowledge or complicity in the forgery of any mortgages, notes, or assignments involving Plaintiff or any of the Defendants styled herein.

9. Defendant specifically denies any complicity, knowledge or any other involvement direct, indirect or otherwise with the concealment of any information from Plaintiff concerning mortgages, personal references, finances or any other matters involving Plaintiff and that Defendant has no knowledge, either direct or otherwise, concerning any such fraud, forgery or concealment involving Plaintiff or any of the Defendants styled above.

10. Defendant specifically denies that he acquiesced, encouraged, cooperated, aided, abetted, and/or assisted in the effectuation of any conbination and conspiracy with or about Plaintiff or with or about any of the Co-Defendants styled in this cause and that Defendant has no knowledge of any such combination or conspiracy.

11. Defendant denies specifically that he was in a position of control concerning the operation of the Defendant, Bell of Jacksonville

or of any other Defendant in this cause and does further deny that prior to service of process in this cause that he had any knowledge of the transaction between any Co-Defendant in this suit and the Plaintiff or any dealings with Plaintiff or any dealings about Plaintiff and does further deny being a controlling person within the meaning of Section 20(a) of the Exchange Act, 15 U.S.C. Section 78T(a) in that he believed himself to be and conducted himself as if he were in no way involved with the operation of Bell of Jacksonville, its profit structure, its directorate or its stockholders.

AS TO PLAINTIFF'S FIRST CAUSE OF ACTION

12. Defendant denies any knowledge of or participation in any unlawful combination, conspiracy and/or course of conduct pursuant to which anyone employed devices, schemes and artifices to defraud, and engage in transactions, practices and course of business which operated as a fraud and deceit upon Plaintiff.

13. Defendant specifically denies acting in concert or in combination with any of the Co-Defendants listed herein in dealing with securities, be they mortgages, notes, bonds or any other negotiable security, registered or otherwise, fraudulent or otherwise, forged or otherwise, valuable or otherwise, at any time in the purvue of this cause of action.

14. Defendant further denies participation in any activity intended to defraud Plaintiff or directly involving Plaintiff.

AS TO PLAINTIFF'S SECOND CAUSE OF ACTION

15. Defendant denies participation in any of the transactions alleged by Plaintiff in the paragraphs comprising its "first cause of action" and does deny that he has in any way and with any persons violated any provisions of the Organized Crime Control Act of 1970.

AS TO PLAINTIFF'S THIRD CAUSE OF ACTION

16. Defendant denies that he knowingly participated in any breach of any duty to Plaintiff and again denies ever having been directly involved with Plaintiff in any sort of transaction either personally or through any corporation or through any intermediary, to his knowledge.

17. Defendant denies that there has ever existed any fiduciary duty between himself and Plaintiff entered into with Defendant's knowledge and does further deny for lack of knowledge

any damage which Plaintiff has sustained by virtue of the alleged breach of fiduciary duty.

AS TO PLAINTIFF'S FOURTH CAUSE OF ACTION

18. Defendant realleges and repeats each and every allegation of paragraphs number 1 through 17.

19. Defendant denies knowingly participating with any of the Co-Defendants hereto in any combination and at any time for the expressed purpose of defrauding Plaintiff or, in fact, of dealing in any way directly with Plaintiff at any time to the best of his recollection.

20. Defendant denies the allegations of fact raised in paragraph 92 of Plaintiff's Complaint for lack of knowledge and demands strict proof thereof.

WHEREFORE Defendant, SIDNEY KONIGSBURG, demands that this cause be dismissed as to said Defendant with all costs assessed to Plaintiff with interest and including a reasonable attorney fee.

ALAN H. KONIGSBURG
SHAMRES AND KONIGSBURG
Attorneys for Defendant, SIDNEY KONIGSBURG
5353 S. W. 40th Avenue
Fort Lauderdale, Florida 33314
Telephone: 587-5860

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by mail to JAMES L. HOLZMAN, Prickett, Ward, Burt & Sanders, 1310 King Street, Wilmington, Delaware 19801, as Attorney for Plaintiff, this 26 day of May, 1976.

ALAN H. KONIGSBURG

CSE/jjd 6/29/78

Doc 10

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FARMERS BANK OF THE STATE OF DELAWARE, a Delaware corporation,	:	
Plaintiff,	:	
v.	:	Civil Action No. 76-122
BELL MORTGAGE CORPORATION, a Florida corporation, et al.,	:	
Defendants.	:	

AMENDMENT TO THE COMPLAINT

Pursuant to plaintiff's motion to amend the complaint which is attached hereto, plaintiff hereby moves to amend paragraphs 35, 39 and 67 of the Complaint by adding the following statements:

Paragraph 35 will be amended by adding the following statement...and Vice President of Bell Mortgage Corporation of Virginia so that paragraph 35 will now read

> Raul Arango at all material times was Vice President and Director of Bell and Vice President of Bell Mortgage Corporation of Virginia.

Paragraph 39 will be amended by adding the following statement... and President of Bell Mortgage Corporation of Virginia so that paragraph 39 of the Complaint will now read

> Andres Castro at all material times was President and Director of Bell Mortgage Corporation and President of Bell Mortgage Corporation of Virginia. He was also a guarantor of the notes assigned to Farmers.

Paragraph 67 will be amended by adding the following statement

> Specifically, sometime in June 1973, Stacy Charles Graybeal, James D. Pennington, Nathan Cohen and Robert Price, among others, met at the Jacksonville offices of the Capital Planning Corporation to discuss and outline the scheme and the steps necessary in implementing it with Farmers Bank. At that meeting, the method of forging the mortgage notes and implementing the scheme were finalized. At the time that the meeting was conducted, Graybeal and Pennington were directors and the chief executive officers of the Capital Planning Corporation and were, from that date on, along with Price and Cohen, the controlling and organizing factor in the scheme to defraud Farmers.

PRICKETT, WARD, BURT & SANDERS

Wayne N. Elliott

James L. Holzman

Charles S. Ernst
1310 King Street
Wilmington, DE 19801
Attorneys for Plaintiff

STATE OF DELAWARE :
: SS.
NEW CASTLE COUNTY :

BE IT REMEMBERED that on this 30th day of June, 1978, personally appeared before the undersigned, a Notary Public in and for the State and County aforesaid, the deponent, who, being by me duly sworn according to law, deposes and says that he is employed in the offices of Prickett, Ward, Burt & Sanders, 1310 King Street, Wilmington, Delaware, and that on June 30, 1978, he deposited in the mail at the United States Post Office at 11th and King Streets, Wilmington, Delaware, the attached paper addressed to:

Marie Stachowski, 707 Brownleaf Rd., Newark, DE 19713
Lyle Lathrop, 498 Century Court, Virginia Beach, VA 23452
Nathan Cohen, Fedl. Correctional Inst., P.O. Box 2000, Lexington, KY 40507
Robert Price, Camden Halfway House, 517 Cooper St., Camden, NJ
Alan H. Konigsburg, Esq., 1700 E. Las Olas Blvd., St. 100, Ft. Lauderdale, FLA
W. Leigh Ansell, Esq., 4336 Virginia Beach Blvd., Virginia Beach, VA
William R. Hester, Jr., Esq., 2105 Parke Ave., St. 1, Orange Park, FLA 32073
Allen C. D. Scott, II, Esq., 3100 University South, St. 225, Jacksonville, FLA

R. S. Redd

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Emily C. Williams

Leanne Orlove, 1652 Kempsville Rd., Virginia Beach, VA 23452
James Pennington, No. 30831-120, Atlanta Penitentiary, Atlanta, GA 30315

(Amendment to Complaint)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Farmers Bank of the State of Delaware, a Delaware Corporation, Plaintiff,	)	
v.	)	Civil Action No. 76-122
Bell Mortgage Corporation et al., Defendants.	)	

MOTION TO DISMISS

Defendant Nathan H. Cohen, pro se, moves the court to dismiss this action under F.R.C.P. 12(b)(1) and as grounds for such motion, the defendant shows that the court has no jurisdiction over the subject matter of this action in that:

(1) The allegations of the complaint, on their face, attempt to circumvent jurisdictional requirements of this court to bring the matter under the provisions of § 22(a) of the Securities Act of 1933, as amended, 15 U.S.C. § 77v(9); Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78aa; Section 1964 of the Organized Crime Control Act, 18 U.S.C. § 1960, et seq.

(2) The matters set forth and alleged in the complaint are insufficient to confer jurisdiction of the court over the subject matter under the provisions of the above-named statutes.

In the alternative, defendant herein moves the court to dismiss the action under F.R.C.P. 12(b)(6) because the complaint fails to state a claim against the defendant on which relief can be granted.

Nathan H. Cohen

I hereby certify that I have sent copies of this motion to the below named parties this 12th day of August 1976.

Nathan H. Cohen

John H. Small, Esq.
W. Leigh Ansell, Esq.
Allen C. S. Scott, II, Esq.
Mr. Lyle L. Lathrop
William R. Hester, Jr., Esq.
Mrs. Leanne Orlove
Alan H. Konigsburg, Esq.
Mrs. Marie L. Stachowski
MR. ROBERT H PRICE

DOC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FARMERS BANK OF THE STATE OF DELAWARE, a Delaware corporation,	:	
Plaintiff,	:	
v.	:	Civil Action No. 76-122
BELL MORTGAGE CORPORATION, et al.,	:	
Defendants.	:	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT COHEN'S MOTION TO DISMISS

Prickett, Ward, Burt & Sanders
Wayne N. Elliott
James L. Holzman
John H. Small
1310 King Street
Wilmington, Delaware
Attorneys for Plaintiff

September 10, 1976

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TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

NATURE OF THE PROCEEDINGS

This is an action brought by Farmers Bank of the State of Delaware ("Farmers"), a Delaware corporation, which was defrauded of approximately $1.25 million in 1974 and 1975 as a result of purchasing certain forged mortgage securities. Farmers seeks here to recover these sums, as well as treble damages pursuant to 18 U.S.C. § 1964(c), from the perpetrators of the fraud, based on violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Organized Crime Control Act of 1970, breaches of common law fiduciary duty, and common law fraud.

Farmers filed this action against 27 corporate and 24 individual defendants on March 26, 1976. Among the individual defendants was Nathan Cohen ("Cohen"), who is presently serving a 15 year term in the Federal correctional facility in Lexington, Kentucky, as a result of his activities in conjunction with Bell Mortgage Corporation ("Bell") and the other defendants in this action. Service has been made on all of the corporate defendants and all but six of the individual defendants, three of whom have fled the country.

Farmers directed detailed interrogatories and a request for production to each of the defendants who were

originally served. Some of these defendants have filed answers or otherwise appeared while others have had defaults taken against them. No depositions have yet been taken, however, due to the fact that Farmers is not in possession of the bulk of the relevant documents. Farmers has engaged in a continuing effort since the commencement of this action to recover the materials it previously turned over to the Justice Department for use before grand juries in Jacksonville, Norfolk and Wilmington, and to secure documents produced by other witnesses and the investigative files of the Justice Department. The return of the documents Farmers produced now appears to be imminent, and once these are returned, depositions of the defendants and witnesses will move forward.

Cohen, after obtaining extensions of time within which to plead or otherwise respond to the complaint, finally filed, on August 12, 1976, a motion to dismiss the complaint under Rule 12(b)(1), F.R.C.P., on the ground that this Court lacks jurisdiction over the subject matter, and under Rule 12(b)(6), for failure to state a claim. At the same time, Cohen filed a supporting memorandum and a response to Farmers' interrogatories, most of which he refused to answer "on the grounds that answers might tend to incriminate him".*

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* While that will be an issue for later consideration, we can't help but note that Cohen the lawyer makes a host of factual allegations in his memorandum, on the one hand, yet Cohen the defendant, on the other hand, refuses to answer any substantive questions.

This is Farmers' brief in opposition to Cohen's motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim.

STATEMENT OF THE FACTS

In about October of 1973, Robert M. Price ("Price") and Cohen, the principals of Whitehall Associates, Ltd., approached Charles R. Haddock ("Haddock") and Ralph W. Barrow ("Barrow"), employees of Farmers, and claimed to be representatives of Bell. (Complaint, ¶ 58)*. Price and Cohen told these Farmers employees that the purpose of their visit was to sell, on behalf of Bell and its affiliates, certain mortgages to Farmers as short-term investments. (¶ 59).

After Haddock and Barrow showed some initial interest in the proposed investment, Cohen, Price, Andres Castro ("Castro") and Raul Arango ("Arango") again visited representatives of Farmers to further outline the investment proposal. (¶'s 60, 61). As a result of the representations made by Cohen, Price, Castro and Arango, Farmers' credit committee, on October 26, 1973, approved a $500,000 investment line of credit to Bell and its affiliates for the purpose of acquiring mortgages and trust indenture notes. (¶ 62). Following approval of this line of credit, these mortgages began to be sent from Florida and Virginia to Farmers, where they were held as short-term investments until such time as Bell secured a long-term investor. (¶ 62).

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* Hereinafter, references to paragraphs of Farmers' complaint will be as follows: (¶ ___).

Under the terms of the arrangement among Farmers and Bell and its affiliates, Farmers was to receive from the mortgage broker a packet consisting of a certified copy of the mortgage, the mortgage note, the title policy and other documents, prior to granting a "draw" against the revolving line of credit established by it as the warehouse bank for Bell and its affiliates, who were otherwise paying for the mortgage. (¶ 61). When Farmers was satisfied with a particular packet of documents, it would draw a check in the name of the mortgage broker or place in the particular broker's account sufficient funds less a discount to cover the loan made by the broker to the mortgagee. (¶ 61). Invariably, of course, the brokers were Bell and its affiliates. The broker would then send to Farmers the original mortgage note along with an assignment of the note from the mortgage broker to the bank. (¶61). Farmers would hold the mortgage note as a short-term investment, drawing interest on the broker's line of credit until the broker made final payment of the mortgage by way of a permanent long-term investor, such as a savings and loan association or a savings bank. (¶61). These permanent lenders would then purchase the original note and assignment by making payment to Farmers. (¶61).

In late October, 1973, Cohen, Price, Castro, Arango and Guillermo Iglesias ("Iglesias") met with Farmers' officials to discuss procedures for handling Farmers' mortgage investments and to execute certain

notes and guarantees on behalf of Bell and its principals. At about the same time, Castro and his wife, Carridad, personally guaranteed the line of credit established for these acquisitions. (¶ 63).

In February, 1974, Castro, Bell, and its affiliates arranged and paid for a trip to Miami, Florida for Haddock and Barrow. While in Miami, Castro proposed to these Farmers employees that Farmers increase its investment to $1.25 million. As a result of the representations of Castro and other Bell representatives at this time, on February 22, 1974, a Farmers Bank credit committee prepared a report recommending the increase. Thereafter, the increased line of credit was approved. (¶ 64). Throughout the period from October 19, 1973 until January, 1975, when the fraud was discovered, upwards of twenty different checking accounts, including escrow accounts, were maintained at Farmers for Bell, Bell of Jacksonville and Bell of Virginia. In addition, the other corporate defendants in this action maintained accounts at Farmers which were used to channel funds to the individual defendants. The accounts of Bell and its affiliates, funded by Farmers' payments for Bell's mortgage securities, were used in connection with the mortgage business conducted in Florida and Virginia and as conduits to channel the defrauded sums from Farmers to other businesses

controlled by the conspirators. (¶'s 65, 73f). The method of channelling the funds from the various corporate bank accounts was either by drafting checks on these accounts or wiring funds from one account at Farmers to an account at another bank either inside or outside the state of Delaware. (¶ 66).

Throughout the time frame of Farmers' dealings with Bell and its affiliates, the mortgages and accompanying documents were mailed or otherwise shipped through interstate commerce from either Virginia or Florida. These mortgage securities, generally, were then held by Farmers until resold by Bell to one of Bell's long-term investors. (¶ 66). Sometime during this period, the exact date being unknown to Farmers, the defendants conspired to forge certain mortgages and to assign those forged documents to Farmers. (¶'s 67, 68, 74, 79). In January, 1975, Farmers discovered that approximately 46 of the mortgages which it held, representing an investment of over $1.25 million, were forgeries. (¶ 69). Farmers' efforts to obtain a return of the funds were fruitless, since the monies had been funnelled through many different accounts at other banks. (¶'s 65, 73f). Almost immediately the Department of Justice undertook an investigation of the fraud and subpoenaed nearly all of Farmers' relevant documents. Most of the individual defendants were subsequently indicted for violation of the Organized Crime Control Act. Several, including Cohen, pled guilty to racketeering.

QUESTIONS PRESENTED

I. IS THE APPLICABLE STANDARD THAT THE COMPLAINT IS TO BE LIBERALLY CONSTRUED AND THE COURT CAN DISMISS THIS ACTION ONLY IF IT FINDS BEYOND DOUBT THAT FARMERS CAN PROVE NO SET OF FACTS IN SUPPORT OF ITS CLAIM?

II. DO THE MORTGAGES ACQUIRED BY FARMERS FROM DEFENDANTS CONSTITUTE SECURITIES WITHIN THE MEANING OF THE FEDERAL SECURITIES LAWS?

III. DOES THE COMPLAINT STATE A CLAIM AGAINST COHEN UNDER THE ORGANIZED CRIME CONTROL ACT OF 1970?

ARGUMENT

I. THE APPLICABLE STANDARD: THE COMPLAINT IS TO BE LIBERALLY CONSTRUED AND THE COURT CAN DISMISS THIS ACTION ONLY IF IT FINDS BEYOND DOUBT THAT FARMERS CAN PROVE NO SET OF FACTS IN SUPPORT OF ITS CLAIM.

Cohen has moved to dismiss this action on two grounds*: (a) because this Court purportedly has no subject matter jurisdiction over this action (Rule 12(b)(1), F.R.C.P.) and (b) because Farmers has purportedly failed to state a claim against Cohen on which relief can be granted (Rule 12(b)(6), F.R.C.P.).

In weighing the merits of the motion, the first consideration is the standard to be applied in examining the allegations of the complaint. In considering a Rule 12(b)(1) motion, the complaint, the sufficiency of which cannot be brought into issue at this juncture, is to be construed liberally. See, e.g., Bachowski v. Brennan, 502 F.2d 79, 83 n. 4 (3rd Cir. 1974); Caserta v. Home Lines Agency, 154 F.Supp. 356 (S.D.N.Y. 1957); and Berman v. National Maritime Union, 166 F.Supp. 327 (S.D.N.Y. 1958). Thus, the allegations of the complaint must be taken as being true. Scheuer v. Rhodes, 416 U.S. 232 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974).

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* So we perceive the motion. Cohen's supporting memorandum, however, goes far beyond the nature and structure of the complaint and makes a number of factual allegations that could only be brought in issue on a motion for summary judgment.

Similarly, in considering the merits of a motion to dismiss pursuant to Rule 12(b)(6), the Court's inquiry is limited to determining whether the allegations constitute a claim under Rule 8(a). Wright & Miller, Federal Practice and Procedure; Civil § 1357.

The standard for granting a dismissal was set down by the Supreme Court in Conley v. Gibson, 355 U.S. 41, 45-6, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80, , (1957):

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." (Emphasis added)

This test has been regularly applied by this District and was recently confirmed by this Court in Jenkins v. General Motors Corp., 354 F.Supp. 1040 (D.Del. 1973). Thus, the Court must draw all inferences in favor of the nonmoving party in deciding a motion to dismiss. As this Court stated in Tanzer v. Huffines, 314 F.Supp. 189, 193 (D.Del. 1970):

> "A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be provided in support of the claim [citation omitted]. Unless defendants show that the complaint could not support relief under any theory, if all facts alleged were proved and all favorable inferences drawn, the motions must fail." (Emphasis added).

See also, Kowalewski v. Pennsylvania Railroad Co., 141 F.Supp. 565 (D.Del. 1956); Canning v. Star Publishing Co., 130 F.Supp. 687 (D.Del. 1955).

Under these standards, or even under more rigid standards, this Court has jurisdiction over the subject matter of this action, and Farmers has stated a claim upon which relief can be granted. That conclusion is reached merely upon reading the 16 page complaint and the factual allegations therein. The following sections of this brief, however, go even further to specify precisely why Cohen's motion to dismiss should be denied.

II. THE MORTGAGES ACQUIRED BY FARMERS FROM DEFENDANTS CONSTITUTE SECURITIES WITHIN THE MEANING OF THE FEDERAL SECURITIES LAWS.

Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1), defines "security" as follows:

> "the term 'security' means any note, stock treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." (emphasis added)

This definition is virtually identical to and interchangeable with that of "security" in Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10) ("the 1934 Act"). 1050 Tenants Corp. v. Jakobson, 503 F.2d 1375, 1377 (2d. Cir. 1974). The definition applies with equal force to the 1934 Act, such that Section 10 of the 1934 Act, 15 U.S.C. §78j, and Rule 10b-5, 17 C.F.R. §240.10b-5, forbid fraud in connection with the purchase or sale of investment contracts. Commerce Reporting Company v. Puretec, Inc., 290 F.Supp. 715 (S.D.N.Y. 1968).

In Securities and Exchange Commission v. Howey, 328 U.S. 293, 298-9, 66 S.Ct. 1100, 1103, 90 L.Ed. 1002, _____

(1946), the Supreme Court defined "investment contract" for purposes of liability under the federal securities laws:

> ". . . an investment contract . . . means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise . . ."

Thus, the test to be applied "involves three elements: 1) an investment of money; 2) in a common enterprise; and 3) with profits to come solely from the efforts of others." Jenson v. Continental Financial Corporation, 404 F.Supp. 792, 800 (D.Minn. 1975) (margin sales of gold and silver coins); Securities and Exchange Commission v. Lake Havasu Estates, 340 F.Supp. 1318 (D.Minn. 1972) (sale of land purchase contracts).

As set forth in the Complaint, the Bell mortgages meet this test. They were offered to Farmers by Cohen, personally, and other individual defendants as an investment opportunity (¶'s 58-60). Defendants took money from Farmers in return for those mortgages. (¶'s 62-65; 67-69). Defendants marketed these mortgages to Farmers, other warehouse banks, and permanent lenders as part of a common enterprise whereby Farmers and others who acquired the mortgages would receive income from the mortgages serviced by Bell. Farmers expected its profits to come solely from the efforts of others; namely, Bell and its mortgagors. (¶'s 7, 60, 61, 70 and 71). As a result of the fraud perpetrated by Cohen and the other defendants, Farmers now

holds worthless mortgage securities and has lost in excess of $1.25 million. (¶'s 67-69; 73-76).

A brief review of other cases involving the application of the securities laws to mortgages confirms the sufficiency of Farmer's case, as pleaded.

Hall v. Security Planning Service, Inc., 371 F.Supp. 7 (D.Ariz. 1974) concerned a class action by the holders of notes which a development corporation, as mortgagee-payee, sold to investors, assigning the mortgages. The suit was against the promoters and the corporation's reorganization trustee. The plaintiffs were purchasers of notes payable to Cochise College Park, Inc. ("Cochise"), which were secured by mortgages given to Cochise as mortgagee. The notes, given to Cochise by parties who had purchased land from Cochise, were secured by mortgages on the land. Cochise subsequently sold and assigned the various notes and mortgages. Payment on the notes was made to Cochise which then disbursed the money to the purchasers of the notes and mortgages. Eventually, Cochise was enjoined from such practices and filed for voluntary reorganization under Chapter X of the Bankruptcy Act.

The Hall Court concluded that the notes, mortgages and assignments were securities; that Cochise was in the business of selling these securities; that the investors expected to make money solely on the efforts of others; and that the securities therein were notes, evidences of debts and investment contracts within the meaning of the federal securities laws. 271 F.Supp. at 14, 15.

The similarities between Hall and the instant litigation are compelling. In both cases, the promoter or third party secured the mortgages by themselves. In both cases, the mortgages and notes were assigned or sold to the investor. In both cases, the investor's sole duty was to pay out money to the promoter. In neither case was the investor required to act. Finally, in both cases, the investors expected to make a profit from their investment which was a result of the labor of the promoter. Without doubt, the Bell mortgages are securities within the meaning of the Hall decision and the federal securities laws.

A second case is Los Angeles Trust Deed & Mortgage Exchange ("LATD") v. Securities and Exchange Commission, 285 F.2d 162 (9th Cir. 1961). There, LATD represented that it would place investor money in trust deeds and mortgages suitabl selected by its staff of experts. The SEC maintained that what was offered was more than the simple sale of second trust deeds; rather, LATD was offering investment contracts. The Court of Appeals concurred in this reasoning. It rejected defendants' contentions that the choice of trust deeds was solely within the discretion of the purchaser; that each purchaser had an absolute right of rejection; and that the supervision of other services was only an accommodation.

Those rejected contentions are similar to those which should be rejected here. As pleaded, it was Bell which picked out the mortgages (¶'s 61, 66). It was Bell which subsequently delivered these mortgages to Farmers (¶66). It as

Bell which was to subsequently find permanent financing (¶'s 61, 70, 71). Like the LATD investors, Farmers was encouraged to rely on defendants' skill and expertise.

Indeed, Farmers relied, as did the LATD investors, on the promoter to secure bonafide investments. As the Court in LATD stated:

> "We find that the economic welfare of the purchasers is inextricably woven with the ability of LATD to locate by the exercise of its independent judgment a sufficient number of discounted trust deeds, and the ability of LATD to subsequently meet its commitments, to check, evaluate, supervise, and supercede." 285 F.2d at 172.

Furthermore, LATD held out to the investors the economic inducement of a 10 percent return. Bell held out the inducement of attractive short-term investment coupled with an expectation of profits stimulated by the Bell enterprise system through deduction on the loan amount and interest payments due from the borrower. As was the case in LATD, Bell's mortgage type investments were securities within the meaning of the federal securities laws.

The Securities and Exchange Commission ("SEC") has consistently followed such reasoning. For example, in Dell Investment Co., [71-72 Transfer Binder] CCH Fed.Sec.L.Rep., ¶78,579, (Nov. 15, 1971) the SEC concluded that Dell was trading in "securities" within the meaning of the 1934 Act. Since its inception, Dell had engaged in the sale of title insured first mortgages. In concluding that the mortgages

involved were securities, the SEC noted that Dell followed this practice:

> "The following is an outline of the general format which would be followed by Dell upon receipt of a no-action letter.
>
> 1. Lots in a new real estate development will be sold by the owner (the 'developer') to a person desiring to build thereon (the 'real estate purchaser').
>
> 2. By pre-arrangement with the developer, the real estate purchaser will execute a note and first mortgage to a financial institution (the 'interim lender'). The note will be co-signed by the developer, providing recourse against it.
>
> 3. Title to the mortgaged property will be insured by a title insurance company (the 'title company').
>
> 4. The interim lender will discount the mortgages in volume to Dell.
>
> 5. Dell will offer and sell individual mortgages on specific parcels of real estate to private parties (the 'mortgage purchasers')."

Satisfaction of the Howey test was evident. The allegations in Farmers' complaint similarly satisfy that test. See, also, Abbett, Sommer & Co., Inc., et al. v. Securities and Exchange Commission, [70-71 Transfer Binder] CCH Fed.Sec.L.Rep., ¶92,813 (D.D.C. 1970), affirming the SEC's determination that a registe broker-dealer, its controlling person and another company controlled by him violated the securities laws in the offer and sale of mortgage contracts.

Precedent confirms that mortgages and deeds of trust can be "securities" within the meaning of the federal sec tie

laws. It also confirms that Farmers, in its complaint, has sufficiently alleged violations of those laws and Cohen's dominent role therein. Any doubt which may linger as to either will be resolved by discovery. Cohen's motion to dismiss is nothing but a continuation of his unabated record of deceitful conduct and should be treated accordingly.

III. THE COMPLAINT STATES A CLAIM AGAINST COHEN UNDER THE ORGANIZED CRIME CONTROL ACT OF 1970.

Cohen also seeks dismissal of the count of the complaint, which alleges violations of 18 U.S.C. § 1964(c). Cohen says the Organized Crime Control Act of 1970, ("the Act"), specifically requires that the transactions under consideration include securities and, therefore, that the definition of "Racketeering activity" found in 18 U.S.C. § 1961(1)(D) is not satisfied. As is apparent from II, above, the activities in question involved transactions in securities within the scope of the federal securities laws. Therefore, as argued, Cohen's motion to dismiss should be denied.

Although Cohen's motion should be denied on that basis alone, it should be noted that "Racketeering activity", as defined by 18 U.S.C. § 1961(B) includes any act which is indictable under the provisions of title 18, United States Code, including section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), and sections 2314 and 2315 (relating to interstate transportation of stolen property). While the keystone of the racketeering activity was, as we have alleged, the sale of fraudulent securities, every possible definition of racketeering activity was not specifically alleged with

statutory citation. Indeed, to do so would be inappropriate under Rule 8, F.R.C.P., which directs the pleader to make a short and plain statement of the claim. Moreover, the operative facts set forth in the complaint allege, if not wire fraud, mail fraud and interstate transportation of stolen property (¶'s 5, 65, 66, 73(d), and 73(f)). Finally, we cannot help but note that Cohen entered a guilty plea in this District to interstate transportation of stolen property, 18 U.S.C. § 2314, in conjunction with the very subject matter of this lawsuit.

Because Cohen has so clouded the issue, a few further observations on the sale of "securities" under the statute may be appropriate. In passing the Act, Congress intended to prohibit the establishment and infiltration of legitimate business by organized crime. It sought to prohibit any pattern of racketeering activity in or affecting commerce. See, United States v. Cappetto, 502 F.2d 1341 (7th Cir. 1974).

Neither Cappetto nor Barr v. WUI/TAS Inc., 66 F.R.D. 109 (S.D.N.Y. 1975), upon which Cohen relies so heavily, concerned transactions involving securities, Barr involved a telephone answering service. Cappetto dealt with the use of a billiards hall for bookmaking operations. Neither case made any mention of a need for securities transactions under the Racketeering Statute.

Barr and Cappetto can lead to only one conclusion - securities activities are not a prerequisite to civil liability under 18 U.S.C. §§ 1960-1964.

Cohen, by declaring in his memorandum that "all of the arguments from Barr are applicable," seems to be claiming that (a) Farmers must allege and prove that Cohen is a member of the Mafia when (b) he was not. A few observations of Barr are worthy of comment. First, even under Barr, it is conceded that the legislative intent of the Act:

> ". . . was not aimed at legitimate business organizations but at combatting 'a society of criminals who seek to operate outside of the control of the American people and their governments' . . ." (Supra at 113)

We do not say that Cohen and his cohorts operated legitimate business organizations. We do say, however, that the 27 individual defendants, some of whom were criminals, conspired in an organized and common effort with each other and with and through the use of the 24 corporate defendants to defraud Farmers (¶'s 67, 68, 69, 73a, 73c, 73d, 73e, 73g, 73h, 74, 75).

Secondly, Cohen, through his own ipse dixit, simply cannot disclaim any involvement in the highly organized and sophisticated criminal activities alleged in the complaint. The facts here contrast sharply with Barr,

where no showing whatsoever was made of the existence of organized crime.

Cohen was, in fact, involved in organized criminal activities throughout the relevant period. Cohen, along with the other individual defendants, controlled the some twenty corporations, listed as defendants in this action, and utilized them as conduits for his illegal activities. (¶'s 65, 73f and 75) The defendants operated these corporations exclusively for their own benefit with funds fraudulently obtained from Farmers through a pattern of racketeering activity. (¶ 73f) The fact that these corporations were merely shells for Cohen's fraudulent operations is indicated by the defaults that have been taken against all of them, and further indicates a pattern of racketeering activity.

More significantly, however, are the indictments of Cohen by federal grand juries in Jacksonville, Florida and Norfolk, Virginia* on charges of violations of U.S.C. §§ 1961-1964. Cohen subsequently pled guilty in the United States District Court for the Eastern District of

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* United States District Court for the Middle District of Florida (Criminal No. 75-162-CR-J-S) and United States District Court for the Eastern District of Virginia, Norfolk Division (Criminal No. 75-327-N).

Virginia to a count charging violations of 18 U.S.C. § 1962(c). Since Cohen admitted to violations of the Act, he is, indeed, hard pressed to deny his involvement with "organized crime" and the applicability of the Act. Indeed, Cohen may even be estopped from urging dismissal on the grounds of the inapplicability of the statute, because at a minimum, his guilty plea is admissable as a declaration against his interest. See, United States v. Wolfson, 52 F.R.D. 170 (D.Del. 1971); see also, Wigmore on Evidence, § 1066.

The activities and transactions alleged in the complaint are precisely those which Congress sought to eradicate in passing the Act. Congress has manifested that intent by admonishing the courts to give the Act a liberal construction. See, Pub.L. 91-452.

Cohen's activities have led to several indictments and subsequent pleas of guilty to charges stemming from violations of the Act. It is evident that the complaint on its face states a claim under the Act. While the strength of that claim and Farmers' ability to prove it may depend on the outcome of discovery, the complaint withstands any construction of the Act. Cohen's motion to dismiss should be denied.

CONCLUSION

The pleadings satisfy the jurisdictional requirements of the federal securities laws and the Organized Crime Control Act. Moreover, each cause of action states a claim for relief against defendant Cohen. Accordingly, defendant Cohen's motion to dismiss should be denied.

Respectfully submitted,

PRICKETT, WARD, BURT & SANDERS

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Attorneys for Plaintiff

September 10, 1976

STATE OF DELAWARE :
: SS.
NEW CASTLE COUNTY :

BE IT REMEMBERED that on this ___ day of _____ 1976, personally appeared before the undersigned, a Notary Public in and for the State and County aforesaid, the deponent, who, being duly sworn according to law, deposes and says that he is employed in the offices of Prickett, Ward, Burt & Sanders, 1310 King Street, Wilmington, Delaware, and that on _____, 1976, he deposited in the mail at the United States Post Office at 11th and King Streets, Wilmington, Delaware, the attached paper addressed to: Mr. Nathan H. Cohen, Box 2000, Lexington, Kentucky, 40507; W. Leigh Ansell, Esquire, Ansell, Butler & Canada, 4336 Virginia Beach Boulevard, Virginia Beach, Virginia, 23452; Mr. Robert M. Price, Allenwood Prison Camp, Post Office Box 1000, Montgomery, Pennsylvania, 17752; Mr. Lyle L. Lathrop, 498 Century Court, Virginia Beach, Virginia, 23452; William R. Hester, Jr., Esquire, Hester, Robison & Townsend, 2105 Park Avenue, Suite 1, Orange Park, Florida, 32073; Mrs. Leanne Orlove, 1652 Kempsville Road, Virginia Beach, Virginia, 23452; Allen C. D. Scott, II, Esquire, Maxwell & Scott, 220 E. Forsyth Street, Jacksonville, Florida, 32202; Alan H. Konigsburg, Esquire, Shamres and Konigsberg, 5353 W.W. 40th Avenue, Ft. Lauderdale, Florida, 33314; Mrs. Marie L. Stachowski, 707 Brownleaf Road, Newark, Delaware, 19711; and Mr. Michael H. Baker, Legal Aid, Federal Correction Institute, Box 2000, Lexington, Kentucky, 40507.

_____

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

_____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FARMERS BANK OF THE STATE OF DELAWARE,	:	
Plaintiff,	:	
v.	:	Civil Action No. 76-122
BELL MORTGAGE CORPORATION, et al.,	:	
Defendants.	:	

O R D E R

THIS 25th day of April, 1978, for the reasons stated in the Court's Memorandum Opinion of this date,

Now, therefore, IT IS ORDERED that defendant Cohen's motion to dismiss is denied as to all Counts.

United States District Judge

78857

DISCOVERY RIGHTS FOR THE RICO PLAINTIFF

by

Scott Pickens

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SUMMARY

¶1. Private plaintiffs bringing a RICO treble damage action have broad discovery rights under the Federal Rules of Civil Procedure. The rules authorize discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action.

¶2. One limitation on the scope of discovery is the privilege against self-incrimination. The privilege applies to facts which directly or indirectly involve a criminal liability. Any information within the privilege is precluded from discovery.

¶3. Because the facts that establish civil liability under RICO also involve criminal conduct, RICO defendants are likely to assert the privilege against self-incrimination during pretrial discovery. As a result, the plaintiff may be prevented from ever discovering his opponent's misconduct. Or, if a stay is granted, discovery may be delayed until the termination of possibly lengthy criminal proceedings. The most effective alternative in such a case is a protective order under Rule 26(c). A protective order would allow discovery to go forward, but would insure that information is revealed only for the use of parties to the action.

I. INTRODUCTION

¶4. Civil actions under RICO[1] are based upon the same activities prohibited by its criminal provisions.[2] Consequently, defendants are likely to raise the Fifth Amendment privilege against self-incrimination[3] during civil pre-trial discovery. This material examines the scope of discovery and describes how the privilege against self-incrimination will affect private civil actions under RICO.

II. THE SCOPE OF DISCOVERY

¶5. Current rules of civil procedure provide for extensive pre-trial discovery.[4] They are the product of a liberal policy

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[1] 18 U.S.C. §§1961-1968 (1976).

[2] 18 U.S.C. §§1962-1964 (1976).

[3] U.S. Const. amend. V.

[4] This material focuses upon discovery under the Federal Rules of Civil Procedure. Many states have discovery procedures modeled upon the federal system. Consequently, much of the following discussion will also be applicable to civil actions in state courts.

that seeks "to take the sporting element out of litigation,"[5] to fully reveal the nature and limits of the dispute,[6] to simplify and narrow the issues involved[7] and to provide all parties with the information necessary for trial.[8]

¶6. Important federal discovery provisions promoting these ends include those authorizing a party to depose other parties and witnesses,[9] to propound written interrogatories to other parties,[10] and to compel production of relevant documents.[11] Each of these provisions is subject to the boundaries established by Rule 26,[12] the central provision governing discovery. That rule authorizes discovery of any matter not privileged which is relevant to the subject matter of the pending action.[13] The material discovered may relate to any claim

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[5] Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).

[6] Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[7] Coxe v. Putney, 26 F.R.D. 562, 563 (E.D. Pa. 1961); Perry v. Creech Coal Co., 55 F. Supp. 998, 999 (E.D. Ky. 1944).

[8] Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).

[9] Fed. R. Civ. P. 26(a) (see appendix for actual text); Fed. R. Civ. P. 30(a) (see appendix for actual text).

[10] Fed. R. Civ. P. 33(a) (see appendix for actual text); Fed. R. Civ. P. 33(b) (see appendix for actual text).

[11] Fed. R. Civ. P. 34(a) (see appendix for actual text).

[12] Fed. R. Civ. P. 26 (see appendix for actual text).

[13] Fed. R. Civ. P. 26(b)(1) (see appendix for actual text).

or defense of any party to the action.[14] Moreover, discovery may be had of any object, document, or other tangible thing, or the identity or location of anyone having knowledge of discoverable material. The information sought need not be admissible as evidence at trial.[16] It need only be reasonably calculated to lead to the discovery of admissible evidence.[17]

A. DEPOSITIONS UPON ORAL EXAMINATION[18]

¶6. The scope of depositions and the purposes for which they may be taken are governed by Rule 26, above. Rule 30[19] describes the procedure used in taking an oral deposition during a civil action.[20] It authorizes depositions to be taken of any person, not just parties to the action.[21] Consequently,

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[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] For a comprehensive discussion, see 8 C. Wright & A. Miller, Federal Practice and Procedure §§2101-2120 (1970) (hereinafter cited as Wright & Miller).

[19] Fed. R. Civ. P. 30 (see appendix for actual text).

[20] See also Fed. R. Civ. P. 27 (Depositions Before Action or Pending Appeal); Fed. R. Civ. P. 28 (Persons Before Whom Depositions May Be Taken); Fed. R. Civ. P. 31 (Depositions Upon Written Questions); Fed. R. Civ. P. 32 (Use of Depositions in Court Proceedings). See Appendix.

[21] Fed. R. Civ. P. 30(a) (see appendix for actual text).

a party may examine, e.g., an officer or employee of a party,[22] a dismissed party,[23] any potential witness,[24] a third party defendant,[25] a public official,[26] or the adverse party himself. ¶7. A party may also seek a deposition from a corporation or other organization by naming the corporation in his notice and in a sub poena.[27] The party seeking the deposition must describe with reasonable particularity the matters on which examination is sought.[28] Under Rule 30(b)(6), the corporation must then name one or more persons who consent to testify on its behalf.[29] The person so designated must testify as to matters known or reasonably available to the corporation.[30] Authori-

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[22] E.g., Truxes v. Rolan Elec. Corp., 314 F. Supp. 752, 759 (D. P.R. 1970); Pacific Vegetable Oil Corp. v. Rutger Bleeker & Co., 3 F.R.D. 235, 236 (S.D.N.Y. 1942).

[23] E.g., Sunbeam Corp. v. Payless Drug Stores, 113 F. Supp. 31, 46-47 (N.D. Cal. 1953).

[24] E.g., Aston v. American Export Lines, Inc., 11 F.R.D. 442, 442-43 (S.D.N.Y. 1951).

[25] E.g., Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 11 F.R.D. 48, 50 (S.D.N.Y. 1951).

[26] E.g., Virgo Corp. v. Paiewonsky, 39 F.R.D. 9, 10 (D.V.I. 1966) (Territorial Governor).

[27] Fed. R. Civ. P. 30(b)(6) (see appendix for actual text).

[28] Id.

[29] Id.

[30] Id.

zation to depose such organizations is not limited to parties to the suit.[31] Thus, depositions of non-party organizations may also be obtained.[32]

B. INTERROGATORIES TO PARTIES

¶8. Written interrogatories to parties are authorized by Rule 33.[34] Although they are designed to achieve the general goals of discovery, significant distinctions exist between interrogatories and other discovery procedures.[35] In particular, interrogatories may only be sought from parties to the action while depositions may be taken of any person.[36] The result is that when discovery is sought from a party, both devices are available.

¶9. Practical considerations determine which device is preferable in a given situation. Interrogatories are much less expensive and time-consuming than depositions.[37] No significant expense is incurred by the party sending the interroga-

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[31] Id.

[32] Id.

[33] For a comprehensive discussion, see Wright & Miller, supra note 18, at §§ 2161-2182.

[34] Fed. R. Civ. P. 33 (see appendix for actual text).

[35] Fed. R. Civ. P. 33(a) & 30(a) (see appendix for actual text).

[36] Id.

[37] Carey v. Schuldt, 42 F.R.D. 390. 396 (E.D. La. 1967).

tories other than the time spent in preparing questions.[38] In addition, interrogatories are a simpler device since none of the preliminary arrangements necessary for a deposition are required.[39]

¶10. On the other hand, depositions are more advantageous if probing, investigative questioning is desired.[40] Depositions provide greater flexibility by allowing the examining party to frame questions on the basis of answers already given.[41] Moreover, depositions, unlike interrogatories, do not allow the deponent an opportunity to study the questions in advance and consult with counsel before answering.[42] Similarly, attempts at evasion which might be overcome with rigorous oral questioning are not easily dealt with by interrogatories.[43] In sum, the flexibility and effectiveness provided by depositions are largely lacking in interrogatories.[44] Nevertheless,

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[38] Wright & Miller, supra note 18, at § 2163.

[39] Wright & Miller, supra n. 18, at § 2163; these arrangements include, e.g., obtaining a court reporter, fixing the time and place for the examination, and notifying parties, witnesses, and counsel.

[40] Id.

[41] Id.

[42] Id.; See also Glaser, Pretrial Discovery and the Adversary System 66 (1968) (" ... [S]ince answers [to interrogatories] are drafted by the opposing lawyer after careful reflection instead of by the other party spontaneously, the answers will give the sender as little information and advantage as possible.")

[43] Wright & Miller, supra note 18, at § 2163.

[44] Id.

interrogatories are an efficient way to "obtain simple facts, to narrow the issues by securing admissions from the other party, and to obtain information needed in order to make use of the other discovery procedures."[45]

¶11. Often a party will seek a deposition when answers to previous interrogatories appear untruthful or evasive.[46] The deponent's replies to such interrogatories may be used for purposes of impeachment, should the oral examination lead to contradiction.[47]

C. REQUESTS FOR ADMISSIONS

¶12. In addition to depositions and interrogatories, a party may request admissions.[49] Rule 36[50] provides the procedure by which one party may request another party to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b).[51] These matters must be set

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[45]Wright & Miller, supra note 18, at § 2163. See also Holtzoff, Instruments of Discovery under Federal Rules of Civil Procedure, 41 Mich. L. Rev. 205, 214 (1942).

[46]Wright & Miller, supra note 18, at § 2163.

[47]Id.

[48]For a comprehensive discussion see Wright & Miller, supra note 18 at §§ 2251-2265.

[49]Fed. R. Civ. P. 36(a) (see appendix for actual text).

[50]Fed. R. Civ. P. 36 (see appendix for actual text).

[51]Id. See also Wright & Miller, supra note 18, at § 2251.

out in the request and may include the genuineness of any documents therein described.[52]

¶13. Requests for admissions serve to define and limit the issues in controversy between the parties.[53] In addition, when properly used, much time and expense can be saved by establishing facts that will not be disputed at trial.[54] For these purposes, Rule 36 is, for two reasons, often more effective than other discovery device.[55] First, it is possible for the party answering an interrogatory or questions at a deposition to state answers in an ambiguous manner.[56] Requests for admissions, however, if narrowly framed, are difficult to evade due to the limited responses available.[57] The answering party can avoid admission of a matter known to be true only by a response that is patently false rather than merely evasive.[58] Second, an admission is deemed conclusive on the matter admitted.[59]

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[52] Id.

[53] Wright & Miller, supra note 18, at § 2252.

[54] Id.

[55] Wright & Miller, supra note 18, at § 2253.

[56] See Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371 (1962).

[57] If a party fails to answer, the matter is admitted. The party may either expressly admit or deny a matter or he may set out the reasons why he cannot truthfully admit or deny the matter. Alternatively, he may object to the request for admission. See Fed. R. Civ. P. 36 (appendix).

[58] Wright & Miller, supra note 18, at § 2253.

[59] The court, however, may permit withdrawal or amendment of an admission. See Fed. R. Civ. P. 36(b) (appendix).

Consequently, any need for proof at trial is avoided.[60] Other discovery devices, however, provide only evidence that is subject to contradiction when later introduced at trial.[61]

D. PRODUCTION OF DOCUMENTS AND THINGS[62]

¶14. Rule 34[63] makes relevant and non-privileged documents and things in the possession of one party available to the other.[64] It authorizes, inter alia, inspection, examination, testing,copying, and photographing of such materials produced.[65] Subject to certain exceptions,[66] any document or thing relevant to the subject matter of the action may be inspected under Rule 34.[67] Thus, discovery by production is governed by the relevancy

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[60] Wright & Miller, supra note 18, at § 2253.

[61] Id.

[62] For a comprehensive discussion, see Wright & Miller, supra n. 18, at §§ 2201-2218.

[63] Fed. R. Civ. P. 34 (see appendix for actual text).

[64] United States v. Procter & Gamble Co., 14 F.R.D. 230, 232 (D. N. J. 1953). See also Wright & Miller, supra note 18, at § 2202.

[65] Fed. R. Civ. P. 34(a) (see appendix for actual text).

[66] Production of a document or thing may not be had if it is privileged, has been prepared in anticipation of litigation for trial, reveals facts and opinions held by experts or there are special reasons why inspection would cause annoyance, embarrassment, oppression or an undue expense burden. Wright & Miller, supra note 18, at § 2206.

[67] Wright & Miller, supra note 18, at § 2206.

[68] Rossi v. Pennsylvania R. Co., 19 F.R.D. 289, 290 (S.D.N.Y. 1956). See also Wright & Miller, supra note 18, at § 2206.

standard of Rule 26 and is not limited to matters admissible at trial.[68]

¶15. Rule 34 may be used to obtain production of documents and things only from parties to the action.[69] This does not, however, prevent similar discovery from a non-party.[70] Parties seeking production of documents or things possessed by a non-party may cause to issue a sub poena duces tecum for a deposition, designating therein the materials to be produced.[71] Rule 45(d)(1)[72] is applicable in that situation. It provides for a procedure analogous to that of Rule 34.[73]

III. LIMITATIONS ON THE SCOPE OF DISCOVERY--THE PRIVILEGE AGAINST SELF-INCRIMINATION

¶16. Only matter deemed not privileged may be discovered under Rule 26(c).[74] Consequently, the discovery rules cannot reach matter protected by the Fifth Amendment[75] privilege

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[69]Fed. R. Civ. P. 34 (see appendix for text).

[70]Fed. R. Civ. P. 34(c) (see appendix for actual text).

[71]Fed. R. Civ. P. 30(b)(1) (see appendix for full text).

[72]Fed. R. Civ. P. 45(d)(1) (see appendix for full text).

[73]See Wright & Miller, supra note 18, at § 2209 n. 44.

[74]Fed. R. Civ. P. 26(c) (see appendix for actual text).

[75]U.S. Const. amend. V.

against self-incrimination.[76] Although the privilege has no obvious application to civil pre-trial discovery, it is a constitutionally guaranteed right in civil proceedings.[77] And, the privilege protects witnesses as well as accused parties.[78]

A. TYPES OF FACTS PROTECTED FROM DISCLOSURE

¶17. The privilege against self-incrimination applies to facts distinctly involving criminal liability or its equivalent.[79] It is not, however, limited only to directly incriminating facts.[80] Often, the information sought would merely be a "link in the chain"[81] of evidence needed for criminal prosecution or would provide leads to other incriminating evidence.[82]

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[76] The amendment provides that "no person ... shall be compelled in any criminal case to be a witness against himself."

[77] McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (The Court stated that "[The privilege] applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.") See also United States v. Kordel, 397 U.S. 1, 7-8 (1970).

[78] Counselman v. Hitchcock, 145 U.S. 547, 562 (1892).

[79] 8 Wigmore, Evidence § 2254 (McNaughton rev. ed. 1961) [hereinafter cited as Wigmore].

[80] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[81] Malloy v. Hogan, 378 U.S.1, 11-12 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951).

[82] See Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 Va. L. Rev. 322, 324-25 (1966).

If so, the information is held within the privilege and will be precluded from discovery in a civil action.[83] Accordingly, courts repeatedly hold that the privilege against self-incrimination justifies a refusal to answer questions at a deposition,[84] to respond to interrogatories[85] or requests for admissions,[86] or to produce documents.[87]

¶18. Where a deposition is sought, the availability of the privilege is not enough to vacate notice of the deposition.[88] The deponent must attend the deposition, be sworn under oath and respond to all questions whose answers would not tend to incriminate.[89] It is then for the court to decide from the resulting record whether any particular questions asked entitled the defendant to claim the privilege.[90]

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[83] Wright & Miller, supra note 18, at § 2018. See also DeVita v. Sills, 422 F.2d 1172, 1178 (3d Cir. 1970) (wherein the court held that a party can object to discovery directed against him when the answers might incriminate him in a pending criminal case).

[84] E.g., In re Penn Cent. Securities Litigation, 347 F. Supp. 1347, 1348 (E.D. Pa. 1972).

[85] E.g., United States v. 47 Bottles, More or Less, of Jenasol, 26 F.R.D. 4, 8 (D.N.J. 1960).

[86] E.g., Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578, 581 (D.C. Cir. 1970).

[87] E.g., de Antonio v. Solomon, 42 F.R.D. 320, 323 (D. Mass. 1967).

[88] Wright & Miller, supra note 18, at § 2018.

[89] United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[90] Capitol Products Corp. v. Hernon, 457 F.2d 541, 543 (8th Cir. 1972).

¶19. The privilege may also be asserted by an objection under Rule 33(a) (interrogatories) or Rule 34(b) (production of documents).[91] Where a request for production is directed to a non-party, the privilege may be asserted by a motion to quash the sub poena duces tecum.[92]

¶20. Requests for admissions are treated similarly.[93] Although Rule 36(b)[94] provides that admissions may not be used in any other proceeding,[95] it is still possible that the admission may provide a link in an incriminating chain or lead to other admissible evidence.[96] Consequently, the privilege is available for such requests.[97]

¶21. The privilege against self-incrimination is also available to a party answering a complaint.[98] Again, the answer may be admissible in subsequent proceedings or may reveal other incrimi-

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[91] See United States v. 47 Bottles, More or Less, of Jenasol, supra note 85; deAntonio v. Solomon, supra note 87.

[92] In re Turner, 309 F.2d 69, (2d Cir. 1962). See also Wright & Miller, supra note 18, at § 2018. (quash subpoena)

[93] Gordon v. Federal Deposit Ins. Corp., supra note 86.

[94] Fed. R. Civ. P. 36(b) (see appendix for actual text).

[95] Id.

[96] Wright & Miller, supra note 18, at § 2018. See also Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371, 383-86 (1962).

[97] Gordon v. Federal Deposit Ins. Corp., supra note 86.

[98] Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 Va. L. Rev. 322, 327-28 (1966). See In re Sterling-Harris Ford, Inc., 315 F.2d 277 (7th Cir.), cert. denied, 375 U.S. 814 (1963).

nating evidence.[99] But this does not mean that a defendant will be relieved from filing a responsive pleading simply because he intends to claim the privilege.[100] The defendant is required to respond where able and must specifically assert the privilege as to averments which may tend to incriminate.[101]

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[99] Wright & Miller, supra note 18, at § 1280; See 4 Wigmore, Evidence § 1066 (Chadbourn rev. ed. 1972) ("The privilege against self-incrimination does not forbid the use in a criminal prosecution, of a plea in a prior civil case admitting the fact now charged, because the plea, filed voluntarily, was a waiver of the privilege. Nevertheless, in order to deprive a civil party of the right to refuse to plead on that ground, statutes have been enacted in some jurisdictions, forbidding the use of such pleadings in criminal cases.")

[100] Note, supra note 98 at 328; In re Sterling-Harris Ford, Inc., supra note 98.

[101] One commentator has suggested that such a use of the privilege "does not relieve a party of the consequences of failing to deny an averment of the complain and those not denied are generally taken as admitted." Note, Use of the Privilege against Self-Incrimination in Civil Litigation, 52 Va. L.Rev. 322, 328 (1966) citing In re Sterling-Harris Ford, Inc., 315 F.2d 277 (7th Cir.), cert. denied, 375 U.S. 814 (1963); Amana Soc'y v. Selzer, 250 Iowa 386, 94 N.W. 2d 337 (1959); Fed. R. Civ. P. 8(d).

This approach creates constitutional problems by effectively forcing the person invoking the privilege to answer. This result is inconsistent with Spevack v. Klein, 385 U.S. 511 (1967) and Garrity v. State of N.J., 385 U.S. 493 (1967). See Wright & Miller, supra note 18 at § 1280. Consequently, the court must create an implied qualification to Rule 8(d) and treat the defendant's claim of privilege as equivalent to a specific denial. De Antonio v. Solomon 42 F.R.D. 320, 322 (1967), modifying, 41 F.R.D. 447 (D. Mass. 1966).

B. EFFECTS AND CONSEQUENCES OF INVOKING THE PRIVILEGE

1. GENERALLY

¶22. The court determines whether the privilege may be asserted in a given situation.[102] Should the court decide to allow the privilege, it must then determine what consequences shall flow from its use.[103]

2. USE BY NON-PARTY

¶23. When a non-party asserts the privilege, the court's only serious concern is to insure the right to cross-examination. If a non-party refuses to answer a substantially relevant question the trial judge may, in his discretion, order any or all of his testimony stricken as incompetent.[105] Under no circumstances, however, may an inference adverse to either party be drawn from a non-party's refusal to testify.[106]

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[102] Hoffman v. United States, 341 U.S. 479, 486-87 (1951). See also Kaminsky, Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis, 39 Brook. L. Rev. 121, 136-37 (1972).

[103] Note, supra note 98, at 330.

[104] Id. See also Brown v. United States, 356 U.S. 148 (1958).

[105] Id. Brown v. United States at 156 n.5.

[106] Note, supra note 98, at 331. See Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 374, 155 A.2d 721, 735 (1959).

3. USE BY DEFENDANT

¶24. Private civil actions under RICO are based upon the same activities that are prohibited by its criminal provisions.[107] Since a central issue in such actions concerns conduct which is also criminal, defendants are particularly likely to assert the privilege against self-incrimination.[108] This may cause great hardship to civil plaintiffs uninterested in the criminal aspect of the defendant's conduct but who are by that circumstance still prevented from discovery of their civil wrongs.[109] The civil plaintiff, therefore, should be aware of the potential consequences resulting from the use of the privilege by defendants in such civil suits.

¶25. Just as in the case of a non-party, above, the trial judge may order part of the defendant's testimony stricken.[110] Most courts, however, go much further. For example, courts have allowed the opposing party to comment upon use of the privilege.[111] More importantly, the great majority of courts

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[107] 18 U.S.C. §§1962-1964 (1976).

[108] See generally Comment, Federal Discovery in Concurrent Criminal and Civil Proceedings, 52 Tulane L. Rev. 769 (1978); 8 Wigmore, Evidence § 2257 (McNaughton rev. ed. 1961).

[109] Id.

[110] Annest v. Annest, 49 Wash. 2d 62, 64, 44, 298 P.2d 483, 484 (1956).

[111] E.g., Morris v. McClellan, 154 Ala. 639, 644, 45 So. 641, 645 (1908). See also Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. Chi. L. Rev. 472 (1957).

permit an adverse inference to be drawn against the defendant.[112]

¶26. Arguments in favor of allowing such an inference are advanced on two grounds. First, an adverse civil judgment is outside the scope of the Fifth Amendment's protection since the privilege protects against only criminal consequences.[113] Adverse inferences in private civil cases cannot have any effect or even be revealed in subsequent criminal proceedings.[114] For this reason, there can be no constitutional objection to permitting them to be made.[115] Second, the adverse inference results

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[112] E.g., Maffie v. United States, 209 F.2d 225, 228 (1st Cir. 1954); United Elec. Radio and Mach. Workers v. General Elec. Co., 127 F. Supp. 934, 942 (D.D.C. 1954), aff'd in part, vacated in part on other grounds, 231 F.2d 259 (D.C. Cir.), cert. denied, 352 U.S. 872 (1956). See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) where the Court referred to

> the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a civil cause." (footnotes omitted) (dictum).

The plaintiff can make effective use of this inference by calling the defendant to the stand and compelling him to repeat his refusal to answer before the jury. See Kaminsky, Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis, 39 Brook. L. Rev. 121, 146 (1972). Alternatively, he can merely read to the jury the relevant deposition. See Fed. R. Civ. P. 32 (see appendix for text).

[113] Kaminsky, supra note 112, at 148.

[114] Id.

[115] Id.

not from the assertion of the privilege itself, but from the defendant's silence in the face of accusations he would normally be expected to refute.[116]

¶27. Although reasonable and consistent, these arguments cloud the real issue. A commentator aptly describes the problem:

> It is simply unfair to allow the private civil defendant to plead the privilege without paying some price. Regardless of whether his presence in court is voluntary, the civil defendant has allegedly done some damage, without justification, to his fellow citizen. While in a governmental context considerations such as privacy and the proper role of government clearly come into play, in a private civil damage suit a defendant will not invoke his privilege against self-incrimination unless he has something to hide. To acknowledge this fact does not denigrate from or make inroads on the privilege. Rather, it is to recognize that the safeguards and constitutional foundation of the privilege (viz., protection against criminal prosecution based on one's own testimony) can be preserved without permitting the civil defendant to gain an unfair advantage—especially since, in private civil litigation, the plaintiff's only source of evidence is frequently the defendant himself, and since the type of case where the privilege is most frequently asserted by private civil defendants (e.g., fraudulent conveyance, libel, misappropriation, conversion) involve [sic] intentional and often malicious conduct.[117]

¶28. Drawing adverse inferences or striking testimony or pleadings for failure to answer questions or otherwise come forward with evidence are not extraordinary sanctions in private civil cases.[118] On the contrary, such measures are frequently

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[116] Id. at 147-48.

[117] Id. at 148-49.

[118] See Fed. R. Civ. P. 37 (see appendix for actual text)

used when parties refuse to come forward for reasons other than the privilege against self-incrimination.[119]

¶29. Extending the sanction concept to a severe extreme, one commentator has suggested that a party should be deemed to have waived all privileges by defending (or initiating) a suit in which the privileged matter is material.[120] Waiver, under these circumstances, has been found where other privileges were involved,[121] but no court has held the privilege against self-incrimination to be so waived.[122] It is unreasonable to conclude that exercising a constitutional right to bring or defend an action results in waiver of the constitutional privilege not to be a witness against oneself.[123]

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[119] See e.g., N. Sims Organ & Co. v. Securities and Exchange Comm'n, 293 F.2d 78, 80-81 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962). See also Kaminsky, supra note 112, at 149.

[120] 4 Moore's Federal Practice ¶ 26.60[6] at 26-252 (2d ed. 1979). Professor Moore contends that when a party shields himself with the privilege when confronted with the basic issue in a civil action, it is both fair and reasonable to find a "waiver" so that the issue is resolved in his opponent's favor.

[121] See, e.g, Mitchell v. Roma, 265 F. 2d 633, 637 (3d Cir. 1959).

[122] Independent Prods. Corp. v. Loew's Inc., 22 F.R.D. 266, 279 (S.D.N.Y. 1958) is cited by Moore in support of his theory. It does not, however, hold that the privilege had been waived. Any waiver found was accomplished by failing to claim the privilege at pre-trial examination and not by bringing suit.

[123] Although the language of waiver is used, what appears to be contemplated is that the action will be dismissed, a default judgment entered or a particular issue foreclosed. See Note, supra note 82, at 330.

4. STAYS

¶29. Because private civil actions under RICO are directed to the same illegal activities that are proscribed by the criminal provisions,[124] the situation may often arise where both criminal and civil actions are simultaneously in progress. From the defendant's perspective, such concurrent criminal and civil actions are cause for alarm. The danger is that the results of broad civil discovery will be used to circumvent the defendant's privilege against self-incrimination and the narrow scope of criminal discovery.[125] The civil defendant's deposition testimony, answers to interrogatories, and documents produced are public records fully accessible to prosecutors for use in criminal actions.[126] It is to be expected, therefore, that the defendant will seek to stay discovery in the civil action until disposition of the pending criminal case.

¶30. Should such a stay be granted, an unacceptable burden

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[124] 18 U.S.C. §§ 1962-1964 (1976).

[125] See generally Comment, Federal Discovery in Concurrent Criminal and Civil Proceedings, 52 Tulane L. Rev. 769 (1978).

[126] Id. at 782. " ... [A] criminal prosecutor may gain otherwise unobtainable "leads" by reviewing a criminal defendant's civil testimony. Even assuming pro arguendo, that a prosecutor learns nothing more than what questions the defendant declined to answer in the civil investigation, this knowledge of areas sensitive to the defendant may well lead to a "link in the chain of evidence" tha unconstitutionally contributes to his conviction." See Blau v. United States, 340 U.S. 159, 161 (1950). See also GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129 (S.D.N.Y. 1976).

may be placed on the civil plaintiff's right to a prompt and fair disposition of his case.[127] In addition, valuable evidence may be lost as a result of the delay.[128] Faced with the prospect of expensive, time-consuming delay and possible loss of evidence, potential plaintiffs may be deterred from ever asserting their rights.[129] Such a result is inconsistent with the right of individuals to be compensated for their damages,[130] and reduces the utility found in the public policy of relying on private suits as a means of enforcing the organized crime laws.[131]

The real issue, then, is how to strike a balance between the rights of private civil plaintiffs and the rights of defendants facing both civil and criminal suits.[132] Unfortunately, neither the criminal nor the civil rules deal explicitly with

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[127] Comment, supra note 125, at 781. See generally United States v. Simon, 373 F.2d 649 (2d Cir.), vacated as moot sub nom. Simon v. Wharton, 389 U.S. 425 (1967).

[128] Comment, supra note 125, at 788. See Texaco, Inc. v. Borda, 383 F.2d 607, 609 (3d Cir. 1967).

[129] Comment, supra note 125, at 788.

[130] Id.

[131] Id. Compare with Bruce Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947) (dealing with the antitrust laws.)

The undesirability of this result is only partially offset by the civil plaintiff's potential use of a conviction to establish a prima facie case under 18 U.S.C. § 1964(d) (1976).

[132] Comment, supra note 125, at 788.

this issue. The Supreme Court has not squarely confronted the problem either and the lower federal courts reach different results. Some lower courts conclude that a complete stay of the civil proceedings or of civil discovery is required during the pendency of the criminal action.[133] Others do not go so far, relying instead on Rule 26(c) protective orders.[134]

5. PROTECTIVE ORDERS

¶31. A stay, either of all civil proceedings or of discovery in the civil case until completion of the criminal trial, is an undesirable alternative in the context of a private civil action under RICO.[135] The only solution other than the unacceptable

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[133] E.g., Dienstag v. Bronsen, 49 F.R.D. 327, 329 (S.D.N.Y. 1970); Perry v. McGuire, 36 F.R.D. 272, 273-74 (S.D.N.Y. 1964). Cf. United States v. Simon, supra note 127, at 653-54 (no stay of civil discovery where party did not choose to assert the Fifth Amendment privilege).

[134] See, e.g., D'Ippolito v. American Oil Co., 272 F. Supp. 310, 312 (S.D.N.Y. 1967) (court permitted discovery depositions of defendants in concurrent civil action to be held with only parties present and ordered testimony to be sealed until conclusion of criminal trial or until court ordered otherwise).

See also Comment, supra note 125, at 782; Data Digest, Inc. v. Standard & Poor's Corp., 57 F.R.D. 42 (S.D.N.Y. 1972). Cf. S.E.C. v. Control Metals Corp., 57 F.R.D. 56 (S.D.N.Y. 1972).

[135] A stay may be desirable in some situations, e.g., where the government is also the plaintiff in the civil action. Since one of the most important functions of the privilege against self-incrimination is to protect individuals from government abuse, a stay of the civil action is a reasonable solution. It protects the defendant's rights and gives full effect to the privilege. This is to be distinguished, however, from a civil action involving two private parties. Here, neither side possesses the broad investigatory powers of the government. No possibility of abuse of governmental power exists. Such an absolute interpretation of the privilege is therefore not so necessary as in actions where the government is a party.

one of precluding discovery, is a protective order under Rule 26(c).[136] Full and liberal discovery would be permitted but fruits of that discovery would be kept under the control of the trial court.[137]

¶32. By granting a protective order, the court can insure that the information a defendant discloses will be kept confidential and known only to the civil parties.[138] Violation of the protective order by revealing information would be disobedience to the court order punishable by contempt.[139]

¶33. This use of protective orders can be analogized to formal grants of immunity. The trial court can compel the defendant's necessary cooperation with pretrial discovery while simultaneousl

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[136] Fed. R. Civ. P. 26(c) (see appendix for actual text).

[137] See Donnici, The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues, 3 Univ. San. Fran. L. Rev. 12 (1968). The author notes that "[W]hile the rule [26(c)] is silent as to any intended use to protect a party from self-incrimination, it is obvious that protective orders can be so adapted." Id. at 16.

[138] See Fed. R. Civ. P. 26(c) (see appendix for actual text). See also United States v. American Radiator & Standard Sanitary Corp., 388 F.2d 201, 204-205 (3d Cir. 1967), cert. denied, 390 U.S. 922 (1968).

Even if the government should learn of the information it could be argued that utilizing such knowledge either as evidence or investigatory leads would be prohibited under Garrity v. N.J., 385 U.S. 493 (1967). See Donnici, The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues, 3 U. San Fran. L. Rev. 12, 21 (1968).

[139] Fed. R. Civ. P. 37(b)(1) (see appendix for actual text).

providing a meaningful substitute for the individual who fears self-incrimination. The information revealed would be known by the opposing parties yet kept confidential from everyone else.[140]

¶34. A limited protective order, fashioned along these lines, is probably the best device presently available to a RICO plaintiff to prevent the defendant from cloaking himself within the privilege against self-incrimination.[141] Such a suggestion, submitted to the trial court and followed by a motion to compel discovery,may prove effective in this situation.

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[140] See Fed. R. Civ. P. 26(c) (see appendix for actual text). See Martindell v. I.T.T. Corp., 25 F.R. Serv. 2d 1283, (S.D.N.Y. 1978), aff'd, 26 F.R. Serv. 2d 1249, 594 F.2d 291, (2d Cir. 1979) (Government was denied access to depositions, relevant to a criminal investigation, which had been given by certain witnesses during the course of discovery in a stockholder's derivative action. The depositions were subject to a protective order stating that depositions would not be used for any purpose other than the preparation and conduct of that action. Deponents did not waive their Fifth Amendment privilege against self-incrimination by choosing to testify in the civil proceedings since assertion of the privilege would have been unnecessary. With the protective order in effect, deponents had given their testimony in reliance upon the confidentiality of discovery and under the reasonable assumption that nothing revealed would be used against them.)

[141] Professor Wright, however, takes a pessimistic view of this approach:

> "It has been suggested that a protective order impounding the results of discovery and forbidding disclosure to anyone other than the parties would remove the risk of incrimination, but whether the court in a civil action can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome, seems doubtful."

Wright & Miller, supra note 18, at § 2018.

APPENDIX

SELECTED PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery

(a) Discovery methods

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of discovery

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation: materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Productive orders

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 196[illegible] eff. July 1, 1966; Mar. 30, 1970, eff. July [illegible], 1970.)

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse

party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

(b) Pending appeal

If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) Perpetuation by action

This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971.)

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States

Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) In foreign countries

In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for interest

No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Rule 29. Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

Rule 30. Depositions Upon Oral Examination

(a) When depositions may be taken

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of examination: general requirements; special notice; non-stenographic recording; production of documents and things; disposition of organization

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the requests.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons

so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) Examination and cross-examination; record of examination; oath; objections

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to terminate or limit examination

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to witness; changes; signing

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and filing by officers; exhibits; copies; notice of filing

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to attend or to serve subpoena; expenses

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972.)

Rule 31. Depositions Upon Written Questions

(a) Serving questions; notice

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to take responses and prepare record

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Notice of filing

When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

Rule 32. Use of Depositions in Court Proceedings

(a) Use of depositions

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) Objections to admissibility

Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

[(c) Abrogated]

(d) Effect of errors and irregularities in depositions

(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972.)

Rule 33. Interrogatories to Parties

(a) Availability; procedures for use

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; use at trial

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to produce business records

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons not parties

This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Rule 36. Requests for Admission of Documents

(a) Request for admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of admission

Any matter admitted under this rul[illegible] co[illegible] clusively established unless the court o[illegible]tio[illegible] permits withdrawal or amendment of the a[illegible] mission. Subject to the provisions of Rule [illegible] governing amendment of a pre-trial order, th court may permit withdrawal or amendmer when the presentation of the merits of th action will be subserved thereby and the part who obtained the admission fails to satisfy th court that withdrawal or amendment will pre udice him in maintaining his action or defens on the merits. Any admission made by a part under this rule is for the purpose of the pen ing action only and is not an admission by hi for any other purpose nor may it be use against him in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 194[illegible] Mar. 30, 1970, eff. July 1, 1970.)

Rule 37. Failure To Make Discovery: Sanctions

(a) Motion for order compelling discovery

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for and order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including and order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with

a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of person in foreign country

A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) Expenses against United States

Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

78858

THE USE OF A PRIOR CRIMINAL JUDGMENT AS COLLATERAL ESTOPPEL

By

Charles Wunsch

CONTENTS

SUMMARY

¶1 Collateral estoppel is a doctrine of finality designed to limit relitigation of issues previously determined. It is founded on ideas of judicial efficiency tempered with fairness. The contexts for use of collateral estoppel are varied. The burden of proof issue, however, affects its use in all contexts.

¶2 The use of collateral estoppel in a civil action following a criminal prosecution is constitutionally permissible. The courts continually grapple with the problems of who to preclude, who is allowed to preclude and what issue was previously determined. The various methods of resolving criminal actions pose special problems, as do certain procedural settings.

¶3 The use of collateral estoppel in a civil action following a RICO conviction should be possible, despite a problem presented by the legislative history. Collateral estoppel should have applications in actions by the United States or private parties and even in proving a RICO offense.

THE USE OF A PRIOR CRIMINAL JUDGMENT

AS COLLATERAL ESTOPPEL

A. THE DOCTRINE OF COLLATERAL ESTOPPEL

¶4 The American Law Institute defines collateral estoppel, or issue preclusion,[1] as follows:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[2]

The courts generally answer three basic questions in deciding the preclusive effect of prior issue determinations:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

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[1]The Restatement (Second) of Judgments §68, Comment b (Tent. Draft No. 4, 1977) draws a distinction between direct estoppel and collateral estoppel. Direct estoppel is issue preclusion in a second action based on the same claim as the first; collateral estoppel involves a different claim in the second action. The distinction is seldom made by courts; therefore this paper will use collateral estoppel and issue preclusion interchangeably, unless otherwise noted.

[2]Restatement (Second) of Judgments §68 (Tent. Draft No. 4, 1977). Issue preclusion is just one of a series of doctrines which give finality to the determinations of the court. Among the other doctrines are claim preclusion (res judicata), law of the case, some aspects of double jeopardy and stare decisis. Res judicata can be used to mean any finality accorded a judgment, be it claim preclusion or issue preclusion. When reading cases one should be aware of the courts' possible use of this broader definition of res judicata. Collateral estoppel differs from res judicata in that it applies only to issues actually litigated in a subsequent action on the same or different claims, while res judicata applies to all issues which were or could have been litigated in a subsequent action on the same claim.

2. Was there a final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[3]

There must be affirmative answers to all three questions before a court will give conclusive effect to the judgment. The essential element of collateral estoppel is the issue was litigated and its determination was necessary to the prior judgment.[4]

¶5 The basic policy of the doctrine is judicial efficiency. By preventing parties from continually relitigating the same issue, the court can speed up the determination of an action and conserve judicial resources by not redeciding the same issue over and over. The doctrine is fair because the party being precluded had his day in court to present his side as best he could.[5]

¶6 Because determining the issue is crucial to issue preclusion, the courts have developed various rules to facilitate their work.[6] One rule provides that if the prior judgment is

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[3]From Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal 2d 807, 813, 122 P.2d 892, 895 (1942) as quoted in Blonder-Tongue Lab, Inc. v. Univ. of Ill. Foundation, 402 U.S. 313, 323-324 (1971).

[4]Cromwell v. County of Sac, 94 U.S. 351, 353 (1876).

[5]Precluding a person not a party to the first action violates due process since the person was not afforded a chance to his day in court. Blonder-Tongue, Inc. v. Univ. of Ill. Foundation, 402 U.S. 313, 329 (1971). See, e.g., New England Mutual Life Ins. Co. v. Null, 554 F.2d 896, 901 (8th Cir. 1977).

[6]For a detailed discussion of rules of issue determination, see Restatement (Second) of Judgments, supra note 2, §68, Comments and Reporter's Notes.

based on alternative, independent grounds, any one of those grounds is collateral estoppel in a subsequent action.[7] Another rule prohibits giving preclusive effect to issues decided in the prior judgment that were not essential to the judgment.[8]

¶7 Issue preclusion is used on fact or mixed fact and law issues, but issues of law can also be estopped.[9] Preclusion of law issues, however, presents special problems for the courts. The courts solve them by being less willing to apply collateral estoppel to law than to facts.[10]

¶8 In deciding who is to be precluded, courts historically have required mutuality and identity of parties or privies. The "mutuality" requirement, in which collateral estoppel applies only when both parties are bound by the prior judgment,

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[7] Winters v. Lavine 574 F.2d 46 (2d Cir. 1978) (Constitutional issue in civil rights action precluded by prior judgment holding no consitutional issue present or, alternatively, no statutory basis for claim). But see, Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970) (questions the rule). The Restatement (Second) of Judgments, supra note 2, §68, Comment i follows Halpern; however, Winters remains the majority rule. Winters v. Lavine, 574 F.2d at 67.

[8] Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 593 (1974). For example, if in the first action the findings were that the plaintiff was contributorily negligent and defendant was negligent, in a subsequent action the defendant would be free to relitigate the issue of his negligence since that was not essential to the prior judgment. F. James and G. Hazard, Civil Procedure, §11.19, at 569-570 (2d ed. 1977).

[9] Restatement (Second) of Judgments, supra note 2, § 68.1(b), Comment on Clause (b) and Reporter's Note on Clause (b) at 43; 1B Moore's Federal Practice ¶0.448, at 4231 (2d ed. 1974); James and Hazard, supra note 8, §11.20, at 571-573.

[10] See, note 9 supra.

has been significantly changed in the past thirty-five years.[11] The privity requirement usually involves "concurrent relationship to the same right of property; successive relationship to the same right of property; or representation of the interests of the same person."[12] Due process considerations prevent a person not a party to the prior action from being precluded.[13]

B. CONTEXTS FOR THE USE OF COLLATERAL ESTOPPEL

¶9 There are four general contexts in which collateral estoppel can be used. They are as follows:

1. a prior civil action used in a subsequent civil action;
2. a prior civil action used in a subsequent criminal action;
3. a prior criminal action used in a subsequent criminal action; and
4. a prior criminal action used in a subsequent civil action.

The first three will be mentioned briefly here, the fourth is discussed in the following section.

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[11] See ¶¶ 18 to 26 infra.

[12] Moore's Federal Practice, supra note 9, ¶ 0.411(1), at 1255.

[13] Hansberry v. Lee, 311 U.S. 32, 41 (1940).

1. CIVIL-CIVIL

¶10 The civil-civil context is where collateral estoppel first developed and where primary use of collateral estoppel has occurred.[15] The Supreme Court, however, has not made the doctrine a constitutional mandate in this setting.[16]

2. CIVIL-CRIMINAL

¶11 A civil determination usually cannot be used as collateral estoppel in a subsequent criminal prosecution. The higher burden of proof, beyond a reasonable doubt, in criminal cases prevents a civil finding, based on a preponderance of the evi-

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[14]The terminology civil-civil, criminal-civil, etc. will be used to designate the time sequence of two types of cases. Thus civil-criminal refers to a situation in which a party is trying to use a judgment from a civil case in a subsequent criminal case.

[15]See, Restatement (Second) of Judgments, supra note 2, §68; James and Hazard, supra note 8, ch. 11; 1B Moore's Federal Practice, supra note 9, §III(b) at 3771-4243. As to early use, see Ashe v. Swenson, 397 U.S. 436, 443-444 (1970).
As an example of the use of collateral estoppel in the negligence area, suppose Cathy and Jack are in an auto accident in a contributory negligence state. Cathy sues Jack for personal injuries and receives a $10,000 verdict. Cathy then brings an action for damages to her car. She will move for summary judgment on the issue of Jack's liability on the ground the prior personal injury judgment collaterally estops him from denying his negligence. The court will grant the motion because the prior judgment for Cathy necessarily included finding Cathy was not negligent and Jack was. The only issue for trial will be damages.

[16]Hoag v. New Jersey, 356 U.S. 464, 471 (1958) ("Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this court has never so held."). But see, Ashe v. Swenson, 397 U.S. 436, 445 (1970) (issue preclusion is part of fifth amendment double jeopardy clause in criminal-criminal setting). See also, Vestal and Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand. L. Rev. 683, 690-691 (1966) (distinction between collateral estoppel and double jeopardy).

dence, from being preclusive.[17] The possible exceptions are when the burdens of proof are the same, such as in an affirmative defense, or when a constitutional issue decided in the civil case in implicated in the criminal.[18] Unless the government was a party to the civil suit, the criminal defendant cannot use the civil finding against the government.[19]

3. CRIMINAL-CRIMINAL[20]

¶12 The Supreme Court in Ashe v. Swenson[21] held the defensive use of collateral estoppel against the government by a criminal defendant in a second criminal prosecution has a constitutional basis in the Fifth Amendment double jeopardy clause.[22] The government can also use collateral estoppel offensively against

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[17] Vestal and Coughenour, supra note 16, at 699.

[18] Vestal and Coughenour, supra note 16, at 699-700.

[19] Vestal and Coughenour, supra note 16, at 700-701.

[20] For a general discussion of the issue and policy involved in this area see Vestal and Coughenous, supra note 16, at 690-699; Annot., 9 A.L.R.3d 203 (1966) (Modern Status of Doctrines of Res Judicata in Criminal Cases).

[21] 397 U.S. 436 (1970).

[22] Id. at 445. Because the court ties collateral estoppel in the criminal context to the double jeopardy clause instead of the due process clauses, collateral estoppel is still not a constitutional requirement in the context of a subsequent civil action. For a recent case where a criminal defendant successfully used collateral estoppel see United States v. Day, 591 F.2d 861, 869 (D.C. Cir. 1979) (After defendant was acquitted of robbery charges, evidence of robbery could not be used by government in a subsequent prosecution for murder).

the defendant.[23] An acquittal in the prior prosecution has a binding effect on the government in the second action as to issues actually litigated because the burden of proof is the same in both actions.[24]

C. THE CRIMINAL-CIVIL CONTEXT

¶13 The general principles of collateral estoppel apply in this context. The nature of the issue and of the parties presents the most difficulties for the courts.[25]

1. AUTHORITY FOR USE OF COLLATERAL ESTOPPEL AGAINST THE DEFENDANT

¶14 The Supreme Court has held, "It is well established that a prior criminal conviction may work an estoppel in favor of the government in a subsequent civil proceeding."[26] This basic proposition has been reaffirmed by the Supreme Court[27]

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[23] See, Pena-Cabanillas v. United States, 394 F.2d 785, 787 (9th Cir. 1968)(Issue of citizenship up to prior conviction could not be relitigated in a subsequent illegal entry case.); United States v. Colacurcio, 514 F.2d 1, 6 (9th Cir. 1975) (Collateral estoppel can be used against defendant, but here, trial court used it improperly).

[24] See, Turner v. Arkansas, 407 U.S. 366, 369 (1972); Ashe v. Swenson, 397 U.S. 436, 445 (1970); United States v. Day, 591 F.2d 861, 869 (D.C. Cir. 1979).

[25] See generally, Vestal and Coughenour supra note 16, 701-716.

[26] Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

[27] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 157 (1963).

and the circuits faithfully follow the precedent.[28] "Because of the higher standard of proof and the numerous safeguards surrounding a criminal trial,"[29] the use of collateral estoppel against the defendant in a subsequent civil case is not unfair. Generally, the defendant had the incentive to litigate the issue fully because his liberty or property was at stake.[30]

¶15 The policy of efficient administration of justice also supports the use of collateral estoppel in this context. Once the state had met the beyond a reasonable doubt standard on an issue, it is a waste of time and resources to make the government meet the lesser preponderance of the evidence standard. Finally, basic notions of fairness are satisfied because the defendant had his day in court to contest the issues raised.[31]

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[28] See, e.g., United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir. 1976); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972); Willard v. United States, 422 F.2d 810, 811-812 (5th Cir.), cert. denied, 398 U.S. 913 (1970).

[29] S.E.C. v. Everest Management Corp., 466 F. Supp. 167, 172 (S.D.N.Y. 1979). See generally, Vestal and Coughenour, supra note 16. Some of the special safeguards in criminal trials are the right to counsel, right to confront witnesses, right to jury trial and protection against self-incrimination.

[30] This reasoning does not apply when the criminal charge is slight, for example jaywalking or routine traffic fines. In this situation the defendant may have felt it was cheaper to pay the fine than contest the issue even though he might reasonably have been expected to win on the issue.

[31] Because the government must prove every element of a crime beyond a reasonable doubt, the defendant has the added incentive to contest every issue reasonably in doubt knowing if he prevails he cannot be convicted. See, Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 862-864 (D.D.C. 1974) contains a discussion of the split between federal and state courts over the use of prior convictions in subsequent civil actions. States tend to give prima facie value only and not full preclusive effect).

2. PARTIES TO THE SUBSEQUENT ACTION

¶16 In all criminal prosecution one party will be a form of government and the other the defendant. In a subsequent civil suit, however, the government or a private individual can be a party.[32]

a. THE GOVERNMENT AS A PARTY TO THE CIVIL ACTION

¶17 When the government is party to the subsequent civil action involving the defendant to the prior criminal prosecution, no problems of mutuality[33] or privity exist.[34] The government may use collateral estoppel offensively[35] (government is plaintiff) or defensively[36] (government is defendant) against the former criminal defendant.

b. THIRD PERSON AS A PARTY TO THE CIVIL ACTION

¶18 The problem in this setting is that there is no mutuality,

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[32] In the discussion that follows it is assumed the criminal defendant was convicted in the criminal prosecution. For the problems posed by acquittals see ¶¶ 42 to 45.

[33] See discussion of Parklane infra ¶¶ 18 to 26.

[34] See, e.g., cases cited in notes 35 and 36 infra.

[35] See, e.g., United States v. Podell, 572 F.2d 31, 33-34 (2d Cir. 1978); United States v. Jacobson, 467 F. Supp. 507, 507-508 (S.D.N.Y. 1979); S.E.C. v. Everest, 466 S. Supp. 167, 169-170 (S.D.N.Y. 1979).

[36] See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 147-149 (1963); Ivers v. United States, 581 F.2d 1362, 1364-136[illegible] (9th Cir. 1978); Tomlinson v. Lefkowitz, 334 F.2d 262, 263-264 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965).

because the government, a party to the previous criminal action, is not the party trying to use collateral estoppel. A stranger is asserting the preclusion, although he is not bound by any determination made in the criminal action.[37] The reasons for the mutuality requirement are obscure; it might have been a result of a desire for symmetry.[38] Recently the Supreme Court abolished the mutuality requirement in the civil-civil context in Parklane Hosiery Co. v. Shore.[39] Nevertheless, a question remains as to whether mutuality is still required in the criminal-civil setting. An analysis of the policy behind Parklane suggests a negative answer.

i. THE PARKLANE CASE

¶19 Stockholders bought a class action against Parklane Hosiery Co., alleging issuance of materially false and misleading proxy statements. The SEC brought an action for injunctive relief based on similar allegations. The court in the injunctive action, sitting without a jury, found the proxy statement to be false and misleading and granted the desired relief. Subsequently, the stockholders moved for partial

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[37] The prior criminal defendant can not use collateral estoppel against the new party because that party has not had an opportunity to litigate the issues.

[38] The argument is a person should not be bound by a prior judgment unless the party trying to bind him in the subsequent action is also bound by the prior judgment. This would make the law symmetric but for no other purpose than aesthetics. See, Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 649 n.8 (1979).

[39] 99 S. Ct. 645, 648-650 (1979).

summary judgment, on the ground that collateral estoppel barred the defendants from relitigating the issue of issuance of a materially false report, which was decided against them in the SEC action. The trial court denied the motion on the ground that Parklane would be deprived of a jury trial. In the injunctive suit, brought in equity, there could be no jury but there was a right to a jury in the class action. The Second Circuit reversed, granting partial summary judgment, and the Supreme Court affirmed.[40]

¶20 One of the issues the Supreme Court framed was "whether a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding."[41] The Court foresaw problems if it gave an affirmative answer[42] but felt "the preferable approach for dealing with the problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion

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[40] Id. at 648, 655.

[41] Id. at 649. The Court noted:

> (i)n this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another.

Id. at 649, n.4.

[42] Among the problems were: (1) the "wait and see" plaintiff who will let the first action by another plaintiff proceed to judgment, even though he could have joined, to see if the first plaintiff can beat the defendant; (2) if the first action was for a nominal amount the defendant may not defend vigorously; (3) inconsistent judgments could prejudice the defendant; and (4) procedural tools unavailable in the first action would be available in the second. Id. at 651.

to determine when it should be applied"[43] (footnote omitted).

The Court set out four factors trial courts must consider before applying offensive[44] collateral estoppel:

1. The party seeking to use collateral estoppel could not have joined the previous action.
2. The party against whom collateral estoppel would apply had incentive to fully litigate the issue in the prior action.
3. There have been no inconsistent rulings on the issue in prior actions.
4. There are no new procedural opportunities available to the precluded party in the second action or, if there are, they are not likely to cause a result different from that of the first action.[45]

If these requirements are satisfied, preclusion of the issue is allowed.

ii. APPLICATION OF THE PARKLANE CRITERIA TO THE CRIMINAL-CIVIL CONTEXT

¶21 The first factor clearly works in a new party's favor

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[43] Id. at 651.

[44] The arguments for offensive use apply even more forcefully to defensive use. As the Court noted,

> The clear weight of recent authority is to the effect that there is no intrinsic difference between "offensive" as distinct from "defensive" issue preclusion, although a stronger showing that the prior opportunity [to litigate] was adequate may be required in the former situation than the latter.

Id. at 651, n.16, (quoting Restatement (Second) of Judgments §88 (Tent. Draft No. 2 1975)).

[45] Id. at 651-652.

because private parties cannot join criminal prosecutions. The second factor also is favorable to the use of collateral estoppel. As discussed above, the prior defendant in the prior criminal case had every incentive to litigate any doubtful issue in order to defeat criminal liability. The inconsistent rulings factor has to be decided on a case by case basis. Generally, one would expect only one prior criminal prosecution to be the basis of the estoppel; therefore, no inconsistency could exist.

¶22 The major hurdle to offensive use of collateral estoppel is the difference between procedural schemes in civil and criminal actions. As a general rule, criminal defendants do not have discovery rights, while civil parties have almost unlimited discovery.[46] Consequently, an argument can be made that use of collateral estoppel unfairly deprives a prior criminal defendant of the opportunity to acquire evidence on a particular issue in the civil case.

¶23 There are several reasons why this is not a true obstacle to offensive use of collateral estoppel. First, the government had to prove the issue in dispute beyond a reasonable doubt in the prior criminal case. To defeat the government the defendant had only to raise a reasonable doubt. It seems unlikely that evidence sufficient to prove an issue by a preponderance of the evidence and thus raise a reasonable doubt was not known

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[46] See, Fed. R. Civ. P. 26 to 37.

to the prior defendant.[47] Second, it is improbable that the party asserting the estoppel will have the same information the government had when it tried the issue. Thus, the new party has no undue advantage over the defendant.

¶24 Finally, in Parklane the Supreme Court found the use of collateral estoppel against the corporation was proper, even though the first action could not be tried before a jury.[48] If the absence of a jury trial in the first action and its presence in the second is not a sufficient procedural discepancy to warrant denial of collateral estoppel, then differences in discovery would not appear to be so either. Thus, the probability of discovery substantially altering the result of the criminal trial seems small enough that use of collateral estoppel against the prior criminal defendant is not unfair.

iii. OTHER FEDERAL AUTHORITY

¶25 In SEC v. Everest Management Corp.,[49] the only case to date applying Parklane to the criminal-civil context, defendant Persky was convicted of filing a false corporate report. In a subsequent civil action brought by the SEC to enjoin Persky

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[47] In a criminal prosecution the defendant would presumably present any evidence he had that would exonerate him. The prosecutor is under a constitutional mandate to produce exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97, 112-113 (1976). The only person who might have exculpatory evidence not available to the defendant would be a third party unknown to the prosecution and defense. This appears to be a remote possibility.

[48] Parklane Hosiery Co. v. Shore, 99 S. Ct. 645, 652-655 (1979).

[49] 466 F. Supp. 167 (S.D.N.Y. 1979).

from violating the securities law, the SEC used collateral estoppel to prevent Persky from denying issues decided in the criminal action. The court assumed, arguendo, the SEC and the U.S. Attorney's Office were different parties for collateral estoppel purposes. Nevertheless, no mutuality was required "so long as the party against whom the estoppel is asserted ... was afforded a full and fair opportunity to litigate the identical issue in the prior (criminal) proceeding."[50]

¶26 Before Parklane several federal courts considered the issue of the use of collateral estoppel by a person not a party to the previous proceeding against the criminal defendant in the prior action. Generally, the courts allowed offensive and defensive use.[51] Consequently, in light of the federal practice before Parklane and the reasoning of Parklane, a third party can use offensive and defensive collateral estoppel in a subsequent action against a party to the prior criminal prosecution.

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[50] Id. at 172, n.6 (emphasis added).

[51] Offensive use: S.E.C. v. Kelly, Andrews & Bradley, Inc., 385 F. Supp. 948, 954-955 (S.D.N.Y. 1974) (Prior criminal defendant collaterally estopped from denying price manipulation conspiracy in subsequent civil aciton by SEC); Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 866-868 (D.D.C. 1974) (Insurance company can use collateral estoppel to acquire summary judgment on issue of malice in a civil suit against a defendant convicted of second degree murder). Defensive use: McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir. 1976) (The defendant, a newspaper, in a civil action brought by a convicted air hijacker could use collateral estoppel against the hijacker on issue of fair trial); Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974) (State police agents, defendants in a civil rights suit, brought by a convicted narcotics dealer, could use collateral estoppel as to issue of sale of heroin); Willard v. United States, 422 F.2d 810, 811 (5th Cir.), cert. denied, 398 U.S. 913 (1970) (FBI agents can use finding of no abuse against prior criminal defendant's action for damages).

3. DETERMINATION OF THE ISSUE TO BE GIVEN CONCLUSIVE EFFECT

¶27 In deciding the preclusive effect to be given an issue from a former adjudication, a court allocates the burden of proof and looks at various types of evidence. The court is also concerned with how and when the prior judgment was rendered.

a. PROCEDURE

¶28 The party claiming preclusion carries the burden of proving what issues were decided.[52] In deciding what issues were determined the present court may examine the prior pleadings,[53] agreed statement of facts,[54] evidence,[55] transcripts,[56]

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[52] See, Turley v. Wyrick, 554 F.2d 840, 842 n.2 (8th Cir. 1977), cert. denied, 434 U.S. 1033 (1978); United States v. Barket, 530 F.2d 181, 188 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976); United States v. Friedland, 391 F.2d 378, 382 (2d Cir. 1968), cert. denied, 404 U.S. 867, 404 U.S. 914 (1971).

[53] See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951); United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972); S.E.C. v. Everest Management Corp., 466 F. Supp. 167, 173 (S.D.N.Y. 1979).

[54] Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978).

[55] See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951); United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972).

[56] See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951); Turley v. Wyrick, 554 F.2d 840, 842 (8th Cir. 1977); United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972); United States v. Friedland, 391 F.2d 378, 382 (2d Cir. 1968), cert. denied, 404 U.S. 867, 404 U.S. 914 (1971); Basista v. Weir, 340 F.2d 74, 81 (3rd Cir. 1965); S.E.C. v. Everest Management Corp., 466 F. Supp. 167, 173 (S.D.N.Y. 1979); Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 865 (D.D.C. 1974).

instructions to the jury,[57] opinions of the court[58] and general or special verdicts.[59] As one court said, "[i]n determining what issues were necessarily resolved by the prior proceedings, the court is to take a practical approach ... ."[60]

b. FACTORS THE COURT CONSIDERS

¶29 The discussion to follow does not exhaust the subject, but it does show a court is concerned with two basic problems: How the prior result was reached and when it was reached.

i. TYPES OF RESULTS

¶30 In a criminal prosecution there are four possible outcomes once the prosecutor decides to proceed with the case. The defendant can be convicted, plead guilty, plead nolo contendere (in some jurisdictions) or be acquitted. When applying collateral estoppel in a subsequent civil action the court has to know which result occurred in the previous criminal case. Each has its own significant effect on the use of collateral estoppel.

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[57] See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951); United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972).

[58] See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951); S.E.C. v. Everest Management Corp., 446 F. Supp. 167, 173 (S.D.N.Y. 1979); Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 865 (D.D.C. 1974).

[59] See, Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972).

[60] United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975).

aa. GUILTY VERDICT

¶31 Generally, a guilty verdict will be collateral estoppel in a subsequent civil action as to issues decided by the verdict.[61] The higher standard of proof and procedural safeguards of the criminal trial support this result.[62] Further, the defendant should be estopped as to all the essential elements of the crime because all were proved for the government to obtain the conviction.[63]

¶32 In Travelers Indemnity Co. v. Walburn,[64] Travelers was able to use the criminal conviction of Walburn as collateral estoppel in a declaratory judgment action.[65] Walburn had a home-owner's insurance policy with Travelers that protected him from accidents and occurrences that Walburn did not expect or intend. One evening Walburn became involved in an altercation with Nalls that ended in Nalls's death by a shotgun blast. Walburn was charged with second degree murder. He was convicted; the verdict was later affirmed.

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[61] Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972); S.E.C. v. Everest Management Corp., 466 F. Supp. 167, 173 (S.D.N.Y. 1979); Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 865 (D.D.C. 1974). Cf., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951) (conviction is only prima facie evidence because of Clayton Act §5).

[62] See, ¶ 10 supra; 1B Moore's Federal Practice, supra note 9, ¶ 0.418[1] at 2703.

[63] In re Winship, 397 U.S. 358, 364 (1970). Conspiracy poses a special problem because all the specific elements charged need not be proved. See, Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951).

[64] 378 F. Supp. 860 (D.D.C. 1974).

[65] Id. at 868. See ¶ 20 supra for successful use of conviction as collateral estoppel by S.E.C.

¶33 Nalls's brother then brought a wrongful death action against Walburn. Travelers eventually sought a declaratory judgment that it did not have to defend Walburn or pay any judgment rendered, because the policy did not cover this type of occurrence. They moved for summary judgment on the ground that Walburn was collaterally estopped by the murder conviction from denying he acted with malice in killing Nalls.[66] The court decided the jury had found Walburn guilty either for acting intentionally or for having foreseen the probable result of his acts. The court, concluding either finding would void the policy, granted summary judgment.[67]

¶34 This case not only demonstrates how a criminal conviction can be used as collateral estoppel in a civil action, it also shows that an entity not a party to the prior action can use collateral estoppel offensively.[68] Also, it illustrates the use of the alternative, independent grounds rule noted above.[69]

¶35 When applying a conviction as collateral estoppel, the courts make certain the same issue is involved in both cases. In Williams v. Liberty,[70] Williams was charged and convicted of resisting arrest and of battery upon a police officer. Subsequently, he brought a civil action against the arresting officers, alleging excessive force was used while he was in custody. The trial court granted the officers' motion for

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[66] Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 861-862 (D.D.C. 1974).

[67] Id. at 867-868.

[68] See ¶¶ 13 to 21 supra.

[69] See ¶ 6, note 7 supra.

[70] 461 F.2d 325 (7th Cir. 1972).

summary judgment on the ground the conviction for resisting arrest collaterally estopped Williams from raising the excessive force issue.[71]

¶36 The Seventh Circuit reversed on the ground that even though Williams resisted arrest, the officers may have responded with excessive force. Because the excessive force issue had not been necessarily determined as part of the conviction for resisting arrest, the prior judgment was not collateral estoppel.[72] This case illustrates the emphasis the courts put on making sure the precluded issue was previously litigated and determined.

bb. PLEA OF GUILTY

¶37 Federal courts allow a guilty plea to be collateral estoppel in a subsequent civil action.[73] By pleading guilty, the defendant is taken to have admitted all the elements of the crime charged.[74]

¶38 A recent case that dealt with these issues was United States v. Podell.[75] Former Congressman Podell was charged with conspiracy, bribery, perjury and criminal conflict of interest with respect to his influencing airline regulatory agencies on behalf of a Bahamian airline. During trial, he agreed to plead guilty to an edited complaint that contained only the conspiracy

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[71] Id. at 326-327.

[72] Id. at 327-328.

[73] Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978); United States v. Podell, 572 F.2d 31, 36 (2d Cir. 1978); Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974).

[74] McCarthy v. United States, 394 U.S. 459, 466 (1969); Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978).

[75] 572 F.2d 31 (2d Cir. 1978).

and conflict of interest charges. The United States, seeking to collect the $41,350 in bribe money, subsequently brought an action to impose a constructive trust and acquire an accounting. The government moved for summary judgment on the ground that the judgment and evidence from the prior criminal trial collaterally estopped Podell from denying his liability for the amount of money due. The motion was granted for $40,000.[76]

¶39 In affirming the judgment the Second Circuit noted a "guilty plea ... constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case."[77] The court recognized the problems inherent in conspiracy findings,[78] but Podell's careful editing of the complaint before pleading guilty was taken as an admission to all elements remaining in the complaint.[79] As the court said, "Podell in effect and, indeed, in actuality, admitted the truth of the remainder of the [edited complaint's] allegations."[80] (footnote omitted). Because Podell was collaterally estopped from denying his liability for the $40,000, summary judgment was proper.[81]

¶40 There is some criticism of the rule giving preclusive

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[76] Id. at 32-34.

[77] Id. at 35.

[78] Id. at 36. Conspiracy judgments often do not specify which of several means the conspirators used to further their plan. See id.

[79] Id.

[80] Id.

[81] Id.

effect to guilty pleas. One argument is the guilty plea is, in essence, a compromise between defendant and prosecutor. Due to constraints of time and money, a defendant may be willing to serve a short sentence rather than contest the issue and risk a harsher penalty.[82] The other argument is that the issue being precluded has never been litigated, so no estoppel is possible.[83] Neither of these arguments, however, has swayed the federal courts.[84]

cc. NOLO CONTENDERE

¶41 The nolo contendere plea in federal court has no preclusive effect in a subsequent civil action.[85] The rule is consistent with the policy of the nolo contendere plea: To provide a method by which a defendant can limit his liability from the criminal conviction.[86] If preclusion was allowed, this purpose of the plea would be defeated.

dd. ACQUITTAL

¶42 An acquittal of the defendant in the prior criminal prose-

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[82] 1B Moore's Federal Practice, supra note 9, ¶ 0.418[1] at 2706-2707.

[83] Id. at 2707-2708.

[84] Id. at 2708.

[85] Hudson v. United States, 272 U.S. 451, 455 (1926); United States v. Brzoticky, 588 F.2d 773, 776 (10th Cir. 1978); United States v. Dorman, 496 F.2d 438, 440 (4th Cir.), cert. denied, 419 U.S. 945 (1974).

[86] United States v. Brzoticky, 588 F.2d 773, 776 (10th Cir. 1978).

cution will generally have no preclusive effect in a subsequent civil action.[87] The rule is predicated on the different standar of proof in criminal and civil actions. A determination that a defendant is not guilty merely means the government did not meet the beyond a reasonable doubt standard; no determination as to the beyond a preponderance of the evidence standard has been made.[88]

¶43 In One Lot Emerald,[89] Klementova, the real party in interest, entered the United States without declaring a lot of emeralds and a ring. He was charged, tried, and acquitted of "willfully and knowingly ... smuggling the article into the United States ... ."[90] The government subsequently instituted a forfeiture action for the jewels. Klementova, intervening, alleged the acquittal barred the forfeiture action. The trial court agreed; the Fifth Circuit reversed.[91]

¶44 The Supreme Court affirmed the Fifth's decision on two grounds. First, because the criminal prosecution and civil

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[87] One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235 (1972) [hereinafter One Lot Emerald]; Helvering v. Mitchell, 303 U.S. 391, 397(1938); Tomlinson v. Lefkowitz, 334 F.2d 262, 264 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965); S.E.C. v. Everest Management Corp., 466 F. Supp. 167, 174 n. 9 (S.D.N.Y. 1979); 1B Moore's Federal Practice, supra note 9, ¶ 0.418[1], at 2703-2704. An acquittal might have preclusive effect if based on an affirmative defense proved by a prependerance of the evidence. Vestal and Coughenour, supra note 15, at 702-703.

[88] Helvering v. Mitchell, 303 U.S. 391, 397 (1938).

[89] 409 U.S. 232 (1972).

[90] Id. at 232-233.

[91] Id. at 233.

action elements were different, the government's failure of proof in the criminal case did not mean it could not prove all the elements of the civil case.[92] Second, "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel."[93] The result was the government was free to prove the civil forfeiture elements without any hindrance from the prior acquittal.

ii. PROCEDURAL SETTINGS THAT AFFECT ISSUE DETERMINATION

¶45 Although most issues to be given preclusive effect are those decided at trial or by a plea, there are certain procedural settings that affect the preclusiveness of a prior determination.

aa. APPEALS

¶46 As a general rule for all contexts of collateral estoppel, a judgment rendered by a court will have preclusive effect in a subsequent action even if an appeal is pending.[94] In the

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[92] Id. at 234-235. This reasoning would appear to be valid even if the defendant could show the government in the criminal case had not met the "beyond a prependerance of the evidence" standard.

[93] Id. at 235.

[94] Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941); Rodriguez v. Beame, 423 F. Supp. 906, 908 (S.D.N.Y. 1976); 1B Moore's Federal Practice, supra note 9, ¶ 0.416[3] at 2252-2254. See also, 1B Moore's Federal Practice, supra note 9, ¶ 0.416[2] at 2231-2232, for various rules regarding collateral estoppel after disposition of issues by appellate court. For example, a reversal or modification by the appellate court has the same preclusive effect as the original judgment; if the appellate court affirms the first of two alternatives, independent grounds without dealing with the second, only the first is conclusive as collateral estoppel even though in the lower court judgment both were. Id. at ¶ 0.416[2], at 2232-2233.

criminal-civil context, a court that spoke to the issue found "[t]he pendency of the appeal from the conviction does not deprive the judgment of conviction of its preclusive effect."[95]

bb. SUPPRESSION HEARING

¶47 A finding made at a suppression hearing has preclusive effect when the party being precluded could have appealed the finding.[96] But if the suppression finding is against a criminal defendant who is ultimately acquitted, there is no preclusion.[97] The policy behind the rule is the convicted defendant has every incentive to litigate an adverse suppression finding in an effort to overturn the conviction. On the other hand, the acquitted defendant has no incentive and generally no right to contest the finding.[98] It would, therefore, be unfair to use collateral estoppel against him.

¶48 The particular problem of the suppression hearing demonstrates the courts' constant concern with the availability of appeal. The courts seem more willing to allow collateral estopp

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[95] Rodriguez v. Beame, 423 F. Supp. 906, 908 (S.D.N.Y. 1976). The court went on to grant the summary judgment motion of police agents whom the criminal defendant had sued for deprivation of constitutional rights. Id.

[96] Rodriguez v. Beame, 423 F. Supp. 906, 908 (S.D.N.Y. 1976); Cf., United States exrel Di Giangiemo v. Regan, 528 F.2d 1262, 1265 (2d Cir. 1975), cert. denied, 426 U.S. 950 (1976) (Due process is not violated by failure to make suppression motion based on collateral estoppel, even though motion would have been granted).

[97] Murphy v. Andrews, 465 F. Supp. 511, 514-516 (E.D. Pa. 1979) (Finding of voluntary confession not binding on party subsequently acquitted of murder).

[98] Id. at 514.

when the precluded party had an opportunity to appeal than when he did not. This is not, however, a general rule.[99]

D. COLLATERAL ESTOPPEL AND RICO

1. USE BY UNITED STATES

¶49 18 U.S.C. § 1964(d) explicitly provides for the use of collateral estoppel by the United States in a civil action following a RICO criminal prosecution.[100] Although RICO is based on anti-trust principles, the collateral estoppel provision is stronger than the corresponding prima facie evidence provision of the anti-trust law.[101] The anti-trust provision creates a rebuttable presumption, while collateral estoppel, once applied, is an absolute preclusion.

2. USE BY PERSONS NOT PARTIES TO THE PRIOR RICO ACTION

¶50 A person not a party to the prior RICO action should be able to use a RICO conviction offensively in a subsequent civil action. This conclusion follows from the basic principles of collateral estoppel as developed in the criminal-civil context.[102]

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[99] See, Moore's Federal Practice, supra note 9 ¶ 0.416[5] at 2301-2302.

[100] "A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States." 18 U.S.C. § 1964(d) (1976).

[101] The anti-trust provision, 15 U.S.C. § 16 (1976), was incorporated into the original RICO bill, S.2049, 90th Cong., 1st Sess. § 6(a) (1967). The current wording was subsequently substituted in an early Senate bill, S.1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9569 § 1964(c) (1969).

[102] See discussion of criminal-civil context supra § C.

An argument, however, can be made that a private party should not be allowed to use collateral estoppel against a party convicted of a RICO offense.

¶51 The argument runs as follows:

> 18 U.S.C. § 1964(c)[103] specifically creates a cause of action for a private party, but section 1964(d),[104] which provides collateral estoppel for government use, does not mention private parties. Consequently, Congress intended to limit the use of collateral estoppel to the United States by its omission of private parties in section 1964(d). A careful reading of the legislative history, however, shows this argument to be false. Section 1964(c) was an addition that made the language of section 1964(d) awkward, but it in no way was intended to bar the private parties' use of collateral estoppel.[105]

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[103] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964 (c) (1976).

[104] See, note 100 supra.

[105] The Senate bill sent to the House, S.30, S. Rep. No. 617, 91st Cong., 1st Sess., 1-32 (1969), did not include a private right of action. Id. Title IX, § 1964. The final House version, S.30, H.R. Rep. No. 1549, 91st Cong., 2d Sess., 1-2, 15-21 (1970), included the private action. Id. § 1964(c). In floor debate Rep. Steiger offered an amendment to clarify the procedure of the private action, 116 Cong. Rec. 35346 (1970). Even though he later withdrew the amendment, id. at 35347, Rep. Steiger made clear he felt the procedure for the private action existed in the bill, and that the amendment was merely to clarify that procedure. Id. at 35346-35347.

3. EXAMPLES OF THE USE OF COLLATERAL ESTOPPEL IN THE RICO CONTEXT

¶52 No case has yet involved the use of collateral estoppel in a civil action following a RICO conviction. The examples given, therefore, are hypothetical, but involve actual fact patterns as much as possible.

a. USE BY UNITED STATES IN A RICO PROSECUTION

¶53 An official of the United States, Mr. B, agrees to testify on behalf of an airline before the FAA in exchange for $20,000.[106] He testifies, but the Justice Department finds out and charges him with bribery.[107] He agrees to plead guilty to the violation in return for probation and payment of the maximum fine of $60,000. Six months later he is bribed again for $20,000. The government brings a RICO prosecution. The "pattern of racketeering" offenses charged are the two bribery violations[108] and the "enterprise" is the defendant's

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[106] Generally based on United States v. Podell, 572 F.2d 31 (2d Cir. 1978).

[107] 18 U.S.C. § 201(e) (1976) provides:

> Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom--
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

[108] 18 U.S.C. § 1961(1)(B) (1976).

agency.[109] At trial, the prosecutor will move that the defendant be collaterally estopped by the inital bribery conviction from denying he committed the first act of "racketeering activity." ¶54 The motion would be granted because the burdens of proof in the trials are the same (beyond a reasonable doubt) and the defendant was able to confront his accusers and examine witnesses in the first trial. The government can now move on to prove the second bribery violation.

b. ACTION FOR RECOVERY OF MONIES BY UNITED STATES

¶55 Assume Mr. B was eventually convicted in the above example. After the conviction the United States can bring an action to recover the $40,000 in bribes.[110] To recover the money the government must show that Mr. B was involved in an exchange of an item for money[111] that resulted in a convict

[109] See, United States v. Frumento, 563 F.2d 1083, 1090-1092 (3rd Cir. 1977), cert. denied, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407, 415 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978).

[110] 18 U.S.C. § 218 (1976):

> In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority, privilege, benefit, certificate, ruling, decision, opinion, or rate schedule awarded, granted, paid, furnished, or published, or the performance of any service or transfer or delivery of anything to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof.

[111] See, note 107 supra.

under the bribery chapter of Title 18.[112] At trial, the government will move for summary judgment on the basis of collateral estoppel. The motion will be granted.

¶56 Mr. B's plea of guilty in the first bribery case will be taken as an admission of all elements of a bribery violation. Among these is Mr. B was a public official who exchanged his testimony for money.[113] Thus, the issue of exchange and conviction would be settled. Further, by his guilty plea he admitted he received $20,000.[114] Because that was an essential element of the bribery offense, he will be estopped from denying this amount is not recoverable. Similarly, the RICO conviction works to estop him on the issue of the second bribe exchange.[115] Because proof of the transaction, not the amount, is essential to the bribery conviction, the issue of the amount of the second bribe is not precluded.[116]

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[112] 18 U.S.C.A. § 201 (West 1969 & Supp. 1979).

[113] See, note 107 supra.

[114] The guilty plea necessarily determined the minimum amount of the bribe. The fine imposed by § 201(e) is $20,000 or three times the value received. Therefore a $60,000 fine implies at least a $20,000 bribe.

[115] This assumes the RICO conviction based on a violation of 18 U.S.C. § 201 as racketeering activity is considered a conviction under the bribery title for purposes of the civil action.

[116] See, United States v. Calacurcio, 514 F.2d 1, 6 (9th Cir. 1975).

c. USE BY PRIVATE PARTIES

¶57 Mrs. X buys a legitimate company with the purpose of issuing bogus securities through it. The company sells two issues of bogus securities to a hundred investors, each of whom pays $10,000 for his shares. She is subsequently charged with and convicted of a RICO violation. The "pattern of racketeering" is the fraudulent sale of two issues of securities; the "enterprise" is the company.

¶58 Subsequently, investor A brings an action to recover his $10,000 from Mrs. X on the theory that it was obtained fraudulent He will move for partial summary judgment on the issue of whether the securities were fraudulently sold. The motion will be granted as to all securities proved in the criminal action to have been fraudulently sold. He could not get summary judgment on Mrs. X' liability because he still must show that he received the bogus securities. In subsequent actions, other investors could get similar summary judgments as to fraud.[117]

[117] This "mass fraud" situation differs from the typical mass tort situation. In a mass tort the courts are concerned with incentives to litigate and inconsistent prior verdicts. See, Berner v. British Commonwealth Pacific Airlines, 346 F.2d 532, 538-541 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966). For example, suppose in the first 25 of 50 actions after an air crash, the airline is found not negligent, but in number 26 the airline is found negligent. The courts will not give numbers 27 to 50 summary judgment as to the airline's negligence because of the inconsistent prior judgments. In the mass fraud situation the civil plaintiffs rely on one criminal judgment. They do not rely upon the chain of estoppel found in mass torts. The result is that the mass fraud case poses fewer problems for use of collateral estoppel as long as the defendant had a full and fair opportunity to litigate in the prior action.

4. CONCLUSION

¶59 Besides the minor, but unresolved, problem of the legislative history, there appear to be no great difficulties in the use of a RICO conviction as collateral estoppel in a subsequent civil action. The general rules of collateral estoppel will still apply: The party being precluded had a full and fair opportunity to litigate the precluded issue and the issue determined in that earlier case is congruent with the issue precluded in the RICO case. In the ideal case, the victim of a RICO defendant will be able to obtain summary judgment on liability and need only litigate damages. Generally, this will not happen, but every issue which can be precluded benefits the civil plaintiff.

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RICO Class Actions

by

Mitchell Lowenthal

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SUMMARY

¶ 1 Private litigants who have been victimized by a pattern of racketeering activity can recover treble damages under Title IX of The Organized Crime Control Act of 1970.[1] Litigants may bring individual or class suits under this statute. The decision to bring a class suit will be influenced by the benefits class action litigation confers upon parties. These include: greater attorney's fees, sharing of initial court fees, a powerful bargaining position, and avoiding dismissals for mootness. RICO class litigants will also benefit from RICO's liberal venue and service of process provisions.

¶ 2 This work is intended to provide a general introduction to class action litigation. It sets out in detail the development of the modern class action. It also includes an extensive analysis of Rule 23 of the Federal Rules of Civil Procedure. The discussion, however, is not exhaustive.[2]

¶ 3 Essentially, this is an explanatory work on the application of various doctrines of civil procedure to class action

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[1] 18 U.S.C. § 1961 et seq. (1976)(hereinafter RICO).

[2] Exhaustive treatment of class actions can be found in H. Newberg, Newberg on Class Actions, (1977 and supp. 1978) (6 volumes) and C. Wright and A. Miller, Federal Practice and Procedure, Civil § 1751 et seq. (1972 and West Supp. 1978)(hereinafter ___ Fed. Prac. and Pro., supra note 2, Civil §___).

litigation. Generally it avoids discussion of the doctrines, themselves, by referring the reader to in-depth analyses appearing elsewhere in this material.

¶ 4 Special attention is paid to the application of class action litigation to RICO. In particular, the advantages and disadvantages of RICO class actions are discussed.

I. INTRODUCTION TO CLASS ACTION LITIGATION

A. Purpose of Class Actions

1. In General

> The King of Brobdingnag gave it for his opinion that, whoever could make two ears of corn, or two blades of grass grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together. In matters of justice, however, the benefactor is he who make one lawsuit grow where two grew before.[3]

¶ 5 The purposes of class action litigation[4] are myriad.[5] On a pragmatic level, class actions save the "time, effort and expense of both the parties and the courts by combining multiple lawsuits into one action."[6] An equally important purpose, historically,[7] and today, is enabling the court "to determine the rights of a numerous class of individuals by one common final judgment."[8] Class actions are also hailed as an incentive to small claimants "to litigate claims that would otherwise not be

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[3] Z. Chafee, Some Problems of Equity, 149 (1950).

[4] A class action is an action brought on behalf of other persons similarly situated to the named party. Class actions are also known as representative suits.

[5] See I H. Newberg, Newberg on Class Actions, §§ 1010-1010.6 (1977).

[6] Illinois Institute for Continuing Legal Education, Class Actions, § 2.4 at pp. 2-8 (1974). See also, 7 Fed. Prac. and Pro., supra note 2, Civil § 1751 at 505.

[7] Farmers Co-Operative Oil Co. v. Socony-Vacuum Oil Co., 43 F. Supp. 435, 437 (N.D. Iowa 1942).

[8] Succhem, Inc. v. Central Aguira Sugar Co., 52 F.R.D. 348, 353 (D. Puerto Rico 1971).

litigated because they are too small as to make it impractical to bring individual suits."[9] In addition to these broad objectives inherent in most class action litigation are narrow, more focussed ones, relating to the specific causes of action alleged in the suit.

2. Under RICO

¶ 6 RICO was enacted to bolster the fight to control 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 activity of those engaged in organized crime."[10] In affording victims the full range of civil remedies,[11] one must assume class action litigation under RICO was either contemplated to be, or necessarily must be, permitted.[12] In

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[9] Shields v. First Nat'l Bank, 56 F.R.D. 442, 445 (D. Ariz. 1972). See also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974)(Douglas, J., dissenting). Recently, however, this incentive has been eroded in the federal courts. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 384 U.S. 332 (1969); Comment, Zahn v. International Paper: Taking the Action Out of Class Action, or Can Zahn Be Avoided, 12 San Diego L. Rev. 208 (1974); Becker, Use and Abuse of Class Actions Under Amended Rule 23, Nw.U. L. Rev. 991, 992 (1974)("As a result of the decisions in [Zahn and Snyder], the use of class actions in diversity cases has diminished to the point of minor significance.")

[10] Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 923 (1970).

[11] See 18 U.S.C. § 1964 (1976).

[12] While this issue is yet to be litigated, there is at least one decision which intimates that class actions are permissible under RICO. See Hines v. City Fin. Co. of Eastover, Inc., 474 F.2d 430, 431 no. 3 (D.C. Cir. 1972). There is no reason to believe that RICO class actions will not be permitted.

addition to the general purposes of class action litigation, RICO class actions should effectively serve to deter criminal activity.

¶ 7 Class actions are mechanisms for deterring crime. Indeed, "[i]t is precisely because the class action deters the robber barons from plundering the poor that it has been hailed as a very important supplement to law enforcement."[13] That RICO affords successful plaintiffs treble damages[14] should geometrically increase the deterrent effect of a RICO class action, and silence those who claim that class actions are an overly expensive means of law enforcement."[15]

B. The Development of Class Action Litigation

1. English Bills of Peace

¶ 8 Class actions were developed and first used in England.[16] They were an:

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[13] Comment, Manageability of Notice and Damage Calculation in Consumer Class Actions, 70 Mich. L. Rev. 338, 338 (1971) (quoting letter from A. Pomeranz to Financial Editor, N.Y. Times, Ap. 25, 1971, Section 3 at 22, col. 8). See also King v. Vesco, 342 F. Supp. 120, 121 (N.D. Cal. 1972)([RICO private actions] are designed to supplement prosecutions by the Department of Justice to combat attempts by organized crime to takeover legitimate businesses.)

[14] 18 U.S.C. § 1964 (c) (1976).

[15] See Wilcox v. Commerce Bank, 55 F.R.D. 134, 138 (D. Kan. 1972), aff'd, 474 F.2d 336 (10th Cir. 1973)(The cost of judicial time and consequent impairment of rights of other litigants appears too high a price to pay for deterrence which can be affected through alternative means. Quoting from American College of Trial Lawyers, Report and Recommendations of the Special Committee of Rule 23 of the Federal Rules of Civil Procedure, 22 (March 15, 1972).)

[16] Chafee, Some Problems of Equity, 200-01 (1950); Walsh, Equity, § 118 at 553-60 (1930); Developments in the Law-Multiply Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 978 (1958).

> invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.[17]

This necessity resulted from procedural rules requiring the joinder of all innocent persons in order to decide common questions within a single action. The new procedural device became known as a bill of peace.[18] In order to maintain an action by or against some members[19] on behalf of the group, the court of chancery had to determine that the group was "so large as to make joinder impossible or impractical, that the group was adequately represented by those who were present, and that the group had a common interest in the question to be decided."[20] If the court permitted the representative action, the judgment would bind all members of the group.[21]

2. American Equity Rules

¶ 9 "[I]n addition to the English class action there existed in the United States another type in which the judg-

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[17] Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

[18] Z. Chafee, Some Problems of Equity, 149-99 (1950); 7 Fed. Prac. and Pro., supra note 2, Civil § 1751; I H. Newberg, Newberg on Class Actions, § 1004 (1977).

[19] Technically known as, and hereinafter referred to as, the class representatives.

[20] Developments in the Law - Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 928 (1958); See ¶¶ 45-53, infra, on the similarity of these requirements and those of modern Rule 23(a).

[21] Adair v. New River Co., 32 Eng. Rep. 1153 (Ch. 1805); 7 Fed. Prac. & Pro. supra note 2, Civil § 1751 at 504, 508.

ment did not affect the rights of those not before the court."[22]

The requirements of this non binding class action were codified in Equity Rule 48.[23] As with the English bill of peace, however, the American representative action was limited to actions in equity.[24] In 1912, Equity Rule 38[25] replaced Equity Rule 48. Significantly, it omitted the final sentence of Equity Rule 48 which prohibited issue preclusion against absent parties.

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[22] Developments in the Law-Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 928-29 (1958).

[23] Fed. Eq. R. 48:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the sought property brought before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

[24] Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363 (1921); 7 Fed. Prac. & Pro., supra note 2, Civil § 1751 at 506-07.

> This was true not only because of the rigid common law rules discouraging joinder of parties inherited from England but because the procedural machinery of the law courts was not well adopted to protect the rights of unknown, unnamed, or nonparticipating persons whose interest in the dispute might be concluded by the litigation.

[25] Fed. Eq. R. 38:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend on the whole.

¶10 Unfortunately, the courts could not agree on the precise meaning of the new rule. One case[26] held that all members of the class were bound by the judgment. A later case[27] limited the binding effect to property interests within the jurisdiction of the court.[28] Although the reason for this confusion is not clear,[29] the law remained ambiguous until the enactment of the Federal Rules of Civil Procedure in 1938.

3. Original Rule 23

¶11 Rule 23,[30] originally adopted in 1938, "represented a bold and well intentioned attempt to encourage more frequent

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[26] Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

[27] Christopher v. Brusselback, 302 U.S. 500 (1938).

[28] Id. at 805.

[29] Developments in the Law-Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 929 (1958)

> The coexistence of the various interpretations was probably due in part to the courts' preoccupation with questions of jurisdiction and due process, such as adequacy of notice, the existence of diversity of citizenship, and service of process, with the result that adequate consideration was not given to the nature of the class-action device.

[30] Rule 23. Class Actions.

> (a) Representation. If persons constituting a class are so numerous as to make it impractible to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

use of class actions."[31] The rule attempted to guide courts in determing which types of cases were appropriate for representative suits. It also extended the scope of class litigation to include legal, as well as equitable, actions.[32]

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(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.
(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.
(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision(a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

[31] 7 Fed. Prac. & Pro., supra note 2, Civil § 1752 at 511.

[32] Montgomery Ward & Co. v. Langer, 108 F.2d 182, 186 (8th Cir. 1948); 7 Fed. Prac. & Pro., supra note 2, Civil § 1752 511.

¶12 Class actions were permitted under the original rule if:

> (1) the class was too hard to join individually;
> (2) the named representatives would insure adequate representation of all members; and
> (3) the class fell within one of three defined categories.[33]

These categories were popularly[34] known as "true," "hybrid," and "spurious."[35] The label attached to the class had a significant effect upon jurisdictional requirements and the binding effect of judgments on absent members of the class.[36]

¶13 Jurisdictional requirements varied with the type of class action involved. "In a true class action, the jurisdictional amount [was] determined on the basis of the total amount of

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[33] See Fed. R. Civ. P. 23(a)(1-3)(1938).

[34] Developments in the Law-Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 930 (1958)(Professor Moore originated these labels, and they were almost completely accepted by the courts.)

[35] Wright, Law of Federal Courts § 72 at 348-49 (3d ed. 1976)

> . . . [A] "true" class action was permitted if the right involved was "joint or common or secondary in the sense that an owner of a primary right refuses to enforce that right a member of the class thereby becomes entitled to enforce it." Where the right involved was "several" but the object of the action was adjudication of claims that did or might affect specific property involved in the action, the label "hybrid" was applied. Finally, an action to enforce "several" rights, where there was a common question of law of fact affecting such rights and "common relief" was sought was a "spurious" class action.

(citing 7 Fed. Prac. & Pro., supra note 2, Civil § 1752).

[36] See ¶13, supra.

the class claim."[37] Aggregation was not permitted, however, for hybrid or spurious classes. In the latter classes, the "individual claims of each party [had to] satisfy the jurisdictional amount."[38]

¶14 Venue, for all classes,[39] was satisfied in the same manner as other federal cases, with the residence of the named representative determinative for diversity purposes.[40] In the event of a dismissal or compromise, notice was required by the court in true class actions. For spurious and hybrid classes, notice was discretionary.[41] This dichotomy of notice requirments was probably a reflection of the subsequent effect of judgments on absent members of the class.[42]

¶15 The binding effect of a judgment on absent members of the class was also determined by its judicially created label. The decree in a "true" class action bound all members of the class.[43] In a hybrid class action, the decree bound all members

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[37] Developments in the Law-Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 933 (1958)(citing Gibbs v. Buck, 307 U.S. 66, 72-75 (1939).

[38] Ames v. Mangel Co., 190 F.2d 344, 347 (2d Cir. 1951) (spurious); Sturgeon v. Great Lakes Steel Corp., 143 F.2d 819, 821-22 (6th Cir.), cert. denied, 323 U.S. 779 (1944)(hybrid).

[39] The stockholder derivative action is an exception to this general rule. See Fed. R. Civ. P. 321.

[40] Developments in the Law-Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 933-34 (1958); See also, Caroline Cas. Ins. Co. v. Local 612, Int'l Bhd. of Teamsters, 136 F. Supp. 941, 943 (N.D. Ala. 1956).

[41] Developments in the Law-Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 932 (1958).

[42] See ¶14 infra. See generally, Developments in the Law-Multiparty Litigation in Federal Courts, 71 Harv. L. Rev. 874, 934-39 (1958).

[43] 3 Moore, Federal Practice ¶23.11 at 3458 (2d Ed. 1948).

of the class only as to their right in property whose distribution or management was the subject of the litigation.[44] In a "spurious" class action, only parties before the court were bound.[45] The categorization of the class, therefore, determined the legal rights of absent members. Unfortunately, courts were unable to accurately differentiate the categories. "In practice the terms 'joint,' 'common,' etc., which were used as the basis for the Rule 23 classification, proved obscure and uncertain."[46] Confusion among the courts was widespread.[47] This confusion, and the resulting res judicata consequences, led to a complete revision of the Rule in 1966.[48]

4. Modern Rule 23

¶16 Modern Rule 23,[49] enacted in 1966, is the current guideline for class action litigation in federal courts. It:

> . . . describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the

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[44] 3 Moore, Federal Practice ¶23.11 at 3468-69 (2d Ed. 1948).

[45] 3 Moore, Federal Practice ¶23.11 at 3465 (2d Ed. 1948).

[46] Proposed Amendments to the Federal Rules of Civil Procedure, 39 F.R.D. 89, 98 (1966).

[47] See, e.g., Gullo v. Veterans' Coop. Housing Ass'n, 13 F.R.D. 11 (D.D.C. 1952); Shipley v. Pittsburgh & L.E.R. Co., 70 F. Supp. 870 (W.D.Pa. 1947); Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D.Pa.), rev'd 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F. Supp. 592 (E.D.Pa.), rev'd sub. nom., Pennsylvania Co. for Insurances on Lives and Granting Immunities v. Deckert, 123 F.2d 979 (3d Cir. 1941).

[48] 7 Fed. Prac. & Pro., supra note 2, Civil § 1752 at 511. "[A]fter a quarter century of experience, it generally was conceded that [Rule 23] had very serious defects and was in need of revision."

[49] Fed. R. Civ. P. 23 (hereinafter Rule 23).

> end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.[50]

The new rule substitutes a functional test for the conceptualism of the original rule.[51] It applies to all actions in law and equity, as did the original rule, with special provisions under separate rules for shareholder's derivative actions,[52] and actions involving unincorporated associations.[53] The balance of this work consisting of an analysis of Modern Rule 23 litigation.

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[50] Proposed Amendments to the Federal Rules of Civil Procedure, 39 F.R.D. 69, 99 (1966).

[51] Thus, the labels "true," "hybrid," and "spurious" do not apply to modern class action litigation. See Snyder v. Harris, 394 U.S. 332, 335 (1969).

[52] Fed. R. Civ. P. 23.1.

[53] Fed. R. Civ. P. 23.2.

II. JURISDICTIONAL REQUIREMENTS OF MODERN CLASS ACTION LITIGATION

A. Subject Matter Jurisdiction

¶17 Congressional enabling legislation authorizes several procedures for bringing a class action in federal court.[54] Under RICO, however, only two federal statutes are applicable.[55]

1. 28 U.S.C. Section 1331

¶18 Federal question of jurisdiction under section 1331 is acquired when two prerequisites are satisfied: (1) the matter in controversy, exclusive of interests or costs, exceeds $10,000,[56] and (2) the case arises under the Constitution, laws or treaties of the United States.[57] The general rule is that each member of the class must individually satisfy the

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[54] See, e.g., 28 U.S.C. §§ 1331-35, 1337-38, 1343 (1976).

[55] 28 U.S.C. § 1331 (1976) which provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and arises under the Constitution, laws, or treaties of the United States . . .

and 28 U.S.C. § 1337 (1976) which provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

[56] 28 U.S.C. § 1331 (1976).

[57] 28 U.S.C. § 1331 (1976).

$10,000 minimum; aggregation of claims is not permitted.[58] The courts reason that aggregation would expand federal jurisdiction,[59] which Rule 82 forbids.[60]

¶19 An exception to the general rule permits aggregation in cases where two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.[61] In most cases, however, claims are found to be separate and distinct.[62] Since the test for this characterization

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[58] Snyder v. Harris, 394 U.S. 332, 335-37 (1969); Founding Church of Scientology v. Director, F.B.I., 459 F. Supp. 748, 755 (D.D.C. 1978); Rosack v. Volvo of America Corp., 421 F. Supp. 933, 936 (N.D. Cal. 1976); Lunsford v. United States, 418 F. Supp. 1045, 1050 (D.S.D. 1976), aff'd 570 F.2d 221 (8th Cir. 1977).

[59] Snyder v. Harris, 394 U.S. 332, 337 (1969); Lunsford v. United States, 412 F. Supp. 1045, 1049 (D.S.D. 1976), aff'd, 570 F.2d 221 (8th Cir. 1977).

[60] Fed. R. Civ. P. 82. This rule prohibits the Rules from being "construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

[61] Snyder v. Harris, 394 U.S. 332, 335 (1979); Black v. Beame, 5550 F.2d 815, 818 (2d Cir. 1977); Weeks v. United States, 406 F. Supp. 1309, 1325 n. 22 (W.D. Okla. 1975), rev'd on other grounds sub. nom. Delaware Tribal Bus. Com. v. Weeks, 430 U.S. 73 (1977).

[62] Aggregation was permitted in Gallagher v. Continental Insurance Co., 502 F.2d 827 (10th Cir. 1974)(state and federal taxpayers sued state officials and a contractor for recovery of payments allegedly unlawfully disbursed in payment of work done on tunnel construction contract); New Jersey Welfare Rights Organization v. Cahill, 483 F.2d 723 (3d Cir. 1973)(welfare rights organization challenges State A.F.D.C. program changes); Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969)(former employees sued employer for a determination of their rights under the employer's profit and sharing plan and trust); Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), cert. denied, 396 U.S. 1037 (1970)(owners of racehorses sued racetracks over distribution scheme of purse monty); Clay, Inc. v. Northwestern Public Service Co., 63 F.R.D. 34 (D.S.D. 1974)(electric consumers sue power company for rate overcharges). These cases are the ex-

is unclear, successfully predicting whether aggregation will be permitted can only be accomplished by surveying and analyzing prior decisions.[63]

¶20 A further restriction upon all non-aggregable claims is that all members of the class, not merely the named representatived, must satisfy the amount in controversy requirement.[64]

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ception, however. See C. Wright, Federal Courts, § 72 at 356 n. 91 (3d Ed. 1976). Aggregation was denied in Holloway v. Bristol-Myers Corporation, 485 F.2d 986 (D.C. Cir. 1973)(consumers sue manufacturer for false and misleading advertising); Givers v. W.T. Grant Co., 457 F.2d 612 (2d Cir.), vacated per curium, 409 U.S. 56 (1972)(consumers sued retailer for usurious and unconsionable installment sales contract); City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1971)(residents sue neighboring city for damages and other relief arising from noise in operation of airport by defendant city); Ainson v. General Motors Corp., 377 F. Supp. 209 (N.D. Ohio 1974) (consumers sued manufacturer for price overcharging under the Economic Stabilization Act); Knucles v. Weinberger, 371 F. Supp. 565 (N.D. Cal. 1973)(recipients of Social Security retirement, survivors, or disability benefit sued the federal government to enjoin the recoupment of overpayments); Ramirez v. Weinberger, 363 F. Supp. 105 (N.D. Ill. 1973), aff'd 415 U.S. 970 (1974)(students sued the federal government to prevent termination of eligibility for benefits at age 21); 27 Puerto Rican Migrant Farm Workers v. Shade Tobacco Growers Agricultural Ass'n, Inc., 352 F. Supp. 986 (D. Conn. 1973), aff'd per curiam, 486 F.2d 1052 (2d Cir. 1974)(employees sued employer for breach of contract); Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971), aff'd 469 F.2d 1033 (2d Cir. 1972), aff'd, 414 U.S. 291 (1974)(lakefront owners and lessees sued corporation for polluting the lake and damaging their property).

[63] See 7 Fed. Prac. & Pro., supra note 2, Civil § 1756 at 562-63.

[64] Zahn v. International Paper Co., 414 U.S. 291, 301 (1974). See also C. Wright, Federal Courts, § 72 at 356 (3rd Ed. 1976)(Although . . . the Zahn court spoke of [23](b)(3) class actions, there is nothing in its reasoning that would suggest that any other rule will govern other kinds of class actions.)

Formerly, courts allowed absent class members lacking jurisdictionally sufficient monetary claims to remain in the class under the doctrine of ancillary jurisdiction.[65] Zahn[66] necessarily overules these cases. Under this new formulation, any class member who fails to satisfy the amount in controversy requirement must be dismissed.[67]

2. 28 U.S.C. Section 1337

¶21 Under title 28, section 1337, district courts have "original jurisdiction of any action or proceeding arising under any Act of Congress regulating commerce . . . "[68] There is no amount in controversy requirement.[69] Whether RICO falls under this statute has not been litigated, but there is a strong probability that it will.[70]

By the concept of ancillary jurisdiction it is held that:

> a district court acquires jurisdiction of a case or controversy as an entirety, and may, as an incident to disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented.

C. Wright, Federal Courts, § 9 at 21 (3rd Ed. 1976). See, e.g., Usch v. Chicago & Eastern Ill. R.R. Co., 279 F. Supp. 912 (N.D. Ill. 1968); Neville v. Delta Ins. Co., 45 F.R.D. 345 (D. Minn. 1968); Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 R.F.D. 39, 51 (1967).

[66] Zahn v. International Paper Co., 414 U.S. 291 (1973).

[67] Zahn v. International Paper Co., 414 U.S. 291, 300 (1973).

[68] 28 U.S.C. § 1337 (1976).

[69] Felter v. Southern Pacific Co., 359 U.S. 326, 329 n. 4 (1959); Hales v. Minn-Dixie Store, Inc., 500 F.2d 836, 840 (4th Cir. 1974).

[70] See ¶ 6 , of Initiating a Private Treble Damage Action in Federal Court Under the RICO Statute: Jurisdiction, Venue, Process, Pleading, Parties (hereinafter RICO Civil Proceedings).

B. Personal Jurisdiction

¶22 "In class actions involving a plaintiff class, jurisdiction over defendants is acquired and service of process effected as in any other action."[71] RICO has special service provisions[72] which will be applicable in both the individual, and the class, suit.[73]

C. Venue

¶23 There are no special venue rules unique to class actions.[74] "Only the residence of the named representatives," however, "is relevant for determining whether venue is proper."[75] IT is unnecessary for absent and intervening members to satisfy the venue requirement.[76] Aside from this interpretive rule, RICO venue provisions[77] for individual suits are equally applicable to class suits.

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[71] 7 Fed. Prac. & Pro., supra note 2, Civil § 1757 at 567.

[72] 18 U.S.C. § 1965 (1976). See RICO Civil Proceedings, supra note 70.

[73] 7 Fed. Prac. & Pro., supra note 2, Civil § 1757 at 567.

[74] 7 Fed. Prac. & Pro., supra note 2, Civil, §1757 at 568.

[75] Id.

[76] Id.

[77] 18 U.S.C. § 1965 (1976). See ¶¶19-58 in RICO Civil Proceedings for an in-depth discussion.

III. PROPER PARTIES IN MODERN CLASS ACTION LITIGATION

¶24 Once a case is in the proper court,[78] the focus will shift to whether the parties are proper. In a class action suit, the critical inquiries are: (1) does the representative have standing;[79] (2) is the case or controversy moot;[80] and (3) have all requirements of Rule 23[81] been satisfied? Failure to satisfy

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[78]Once subject matter and personal jurisdictional requirements, as well as venue provisions, have been satisfied.

[79]"Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution or that controversy is what has traditionally been referred to as the question of standing to sue." Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972).

[80]A case is moot where a determination is sought upon some matter which when rendered, for any reason cannot have any practical effect upon a then existing controversy. See De Funis v. Odegaard, 416 U.S. 312, 317 (1974). See also St. Pierre v. United States, 319 U.S. 41 (1943).

[81]Fed. R. Civ. P. 23,

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
> (b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of

[81]cont'd.

(A) inconsistent or varying adjudications respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (C) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision(b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

[81]cont'd.

(3) The judgment in an action maintained as a class action under subdivision(b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision(b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

any one of these requirements can lead to dismissal.[82]

A. Standing to Sue

¶25 In non-representative suits, an individual must allege a sufficient personal stake in the controversy to satisfy the requirement of standing.[83] By this requirement, courts attempt to insure that controversies will be zealously litigated by adverse parties.[84] This "fight theory"[85] approach to the adversary system is premised on the assumption that there is a greater likelihood of arriving at the truth when both sides are adequately represented. This philosophy is embodied in class action standing.[86]

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[82] Sierra Club v. Morton, 405 U.S. 727 (1972); (standing); DeFunis v. Odeggard, 416 U.S. 312 (1974)(mootness); McAdory v. Scientific Research Instruments, Inc., 355 F. Supp. 468 (D. Md. 1973)(Rule 23(a, L) and (c)(1) violations).

[83] Since this paper is designed to apply doctrines to the special situation of class actions, see ¶ 3, supra, the law of individual standing will not be discussed here. For an in-depth discussion of that subject, specifically relating to RICO, see Standing for the RICO Treble Damages Action.

[84] Baker v. Carr, 369 U.S. 186, 204 (1962)(standing is required to "assure that concrete adverseness which . . . sharpens the presentation of issues upon which the court so largely depends for illumination of different . . . questions").

[85] Frank, Courts on Trial, 80-103 (1973).

[86] I H. Newberg, Class Actions, § 1074 at 126 (1977),

> [The] personal stake in the outcome concept is embodied in the doctrine of threshold individual standing.

Threshold individual standing is the first tier of the standing requirement for class actions. Sierra Club v. Morton, 405 U.S. 727(1972); Weiner v. Bank of King of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973).

¶26 The standing test for class actions combines individual standing requirements with Rule 23 requirements. To assert the claims of a class, the representative[87] must allege sufficient individual interest.[88] He must also comply with the requirements of Rule 23(a) and (b).

1. Threshold Standing Inquiry

¶27 Whether individual standing requirements have been satisfied is generally the threshold inquiry in class action litigation.[89] Addressing this issue, the Supreme Court stated:

> Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other unidentified members of the class to which they belong and which they purport to represent. Unless these [named representatives] can thus demonstrate the requisite case or controversy between themselves personally and [the defendants], none may seek relief on behalf of himself or any member of the class.[90]

Since a representative is not permitted to use injury to members of the representative class to "boot strap" standing,[91] care must be taken to insure that the class representative can satisfy individual standing requirements.

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[87] Rule 23 permits "one or more members of a class" to sue as representative parties.

[88] See ¶25, note 83, supra.

[89] See ¶26, note 88, supra.

[90] Warth v. Seldin, 422 U.S. 490, 502 (1975)(citing O'Shea v. Littleton, 414 U.S. 488, 494 (1976)). See also: Senior v. Eastern Welfare Rights Organization, 426 U.S. 26, 40 n. 20 (1976); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972); Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 690 (E.D. Pa. 1973)("It is a fundamental principle of law that a plaintiff must demonstrate injury to himself by the parties whom he sues before that plaintiff can successfully state a cause of action.").

[91] Weiner v. Bank of King of Prussia, 358 F. Supp. 684, 694 (E.D. Pa. 1973); Allee v. Medrano, 416 U.S. 802 (1974); I Newberg, Class Actions, § 1040 at 83 (1977)(" . . . one cannot acquire individual standing by virtue of bringing a class action.").

¶28 The concept of organizational standing represents a minor deviation from the requirements of individual standing. Under this doctrine, an organization may sue to vindicate the rights of its members[92] The injuries of the organization's members are imputed to the organization itself, establishing "individual injury" for the organization.[93] Courts are more willing to authorize organizational standing when the relief sought is prospective--such as an injunction--because then "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured."[94] Under certain circumstances, states,[95] as representative litigants, may assert the rights of their citizens as parens patriae.[96]

¶29 Two other deviations are shareholders' derivative actions and actions relating to unincorporated associations. Both situations have special rules[97] whose requirements must

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[92] Sierra Club v. Morton, 405 U.S. 727, 738-39 (1972); NAACP v. Burton, 371 U.S. 415, 428 (1963); Arkansas Education Association v. Board of Education, 446 F.2d 763, 766 (8th Cir. 1971).

[93] NAACP v. Alabama, 357 U.S. 449, 458-59 (1958).

[94] Warth v. Seldin, 422 U.S. 490. 515 (1975).

[95] Note, however, that a state may not sue the Federal government to vindicate the rights of its citizens. Massachusetts v. Millon, 262 U.S. 447, 485-86 (1923).

[96] Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945); Missouri v. Illinois, 180 U.S. 208, 241 (1901).

[97] Fed. R. Civ. P. 23.1, Derivative Actions by Shareholders,

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the com-

be satisfied if the litigants are to acquire standing.[98]

2. Secondary Standing Requirement

¶30 Upon satisfying the threshold inquiry, the focus shifts to the relationship between the class and the representatives.[99] Obviously, the representative must be a member of the class

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> plaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Fed. R. Civ. P. 23.2, Actions Relating to Unincorporated Associations,

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

[98] Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966).

[99] Whereas the focus for individual standing is primarily "on [representative] seeking to get his complaint before a federal court." Flast v. Cohen, 392 U.S. 83, 99 (1968).

represented.[100] To be a member of the class, the representative must possess the same interest and suffer the same injury shared by all members of the class he represents.[101] Indeed, it is unlikely that a party who is not a member of the class can fairly and adequately protect the interests of the class.[102]

¶31 Once the representative establishes individual standing and class membership, he must meet the requirements of Rule 23. These requirements, however, reflect the philosophy of standing. Indeed, "the plaintiff who has individual standing to sue, has begun to satisfy the Rule 23 requirements of typicality and adequate representation."[103]

3. Special RICO Standing

¶32 An important question, yet to be litigated, concerns the

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[100] Bailey v. Patterson, 369 U.S. 31, 32-33 (1962)("[Plaintiffs] cannot represent a class of whom they are not a part."); Weit v. Continental Illinois National Bank and Trust Co., 60 F.R.D. 5, 7 (N.D. Ill. 1973)("It is fundamental that the named plaintiff brings suit only on behalf of those who are similarly situated to himself." Herbst v. Able, 45 F.R.D. 451, 455 (1968)("Only members of the class can sue as representative parties on behalf of the class."); Fed. R. Civ. P. 23(a)("One or more members of a class may sue or be sued as representative parties on behalf of all . . . ")

[101] Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974); Seligson v. Plum Tree, Inc., 55 F.R.D. 259, 261 (E.D. Pa. 1972)("[Plaintiff] must have suffered or be threatened with the same injury alleged on behalf of the class.")

[102] Fed. R. Civ. P. 23(a)(4),

> One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representatives parties will fairly and adequately protect the interests of the class.

[103] I H. Newberg, Newberg on Class Actions, § 1074 at 127 (1977

injury each RICO litigant must suffer. Most RICO litigants will be victims of a series of racketeering acts, or of a single act which is part of a conspiracy to commit other acts. Unquestionably, RICO affords these litigants standing. Absent a conspiracy, however, it is unclear whether an individual whose injury is the result of a single act, but is unaffected by the pattern, may sue under RICO.

¶33 Narrowly read, the statute requires each RICO plaintiff to have been the victim of at least two acts of racketeering activity. Litigants injured by only a single act, assuming the absence of a conspiracy, would lack standing. For example, each RIOC litigant must have been the victim of two mail frauds, a wire fraud and a conspiracy, or some other combination of underlying RICO offenses. Read more broadly, RICO would permit victims of separate racketeering acts, such as a single mail fraud or a single securities fraud, to join together as plaintiff and aggregate[104] their injuries to satisfy the RICO pattern of activity requirement. This approach focuses attention on the defendant's activities, as well as the plaintiff's injuries.[105]

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[104] In this section, aggregation is used differently than in ¶¶18-21. In the latter section, aggregation referred to joining together the monetary claims of individual litigants to satisfy the amount in controversy requirement for subject matter jurisdiction under 28 U.S.C. § 1331. Here, aggregation refers to the joining of the injuries of individual litigants to satisfy the RICO pattern of activity requirement.

[105] This novel approach seems reasonable when applied to a statute which prohibits a pattern of activity, not individual, isolated acts. It should be noted that RICO is the only federal statute that proscribes a pattern of activity.

¶34 The broader interpretation of RICO is the preferred approach. RICO grants standing to "any person injured in his business or property by reason of a violation of section 1962." A liberal reading of this provision is consistent with the congressional mandate.[106] Injury to an individual from a single racketeering act, part of a pattern of racketeering activity, would be "by reason of a violation of section 1962" even though only the single act and not the pattern affected the victim. For example, if A committed a mail fraud upon B, and then upon C, both B and C could sue for treble damages under RICO. They would allege a pattern of activity--the two mail frauds--and an injury suffered as a result of that pattern. This approach would be especially useful in class actions; several individuals could aggregate their injuries to allege a RICO violation.

B. Mootness[107]

¶35 The test of mootness in class actions is similar to the test of standing, and is considered after the standing determination is made.[108] The named plaintiff must show that the threat of injury to himself is "'real and immediate,' not 'conjectual'

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

[107]See generally, I Newberg, Newberg on Class Actions, §§ 1085-92 (1977); Developments in the Law-Class Actions, 89 Harv. L. Rev. 1317 (1976); Note, A Search for Principles of Mootness in the Federal Courts, Part Two, Class Actions, 54 Texas L. Rev. 1289 (1976); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representatives, 1974 Duke L. J. 573.

[108]Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376 (1974)("Mootness questions arise only once a court has determined, usually implicitly, that a litigant has standing to bring the action.").

or 'hypothetical.'"[109] The plaintiff must also be a "member of the class which he seeks to represent at the time the class action is certified by the district court."[110] If these requirements are not satisfied, the case will be dismissed as moot.[111]

¶36 In an individual action, the plaintiff's stake in the outcome of the litigation must continue throughout the trial and any subsequent appeal; the mootness of a point is an issue that can be raised at any time.[112] The rigor of this requirement is mitigated in class actions by the court's willingness to look beyond the claims of the representative to those of the class.[113]

1. Importance of Class Certification[114]

¶37 If an action is moot with respect to the named representatives before the class can be certified,[115] the entire

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[109] Sosna v. Iowa, 419 U.S. 393, 403 (1975) citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Golden v. Zwickler, 394 U.S. 103, 109-10 (1969).

[110] Sosna v. Iowa, 419 U.S. 393, 403 (1975) citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

[111] Marchand v. Director, United States Probation Office, 421 F.2d 331 (1st Cir. 1970).

[112] Roe v. Wade, 410 U.S. 113, 125 (1973); Golden v. Zwickler, 394 U.S. 103, 108 (1969); United States v. Munsingwen, 340 U.S. 36, 39 (1950).

[113] See, I Newberg, Newberg on Class Actions, §§ 1010.1(a), 1090, 1092 (1977).

[114] If a court determines that a class action is maintainable, it will certify the class under Rule 23(c)(1).

[115] Fed. R. Civ. P. 23(c)(1) requires that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

action is not necessarily moot.[116] The district court should decide the class certification motion prior to deciding whether or not the case is moot.[117] Assuming the action is not moot at the outset, if the class is certified, the certification may "relate back" prior to the mootness of the representative's claim,[1] and the action will survive.[119] A pending motion for certification is permitted to relate back for purposes of mootness because it "sufficiently, though provisionally, bring[s] the interests of class members before the court so the apparent conflict between their interests and those of the defendant will avoid a mootness."[120] Certification of the class, therefore, "significantly affects the mootness determination."[121]

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[116] If it were an individual action, however, the case would be dismissed.

[117] Susman v. Lincoln American Corp., 587 F.2d 866, 870 (7th Cir. 1978), petition for cert. filed 47 U.S.L.W. 3688 (U.S. Jan. 26, 1979)(No. 78-1169).

[118] Sosna v. Iowa, 419 U.S. 393, 402 n. 11 (1975); Susman v. Lincoln American Corp., 587 F.2d 866, 870 (7th Cir. 1978); Wright v. Califano, 587 F.2d 345, 350 (7th Cir. 1978).

[119] See ¶39, infra. Whether the certification will relate back to the filing of the complaint will "depend upon the circumstances of the particular case." Sosna v. Iowa, 419 U.S. 393, 402 n. 11 (1975).

[120] Susman v. Lincoln American Corp., 587 F.2d 866, 869 (7th Cir. 1978).

[121] Sosna v. Iowa, 419 U.S. 393, 399 (1975).

2. Post-certification of the Class

¶38 Any time after the certification of the class,

> the mooting of a claim set forth by the named plaintiff does not automatically deprive a court of jurisdiction over the cause of action asserted by the class. A justiciable legal controversy may continue to exist between the class as an entity and defendant, thus satisfying Article III.[122]

In fact, as long as a legal controversy exists between the parties, the court possesses the constitutional power to hear the case.[123]

¶39 Whether or not the case will be permitted to continue is within the court's discretion, and depends on several factors:

> whether (1) the action would be considered a continuing controversy in the absence of class allegation; (2) the intervening of events causing the mootness have individual or class-wide impact; and (3) the mootness of the plaintiff's claim occurs before or after a class ruling or a judgment on the merits.[124]

At this point, the courts appear to have three options: continue to permit the named representative to represent the class,[125] notify absent class members, inviting them to intervene and become the class representatives,[126] or "remand the action to the

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[122] Geraghty v. United States Parole Commission, 579 F.2d 238, 248 (3d Cir. 1978), cert. granted 47 U.S.L.W. 3586 (1979)(No. 78-572).

[123] Geraghty v. United States Parole Commission, 579 F.2d 238, 250 (3d Cir. 1978)(emphasis in original), cert. granted 47 U.S.L.W. (1979)(No. 78-572).

[124] I. Newberg, Newberg on Class Actions, § 1090 at 151-52 (1977).

[125] Gatung v. Butler, 52 F.R.D. 389, 394-95 (D. Conn. 1971).

[126] Rothman v. Gould, 52 F.R.D. 494, 496 (S.D.N.Y. 1971); Fed. R. Civ. P. 23(d)(2)("The court may make appropriate orders . . . requiring . . . that notice be given . . . of the opportunity of members . . . to come into the action.")

trial court for a consideration of mootness in light of the continued viability of class claims and the possible availability of a substitute class representative."[127] Therefore, even after a finding of mootness as to the named representative, the case may still continue. Furthermore, there are numerous exceptions to the mootness doctrine which will avoid dismissal even with respect to the named representative.

3. Exceptions to the Doctrine of Mootness

¶40 There are four exceptions to the docrine of mootness[128] which might affect a RICO class action.[129] These exceptions, however, apply only where prospective relief is sought. When the relief sought by the plaintiff is voluntarily brought about by the defendant, the case will not be held moot unless the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated."[130] This burden "is heavy one" to satisfy.[131] When the plaintiff has received the relief sought because of a change in conditions, the case is not

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[127] I H. Newberg, Newberg on Class Actions § 1092(a) at 163 (1977). See Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973).

[128] See I H. Newberg, Newberg on Class Actions § 1088 (1977 and Supp. 1978), from which the bulk of this section is taken. (1) Voluntary cessation of challenged practices; (2) charges of condition caused by or capable of being altered by the defendant; (3) challenged conduct ceases but capable of repetition; and (4) temporary change of conditions.

[129] It is doubtful, however, that very many RICO fact patterns will satisfy these exceptions.

[130] United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945).

[131] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

moot if the change is due to the defendant's action, or the conditions are capable of being altered back to their original state by the defendant.[132] Mootness is also awarded when the challenged conduct ceases, yet it is capable of repetition and the plaintiff has a stake in its non-recurrence.[133] Finally, when changed conditions that moot a plaintiff's immediate claims are of a temporary nature, the controversy continues and is not moot.[134]

C. Modern Rule 23

¶41 If a litigant who is otherwise a property party and who brings suit in the proper court, satisfies the requirements of Rule 23, the case is a valid class action and can proceed as such. The Rule is divided into five sections. The first three specifically relate to the initiation and maintenance of a class action,[135] while the latter two relate to (1) court orders in the conduct of class actions,[136] and (2) dismissals or compromises.[137] The remainder of this paper[138] is devoted to a

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[132] Kates, Memorandum of Law of Mootenss--Part I, 3 Clearinghouse Rev. 213, 218-19 (1970).

[133] Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 125-27 (1974); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 178-79 (1968).

[134] Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Pierce v. LaVallee, 293 F.2d 233, 234 (2d Cir. 1961).

[135] Fed. R. Civ. P. 23(a), (b), and (c).

[136] Fed. R. Civ. P. 23(d).

[137] Fed. R. Civ. P. 23(e).

[138] There is also a discussion of attorney's fees and an analysis of the advantages and disadvantages of class actions under RICO.

discussion of these requirements.

IV. REQUIREMENTS OF MODERN RULE 23

A. Prerequisites

1. A Class Must Exist

¶42 An essential and self evident prerequisite of a Rule 23 action is the existence of a class.[139] Although not specifically required by the Rule, this prerequisite is invoked by the courts.[140] The existence of a class is held a question of fact, to be determined on a case by case basis.[141]

¶43 The courts are reluctant to precisely defend the term "class," or formulate a general test, because of the many different situations in which the question arises.[142] Some courts focus on whether the other requirements of Rule 23 have been satisfied. If so, the action is held to be properly brought.[143] Other courts simply allow the action to be brought if it would further the purposes of Rule 23.[144] In general, every member of

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[139] Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976).

[140] 7 Fed. Prac. and Pro., supra note 2, Civil § 1759 at 573.

[141] Chaffer v. Johnson, 229 F. Supp. 445, 448 (S.D. Miss. 1964), aff'd, 352 F.2d 514 (5th Cir.), cert. denied, 384 U.S. 956 (1965); Clark v. Thompson, 206 F. Supp. 539, 542 (S.D. Miss. 1962), aff'd per curiam, 313 F.2d 637 (5th Cir.), cert. denied, 375 U.S. 951 (1963).

[142] 7 Fed. Prac. and Pro., supra note 2, Civil § 1760 at 579-80.

[143] Carpenter v. Davis, 424 F.2d 257, 260 (5th Cir. 1970); Rumler v. Bd. of School Trustees for Lexington County Dist. No. 1 Schools, 327 F. Supp. 729, 739 (D.S.C.), aff'd per curiam, 437 F.2d 953 (4th Cir. 1971).

[144] 7 Fed. Prac. and Pro., supra note 2, Civil § 1760 at 580.

the class need not be identifiable at the outset of the action.[145] Outlines of the membership, however, must be determinable.[146] Due to the restrictive construction currently given to Rule 23,[147] care must be taken to accurately describe the class. Should the court object to the proferred class definition, it may either dismiss the action,[148] limit the class,[149] or permit the action to proceed on an individual basis.[150]

2. The Representative Must Be a Member of the Class

¶44 A second prerequisite read in by the courts[151] requires that the named representative must be a member of the class.[152]

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[145] Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 645 (4th Cir. 1975); King v. Kansas City So. Indus., Inc., 519 F.2d 20, 27 (7th Cir. 1975).

[146] Alliance to End Repression v. Rochford, 565 F.2d 975, 977-78 (7th Cir. 1977); Berman v. Narragansett Racing Ass'n, Inc., 414 F.2d 311, 317 (1st Cir. 1969), cert. denied, 396 U.S. 1037.

[147] See 7 Wright, Miller, & Kane, Federal Practice and Procedure, § 1754 at 81 (Supp. 1979); Comment, The Federal Courts Take a New Look at Class Actions, 27 Baylor L. Rev. 751 (1975).

[148] Coates v. Ill. State Bd. of Educ., 419 F. Supp. 25, 28 (N.D. Ill. 1976)(dictum), aff'd on other grounds, 559 F.2d 445 (7th Cir. 1977).

[149] Taylor v. Safeway Stores, Inc., 524 F.2d 263, 269 (10th Cir. 1975); Aiken v. Obledo, 442 F. Supp. 628 (E.D. Cal. 1977); Price v. Skolnick, 54 F.R.D. 261, 265 (S.D.N.Y. 1971).

[150] Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 354 F. Supp. 778, 783 (D. Conn.), aff'd in part and rev'd in part on other grounds, 482 F.2d 1333 (2d Cir. 1973).

[151] 7 Fed. Prac. and Pro., supra note 2, Civil § 1759 at 573. Fed. R. Civ. P. 23(a) does require, however, that "one or more members of a class may sue or be sued as representative parties on behalf of all . . . "

[152] Bailey v. Patterson, 369 U.S. 31, 32-33 (1962); DuPree v. United States, 559 F.2d 1151, 1153 (9th Cir. 1977); Fanty v. Pa. Dep't of Public Welfare, 551 F.2d 2, 7-8 n. 4 (3d Cir. 1977).

This is also required for standing to sue in class action litigation.[153] Consequently, if the representative is not a member[154] of the class, it will not be certified and the class action will be dismissed.[155]

3. Joinder of All Class Members Must Be Impractical

¶45 Rule 23(a)(1) permits maintenance of a class action only[156] if "the class is so numerous that joinder of all members is impractical."[157] "Impracticability" does not mean "impossibility"; a showing of extreme difficulty or inconvenience will suffice.[158] A precise test has not been formulated, as what constitutes impracticability is largely within the discretion of the court.[159]

¶46 Courts consider several factors regarding the impracti-

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[153] See ¶30, note 100, supra.

[154] If there is more than one representative, only one must be a member of the class. Hunter v. Atchison Topeka & Santa Fe Railroad Co., 188 F.2d 294 (7th Cir.), cert. denied, 342 U.S. 819 (1951); Aiken v. Obledo, 442 F. Supp. 628, 658 (N.D. Cal. 1977).

[155] Denny v. Barber, 576 F.2d 465, 469 (2d Cir. 1978); Fitzgerald v. Kriss, 10 F.R.D. 51, 55 (N.D.N.Y. 1950). The case, however, may be permitted to proceed on an individual basis. See ¶43, note 150, supra.

[156] Failing to satisfy this prerequisite will prevent certification of the class and will lead to dismissal or permission to proceed only on an individual basis. Roman v. ESB, Inc., 550 F.2d 1343, 1349 (4th Cir. 1976); Sims v. Parke Davis & Co., 334 F. Supp. 774, 781 (E.D. Mich. 1971), aff'd, 453 F.2d 1259 (6th Cir.), cert. denied, 405 U.S. 978 (1972).

[157] Fed. R. Civ. P. 23(a)(1).

[158] Sweet v. General Tire & Rubber Co., 74 F.R.D. 333, 334 (N.D. Ohio 1976); United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10, 16 (D. Nev. 1975); Fox v. Prudent Resources Trust, 67 F.R.D. 74, 78 (E.D. Pa. 1975).

[159] Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712, 716 (S.D. Fla. 1979)(The trial court has broad discretion to rule on whether joinder is "impracticable.")

cability of joinder. The size of the class is an important, although indeterminative factor.[160] No precise line can be drawn delineating when a class is so large that joinder is impractical due to conflicting decisions among jurisdictions.[161] Broad generalizations, however, are possible. Most courts hold that twenty-five members is too small,[162] while one-hundred and fifty is sufficiently large.[163] Non-numerical factors are highly important, too. Indeed,

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[160] Aiken v. Obledo, 442 F. Supp. 628, 658 (E.D. Cal. 1977); Jaquandan v. Giles, 379 F. Supp. 1178, 1184 (N.D. Miss. 1974), aff'd in part, 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977); Barnes v. Board of Trustees, Michigan Veterans Trust Fund, 369 F. Supp. 1327, 1333 (W.D. Mich. 1973)(" . . . [T]he practicability of joinder is not a question which is to be resolved by a mere inspection of numbers alone. The court should examine all of the circumstances of the case."); Davy v. Sullivan, 354 F. Supp. 1320, 1325 (D. Ala. 1973).

[161] 7 Fed. Prac. and Pro., supra note 2, Civil § 1762 at 596.

[162] Wilburn v. Steamship Trade Ass'n of Baltimore, Inc., 376 F. Supp. 1228 (D. Md. 1974); Moreland v. Rucker Pharmacal Co., 63 F.R.D. 611 (W.D. La. 1974); Corp. of Haverford College v. Rieker, 329 F. Supp. 1196 (E.D. Pa. 1971); Moscarelli v. Stamm, 288 F. Supp. 453 (E.D.N.Y. 1968) Contra, Manning v. Princeton Consumer Discount Co., 390 F. Supp. 320 (E.D. Pa. 1975), aff'd, 533 F.2d 102 (3d Cir.), cert. denied, 429 U.S. 865 (1976)(14 members); Sabala v. Western Gillette, Inc., 362 F. Supp. 1142 (S.D. Tex. 1973), aff'd in part and rev'd in part on other grounds, 516 F.2d 1251 (5th Cir. 1975), vacated on other grounds, 431 U.S. 951 (1977)(26 members); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968)(25 members).

[163] Sagers v. Yellow Freight System, Inc., 529 F.2d 721 (5th Cir. 1976)(110-130 members); Kirkland v. N.Y. State Dep't of Correctional Services, 520 F.2d 420 (2d Cir. 1975), cert. denied 429 U.S. 829 (1976)(117 persons); Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977)(160 members); Barrett v. Thorofare Markets, Inc., 77 F.R.D. 22 (W.D. Pa. 1977)(139 members). Contra, Minersville Coal Co. v. Anthracite Export Ass'n, 55 F.R.D. 426 (M.D. Pa. 1971)(350 members); City and County of Denver v. American Co., 53 F.R.D. 620 (D. Colo. 1971)(126 members); Utah v. Am. Pipe & Const. Co., 49 F.R.D. 17 (C.D. Cal. 1969)(350 members).

> [t]he obvious inconsistency of many of [the] cases when they are viewed solely from the perspective of the number of class members involved graphically demonstrates that caution should be exercised in relying on a case as a precedent simply because it involves a class of a particular size.[164]

¶47 A variety of non-numerical factors influence a court's determination regarding the impracticability of joinder. These include: the nature of the action;[165] the size of the individual claims;[166] the ability of individual litigants to institute actions in their own behalf;[167] and the location of members of the class or the property that is the subject matter of the dispute.[168] Courts will also consider whether personal jurisdiction limitations render joinder impossible.[169]

> If [the parties] are not [within the jurisdiction of the court], and if a situation arises where all parties must be joined for the fair and efficient adjudication of the controversy, Rule 19 would not apply. In such situations, permissive joinder under Rule 20 would not be a satisfactory alternative, since the parties either join or sue separately at their discretion. Thus, joinder would seem to be impractical.[170]

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[164] 7 Fed. Prac. and Pro., supra note 2, Civil § 1762 at 600.

[165] 7 Fed. Prac. and Pro., supra note 2, Civil § 1762 at 600.

[166] Swanson v. American Consumer Indus., Inc., 415 F.2d 1326, 1333 n. 9 (7th Cir. 1969) (dictum).

[167] Donelson, Prerequisites to a Class Action Under New Rule 23, 10 B.C. Indus. & Com. L. Rev. 527, 531 (1969).

[168] Boyd v. Ozark Airlines, Inc., 568 F.2d 50, 55 (8th Cir. 1977); Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531, 534 (D.N.H. 1971); Williams v. Humble Oil & Ref. Co., 234 F. Supp. 985, 987 (E.D. La. 1964).

[169] Hansberry v. Lee, 311 U.S. 32, 41 (1940).

[170] Donelan, Prerequisites to a Class Action Under New Rule 23, 10 B.C. Indus. & Com. L. Rev. 527, 531 (1969).

That joinder of a party would destroy subject matter jurisdiction,[171] however, does not make joinder impracticable for Rule 23 purposes.[172] Rule 82[173] specifically limits use of the rules to extend the jurisdiction of the courts,

> which means that the effect of joining a nondiverse party or juridsiction is not a relevant factor in determining impracticability under subdivision (a)(1).[174]

In sum, a variety of both numerical and non-numerical factors must be taken into consideration in determining whether the impracticability requirement of Rule 23(a)(1) has been satisfied.[175]

4. There Must Be Common Questions of Law or Fact

¶48 Rule 23(a)(2) requires that there be "questions of law or fact common to the class." This does not require that all questions be common,[176] or that common questions predominate.[177]

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[171] Joinder can destroy subject matter jurisdiction when that jurisdiction is based on diversity or citizenship and the party to be joined would destroy that diversity. This proviso will only effect cases whose subject matter jurisdiction rests on diversity of citizenship. RICO claims, however, will be based on federal question jurisdiction.

[172] Hood v. James, 256 F.2d 895, 903 (5th Cir. 1958); see also Goodman v. H. Hentz & Co., 265 F. Supp. 440, 443 (N.D. Ill. 1967).

[173] Fed. R. Civ. P. 82. See also ¶18, note 60, supra.

[174] 7 Fed. Prac. and Pro., supra note 2, Civil § 1762 at 600-01.

[175] Boyd v. Ozark Airlines, Inc., 568 F.2d 50, 55 (8th Cir. 1977); Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712, 715-16 (S.D. Fla. 1979); Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 45 (N.D. Cal. 1977). See also ¶46, note 160, supra.

[176] Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712, 717 (S.D. Fla. 1979); Doe v. First City Bank Corporation of Texas, Inc., 81 F.R.D. 562, 569 (S.D. Texas 1978)(Rule 23(a)(2) does not require that all questions of law and fact be common.)

[177] Kuhn v. Philadelphia Elec. Co., 80 F.R.D. 681, 684 (E.D. Pa. 1978)([Rule 23(a)(2) does not] require that common questions predominate.)

It requires only that there be common questions.[178] "In general, those courts that have focussed on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts."[179]

¶49 In the area of securities fraud, courts have found commonality where plaintiffs were induced to purchase securities as a result of a series of misleading newspaper advertisements[180] and false and misleading annual reports distributed to stockholders. Although these cases represent potential RICO actions,[182] RICO violations were not alleged.

5. The Claims of the Representatives Must Be Typical

¶50 The typicality requirement of Rule 23(a)(3)[183] requires

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[178] Morgan v. Laborers Pension Trust Fund for N. Cal., 81 F.R.D. 669, 676 (N.D. Cal. 1979)("[A]t least some of the issues in the class must be raised by each member of the putative class"); Wajda v. Penn. Mut. Life Ins. Co., 80 F.R.D. 303, 311 (E.D. Pa. 1978)("Denial of class certification for failure to satisfy the commonality requirement is proper only where no questions of law or fact are common to the class"); Helfand v. Cenco, Inc., 80 F.R.D. 1, 6 (N.D. Ill. 1977)("[Commonality] would be met if there was a common question of either law or fact.")(dictum).

[179] 7 Fed. Prac. and Pro., supra note 2, Civil § 1763 at 604.

[180] Metge v. Baehler, 77 F.R.D. 470, 474 (S.D. Iowa 1978).

[181] Cohen v. Uniroyal, Inc., 77 F.R.D. 685, 691 (E.D. Pa. 1977).

[182] RICO specifically lists "fraud in the sale of securities" as racketeering activity. 18 U.S.C. § 1961(1)(D). Indeed, it would seem that successful securities fraud class actions, by definition, would be successful RICO class actions. See material on securities fraud and RICO.

[183] Fed. R. Civ. Pr. 23(a)(3)(the claims or defenses of the representative parties are typical of the claims or defenses of the class.)

that

> the interests of the named plaintiffs . . . be sufficiently aligned with the interests of their fellow class members to ensure that each claim will be prosecuted with diligence and care.[184]

The requirement is often looked at in conjunction with other Rule 23 prerequisites[185] such as commonality of questions[186] and adequacy of representation.[187] Such an approach, however, fails to recognize the independent significance of this requirement.

¶51 Some courts do afford the "typicality" requirement most independent significance.[188] One court required that the representatives claims be co-extensive with the claims of other class members.[189] This view is generally thought to be too restrictive,

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[184] Morgan v. Laborers Pension Trust Fund For N. Cal., 81 F.R.D. 669, 677 (N.D. Cal. 1979).

[185] Herbert v. Monsanto Co., 576 F.2d 77, 80 (5th Cir. 1978), vacated on other grounds, 580 F.2d 178 (with commonality requirement); Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir. 1977) (with commonality requirement); Pendleton v. Schlesinger, 73 F.R.D. 506, 509 (D.D.C. 1977) ("The precise meaning of [the typicality] standard is difficult to ascertain. Indeed, case upon case interpreting the phrase has equated it with the commonality requirement or has treated it as an aspect of the adequate representation requirement in [23](a)(4).]"; Chirielski v. City Prod. Corp., 71 F.R.D. 118, 151 (W.D. Mo. 1976) (with adequacy of representation); Mudd v. Busse, 68 F.R.D. 522, 529 (N.D. Ind. 1975) (with adequacy of representation); Fertig v. Blue Cross of Iowa, 68 F.R.D. 53, 57 (N.D. Iowa 1974) (with adequacy of representation).

[186] Fed. R. Civ. Pr. 23(a)(2).

[187] Fed. R. Civ. P. 23(a)(4).

[188] See, e.g., Pendleton v. Schlesinger, 73 F.R.D. 506, 509 (D.D.C. 1977) (Rule 23(a)(3) may be used to screen out class actions when the factual position of the representatives is markedly different from that of other members, even though common issues of law or fact are raised [quoting 7 Fed. Prac. and Pro., supra note 2, Civil § 1764 at 614].)

[189] Insley v. Joyce, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971); Koehler v. Ogilvie, 53 F.R.D. 98, 100 (N.D. Ill. 1971); aff'd mem., 405 U.S. 906 (1972).

and is not widely followed.[190] Other courts take a more permissive approach to the typicality requirement.[191] These courts, as well as other courts who read other prerequisites into the "typicality" requirement, will even permit varying fact patterns[192] as disparities in damages[193] and still find typicality.

6. The Prepresentative Must Fairly and Adequately Protect the Interests of the Class

¶52 Perhaps the most important prerequisite to modern class action litigation requires that the representative "fairly and adequately"[194] represent the class.[195] Aside from being prescribed by Rule 23, this prerequisite has constitutional dimensions.[196] The due process clause protects absent class members whose legal

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[190] 7 Fed. Prac. and Pro., supra note 2, Civil § 1764 at 613.

[191] Pendleton v. Schlesinger, 73 F.R.D. 506, 509 (D.D.C. 1977) (representatives' claims must "resemble" or exhibit the essential characteristics of the class); Carter v. Newsday, Inc., 76 F.R.D. 9, 14 (E.D.N.Y. 1976)(representative must suffer the "same or similar grievances" of those of the class.).

[192] Morgan v. Laborers Pension Trust Fund for N. Cal., 81 F.R.D. 669, 677 (N.D. Cal. 1979); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254, 270 (N.D. Ill. 1978)("The factual differences in detail between plaintiff's claims and those of the class will not preclude a finding of typicality where the claims arise out of the same legal or remedial theory"); Sley v. Jamaica Water & Utilities, Inc., 77 F.R.D. 391, 394-95 (E.D. Pa. 1977).

[193] Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480, 484 (E.D. Pa. 1977); Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 898 n. 57 (S.D.N.Y. 1975).

[194] Fed. R. Civ. P. 23(a)(4).

[195] Helfand v. Cenco, Inc., 80 F.R.D. 1, 6 (N.D. Ill. 1977)("Adequacy of representation [Rule 23(a)(4)] is, in the view of this Court, one of the most significant prerequisites to a determination of class certification.")

[196] Nat'l Ass'n of Regional Medical Programs, Inc. v. Matthews, 551 F.2d 340, 346 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977).

rights will be determined by the litigation.[197] As a result,

> it is imperative that this requirement be stringently applied since there could be a collateral attack on the judgment if the interest of the members of the class were not vigorously and completely prosecuted.[198]

¶53 No clearly defined test exists to determine adequacy of representation.[199] Courts do, however, consider several factors. These include: zealousness of the representative;[200] resources of the representative;[201] competence of the attorney;[202] compatability of interests among the representative, the attorney,

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[197] Morgan v. Laborers Pension Trust Fund for Northern California, 81 F.R.D. 669, 679 (N.D. Cal. 1979); Apanewicz v. General Motors Corp., 80 F.R.D. 672, 677 (E.D. Pa. 1978); Vecchione v. Wohlgemoth, 80 F.R.D. 32, 53 (E.D. Pa. 1978); Helfand v. Cenco, Inc., 80 F.R.D. 6 (N.D. Ill. 1977)("Adequate representation embodies a crucial due process requirement.").

[198] Helfand v. Cenco, Inc., 80 F.R.D. 1, 6-7 (N.D. Ill. 1977).

[199] See 7 Fed. Prac. and Pro., supra note 2, Civil § 1765 at 622.

[200] Nat'l Ass'n of Regional Medical Programs, Inc. v. Matthews, 551 F.2d 340, 345 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977); Rossini v. Ogilvy & Mather, Inc., 80 F.R.D. 131, 135 (S.D.N.Y. 1978); Kane Assocs. v. Clifford, 80 F.R.D. 402, 409 (E.D.N.Y. 1978).

[201] Rode v. Emery Air Freight, 80 F.R.D. 314, 317 (W.D. Pa. 1978); Apanewicz v. General Motors Corp., 80 F.R.D. 672, 680 (E.D. Pa. 1978).

[202] Kuck v. Berkey Photo, Inc., 81 F.R.D. 736, 740 (S.D.N.Y. 1979); Morgan v. Laborers Pension Trust Fund for N. Cal., 81 F.R.D. 669, 679 (N.D. Cal. 1979); Perney v. Beneficial Finance Co. of N.Y., Inc., 81 F.R.D. 490, 495 (W.D.N.Y. 1979); Doe v. First City Bancorporation of Texas, Inc., 81 F.R.D. 562, 569-70 (S.D. Texas 1978); Munoz v. Arizona State University, 80 F.R.D. 670, 671 (D. Ariz. 1978); Helfand v. Cenco, Inc., 80 F.R.D. 1, 7 (N.D. Ill. 1977).

and the class;[203] ability of the attorney to objectively view the case with respect to absent class members;[204] as well as others.[205] These factors are important to both the litigant and the court throughout the history of the action as stringent judicial policing of this prerequisite continues throughout the proceeding.[206] If the representation is found to be inadequate,

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[203] Nat'l Ass'n of Regional Medical Programs, Inc. v. Mathews, 5551 F.2d 340, 345 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977); Kuck v. Berkey Photo, Inc., 81 F.R.D 736, 740 (S.D.N.Y. 1979); Morgan v. Laborers Pension Trust Fund for N. Cal., 81 F.R.D. 669, 679 (N.D. Cal. 1979); Perry v. Beneficial Finance Co. of N.Y., Inc., 81 F.R.D. 490, 495 (W.D.N.Y. 1979); Doe v. First City Bancorporation of Tex., Inc., 81 F.R.D. 562, 569-70 (S.D. Tex. 1978); Rossini v. Ogilvy & Mather, Inc., 80 F.R.D. 131, 135 (S.D.N.Y. 1978); Kane Assocs. v. Clifford, 80 F.R.D 402, 409 (S.D.N.Y. 1978); Helfand v. Cenco,Inc., 80 F.R.D 1, 7 (N.D. Ill. 1977).

[204] Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978)(holding it to be attorney's duty to point out conflicts between the class and the representatives), cert. denied, U.S. , 99 S. Ct. 1020 (1979); Lyon v. Arizona, 80 F.R.D. 665, 668 (D. Ariz. 1978).

[205] Karan v. Nabisco, Inc., 78 F.R.D. 388, 406 (W.D. Pa. 1978).

> The court must assure that no danger of collusion on certain class issues exists, that no class issues be ignored, that the case be competently presented in an orderly manner, and that the issues are capable of being fairly and thoroughly tried in a single suit. Relevant considerations would include the importance of the common class questions to Plaintiffs' individual claims, whether Plaintiffs' individual interests are antagonistic to the interests of the class, the extent to which the Court can assure that any antagonism that may exist will not affect presentation of the class issues, Plaintiffs' familiarity with the circumstances of the other class members, resources required to pursue properly the litigation as to the class asserted, whether goegraphically dispersed class members would have to be in close contact with counsel for proper presentation of their claims, and the competence, experience and zeal of Plaintiffs' counsel.

[206] Guerine v. J. & W. Investment, Inc., 544 F.2d 863, 864 (5th

the court may either dismiss the action,[207] allow the action to proceed on an individual basis with only the named representatives as parties,[208] establish subclasses,[209] limit the class to those who would be adequately represented by the representatives,[210] or augment the number of representatives to ensure adequate representation.[211] If the representation is found to be adequate, however, and all other prerequisites have been satisfied, the court will focus on whether the class action is maintainable under Rule 23(b).[212]

Cir. 1977); Nat'l Ass'n of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340, 344-45 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977)(Basic consideration [sic] of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment.)

[207] Vervaecke v. Chiles, Heider & Co., 578 F.2d 713 (8th Cir. 1978); Smith v. Merchant's & Farmer's Bank of West Helena, Ark., 574 F.2d 982 (8th Cir. 1978); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976).

[208] Duncantell v. City of Houston, Tex., 333 F. Supp. 973, 974 (S.D. Tex. 1971); Cox v. Hutchinson, 204 F. Supp. 442, 447 (S.D. Ind. 1962).

[209] EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), vacated on other grounds, 431 U.S. 951 (1977); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

[210] Sagers v. Yellow Freight Systems, Inc., 529 F.2d 721 (5th Cir. 1976); Maxwell v. Wyman, 458 F.2d 1146, 1152 (2d Cir. 1972).

[211] Norman v. Conn. State Bd. of Parole, 458 F.2d 497, 499 (2d Cir. 1972); Ernst & Ernst v. U.S. Dist. Ct. for S. Dis. of Tex., 457 F.2d 1399, 1400 (5th Cir. 1972).

[212] Fed. R. Civ. P. 23(b).

¶54 Although the litigant must satisfy all the requirements of 23(a), only one of the three subdivisions of 23(b) must be met.[213] It is important to avoid associating these three categories with those of the original Rule 23.

> Because there are three categories in the new rule, just as there were in the old, there has been some tendency to suppose that the old names "true," "hybrid," and "spurious," may still be used, though with their definitions in the rule altered. This is not only wrong, but dangerously wrong. Nothing in the new rule corresponds to the former "spurious" class action, since it is expected that the judgment in a class action under new rule will bind all members of the class, except those who have been expressly excluded. Nor do any of the clauses of new Rule 23(b) correspond with the old "true" or "hybrid" class actions. The new rule must be approached on its own pragmatic terms, rather than with preconceptions derived from the old conceptual categories.[214]

Like the original rule, however, there are important distinctions between the categories that will determine rights and obligations of the litigants.[215]

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[213] In some cases, a class may satisfy more than one of these subdivisions. If so, the rights and obligations of the litigants will depend on which of the subdivisions is held to govern.

[214] Wright, Law of Federal Courts, § 72 at 350 (3d ed. 1976).

[215] I H. Newberg, Newberg on Class Actions, § 1125 at 226-27 (1977)("In (b)(3) classes only, in contrast to actions certified under b(1) or (2):

> (1) Notice of a class certification ruling to class members is mandatory.
> (2) Such notice must be individual to all members who can be identified through reasonable effort.
> (3) Absent class members have the right to exclude themselves from the class and from the binding effect of the judgment.
> (4) Alternatively, absent class members have the right to enter their appearance through counsel.

1. Class Action is Necessary to Avoid Adverse Effects

¶55 The two subsections of 23(b)(1) are designed to protect the opponents of the class[216] and absent class members.[217]

> If the court determines that individual lawsuits by or against class members do not pose a serious threat of inconsistent adjudications that work a hardship on the opposing party or that separate proceedings would not prejudice the other members of the class, the action cannot be maintained as a class action unless some other portion of Rule 23(b) applies.[218]

The court will look to the nature of the relief being sought or that might be sought in other actions in determining the applicability of 23(b)(1). In addition, litigants will usually[219] satisfy both clauses of this provision.[220] "[A]ctions under clause (A) and clause (B) [,however,] are treated in the same manner for purposes of the other portions of Rule 23," and nothing turns on which provision is held controlling.[221]

¶55 Rule 23(b)(1)(A) permits the maintenance of a class

Moreover, aggregation of claims of members to meet the federal jurisdictional amount may be permitted in certain class actions certified under (b)(1) or (2), but rarely in b(3) actions.")

[216]Fed. R. Civ. P. 23(b)(1)(A).

[217]Fed. R. Civ. P. 23(b)(1)(B).

[218]7A Fed. Prac. and Pro., supra note 2, Civil § 1772 at 4-5.

[219]7A Fed. Prac. and Pro., supra note 2, Civil § 1772 at 6.

[220]Larionoff v. United States, 533 F.2d 1167, 1182 n. 36 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977); Guadamuz v. Ash, 368 F. Supp. 1233, 1235 (D.D.C. 1973).

[221]7A Fed. Prac. and Pro., supra note 2, Civil § 1772 at 7.

action when separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class."[222] By definition, therefore, there must be a risk of future litigation by member of the class if a class action is not permitted. This requires the court to make a "realistic appraisal of the likelihood of multiple litigation occurring given the pragmatics of the situation."[223] Factors the court may look to include whether other actions have already been brought and the size of the stakes of the individual claimants.[224]

¶57 Should the court determine that a risk of future litigation exists, it must then consider whether that risk might result in placing the potential class opponent into a "conflicted position. Such a position occurs when different results in separate actions would impair the imposing parties' ability to

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[222] 7A Fed. Prac. and Pro., supra note 2, Civil § 1773 at 8.

[223] Id. at 8-9.

[224] Free World Foreign Cars, Inc., v. Alfa Romeo, 55 F.R.D. 26, 29 n. 9 (S.D.N.Y. 1972)(absence of other suits); Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972)(absence of other suits); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968), class action held maintainable on remand, 52 F.R.D. 253 (S.D.N.Y. 1971), rev'd, 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156 (1974)(size of claims too small to stimulate future litigation.)

[225] Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 388 (1967).

pursue a uniform continuing course of conduct.[226] The Advisory Committee on Civil Rules offers an illustrative example: when

> [s]eparate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations.[227]

Class actions brought under 23(b)(1)(A) should avoid judicially ordered inconsistent conduct.

¶58 Subdivision (b)(1)(B) of Rule 23 permits class actions when separate suits might adversely affect class members.[228] No showing of any future risk of litigation is necessary as

> the purpose of this provision is to protect the interests of all the class members against any determination that might have an adverse effect on them . . . [and] only one action (the one instituted by the representatives) could impair the rights of other members of the potential class.[229]

Examples of such actions include: cases where class members

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[226] 7A Wright and Miller, Federal Practice and Procedure, § 1733 at 10 (1972). See Cullen v. State Civil Service Comm'n, 435 F. Supp. 546, 561 (E.D.N.Y.), appeal dismissed, 566 F.2d 846 (2d Cir. 1977); Gary-N.W. Ind. Women's Services, Inc. v. Bowen, 421 F. Supp. 734, 735 (N.D. Ind. 1976), aff'd 429 U.S. 1067 (1977).

[227] Proposed Rules of Civil Procedure, 39 F.R.D. 69, 100 (1966).

[228] Fed. R. Civ. P. 23(b)(1)(B)(A class action may proceed if separate actions by individual members of the class would create a risk of "adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impeach their ability to protect their interests.")

[229] 7A Fed. Prac. and Pro., supra note 2, Civil § 1774 at 14.

have claims against a potentially insufficient fund;[230] suits by stockholders to compel the declaration of a dividend;[231] actions charging breach of trust where an accounting is demanded;[232] and actions seeking injunctive relief.[233]

2. Injunctive on Declaratory Relief

¶59 A class action is maintainable under Rule 23(b)(2) when

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.[234]

It is intended to

> reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole is appropriate.[235]

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[230] Dickinson v. Burnham, 197 F.2d 973 (2d Cir.), cert. denied, 344 U.S. 875 (1952); Coburn v. 4-R Corp., 77 F.R.D. 43, 46 (E.D. Ky. 1977).

[231] Denn v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961); Ames v. Mengel Co., 190 F.2d 344 (2d Cir. 1951); Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1447).

[232] Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir. 1944); Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir. 1944); Boeseaberg v. Chicago Title & Trust Co., 128 F.2d 245 (7th Cir. 1942).

[233] Collins v. Bolton, 287 F. Supp. 393, 397 (N.D. Ill. 1968) (enjoined tax assessment); Bieckele v. Norfolk & Western Railway Co., 309 F. Supp. 354, 355 (N.D. Ohio 1969); Van Germert v. Boeing Co., 259 F. Supp. 125, 130 (S.D.N.Y. 1966)(compel conversion of debentures). (Note, however, that actions seeking injunctive relief are more commonly brought under Rule 23(b)(2). See ¶¶ 58-61, infra.)

[234] Fed. R. Civ. P. 23(b)(2).

[235] Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (19

This subdivision is primarily, though not exclusively,[236] concerned with facilitating civil rights clsss actions.

¶60 Two basic requirements must be satisfied in order for an action to fall within this subdivision: "(1) the opposing party's conduct or refusal to act must be 'generally applicable' to the class, and (2) final injuncitve or corresponding declaratory relief must be requested for the class."[237] "Generally applicable" requires that a party's actions affect all those similarly situated; the class opponent does not have to act "directly against each member of the class."[238] Thus,

> [a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.[239]

"Final injunctive relief" does not include preliminary injunctions or temporary restraining orders.[240] It does, however, embrace both mandatory and prohibitory final injunctive orders.[241] "Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief."[242] Thus,

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[236] 7A Fed. Prac. and Pro., supra note 2, Civil § 1775 at 24.

[237] 7A Fed. Prac. and Pro., supra note 2, Civil § 1775 at 19.

[238] Comment, Rule 23: Categories in Subsection (b), 10 B.C. Indus. & Com. L. Rev. 539, 542 (1969).

[239] Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966).

[240] Comment, Rule 23: Categories of Subsection (b), 10 B.C. Indus. & Com. L. Rev. 539, 543 (1969).

[241] 7A Fed. Prac. and Pro., supra note 2, Civil § 1775 at 21.

[242] Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966).

> request for a declaration that a particular patent is invalid . . . would qualify as "corresponding declaratory relief" because the resulting judicial directive would have the effect of "enjoining" the enforcement of that patent . . . [243]

¶61 23(b)(2) is not intended to apply where the relief sought is exclusively or predominantly monetary.[244] Courts do, however, permit damage recoveries under (b)(2) where the monetary relief sought was ancillary to an injunction.[245] Consequently, it is possible to seek damages under subdivision (b)(2) but only where the primary relief sought is injunctive.

3. Commonality and Superiority

¶62 Subsection b(3) of Rule 23 permits class actions to proceed where convenient and desirable, although not clearly called for as in b(1) or b(2) class action.[246] The court must find "that the questions of law or fact common to the members of the class predominate over any questions affectively only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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[243] 7A Wright and Mills, Federal Practice and Procedure, § 1775 at 22 (1972).

[244] Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966).

[245] Alexander v. Aero Lodge No. 785, Int'l Ass'n of Machinists, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 98 S. Ct. 2849 (1978); Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), cert. granted, 99 S. Ct. 75 (1978); Sperry Rand Corp. v. Larson, 554 F.2d 868, 875 (8th Cir. 1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 256-58 (5th Cir. 1974).

[246] Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966).

[247] Fed. R. Civ. P. 23(b)(3).

A class action, therefore, may proceed whenever the parties' actual interests are best served by adjudicating their claims in a single action.[248]

¶63 Two basic requirements must be satisfied in order for an action to fall within this subdivision: (1) questions of law or fact common to the class must predominate; (2) a class action must be the best available method for fairly and efficiently adjudicating the claim.[249] The subdivision lists four factors considered pertinent. They are:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular form; (D) the difficulties likely to be encountered in the management of a class action.[250]

The court, in its discretion, may also consider other factors, as this list is not considered exhaustive.[251]

¶64 Rule 23 does not clarify the meaning of "predominate" in subdivision (b)(3), nor is there any court created test for determining whether the common questions satisfy the rules' requirement.[252]

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[248] Bennett v. Gravelle, 323 F. Supp. 203, 218 (D. Md.), aff'd, 451 F.2d 1011 (4th Cir. 1971), cert. dismissed, 407 U.S. 917 (1972); Carpenter v. Hall, 311 F. Supp. 1099, 1115 (S.D. Tex. 1970).

[249] See generally, 7A Fed. Prac. and Pro., supra note 2, Civil §§ 1777, 1778.

[250] Fed. R. Civ. P. 23(b)(3).

[251] In re Transit Co. Tire Antitrust Litigation, 67 F.R.D. 59, 72 (W.D. Mo. 1975).

[252] See 7A Fed. Prac. and Pro., supra note 2, Civil § 1778 at 52.

At a minimum, common questions must exist.[253] How much more is required, however, is unclear. A possible quantitative measure is the total amount of time necessary to litigate the issue. This measure, however, was expressly rejected.[254] Courts have held actions to be under b(3) when there is a "common nucleus of operative facts" present.[255] Other courts view the predominate issues as those that are outcome-determinative.[256] This view, however, substitutes "significance" for "predominance"; an equation that should not automatically be made.[257] A final approach, usually taken in antitrust or securities fraud cases, holds that if the defendants activities "present a 'common course of conduct' so that the issue of statutory liability is common to the class,"[258] the predominance requirement is satisfied.[259]

¶65 The second requirement of Rule 23(b)(3) is that the court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

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[253] A prerequisite under 23(a)(2) is the existence of common questions of law or fact. See ¶¶48-49 supra.

[254] Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn. 1968).

[255] Explin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 488 n. 7 (N.D. Ill. 1969).

[256] Richardson v. Hamilton Int'l Corp., 62 F.R.D. 413, 421 (E.D. Pa. 1974); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 572 (D. Minn. 1968).

[257] 7A Fed. Prac. and Pro., supra note 2, Civil § 1778 at 54.

[258] Id. at 54.

[259] This appraoch is most amenable to RICO class actions since a "pattern of racketeering activity" must be alleged. 18 U.S. § 1962 (1976).

[260] Fed. R. Civ. P. 23(b)(3).

> In determining whether the answer to this inquiry is to be affirmative, the court must initially consider what other procedures, if any, exist for disposing of the dispute before it. It must then compare the possibilities to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court.[261]

Other available procedures include: individual actions,[262] utilizing the Judicial Panel on Multidistrict Litigation;[263] and settlements out of court.[264]

¶66 In determining whether a class action is superior,[265] the court may look to the four factors listed in the Rule.[266] The Rule, however, fails to specify the weight to be given to each, but "[c]learly no single element is determinative."[267] These factors, then, offer guidelines for use in determining the propriety of a (b)(3) class suit.

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[261] 7A Fed. Prac. and Pro., supra note 2, Civil § 1779 at 59.

[262] Indeed, the res judicata effect of the individual suits may be functionally equivalent to a class action. See, Manes v. Golden, 400 F. Supp. 23 (E.D.N.Y. 1975), aff'd mem., 423 U.S. 1068 (1976); J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp., 62 F.R.D. 58 (S.D. Ohio 1974).

[263] Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392, 399 (E.D. Va. 1975).

[264] Berley v. Dreyfus & Co., 43 F.R.D. 397, 398-99 (S.D.N.Y. 1967).

[265] Some of these factors may also aid the court in determining whether common issues predominate.

[266] See ¶63, note 250, supra.

[267] 7A Fed. Prac. and Pro., supra note 2, Civil § 1780 at 64.

¶67 In judging the interest of class members in "individually controlling the prosecution . . . of separate actions."[268] The court must balance "the advantages of determining the common issues by means of a class action against the individual members' interest in separate adjudications of their rights."[269] In appraisi the sentiment of the class members as to their interest in separate adjudications, the court will scrutinize objections to class action litigation.[270] These objectives could be indicative of inadequate representatives or that common questions do not predominate.[271]

¶68 The second factor focuses the court's attention on "the extent and nature of any litigation concerning the controversy already commenced . . . by the class"[272] The manner in which the courts interpret the presence of other pending litigation varies. Some courts view the presence of other actions as indicative of strong individual interest in litigation[273] and a predominan of individual claims.[274] Consequently, these courts deny class action status. Other courts view multiple individual actions as

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[268] Fed. R. Civ. P. 23(b)(3)(A).

[269] 7A Fed. Prac. and Pro., supra note 2, Civil § 1780 at 66.

[270] Comment, Rule 23: Categories of Subsection(b), 10 B.C. Indus. & Com. L. Rev. 539, 547 (1969).

[271] Id.

[272] Fed. R. Civ. P. 23(b)(3)(B).

[273] Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970); Reynolds v. Texas Gulf Sulphur Co., 309 F. Supp. 566, 570 (D. Utah 1970), aff'd in part and rev'd in part on other grounds, sub nom., Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir. 1971), cert. denied, 405 U.S. 918 (1972).

[274] City of New York v. International Pipe & Ceramics Co., 44 F.R.D. 584, 586-87 (S.D.N.Y. 1968).

an inefficient use of court time which contributes to the possibility of conflicting judgments.[275] These courts generally will certify the class.

§69 The third factor, "the desirability or undesirability of concentrating the litigation of the claims in the particular forum,"[276] requires the court to determine if the forum chosen is appropriate. Issues to consider include: the citizenship of the interested parties;[277] the availability of witnesses and evidence;[278] and the condition of the court's calender.[279] Transfer of venue provisions[280] should also be considered.

¶70 The fourth and final factor under Rule 23(b)(3) is whether the suit is manageable as a class action.[281] The manageability of the class will depend upon the size of the class,[282] the difficulty

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[275] Hohmann v. Packard Instrument Co., 399 F.2d 711, 714 (7th Cir. 1968).

[276] Fed. R. Civ. Pr. 23(b)(3)(c).

[277] Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 793 n. 3 (10th Cir. 1970); Carpenter v. Hall, 311 F. Supp. 1099, 1112 (S.D. Tex. 1970); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 80 (E.D. Pa. 1970).

[278] Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 80 (E.D. Pa. 1970); American Trading and Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155, 157 (N.D. Ill. 1969); Caceres v. International Transport Ass'n, 46 F.R.D. 89, 95 (S.D.N.Y. 1969).

[279] Frankel, Amended Rule 23 From A Judge's Point of View, 32 A.B.A. Antitrust L. J. 295, 296 (1966).

[280] 28 U.S.C. 1404, 1407 (1976).

[281] Fed. R. Civ. P. 23(b))3)(D).

[282] Boshes v. General Motors Corp., 59 F.R.D. 589, 599 (N.D. Ill. 1973)(class of 30-40 million denied); City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 61 (D.N.J. 1971)(6 million denied). But see West Virginia v. Chas. Pfizer & Co., 314 F.2d 1079 (2d Cir. 1971)(class of several million allowed).

of giving notice to the class,[283] difficulty in determining and apportioning damages,[284] and counterclaims against class members.[285]

¶71 These listed factors are not intended to be exhaustive.[286] Courts also consider whether members of a defendant class could be guaranteed a full and fair hearing of their defenses[287] and whether a class action would reduce the delay in securing relief.[288]

> This is as it should be. To a degree, most actions instituted under Rule 23 present some type of a challenge to the court, which means that federal judges have to be sensitive to the relevance of a wide spectrum of considerations.[289]

C. Certification; Notice; Judgment; Subclasses

1. Certification

¶72 "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order

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[283] Boshes v. General Motors Corp., 59 F.R.D. 589, 599-60 (N.D. Ill. 1973); P.D.Q., Inc. of Miami v. Nissan Motor Corp., 61 F.R.D. 372, 381 (S.D. Fla. 1973); Schaffner v. Chemical Bank, 339 F. Supp. 329, 335 (S.D.N.Y. 1972).

[284] Herbst v. Int'l Telephone and Telegraph Corp., 495 F.2d 1308, 1313 (2d Cir. 1974).

[285] Turoff v. Union Oil Co. of Cal., 61 F.R.D. 51, 58-59 (N.D. Ohio 1973); Alpert v. U.S. Indus., Inc., 59 F.R.D. 491, 499 (C.D. Cal. 1973); Berkman v. Sinclair Oil Corp., 59 F.R.D. 602, 609 (N.D. Ill. 1973); Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549, 553 (S.D.N.Y. 1972); Loh v. Shell Oil Co., 50 F.R.D. 198, 200 (S.D. Ohi 1970).

[286] See ¶63, note 251, supra.

[287] Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 491 (N.D. Ill. 1969).

[288] Contract Buyers League v. F. & F. Investment, 48 F.R.D. 7, 12 (N.D. Ill. 1969).

[289] 7A Fed. Prac. and Pro., supra note 2, Civil § 1780 at 77.

whether it is to be so maintained."[290] The plaintiff,[291] the defendant,[292] or the court[293] can prompt certification. Certification may be "conditional, and may be altered or amended before a decision on the merits."[294] Some district courts have local rules which set specific time limits on when a party must move for a class determination. In these courts, noncompliance prevents class certification.[295] Usually,[296] however, the untimeliness of a class action will not justify a denial of certification.[297]

¶73 Although rule 23 contemplates a speedy certification, the phrase "as soon as practicable" will mean different things under different circumstances.[298] Although some courts require

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[290] Fed. R. Civ. P. 23(c)(1).

[291] State of Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

[292] Cook County College Teachers Union Local 1600 v. Byrd, 426 F.2d 882, 885 (7th Cir.), cert. denied, 409 U.S. 848 (1972); Moth v. Dechert, Prize & Rhoads, 70 F.R.D. 602, 606 (E.D. Pa. 1976).

[293] Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1371 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978); Johnson v. City of Baton Rouge, 50 F.R.D. 295, 298 (E.D. La. 1970)(The courts' determination that a suit can be maintained as a class action may be made on a motion of either a proponent or opponent of the class action or on the court's own motion.)

[294] Fed. R. Civ. P. 23(c)(1).

[295] Coffin v. Secretary of HEW, 400 F. Supp., 953, 956-57 (D.D.C. 1975), appeal dismissed, 430 U.S. 924 (1977); Walker v. Columbia Univ., 62 F.R.D. 63 (S.D.N.Y. 1973).

[296] 7A Wright, Miller and Kane, Federal Practice and Procedure, § 1785 at 86-87 (West Supp. 1979).

[297] Grey v. Greyhound Lines, East, 545 F.2d 169, 173 n. 11 (D.C. Cir. 1976); Marquez v. Kiley, 436 F. Supp. 100, 109 (S.D.N.Y. 1977).

[298] Bucholtz v. Swift & Co., 62 F.R.D. 581, 588 (D. Minn. 1973).

a final class certification before review of the merits,[299] others permit the certification to be made at the entry of judgment,[300] or do not require that the certification be final.[301]

¶74 Before certification, the court must consider whether all the prerequisites of Rule 23(a) have been satisfied and whether the action falls under one of the subdivisions of 23(b). If any one of the prerequisites is not satisfied, or if the action does not fall under any of the 23(b) subdivisions, it cannot be maintained as a class action.[302] An appeal from such a determination is available only if it is dispositive of the action.[303] Also, under 23(c)(1) any determination may be altered or amended before a decision on the merits. Therefore, even initial class certification is not an irrevocable determination.

2. Notice[304]

¶75 If a court certifies a class action under Rule 23(b)(subdivision (c)(2) requires the court to "direct to the members

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[299] Peritz v. Liberty Loan Corp., 523 F.2d 349, 353-54 (7th Cir. 1975).

[300] Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1372 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978); Carionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977); McLaughlin v. Wohlgemuth, 535 F.2d 251, 251-52 n. 1 (3d Cir. 1976).

[301] Jimenez v. Weinberger, 523 F.2d 689, 699 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

[302] Doninger v. Pacific Northwest Berl, Inc., 564 F.2d 1304 (9th Cir. 1977); Swift v. Toia, 450 F. Supp. 983 (S.D.N.Y. 1978).

[303] 7A Fed. Prac. and Pro., supra note 2, Civil § 1802.

[304] For an extension analysis, including model notice forms, see American Bar Association, Manual of Class Action Notice Forms (1979

of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[305] Thus, the giving of notice is mandatory,[306] but the court has broad discretion in determining the manner of notification.[307]

¶76 Adequate notice is essential to a (b)(3) class certification. Without adequate notice, it would be unconstitutional to bind absent class members to the judgment.[308] If, on the other hand, the judgment was not binding on absent class members, there would be no reason to bring a class action. This mandate, however, requires notice only for (b)(3) classes[309] because adequate representation is less of a problem in (b)(1) and (b)(2) classes.[310]

¶77 The courts determine the manner of notice[311] on a

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[305] Fed. R. Civ. P. 23(c)(2). Rule 23 contains no provisions which require giving notice to (b)(1) or (b)(2) classes.

[306] Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971).

[307] Contract Buyers League v. F. & F. Investment, 48 F.R.D. 7, 15 (W.D. Ill. 1969); Maraist & Sharp, Federal Procedures' Troubled Marriage: Due Process and the Class Action, 49 Tex. L. Rev. 1, 18 (1970).

[308] 7A Fed. Prac. and Pro., supra note 2, Civil § 1786 at 140.

[309] Bolton v. Murray Envelope Corp., 553 F.2d 881, 883 (5th Cir. 1977); Society for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906 (9th Cir. 1975); Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975).

[310] 7A Fed. Prac. and Pro., supra note 2, Civil § 1786 at 142-44.

[311] The names of notice refers to what is "practicable" and what is a "reasonable effort" under the circumstances.

case by case basis.[312] Important factors include:

> (1) a comparison of the cost of any particular form of notice with the total damages sought; (2) whether any members of the class have an especially large stake in the outcome of the case; (3) the likelihood that members will want to opt out; and (4) whether the suit will ever be brought if not allowed to proceed as a class action.[313]

The courts will attempt to balance constitutional sufficiency against the needs of the class members.

¶78 The court must first determine whether any members deserve individual notice. The Rule provides no standards, but the courts have held that phonebooks[314] and stockholder lists[315] enumerate class members entitled to individual notice. Recently, the Supreme Court closely associated "identified through reasonable effort" with "easily ascertainable."[316] Whether this decisio will clarify the standard, however, is doubtful.

¶79 All members identified must receive individual notice regardless of the cost of notification or the size of the indi-

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[312] In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977); In re Four Seasons Sec., passim Laws Litigation, 60 F.R.D. 598 (W.D. Okla. 1973); Miller, Problems of Giving Notice in Class Actions, 58 F.R.D. 313 (1973).

[313] Comment, Constitutional and Statutory Requirements of Notice Under Rule 23(c)(2), 10 B.C. Indus. & Com. L. Rev. 571, 576 (1969).

[314] Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1022 (2d Cir. 1973)(Oakes, J., dissenting), vacated, 417 U.S. 156 (1974).

[315] Mader v. Armel, 402 F.2d 158, 161 (6th Cir. 1968), cert. denied, 394 U.S. 930 (1969); Lewis v. Bogin, 337 F. Supp. 331, 340 (S.D.N.Y. 1972).

[316] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974).

vidual claims. Litigants had contended that the purpose of individual notification was to allow class members to opt out. Since there was little reason for individuals with small claims, it was argued that notification of individuals with small claims was unnecessary. The Supreme Court, however, has held:

> The short answer . . . is that individual notice is not a discretionary consideration to be waived in a particular case . . . [E]ach class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action.[317]

Furthermore, class representatives must bear the cost of notification.[318]

¶80 If the class members cannot be identified, the court must give the "best notice predictable under the circumstances."[319] Usually,[320] publication is most practicable. The publication must be "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."[321]

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[317] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

[318] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974); Comment, Cost of Notice in Class Actions After Oppenheimer Fund, Inc. v. Sanders, 78 Colum. L. Rev. 1517 (1978).

[319] Fed. R. Civ. P. 23(c)(2).

[320] 7A Fed. Prac. and Pro., supra note 2, Civil § 1786 at 153.

[321] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

¶81 The notice must inform the absent class member that:

> (A) The court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.[322]

Notice may also inform the class member of the nature of the suit, the issues being litigated,[323] the possible costs; and the prospects for recovery.[324]

¶82 Notice should be sent as soon as possible after the court determines that the class action is proper under subdivision (c)(1).[325] Although the court must approve the notices, they are usually drafted by the parties.[327] Whether sanctions may be imposed for unauthorized information in the notice is unclear.[328]

3. Effect of Judgment

¶83 Favorable and unfavorable judgments must enumerate a (b)(1) and (b)(2) class members, as well as (b)(3) class members who were notified and did not opt out. The judgment, however, does not necessarily bind these class members. The

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[322] Fed. R. Civ. P. 23(c)(2)(A), (B), and (C).

[323] 7A Fed. Prac. and Pro., supra note 2, Civil § 1787 at 162.

[324] In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1105 (5th Cir. 1977); Sarafin v. Sears, Roebuck & Co., 73 F.R.D. 585, 588-89 (N.D. Ill. 1977).

[325] In re Home-Stake Prod. Co. Securities Litigation, 76 F.R.D. 351, 380 (N.D. Okla. 1977).

[326] 7A Fed. Prac. and Pro., supra note 2, Civil § 1788 at 166.

[327] Gates v. Dalton, 67 F.R.D. 621 (E.D.N.Y. 1975); In re Antibiot Antitrust Action, 333 F. Supp. 267 (S.D.N.Y. 1971); State [illegible]illi v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 196

[328] 7A Fed. Prac. and Pro., supra note 2, Civil § 1788 at 168.

binding effect of a judgment can be tested only in a later suit.[329]

4. Subclasses and Subissues

¶84 Subsection (c)(4) allows the court to limit the class action to particular issues or particular subclasses. This device is used to remedy a variety of defects in the litigation,[330] and requires no formal motion from the parties.[331]

D. Orders

¶85 Subdivision (d) includes an extensive, though not exclusive,[332] list of orders a court can issue during a class action. The possible orders include:

> (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative par-

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[329] Taunton Gardens Co. v. Hills, 557 F.2d 877, 878 (1st Cir. 1977); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

[330] Such as limiting the class to that group when the representation will adequately represent, or certifying common questions, and leaving others to be adjudicated on an individual basis. See ¶53, notes 9-10, supra (subclasses); Cross v. National Trust Life Insurance Co., 553 F.2d 1026 (6th Cir. 1977)(limiting issues); United Steelworkers of America v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976).

[331] 7A Fed. Prac. and Pro., supra note 2, Civil § 1790 at 186.

[332] Cohn, The New Federal Policy of Civil Procedure, 54 Geo. L. J. 1204, 1218 (1966).

> ties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegation as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combine with an order under Rule 16, and may be altered or amended as may be desirable from time to time.[333]

These provisions help the court manage and dispose of complex class actions. For example, they offer "guidance as to the types of problems the district judge is likely to encounter."[334]

E. Dismissal or Compromise

¶86 Subdivision (c) prohibits the dismissal or compromise of a class action without the approval of the court. This protects absent class members from unfair settlements. Courts will approve compromises only if they are fair, reasonable, and in the best interests of those who will be affected.[335] A variety of factors have influenced the courts' determination: opposition to settlement,[336] likelihood of the class being successful in the litigation,[337] points of law on which the

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[333] Fed. R. Civ. P. 23(d).

[334] 7A Fed. Prac. and Pro., supra note 2, Civil § 1791 at 193. For an extensive discussion of these orders see Id. at §§ 1791-96.

[335] Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1214 (5th Cir. 1978), cert. denied, (99 S. Ct. 1020, Jan. 15, 1979); McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 427-28 (1977); Colton v. Hinton, 559 F.2d 1326, 1331-32 (5th Cir. 1977).

[336] Bujan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir. 1974); McNary v. American Savings & Loan Ass'n, 76 F.R.D. 644, 648 (N.D. Tex. 1977).

[337] Colton v. Hinton, 559 F.2d 1326, 1331-32 (5th Cir. 1977); Flinn v. FMC Corp., 528 F.2d 1169, 1172-73 (4th Cir. 1975), cert. denied 424 U.S. 967 (1976).

settlement is based,[338] the proposed settlement compared to the possible recovery,[339] the plan for distributing the settlement,[340] propriety of notifying absent class members,[341] and the effect on the rights of others.[342] If the court approves a compromise, subdivision (c), with limited exceptions,[343] requires notice to all class members. Although the Rule does not describe the contents of the notice,[344] it should describe the current state of the action and the consequences of a dismissal or of a compromise.[345]

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[338] State of West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1086-88 (2d Cir.), cert. denied, 404 U.S. 871 (1971).

[339] Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); Patkison v. Stovall, 528 F.2d 108, 115 (7th Cir. 1976).

[339] Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); Patkison v. Stovall, 528 F.2d 108, 115 (7th Cir. 1976).

[340] Beecher v. Able, 441 F. Supp. 426 (S.D.N.Y. 1977), aff'd 575 F.2d 1010 (2d Cir. 1978); In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 706, 714 (D. Minn. 1975),

[341] Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 372 (E.D. Pa. 1970).

[342] Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971); Jamison v. Butcher & Shenerd, 68 F.R.D. 479 (E.D. Pa. 1975).

[343] See 7A Fed. Prac. and Pro., supra note 2, Civil § 1797 at 234-36.

[344] The court, however, must approve the notice.

[345] Miller v. Republic Nat'l Life Ins. Co., 559 F.2d 426 (5th Cir. 1977); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177-78 (9th Cir. 1977).

V. ATTORNEY'S FEES[346]

¶87 The courts have discretion under their inherent equity powers, to award attorney's fees.[347] Yet, RICO provides the cour with statutory authority to award attorney's fees.[348]

¶88 Regardless of the source of the power, the courts have broad discretion to determine the amount of the award.[349] Each attorney has usually been required to submit records of the work he performed and the hours he worked.[350] A RICO class attorney will probably also be required to submit such records.[35] The general standard is one of reasonableness under the cir-

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[346]A complete discussion of attorney's fees under RICO can b found in "Recovery of the Cost of Suit, Including a Reasonable Attorney's Fee."

[347]This renumeration may include costs for experts as well as attorney's fees. See Monaghan v. Hill, 140 F.2d 31 (9th Cir. 1944). RICO authorizes the awarding of court costs. 18 U.S.C. § 1964 (c) (1976).

[348]18 U.S.C. § 1964 (c) (1976).

[349]Alpine Pharmacy Inc. v. Charles Pfizer & Co., 481 F.2d 1045, 1050 (2d Cir. 1973); Ojeda v. Hackney, 452 F.2d 947, 948 (5th Cir. 1972).

[350]In re Equity Funding Corp. of Am. Sec. Litigation, 438 F. Supp. 1303 (C.D. Cal. 1977); Foster v. Boise-Cascade, Inc., 420 F. Supp. 274, 679-82 (S.D. Tex. 1976), aff'd, 577 F.2d 335 (5th Cir. 1978). A more extensive discussion of these requirements can be found in 7A C. Wright, A. Miller, M. Kane, Federal Practice and Procedure, Civil § 1803 at 171-99 (Supp. 1979) and in "Recovery of the Cost of Suit, Including a Reasonable Attorney's Fee."

[351]This issue, however, has not been litigated. For an argument favoring the position, see "Recovery of the Cost of Suit, Includi a Reasonable Attorney's Fee."

cumstances.[352] The courts consider many factors,[353] but rely most heavily on the benefit the lawsuit has produced.[354]

¶89 Since the award is considered a collateral order,[355] dissatisfied attorneys can appeal immediately. Only excessive or totally inadequate awards, however, are likely to be modified.[356]

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[352] Angoff v. Goldfine, 270 F.2d 185, 189 (1st Cir. 1959); North Drive-In Theatre Corp. v. Park-In Theatres, Inc., 248 F.2d 232, 239 (10th Cir. 1957).

[353] In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680, 689-90 (D. Minn. 1975); In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931).

[354] Landaw v. Chase Manhatten Bank, 556 F.2d 664 (2d Cir. 1977); In re Equity Funding Corp. of American Securities Litigation, 438 F. Supp. 1303 (C.D. Cal. 1977). Under this approach, if the court determines that the class has not been benefited, it may not be allowed attorney's fees. Somue v. University of Pittsburgh, 395 F. Supp. 1275, 1282 (W.D. Pa. 1975), vacated 538 F.2d 991 (1976), vacated on other grounds, 538 F.2d 991 (1976).

[355] Rogers v. Paul, 345 F.2d 117, 125 (8th Cir.), vacated and remanded on other grounds, 382 U.S. 198 (1965); Angoff v. Goldfine, 270 F.2d 185, 186-88 (1st Cir. 1959).

[356] Swanson v. American Consumer Indus., Inc., 517 F.2d 555, 561-62 (7th Cir. 1975); Grunin v. International House of Pancakes, 513 F.2d 114, 126 (8th Cir.), cert. denied, 423 U.S. 864 (1975); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

VI. RICO CLASS ACTIONS: ADVANTAGES AND DISADVANTAGES

¶90 Up to this point, this material has concentrated on how and when a class action may be brought. The focus now shifts to why a class action, specifically a RICO class action, should be brought. This choice will not confront all RICO litigants,[357] but those confronted should consider both the advantages and disadvantages of RICO class action litigation.

A. Advantages

¶91 All RICO litigants will benefit from special procedural devices authorized by statute. These devices pertain to venue,[358] service of process,[359] and recovery of awards.[360] They do not discriminate in any way, however, between the individual and the class litigant: each is identically benefited by these provisions. Venue and service of process relate to a plaintiff's ability to bring a particular defendant in a particular court: the number of plaintiffs is irrelevant.[361] Similarly, both individual and class plaintiffs will recover treble damages and costs and attorney's fees. These devices, therefore, may cause a litigant to bring a RICO, as opposed to a non-RICO, claim

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[357] Only those RICO litigants who can satisfy the requirements of Rule 23 can choose between a RICO individual and a RICO representative suit.

[358] 18 U.S.C. § 1965 (a)(1976).

[359] Id., § 1965 (b)(c)(d).

[360] 18 U.S.C. § 1964 (c)(1976).

[361] The advantages of RICO venue and process rules over non-RICO rules are discussed in RICO Civil Proceedings, supra note 20.

but will not affect the choice between an individual and a representative suit. Other factors, inherent in the nature of class action litigation, will affect this decision.

1. Attorney's Fees

¶92 As previously mentioned,[362] courts will look to the amount of recovery when computing the attorney's fee in a class action. Since the number of injured plaintiffs will affect the size of the award, the number of plaintiffs will affect the size of the attorney's fee. Attorneys, therefore, may prefer a representative over an individual action.

¶93 The incentive to bring a class action, however, is not "trebled" by RICO's provision for treble damages. When measuring the success of counsel in determining the fee, only single damages will be considered, not the judgment amount.[363] The damages found--the single damages--reflect the success of counsel. The remaining two thirds of the judgment are imposed by Congress, and not the result of the attorney's work effort.

¶94 Successful attorneys will also benefit from RICO's statutorily authorized fee awards where the attorney successfully

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[362] See ¶88, supra note 354.

[363] Milwaukee Toune Corp. v. Loew's Inc., 190 F.2d 561, 571 (7th Cir. 1951), cert. denied, 342 U.S. 909 (1952); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 484 (S.D.N.Y. 1970), modified on other grounds, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 383 (1973). Contra Advance Business Systems and Supply Co. v. SCM Corp., 415 F.2d 55, 70 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

proves the defendant's liability, but the damages recovered are small. Usually a small recovery [364] will be reflected by a small attorney's fee.[365] RICO, however, authorizes the awarding of reasonable fees to attorneys, and even in cases of small single damages the attorney should receive a reasonable fee.[366] This is also true for non-class action RICO suits.

2. Expense Sharing

¶95 Although RICO authorizes the recovery of court costs, the award is made only after a successful judgment. Interim costs arise,[367] however, and the litigant must be prepared to pay these expenses. The representatives in a class action often[368] overcome this burden by sharing the expenses.[369]

3. Treble Damages

¶96 Civic minded plaintiffs may choose to bring class actions based on their deterrent effect.[370] Although their individual damages recoveries will not be increased, the cost to the defen-

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[364] A small recovery is one in which a reasonable percentage of the single damages found would yield an inadequate attorney's fee.

[365] See ¶88, supra note 353.

[366] Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383, 390 (8th Cir.), cert. denied, 418 U.S. 836 (1974); Advance Business Systems and Supply Co. v. SCM Corp., 415 F.2d55, 70 (4th Cir. 1969) cert. denied, 397 U.S. 920 (1970); Locklin v. Day-Glo Color Corp., 378 F. Supp. 423, 428 (N.D. Ill. 1974). See also "Recovery of the Cost of Suit Including a Reasonable Attorney's Fee," ¶27.

[367] E.g., notifying absent class members. See ¶79, note 318.

[368] I H. Newberg, Newberg on Class Actions, § 1010.16 at 27 (1977).

[369] This same advantage will also accrue to a group of litigants who have joined their claims, but are not representing the interests of absentees.

[370] See ¶6-7, supra.

dants will increase as each class member is added. Once the group is of considerable size, as class action litigation necessitates,[371] the cost to the defendant will be relatively great, increasing the deterrent effect of the litigation.

4. Settlements

¶97 The bargaining positions of a single plaintiff and a defendant radically change when numerouse other plaintiffs join the first. The effect is a "more powerful litigation posture" for the class.[372] Furthermore, the class representative acquires a psychological advantage in coming before the court not alone, as the representative of one party, but on behalf of many."[373] This enhanced position of the plaintiff, and the concomitantly diminished position of the defendant, is much more likely to result in favorable settlements than will a series of individual actions.

5. Avoidance of Mootness

¶98 In suits for injunctions,[374] "[o]ne of the primary advantages of bringing a class action . . . is the avoidance of mootness . . ."[375] If a change in circumstances renders the

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[371] See ¶¶45-47.

[372] Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972).

[373] Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 435 (1959-60).

[373] It is not clear that a private litigant can seek an injunction under RICO. See "Private Action for Injunctive Relief," arguing that such relief is possible.

I H. Newberg, Newberg on Class Actions, § 1010.1a at 26 (1977).

representative's individual claim moot, the suit is not, necessarily, dismissed. The court may permit the individual representative to continue in that capacity, or allow substitute class representatives to intervene.[376] This further enhances the RICO class representatives bargaining position,[377] and increases the defendant's willingness to settle.

B. Disadvantages

1. Settlement

¶99 Although the likelihood of favorable settlements is increased in representative litigation, the plaintiff's choice of settlement may be decreased. Rule 23 requires court approval of any settlements or compromises once there has been class certification.[378] The freedom of the litigant to accept a settlement, therefore, is somewhat diminished.

2. Delay of Individual Relief

¶100 In individual action, once relief is awarded to the plaintiff, the action terminates. In class action litigation, however, the action is not terminated until all members of the class have been served with equal or proportional relief. The individual relief for the representative, therefore, "may be

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[376] See ¶39, supra.

[377] If the case is not dismissed due to mootness, the likelihood of a decision on the merits is greater.

[378] Fed. R. Civ. P. 23(c).

delayed until all relief for class members has been determined and distributed."[379]

3. Participation of Unwelcomed Counsel

¶101 Subdivision (C)(2)(C) permits any class member, who has not requested exclusion, to enter an appearance through counsel. If there is an intervention, the class representative risks having the litigation conducted in part by an unwelcomed counsel who has a different view of and approach to the litigation. A compatible intervening counsel, of course, may actually benefit the class representative, and the class, by sharing in the prosecution.[380]

4. Increased Court Costs

¶102 Although RICO authorizes payment of court costs and attorney's fees,[381] the unsuccessful litigant must bear these costs on his own. Beyond the usual court costs, added costs, such as notice to class members, are associated with the bringing of a class action. Should the action prove unsuccessful, then, the class representation becomes liable for larger litigation expenses.

5. Res Judicata

¶103 In the event of an unsuccessful litigation, all members of the class, present or absent, will be bound.[382] This result may not directly affect the named representative who

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[379] I H. Newberg, Newberg on Class Actions, § 1010.2a at 36 (1977).

[380] Id. at § 1010.2d.

[381] 18 U.S.C. § 1964 (c)(1976).

[382] Fed. R. Civ. P. 23(c)(3).

initiates the litigation: he would be bound in an individual action, too, but the effect on absent class members may influence his decision.

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THE STATUTE OF LIMITATIONS IN A CIVIL RICO SUIT FOR TREBLE DAMAGES

by

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Mark Flanagan
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INTRODUCTION

¶ 1 This material focuses primarily on one of the major issues that a private plaintiff will encounter in bringing a civil suit for treble damages under Title IX of the Organized Crime Control Act, of 1970, more commonly known as Racketeer Influenced and Corrupt Organizations (RICO). The RICO statute does not contain a statute of limitations provision. The issue is what statute of limitations should be applied to the RICO civil suit.

¶ 2 RICO permits the intensive use of civil suits to recover treble damages for injury caused by the defendant's pattern of criminal conduct[1] and to prevent activities which would cause such injury.[2] Congress intended these civil remedies to constitute a possible list of remedial measures - not an exhaustive one.[3] Congress emphasized that the "only limit on remedies is that they accomplish the aim set out of removing the corrupting influences and make due provisions for the rights of innocent people."[4]

¶ 3 The RICO civil remedies, particularly the treble

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[1] 18 U.S.C. § 1964(c) (1976).

[2] 18 U.S.C. § 1964(a) (1976).

[3] H.R. Rep. No. 1549, 19st Cong., 2d Sess. 35, 57, reprinted [1970] U.S. Code Cong. & Ad. News 4034.

[4] Id.

damage provision of section 1964(c),[5] are currently a major untapped method of redressing injured plaintiffs.[6] The legislative history of RICO reveals that Congress patterned the treble damage provision, as well as other sections of RICO, after the current body of antitrust law.[7] These private suit provisions of the antitrust law have blossomed into a major component of the nation's antitrust program.[8] The RICO civil remedies, still virgin territory, possess analogous potentiality.

¶ 4 Since the civil provisions of RICO evolved from antitrust law, the history of litigation in civil antitrust suits provides a source for analyzing many of the issues that will arise in future civil treble damage RICO suits. The issue that this material analyzes - the statute of limitations - is a good example. Although Congress amended the Clayton Act in 1955 to impose a four-year statue of limitations on treble damage antitrust suits, the jurisprudence prior to this time serves as a relevant precedent.[9]

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[5] 18 U.S.C. § 1964(c) (1976).

[6] Only two civil treble damage cases have been brought under RICO so far and both were dismissed on venue grounds. See Farmer's Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978); King v. Vesco, 342 F. Supp. 120 (N.D. Cal. 1972).

[7] See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58, reprinted in [1970] U.S. Code Cong. & Ad. News 4007, 4034. "Section 1965 contains broad provisions regarding venue and process which are modeled on present antitrust legislation."

[8] L. Sullivan, Handbook of the Law of Antitrust 770 (1st ed. 1977).

[9] C. Hill, Antitrust Advisor 554 (1st ed. 1971).

¶ 5 It is far from certain, however, that a federal court forced to choose between several possible limitations periods for a RICO action will apply the same analysis as did the pre-1955 federal courts in the antitrust context.[10] Consequently, "old" antitrust law should not necessarily be relied on when this issue is finally litigated.[11]

¶ 6 This analysis is divided into five principal sections: Section I, an introduction to the relevant legislative history behind the limitations issue; Section II, a capsulized version of the general strategy to be employed in bringing a treble damage RICO suit; Section III, a detailed presentation of the statute of limitations issue; Section IV, a hypothetical civil suit in which the statute of limitations issue is resolved; and finally Section V, a general conclusion.

I. LEGISLATIVE HISTORY

¶ 7 It would have been reasonable to have expected Congress to have included a statute of limitations for civil RICO actions. The same functions served by adding a statute of limitations to the civil provisions of the federal antitrust laws[12]

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[10] See ¶¶ 47 - 48, infra.

[11] A RICO plaintiff should be aware that in many cases it will be the defendant arguing that the old antitrust law should serve as ruling precedent. As will be explained in more detail below, reliance on old antitrust law will more consistently result in the application of shorter limitations periods.

[12] 15 U.S.C. 15-15c (1976).

in 1955 would have been served by providing a limitations period for RICO.[13] The legislative history of RICO suggests that the omission was the result of political maneuvering, rather than a desire to use state law.[14]

¶ 8 The first proposals to Congress for RICO type legislation were made in the 90th Congress. S. 2048[15] would have amended the Sherman Act to prohibit the investment of unreported income in interstate business.[16] As an amendment to the antitrust laws, damages for violation could have been sought under the anti-

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[13] Mr. Celler described the role of the 1955 amendment to the antitrust laws: "[T]o avoid the difficulty and confusion that confonts litigants and their counsel as to what statute really applies ... , we come now and we seek to resolve chaos and confusion." 101 Cong. Rec. 5129 (1955).

[14] The Supreme Court has held legislative omission of a statute of limitations is to be taken as a signal to apply state statutes of limitations. Runyon v. McCrary, 427 U.S. 160, 180 (1975). But see Occidental Life v. E.E.O.C., 432 U.S. 355, 367 (1977) (state limitations will not be borrowed if application would defeat the purpose of the federal legislation).

[15] S. 2048, 90th Cong., 1st Sess. (1967), reprinted in RICO Legislative History at 4-5 as compiled by the Cornell Institute on Organized Crime [hereinafter cited as RICO Leg. Hist.].

[16]

> Sec. 8. Every person who (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise engaged in or affecting trade or commerce among the several States, with foreign nations, or within any place subject to the provisions of Section 3, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than $50,000, or imprisoned for not more than one year, or both.

Id. § 8, reprinted in RICO Leg. Hist. at 4-5.

trust treble damage provision,[17] and the 1955 statute of limitations[18] would have been applicable. S. 2049[19] prohibited investments in interstate business with funds derived from listed criminal activities.[20] It provided remedies parallelling the

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17 Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976).

18 "Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued."

15 U.S.C. § 15b (1976).

19 S. 2049, 90th Cong., 1st Sess. (1967), reprinted in RICO Leg. Hist. at 6-14.

20 Sec. 3.(a) Whoever, being a person who has received any income derived directly or indirectly from any criminal activity in which such person has participated as a principal within the meaning of Section 2, Title 18, United States Code, applies any part of such income or the proceeds of any such income to the acquisition by or on behalf of such person of legal title to or any beneficial interest in any of the assets, liabilities, or capital of any business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce shall be guilty of a felony and shall be fined not more that $10,000 or imprisoned not more than ten years or both.

(b) Whoever, being a director, officer, or agent of a corporation who has authorized, ordered, or performed any act which constitutes in whole or in part a violation of subsection (a) by such corporation, shall be guilty of a misdemeanor and shall be fined not more than $5,000, or imprisoned not more than one year, or both.

Id. § 3a, reprinted in RICO Leg. Hist. at 8.

antitrust laws.[21] S. 2049 also explicitly provided a statute of limitations for civil actions[22] and the means for tolling the statute during government actions.[23]

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[21] Sec. 5. (a) Any person who is injured in his business or property by reason of any violation of section 3 may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

(b) Whenever the United States is injured in its business or property by reason of any violation of section 3, it may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual amount of the damages sustained, and the cost of the action.

Id. §§ 5(a), 5(b), reprinted in RICO Leg. Hist. at 10.

[22] "(c) Except as otherwise provided by section 6, any action under this section shall be barred unless it is commenced within four years after the cause of action accrued." Id. § 5(c), reprinted in RICO Leg. Hist. at 10. S. 2049 and subsequent bills provided for government actions for damages or injunctions. A state's statute of limitations cannot prevent actions by the United States to enforce its own rights or public policy. United States v. Summerlin, 310 U.S. 414, 416 (1940).

[23] (b) Whenever any civil or criminal action (other than an action under section 5(b)) is instituted by the United States to prevent, restrain, or punish any violation of section 3, the running of the period of limitations prescribed by section 5(c) with respect to any private right of action arising under this Act which is based in whole or in part on any matter complained of in such action by the United States shall be suspended during the pendency of such action by the United States and for one year thereafter. Whenever the running of such period of limitations is so suspended with respect to any right of action arising under section 5(a), action thereon shall be barred unless it is commenced within such period of suspension or within four years after the accrual of the cause of action.

Id. § 6(b), reprinted in RICO Leg. Hist. at 11.

¶ 9 No action was taken on S. 2048 or S. 2049,[24] but, on the recommendation of the American Bar Association,[25] they were consolidated into an independent bill and reintroduced in the 91st Congress as S.1623.[26] Once again the suggested civil actions provisions of the bill[27] were accompanied by the necessary statute of limitations[28] and tolling provision.[29] After initial committee hearings, S.1861[30] was introduced refining S.1623.[31] S.1861 deleted the provision for private civil

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[24] 113 Cong. Rec. 18007 (1967) (introduction and referral to committee).

[25] Organized Crime Control: Hearings on S. 30 and related proposals before Subcomm. No. 5 of the Comm. on the Judiciary House of Representatives, 91st Cong., 2d Sess. 148 (1970), reprinted in RICO Leg. Hist. at 129.

[26] S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-6996 (1969), reprinted in RICO Leg. Hist. at 27-28. "In the 90th Congress I sponsored two bills, S. 2048 and S. 2049, which were essentially similar to the bill I introduce today." 115 Cong. Rec. 6993 (1969) reprinted in RICO Leg. Hist. at 25 (remarks by Senator Hruska upon introduction of S. 1623).

[27] S. 1623, 91st Cong., 1st Sess. §§ 4(a), (b), 115 Cong. Rec. 6996 (1969), reprinted in RICO Leg. Hist. at 28.

[28] "Except as otherwise provided by section 5, any action under this section shall be barred unless it is commenced within four years after the cause of action accrued." Id. § 4(c), reprinted in RICO Leg. Hist. at 28.

[29] Id. § 5(b), reprinted in RICO Leg. Hist. at 28.

[30] S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568-9571 (1969), reprinted in RICO Leg. Hist. at 31-34.

[31] "The bill which I am introducing today, the Corrupt Organizations Act of 1969, is in part a product of testimony developed in 4 days of hearings on S. 30." 115 Cong. Rec. 9567 (1969), reprinted in RICO Leg. Hist. at 30 (Hearings on S. 30 and S. 1623 were simultaneously conducted).

remedies and the accompanying statute of limitations and tolling provision.[32] S. 30,[33] containing RICO,[34] followed the lead S.1861 and was passed by the Senate[35] with no provision for private civil remedies.

¶ 10 The House Committee on the Judiciary, at the suggestion of the American Bar Association,[36] added private civil actions to S.30. H. 19586[37] was identical to the Senate version of S.30 in relevant parts but provided for private civil actions.[38]

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[32] It is reasonable to conclude that private civil actions were deleted in an attempt to streamline the bill, sidestepping the accompanying complex legal issues. The Senate appears to have been more interested in providing the government with RICO powers, quickly, than in providing all the possible remedies. The Senate realized that a fully developed private civil action jurisprudence would have required extensive work in areas of standing to sue, proximate causation, government intervention, private injunctive actions as well as statutes of limitations.

[33] S. Rep. No. 617, 91st Cong., 1st Sess. 1-32 (1969), reprinted in RICO Leg. Hist. at 88-109.

[34] S. 1623 and S. 1861 were combined and refined to form Title IX of S. 30.

[35] 116 Cong. Rec. 36296 (1970).

[36] Organized Crime Control: Hearings on S. 30, and related proposals before Subcomm. No. 5 of the Comm. on the Judiciary House of Rep., 91st Cong., 2d Sess. 544, 548 (1970), reprinted in RICO Leg. Hist. at 158.

[37] H. 19586, 91st Cong., 2d Sess. (1970), reprinted in part in RICO Leg. Hist. at 123.

[38]
> (c) Any person injured in his business or property by reason of a violation of Section 1962 of this Chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id. § 1964(c), reprinted in RICO Leg. Hist. at 123.

It did so incompletely, providing no subsidiary provisions.[39] H. 19215[40] parallelled H. 19586, but H. 19215 contained a statute of limitations and other necessary provisions.[41] An amendment similar in scope to H. 19215 was also presented directly to the House Committee on the Judiciary by Representative Stieger.[42]

¶ 11 The House Committee on the Judiciary passed over the complete versions and chose the incomplete language of H. 19586

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[39] H. 19586 had no provisions for:

(1) a statute of limitations;
(2) private injunctive actions;
(3) government damage actions;
(4) government intervention into private actions; or
(5) colateral estoppel.

[40] H. 19215, 91st Cong., 2d Sess. (1970), reprinted in part in RICO Leg. Hist. at 121-122.

> Any person who is injured in his business or property by reason of any violation of Section 1962 of this Chapter may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the actual damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

Unenacted § 1964(e) as proposed by H. 19215, 91st Cong., 2d Sess. (1970), reprinted in RICO Leg. Hist. at 121.

[41] "(h) Except as hereinafter provided, any civil action under this section shall be barred unless it is commenced within five years after the cause of action accrued."
Unenacted § 1964 (h) as proposed by H. 19215, 91st Cong., 2d Sess. (1970) reprinted in RICO Leg. Hist. at 122.

[42] Measures Relating to Organized Crime: Hearings on S.30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 520-522 (1970), reprinted in RICO Leg. Hist. at 156-57.

providing private civil actions,[43] but no statute of limitations. Even when a floor amendment[44] was offered by Representative Steiger to rectify the omission, the committee persuaded its sponsor to have it withdrawn.[45] The House was shown the need for a statute of limitations and had ample opportunity to include one. The Senate had no such opportunity. Because of the approaching end of the Congress and upcoming elections, the Senate was forced to concur with the House's version of S. 30 or, had it waited for a conference committee, face the possible death of a much needed bill.[46]

¶ 12 When Representative Stieger was persuaded to withdraw

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

18 U.S.C. § 1964(c) (1976), reprinted in RICO Leg. Hist. at 184.

[44] 116 Cong. Rec. 35346 (1970), reprinted in RICO Leg. Hist. at 209

[45] [Poff:] [Y]et I suggest to the gentleman that prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have in all the ramifications which this legislation contains and for that reason, I would hope the gentleman might agree to ask unanimous consent to withdraw his amendment from consideration ... .

[Steiger:] I would like to believe that I do not have to be run over by a tank to get the word.

Id.

[46] The Senate received S.30 from the House on October 12th, days before the election recess and only 29 working days before the end of the session. See 116 Cong. Rec. 36280-44876 (1970).

his floor amendment, Representative Poff told him that a statute of limitations would be considered at a future date.[47] Only the Senate gave this area more consideration.

¶ 13 In the 92nd Congress, Senators McClellan and Hruska introduced S. 16.[48] Like Representative Stieger's amendment, S. 16 would have amended RICO by providing a statute of limitations[49] and other civil remedies.[50] The Senate passed S. 16,[51] but even though it was tacked onto an already agreed to House bill,[52] the House refused to consider it.[53] The effort to add a statute

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[47] "I would hope that the gentleman might agree to ask unanimous consent to withdraw his amendment from consideration with the understanding that it might properly be considered by the Judiciary Committee when the Congress reconvenes following elections or some other appropriate time."
116 Cong. Rec. 35346 (1970), reprinted in RICO Leg. Hist. at 209.

[48] Victims of Crime: Hearings on S.16, S.33, S.750, S.1946, S.2087, S.2426, S.2748, S.2856, S.2994, and S.2995 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess. 3-4 (1972).

[49] "Except as hereinafter provided, any civil action under this section shall be barred unless it is commenced within five years after the cause of action accrued."
S. Rep. No. 1070, 92 Cong., 2d Sess. 2 (1972), reprinted in RICO Leg. Hist. at 259.

[50] Private injunctive relief, government damage actions, and government intervention into private actions were provided in S.16. See S. Rep. No. 1070, 92d Cong., 2d Sess. 1-2 (1972), reprinted in RICO Leg. Hist. at 258-59.

[51] 118 Cong. Rec. 29379 (1972).

[52] S. 16 was incorporated in the Senate amended version of H.R. 8389. 118 Cong. Rec. 31055 (1972).

[53] The House received S. 16 and referred it to committee. 118 Cong. Rec. 29615 (1972). No action was taken on H.R. 8389 when it returned to the House.

of limitations was repeated in the 93rd Congress through S. 13.[54] S. 13 was identical to S. 16 and passed the Senate by a voice vote early in the first session.[55] It, too, received no House consideration.[56]

¶ 14 The House of Representatives had opportunities to include or add a statute of limitations to RICO. Although the courts may read this omission as a signal to apply state statutes of limitations,[57] more likely it was the result of political tensions and maneuvering. The Senate and some members of the House wanted a federal statute of limitations for RICO.[58] One can only conjecture that the House Committee on the Judiciary felt these outside proposals to be infringements on its domain,[59] therefore, refusing to give them proper consideration.[60]

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[54] S. 13, 93rd Cong., 1st Sess., 119 Cong. Rec. 10319-21 (1973), reprinted in part in RICO Leg. Hist. at 276-77.

[55] 119 Cong. Rec. 10319 (1973).

[56] The House referred S. 13 to committee where it died. 119 Cong. Rec. 10592 (1973).

[57] See note 3 supra.

[58] This is evidenced by the Senate's action on S. 16 and S. 13 and the recommendations of Rep. Steiger.

[59] The parliamentary inquiries of Mr. Celler and other members of the House Committee on the Judiciary upon the reading of Mr. Steiger's amendment reveal the Committee's dislike for outside input. 116 Cong. Rec. 35346 (1970), reprinted in RICO Leg. Hist. at 209.

[60] The House Judiciary Committee's Hearings and Reports make no mention of the statute of limitations issue.

II. GENERAL STRATEGY INVOLVED IN THE FORMULATION OF CIVIL RICO SUITS FOR TREBLE DAMAGES

¶ 15 A prosecutor in a criminal RICO case possesses a pivotal position in regard to a plaintiff in a related treble damage RICO case. His access to superior investigative resources and his familiarity with the entire spectrum of local criminal activity assists a prosecutor in recognizing a RICO pattern of activity and the resulting victims. The private plaintiff, on the other hand, may not even be aware that someone harmed him, or even if he is, that the perpetrator engaged in other criminal conduct in furtherance of a pattern that would invoke the criminal and civil aspects of RICO - and thus, the treble damages. Consequently, the prosecutor must conduct his RICO investigations in such a way as to facilitate the bringing of subsequent civil RICO suits. This is accomplished by always looking for a financially solvent defendant. A brief analysis of a prosecutor's normal strategy assists in demonstrating what new considerations are required.

¶ 16 Traditionally, four stereotype defendants exist in a criminal prosecution for bribery, graft, fraud, extortion, or related crimes:

1) Mr. Thug, the violent enforcer;

2) Mr. Mafioso, the leader and most responsible person;

3) Mr. Corruption, the fallen public official; and

4) Mr. Money, the "legitimate" white-collar businessman who funds a scheme and maintains a low profile.

A prosecutor normally indicts only the first three: Mr. Thug, because society desires that violent persons be imprisoned; Mr. Mafioso, because he is the most culpable person; and Mr. Corruption, because he has abused the "public trust" inherent in his office. The prosecutor does not indict Mr. Money for a combination of factors: a low level of culpability; insufficient evidence; and the desire to immunize him and turn him state's witness to obtain more evidence against the other three.

¶ 17 Thus, in a more traditional sense, the prosecutor halts his investigation once he obtains sufficient evidence to indict Mr. Thug, Mr. Mafioso, and Mr. Corruption. The investigation does not normally continue into Mr. Money; it will be too time-consuming and he will be immunized anyway.

¶ 18 Such a scenario hinders the bringing of a treble damage RICO suit. In this regard, the effects of an indictment on the civil plaintiff need to be examined. First, the indictment informs him who is responsible for the damages he suffered. Second, it conveys the RICO nature of the offense. Third, it provides sufficient prima facie evidence for the plaintiff to file a civil complaint.

¶ 19 Consequently, with the filing of the indictment, the plaintiff knows that Mr. Thug, Mr. Mafioso, and Mr. Corruption are responsible. The problem, however, is that these defendants are usually insolvent: Mr. Thug does not possess much wealth; Mr. Mafioso retains his wealth in hidden assets;

and Mr. Corruption is typically of comfortable, but limited, means. Thus, the private plaintiff has no incentive to bring a treble damage civil suit against these three.

¶ 20 Obviously, Mr. Money is the solvent defendant. At the time of the indictment, however, Mr. Money is not included; thus, the plaintiff does not know of his involvement. By the time Mr. Money is revealed as a witness in the case and the plaintiff discovers his involvement, the statute of limitations for filing the civil complaint may well have run, and with it the opportunity for civil damages. Further, even if the plaintiff knows before the indictment through independent means that Mr. Money is somehow involved in the injury against him, he may not connect Mr. Money with the other three and may not know that Mr. Money's actions constitute grounds for a RICO case. Thus, if Mr. Money is not included in the indictment then the plaintiff will not make the connection. If he does not make the connection, he will not realize the RICO nature of the offense. If he does not realize the RICO nature of the offense, he will not be able to bring a suit for treble damages.

¶ 21 The prosecutor must therefore conduct his RICO case with a focus on the financially solvent defendant: the key to the civil RICO cases. The prosecutor can accomplish this goal by continuing his investigation despite the extra costs until he gathers enough evidence, if possible, to indict Mr. Money. The indictment will serve notice to all possible plaintiffs that Mr. Money was involved and that the offense is of a RICO nature. As a result the

plaintiff will be able to file his complaint in time to avoid a bar under the statute of limitations. He will also be able to take advantage of any tolling resulting from the pendency of the government action.

¶ 22 This result is consistent with the prosecutor's traditional scheme. He can still make Mr. Money an immunized witness and can still prosecute Mr. Thug, Mr. Mafioso, and Mr. Corruption. Further, despite the extra investigation costs, the prosecutor has real incentive to employ the civil RICO strategy in his cases: his "promotion" of civil suits will help deter criminal activity since the consequence of such activity may be the payment of treble damages.

III. STATUTE OF LIMITATIONS

¶ 23 The statute of limitations poses the most complex issue that a plaintiff will encounter in bringing a treble damage RICO suit. The RICO statute, a federally created right, does not contain any statute of limitations provision. This means that the courts must look somewhere else to ascertain an appropriate statute of limitations.

¶ 24 In this regard case law involving federally created rights with no statute of limitation is a valuable precedent in predicting the future course of RICO. For example, the "old" antitrust law - the period prior to the congressional enactment of a standard four-year limitations statute is helpful. The statute of limitation situation of RICO is analogous to the old antitrust law: both are federally created rights that provide for treble damages. Other areas

of analogy are securities laws,[60a] federal civil rights cases,[61] and cases arising under the National Labor Relations Act.[62]

A. Application of State Law

¶ 25 It is well settled that when a federal statute creates a wholly federal right, but specifies no particular statute of limitations to govern actions under the right, the federal court applies a state statute of limitations for an analogous type of action.[63] The federal courts applied this rule to antitrust treble damage actions before the enactment of the four-year period of limitations.[64] It is the general rule for all types of federally created rights.[65]

¶ 26 This rule was challenged early in antitrust history in the United States Supreme Court case of Chattanooga Foundry & Pipe Works v. City of Atlanta,[66] an action under

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[60a] See S.E.C. rule 10b-(5), 17 C.F.R. § 240.10b-5 (1978), promulgated pursuant to § 10b of the Securities Exchange Act of 1934, 15 U.S.C § 78; (1976).

[61] See § 706(d) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 (1976); 42 U.S.C. §§ 1981 - 1983 (1976).

[62] See § 301 of the Labor Management Relations Act of 1947, 29 U.S.C § 185 (1976).

[63] See e.g., International U., U.A., A. & A.I.W. v. Hoosier C. Corp., 383 U.S. 696 (1966); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Campbell v. City of Haverhill, 155 U.S. 610 (1895).

[64] See e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta, id.; LEH v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964); Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), cert. denied, 361 U.S. 960 (1960).

[65] See generally the cases cited at note 63, supra.

[66] 203 U.S. 696 (1966).

the Sherman Act for treble damages. The Supreme Court decided, inter alia, whether the federal five-year statute of limitations for a "suit or prosecution for any penalty or forfeiture" should apply instead of an analogous state statute.[67] Justice Holmes, who delivered the opinion of the Supreme Court, stated emphatically that the penalty statute did not apply.[68] Mr. Justice, Holmes, did not elaborate on his reasoning; he only cited arguments in two earlier Supreme Court cases.[69] In the more informative of the two cases,[70] Justice Grey stated that the words, "penal" and "penalty," in a strict and primary sense, denote a punishment "imposed and enforced by the state for a crime against its laws."[71] Justice Grey also acknowledged that the words, "penal" and "penalty," can be construed in a broader sense. They are also "commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor

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[67] Id.

[68] Id. at 397.

[69] Id. See Brady v. Daly, 175 U.S. 148 (1899); Huntington v. Attrill, 146 U.S. 657 (1892).

[70] Huntington v. Attrill, id. (The issue in this case was whether or not a New York statute imposing liability on the officers of a corporation was penal. If it was penal, then no other states would have to give it due faith and credit since it would be an offense against the state of New York. If it was not penal, however, but a civil remedy to secure a private right, then other states would have to give a judgement under the statute full faith and credit. The issue did not concern a statute of limitations problem. The case is useful, however, for the various definitions of penal and penalty.)

[71] Id. at 667.

of the person wronged, not limited to damages suffered."[72]

¶ 27 In refusing to apply the federal penalty limitations statute to the treble damage suit in Chattanooga, the Supreme Court determined that the word, "penalty," in the statute referred to the strict sense, i.e., punishment for an offense committed against the state.[73] Since a treble damage anti-trust action is a civil remedy for a private plaintiff, regardless of whether it may be "penal in nature" in a broad sense, the federal penalty statute does not apply. The Supreme Court has steadfastly adhered to this construction of the penalty statute.[74]

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[72] Id. Justice Grey summarized the distinction among the various constructions in the following passage:

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrong-doer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. Id. at 667.

[73] Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906).

[74] It is extremely important to delineate among the various definitions that can be applied to the word "penalty." Additionally, just because the federal courts construe "penalty" in the federal penalty limitations statute in a strict, criminal sense does not mean that a state must also construe its state penalty limitations statute, if it has one, in a similar manner. The state could define "penalty" in a broad sense and thus apply its penalty limitations statute to civil remedies of private plaintiffs. Indeed in Huntington v. Attrill, Justice Grey, in dictum, tacitly acknowledged that a state is free to apply a broad definition to a state penalty limitations provision and that this would not necessarily be inconsistent with the federal viewpoint. 146 U.S. 657 (1892). See Part C, infra.

¶ 28 Recently, however, the Supreme Court deviated from this approach. In Occidental Life v. E.E.O.C.,[75] involving the Civil Rights Act of 1964, the sole question before the Court was what time limit, if any, was applicable to the Equal Employment Opportunity Commission's right to sue a private employer alleged to have violated the Act.[76] Justice Stewart acknowledged that "[w]hen Congress has created a cause of action and has not specified the period of time within which it may be asserted, the Court has frequently inferred that Congress intended that a local time limitation should apply."[77] Justice Stewart stated further that "the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute"[78] and that "[s]tate limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute."[79] Stewart argued that Congress did not adequately foresee the tremendous backlog of suits that would confront the EEOC, and that a state statute of limitations would frequently, as in the instant case, bar the plaintiff's suit.[80] Stewart

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[75] 423 U.S. 355 (1977).

[76] Id.

[77] Id. at 367.

[78] Id.

[79] Id. (emphasis added).

[80] Id. at 370 - 71.

concluded that this result was contrary to congressional intent and that the Supreme Court could use its "discretionary power" to locate a just result.[81] Consequently, the Supreme Court affirmed the holding of the Court of Appeals that the state statute of limitations was not applicable in the instant case[82] - a result which meant that no limitations statute was applied.[83]

¶ 29 It is difficult to weigh the effect that Occidental might have on RICO cases. Since RICO was patterned after antitrust law, and Congress was ostensibly aware of the practice of looking to the state under the old law and of the enactment of the standard statute of limitations, it is apparent that Congress intended the courts to apply the state law.[84] In keeping with this view, Occidental stands for the principle that if unforeseen circumstances intervene that hamper federal policy, and Congressional intent,

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[81] Id. at 373.

[82] Id.

[83] Mr. Justice Rehnquist, with whom the Chief Justice joined, filed a strenuous dissent. Justice Rehnquist stated that "a consistent line of opinions from this Court holding that, in the absence of a federal limitations period, the applicable state limitations period will apply is being ignored by a process of unwarranted judicial legislation" and that the "premises of the majority . . . are supported, not by a slender reed, but by no reed at all." Id. at 373 - 74, 378. He also stated that there "is simply no support for the proposition that a federally created right of action should impliedly be without temporal limitations." Id. at 376.

[84] Cf., ¶ 14, supra.

then the courts are free to exercise "discretionary power."[85] Consequently, if a particular statute of limitations is contrary to the federal policies behind RICO, it can possibly be circumvented.[86]

¶ 30 In future RICO cases for treble damages the courts will probably apply a state statute of limitations.[86a] This viewpoint is strongly suggested by a regiment of federal decisions. Two questions then remain: 1) from which state should a statute be invoked; 2) given this answer, which statute of limitation within a given state should be invoked?

B. Choice of a State for the Purpose of Choosing a Statute of Limitations

¶ 31 When a cause of action arises out of a federally created right, and courts look toward state law for a statute of limitations, the courts have invariably applied the

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[85] But see Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) where an analogous issue arose in the civil rights area. The Supreme Court took a view contrary to Occidental and upheld a state statute of limitations.

[86] It must be cautioned, however, that Occidental involved civil rights, an area noted for special; the precedential value in regard to RICO may be slight.
In a footnote, Justice Rehnquist (dissenting in part) stated that previously "this Court rejected arguments based, in part, on contentions that Title VII plaintiffs should be treated with special deference because Title VII served to vindicate important public interests. I fear that the Court today adopts, sub silentio, their previously rejected 'Title VII-is-different' arguments as a way of approaching a statute notable for its expanses of congressional silence." Occidental Life Ins. Co. of Cal. v. E.E.O.C., 432 U.S. at 380 n. 4.

[86a] But see the concurring opinion of Mr. Justice Brennan in McAllister v. Magnolia Petro. Co., 357 U.S. 221, 227-30 (1968).

statute or law of the forum state.[87] For instance, in a recent case, Forrestal Village, Inc. v. Graham,[88] the United States Court of Appeals for the District of Columbia stated in dictum that "[it] is well established that when, as here, Congress has created a federal right, but has not prescribed a limitation period for enforcement, federal courts will borrow the period of limitations prescribed by the state where the court sits."[89] The Court of Appeals cited three Supreme Court cases as authority.[90] In none of these cases, however, did the courts consider any arguments that the provisions of some other state, other than the forum state, were relevant. Indeed, in one of these Supreme Court cases Justice Stewart included the following footnote:

> The record indicates that Indiana is both the forum State and the State in which all operative events occurred. Neither party has suggested that the limitations provision of another State is relevant. There is therefore no occasion to consider whether such a choice of law

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[87] See e.g., Shapiro v. Paramount Film Dist. Corp., 274 F.2d 743, 745 (3d Cir. 1960) (statute of limitations for the forum in which the court is sitting should be applied); Gordon v. Loew's, Inc., 247 F.2d 451, 454 (3d Cir. 1957) (statute of limitations in which the district court sat); Filson v. Fountain, 197 F.2d 383 (D.C. Cir. 1952) (per curiam) (even though the cause of action arose in New Jersey, the forum state controlled). But see Vanston Bondholders Protective Com. v. Green, 329 U.S. 156 (1946) where the Court did not apply the law of the state where it sat, but enforced the Bankruptcy Act in accordance with the authority granted by Congress to determine what claims should be heard according to federal equitable principles.

[88] 551 F.2d 411 (D.C. Cir. 1977) (per curiam).

[89] Id. at 413.

[90] McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 276 - 77 (1830); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) (actions at law); Cope v. Anderson, 331 U.S. 461, 463 - 64 (1947) (suits in equity); and International Union, UAW v. Hoosier Corp., 383 U.S. 696, 704 - 05 n. 7 (1966).

> should be made in accord with the principle of Klaxon Co. v. Stenton Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477; or by operation of a different federal conflict-of-laws rule.[91]

The point is this: it does not appear that the federal courts have decided on the merits that the statute of limitations of the forum state, as opposed to some other state, should automatically apply.[92] This has been the practice - not the law.

¶ 32 Where the forum state is also the state where all operative facts occurred, there is no issue. If, however, the lex loci is some other state or combination of states, then it can be persuasively argued that the law of these states should apply since they have a greater nexus to the cause of action. Thus a complex issue concerning a choice of state could arise - an issue Justice Stewart clearly foresaw.[93] Of course, where there are "borrowing provisions" in the forum state[94] - statutes that require the use of the statute of limitations where the cause of action accrued - then the issue is resolved. Notice, however, that even in this instance federal courts are still

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[91] International U., U.A., A. & A.I.W. v. Hoosier C. Corp., 383 U.S. 696, 705 n. 8 (1966).

[92] See A. Hill, State Procedural Law In Federal Nondiversity Litigation, 69 Harv. L. Rev. 66, 80 (1955).

[93] See note 91, supra.

[94] See, e.g., Momand v. Universal Film Exchanges, 172 F.2d 37 (1st Cir. 1948), cert. denied, 336 U.S. 967 (1949); Hansen Packing Co. v. Swift, 27 F. Supp. 364 (S.D.N.Y. 193

applying the law of the forum state. The question thus becomes: should the federal courts apply their own discretionary power based on federal common law to choose the law of the state that it determines to the case at bar?

¶ 33 The obstacles to such an alternative are the Klaxon principle[95] and the settled practice evolving from Rules of Decision Act[96] of applying the statute of limitations of the forum state.[97] In diversity cases the Klaxon case established the view that the law of the forum state applies in choice-of-state problem.[98] Its applicability, however, is not entirely apparent in a federal-question case. Klaxon aims at providing the same result in the federal court as in the state court. But with federally created rights, where the federal government has exclusive jurisdiction, why should state interests be controlling? Since the suit cannot be brought in a state court there is no state-federal forum shopping interest to protect. Consequently, the strong federal interest to lessen forum shopping among federal courts outweighs any state interest. In this regard, one authority stated:

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[95]The law of the forum state applies in choice of law problems in diversity cases. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

[96]28 U.S.C. § 1652 (1976).

[97]See A. Hill, State Procedural Law In Federal Nondiversity Litigation, 69 Harv. L. Rev. 66, 100 (1955).

[98]Id. at 73; Note, Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases, 68 Harv. L. Rev. 1212, 1215 (1955).

> To permit the result of the litigation to vary from one federal court to another, on the basis of the accident of venue in a state which has no interest whatever in the subject matter of the controversy, can be justified only by a clear congressional directive, which is, of course, lacking. This argument has a fortiori bearing when a state statute of limitations is applied although the action is upon a federally created right and state interests are entirely non-existent.[98a]

¶ 33a In regard to the Rules of Decision Act, under which the local choice-of-law rules are followed in the absence of a compelling federal interest, the same authority suggested that the federal interest in the outcome of the litigation provides enough reason to justify the application of a federal choice-of-law rule.[98b]

¶ 34 Thus, an argument can be made in future treble damage RICO suits that compelling federal interests necessitate the application of federal choice-of-law rules in choosing a state for the purposes of a statute of limitations. In making such a choice the federal courts should consider all relevant factors such as the state or states of lex loci, the residences of the defendants, and the principal places

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[98a] A. Hill, State Procedural Law In Nondiversity Litigation, 69 Harv. L. Rev. 66, 102 (1955). See also Note, Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases, 68 Harv. L. Rev. 1212, 1226 - 27 (1955).

[98b] A. Hill, State Procedural Law, id. at 104. See generally P. Mishkin, The Variousness of "Federal Law:" Competence and Discretion In the Choice of National and State Rules For Decision, 105 U. Pa. L. Rev. 797 (1957) (examines the issues arising when a court must choose between state law or federal common law in a federal question case where congressional legislation is silent); Hart and Weschler, The Federal Courts and the Federal System 756, 825 - 29 (2d ed. 1973).

of business.

¶ 35 In regard to a civil RICO suit for treble damages, it is clearly advantageous to the plaintiff if the courts continue to apply the law of the forum state: this allows the plaintiff the most flexibility in choosing a desirable state of limitations. The lex loci alternative is presented here so that the civil plaintiff can anticipate such moves by a defendant. If a defendant does argue that the law of a state other than the forum should apply, and the limitations of that state would bar the action, this issue becomes quite important. The plaintiff can respond to such an argument in at least three ways. First, in a statute of limitations issue, the courts should follow the Rules of Decision Act as it has been practiced through the years and apply the forum-state law. Second, the Congress intended that the courts construe RICO liberally to accomplish its remedial purposes.[99] This should include permitting the plaintiff to choose a forum that will best effectuate the federal policy of permitting redress. Third, while developing a federal choice-of-law design will result in more uniformity, it will also result in the expenditure of valuable resources to determine the proper forum that should apply. For instance, the cause of action in a RICO mail fraud case could be everywhere the defendant mailed a letter pursuant to the RICO pattern of criminal activity. This could involve

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[99] Organized Crime Control Act of 1970 § 904(a), 84 Stat. 947 (1970). ("The provisions of this title shall be liberally construed to effectuate its remedial purposes.")

a multiplicity of states. Which state should the federal courts apply? No simple answer may exist; it is easier and more efficient to apply the forum state.

¶ 36 Since most courts have routinely applied the law of the forum, it can be expected that this practice will continue under RICO suits. Nevertheless, the plaintiff should be aware of this issue.

C. Characterization of the Federal Cause of Action

¶ 37 Once a court decides that state law should apply, and once the court chooses a particular state's law, it must then choose the most analogous state statute of limitations. This process of analogy requires the court to determine the essential character of the federal cause of action. Whether this "characterization" process is a question of local or federal law has split (and continues to split)[100] the federal courts. The evolution of this process among the various Circuits, as well as different characterization approaches for different substantive federal rights makes an accurate prediction quite difficult. Nonetheless, this section will attempt to give the RICO plaintiff some guidelines along which to select the most advantageous federal circuit and state.

¶ 38 The limitation provision in a state can generally be divided into five categories:

1) liability created by a statute other then a penalty or forfeiture;

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[100] See ¶¶ 47 - 56, infra.

2) liability for a tort;

3) liability for a breach of contract - written and oral;

4) liability for a statutory penalty or suit for a penalty; and

5) relief not otherwise provided for.[101]

Since the length of the limitation for each category usually differs substantially, with a suit for a penalty quite short[102] and for other actions such as an action on the case quite long,[103] the application of different categories can result in widely inconsistent results. In the area of treble damage suits the unique nature of the remedy made this application even more inconsistent.

1. Old Antitrust Law

39 Under the "federal" approach, the federal courts characterized the cause of action of the antitrust offense, usually a tort, looked to the state limitations provision,

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[101] See Note, Federal Statutes Without Limitations Provisions, 53 Col. L. Rev. 68, 69 (1953). Not all states have separate provisions for each category and each category may be subdivided. Note, too, that different statutes are often applicable to suit in the name of the state.

[102] See, e.g., Gordon v. Loew's, Inc., 247 F.2d 451 (3d Cir. 1957) (application of a penalty statute of two years).

[103] Shapiro v. Paramount Film Dist. Corp., 274 F.2d 743 (3d Cir. 1960) (the court applied a six-year statute for action on the case).

and chose the category into which the cause of action fell.[104] The basic premise to this approach was that the nature of the action was remedial or compensatory and not penal, as the Supreme Court held in Chattanooga Foundry & Pipe Works v. City of Atlanta.[105] Consequently, the federal courts did not even consider state penalty statutes: federal law determined that such provisions did not apply.

¶ 40 The federal approach was not concerned with the possibility that state courts interpreted the state penalty limitations provisions in a "broader" sense - thus encompassing a treble action civil suit - than Justice Homes' interpreted the federal statute in Chattanooga. In this regard, the Chief Judge of the United States District Court of Kansas said that the "cases taking the 'federal approach' seem to apply the state statute of limitations to the cause of action given under the Sherman Act as if the construction of that Act by the Supreme Court were a part of it."[106] Thus, under the federal approach, the federal courts looked to the state to choose a statute of limitations with the caveat that the state penalty provisions did not apply as a matter

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[104] See, e.g., Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961); Greene v. LAM Amusement Co., 145 F. Supp. 346 (N.D. Ga. 1956); Fulton v. Loew's Inc., 114 F. Supp. 676 (D. Kan. 1953); Electric Theatre Co. v. Twentieth-Century Fox Film Corp., 113 F. Supp. 937 (W.D. Mo. 1953); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952). Cf., Momand v. Twentieth-Century Fox Film Corp., 37 F. Supp. 649 (D. Okla. 1941).

[105] 203 U.S. 390 (1906).

[106] Fulton v. Loew's, Inc., 114 F. Supp. 676, 682 (D. Kan. 1953).

of federal determination[106a] - regardless of how the state defined "penalty." A district judge from the United States Western District of Missouri succinctly described the underlying rationale behind the federal approach:

> Whatever may be the judicial prerogative of state courts to construe their own statutes, we do not believe that they can ever assume the awesome role of Delphic Oracle on such a fundamental matter as to with finality characterize or classify a purely federal cause of action. It is true that a federal court will, particularly in diversity cases, apply state court construction to a state-derived cause of action. But when state court construction, even of its own statutes, invades the province of characterization in a field divorced from state regulation, then clearly such an invasion of the federal judicial province is entitled to no consideration. The line of demarcation between statutory construction and characterization is often elusive and distressingly vague. Yet, we cannot ignore the distinction. Although by federal law we are directed to the state statute of limitations in cases of this kind, we do not think that such procedural directive transforms state adjective law into a springboard from which state courts can assert a formative influence on federal substantive law. Regardless of defendants' protestations to the contrary, to allow an antitrust action to be characterized as one for a penalty or forfeiture, depending on a state court stare decisis, would involve considerably more than statutory construction for a limited procedural purpose.[107]

¶ 41 The federal courts siding with the "state" approach

[106a] As previously mentioned, the penalty provsions usually have a statute of limitations that is shorter than other limitation provisions. The federal approach assists in keeping the action alive.

[107] Electric Theatre Co. v. Twentieth-Century Fox Film Corp., 113 F. Supp. 937, 941 (W.D. Mo. 1953).

believed that the "federal" approach misapplied Chattanooga.[108] Under the "state" appraoch, the courts held that the application of the statute of limitations was to be left to the construction of the local laws.[109] In this regard, the courts placed critical reliance on the language in Chattanooga where Justice Holmes wrote that the question presented was "left to the local law by the silence of the United States"[110] and that since it "involves the construction of local law, we cannot but attribute weight to the opinion of the judge who rendered the judgement [in the court below], in view of his experience on the Supreme Court of Tennessee."[111] In construing the local law, the courts then held that the word, "penalty," in the state statute could possess a different meaning than in the federal statute,[112] and that the federal courts, under Chattanooga, had to accept the construction and interpretation of the state courts and statutes.[113]

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[108] See, e.g., Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), cert. denied, 361 U.S. 960 (1960); Gordon v. Loew's, Inc., 247 F.2d 451 (3d Cir. 1957); Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), cert. denied, 342 U.S. 947 (1952).

[109] See, e.g., LEH v. General Petroleum Corp., 330 F.2d 288, 291 (9th Cir. 1964). See also cases cited at note 108, supra.

[110] Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906). See., e.g., Powell v. St. Louis Dairy Co., 276 F.2d 464 (8th Cir. 1960). See also cases cited at note 108, supra.

[111] Id. at 398.

[112] See, e.g., Gordon v. Loew's, Inc., 247 F.2d 451, 457 (3d Cir. 1957); Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785, 788 (2d Cir. 1959).

[113] LEH v. General Petroleum Corp., 208 F. Supp. 289 (S.D. Cal. 1964), aff'd, 330 F.2d 288 (9th Cir. 1964) (lower court opinion cited extensively by the Court of Appeals).

The Court of Appeals for the Ninth Circuit (citing the lower court's opinion) summarized the import of the "state" approach:

> 'Adherence to the rationale just stated has required the Federal courts to compare the nature of the Federal treble-damage antitrust action with that of analogous State causes, as construed by the courts of the particular State involved, and from such comparison to decide which local statute of limitations the courts of the State would deem applicable to actions embracing Federal treble-damage antitrust claims.'[114]

¶ 42 Adherence to the "state" approach did not mean that the courts automatically invoked a penalty statute: some states construed their penalty state in a manner similar to Justice Holmes' construction of the federal statute.[115] Thus, the state law held that according to its law a treble damage antitrust action was not a suit for a penalty. Such a state construction gave a result similar to the "federal" approach.

¶ 43 Under the old antitrust law the majority of the courts adopted the "state" approach - specifically, the federal

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[114] Id. 330 F.2d at 294 (emphasis added).

[115] See, e.g., Shapiro v. Paramount Film Dist. Corp., 274 F.2d 743 (3d Cir. 1960); United Banana Co. v. United Fruit Co., 172 F. Supp. 580 (D. Conn. 1959); Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747 (S.D.N.Y. 1953).

courts in the First,[116] Second,[117] Third,[118] Fourth,[119]

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[116] Momand v. Universal Film Exchange, Inc., 172 F.2d 37 (1st Cir. 1948) (applied a six-year statute for torts; did not address the issue of a penalty provision; the "state" approach appeared to be controlling); LeWitt v. Warner Bros. Pictures Distributing Corp., 158 F. Supp. 307 (D.N.H. 1957) (applied a six-year statute for all personal injuries instead of a two-year penalty statute).

It should be mentioned that not all the relevant cases in this circuit were analyzed; only a few principal cases were examined to acquire an overview of the circuit law. Consequently, anyone conducting similar research in this circuit or states within the circuit should use the cases cited here only as avenues of approach; there could be other cases that might alter the respective holdings, although not in significant degrees.

[117] Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), cert. denied, 361 U.S. 960 (1960) (in New York, six-year statute for liability created by a statute other than a penalty on forfeiture applied and not the three-year penalty statute; this case settled a split in the district courts of New York). See Banana Distributors v. United Fruit Co., 158 F. Supp. 160 (S.D. N.Y. 1957) (three-year penalty applied in New York); Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747 (S.D.N.Y. 1953) (six-year statute applied). See also United Banana Co. v. United Fruit Company, 172 F. Supp. 580 (D. Conn. 1959) (three-year statute based on tort applied and not a one-year penal statute).

[118] Shapiro v. Paramount Film Dist. Corp., 274 F.2d 743 (3d Cir. 1960) (in Pennsylvania six-year statute for action on the case and not a penalty statute); Gordon v. Loew's, Inc., 247 F.2d 451 (3d Cir. 1957) (in New Jersey a two-year penalty statute applied and not a six-year tort statute).

[119] North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960) (in North Carolina a one-year penalty statute applied and not a three-year statute for a liability created by a statute other than penalty or forfeiture).

Sixth,[120] Seventh,[121] Eighth,[122] and Ninth[123] Circuits. Only the courts under the jurisdiction of the Fifth[124] and Tenth Circuits[125] followed the federal approach.[125a]

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[120] Englander Motors, Inc. v. Ford Motor Co., 293 F.2d 802 (6th Cir. 1961) (in Ohio a six-year statute governed and not a one-year penalty or forfeiture statute); Northern Kentucky Telephone v. Southern Bell Telephone & Telegraph Co., 73 F.2d 333 (6th Cir. 1934), cert. denied, 249 U.S. 719 (1935) (no penalty statute involved; it appeared that state law controlled); Schreiber v. Loew's Inc., 147 F. Supp. 319 (W.D. Mich. 1957) (penalty statute not involved; applied state law).

[121] Baldwin v. Loew's Inc., 312 F.2d 387 (7th Cir. 1963) (in Wisconsin a two-year penalty statute applies and not a six-year statute for an action created by a liability by a statute when a different limitation is not prescribed by law); Grengs v. Twentieth Century-Fox Film Corp., 232 F.2d 325 (7th Cir. 1956), cert. denied, 352 U.S. 871 (1956) (same holding as Baldwin); Hoskins Coal & Dock Corp. v. Traus Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), cert. denied, 342 U.S. 947 (1952) (in Illinois a two-year penalty statute applies instead of a five-year statute for civil actions not otherwise provided for); Sandidge v. Rogers, 167 F. Supp. 553 (S.D. Ind. 1958)(two-year penalty statute).

[122] Powell v. St. Louis Dairy Co., 276 F.2d 464 (8th Cir. 1960) (under Mississippi law, the court applied a two-year penalty statute instead of a five-year statute).

[123] LEH v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964) (in California a one-year penalty statute instead of a three-year statute).

[124] Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961) (would not apply the penalty statute of Alabama); Greene v. LAM Amusement Co., 145 F. Supp. 346 (N.D. Ga. 1956).

[125] Electric Theater Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937 (D. Kan. 1953); Fulton v. Loew's, Inc., 114 F. Supp. 676 (D. Kan. 1953); Wolf Sales Co. v. Rudulph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952). Cf., Momand v. Twentieth Century-Fox Film Corp., 37 F. Supp. 649 (W.D. Okla. 1941).

[125a] No decisions from the Court of Appeals for the D.C. Circuit were found.

¶ 44 In analyzing the split for the purposes of RICO, the instances where a court followed the "state" approach and applied a penalty statute are the most critical. These will be the states - according to old antitrust law - that will invoke a short statute of limitations. In this regard, of the states that confronted this issue, half applied the penalty provision:[126] California,[127] Illinois,[128] Indiana,[128a] Mississippi,[129] North Carolina,[130] New Jersey,[131] and Wisconsin.[1] Connecticut,[133] New York,[134] Pennsylvania,[135] and Ohio,[136]

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[126]This material analyzed approximately twenty states that addressed the statute of limitations issue generally. Of these states, fifteen took the "state" approach; and of these, seven clearly applied a penalty statute over another statute.

[127]LEH v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964), rev'd on other grounds, 382 U.S. 54 (1965).

[128]Hoskins Coal & Dock Corp. v. Truas Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), cert. denied, 342 U.S. 947 (1952).

[128a]Sandidge v. Rogers, 167 F. Supp. 553 (S.D. Ind. 1958).

[129]Powell v. St. Louis Dairy Co., 276 F.2d 464 (8th Cir. 1960).

[130]North Carolina Theatres Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

[131]Gordon v. Loew's, Inc., 247 F.2d 451 (3d Cir. 1957).

[132]Baldwin v. Loew's, Inc., 312 F.2d 387 (7th Cir. 1963).

[133]United Banana Co. v. United Fruit Co., 172 F. Supp. 580 (D. Conn. 1959).

[134]Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), cert. denied, 361 U.S. 960 (1960).

[135]Shapiro v. Paramount Film Dist. Corp., 274 F.2d 743 (3d Cir. 1960).

[136]Englander Motors Inc. v. Ford Motor Co., 293 F.2d 802 (6th Cir. 1961).

followed the "state" approach, but declined to apply a penalty or forfeiture provision. In the cases where the courts applied a penalty provision, the statute of limitations, in comparison to what the alternative statute of limitations would have been, decreased an average of 3.3 years - from 4.8 years to 1.5 years.[137] Further, although it appears that many states were not involved in litigation concerning a penalty provisions dispute, it is reasonable to assume that upwards of half would have applied a penalty limitations provision considering that seven of the circuits applied the state approach.

¶ 45 It is clear that the application of the penalty limitations provision under old antitrust law sharply curtailed the plaintiff's ability to seek redress. Unfortunately, the "state" approach towards Chattanooga appears to be the better interpretation on purely legal principles. Despite the ambiguity of the Supreme Court's reasoning for the rejection of the Tennessee penalty provision, Justice Holmes emphatically directed the courts to look to the local law to construe the statute of limitations.[138]

¶ 46 In 1955 Congress resolved the chaos permeating the antitrust state by enacting a four-year limitation for treble damage suits.[139] The legislative history pertaining to this amendment documents just how chaotic the old law had

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[137]These figures were calculated from the time periods listed in the cases cited supra, notes 127-132.

[138]Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397-98 (1906). See ¶41, supra.

[139]L. Sullivan, Handbook of the Law of Antitrust 124 (1st ed. 1977).

become.[140]

¶ 47 The disparity in the state/federal characterization process still exists despite the Supreme Court's pronounce-

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[140] S. Rep. No. 619, 84th Cong., 1st Sess., reprinted in [1955] U.S. Code Cong. & Ad. News 2328, 2331.

> Even when the State whose statute of limitations is applicable has finally been ascertained, there remains still another hurdle to be overcome, namely the selection of the appropriate law of the State that governs private triple-damage proceedings. The problem is complicated in many instances by virtue of the fact that statutes of limitation must frequently be chosen from those pertaining to the ancient common-law forms of action such as trespass to persons and property, damage to property, and actions in the nature of actions on the case. In those instances where the State law has established a special statute of limitations for actions upon a liability created by statute, the selection of the proper limitation period may be immeasurably easier. Even here, however, confusion as to the correct limitation period abounds.
>
> In Northern Kentucky Tel. Co. v. Southern Bell T. & T. Co., a private suit for triple damages filed in the State of Kentucky which had a 5-year statute of limitations applicable to "an action upon a liability created by statute * * *," the court held that the 1-year statute of limitations governing actions for conspiracy was to be preferred to the 5-year period for statutory liability. In Reid v. Doubleday & Co., the problem was whether the applicable period was contained in the statute of limitations pertaining to actions to enforce "a liability created by statute other than a forfeiture or penalty" or that prescribed for actions "upon a statute for a penalty of forfeiture." In this instance, it was held that the 6-year period governing proceedings of the former type rather than the 1-year period for actions of the latter was applicable.

ment in UAW v. Hoosier Cardinal Corporation.[141] The Court held that the question of characterizing the essential nature of a federal cause of action is a matter of federal law.[142] Yet the Court left the door open to the state approach, upholding the district courts' characterization of the action as a matter of state law and stating that "there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy."[143]

> It can therefore be seen that not only are the provisions of State law establishing time limitations upon actions to recover a statutory liability inconclusive insofar as ascertaining the correct period in which to bring suit is concerned, but they frequently create the additional problem of determining whether the statutory liability imposed under the antitrust laws is in the nature of a penalty or forfeiture, or otherwise.
>
> It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws. This will be accomplished by establishing a uniform statute of limitations applicable to all private treble damage actions as well as Government damage actions, of 4 years.

See also, note, Treble Damages Time Limitations, 60 Yale L. J. 553 (1951).

[141] 383 U.S. 696 (1966).

[142] Id. at 706.

[143] Id.

¶ 48 Fortunately for the RICO plaintiff however, the Circuits have significantly migrated towards the "federal" approach since the era of the "old" antitrust cases. Evidence of this evolution can be seen by an analysis of case law interpreting several other federal statutes for which statutes of limitation are not provided.

2. Civil Rights Act of 1866

¶ 49 The cases arising under this federal statute reveal the most significant disparity in the characterization process. The Second, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits adopt the federal approach.[144] Note that with the exception of the Tenth Circuit,[145] all others have moved

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[144] See, e.g., Second Circuit: Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973) (citing only to federal precedent in determining that the analogous period is that for a "liability created by statute"); Swan v. Bd. of Ed. of New York, 319 F.2d 56 (2d Cir. 1963).

Fourth Circuit: Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978) (citing only to federal precedent in deciding that two-year period for "personal injuries" most analogous); Almond v. Kent, 459 F.2d 200 (4th Cir. 1972).

Sixth Circuit: Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975) (no reference to state law in characterizing the federal right as without analogue in the common law).

Seventh Circuit: Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978) (looks exclusively to federal precedent in characterizing the federal civil rights claim as "fundamentally different" from a common law tort and applying "liability created by statute" period).

Ninth Circuit: Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) ("Congress was not evinced any intention to defer to the states the definition of the federal right created in section 1983); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962) ("federal court determines for itself the nature of the right conferred by the federal statute").

Tenth Circuit: Zuniga v. Amfac Foods, Inc., 580 F.2d 380 (10th Cir. 1978) ("The characterization of this action for the purpose of selecting the appropriate state limitations period is ultimately a question of federal law.").

[145] The Tenth Circuit has taken a consistently federal approach. Compare Fulton v. Loew's, Inc., 114 F. Supp. 676 (D. Kan. 1953) with Zuninga v. Amfac Foods, Inc., 580 F.2d 380 (10th Cir. 1978)

away from the state characterization approach of the "old" antitrust cases.[146] These circuits choose the state analogy that "best effectuates the federal policies" underlying the federal statutory right.[147] For example, in Shouse v. Pierce County,[148] the Ninth Circuit held that a federal court "determines for itself the nature of the right conferred by the federal statute." The effectuation of federal policies must guide the court in the characterization process; a federal court must choose the state limitations period "that is sufficiently generous to preserve the remedial spirit of the federal civil rights actions."[149] The court determined that the most analogous state statute of limitations would be one for "liability created by statute;"

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[146] Second Circuit: Compare Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), cert. denied, 361 U.S. 960 (1960) with Rosenberg v. Martin, 478 F.2d 520 (2d Cir), cert. denied, 414 U.S. 872 (1973).
Fourth Circuit: Compare North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960) with Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978).
Sixth Circuit: Compare Englander Motors, Inc. v. Ford Motor Co., 293 F.2d 802 (6th Cir. 1961) with Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975).
Seventh Circuit: Compare Baldwin v. Lowe's, Inc., 312 F.2d 387 (7th Cir. 1963) with Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), cert. denied 438 U.S. 907 (1978).
Ninth Circuit: Compare LEH v. Gen'l Petroleum Corp., 330 F.2d 288 (9th Cir. 1964) with Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).

[147] See, e.g., Beard v. Robinson, 563 F.2d 331, 357 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978); Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970). Effectuation of federal policy should theoretically be a guiding principal in all cases where a state limitations period is borrowed. See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).

[148] 559 F.2d 1142 (9th Cir. 1977).

[149] Id. at 1146.

since the forum had no such period, the court applied the "catch-all" period.[150]

¶ 50 Several circuits adopt a "hybrid" approach; they look both to federal and state law when they characterize, or they use language that suggests a state approach, yet apply federal characterizations. The federal/state split is clear in the Third Circuit. In Wilson v. Sharon Steel Corporation,[151] the court held that the "limitation to be applied is that which would be applicable in the court of the state in which the federal court is sitting had an action seeking similar relief been brought under state law"[152] - a clear expression of the state approach.[153] Yet in Meyers v. Pennypack Woods Ownership Association,[154] the court looked to federal precedent and relied on its own de novo - and, by definition, federal - findings as to the plaintiff's section 1982 claim, although using "state approa" language and citing two state cases.[155] Further, the court

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[150] Id. at 1146-47. Since these cases adopt the "catch-all" limitation period by default, they do not explicitly characterize the essential nature of the federal right. Still, the federal courts must examine the character of the right--as a matter of federal law--to determine that no state law equivalent fits.

[151] 549 F.2d 276 (3d Cir. 1977).

[152] Id. at 280.

[153] See also Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977) where the court held that "federal courts must ascertain the underlying cause of action under state law and apply the limitations period which the state would apply if the action had been brought in state court." Id. at 1216.

[154] 559 F.2d 894 (3d Cir. 1977).

[155] Id. at 900

justified its analogy to a state tort cause of action on federal policy grounds,[156] a familiar element in "pure" federal approach cases.

¶ 51 The First Circuit is also ambivalent. On the one hand, one court appeared to adopt the state approach - the plaintiff's "alleged injuries are properly construed as personal injuries under Rhode Island law."[157] Yet, on the other hand, another case held that federal law "govern[ed] the question [of] what is the nature of a section 1981 action."[158] In Partin v. St. Johnsbury's Company,[159] the Rhode Island district court confronted its confusion when it stated: "It is unclear whether, in adopting an analogous state statute of limitations, a federal court must also look to whether state law would characterize the federal action as ex contractu or ex delicto . . . "[160]

¶ 52 The Fifth Circuit looks exclusively to state law in characterizing the essential nature of the federal cause of action. In a dramatic shift from the federal to the state

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[156] Id. at 903 n. 26.

[157] Walden III, Inc. v. Rhode Island, 576 F.2d 945, 947 (1st Cir. 1978).

[158] Ware v. Colonial Provision Co., 458 F. Supp. 1193, 1194 (D. Mass. 1978).

[159] 447 F. Supp. 1297 (D. R.I. 1978).

[160] Id. at 1310 n. 3. The court failed to resolve the inconsistency because the state and federal characterizations were identical. Id. at 1301.

approach,[161] two recent cases stated that state law controls regardless of what language previous Fifth Circuit opinions had used.[162] Both cases pointed out that the earlier federal cases had really applied state law characterizations; "references to federal law . . . in this line tend to be of little import. Federal interests are thus generally subordinated to a mechanical application of state law."[163] Since the ostensibly "federal approach" cases in the Fifth Circuit "depend[ed] substantially on state law in categorizing the essential nature of the claim,"[164] these recent cases unequivocably adopted the state approach.

3. National Labor Statutes[165]

¶ 53 The disparity of approaches in litigation under this statute is less obvious, yet inconsistency persists. The Fifth Circuit clearly adopts the state approach.[166] With the exception of the Seventh and Eighth Circuits, the remaining circuits which have heard National Labor Acts cases

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[161] In the old antitrust law, the Fifth Circuit clearly adopted the federal approach. See, e.g., Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961).

[162] Ingram v. Steven Robert Corp., 547 F.2d 1260, 1261 (5th Cir. 1977); Shaw v. McCorkle, 537 F.2d 1289, 1292-93 (5th Cir. 1976).

[163] Ingram, 547 F.2d at 1261.

[164] Shaw, 537 F.2d at 1293.

[165] See Labor-Management Relations Act, 1947, 29 U.S.C. §§ 141 et seq. (1976).

[166] See, e.g., Sewell v. Grand Lodge of the International A[illegible]. of Machinists and Aerospace Workers, 445 F.2d 545, 550 (5th Cir.), cert denied, 404 U.S. 1024 (1971); Dantagnan v. L.L.A. Local 1418, AFL-CIO, 496 F.2d 400, 403 (5th Cir. 1974).

appear to follow a uniformly federal approach,[167] characterizing the claim according to federal law and using effectuation of federal labor policy as a guideline in the analogy process.

¶ 54 The Seventh and Eighth Circuits contain conflicting decisions. In the Seventh, a district court[168] held that the characterization of the claim was a matter of federal law and stressed the importance of best effectuating federal labor policy.[169] On the other hand, another district court in the Seventh Circuit adopted the state characterization of a similar suit. In the Eighth Circuit, the court in Butler v. Local Union 823[171] held that "when a plaintiff sues on a federal cause of action the character of the action -

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[167] See, e.g., First Circuit: DeArroyo v. Sindicato de Trabajadores, Packing, AFL-CIO, 425 F.2d 281 (1st Cir 1970).
Second Circuit: Abrams v. Carrier Corp., 434 F.2d 1234, 1251-52 (2d Cir. 1970) ("it is for the federal court to consider the character of the claim involved, and give effect to the nature and purpose of the federal act from which the claim derives and to the federal objectives pursued.").
Fourth Circuit: Howard v. Aluminum Workers International Union and Local 400, 589 F.2d 771 (4th Cir. 1978); Coleman v. Krogen Co., 399 F. Supp. 724, 729 (W. D. Va. 1975).
Sixth Circuit: Pesola v. Inland Tool & Mfg., Inc., 423 F. Supp. 30, 33 (D. Mich. 1976).
Ninth Circuit: Pierce v. Southern Pacific Trans. Co., 586 F.2d 750, 752 (9th Cir. 1978).

[168] Grant v. Mulvihill Bros. Motor Serv., Inc., 428 F. Supp. 45 (N.D. Ill. 1976).

[169] Id. at 47.

[170] Mikelson v. Wisconsin Bridge & Iron Co., 395 F. Supp. 444, 447 (W.D. Wis. 1973).

[171] 514 F.2d 442 (5th Cir.), cert. denied, 423 U.S. 924 (1975).

e.g., whether it is one in "tort" or in "contract" - is a federal question."[172] Butler also stated that a court must characterize so as to best effectuate federal policy.[173] In contrast, the court in Sandobal v. Armour and Company[174] characterized the essential nature of the claim according to Nebraska law.[175]

4. Other Federal Statutes

¶ 55 In claims arising under the Securities Exchange Act of 1934,[176] federal courts uniformly apply the federal approach.[177] The federal approach has been adopted by the

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[172] Id. at 446.

[173] Id.

[174] 429 F.2d 249 (8th Cir. 1970).

[175] Id. at 256.

[176] 15 U.S.C. §§ 78a et seg. (1976).

[177] See, e.g., First Circuit: Cook v. Avien, 573 F.2d 685 (1st Cir. 1978).
Second Circuit: Phillips v. Levie, 593 F.2d 459 (2d Cir. 1979).
D.C. Circuit: Forrestal Village, Inc. v. Graham, 551 F.2d 411, 413 (D.C. Cir. 1977).
Third Circuit: Baker v. Butcher & Singer, 427 F. Supp. 355 (E.D. Pa. 1977).
Fourth Circuit: Newman v. Prior, 518 F.2d 97 (4th Cir. 1975).
Fifth Circuit: Hudak v. Economic Research Analysts, Inc., 499 F.2d 996 (5th Cir. 1974) (note: No discussion of how analogy reached.).
Sixth Circuit: Charney v. Thomas, 372 F.2d 971 (6th Cir. 1967).
Seventh Circuit: LaRosa Bldg. Corp. v. Equitable Life Assurance Soc. of the U.S., 542 F.2d 990 (7th Cir. 1976).
Eighth Circuit: Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.) cert. denied, 400 U.S. 852 (1970).
Ninth Circuit: Douglass v. Glenn E. Hinton Investments, Inc., 440 F.2d 912 (9th Cir. 1971). But see Fratt v. Robinson 203 F.2d 627 (9th Cir. 1953).

majority of those circuits that have adjudicated claims for damages implied under the Constitution.[178] Cases concerning section 459 of the Military Selective Service Act of 1967 likewise adopt the federal approach.[179]

¶ 56 Although the circuits seem largely consistent in their method of characterizing the preceding federal causes of action, individual circuits lack internal consistency in characterizing different federal rights. For example, the First, Third and Fifth Circuits employed the state approach in adjudicating claims arising under the Civil Rights Acts.[180] However, the Fifth Circuit uses a federal approach in analogizing SEC and Military Selective Service Act claims;[181]

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[178] See, e.g., Second Circuit: Regan v. Sullivan, 557 F.2d 300 (2d Cir. 1977).
Seventh Circuit: Beard v. Robinson, 563 F.2d 337 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978).
Ninth Circuit: DeMalherbe v. International Union of Elevator Operators, 449 F. Supp. 1335 (N.D. Cal. 1978).
The D.C. Circuit appears to adopt the state approach. In Shifrin v. Wilson, 412 F. Supp. 1282, 1301 (D. D.C. 1976), the court held that "the applicable statute of limitations for an action [implied under the constitution] is the same as that which 'the state courts would enforce in a comparable state action.'" Citing Ortiz v. LaVelle, 442 F.2d 912, 913-14 (2d Cir. 1971). This is not absolutely certain, however, since the court did not rely on state precedent in characterizing the essential nature of the claim.

[179] Fifth Circuit: Bell v. Aerodex, Inc., 473 F.2d 869, 871 (5th Cir. 1973).
Sixth Circuit: Marshall v. Chrysler Corp., 378 F. Supp. 94 (E.D. Mich. 1974).

[180] See ¶¶ 50-52, supra.

[181] See nn. 177 and 179, supra.

the Third Circuit often used a state approach in civil rights adjudication,[182] but uses an exclusively federal approach in SEC cases.[183] Finally, the First Circuit also used the state approach on occasion in civil rights cases,[184] but has chosen not to do so for labor[185] and SEC[186] suits. This inconsistency hampers an accurate prediction of a particular circuit's approach when the issue under RICO is finally litigated.

5. Summary and Recommendations

¶ 57 The preceding analysis clearly suggests the need for greater consistency in characterizing the essential nature of a federal cause of action. In addition to creating uncertainty and inadequate notice to potential plaintiffs,[187] inconsistency in characterization further complicates the inherently complex process of absorbing a state number. Administrative efficiency of the federal courts is significantly diminished. A uniform approach to characterization seems mandated.

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[182] See ¶ 50, supra.

[183] See note 177, supra.

[184] See ¶ 51, supra.

[185] See note 167, supra.

[186] See note 177, supra.

[187] See Ingram v. Steven Robert Corp., 547 F.2d 1260, 1263 (5th Cir. 1977) ("[T]he uncertainty about which limitation provision applies affords inadequate notice to potential plaintiffs.")

¶ 58 Assuming that UAW v. Hoosier Cardinal Corporation[188] stands for the position that state characterizations need not always control, the preferable alternative is to fashion a uniform approach of determining the essential nature of a federally-created right as a matter of federal law. The need for uniformity and the federal policy of administrative efficiency and adequate notice to the plaintiff seem sufficiently strong to override the presumption that a federal court must adopt state law characterization to fill gaps in the federal law. Moreover, as UAW states, characterization of a federal right is a federal question since characterization defines and limits the federal right - something which federal courts should properly do.[189]

¶ 59 The Supreme Court's latest pronouncement supports the federal approach. In Occidental Life Insurance Co. v. EEOC,[190] Justice Stewart stated: "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assume that the importation of state law will not frustrate or interfere with the implementation of national policies."[191] Federal

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[188] 383 U.S. 696 (1966).

[189] See note, Federal Statutes Without Limitations Periods, 53 Col. L. Rev. 68, 71-72 (1953) ("The courts are well situated to write federal law on the subsidiary issues involved in the limitation of actions.").

[190] 432 U.S. 355 (1977).

[191] Id. at 367.

characterization of the federal claim would insure that national policies are considered.

6. Implications for RICO

¶ 60 Since Congress modelled RICO after the antitrust laws and failed to equip it with a statute of limitations, RICO will naturally inherit much of the complexity and uncertainty of the "old" antitrust law. If the courts passively adopt the majority viewpoint of the old law - the "state" approach - then RICO treble damage suits will most probably be subject to the penalty provision. As explained above, the RICO plaintiff will often not know of the possibility of a RICO civil action until the criminal indictment occurs. The indictment, however, will frequently not be filed for several years since the substantive offenses delineated in RICO all have lengthy criminal limitation provisions. Consequently, if the plaintiff is restricted to bringing his action in states where the federal courts apply a penalty provision, it is highly likely that the civil cause of action will have accrued and run before the plaintiff can file his suit.

¶ 61 It is likely that some federal courts will adopt a position that is analogous to the "state" approach. Any RICO plaintiff must therefore choose a forum state with advanced knowledge of what the state construction of the law will be for the relevant statutes of limitations.[192]

¶ 62 Because of the liberal jurisdiction and venue pro-

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[192] See Appendix.

visions of RICO,[193] the plaintiff will normally have numerous state forums in which to bring his action. Consequently, if necessary the plaintiff will be able to avoid the short statute of limitations in a "penalty" state, through careful selection of his forum. If he chooses a "non-penalty" state as his forum and it is also the state where the cause of action accrued, the plaintiff will be able to litigate his suit without the threat of any penalty provisions.[194] If, however, the state he chooses is not the lex loci and is not involved intimately in the cause of action, then other considerations enter the picture. If the state he originally chooses has a borrowing statute, the plaintiff may still be stuck with the law of the lex loci. Alternatively, if the originally chosen forum state has no borrowing statute, the defendant might still be able to invoke the law of the lex loci or some other intimately involved state through the application of the federal choice of law principles outlined in Part III(B).

¶ 63 Thus, the initial advantage the plaintiff enjoys in choosing a forum may be reduced sharply. Indeed, this possibility heightens the need for advanced knowledge and analysis of the construction of state law in all the possible forums. Ideally, if the lex loci is a penalty state and will be a bar to his action, the plaintiff should ini-

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[193] See 18 U.S.C. §§ 1964(a) 1965 (1976).

[194] This will also be the case in a state where the applicable federal circuit adopts the "federal" approach. See ¶ 64, infra.

tiate his suit by choosing a non-penalty forum that contains no borrowing statute and also provides for an adequate statute of limitations based on the characterization of the cause of action.

¶ 64 Fortunately, most courts should apply the "federal" approach when the issue is litigated.[195] In such a situation, the plaintiff should emphasize the remedial, non-penalty character of the civil provisions of RICO. The statute is unambiguous.[196] If courts follow its clear command, civil RICO will be interpreted as remedial and the shorter, "penalty provisions" of the state statutes will not be applied.

¶ 65 This result has much to recommend it. First, the congressional intent underlying the RICO statute will be defeated if the short penalty provisions are applied. This statute is meant to be broadly construed to effect its remedial purposes. The treble damage provision is designed to encourage private plaintiffs to file suits and thus help reduce the onslaught of criminal activity as well as provide monetary relief for the legal damages proved and for the accumulative intangible harm that cannot be estimated.[197]

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[195]The majority of circuits now have adopted the federal characterization approach. See ¶¶ 48-56, supra. Since the old antitrust cases, however, the characterization of a treble damages-type action has not been attempted. A RICO plaintiff should expect the defendant to argue that the characterization approach of the old antitrust era should be reapplied in the RICO situation.

[196]Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes.").

[197]See generally, Vold, Are Threefold Damages Under the Antitrust Act Penal or Compensatory, 28 Ky. L. J. 117 (1940).

A short statute of limitations inhibits these goals.

¶ 66 Second, the process of choosing state law obviously breeds inconsistent results. Although this can never be entirely eliminated, deciding not to apply the penalty provisions will promote greater uniformity. Additionally, both the plaintiffs and defendants will be more certain of their rights and remedies.

¶ 67 Third, the nature of RICO is different from other suits. While a plaintiff may know he has been wronged or injured, and can sue under other theories, he may not be aware that the defendant has engaged in a pattern of racketeering activity and is thus subject to the treble damage RICO suit. Only the indictment may inform the plaintiff, an indictment that may not come forth for several years. Thus, as also explained in Section II, time is of the essence.

D. Choosing the Particular State Limitations Period

¶ 68 The preceding analysis assumed that the federal courts have only two state limitations provisions to choose from: 1) actions on a statute for a penalty or forfeiture; or 2) actions created by statute other than a penalty or forfeiture. Unfortunately, this will not be the case. Other categories could include, inter alia, tort, written contract, oral contract, common-law fraud, state securities laws, state antitrust laws, or state RICO statutes containing limitations provisions.[198] Each category might conceivably have a different time limit.[199] Further, the wide range

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[198] See, e.g., Ariz. Rev. Stat. Ann. § 13-2314(f) (1978) (7 years); Fla. Stat. Ann. § 943.464 (10) (West Supp. 1979) (5 years).

[199] See Appendix.

of substantive offenses that are included under RICO suggests that the state-statute analogy analysis could produce a different limitations period for each fact situation. A court could focus on the facts of the underlying transaction, the abstract nature of the rights and duties the statute creates, the type of relief which the plaintiff demands, or any combination thereof.

¶ 68a Federal courts have not been consistent in their consideration of the preceding factors in litigation under other federal statutes. Cases under the Civil Rights Act,[200]

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[200] See, e.g., Third Circuit: Facts underlying transaction and particular allegations in plaintiff's complaint. See Meyers v. Pennypack Woods Ownership Ass'n., 559 F.2d 894, 903 (3d Cir. 1977).

Tenth Circuit: Same. See Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 387 (10th Cir. 1978).

Second Circuit: Focusses solely on the abstract nature of the federal right and duties involved and to the federal policy interests underlying the right. See Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973).

Seventh Circuit: Same. See Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978).

Ninth Circuit: Same. See Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).

Fourth Circuit: Same. See Almond v. Kent, 459 F.2d 200 (4th Cir. 1972).

Eighth Circuit: Split. Focusses on rights and obligations created by the statute (Glasscoe v. Howell, 431 F.2d 863 (8th Cir. 1970) and facts giving rise to the claim (Reed v. Hutte 486 F.2d 534, 535-37 (8th Cir. 1973).

Sixth Circuit: Same. Statutory analysis (Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1977); factual analysis (Carmicle v. Weddle, 555 F.2d 555 (6th Cir. 1977).

Fifth Circuit: Same. Statutory Analysis (White v. Padgett, 475 F.2d 79, 82 (5th Cir.), cert. denied, 414 U.S. 861 (1973); factual analysis (Ingram v. Steven Robert Corp., 547 F.2d 1260 (5th Cir. 1977).

the national labor acts,[201] actions for damages implied un-

[201] See, e.g., First Circuit: DeArroyo v. Sindicato de Trabajadores Packing, AFL-CIO, 425 F.2d 281 (1st Cir. 1970) (nature of plaintiff's statutory right to relief and of union's duty primarily considered) (tort analogy).

Second Circuit: There is a split in the second circuit on the issues to be considered when analogizing national labor causes of action without limitations periods. Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970) (federal interest in efficiency and uniformity and the policies underlying the national labor laws weighed in analogizing) (contract analogy); Jones v. TWA, 495 F.2d 790 (2d Cir. 1970) (contract analogy) (remedy requested considered).

Fourth Circuit: Howard v. Aluminum Workers' International Union and Local 400, 589 F.2d 771 (4th Cir. 1978) (facts not considered) (nature of the statutory rights and duties analyzed) (tort analogy for both sections).

Fifth Circuit: Sewell v. Grand Lodge of International Association of Machinists and Aerospace Workers, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1971) (nature of grievance, underlying facts and allegations in complaint analyzed) (tort analogy); Dantagnan v. L.L.A. Local 1418, AFL-CIO, 496 F.2d 400 (5th Cir. 1974) (factual averments in complaint and character of relief requested considered) (quasi-contract analogy).

Sixth Circuit: Pesola v. Inland Tool and Manufacturing, Inc., 423 F. Supp. 30 (D. Mich. 1976) (nature of statutory right viewed) (tort analogy).

Seventh Circuit: Grant v. Mulvihill Brothers' Motor Service, Inc., 428 F. Supp. 45 (N.D. Ill. 1976) (federal labor policy dispositive of what period chosen) (logical similarity of right violated to tort claim ignored by court in effectuating labor policy) (contract analogy).

Eighth Circuit: There is a split in the eighth circuit. See, e.g., Butler v. Local Union 823, International Brotherhood of Teamsters, 514 F.2d 442 (8th Cir. 1975), cert. denied, 423 U.S. 924 (1975) (federal labor policy dispositive of analogy chosen) (contract analogy); Sandobal v. Armour & Co., 429 F.2d 249 (8th Cir. 1970) (facts and relief requested considered) (written contract period most analogous).

Ninth Circuit: Pierce v. Southern Pacific Transportation Co., 586 F.2d 750 (9th Cir. 1978) (source of federal duty dispositive of analogy) (statutory liability period).

der the Constitution,[202] SEC 10-b(5) actions,[203] and cases

[202] See, e.g., Second Circuit: Regan v. Sullivan, 557 F.2d 300 (2d Cir. 1977) (catch-all period chosen) (focused on unique nature of the constitutional right, which precludes analogy based on facts of case to common law claims). There is a conflict in the district courts in the Second Circuit as to the proper mode of analogy in these types of cases. Cf., Ervin v. Lanier, 404 F. Supp. 15 (E.D. N.Y. 1975) (liability created by statute period applied) (federal interest in uniformity outweighing less than perfect analogy of a constitutional right to a statutory liability); Felder v. Daly, 403 F. Supp. 1324 (S.D. N.Y. 1975) (intentional tort analogy) (fact approach).

D.C. Circuit: Shifrin v. Wilson, 412 F. Supp. 1282 (D. D.C. 1976) (tort analogy) (fact approach).

Seventh Circuit: Beard v. Robinson, 563 F.2d 337 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978) (statutory liability analogy) (unique nature of the federal constitutional right considered) (federal interest in treating members of same conspiracy alike weighed in analogy).

Ninth Circuit: DeMalherbe v. International Union of Elevator Operators, 449 F. Supp. 1335 (N.D. Cal. 1978) (statutory liability period applicable) (unique nature of constitutional right and federal interests in uniformity and judicial efficiency controlling).

[203] See, e.g., First Circuit: Cook v. Avien, 573 F.2d 685 (1st Cir. 1978) (tort analogy) (abstract nature of SEC claim controlling);

Second Circuit: Phillips v. Levie, 593 F.2d 459 (2nd Cir. 1979) (fraud analogy) (abstract nature of SEC claim implicitly controlling);

D.C. Circuit: Forrestal Village, Inc. v. Graham, 551 F.2d 411 (D.C. Cir. 1977) (local blue sky analogy) (effectuation of purpose underlying securities laws dispositive);

Third Circuit: Baker v. Butcher & Singer, 427 F. Supp. 355 (E.D. Pa. 1977) (fraud analogy by default since blue sky period not available) (federal policy governing analogizing process).

Fourth Circuit: Newman v. Prior, 518 F.2d 97 (4th Cir. 1975) (blue sky analogy) (effectuation of federal policy better served by blue sky than by fraud period);

Fifth Circuit: Hudak v. Economic Research Analysts, Inc., 499 F.2d 996 (5th Cir. 1974) (blue sky analogy) (no discussion of how analogy reached);

Sixth Circuit: Charney v. Thomas, 372 F.2d 971 (6th Cir. 1967) (federal policy controlling analogy) (fraud analogy used because local blue sky law dissimilar to federal securities laws);

adjudicating the Military Selective Service Act of 1967[204] manifest the confusion and lack of uniformity.

¶ 68b The inconsistency in approaches among the several circuits and - as is often true in labor and civil rights cases - within the same circuit obviously demands amelioration. Considering facts in one case, federal policy in another, the abstract nature of the rights and duties involved in still others introduces additional variables into the already inconsistent and unpredictable quest for a state number. Perhaps the simplest judicial remedy is to apply, especially in RICO cases, the "catch-all" or "statutory-liability" periods uniformly.[205] Although this approach

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Seventh Circuit: LaRosa Building Corp. v. Equitable Life Assurance Society of the United States, 542 F.2d 990 (7th Cir. 1976) (local blue sky period adopted) (commonality of purpose in blue sky law and federal policy of protecting the "uninformed, the ignorant, the gullible" and of increasing uniformity in federal courts' approach to limitations issues controlling);

Eighth Circuit: Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir. 1970), cert. denied, 400 U.S. 852 (1970) (local blue sky analogy) (commonality of purpose and effectuation of federal securities policy controlling in adoption of local securities period);

Ninth Circuit: Douglass v. Glenn E. Hinton Investments, Inc., 440 F.2d 912 (9th Cir. 1971) (fraud analogy) (policy of protecting federal plaintiff's right to sue and interest in federal uniformity mandating fraud analogy).

[204]Fifth Circuit: Bell v. Aerodex, Inc., 473 F.2d 869 (5th Cir. 1973) (relief requested exclusive basis of analogy) (restoration of wages under state law analogy);

Sixth Circuit: Marshall v. Chrysler Corp., 378 F. Supp. 94 (E.D. Mich. 1974) (personal injury analogy) (facts of underlying transaction and relief requested considered).

[205]The "catch-all" provision is generally the longest limitations period in the state codes. See Appendix. The "statutory liability" provisions are generally shorter, but still give the plaintiff a significant period in which to bring suit. See Appendix.

is suggested, a RICO plaintiff should be aware that it may not be followed by the courts.

¶ 69 This approach would do much to remedy some of the inconsistency presently abounding in this area, yet it will not remove it. "Catch-all" or "statutory-liability" periods still vary from state to state.[206] To achieve maximum uniformity the courts should adopt the most analogous federal statute of limitations[207] and apply consistently to the same federal statute. In this way, the important federal policies behind the RICO statute will be consistently effectuated.

¶ 70 Of course, such an approach is unlikely. Besides going against the great preponderance of federal precedent,[208] such an approach has never been used in a civil action for money damages.[209] Theoretically, however, Occidental Life Insurance Co. v. EEOC[210] opens the door to that possibility. Since application of the relevant state limitations period would have "frustrate[d] or interfere[d] with the implementation of national policies,"[211] the Court refused to

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[206] See Appendix.

[207] See generally, Note, Limitation Borrowing in Federal Courts, 77 Mich. L. Rev. 1127, 1133-34 (1979).

[208] See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 374 (1979) (Rehnquist, J., dissenting).

[209] In McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), a federal statute of limitations was borrowed in a maritime action. See Note, supra note 207 at 1133.

[210] 432 U.S. 355 (1979).

[211] Id. at 367.

borrow. A federal statutory limitations period, however, was not substituted; the Court instead limited the action by "standards like those of the equitable doctrine of laches."[212]

¶ 71 A RICO plaintiff should make the preceding argument, but he should not rely on it. Instead, all possible limitations periods should be considered. The following section will analyze such a process.

IV. HYPOTHETICAL

¶ 72 The following hypothetical is presented to analyze how the statute of limitation will be applied under RICO. Only the statute of limitations issue is analyzed; such issues as accrual of the cause of action, tolling of the statute, and the proper measure of damages are not addressed. Further, it is assumed that the plaintiff could bring the action in any of the three states in the hypothetical; a choice of law under lex loci is not included. In essence, this material attempts solely to ascertain what the statute of limitations will be in each state for the given cause of action and for RICO actions generally. Other issues, such as lex loci problems arising from a borrowing statute, are strategy issues that a plaintiff would address after determining the applicable law of each state. In this regard, the arguments addressed in Part C(6) of Section III would be used.

¶ 73 This analysis is divided into four segments: the

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[212] Note, supra note 207 at 1127.

facts, the characterization of the cause of action, the state law construction, and a conclusion.

A. Facts

¶ 74 Suppose that Mr. Promotor devises a plan to build a shopping plaza in Northern Virginia, a suburban section of Washington, D.C. The plaza is located just off the metropolitan beltway, the freeway encircling Washington, and is designed to attract consumers from Maryland, the District of Columbia, and Virginia.

¶ 75 Mr. Promotor resides in D.C.; his principal place of business is an office building in Alexandria, Virginia, a suburb of Northern Virginia. Mr. Promotor also has subsidiary branches of his business, Promotions, Inc., located throughout the metropolitan area - in Maryland, Washington, and Virginia.

¶ 76 In an effort to attract prospective renters for the commercial spaces in his future plaza, Mr. Promotor mails a brochure to numerous prospects. Mr. Naïve, who lives in Maryland, is one of these persons. This brochure contains general information about the layout of the future plaza.

¶ 77 Mr. Naïve becomes interested in renting some commercial space. In an effort to lure Mr. Naïve, Mr. Promotor sends him a letter from his Washington, D.C. home in January, 1975 and makes several promises to Mr. Naïve:

1) that the entire shopping plaza will be completed by August, 1978;

2) that Mr. Naïve will be able to open a business in the plaza that month;

3) that Mr. Promotor will have 75% of the spaces rented and "open to the public for retail business" by August, 1976; and

4) that Mr. Promotor will have 100% of the commercial space rented and "open to the public for retail business" by January, 1977.

Mr. Naïve receives the letter at his home in suburban Maryland.

¶ 78 Mr. Promotor reiterates such promises in letters to Mr. Naïve over the next twelve months. These letters are mailed from Virginia, Maryland, and Washington. Finally, Mr. Naïve signs a five-year contract with Mr. Promotor in January, 1976, to rent some commercial space. Mr. Naïve is to pay Mr. Promotor monthly fees once he begins occupancy. The agreement does not mention any guarantees on assurances concerning occupancy of other commercial spaces or plaza completion dates.

¶ 79 August, 1976, arrives. Even though Mr. Naïve is able to occupy his space, much of the plaza is not yet completed. Mr. Naïve contacts Mr. Promotor who writes back, apologizing for the delay, but saying that when construction is completed the plaza will be 75% occupied and open for business. Mr. Naïve begins his monthly payments; several such "assurance" letters arrive over the next twelve months, the last being in July, 1977.

¶ 80 Construction of the plaza is finally completed in August, 1977. Only 20% of the plaza is occupied, however. Mr. Naïve [illegible] the other occupants, believing that new renters will soon

move in, attempt to make a go of the venture. Meanwhile, they all continue to make monthly payments to Mr. Promotor.

¶ 81 By May, 1978, no one else has moved into the plaza. Mr. Naïve and the other occupants encounter difficulty in contacting Mr. Promotor directly. They learn in July, 1978, that Mr. Promotor had not been attempting to rent the other commercial spaces to retail businesses but instead had entered into an agreement in June, 1978, to rent the remaining space to Ralph Nadar who intended to use the facilities as his new Washington headquarters.

¶ 82 Mr. Naïve and his colleagues meet to discuss their dismal situation. None of the contracts any of them signed contained any of the assurances that Mr. Promotor had used to induce them to rent the spaces. Mr. Naïve continues to make monthly payments because he is fearful to breach the contract and possibly lose any money he may have coming to him as a result of Mr. Promotor's false promises.

¶ 83 In late August, 1978, Mr. Naïve consults his attorney to determine what course of action, if any, he has against Mr. Promotor. His attorney informs him that Mr. Promotor could be liable for treble damages under RICO for a pattern of racketeering activity stemming from muliple counts of mail fraud. His attorney explains that the fraudulent letters that induced Mr. Naïve to enter the contract constitute the mail fraud. His attorney also explains that each monthly rent bill sent by Mr. Promotor is another mailing in furtherance of the scheme. Mr. Naïve's injuries would be the lost business he would have obtained since entering the plaza in August, 197

had the plaza been 75% and later 100% occupied by retail businesses as Mr. Promotor assured. On the advice of his attorney, Mr. Naïve files a civil complaint in September, 1978, charging a violation of RICO and seeking treble damages under § 1964(c).

B. Characterization of the Cause of Action.

¶ 84 The facts giving use to the right of action under RICO are the instances of mail fraud. The plaintiff is injured in his property by being led to pay money wrongfully induced, i.e., he rented the space because of the assurances from Mr. Promotor. He suffers damages in the form of income that he would have acquired had the plaza been 75% full of retail businesses; the volume of people attracted to a full plaza would have undoubtedly raised the sales of Mr. Naïve.

¶ 85 From these facts the cause of action could sound in tort - the defendant's pattern of criminal activity, the mail frauds, caused the plaintiff to be injured in his personal property. The characterization may also sound in contract - the plaintiff relied on the assurances of the defendant in entering into the contract to purchase the space. The mailings served as conduits for the assurances; the breach of their assurances caused the plaintiff's damages. Finally, the characterization could also take the form of common-law fraud.

¶ 86 The first characterization is probably the most appropriate. RICO is designed to hamper patterns of economic activity - organization structures - that cause a person to be injured. It is the conscious conduct of these organizations

that causes the harm. Whether the defendant breaches a contract or in some other way causes a contract to be rescinded is not the issue; it is the defendant's criminal conduct that causes the injury and that gives rise to the RICO claim. Further, the language of the RICO statute gives relief to "[a]ny person injured in his business or property,"[213] identical language to the antitrust law. This language appears to sound in tort.

¶ 87 In any event, the statutes of limitations for all possibilities must be examined in Maryland, Virginia, and the District of Columbia. The way the state combines the categories may often solve the issue of characterization.

¶ 88 This material next examines the statutes of limitations in each of the three states. All possible limitations are presented, not just those applicable to the given hypothetical.

C. State Law Construction

1. Virginia

¶ 89 The general limitations section of the Virginia code contains numerous statutes of limitations that could apply based on the following actions: action for personal injuries,[214] action for injury to property,[215] personal

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[213] 18 U.S.C. § 1964(c) (1976).

[214] Va. Code § 8.01-243 (1977) (applies a two-year statute of limitations for actions for "personal injuries" and a five-year period for "injury to property." See generally Howard v. Aluminum Workers Int. Union, 418 F. Supp. 1058 (D. Va. 1976) (action for unfair representation in a labor union subject to two-year statute for personal injury); Tyler v. Street & Co., 322 F. Supp. 541 (E.D. Va. 1971) (injury from fumes emitted from a product came under the two-year statute for personal injuries and not a four-year statute for contracts for sale).

[215] Id.

actions based on contract,[216] personal actions for which no other limitation is specified,[217] and actions for the violation of the state security laws.[218]

¶ 90 Of these actions (since Virginia does not have a limitations provision for statutory liability) the first two - actions for personal injury and for injury to property - are the most analogous to the mail fraud hypothetical and probably to RICO in general for at least two reasons. First, as already stated, the cause of action under RICO, in this case the mail fraud counts, sounds in tort; these two actions are the tort provisions for the Virginia Code. Second, the RICO statute gives relief for someone injured in his property; these provisions contain analogous language. The provisions specifically state:

> Personal action for injury to person or property generally.
> A. Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued.
> B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years next after the cause of action shall have accrued.[219]

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[216] Va. Code § 8.01-246 (1977).

[217] Va. Code § 8.01-248 (1977) (applies a one-year limitations period).

[218] Va. Code § 13.1-44 (1978) (liability of directors; two-year statute of limitations);
Va. Code § 13.1-522 (1978) (civil liability generally; two years).

[219] Va. Code § 8.01-243 (1977).

The crucial question becomes: is the RICO action "for personal injury" or for "injury to property"?

¶ 91 A treble damage antitrust case that arose out of the Eastern District of Virginia and that was ultimately decided in the United States Court of Appeals for the Fourth Circuit provides an answer. In Barnes Coal Corp. v. Retail Coal Merchants Assoc.[220] the plaintiff brought a civil action to recover treble damages for an alleged violation of the Sherman Antitrust Act. The sole issue before the circuit court was to decide which Virginia statute of limitations applied: a one-year action for a tort that did not survive or a five-year tort for an action that did survive.[221] The Fourth Circuit concluded that the action was survivable and applied the five-year statute.[222] In doing so, the court said that "the class of actions which survive in Virginia has been enlarged to include those which involve injury to a person in his property or business as distinguished from purely personal wrongs."[223]

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[220] 128 F.2d 645 (4th Cir. 1942).

[221] Id.

[222] Id.

[223] Id. at 650 (emphasis added).

¶ 92 Since this case the Virginia Code was adopted and the principle of survivability in statute of limitations eliminated.[224] The new provisions hold that all causes of action survive the death of the plaintiff or defendant.[225] The applicable statute is now decided on the basis of the wrong that is alleged.[226]

¶ 93 The Barnes case can still be a precedent. The court divided the tort actions into personal actions and property actions for the purposes of the survivability issue. It construed the antitrust treble damage action in a broad sense concluding that being injured in one's property was a survivable action.

¶ 94 It can be argued that the two-year provision for actions "for personal injuries" evolved from the one-year non-survivable actions provision and that injuries "to property" evolved from the five-year survivable actions provision. Consequently, the five-year statute should apply to RICO on the basis of Barnes, its reference to property, and this historical evolution.

¶ 95 In "old" antitrust cases, the Fourth Circuit adopted the "state" characterization approach.[227] In Barnes Coal, however, the cause of action was characterized "in light

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[224] See Va. Code § 8.01-26 (1977) (reviser's note of the 1977 replacement volume).

[225] Id.

[226] Id.

[227] North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

of the common law and . . . not . . . by state survival statutes or state decisions relating to the subject."[228]

The state approach was abandoned in this case because the question of survivability, unlike the characterization of the cause of action for the purpose of choosing an appropriate limitations period, "is not one of procedure, but one which depends 'on the substance of the cause of action.'"[229] It is therefore arguable that were a federal court to adopt a state characterization approach when the survivability of the action was not in issue, state decisions would render a different result. Virginia law, however, supports the court's characterization. The court stated in dicta: "We have reached the conclusion that the cause of action here involved should be held to survive, even though the question of its survivability, [and hence, characterization] be determined solely by the law of Virginia."[230]

¶ 96 Therefore, under the federal approach or state approach, the five-year limitations period would probably apply to the RICO claim.[231] Virginia does not have a borrowing statute; the law of the forum will apply regardless of where the cause of action arose.[232]

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[228] Barnes Coal Corp. v. Retail Merchants' Ass'n., 128 F.2d 645, 648 (4th Cir. 1942).

[229] Id.

[230] Id. at 650.

[231] Va. Code § 8.01-243 (1977) (Five-year period for "injury to property".).

[232] Holdford v. Leonard, 355 F. Supp. 261, 263 (W.D. Va. 1973); Owens v. Combustion Engineering, Inc., 279 F. Supp. 257, 258 (E.D. Va. 1967).

¶ 97 Another statute of limitations might apply in a situation involving the violation of the federal securities law. Under the construction of RICO, multiple securities law violations could constitute the pattern of racketeering activity. In this regard, the federal courts have previously applied the statute of limitations of the Virginia blue-sky law to actions under the federal securities law.[233] The result might be a period of two years instead of five years.[234]

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[233] Miller v. Roanoke Ind. Loan & Thrift, 70 F.R.D. 448 (W.D. Va. 1975); Reid v. Madison, 438 F. Supp. 332 (E.D. Va. 1975); Maine v. Leonard, 353 F. Supp. 968 (W.D. Va. 1973).

[234] Va. Code § 13.1-44 (1978); Va. Code § 13.1-522 (1978).

2. District of Columbia

¶ 98 The District of Columbia Code contains a general limitations provision that is divided into several subsections.[23] Except for a suit for a statutory penalty or forfeiture, which contains a one-year limitation, all of the other possibly relevant limitations contain a three-year period. Fur-

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[235] D.C. Code Ann. § 12-301 (1966):

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:
>
> (1) for the recovery of lands, tenements, or hereditaments--15 years;
>
> (2) for the recovery of personal property or damages for its unlawful detention--3 years;
>
> (3) for the recovery of damages for an injury to real or personal property--3 years;
>
> (4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment--1 year;
>
> (5) for a statutory penalty or forfeiture--1 year
>
> (6) on an executor's or administrator's bond--5 years; on any other bond or single bill, covenant, or other instrument under seal--12 years;
>
> (7) on a simple contract, express or implied--3 years;
>
> (8) for which a limitation is not otherwise specially prescribed--3 years
>
> This section does not apply to actions for breach or contracts for sale governed by § 28:2-725.

ther, the following suits render it doubtful that the district courts would apply the one-year penalty provision to a treble damage suit.

¶ 99 The D.C. Circuit adopts both a state and a federal approach depending on the particular federal claim. For example, in Forrestal Village, Inc. v. Graham,[236] the court held that the characterization of a 10-b(5) cause of action for the purpose of choosing a limitations period would be determined by reference to the effectuation of the policies of the federal securities laws.[237] Yet in a claim brought under section 1983, the district court for the District of Columbia held that "the applicable statute of limitations . . . is the same as that which 'the state courts would enforce in a comparable state action.'"[238]

¶ 100 Either approach, however, would result in the application of a three-year period since "state" law would probably characterize RICO as remedial. In two actions to recover double the amount of rent paid to a defendant in excess of the maximum rent ceiling, the District of Columbia Municipal Court of Appeals held that the right to sue for double rent was a private right that was civil and remedial in nature and not brought for any statutory penalty or forfeiture and not subject to any statute of limitations contain-

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[236] 551 F.2d 411, 413 (D.C. Cir. 1977).

[237] Id.

[238] Shifrin v. Wilson, 412 F. Supp. 1282, 1301 (D. D.C. 1976).

ing such language.[239] Application of the federal approach would also result in characterizing RICO as remedial.[240] Consequently, the District of Columbia would probably not apply the penalty statute to RICO.

¶ 101 The District of Columbia Code contains no borrowing provision; this issue has been left to court construction. The traditional rule has been to apply the law of the forum state regardless of whether or not recovery would be barred in the state in which the cause of action arose.[241] In some recent cases, however, the United States District Court for the District of Columbia has taken an "interest analysis" approach that weighs all factors in the choice of a statute of limitations.[242] This recent approach remains in an unstable state; indeed, it was recently criticized as being contrary to a consistent tradition.[243] Consequently, absent compelling equitable interest, the statutes of the forum will most likely be applied.

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[239] Shenk v. Cohen, 51 A.2d 298 (D.C. Mun. App. 1947); Heitmuller v. Berkow, 51 A.2d 302 (D.C. Mun. App. 1947), aff., 165 F.2d 961, 83 U.S. App. D.C. 70 (1948). See also Lustine v. Williams, 68 A.2d 900 (D.C. Mun. App. 1949) (the court noted that the former § 12-201 three-year provision applied to tort actions not otherwise specifically prescribed; this included rent overcharges).

[240] See ¶ 64, supra.

[241] Filson v. Fountain, 197 F.2d 383, 90 U.S. App. D.C. 273 (D.C. Cir. 1952) (per curiam); Wells v. Alropa Corp., 82 F.2d 877, 65 U.S. App. D.C. 28 (D.C. Cir. 1936).

[242] Cornwell v. C.I.T. Corp. of New York, 373 F. Supp. 661 (D. D.C. 1974); Farrier v. May Department Stores Co., 357 F. Supp. 190 (D. D.C. 1973).

[243] Manatee Cablevision Corp. v. Pierson, 433 F. Supp. 571 (D. D.C. 1977) (diversity jurisdiction).

¶ 102 The District of Columbia, like Virginia, applies the statue of limitations of the local blue-sky law to actions arising under the federal securities act.[244] This is a two-year statute.[245] The plaintiff should anticipate that the courts might apply the two-year time period for any RICO suit based on a pattern of violations of the federal securities law.

¶ 103 Thus, it appears that the District of Columbia will apply a three-year limitations to all RICO suits except for securities violations. It is also probable that the plaintiff will be able to defeat any attempt to invoke the law of some other state.

3. Maryland

¶ 104 The Maryland Code Annotated contains one general provision that encompasses almost all civil actions:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.[246]

Only two other provisions in the Code could be applicable. Section 5-107 provides a one-year statute for a "prosecution or suit for a fine, penalty, or forfeiture."[247]

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[244] Forrestal Village, Inc. v. Graham, 551 F.2d 411 (D.C. Cir. 1977) (per curiam).

[245] D.C. Code Ann. § 2-2413 (Supp. 1978).

[246] Md. [Cts. & Jud. Proc.] Code Ann. § 5-101 (1974).

[247] Md. [Cts. & Jud. Proc.] Code Ann. § 5-107 (1974) (one year).

¶ 105 Under "old" antitrust law, the Fourth Circuit adhered to the state characterization approach.[248] If this approach were extended to a RICO action, it is unclear whether the penalty provision would apply since, to date, the statute has only been applied to criminal prosecutions; the issue of civil application has not been litigated.[249]

¶ 106 Application of the state approach, however, is unlikely. The Fourth Circuit has consistently employed the federal approach in civil rights litigation,[250] securities actions,[251] and cases arising under the federal labor laws.[252] If it continues this tack, as it should, a RICO treble damages action will almost certainly be characterized as remedial,[253] thereby foreclosing application of the one-year penalty provision.

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[248] North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

[249] One case does exist under the old antitrust law that supports the applicability of the Maryland general three-year statute. In Seaboard Terminals Corp. v. Standard Oil Co. of New York, 104 F.2d 659 (2d Cir. 1939), the Second Circuit applied a three-year Maryland statute of limitations for actions on the case to a treble damage suit brought in New York where the operative facts occurred in Maryland. The court applied the law as it felt the state of Maryland construed it.

[250] Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978); Almond v. Kent, 459 F.2d 200 (4th Cir. 1972).

[251] Newman v. Prior, 518 F.2d 97 (4th Cir. 1975).

[252] Howard v. Aluminum Workers' International Union and Local 400, 589 F.2d 771 (4th Cir. 1978).

[253] As previously discussed, a federal characterization of the RICO statute should clearly be remedial. See ¶ 64, supra.

¶ 107 The second statute provides a one-year limitation period for violations of the state blue-sky law.[254] As in Virginia and the District of Columbia, this statute has been applied to violations of the federal securities law.[255] Consequently, in bringing a RICO case based on violations of the federal securities law, the plaintiff will have to be particularly swift in acting because of the possibility that the court would make the securities law analogy and apply a one-year limitations period.

¶ 108 Maryland does not have a borrowing statute. The Court of Appeals for the state of Maryland stated in dictum, however, that the forum state controls in statute of limitations issues.[256] The absence of a statutory provision and this decision render it probable that the law of the forum will control.

D. Conclusion

¶ 109 All three jurisdictions - Maryland, Washington, and Virginia - provide potentially different results. The plaintiff must therefore choose the forum that best effectuates his goals. In the given hypothetical, depending upon when the cause of action accrues, Mr. Naive should choose his forum based on the following formula:

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[254] Md. [Corp. & Ass'ns.] Code Ann. § 11-703 (1975).

[255] Fox v. Kane-Miller, 542 F.2d 915 (4th Cir. 1976).

[256] Leonard v. Wharton, 268 F. Supp. 715 (D. Md. 1967), appeal dismissed, 396 F.2d 452 (4th Cir. 1968), cert. denied, 393 U.S. 1028 (1969).

1) for an action under one year old, he could choose any forum;

2) for an action greater than one and up to two years old, he should choose either Washington or Virginia since the Maryland penalty statute could bar him;

3) for an action greater than two and up to three years old, he should choose Washington since the Maryland penalty statute and the possible application of the Virginia two-year personal injury statute could bar him; and finally

4) for an action greater than three years old and up to five years old, he should obviously choose Virginia because he would definitely be barred in the other jurisdictions

E. Questions To Be Asked in Analyzing the Statute of Limitations Issue

¶ 110 a. What are the general limitation provisions of the state code? To whom do they apply (i.e. private suit, state suits)? What are the categories? Does it contain a provision for suits for penalties or forfeitures? What are the respective time periods for each provision? When does cause of action accrue? When is the action lotted (filing or service)?

¶ 111 b. What approach did the state's circuit take in old antitrust litigation? What approach does it take now under other federal statutes? Into what limitations categories does the court place particular causes of action? Why?

¶ 112 c. How does the state case history construe their limitations provisions, particularly penalty or forfeiture provisions? For each provision, are there any analogous preceding statutes? How were these construed?

¶ 113 d. Does the state code contain limitation provisions for specific laws that could be applicable? Does it have a blue-sky law? If so, does it apply the blue-sky limitation provision to federal securities actions? Why or why not?

¶ 114 e. Does the state apply the law of the forum or lex loci? Does the state have a borrowing statute? If so, when and how does it apply? What does the case law say about the application of the law of the forum state in statute of limitations issues?

¶ 115 f. Finally, for RICO suits generally, what statute or statutes of limitations will be applicable? Why? Why will the other provisions not be applicable? What arguments can be made for and against the application of the principal provisions to a RICO action? Is there anything unique about the state law that could apply to RICO?

V. GENERAL CONCLUSION

¶ 116 An ideal answer to the legal chaos permeating the statute of limitation issue is congressional action. This, however, is unlikely for pragmatic political reasons. An alternative approach would be to argue before the courts that they should apply the limitations of an analogous federal right - in essence, to judicially create a limitations period. This, also, is unlikely.

¶ 117 Faced with these prospects, the plaintiff must accept the application of state law and aim for the most reasonable result. At a minimum, this means that plaintiff considering

a RICO suit will have to master the law concerning the statutes of limitation in every state in which the suit could be brought. In light of the liberal jurisdiction and venue provisions this may entail mastery of all fifty states. Under the present "apparent" law the plaintiff simply has no choice: he cannot afford to have his suit barred simple because he brought it in Maryland instead of Virginia.

¶ 118 Finally, if the plaintiff is unlucky enough to be confined to a state that will apply a penalty provision that will bar the action, he must argue federal policy to preent its application. Only through such arguments will he be able to persuade the court to invoke its discretionary power and apply a more equitable statute of limitations.

APPENDIX

CHART OF STATE LAW AND THE CHARACTERIZATION APPROACH OF THE FEDERAL CIRCUIT COURTS

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
State: See Momand v. Universal Film Exchange, Inc., 172 F.2d 37 (1st Cir. 1948); LeWitt v. Warner Bros. Pictures Dist. Corp., 158 F. Supp. 307 (D.N.H. 1957).	Hybrid: State: Walden III, Inc. v. Rhode Island, 576 F.2d 945, 947 (1st Cir. 1978). Federal: Ware v. Colonial Provision Co., 458 F. Supp. 1193, 1194 (D. Mass. 1978).	Federal: De Arroyo v. Sindicato de Trabajadores, Packing, AFL-CIO, 425 F.2d 281 (1st Cir. 1970).	Federal: Cook v. Avien, 573 F.2d 685 (1st Cir. 1978).	Cook v. Avien, 573 F.2d 685 (1st Cir. 1978) (tort analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Maine	1. One year - Action for any penalty or forfeiture on a penal statute brought by a person to whom the penalty or forfeiture is given in whole or in part. Me. Rev. Stat. Ann. tit. 14, § 858 (1965). 2. Two years - Civil securities actions. Me. Rev. Stat. Ann. tit. 32, § 881(4) (1965). 3. Six years - All civil actions except as otherwise provided, (Me. Rev. Stat. Ann. tit. 14, § 752 (1965)) fraud (Me. Rev. Stat. Ann. tit. 14, § 859 (1965)).	Remedial. See Hall v. Hall, 112 Me. 234, 236-37 (1914) ("If the right of action be given to the injured party, and the increased damages are only incidental to the several rights to recover, the statute and action are remedial.") (cases cited).	Me. Rev. Stat. Ann. tit. 14, § 866 (1965) (" . . . no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory or country while all the parties have resided therein.") Otherwise the law of Maine governs. See Thibodean v. Levassner, 36 Me. 362 (1853).
Massachusetts	1. One year - Actions for penalties or forfeitures under penal statute if brought by a person to whom the penalty or forfeiture is given in whole or in part. Mass. Gen. Laws Ann. ch. 260, § 5 (Co-op 1968). 2. Three years - Actions of tort, contract to recover for personal injuries. Mass. Gen. Laws Ann. ch. 260, § 2A (Co-op 1968). 3. Six years - Contracts, express or implied. Mass. Gen. Laws Ann. ch. 260, § 2 (Co-op 1968).	Prior to the addition of a statute of limitations to the federal antitrust statute, the Mass. District Court used the two-year tort statute of limitations for treble damages actions instead of the one-year penalty provision. See April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919, 924 (D. Mass. 1958).	Mass. Gen. Laws Ann. ch. 260, § 9 (Co-op 1968). If a cause of action is barred in the state where the plaintiff resides, it is barred in Massachusetts.
New Hampshire	1. Two years - Actions for maliciously cutting and carrying away logs (N.H. Rev. Stat. Ann. § 539:1 (Supp. 1977) (5x damages)); for maliciously destroying fences (N.H. Rev. Stat. Ann. § 539:3 (Supp. 1977) (5x damages)); for maliciously or wrongfully digging and carrying away stone (N.H. Rev. Stat. § 539:4 (1974) (treble damages); etc. 2. Four years - Private actions under the state antitrust laws (N.H. Rev. Stat. § 356:12 (Supp. 1977) (treble damages for wilful or flagrant violations).	In 1854, the New Hampshire Supreme Court characterized the statute prohibiting the destruction of fences which provided treble damages to the party aggrieved to be penal in nature. Janvrin v. Scammon, 29 N.H. 281 (1854). Basically, a federal district court in New Hampshire would apply the limitations period which most closely resembles a RICO action. The antitrust laws seem closer than cutting and and carrying away logs, but both have limitations periods specifically tailored to those actions. A good argument can be made that	No borrowing. See Smith v. Turner, 91 N.H. 198, 17 A.2d 87 (1940); Conn. Valley Lumber Co. v. Maine Cent. R.R., 78 N.H. 553, 557, 103 A. 263 (1918).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
New Hampshire cont'd	3. Six years - All personal actions except as otherwise provided. N.H. Rev. Stat. § 508:4 (Supp. 1977).	neither period should apply and that the six-year, catch-all provision should apply to RICO actions.	
Rhode Island	1. One year - All actions founded upon any penal statute, which are wholly or in part for the use of the prosecutor. R.I. Gen. Laws § 12-21-2 (1969). 2. Two years - All other actions on penal statutes. Id. 3. Three years - Personal injury actions. R.I. Gen. Laws § 9-1-14 (1956). 4. Ten years - All actions not otherwise specified. R.I. Gen. Laws § 9-1-13 (1956).	Remedial. The one and two-year limitations periods for actions on a penal statute (§ 12-21-2) are not applicable to civil actions. See Baker v. Smith, 102 A. 721, 722-23 (R.I. 1918); Kilton v. Providence Tool Co., 48 A. 1039, 1041 (R.I. 1901) (this statute "refer[s] to the recovery . . . of fixed pecuniary penalties . . . Id.). Note: The definition of "personal injury" within the meaning of § 9-1-14 has been interpreted very broadly and would probably be applied in a RICO action. See Commerce Oil Refining Corp. v. Minei, 98 R.I. 14, 20-21, 199 A.2d 606 (1964).	R.I. Gen. Laws § 9-1-18 (1956) (" . . . [N]o action shall be brought by any person upon a cause of action accruing without this state which was barred by limitation or otherwise in the state . . . in which the cause of action arose while he resided there.").

SECOND CIRCUIT

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
State: See Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), cert. denied, 361 U.S. 960 (1960); Banana Distributors v. United Fruit Co., 158 F. Supp. 160 (S.D.N.Y. 1957); Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747 (S.D.N.Y. 1953).	Federal: Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973); Swan v. Bd. of Ed. of New York, 319 F.2d 56 (2d Cir. 1963).	Federal: Abrams v. Carrier Corp., 434 F.2d 1234, 1251-52 (2d Cir. 1970); Wallace v. A.T. & T, Inc., 460 F. Supp. 755, 757 (E.D.N.Y. 1978).	Federal: Phillips v. Levie, 593 F.2d 459 (2d Cir. 1979).	Phillips v. Levie, 593 F.2d 459 (2d Cir. 1979) (common-law fraud analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Connecticut	1. One year - Suit for forfeiture on a penal statute (Conn. Gen. Stat. Ann. § 52-585 (West 1960)); suit on note obtained by fraud or conspiracy (Conn. Gen. Stat. Ann. § 52-588 (West 1960)). 2. Two years - Civil securities actions (Conn. Gen. Stat. Ann. § 36-488(e) (West Supp. 1979)), actions for injury to person or property (Conn. Gen. Stat. Ann. § 52-584 (West Supp. 1979). 3. Three years - Actions on a tort (Conn. Gen. Stat. Ann. § 52-577 (West 1960) (intentional torts. See Shinabarger v. United Aircraft Corp., 262 F. Supp. 52, 58 (D. Conn. 1966). Negligent, reckless, or wanton torts governed by two-year period). 4. Four years - Antitrust treble damages actions. Conn. Gen. Stat. Ann. § 35-40 (West Supp. 1979).	Remedial. See United Banana Co. v. United Fruit Co., 172 F. Supp. 580, 584-85 (D. Conn. 1959) (antitrust); Plum v. Griffin, 74 Conn. 132, 134-35, 50 A. 1, 2 (1901) treble damages for wrongful cutting of trees).	Generally, case law holds that Connecticut's limitation period applies even where the cause of action arose elsewhere. See, e.g., Brown v. Merrow Mach. Co., 411 F. Supp. 1162, 1164 (D. Conn. 1976); Gorman v. Transocean Airlines, 158 F. Supp. 339, 340 (D. Conn. 1958); Morris Plan Indus. Bank of N.Y. v. Richards, 131 Conn. 671, 674, 42 A.2d 147, 148 (1945).
New York	1. One year - Actions to enforce a penalty or forfeiture created by statute. N.Y.C.P.L.R § 215 (McKinney 1972). 2. Three years - Actions on a statute not a penalty or forfeiture or actions to recover damages for injury to person or property. N.Y.C.P.L.R. § 214 (McKinney 1978 Supp.). 3. Six years - Actions on a contract or based on fraud or mistake. N.Y.C.P.L.R. § 213 (McKinney Supp. 1978).	Remedial. See Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747, 756 (S.D.N.Y. 1953).	N.Y.C.P.L.R. § 202 (McKinney 1972) ("An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.").

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Vermont	1. Two years - Wrongful death, (Vt. Stat. Ann. tit. 14, § 1492 (1974)), actions upon a penalty or forfeiture brought by a state, county, or town, (Vt. Stat. Ann. tit. 13. § 4505 (1974)). 2. Three years - Assault and battery, personal injury, property damage. Vt. Stat. Ann. tit. 12, § 512 (1973 and Supp. 1979). 3. Four years - Action upon a statute for a penalty or forfeiture brought by the party aggrieved. Vt. Stat. Ann. tit. 13, § 4506 (1974). 4. Six years - Actions upon a statute for a penalty or forfeiture brought by the person aggrieved against a moneyed corporation, its directors, or stockholders. Vt. Stat. Ann. tit. 13, § 4511 (1974). 5. Six years - Actions not otherwise provided for. Vt. Stat. Ann. tit. 12, § 511 (1973).	Remedial. See Guild v. Prentis, 83 Vt. 212, 74 A. 115 (1909); Burnett v. Ward, 42 Vt. 80 (1868) (statute authorizing owner of land to sue for treble damages against any person for "conversion of trees or defacing marks or logs" held remedial and not penal).	No borrowing statute. Vermont statute of limitations will apply. See Coral Gables v. Christopher, 108 Vt. 414, 189 A. 147 (1937); Sissa v. Niles, 64 Vt. 449, 24 A. 992 (1892).

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
State: See Shapiro v. Paramount Film Dist. Corp., 274 F.2d 743 (3d Cir. 1960); Gordon v. Loew's, Inc., 247 F.2d 451 (3d Cir. 1957).	Hybrid: State: See Wilson v. Sharon Steel Corp., 549 F.2d 276 (3d Cir. 1977); Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977). Federal: See Meyers v. Pennypack Woods Ownership Ass'n, 559 F.2d 894 (3d Cir. 1977).		Federal: Baker v. Butcher & Singer, 427 F. Supp. 355 (E.D. Pa. 1977).	Baker v. Butcher & Singer, 427 F. Supp. 355 (E.D. Pa. 1977) (common-law fraud analogy by default because blue-sky period not available).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Delaware	1. One year - Civil actions for forfeiture under a penal statute. Del. Code Ann. 10 § 8115 (1975). 2. Two years - Actions to recover damages for personal injury. Del. Code Ann. 10 § 8119 (1975). 3. Three years - Actions based on a promise, actions based on a statute, and actions to recover "damages caused by an injury accompanied with force or resulting indirectly from the act of the defendant. Del. Code Ann. 10 § 8106 (1975). Note: "Actions based on a statute" refers only to "new" rights, not rights derived from common law. See Butler v. Butler, 222 A.2d 269, 271-72 (Del. 1966). Note: The three-year limit applies to damage actions for fraud and deceit. See E.M. Fleischmann Lumber Co. v. Resources Corp. Int'l, 211 F.2d 204, 206 n. 4 (3d Cir. 1954).	Penal. See SCOA Industries v. Bracken, 374 A.2d 263, 263-64 (Del. 1977) (double damages under state's Wage Payment and Collection Act held penal in character); cf., Schlieff v. Baltimore & O. R.R. Co., 36 Del. Ch. 342, 350, 130 A.2d 321, 330 (1955) (plaintiff was suing to collect full damages, not to recover three times the damages. Therefore, the suit was not a forfeiture under a penal statute). Note however, that courts have ruled that private antitrust suits are actions for trespass on the case, and thus fall under Delaware's three-year statute of limitations. See Klein v. Lionel Corp., 130 F. Supp. 725, 727 (D. Del. 1955), aff'd, 237 F.2d 13 (3d Cir. 1956); Williamson v. Columbia Gas & Elec. Co., 110 F.2d 15, 18 (3d Cir. 1939), cert. denied, 310 U.S. 639 (1940).	Del. Code Ann. 10 § 8121 (1975) ("Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply."). Note: When another state's statute is borrowed, Delaware also borrows that state's interpretations and applicable collateral statutes of limitations. See Frombach v. Gilbert Associates, Inc., 236 A.2d 363, 366 (Del. 1967), cert. denied, 391 U.S. 906 (1968).
New Jersey	1. Two years - injuries to a person by wrongful act (N.J. Stat. Ann. § 2A: 14-2 (West 1952)), penalty sought by the aggrieved party or state (N.J. Stat. Ann. § 2A: 14-10(a), (b) (West 1952), civil securities actions (N.J. Stat. Ann. § 49: 3-71(e) (West Supp. 1979-80). 2. Four years - Antitrust/restraint of trade actions. N.J. Stat. Ann. § 56: 9-14 (West 1970). 3. Six years - Property damages, torts not otherwise provided for, contracts, trespass. N.J. Stat. Ann. § 2A: 14-1 (West 1952).	Penal. Gordon v. Loew's, Inc., 247 F.2d 451 (3d Cir. 1957); Addis v. Logan Corp., 23 N.J. 142, 128 A.2d 462 (1957) (both antitrust).	No-borrowing state. For common-law test, see Heavner v. Uniroyal, Inc., 63 N.J. 130, 141, 305 A.2d 412, 418 (1973).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Pennsylvania	1. One year - Invasion of privacy, civil penalty or forfeiture not by government. 42 Pa. Cons. Stat. Ann. § 5523(1), (2) (Purdon, Judicial Code, 1979 Pamphlet). 2. Two years - Intentional torts, wrongful death, personal injury, civil penalty or forfeitures by government. Pa. Cons. Stat. Ann. § 5524(1) - (5) (Purdon, Judicial Code, 1979 Pamphlet). 3. Four years - Usury. Pa. Stat. Ann. tit. 41, § 502 (Purdon Supp. 1979 - 80). 4. Six years - Actions not otherwise provided for. 42 Pa. Cons. Stat. Ann. § 5527(6) (Purdon, Judicial Code, 1979 Pamphlet).	Remedial. Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 216, 146 A.2d 714 (1958) (the case noted that if a statute imposes both criminal and civil liability, that is evidence that the statute is not a penalty). See also Shapiro v. Paramount Film Dist. Corp., 274 F.2d 743 (3d Cir. 1960) (antitrust).	42 Pa. Cons. Stat. Ann. § 5521 (Purdon, Judicial Code, 1979 Pamphlet) ("The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim.").

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
State: See North Carolina Theatres Inc. v. Thompson, 277 F. 2d 673 (4th Cir. 1960).	Federal: Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978); Almond v. Kent, 459 F.2d 200 (4th Cir. 1972).	Federal: Howard v. Aluminum Workers International Union and Local 400, 589 F.2d 771 (4th Cir. 1978); Coleman v. Kroger Co., 399 F. Supp. 724, 729 (W.D. Va. 1975).	Federal: Newman v. Prior, 510 F.2d 97 (4th Cir. 1975).	Newman v. Prior, 518 F.2d 97 (4th Cir. 1975) (blue-sky analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Maryland (see text).			
North Carolina	1. One year - Actions on a statute for a penalty or forfeiture. N.C. Gen. Stat. § 1-54 (Supp. 1977). 2. Three years - Actions on a contract, upon a statutory liability not a penalty or forfeiture, for injury to goods or chattels, for injury to the person or rights of another or based on fraud or mistake. N.C. Gen. Stat. § 1-52 (Supp. 1977).	Penal. See Williams v. Gibson, 232 N.C. 133, 134, 59 S.E.2d 602, 603 (1950); Smoke Mount Ind., Inc. v. Fisher, 224 N.C. 72, 75, 29 S.E.2d 128 (1944).	N.C. Gen. Stat. § 1-21 (1969). If a claim is barred in the jurisdiction where the cause of action accrued, it may not be brought in North Carolina.
South Carolina	1. One year - Actions upon a statute for a penalty or forfeiture given in whole or in part to any person who will prosecute it. S.C. Code § 15-3-570 (1962) ("informers" statute). 2. Two years - Assault, battery, and actions upon a statute for a penalty or forfeitures given to the state. S.C. Code § 15-3-550 (1962). 3. Three years - Actions upon a statute for a penalty or forfeiture given to the party aggrieved or to such party and the state. S.C. Code § 15-3-540 (1962). 4. Six years - Actions on a statute other than a penalty or forfeiture, fraud, personal injury or injury to the rights of another. S.C. Code § 15-3-530 (1962).	Remedial. See State v. Ntl. Linen Service Corp., 225 S.C. 232, 81 S.E.2d 342, 343-44 (1954); Lipscomb v. Seejers, 19 S.C. 425, 431-32 (1883). (In Lipscomb, the court reasoned that since the award compensated the injured party (the state) the statute was not penal, but remedial. Id.)	No borrowing statute. Law of the forum governs statute of limitations issues. See Gattis v. Chavez, 413 F. Supp. 33 (D.S.C. 1976); State v. Southern Farm Bureau Life Ins. Co., 265 S.C. 402, 219 S.E.2d 80 (1975).
Virginia (see text).			

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
West Virginia	1. Two years - Personal injuries (W. Va. Code § 55-2-12 (1966)), property damage (id.), wrongful death (W. Va. Code § 55-7-6 (1966)). 2. Three years - Civil securities actions. W. Va. Code § 32-4-410(e) (1975). 3. Four years - State antitrust actions. W. Va. Code § 47-18-11 (Supp. 1978). Note: West Virginia has no special limitation period for liabilities under statutory penalties. Gawthrop v. Fairmont Coal Co., 74 W. Va. 39, 40, 81 S.E. 560, 560 (1914).	Not applicable. In West Virginia, a RICO plaintiff should argue the antitrust analogy, as the limitations period for state antitrust actions is four years.	W. Va. Code § 55-2A-2 (1966) ("The period of limitation applicable to a claim accruing outside of this State shall be either that prescribed by the law of the place where the claim accrued, or by the law of this State, whichever bars the claim.").

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
Federal: See Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961); Greene v. LAM Amusement Co., 145 F. Supp. 346 (N.D. Ga. 1956).	State: Ingram v. Steven Robert Corp., 547 F.2d 1260, 1261 (5th Cir. 1977); Shaw v. McCorkle, 537 F.2d 1289, 1292-93 (5th Cir. 1976).	State: Sewell v. Grand Lodge of the International Ass'n of Machinists and Aerospace Workers, 445 F.2d 545, 550 (5th Cir.), cert. denied, 404 U.S. 1024 (1971); Dartagnan v. L.L.A. Local 1418 AFL-CIO, 496 F.2d 400, 403 (5th Cir. 1974).	Federal: Hudak v. Economic Research Analysts, Inc., 499 F.2d 996 (5th Cir. 1974).	Hudak v. Economic Research Analysts, Inc., 499 F.2d 996 (5th Cir. 1974) (blue-sky analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Alabama	1. Six years - Assault and battery, conversion of real property, and simple contracts and promises not under seal. Ala. Code Civ. Prac. § 6-2-34 (1975). 2. One year - Penalties, libel, and personal injury. Ala. Code Civ. Prac. § 6-2-39 (1975). 3. One year - After discovery of facts constituting a fraud. Ala. Code Civ. Prac. § 6-2-3 (1975). Note: Defendant's absence from state during the period that a suit could be commenced against him suspends the running of the statute until after the person's return. Ala. Code Civ. Prac. § 6-2-10 (1975).	Remedial. (Specifically, the court in Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 197 F. Supp. 333, 335 (N.D. Ala. 1960), considered an antitrust treble damages action as a tortious interference with the rights of others and so applied the appropriate one-year statute of limitations. See Ala. Code Civ. Prac. § 6-2-39(a)(5) (1975)). Note: Even if a treble damages action were considered as a penalty, the statute of limitations would still be one year. Ala. Code Civ. Prac. § 6-2-39(a)(3) (1975).	Ala. Code Civ. Prac. § 6-2-17 (1975) ("When the statute of limitations of another state . . . has created a bar to an action upon a contract made or act done in such state . . . while the party sought to be charged was a resident of such state . . . , the bar thus created is effectual in this state against any action commenced thereon in the same manner it would have been in the state or county where the act was done or contract made.").
Florida	1. Five years - Florida has enacted a RICO statute similar to the federal law. Fla. Stat. Ann. §§ 943.46 - 943.464 (West Supp. 1979). In a federal RICO action, the federal courts would apply the five-year limitations period of the state statute. Fla. Stat. Ann. § 943.464(10) (West Supp. 1979).		Fla. Stat. Ann. § 95.10 (West Supp. 1979) ("When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state.").
Georgia	1. One year - Informer suits (Ga. Code Ann. § 3-714 (West 1975)) and actions for injuries to reputation (Ga. Code Ann. § 3-1004 (West 1975)). 2. Two years - Civil securities actions (Ga. Code Ann. § 97-114 (West 1976)) and personal injury actions (Ga. Code Ann. § 3-1004 (West 1975)). 3. Four years - Trespass upon or damage to real property, (Ga. Code Ann. § 3-1001 (West	Note: (1) This characterization is irrelevant in Georgia as the state statutes of limitation make no such distinction between penalty and remedial actions. (But see Neal v. Moultrie, 12 Ga. 104, 112-13 (1852)). (2) In a federal antitrust action, the court in Greene v. LAM Amusement Co., 145 F. Supp. 346, 348 (N.D. Ga. 1956) refused to apply Georgia's twenty-year period for enforcement of rights under statutes. Since the antitrust laws were held as allowing private actions only as a means to remedy a public harm, and not exclusively a grant of	No borrowing statute. Georgia will apply the limitations statute of another jurisdiction only when the period is shorter and the statute qualifies the right and not merely the remedy. See Blue v. Maico, 217 F. Supp. 747, 748 (N.D. Ga. 1963); Indon Ind. v. Martin Dist. Co. Inc., 234 Ga. 845, 218 S.E.2d 562 (1975); Murray v. Taylor, 231 Ga. 852, 204 S.E.2d 747 (1974).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Georgia cont'd	3. cont'd 1975)), damage to personal property (Ga. Code Ann. § 3-1002 (West 1975)), recovery or conversion of personal property (Ga. Code Ann. § 3-1003 (West 1975)), and all other contracts not otherwise provided for (Ga. Code Ann. § 3-711 (West 1975)). 4. Six years - Written contracts. Ga. Code Ann. § 3-705 (West 1975). 5. Twenty years - Enforcement of rights accruing to individuals under statutes or by operation of law. Ga. Code Ann. § 3-704 West 1975).	individual rights, the court applied Georgia's four-year statute of limitations for injury to personal property. Accord, Service Stages, Inc. v. Greyhound Corp., 170 F. Supp. 482, 485 (N.D. Ga.), aff'd, 268 F.2d 739 (5th Cir. 1959) (per curiam).	
Louisiana	1. One year - Damages actions caused by offenses or quasi-offenses. La. Civ. Code Ann. art. 3536 (West 1953). 2. Ten years - All personal actions except those otherwise enumerated. La. Civ. Code Ann. art. 3544 (West 1953). 3. Two years - Civil securities actions. La. Rev. Stat. Ann. § 51:715(E) (West Supp. 1979).	Inapplicable. Note: It is probable that federal courts in Louisiana will apply the one-year statute to RICO treble damage actions. Such an action is based upon the breach of a duty imposed by law and thus arises "ex delicto" (tort) under Louisiana law. See Don George, Inc. v. Paramount Pictures, 145 F. Supp. 523, 528 (W.D. La. 1956).	Statute of limitation of the forum is controlling. See Wright v. Fireman's Fund Ins. Co., 522 F.2d 1376, 1378 (5th Cir. 1975), rehearing denied, 526 F.2d 1407 (1976).
Mississippi	1. One year - Actions on a statute for penalties or forfeitures (Miss. Code Ann. § 15-1-33 (Lawyer's Co-op 1972)), assault and battery Miss. Code Ann. § 15-1-35 (Lawyer's Co-op 1972)). 2. Two years - Civil securities actions. Miss. Code Ann. § 75-71-31 (Lawyer's Co-op 1972). 3. Six years - Liabilities not otherwise provided for. Miss. Code Ann. § 15-1-49 (Lawyer's Co-op 1972).	Mississippi has applied its penalty provision to actions under the Federal Labor Standards Act holding that liabilities not determined by actual damages are penal. Southern Package Corp. v. Walton, 196 Miss. 786, 18 So.2d 458 (1974). See also State v. Newton, 191 Miss. 611, 3. So.2d 816 (1941). Double damages actions have been held penal (Sherill v. Stewart, 197 Miss. 880, 21 So. 2d 11 (1945) (deterrence rationale)) and remedial (Rather v. Moore, 179 Miss. 78, 173 So. 664 (1937) (compensation justification)) depending upon the controlling purpose of the	Miss. Code Ann. § 15-1-65 (Lawyer's Co-op 1972) ("When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.").

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Mississippi cont'd	Note: Suits by the State or its subdivisions are exempted from the scope of these limitations provisions. Miss. Const. § 104; Miss. Code Ann. § 15-1-51 (Lawyer's Co-op 1972).	statute. A RICO plaintiff should therefore stress the remedial character of the statute. See RICO, §`904(a), 84 Stat. 947 (1970).	
Texas	1. Two years - Debts not on written contracts, personal injury, wrongful death. Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon 1958). 2. Three years - Civil securities actions. Tex. Rev. Civ. Stat. Ann. art. 581-33 (Vernon Supp. 1978). 3. Four years - Liabilities upon penalty statutes (Tex. Rev. Civ. Stat. Ann. Art. 5527 (Vernon 1978)), usury (Tex. Rev. Civ. Stat. Ann. art. 5069-1.06 (Vernon 1971); Tex. Rev. Stat. Ann. art. 5069-8.04 (Vernon Supp. 1978)), and liabilities not otherwise provided for (Tex. Rev. Civ. Stat. Ann. art. 5529 (Vernon 1958). Note: The state is not limited by these provisions. See Weatherly v. Jackson, 46 S.W.2d 1030 (Civ. App.), rev'd on other grounds, 123 Tex. 213, 71 S.W.2d 259 (1934).	In Green v. Wilkinson, 234 F.2d 120 (5th Cir. 1956), the Fifth Circuit reversed the 35-year practice of applying Texas' four-year catch-all statute to antitrust actions. The court held that such actions were actions for "debts not written contracts" and so applied the two-year limitations period. See also Aero Sales Co. v. Columbia Steel, 119 F. Supp. 693 (N.D. Cal. 1954). Although unfortunate for the purposes of general precedent, a RICO plaintiff might have to argue that a RICO action is a liability upon a penalty statute to acquire the applicable four-year period. A better approach would be to argue that the four-year catch-all for actions not otherwise provided for is applicable to RICO.	No borrowing statute. Texas will apply the limitations statute of another state only when it qualifies the right and not merely the remedy, (Page v. Cameron Iron Works, 259 F.2d 420 (5th Cir. 1958)), or the defendant is an immigrant from the foreign state. (Tex. Rev. Civ. Stat. Ann. art. 5542 (Vernon 1958).

SIXTH CIRCUIT

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	Charney v. Thomas, 372 F.2d 971 (6th Cir. 1967) (common-law fraud analogy).
State: See Englander Motors, Inc. v. Ford Motor Co., 293 F.2d 802 (6th Cir. 1961); Northern Kentucky Telephone v. Southern Bell Telephone and Telegraph Co., 73 F.2d 333 (6th Cir 1934), cert. denied, 249 U.S. 719 (1935); Schreiber v. Loew's Inc., 147 F. Supp. 319 (W.D. Mich 1957).	Federal: Mason v. Owens-Illinois Inc., 517 F.2d 520 (6th Cir. 1975).	Federal: Pesola v. Inland Tool and Mfg., Inc., 423 F. Supp. 30, 33 (D. Mich. 1976).	Federal: Charney v. Thomas, 372 F.2d 971 (6th Cir. 1967).	

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Kentucky	1. One year - Personal injury, conspiracy, action for the recovery of usury paid for the loan or forbearance of money against the loaner. Ky. Rev. Stat. Ann. § 413.140 (1) (1978). 2. Five years - Action upon a liability created by statute, action for penalty or forfeiture, actions not otherwise enumerated, action for fraud or mistake. Ky. Rev. Stat. Ann. § 413.120 (1969). 3. Fifteen years - Action on a written contract. Ky. Rev. Stat. Ann. § 413.090 (1978). 4. Three years - Civil securities actions. Ky. Rev. Stat. Ann. § 292.480(3) (1978).	Irrelevant. Five-year statute would apply to either characterization. Note however, that a court may apply the one-year statute if conspiracy is the gravamen of the RICO action. See Northern Ky. Telephone Co. v. Southern Bell Telephone and Telegraph Co., 73 F.2d 333, 334 (6th Cir. 1934), cert. denied, 249 U.S. 719 (1935) (antitrust).	Ky. Rev. Stat. Ann. § 413.320 (1969). ("When a cause of action has arisen in another state or county, and by the laws of this state or county where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, the said action shall be barred in this state at the expiration of said shorter period.").
Michigan	1. Two years - Assault, battery, false imprisonment (Mich. Comp. Laws Ann. § 600.5805(2) (West Supp. 1979)), civil securities actions (Mich. Comp. Laws Ann. § 451-810(3) (West Supp. 1979)), and recovery by the stationary penal statute (Mich. Comp. Laws Ann. § 600.5809(2) (West Supp. 1979)). 2. Three years - Personal or property injury and wrongful death. Mich. Comp. Laws Ann. § 600.5305(8) (West Supp, 1979). 3. Six years - Breach of contract (Mich. Comp. Laws Ann. § 600.5807(8) (West 1968), and personal actions not otherwise provided for (Mich. Comp. Laws Ann. § 600.5813 (West 1968)).	Note: Michigan's six-year "catch-all" provision was used in "old" antitrust cases. See, e.g., Schreiber v. Loew's, Inc., 147 F. Supp. 319, 322 (W.D. Mich. 1957). The Sixth Circuit also applies the six-year period for federal securities actions instead of the two-year limitation of the state's Blue Sky Laws. IDS Progressive Fund, Inc. v. First of Mich. Corp., 533 F.2d 340 (6th Cir. 1976); Charney v. Thomas, 372 F.2d 97, 100 (6th Cir. 1967). A RICO plaintiff should argue the antitrust and securities law analogies as well as emphasize the important federal policy of the RICO statute which would be circumvented by a short limitations period.	Mich. Comp. Laws Ann. § 600.5861 (West Supp. 1979). ("An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of this state the statute of limitations of this state shall apply.").

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Ohio	1. One year - Actions against a fiduciary for embezzlement of trust property, (Ohio Rev. Stat. Ann. § 2109.43 (Page 1976) for actions brought against an advisor to a fraudulent sale of securities by their purchaser (Ohio Rev. Stat. Ann. § 1702.42 (Page 1978)), assault, battery, or upon a statute for penalty or forfeiture (Ohio Rev. Stat. Ann. § 2305.11 (Page Supp. 1978)). 2. Two years - Actions brought against the seller of fraudulent securities (Ohio Rev. Stat. Ann. § 1707.41 (Page Supp. 1978)), actions brought to recover the purchase price of fraudulent securities (Ohio Rev. Stat. Ann. § 1707.43 (Page Supp. 1978)), actions by or against a corporation for unlawful loans, dividends, and distribution of assets (Ohio Rev. Code Ann. § 1701.95(E) Page 1978)). 3. Four years - For relief on the grounds of fraud. Ohio Rev. Stat. Ann. § 2305.09 (Page Supp. 1978). 4. Six years - Action upon a statute other than a penalty or forfeiture. Ohio Rev. Stat. Ann. § 2305.09 (Page Supp. 1978).	Remedial. Pittsburgh, Ft. W. & C. Ry. Co. v. Methven, 21 Ohio St. 586 (1871).	No borrowing. See Mahalsky v. Salem Tool Co., 461 F.2d 581, 583-84 (6th Cir. 1972); Lee v. Wright Tool & Forge Co., 2 Ohio Op.3d 115, 356 N.E.2d 303, 306 (1975).
Tennessee	1. One year - Actions for personal injury and liabilities under statutory penalties. Tenn. Code Ann. § 28-304 (Supp. 1978). 2. Three years - Usury (Tenn. Code Ann. § 47-14-118 (1979)), injury to real or personal property (Tenn. Code Ann. § 28-305 (1955)). 3. Ten years - Actions not otherwise provided. Tenn. Code Ann. § 28-310 (1955). 4. Two years - Civil securities actions. Tenn. Code Ann. § 48-1652 (1979).	Remedial. See Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906); Doly v. Fed. Land Bank of Louisville, 173 Tenn. 140, 143, 114 S.W.2d 953 (1937). Note: The Tennessee state and federal courts have looked to the gravamen of the action to determine the appropriate statute of limitations for treble damages under Tennessee's statute prohibiting interference with contracts. See Edwards v. Travelers Ins. Co., 563 F.2d 105, 117 (6th Cir. 1977), citing Vance v. Schulder, 547 S.W.2d 927 (Tenn. 1977). A federal court	Actions are barred only when the defendant is a resident of the foreign jurisdiction in which the claim arose and remains a resident until its laws have relinquished the cause of action. See Sigler v. Youngblood Truck Lines, 149 F. Supp. 61 (E.D. Tenn. 1957); Kempe v. Baden, 86 Tenn. 189, 6 S.W. 126 (1887); Pitcher v. Carroll, 15 Tenn. App. 423 (1932).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Tennessee cont'd	Note: The state is not limited by fixed statutory periods. Tenn. Code Ann. § 28-115 (1955).	in Tennessee may be tempted to look to the underlying conduct to determine the applicable limitations period for a RICO action.	

SEVENTH CIRCUIT

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
State: See Baldwin v. Loew's Inc., 312 F.2d 387 (7th Cir. 1963); Grenjs v. Twentieth-Century Fox Film Corp., 232 F.2d 325 (7th Cir.), cert. denied, 352 U.S. 871 (1956); Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), cert. denied, 342 U.S. 947 (1952); Sandidje v. Rogers, 167 F. Supp. 553 S.D. Ind. 1958).	Federal: Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978).	Hybrid: Federal: Grant v. Mulvihill Bros. Motor Serv. Inc., 428 F. Supp. 45 (N.D. Ill. 1976). State: Mikelson v. Wisconsin Bridge & Iron Co., 395 F. Supp. 444, 447 (W.D. Wis. 1973).	Federal: LaRosa Bldg. Corp. v. Equitable Life Assurance Soc. of the U.S., 542 F.2d 990 (7th Cir. 1976).	LaRosa Bldg. Corp. v. Equitable Life Assurance Soc. of the U.S., 542 F.2d 990 (7th Cir. 1976).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Illinois	1. Two years - Personal injury or actions on a statutory penalty. Ill. Rev. Stat. ch. 83, § 15 (1975). 2. Three years - Actions under the Illinois Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. ch. 121 1/2, § 2702 (1975)), civil securities actions (Ill. Rev. Stat. ch. 121 1/2, § 137.13 (1975)). 3. Five years - Actions for property damages, recovery of possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for. Ill. Rev. Stat. ch. 83, § 16 (1975).	Penal. See Schiffman Bros. Inc. v. Texas Co., 196 F.2d 695, 697 (7th Cir. 1952); Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912, 913 (7th Cir. 1951), cert. denied, 342 U.S. 947 (1952); Chicago Burlington & Quincy R.R. v. Jones, 149 Ill. 361, 372, 37 N.E. 247, 258 (1894); Woolverton v. Taylor, 132 Ill. 197, 206, 23 N.E. 1007, 1008 (1890); Superior Laundry & Linen Supply Co. v. Edmanson-Bock Caterers, 11 Ill. App.2d 132, 136 N.E.2d 610 (1956).	Ill. Rev. Stat. ch. 83, § 21 (1975) ("When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."). Note: This section has been construed to apply only to non-resident plaintiffs. See Coan v. Cessna Aircraft, 53 Ill.2d 526, 293 N.E.2d 588 (1973).
Indiana	1. Two years - Claims for injuries to person, character, personal property, and for statutory penalty or forfeiture. Ind. Code § 34-1-2-2 (1971). 2. Three years - Civil securities actions. Ind. Code § 23-2-1-19 (1978). 3. Six years - Relief against fraud. Ind. Code § 34-1-2-1 (1971).	Case law is inconclusive. In Am. Credit Indem. Co. v. Ellis, 59 N.E. 679, 683 (Ind. 1901) a statutory damages claim based on corporate mismanagement was held to be remedial. The court considered such factors as the plaintiff was only entitled to compensation to the extent of damages sustained and the cause of action was grounded on common-law fraud. See also Brown v. Clow, 158 Ind. 403, 62 N.E. 1006, 1009 (1902). The characterization of a RICO action is hard to ascertain from these cases. Note however, that the Indiana antitrust statute providing a treble damages action to a party aggrieved labels the recovery as a "penalty." Ind. Code § 24-1-2-7 (1971). Compare Ind. Code § 24-1-3-4 where an analogous statute (combinations to prevent sale of supplies) providing a cause of action to an aggrieved party to the extent of actual damages is labelled "damages."	Ind. Code § 34-1-2-6(b) (1978). Where any claim arises outside of Indiana against a non-resident defendant and the claim has been fully barred by the laws both of the place of the defendant's residence and of the place where the claim arose, then that bar is a defense in Indiana.

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Wisconsin	1. Two years - Usury, (Wis. Stat. Ann. § 138.06 (West 1974)), assault and battery (Wis. Stat. Ann. § 893.21(2) (West 1966)), actions brought by a private party upon a statutory penalty or forfeiture (Wis. Stat. Ann. § 893.19(3) (West 1966)). 2. Three years - State securities actions (Wis. Stat. Ann. § 551.59(5) (West 1979), personal injuries not covered elsewhere (Wis. Stat. Ann. § 893.205 (West 1966)). 3. Six years - Obligations or liabilities not otherwise provided for (Wis. Stat. Ann. § 893.19(3) (West 1966)), liabilities created by statute (Wis. Stat. Ann. § 893.19 (4) (West 1966)), and fraud (Wis. Stat. Ann. § 893.19(7) (West 1966)).	Penal. See Kania v. Chicago & N.W. Ry. Co., 57 Wis.2d 761, 204 N.W.2d 681 (1973); Chrome Plating Co. v. Wisconsin Elec. Power Co., 241 Wis. 554, 6 N.W.2d 692 (1942); Haver v. Bankers Trust New York Corp., 425 F. Supp. 796, 799 (E.D. Wis. 1977); Baldwin v. Loew's, Inc., 312 F.2d 387 (7th Cir. 1963).	Wis. Stat. Ann. § 893.205 (West 1966). ("[N]o action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action is barred by any limitations of actions of the state . . . in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state."). Note: In all other actions, Wisconsin law applies. See Durian v. A.J. Lindemann & Hoverson Co., 238 F.2d 72, 75 (7th Cir. 1956); In re Estate of Schultz, 252 Wis. 126, 30 N.W.2d 714 (1948).

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
State: See Powell v. St. Louis Dairy Co., 276 F.2d 464 (8th Cir. 1960).		Hybrid: Federal: Butler v. Local Union 823, 514 F.2d 442 (8th Cir.), cert. denied, 423 U.S. 924 (1975). State: Sandobal v. Armour Co., 429 F.2d 249 (8th Cir. 1970).	Federal: Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), cert. denied, 400 U.S. 852 (1970).	Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), cert. denied, 400 U.S. 852 (1970) (blue-sky analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Arkansas	1. One year - Assault and battery, slander, or false imprisonment. Ark. Stat. Ann. § 37-201 (Supp. 1977). 2. Two years - Actions to recover a penalty. Ark. Stat. Ann. § 37-204 (1962). 3. Three years - Actions on contracts not in writing, libel, trespass, or the taking or injuring of any goods or chattels. Ark. Stat. Ann. § 37-206 (1962). 4. Five years - Actions on written contracts (Ark. Stat. Ann. §§ 32-209, 37-210 (1962)), securities violations (Ark. Stat. Ann. § 67-1256 (Supp. 1977)), or actions not otherwise provided for (Ark. Stat. Ann. § 37-213 (1962)).	Remedial. See Organized Crime Control Act of 1970, Title IX (RICO), § 904(a). ("The provisions of this title shall be liberally construed to effectuate its remedial purposes.")	No borrowing. See Pierce v. Sterling, 225 Ark. 108, 112, 279 S.W.2d 840, 842 (1955); Chicago, R.I. & P. Ry. Co. v. Lena Lumber Co., 99 Ark. 105, 137 S.W. 562 (1911).
Iowa	1. Two years - Actions for personal injuries, reputation, including injuries to relative rights, whether based on contract or tort, or for a statutory penalty. Iowa Code § 614.1(2) (1977). Civil Securities actions, Iowa Code § 502.504(2) (1977). 2. Five years - Unwritten contracts, property damage, fraud, and all other actions not otherwise provided for. Iowa Code § 614.1 (4) (1977).	Penalty. See Baker Wire Co. v. Chicago & N.W. Ry., 106 Iowa 239, 76 N.W. 665, 667 (1898); Herriman v. Burlington, Cedar Rapids & Northern Ry., 57 Iowa 187, 188, 9 N.W. 378, 379 (1881). See also Stevenson v. Stouffler, 237 Iowa 513, 21 N.W.2d 287 (1946).	Iowa Code § 614.7 (1977) ("When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter, but this section shall not apply to causes of action arising within this state."). Note: The word "country" has been construed to refer to any of the United States. See Andrew v. Ingvoldstad, 218 Iowa 8, 254 N.W. 334 (1934).
Minnesota	1. Two years - Action upon a statute for a penalty or forfeiture. Minn. Stat. Ann. § 541.07 (West Supp. 1979). 2. Three years - Civil actions under the state's	In Minnesota, the penal/remedial distinction is unclear. In Owens v. Owens, 207 Minn. 489, 499, 292 N.W. 89 (1940), the state Supreme Court held that the penalty statute did not apply to an action for recovery of double damages upon a	No borrowing statute in effect.

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Minnesota cont'd	2. cont'd. securities laws. Minn. Stat. Ann. § 80A.23 (West Supp. 1979). 3. Four years - Civil actions under the state's antitrust laws. Minn. Stat. Ann. § 325.8026 (West Supp. 1979). 4. Six years - Actions upon a statute other than a penalty or forfeiture, for taking, defaming or injuring personal property, for injury to the person or rights of another, for fraud. Minn. Stat. Ann. § 541.05 (West Supp. 1979).	statute concerning embezzlement from an estate. The statute was not penal "since it gives the same right as existed at common law and merely increases the damages payable to the party aggrieved." But see State v. Bonness, 99 Minn. 392, 109 N.W. 703, 703 (1906) and State v. Buckman, 95 Minn. 272, 104 N.W. 240, 244 (1905) where a statute giving treble damages to the state for cutting timber on state lands was held to be a penalty.	
Missouri	1. Two years - Assault and battery (Mo. Rev. Stat. § 516.140 (Supp. 1976)), civil securities actions (Mo. Rev. Stat. § 409.411 (1969)). 2. Three years - Action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state. Mo. Rev. Stat. §§ 516.130, 516.400 (1909). Note: See § 516.420 which extends the previous limitation to six years where such suits are brought against moneyed corporations or against the directors or stockholders thereof. Note: See also §§ 516.380 - .390. 3. Five years - Actions upon a statute not a penalty or forfeiture, for taking, defaming, or injuring goods or chattels, for injury to person or rights of another not arising on contract and not otherwise enumerated. Mo. Rev. Stat. § 516.120 (1969). Note: These provisions apply to states as well as to private parties. Mo. Rev. Stat. § 516.360 (1969).	Penal. See Powell v. St. Louis Dairy Co., 276 F.2d 464, 467 (8th Cir. 1960) (antitrust); State ex rel. Attorney General v. Arkansas Lumber Co., 260 Mo. 212, 284-95, 169 S.W. 145, 168 (1914) (antitrust) (three-year limitation applies); McCormick v. Kaye, 41 Mo. App. 263, 268 (1890) (treble damages for tearing down and destroying fences held penal); Holliday v. Jackson, 21 Mo. App. 660, 664 (1886) (treble damages for cutting and carrying away the timber of another held penal).	Mo. Rev. Stat. § 516.190 (Supp. 1976) ("Whenever a cause of action has been fully barred by the laws of the state, territory, or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.").

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Nebraska	1. One year - An action upon a statute for a penalty or forfeiture, assault and battery. Neb. Rev. Stat. § 25-208 (1975). 2. Two years - Civil securities actions. Neb. Rev. Stat. § 8-1118 (1977). 3. Three years - Action upon a federal statute not a penalty or forfeiture. Neb. Rev. Stat. § 25-219 (1975). 4. Four years - Action for fraud. Neb. Rev. Stat. § 25-207 (1975).	Penalty. See Abel v. Conover, 170 Neb. 926, 930, 104 N.W.2d 684, 684 (1960). ("A statute which imposes liability for actual damages and additional liability for the same act provides a penalty.") (antitrust).	Neb. Rev. Stat. § 25-215 (1976) ("All actions . . . which are barred by laws of any other state . . . shall be deemed barred in this state; but no action shall be barred by laws of any other state . . . unless the same would have been barred by the provisions of this chapter had the defendant been a resident of this state for the period herein prescribed.").
North Dakota	1. One year - Actions upon a statute for a penalty or forfeiture. N.D. Cent. Code § 28-01-20 (1974). 2. Six years - Actions upon a contract, upon a liability created by statute not a penalty or forfeiture, for injury to goods or chattels, for injury to person or rights of another, or based on fraud. N.D. Cent. Code § 28-01-16 (Supp. 1977).	No case law interpreting the penal/remedial distinction.	No borrowing. See Star Wagon Co. v. Matthiessen, 5 Dak. 233, 14 N.W. 107 (1882).
South Dakota	1. Two years - Assault and battery, action upon a statute for a penalty or forfeiture given to the state. S.D. Compiled Laws Ann. § 15-2-15 (Supp. 1978). 2. Three years - Action upon a statute for a penalty or forfeiture given to the party aggrieved or to such party and the state; for personal injury. S.D. Compiled Laws Ann. § 15-2-14 (1967). 3. Six years - Actions upon a statute other than a penalty or forfeiture, injury to goods or chattels, and relief from fraud. S.D. Compiled Laws Ann. § 15-2-13 (1967).	No case law interpreting the penal/remedial distinction.	No borrowing; law of the forum applies. See Halladay v. Verschoor, 381 F.2d 100, 109-10 (8th Cir. 1967).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
South Dakota cont'd	4. Four years - State antitrust treble damages actions. S.D. Compiled Laws Ann. §§ 37-1-14.3, 37-1-14.4 (1977)		

NINTH CIRCUIT

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
State: See LEH v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964).	Federal: Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962).	Federal: Pierce v. Southern Pacific Trans. Co., 586 F.2d 750, 752 (9th Cir. 1978).	Federal: Douglass v. Glenn E. Hinton Investments, Inc., 440 F.2d 912 (9th Cir. 1971). But see Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953) (state).	Douglass v. Glenn E. Hinton Investments, Inc., 440 F.2d 912 (9th Cir. 1971) (common-law fraud analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Alaska	1. Two years - (1) libel, slander, assault, battery, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture. Alaska Stat. § 09.10.070 (1973). 2. Three years - Alaska securities law (Alaska Stat. § 45.55.220 (Supp. 1978)), actions for penalties or forfeitures when the action may be brought either by the aggrieved party or by the state (Alaska Stat. § 09.10.060 (1973)). 3. Six years - Actions brought in the name of, or for the benefit of the state. Alaska Stat § 09.10.120 (1973). 4. Ten years - Actions not otherwise provided for. Alaska Stat. § 09.10.100 (1973).	No treble damages actions adjudicated.	No borrowing. See Van Schuyver v. Hartman, 1 Alaska 431 (1902).
Arizona	1. Seven years - Arizona has recently added to its criminal code statutes that are based on the federal RICO statute. This state RICO statute includes a statute of limitation for civil actions. Ariz. Rev. Stat. Ann. § 13.2314(F) (1978). The federal courts should apply this limitations period for suits brought under federal RICO. See Chevron Oil Co. v. Hudson, 404 U.S. 97, 104 (1971).		Ariz. Rev. Stat. Ann. § 12-506(A) (1956) ("No action shall be maintained against a person removing to this state from another state or foreign country to recover upon any action which was barred by the law of limitations of the state or country from which he migrated.").

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
California	1. One year - Statutory penalty or forfeiture, libel, slander, assault, battery, false imprisonment, wrongful death or injury. Cal. Civ. Proc. Code § 340 (West Supp. 1979). 2. Three years - Action on a statutory liability, other than a penalty or forfeiture; trespass or injury to property; fraud or mistake. Cal. Civ. Proc. Code § 338 (West Supp. 1979). 3. Four years - Restraint on trade (Cal. Bus. & Prof. Code § 16750.1 (West Supp. 1979)), sale and purchase of securities (Cal. Corp. Code § 25506 (West Supp. 1979) (or after one year after discovery, whichever occurs first)), relief not otherwise provided for (Cal. Civ. Proc. Code § 343 (West 1954)), or actions in the name of the state or county (Cal. Civ. Proc. Code § 345 (West 1954)).	Penal. See LEH v. Gen'l Petroleum Corp., 208 F. Supp. 289, 293 (S.D. Cal. 1962), aff'd, 330 F.2d 288 (9th Cir. 1964), rev'd on other grounds, 382 U.S. 54 (1965) (anti-trust); Dep't of Social Welfare v. Stauffer, 56 Cal. App.2d 699, 133 P.2d 692 (1943) (double damages under state's Old Age Security Law); Miller v. Municipal Court, 22 Cal.2d 818, 142 P.2d 297 (1943) (" . . . a penalty includes any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for legal damage done him by the former." Id. at 837, 142 P.2d at 808).	Cal. Civ. Proc. Code § 361 (West 1954) ("When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by the reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.").
Hawaii	1. One year - Actions on a federal statute which imposes a civil penalty or liquidated damages, imposes a new liability or enlarges an existing liability (and which provides no statute of limitations) if brought in state court. Haw. Rev. Stat. § 657-11 (1976) 2. Two years - Actions for damage or injury to persons or property (Haw. Rev. Stat. § 657-7 (1976)), Civil Securities Actions (Haw. Rev. Stat. § 485-20 (1976)). 3. Six years - Actions for the recovery of any debt founded on any contract, obligation, or liability; personal actions of any kind not specifically covered by other statute. Haw. Rev. Stat. § 657-1(1), (4) (1976).	There is no case law analyzing the penal/remedial characterization distinction. In Sotamura v. County of Hawaii, 402 F. Supp. 95, 104 (D. Hawaii 1975), the court held that the one-year statute of limitations (§ 657-11) was intended to be limited to actions for the recovery of penalties and liquidated damages and not to § 1983 Civil Rights actions. There has been no further elaboration or narrowing. The potential for a federal characterization of RICO as remedial and therefore outside the scope of § 657-11 should not be overlooked.	Haw. Rev. Stat. § 657-9 (1976) ("When a cause of action has arisen in any foreign jurisdiction, and by the laws thereof an action thereon cannot be maintained against a person, by reason of the lapse of time, an action thereon may not be maintained against him in this State, except in favor of a domiciled resident thereof, who has held the cause of action from the time it accrued.").

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Idaho	1. Two years - Action upon a statute for a penalty or a forfeiture given to an individual or an individual and the state. Idaho Code § 5-219(2) (1979). 2. Three years - Action upon a liability created by statute other than a penalty or forfeiture, action for fraud or mistake (Idaho Code § 5-218 (1979)), civil securities actions (Idaho Code § 30-1446 (1979)). 3. Four years - Any action not otherwise provided for. Idaho Code § 5-224 (1979).	There is no state law characterizing the penal/remedial distinction.	Idaho Code § 5-239 (1979) ("When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued.").
Montana	1. Two years - Actions upon a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state, a liability created by statute other than a penalty or forfeiture (Mont Rev. Code Ann. § 27-2-211 (1978)), actions for fraud or mistake (Mont. Rev. Code Ann. § 27-2-203 (1978)). 2. Three years - Wrongful death, assault and battery. Mont. Rev. Code Ann. § 27-2-204 (1978). 3. Five years - All actions not otherwise provided for. Mont. Rev. Code Ann. § 27-2-215 (1978). Note: Actions by the state are subject to the preceding statutes. Mont. Rev. Code Ann. § 27-2-103 (1978).	Irrelevant, as either characterization would result in the two-year limitations period of § 27-2-211.	Mont. Rev. Code Ann. § 27-2-104 (1978).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Nevada	1. Two years - Action on a statute for a penalty or forfeiture, where the action is given to an individual, or to the state, or to an individual and the state, for assault and battery (Nev. Rev. Stat. § 11.190(4) (1977)); civil securities actions (Nev. Rev. Stat. § 90.200 (1977)). 2. Three years - Actions on a statute other than a penalty or forfeiture, for property damage, for fraud or mistake (Nev. Rev. Stat. § 11.190(3) (1977)). Note: Actions to recover a penalty or forfeiture against directors or stockholders of a corporation may be brought within three years by the aggrieved party. See Nev. Rev. Stat. § 11.380 (1977).	No case has interpreted the distinction between a remedial and penal statute in Nevada. A RICO plaintiff, therefore, should draw on cases in other jurisdictions holding treble damages actions remedial.	Nev. Rev. Stat. § 11.020 (1977) ("When a course of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of lapse of time, an action thereon shall not be maintained against him in this state, except in favor of a citizen thereof who has held the cause of action from the time it accrued.").
Oregon	1. One year - Unfair trade practices. Or. Rev. Stat. § 646.638(S) (1977). 2. Two years - Personal injury, intentional torts, penalty sought by the state. Or. Rev. Stat. § 12.110 (1977). 3. Three years - Penalty sought by an aggrieved party. Or. Rev. Stat. § 12.100 (1977). 4. Four years - Antitrust. Or. Rev. Stat. § 646.800(2) (1977). 5. Six years - Injury or recovery of personal property, liability on a statute not a penalty or forfeiture. Or. Rev. Stat. § 12.080 (1977). 6. Ten years - Actions not otherwise provided for. Or. Rev. Stat. § 12.140 (1977). Note: Governmental units exempt unless explicitly bound. Or. Rev. Stat. § 12.250 (1977).	For the penal/remedial test, see Nordling v. Johnston, 205 Or. 315, 324-27, 283 P.2d 994, 998-99 (1955); Kinzva Lumber Co. v. Daggett, 203 Or. 585, 590-97, 281 P.2d 221, 223-31 (1955) (1. Is there an intent element? 2. Are plaintiff's litigation costs reducible by an attorney's fees award? 3. Are the damages easily determinable? 4. Was there legislative intent to create a penalty?).	Or. Rev. Stat. § 12.260 (1977). A cause of action is barred in Oregon if it arose in another state between non-residents of Oregon and the statute of limitations has run in the other state.

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Washington	1. Two years - Assault, battery, action for a penalty or forfeiture given to the state (Wash. Rev. Code Ann. § 4.16.100 (1962)), actions for relief not otherwise provided (Wash. Rev. Code Ann. § 4.16.130 (1962)). Note: The catch-all provision has been interpreted to apply to an action or a statute not a penalty or forfeiture. See Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953). 2. Three years - Action upon a statute for a penalty or forfeiture given to the aggrieved party, personal injury (Wash. Rev. Code Ann. § 4.16.080 (1962)), civil securities actions (Wash. Rev. Code Ann. § 21.20.430 (1978)). 3. Four years - State antitrust, consumer protection laws. Wash. Rev. Code Ann. § 19.86.120 (1978).	Penalty. See Noble v. Martin, 191 Wash. 39, 70 P.2d 1064, 1073 (1937) (dicta). Note: A RICO plaintiff in Washington would be in the unfortunate situation of arguing that RICO is a penal statute so as to take advantage of the longer limitations period. Compare Wash. Rev. Code Ann. § 4.16.130 (1962); Fratt v. Robinson, 203 F.2d 672 (9th Cir. 1953) (two years), with Wash. Rev. Code Ann. § 4.16.080 (1962) (three years).	Wash. Rev. Code Ann. § 4.16.290 (1962) ("When the cause of action has arisen in another state . . . between nonresidents of this state, and by the laws of the state . . . where the action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state.").

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
Federal: See Electric Theatre Co. v. Twentieth-Century Fox Film Corp., 113 F. Supp. 937 (D. Kan. 1953); Fulton v. Loew's, Inc., 114 F. Supp. 676 (D. Kan. 1953); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952); Momand v. Twentieth-Century Fox Film Corp., 37 F. Supp. 649 (W.D. Okla. 1941).	Zuniga v. Amfac Foods, Inc., 580 F.2d 380 (10th Cir. 1978).			Clegg v. Conk, 507 F.2d 1351 (10th Cir. 1974), cert. denied, 422 U.S. 1007 (1975) (common-law fraud analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Colorado	1. One year - Actions for any penalty or forfeiture of any penal statute brought by the state or any person to whom the penalty or forfeiture is given (Colo. Rev. Stat. 13-80-104 (1973), assault and battery, false imprisonment, slander, and libel (Colo. Rev. Stat. § 13-80-102 (1973)). 2. Two years - Actions under federal statutes that have no federal limitations periods (Colo. Rev. Stat. § 13-80-106 (1973) (other than for a penalty or forfeiture)), securities civil actions (Colo. Rev. Stat. § 11-51-125 (1973)). 3. Three years - Fraud (Colo. Rev. Stat. §§ 13-80-108, 13-80-109 (1973)), all other actions for which no limitations period is provided (Colo. Rev. Stat. § 13-80-108 (1973)). 4. Six years - Debt founded on any contract or liability in action, assumpsit, or on the case founded on any expressed or implied contract or liability, and all other actions on the case except actions for slander and libel. Colo. Rev. Stat. § 13-80-110 (1973).	Federal - remedial. See RICO, § 904(a). Cf. Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506, 507 (D. Colo. 1952) (under the federal approach, the court found that private treble damage actions under federal antitrust laws are compensatory and remedial, not a penalty or forfeiture). State - penal. See Carlson v. McCoy, 566 P.2d 1073, 1075 (Colo. 1977) (en banc) (treble damages action for landlord's improper retention of security deposit).	Colo. Rev. Stat. § 13-80-118 (1973) ("If a cause of action arises in another state or territory or in a foreign country and, by the laws thereof, an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state.").
Kansas	1. One year - Libel, slander, intentional torts, statutory penalty or forfeiture. Kan. Stat. § 60-514 (1976). 2. Two years - Recovery or injury to personal property, fraud, injury to rights of another not on contract or provided for elsewhere. Kan. Stat. § 60-513 (1976). 3. Three years - Liability created by statute, but not a penalty or forfeiture. Kan. Stat. § 60-512(2) (1976).	Federal - remedial. See RICO, § 904(a). State - penal. See Missouri-Kansas-Texas R.R. v. Standard Indus., Inc., 192 Kan. 381, 384, 388 P.2d 632, 634-35 (1964). (A "penalty" is "a statutory liability imposed on a wrong-doer in an amount which is not limited to the damages suffered by the party wronged.")	Kan. Stat. § 60-516 (1976). Action barred in Kansas if barred in the state where the action arose, except when a Kansas resident has the cause of action and has not assigned it since the time of accrual.

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
New Mexico	1. Two years - Actions for usury. N.M. Stat. Ann. § 56-8-13 (1978). 2. Three years - Actions for personal injury or injury to reputation. N.M. Stat. Ann. § 56-8-13 (1978). 3. Four years - Actions for injury or conversion of property, actions for fraud, and all other actions not otherwise provided for. N.M. Stat. Ann. § 37-1-4 (1978).	Irrelevant in New Mexico.	No borrowing. See Husel v. York, 46 N.M. 210, 125 P.2d 717 (1942).
Oklahoma	1. One year - Action upon a statute for penalty or forfeiture, intentional torts. Okla. Stat. Ann. tit. 12, § 95 (Fourth) (West Supp. 1978-79). 2. Two years - Action in tort, injury to personal property, fraud. Okla. Stat. Ann. tit. 12, § 95 (Third) (West Supp. 1978-79). 3. Three years - Liability created by statute other than a penalty or forfeiture. Okla. Stat. Ann. tit. 12, § 95 (Second) (West Supp. 1978-79). 4. Four years - Restraint of Trade. Okla. Stat. Ann. tit. 79, § 25 (West 1976) (identical to federal antitrust law).	Remedial. See Smith Eng. Works v. Custer, 194 Okla. 313, 321, 151 P.2d 404, 407 (1944) (state). See also Tulsa Ready-Mix Concrete v. McMichael, 495 P.2d 1279 (1972).	Okla. Stat. Ann. tit. 12, § 105 (West Supp. 1978-79). A claim arising outside the state is subject to the law of Oklahoma or the law of the state in which the claim arose, whichever is longer.
Utah	1. One year - Actions on statutes created by foreign states, penalties or forfeitures, assault and battery. Utah Code Ann. § 78-12-29 (1977). 2. Two years - Civil securities actions. Utah Code Ann. § 61-1-22(5) (1978). 3. Three years - Property damage, fraud or mistake (Utah Code Ann. § 78-12-26 (1977)) Utah	Remedial. See RICO, § 904(a), 84 Stat. 947 (1970).	Utah Code Ann. § 78-12-45 (1977). Statute of limitations of the foreign state where the claim arose applies when it is shorter than Utah's. Exception is provided for Utah residents suing as original holders of the cause of action.

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
Utah cont'd	3. cont'd statute not a penalty or forfeiture, penalty or forfeiture against directors or stockholders of a corporation (Utah Code Ann. § 78-12-27 (1977)). 4. Four years - Actions not otherwise provided for. Utah Code Ann. § 78-12-25 (1977). Note: These limitations apply to the state. Utah Code Ann. § 78-12-33 (1977).		
Wyoming	1. One year - Assault and battery, liabilities on a statute for a penalty or forfeiture. Wyo. Stat. § 1-3-105(v) (1977). 2. Two years - Wrongful death (Wyo. Stat. § 1-38-102(d) (1977)), securities actions (Wyo. Stat. § 17-4-122(e) (1977)), and actions on a federal statute not a penalty or forfeiture (Wyo. Stat. § 1-3-115 (1977)). 3. Four years - Injury to personal rights not on a contract, fraud. Wyo. Stat. § 1-3-105 (iv) (1977). 4. Eight years - Liabilities on a statute not a penalty or forfeiture. Wyo. Stat. § 1-3-105 (ii) (1977). 5. Ten years - Actions not otherwise provided for. Wyo. Stat. § 1-3-109 (1977).	Remedial. See RICO, § 904(a) 84 Stat. 947 (1970). Note: The two-year limitation period for federal statutory actions might be unconstitutional. In Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506, 508 (D. Colo. 1952), the court found that when a state's statute of limitation is directed exclusively to claims under federal law, and especially when the statute has a discriminating effect in favor of state claims, that statute is unconstitutional. If the statute were found unconstitutional, the eight-year period of § 1-3-105(ii) would be applicable.	Wyo. Stat. § 1-3-117 (1977) ("If by the laws of the state or country where the cause of action arose the action is barred, it is also barred in this state."). See Duke v. Housen, 589 P.2d 334 (Wyo. 1979).

D.C. CIRCUIT

CHARACTERIZATION APPROACH				FEDERAL SECURITIES ANALOGY
Old Antitrust Law	Civil Rights Acts	Federal Labor Laws	Securities Laws	
			Federal: See Forrestal Village, Inc. v. Graham, 551 F.2d 411, 413 (D.C. Cir. 1977).	Forrestal Village, Inc. v. Graham, 551 F.2d 411, 413 (D.C. Cir. 1977) (local blue-sky analogy).

State	Potentially Applicable Limitations Periods	Treble Damages Actions: Remedial or Penal?	Borrowing Statute
District of Columbia (see text).			

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THE FEDERAL DOCTRINE OF FRAUDULENT CONCEALMENT

by

Lani Collins

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OUTLINE

SUMMARY

¶ 1 Although federal courts generally look to state law to determine the limitations period for a federally created right that has no federally specified limitations period, the courts will look to federal law to determine when the period begins. Under the federal doctrine of fraudulent concealment, the statute will begin to run when the cause of action is discovered, or should have been discovered, by the exercise of due diligence. What one must plead and show to establish fraudulent concealment depends on the case.

¶ 2 In actions not based on fraud, the plaintiff must plead with particularity and show:

1) fraudulent concealment by the defendant;

2) he did not know and had no reason to know of his cause of action prior to the running of the limitations period before the commencement of his suit; and

3) that once on notice of his possible cause of action, he exercised due diligence in discovering the facts of his claim.

¶ 3 In actions based on fraud, the plaintiff need not plead fraudulent concealment if the concealment claim is based on the substituve fraud because the defendant is on notice of the fraud claim. When the defendant claims the statute of limitations bars the suit, the plaintiff must establish elements two and three stated above. If the concealment does not involve the substitive fraud, the plaintiff must establish all three elements.

¶ 4 For all types of cases, leave to amend is liberally granted with few exceptions.

I. WHEN TO APPLY THE FEDERAL DOCTRINE OF FRAUDULENT CONCEALMENT

A. Supreme Court Case Law

1. Fraud Action in Equity

¶ 5 The federal doctrine of fraudulent concealment had its beginnings in equity in Bailey v. Glover.[1] The case involved a bankruptcy fraud under the Federal Bankruptcy Act of 1867 that included its own limitations period. The pleadings alleged fraudulent concealment. The Court held that where there is no negligence or laches[2] in learning of the fraud and when the fraud is the foundation of the action and is concealed or is of the nature that it conceals itself, the Statute of limitations will not begin to run until the fraud is discovered, or becomes known to the party suing, or those in privity with him.[3]

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[1] 88 U.S. (21 Wall.) 342 (1874).

[2] The doctrine of laches was used in equity courts in place of a limitations period so that if the plaintiff slept on his rights and if the defendant was prejudiced by the dely, equity would bar the suit. Federal courts are free to apply the federal doctrine of laches in suits which have their sole remedy in equity and that involve a federally created right. See Cope v. Anderson, 331 U.S. 461 (1947); Holmberg v. Armbrecht, 327, 394-397 U.S. 392 (1946). A federal court will adopt the forum state's statute of limitations rather than apply the doctrine of laches in suits that involve a federal right that does not include a limitations period and when the right is legal in character or the enforcement of the right gives rise to concurrent remedies in law and equity. See Cope v. Anderson, 331 U.S. 461, 463-64 (1947). See generally 2 Moore's Federal Practice ¶ 3.07(3) (2d ed. 1978).

[3] 88 U.S. (21 Wall.) at 349-50.

¶ 6 The Court recognized that the following rule was well accepted in equity, and that the great weight of authority accepted it at law, as well.[4] The statute of limitations will not bar relief where: 1) the action is grounded on fraud; 2) ignorance of the fraud was caused by the wrong-doers affirmative acts to conceal the facts from the innocent party; and 3) the action was brought within the proper time after discovery.[5]

¶ 7 The Court noted a second doctrine that was not clearly settled in equity but that the great weight of authority did favor.

> [W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run with the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.[6]

The Court recognized a "very decided conflict of authority" at law over this second doctrine, but agreed with those courts seated both in the United States and in England, who applied the rule at law as well as in equity.[7] The Court reasoned:

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[4] Id. at 347-48.
The Supreme Court in Wood v. Carpenter, 101 U.S. 135, 139 (1879) (fraudulent representations by judgment debtor concerning the amount he was worth which induced judgment creditor to sale judgment for less than it was worth) again noted that this doctrine had its origin in equity and has been applied in trials at law, as well.

[5] 88 U.S. (21 Wall.) at 347-48.

[6] Id. at 348 (citations omitted).

[7] Id. at 348-49.

> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitaitons to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.[8]

¶ 8 According to Bailey, the statute will be tolled in cases founded on fraud when the plaintiff remains in ignorance of the fraud without want of diligence or care, whether or not it is concealed by the wrongdoer, if the fraud is of the nature that it conceals itself. This is important because the answer to when affirmative acts of concealment are necessary to toll the statute of limitations is sometimes confused.[9]

2. Non-fraud Actions in Equity Based on Federally Created Rights

¶ 9 The suit in Holmberg v. Ambrecht[10] was not based on fraud. Rather, the action was brought to enforce the statutory liability of stockholders of a joint stock land bank under section 16 of the Federal Farm Loan Act.[11] Nevertheless, the Court applied the fraudulent concealment doctrine when it was found that one shareholder had concealed his holdings under a different name. The Federal Farm Loan Act did not contain

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[8] Id. at 349.

[9] See ¶¶ 35-38 and n. 118 infra.

[10] 327 U.S. 392 (1946).

[11] Federal Farm Loan Act, ch. 245, 516, 39 Stat. 360, 374 (1916) (repealed 1971).

a statute of limitations. Normally, a federal court would look to the state in which it sat for the limitations period,[12] but in distinguishing Guaranty Trust Co. v. York,[13] Holmberg held that suits in federal courts to enforce federally created equitable rights are not solely controlled by the state's limitations period.[14]

¶ 10 In holding that the doctrine of fraudulent concealment applied, the court reasoned that if the Federal Farm Loan Act had an explicit statute of limitations for suits brought under section 16, then the federal doctrine of fraudulent concealment would apply. "This equitable doctrine is read into every federal statute of limitation."[15] The Court went on to say:

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[2] See Runyan v. McCrary, 427 U.S. 160, 180 (1975). But see Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) ("State limitations periods will not be borrowed if their application would be inconcsistent with the underlying policies of the federal statute.")

[13] 326 U.S. 99 (1945) (holding that in equity actions in federal courts based on diversity jurisdiction, the applicable state statute of limitations will be used).

[14] 327 U.S. at 395.

[15] Id. at 397. See also American Pipe and Construction Co. v. Utah, 414 U.S. 338 (1974). The Supreme Court cited Holmberg approvingly and stated that the beginning of the statute of limtiations is tolled or suspended by the defendant's conduct.

> [T]he mere fact that a federal statute providing for substitive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

at 559.

> It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute on the same terms would be given the mitigating construction required by that doctrine.[16]

B. Circuit Court Case Law

1. Non-fraud Actions at Law Based on Federally Created Rights

¶ 11 Moviecolor, Ltd. v. Eastman Kodak Co.[17] involved a treble damage antitrust action and, like Holmberg, was not founded on fraud. The issue was whether the principle articulated in Holmberg, that the doctrine of concealment extends a state's limitation period in actions in equity to enforce federally created right that contains no federal limitations period, would also be applied to actions at law.[18] The defendants argued that fraudulent concealment applied only in two situations: 1) when Congress specifies its own limitations period when creating a federal right (Bailey v. Glover); or 2) when the action is to enforce a federally created right and is in equity (Holmberg v. Ambrecht).[19] The Court rejected the defendant's argument and held that the federal rule of fraudulent concealment applies at law as well as in equity in actions for treble damages under the Clayton Act even when the

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[16] 327 U.S. at 397.

[17] 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961).

[18] Id. at 84.

[19] Id. at 82.

court looks to the state for a limitations period.[20]

¶ 12 The court reasoned that Congress would prefer uniformity among the federal courts rather than conformity between state and federal courts within the same state:

> It seems far more likely that Congress would have desired the federal sector it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer.[21]

The Court found this to be especially true when enforcement of a right serves both private and public ends, which the Clayton Act provided. It contrasted cases under exclusive jurisdiction, e.g., cases under the Clayton Act,[22] with those under diversity jurisdiction and found that the federal interests transcend state interests. The Court reasoned that state statute of limitations are used only to affect federal policy, and that there is no reason to borrow a state doctrine when there is an established federal one.[23] The Court went on to say that the reason for the result in Holmberg in contrast to Guaranty Trust Co. was that Holmberg involved a federally cre-

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[20] Id. at 83.

[21] Id. at 84.

[22] It has been held that federal district courts have exclusive jurisdiction over private civil actions brought under the federal antitrust laws. General investment Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 286-288 (1922); Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436, 440 (1920). These holdings will probably be applicable to RICO, as well.

[23] 288 F.2d at 84-85.

ated right and not that the action was in equity. The Court also cited Bailey as being applicable to actions at law as well as in equity.[24] Finally, the Court found that the declared purpose of the 1948 revision of section 34 of the Judiciary Act[25] would make any distinction between law and equity, as applied to the federal doctrine of fraudulent concealment, a distortion of the language of the Act.[26]

¶ 13 Moviecolor has been consistently cited as authority for applying the doctrine of fraudulent concealment to actions at law involving a federally created right when no statute of limitations has been provided for by Congress.[27] Cases

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[24] Id. at 85 (citing Bailey v. Glover, 88 U.S. (21 Wall.) at 348-49).

[25] 28 U.S.C. § 1652 (1976).

[26] 288 F.2d at 85-86.

[27] See, e.g., Morgan v. Koch, 419 F.2d 993, 997 (7th Cir. 1969) (securities fraud, Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976) and rule 10b-5, 17 C.F.R. § 240.106-5 (1978); and pendent claim for common law fraud for which the court applied the state's doctrine of fraudulent concealment); Mittendorf v. J.R. Williston & Beane, Inc., 372 F.2 Supp. 821, 833 (S.D.N.Y. 1974) (15 U.S.C. § 78j(b) (1976)) (federal doctrine used not withstanding the borrowed statute begins the period from the date of perpetration rather than from the date of discovery).

decided prior to Moviecolor have also indicated this proposition.[28]

2. Fraud Actions at Law Based on Federally Created Rights

¶ 14 Janigan v. Taylor[29] involved a securities fraud based on section 10 of the Securities Exchange Act of 1934.[30] The Court outlined the decisions of Bailey, Holmberg, and Moviecolor. It did not decide how far to carry the decision in Moviecolor, but decided that federal law determines the date of accrual of a cause of action although the period of limitation is determined by the state statute.[31] The application

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[28] See, e.g., Tobacco & Allied Stocks v. Transamerican Corp., 244 F.2d 902, 903 (3d Cir. 1957) (federal doctrine of fraudulent concealment applied to actions under the Securities Exchange Act to which state statute of limitations applied), affirming, 143 F. Supp. 323 (D. Del. 1956); Crummer Co. v. DuPont, 117 F. Supp. 870, 876 (N.D. Fla. 1954) (antitrust actions using state statute of limitations will apply the federal doctrine if sufficiently alleged in the complaint), rev'd on other grounds, 223 F.2d 238 (5th Cir.), cert. denied, 350 U.S. 848 (1955); Winkler-Kock Engineering Co. v. Universal Oil Products Co., 100 F. supp. 15, 29 (S.D.N.Y. 1951) (antitrust action using state statute of limitations).

[29] 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965).

[30] 15 U.S.C. 78j (1976).

[31] 344 F.2d at 784. See also Hilton v. Mumaw, 522 F.2d 588, 601-02 (9th Cir. 1975) (securities fraud). The court found that the great weight of authority requires the application of federal law to determine when the statute begins even when the state may have a similar fraudulent concealment doctrine. The court noted that its decision in Errion v. Connell, 236 F.2d 477, 455-56 (9th Cir. 1956) did not hold to the contrary because the state rule applied to determine when the period began was identical to the federal rule. at 601-02 & n. 13.

of federal law to determine when the statute commences or when the action accruses has been followed consistently by circuit courts for fraud and non-fraud cases such as actions based on the federal Securities Exchange Acts.[32] The Emergency Petroleum Allocation Act of 1973,[33] the Civil Rights Act of 1871,[34] the Interstate Land Sales Full Disclosure Act of 1968,[35] the Sherman Antitrust Act of 1890,[36] and the Clayton Act of 1914.[37]

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[32] See, e.g., Cook v. Avien, 573 F.2d 685, 694 (1st Cir. 1978) (15 U.S.C. 78j(b) (1976)); Arneil v. Ramsey, 550 F.2d 774, 780 (2d Cir. 1977 (same)); Tomera v. Gault, 511 F.2d 504, 509 (7th Cir. 1975) (same); Saylor v. Lindsley, 391 F.2d 965, 970 (2d Cir. 1968) (15 U.S.C. § 78aa (1976)); Azalea Meats, Inc. v. Muscat, 386 F. U 5, 8 (5th Cir. 1967) (15 U.S.C. § 78j(b) (1976), reversing, 246 F. Supp. 780 (S.D. Fla. 1965); Alabama Ban Corporation v. Henley, 465 F. Supp. 648, 652 (N.D. Ala. 1979) (15 U.S.C. § 78n (1976).

[33] 15 U.S.C. 754(a)(1) (1976). See e.g., Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F.2d 984, 988 (Temp. Emer. ct. App. 1977), cert. denied, 435 U.S. 994 (1978).

[34] 42 U.S.C. § 1983 (1976). See, e.g., Briley v. State of Cal., 564 F.2d 849, 855 (9th Cir. 1977); Cestaro v. Mackell, 429 F. Supp. 465, 469-70 (E.D.N.Y.), aff'd, 573 F.2d 1288 (1977).

[35] 15 U.S.C. § 1701-1720 (1976). See, e.g., Lukenas v. Bryce's Mt. Resort, Inc., 538 F.2d 594, 597 (4th Cir. 1976).

[36] 15 U.S.C. §§ 1-7 (1976). See, e.g., General Aircraft Corp. v. Air America, Inc., [1979] 5 Trade Reg. Rep. (CCH) ¶ 62452 (D.D.C. Jan. 30, 1979); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 284 (8th Cir. 1962), cert. denied, 371 U.S. 912 (1962), cert. denied, 373 U.S. 914 (1963).

[37] Clayton Act of 1914, ch. 323, 38 Stat. 730 (codified in scattered sections of 15, 29 U.S.C.). See, e.g., General Aircraft Corp. v. Air America, Inc., [1979] 5 Trade Reg. Rep. (CCH) ¶ 62452 (D.D.C. Jan. 30, 1979); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975).

C. Exceptions

¶ 15 The exceptions to applying the federal doctrine to state and federal statute of limitations for actions based on a federally created right are few. The cases that have not applied when the court looked to the state statute to determine the period appear to have overlooked the general principle.[38] Other cases have carved out specific exceptions

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[38] Klein v. Shields & Co., 470 F.2d 1344, 1346 (2d Cir. 1972) and Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970) involved securities frauds under 15 U.S.C. § 78g (1976). The Second Circuit discussed New York's fraud statute which, like the federal doctrine, requires the statutory period to begin when the fraud is discovered or could have been discovered by the exercise of reasonable diligence. The court said nothing about the federal doctrine. Again in Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 409-10 (2d Cir. 1975) (securities fraud) the court said the statute could begin when the plaintiff knew or should have known of the fraud by the exercise of diligence. The court cited the two Klein cases and made no references to the federal doctrine. But finally, in Arneil v. Ramsey, 550 F.2d 774, 780 (2d Cir. 1977) (securities fraud), the court acknowledged that federal law determines when the period begins. Stull v. Bayard, 561 F.2d 429, 432 (2d Cir. 1977) (Securities Exchange Act of 1934 §14(c), 15 U.S.C. 78n(e) (1976)), cert. denied, 434 U.S. 1035 (1978) also explained that under federal law, the statutory period begins when the plaintiff has actual knowledge of the fraud or knowledge of the facts which with reasonable diligence would lead to actual knowledge. In harmonizing the two statutory periods applicable. Under New York law, the court cited Hoff Research & Dev. Laboratories, Inc. v. Phillipine Nat. Bank, 426 F.2d 1023, 1026 (2d Cir. 1970) which explained that there are two separately timed and alternative limitation periods in cases of delayed discovery: six years after accrual or two years from discovery, which ever is longer. Id. This is in keeping with the federal fraud policy. In Turner v. Lundguist, 377 F.2d 44, 46 (9th Cir. 1967) (Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1976) the Ninth Circuit reasoned that because the alleged fraud occurred in California and California's statute of limitations applies, we must look to California law to determine when the limitations period begins to run. But in latter cases, the Ninth Circuit recognized that the federal doctrine applies. See note 31 supra.

to the doctrine for certain federal statutes that contain limitation periods. For example, although "[i]t is elementary that the statute of limitations for rule 10b-5 and related securities is tolled during any period of fraudulent concealment,"[39] the doctrine does not apply to a federal limitation that Congress has provided for by clear and unambiguous language.[40] Consequently, sections 11 and 12(2) of the Securities Exchange Act of 1934[41] are not tolled by fraudulent concealment because they are governed by the absolute time bar of section 13.[42] Also, although Bailey concerned a bankruptcy fraud and has been followed by subsequent bankruptcy cases,[43] it has been held that a case based on section 386 of the Bankruptcy Act of 1898[44] is fundamentally different from the typical case because the section explicitly provides that the time of accrual of an action for fraud to set aside a confirmation of a chapter XI plan is the date of confirmation and not the date when the fraud was discovered.[45]

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[39] Helfand v. Cenco, Inc., 80 F.R.D. 1, 9 (N.D. Ill. 1977).

[40] Brick v. Dominion Mortg & Rlty. Trust, 442 F. Supp. 283, 291 (W.D.N.Y. 1977).

[41] 15 U.S.C. §§ 77k, 771(2) (1976).

[42] Brick, 442 F. Supp. at 291.

[43] See, e.g., Avery v. Cleary, 132 U.S. 604, 609-10 (1890); Linn & Lane Timber Co. v. United States, 196 F. 593, 599-600 (9th Cir. 1912), aff'd, 236 U.S. 574 (1915).

[44] 11 U.S.C. § 786 (1976).

[45] In re Newport Harbor Assoc., 589 F.2d 20, 23 (1st Cir. 1978).

II. THE ELEMENTS OF THE FEDERAL DOCTRINE OF FRAUDULENT CONCEALMENT

¶ 16 In general, the limitations period is tolled as long as the party injured remains ignorant of his injury,[46] or of the facts rendering the injury actionable,[47] or the identity of the wrongdoer,[48] through no fault or want of diligence on his own, and his ignorance is the result of successful concealment by the defendant. If the fraud is the basis of the action and is of the nature that it conceals itself, then active concealment by the defendant is unnecessary. In both cases, the statute will begin to run when the injured party discovers his cause of action, or should have discovered it, by the exercise of due diligence. If due diligence has been exercised continuously after the plaintiff became suspicious that he might have a claim and the limitations period has expired in the interim, the injured party may still bring his suit.

¶ 17 Those considerations involve two elements in cases based on fraud:[49]

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[46] Bailey v. Glover, 88 U.S. (21 Wall.) 342, 347 (1874).

[47] Traer v. Clews, 115 U.S. 528 (1885).

[48] Holmberg v. Armbrecht, 327 U.S. 392 (1946).

[49] In Long v. Abbot Mortgage Corp., 459 F. Supp. 108 (D. Conn. 1978) (securities fraud, 15 U.S.C. 78j(b) (1976)), the court questioned whether both due diligence and concealment were necessary and gave policy reasons for both an "either/or" requirement and a "both/and" requirement. Id. at 118, n. 7. Rather than decide the issue, the court found both no concealment by the defendant and no diligence by the plaintiff. Long did state that Tomera v. Gault, 511 F.2d 504, 510 (7th Cir. 1975) (securities fraud) implied an "either/or" formulation by indicating that Bailey v. Glover

1) was the action concealed or did the plaintiff know, and

2) was due diligence exercised once the plaintiff was put on notice that he might have a cause of action,

and the elements in cases not based on fraud:[50]

1) use of fraudulent means by the wrongdoer,

2) successful concealment of the facts that form the basis of the injured party's cause of action, and

3) the exercise of due diligence by the plaintiff once he was put on notice of a possible cause of action.

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recognized two types of fraudulent behavior. Id. Reading these cases together, it appears that for fraud cases, and for non-fraud cases where the conduct of the defendant necessarily conceals the cause of action, the plaintiff must show 1) concealment in the sense that he did not know nor should he have known of his cause of action earlier; and 2) that once there were sufficient facts to put him on notice of a possible claim, he exercised due diligence. Actual affirmative acts of concealment will probably not be required to be proved in fraud type cases. See ¶ 36 infra.

[50] See, e.g., Weinberger v. Retail Credit Co., 498 F.2d 552, 555 (4th Cir. 1974); King & King Enterprises v. Champlin Petroleum Co., 446 F. Supp. 906, 910-11 (E.D. Okla. 1978); Douberg v. Dow Chem. Co., 195 F. Supp. 337, 343 (E.D. Pa. 1961), aff'd 353 F.2d 963 (3d Cir. 1965), cert. denied, 384 U.S. 907 (1966); Philco Corp. of Am. v. Radio Corp. of Am., 186 F. Supp. 155, 163-64 (E.D. Pa. 1960). Cf. City of Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1974). The court specified only two elements that the plaintiff must show:

> 1) that defendants concealed the basic facts that would reveal the existence of their monopolistic behavior, and
> 2) that plaintiffs were ignorant of those facts through no fault of their own.

¶ 18 Because the claim of fraudulent concealment is a means of avoiding the limitations period, the party seeking the benefit of the doctrine has the burden of establishing it[51] by showing, with particularity,[52] the above listed elements. Whether or not these elements must be alleged in the complaint, and to what extent they must be alleged depends on the case.

III. CHALLENGES TO THE CLAIM OF FRAUDULENT CONCEALMENT

¶ 19 In summary, courts are not consistent in determining what elements of fraudulent concealment need to be alleged in the complaint. Some courts do not require the claim to be pleaded at all until the defendant puts the running of

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Id. at 460. See also Baker v. F & F Investment, 420 F.2d 1101, 1191 (7th Cir.) (citing Bailey v. Glover, 88 U.S. (21 Wall.) at 349), cert. denied, 400 U.S. 821 (1970). But the court in City of Detroit acknowledged that when the cause of action of an antitrust action is concealed, the plaintiff must also show that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated his discovery notwithstanding such diligence. 495 F.2d at 461 (citing Laundry Equipment Sales Corp. v. Borg Warner Corp., 334 F.2d 788 (7th Cir. 1964); Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961); and Starview Outdoor Theatre, Inc. v. Paramount Film Distributing Corp., 254 F. Supp. 855 (N.D. Ill. 1966)).

[51] Charlotte Telecasters, Inc. v. Jefferson Pilot Corp., 546 F.2d 570, 574 (4th Cir. 1976); Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975); City of Detroit v. Grinnel Corp., 495 F.2d 448, 461 (2d Cir. 1974); King & King Enterprises v. Champlin Petroleum Co., 446 F. Supp. 906, 910-11 (E.D. Okla. 1978).

[52] See ¶¶ 20-27 infra.

the statute of limitations in issue by a motion to dismiss or by a motion for summary judgment. The strict pleading requirements for fraudulent concealment in the complaint are specifically followed in antitrust cases where the action is not based on fraud. In securities fraud cases, the pleading of the fraud serves to put the defendant on notice that the plaintiff's claim includes fraud so that the specific pleading of fraudulent concealment is not required on the complaint and can be saved until the defendant claims that the statute of limitations bars the suit. Those courts requiring the pleading of fraudulent concealment in the complaint will grant leave to amend unless it is clear from the evidence before the court that the plaintiff cannot show the required elements.

A. Pleading Requirements

1. The Complaint

¶ 20 As stated in 9(b) of the Federal Rules of Civil Procedure, "the circumstances constituting fraud . . . must be stated with particularity." The 9(b) requirement for fraud is a general requirement that, of course, applies in antitrust cases[53] and securities cases.[54] The Second Circuit

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[53] See, e.g., Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 574 (4th Cir. 1976); Akron Presform Mold Company v. McNeil Corporation, 496 F.2d 230, 233 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

[54] See, e.g., Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975) (Rule 10b-5, 17 C.F.R. § 240-10(1978)).

in Moviecolor, Ltd. v. Eastman Kodak Co.[55] stated:

> Even under modern liberal rules of pleading "justice" still requires that a plaintiff seeking to escape the statute in such a case shall make "distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made."[56]

¶ 21 The Supreme Court in Stearns v. Page[57] laid down the general rules governing a court of equity in upholding a complaint where the statute of limitations has run.[58] The Court required distinct averments as to:

1) the time of discovery and what the discovery was;

2) the particular act of fraud, misrepresentation, or concealment; and

3) how, when, and in what manner it was perpetrated.

The claim must also be "reasonably certain, capable of proof, and clearly proved."[59]

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[55] 288 F.2d 80 (2d Cir.) (antitrust action), cert. denied, 368 U.S. 821 (1961).

[56] Id. at 88 (quoting Stearns v. Page, 48 U.S. (7 How.) 819, 829 (1849).

[57] 48 U.S. (7 How.) 819 (1849) (action based on fraud).

[58] The Court observed that a lapse in time necessarily obscures truth and destroys evidence and so courts must be cautious in dealing with cases involving old actions. Id. at 829.

[59] Id.

¶ 22 In applying the fraudulent concealment doctrine to toll a state statute of limitations, the Supreme Court, in Wood v. Carpenter,[60] held, "[i]n this class of cases the plaintiff is held to stringent rules of pleading and evidence."[61] The Court found the complaint and following reply insufficient declaring that a general allegation of ignorance of the claim at one time and of knowledge of it at another is not sufficient. "If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner."[62] The Court also stated that no averments were made that the plaintiff had inquired into the facts available to him.[63]

¶ 23 In Traer v. Clews,[64] the Supreme Court cited Woods v. Carpenter[65] stating:

> He must declare what his discovery is, how it was made, why it was not made sooner, and that he used diligence to detect. All these circumstances must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.[66]

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[60]101 U.S. 135 (1879) (fraudulent representations by judgment debtor about the amount he was worth).

[61]Id. at 140.

[62]Id. at 140-141.

[63]Id. at 139.

[64]115 U.S. 528 (1855) (plaintiff purchaser of bankrupt estate asserts title against defendant and alleges fraud and concealment by defendant in acquiring the title from the trustee of the bankrupt estate).

[65]101 U.S. 135 (1879).

[66]115 U.S. at 530-31.

The amended complaint alleged fraudulent concealment by one of the defendants, but the Court found that neither the pleadings nor the proof showed the circumstances involved in the concealment. The only proof offered was that the attorneys conducting the investigations had no knowledge of the defendant's connection with the sale of the bankrupt estate. This was not sufficient to sustain the claim.[67]

¶ 24 The particularity requirement of federal rule 9(b) for alleging fraud, which the above cases set the background for, is read together with 8(a)(2), 8(e)(1), and 8(f) of the Federal Rules of Civil Procedure.[68] Rule 8(a) states, for example, that the pleadings shall induce a "short and plain statement of the claim showing that the pleader is entitled o relief."[69] Forms 6, 9, and 11 in the Federal Rules of Civil

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[67] Id. at 531.

[68] Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975) (Rule 10b-5, 17 C.F.R. § 240.10b-5 (1978) (citing Buckley v. Altheimer, 2 F.R.D. 285 (D.C. Ill. 1942) and C. Wright, Law of Federal Courts 282 (2d ed. 1970)).

[69] Rule 8(e)(1) states: "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required. Rule 8(f) states: "All pleadings shall be so construed as to do substantial justice."

Procedure show that a simple and concise statement is all that is needed to put the defendant on notice of the claim. Looking at rules 8 and 9(b) and the forms, the Seventh Circuit, in a securities fraud case, held that rule 9 lists the actions that require slightly more for meeting the notice requirement so that in a fraud action a plaintiff must state with particularity the circumstances constituting the fraud.[70]

¶ 25 In antitrust cases, the Second Circuit has held that the specific factors to be stated are the time of discovery and what was discovered.[71] These factors must be pleaded along with the three elements of fraudulent concealment[72] given in paragraph 17. The Ninth Circuit, in a securities fraud case, has found that federal procedure does not require the pleading of the time and circumstances of discovery in the complaint, but that they must be shown only after the defendant raises the issue in his motion.[73]

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[70] Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975) (Rule 10b-5, 17 C..F.R. § 240.10b-5 (1978)).

[71] Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir.), cert. denied, 368 U.S. 821 (1961).

[72] Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (antitrust); General Aircraft Corp. v. Air America, Inc., [1979] 5 Trade Reg. Rep. (CCH) ¶ 62.452 at 76676 (D.D.C. Jan. 30, 1979) (antitrust).

[73] Turner v. Lundquist, 377 F.2d 44, 48 (9th Cir. 1967). See also Briskin v. Ernst & Ernst, 589 F.2d 1363, 1367 n.3 (9th Cir. 1978) (securities fraud).

¶ 26 Conclusory allegations of fraud will not support a federal cause of action.[74] The mere allegation of fraudulent concealment of a cause of action is not sufficient,[75] but because certain techniques of concealment would not be noticed by plaintiffs, rule 9(b) does not require these techniques

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[74] In Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978) (antitrust) the complaint stated:

> Defendant concealed the existence of the aforesaid price discrimination through the adoption of elaborate schemes, resorting to secrecy to avoid detection, and by denying that such discrimination or price differential existed.

The court held that the plaintiff cannot rely on conclusory statements to avoid the statute of limitations bar:

> He must plead with particularity the circumstances surrounding the concealment and state facts showing his due diligence in trying to uncover the facts.

Id. In Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 943 (D.N.J. 1978) (securities fraud) the complaint stated:

> Plaintiff acted reasonably and with due diligence at all times. Plaintiff discovered defendant's material omissions and misrepresentations only after employing legal counsel to investigate and report. Plaintiff could not in the exercise of due diligence have discovered the fraud alleged herein at any time prior to the completion of the investigation and report of such counsel because defendants at all times acted to suppress and fraudulently conceal all facts and information regarding their fraudulent and otherwise illegal conduct.

The court found the complaint insufficient because it did not allege:

1) the actions by defendants that suppressed the needed facts,

2) why facts were not discovered within the limitations period, and

3) with particularity why it took so long to consult an attorney and to prepare the complaint.

Id. at 943.

In Weinberger v. Retail Credit Company, 498 F.2d 552 (4th Cir. 1974) (antitrust action), the complaint stated:

be alleged.[76] Allegations of fraudulent concealment plus some detail as to the alleged secret activities is sufficient to meet the requirements of rule 9(b).[77] In securities fraud actions, an allegation of fraudulent concealment has been found sufficient to withstand a motion to dismiss.[78]

¶ 27 In most antitrust cases, mere allegations of due diligence is insufficient. The plaintiff must also assert what

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> Plaintiff had no knowledge of the monopolization or attempt to monopolize by defendant, or of the facts which might have led to the discovery thereof until recently. Plaintiff could not have discovered the antitrust violations alleged herein at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by defendant to avoid detection and to fraudulently conceal its activities attempting to monopolize the investigative reporting field.

The court found the complaint insufficient and, citing Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 87 (2d Cir.) (antitrust), cert. denied, 368 U.S. 821 (1961), stated that justice requires distinct averments as to the discovery made and what is discovered. Id. at 554-55. See also Suckow Borax Mines Consol. Inc. v. Borax Consol., Ltd., 185 F.2d 196, 209 (9th Cir. 1950) (antitrust action) (mere allegation of fraudulent concealment of conspiracy is insufficient to meet the pleading requirement of rule 9(b)), cert. denied, 340 U.S. 943 (1951).

[76] Chambers & Barber, Inc. v. General Adjustment Bureau, 60 FRD 455, 459 n. 7 (S.D.N.Y. 1973) (antitrust action).

[77] Id. at 458-59. The complaint stated that discovery was not made earlier "because of the practices and techniques of secrecy employed by defendants and its co-conspirators to avoid detection and fraudulently to conceal such violations." This language fell short of the rule 9(b) requirement, but another paragraph in the complaint adequately showed "activities which from their general nature may be presumed to be secret and which could qualify as means of concealment." Id. at 458.

[78] Brick v. Dominion Morg. & Rlty. Trust, 442 F. Supp. 283, 304-05 (W.D.N.Y. 1977) (whether concealment was made by defendant or not, and whether the plaintiff could have discovered the fraud sooner cannot be determined on a motion to dismiss); Puttkammer v. Stifel Nicholaus & Co. Inc., 365 F. Supp. 495, 498-99 (N.D. Ill. 1973).

steps were taken to discover the fraud.[79] But in some anti-trust cases, a statement about one's due diligence appears to not be specifically required in the complaint. These cases have held that the complaint is sufficient if it alleged two elements: 1) the use of fraudulent means by the party raising the statute of limitations; and 2) successful concealment.[80] Securities fraud cases have also required a statement as to any actual steps taken to discover the fraud,[81] but if there was nothing to make a reasonable man suspicious, so requiring due diligence in investigating and discovering the fraud, the pleading of such negative facts may not be necessary.[82]

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[79] Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975).

[80] Kansas City, Missouri v. Federal Pacific Electirc Co., 310 F.2d 271, 278 (8th Cir.) (due diligence by attorneys is noted in the courts discussion of the merits of the case so that it appears that while the plaintiff must prove this element, he need not plead it for this court), cert. denied, 371 U.S. 912 (1962), cert. denied, 373 U.S. 914 (1963); Illinois v. Sperry Rand Corp., 237 F. Supp. 520, 524 (N.D. Ill. 1965).

[81] Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974); Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945 (D.N.J. 1978).

[82] Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265, 1268-69 (7th Cir. 1975).

2. Amendments

¶ 28 Defective pleadings may be supplemented by evidence brought in on a motion to dismiss,[83] or by affidavits summite. on a motion for summary judgment,[84] or by looking to other paragraphs of the complaint.[85] The court will also allow supplementation of defective pleadings when it appears that the complaint can be amended to allege sufficient facts to make out fraudulent concealment.[86]

¶ 29 Even though amendments are liberally granted, the plaintiff must be careful. For example, in a securities fraud case where the complaint made no mention of fraudulent concealment and the amended complaint did not allege fraud with the required particularity, the court dismissed the complaint with prejudice and would not permit a second amended complaint to allege fraud. The court reasoned that because the plaintiff had already amended his complaint once, after the issue had been briefed,

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[83] Glazer Steel Corp. v. Toyomenka, Inc., 392 F. Supp. 500, 503 (S.D.N.Y. 1974). The defendants moved to dismiss the count that alleged the Sherman Act violation. The court held the plaintiff's showing that the history of discovery in the case might constitute fraudulent concealment rendered pleading unnecessary, although greater specificity could have been given in the complaint.

[84] Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F.2d 984, 988 (Temp. Emer. Ct. app. 1977) (Emergency Petroleum Allocation Act of 1973, 17 U.S.C. ¶ 754(a)(1) (1976)) (although affidavits may suppliment pleadings, here the affidavit failed to support hte claim of fraudulent concealment).

[85] Chambers & Barber, Inc. v. General Adjustment Bureau, Inc., 60 F.R.D. 455, 458-59 (S.D.N.Y. 1973) (antitrust).

[86] Saylor v. Lindslay, 391 F.2d 965, 970 (2d Cir. 1968) (securities, 15 U.S.C. §§ 78aa (1976)); Roberts v. Magnet Metals Co., 463 F. Supp. 934, 943 (D.N.J. 1978) (securities fraud, 15 U.S.C. § 78j(b) (1976)).

for the express purpose of alleging fraud sufficient to toll the limitations period, the information alleged in the amended complaint must have been the best the plaintiff could claim.[87] The Second Circuit refused leave to amend an insufficient plea of fraudulent concealment where the complaint alleged an anti-trust claim based on transactions almost thirty years old. The court stated that the attorney must have submitted the best complaint possible to meet a motion raising the statute of limitations since he must have realized that a claim this old would be so met.[88]

B. On the Merits

1. Summary Judgment

¶ 30 Most often, the fraudulent concealment issue is decided on a motion for summary judgment, or on a motion to dismiss, which when accompanied with affidavits, is treated as a motion for summary judgment. Securities fraud cases have held that nothing need be said in the complaint about fraudulent concealment and the doctrine comes into issue when the defendant declares in his motion or defense that the cause of action is

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[87] Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890 902 n. 17 (D. Me. 1971).

[88] Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 88 (2d Cir.), cert. denied, 368 U.S. 821 (1961).

time barred.[89] All presumptions are against the plaintiff because, in seeking the benefit of the fraudulent concealment doctine, his claim for such an exemption is against the current of the law.[90]

¶ 31 Summary judgment will not be granted unless it appears as a matter of law that there was no fraudulent concealment.[91] If it is possible that any of the facts alleged will proved at trial,[92] or that the complaint can be amended to state suf-

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[89] Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 113 (D. Conn. 1978). See also, Turner v. Lundguist, 377 F.2d 44, 46 (9th Cir. 1967) (a motion for summary judgment is a proper method for determining whether or not the plaintiff's claim is barred by the statute of limitations).

[90] Akron Presform Mold Company v. McNeil Corporation, 496 F.2d 230, 233 (6th Cir.), cert. denied, 419 U.S. 987 (1974) (antitrust).

[91] Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975) (securities fraud) (allegations that no discovery was made because defendants took positive steps after committing the fraud to keep it concealed pleaded sufficient details which once proved at trial would establish defendant's fraudulent concealment); Husted v. Amrep Corp., 429 F. Supp. 298, 307 (S.D.N.Y. 1977) (court found that it was possible that some of the alleged facts could be proved which owuld toll the statute and that this alone would be sufficient to deny defendant's motion) (Interstate Land Sales Full Disclosure Act of 1968, 15 U.S.C. § 1703(a)(2)(b) (1976).

[92] See Husted v. Amrep Corp., 429 F. Supp. 298, 307 (S.D.N.Y. 1977) (Interstate Land Sales Full Disclosure Act of 1968, 15 U.S.C. § 1703(a)(2)(b) (1976)); deHass v. Empire Petroleum Co., 286 F. Supp. 809, 813 (D. Colo. 1968) (securities fraud, 15 U.S.C. § 78j(b) (1976)) (court found a genuine issue of fact concerning plaintiffs' contention that although they doubted that the merger was a good business practice, they relied upon the integrity and information provided them by management).

ficient facts to meet the requirements of fraudulent concealment,[93] then summary judgment will not be granted. Courts agree that the question of reasonable diligence is factually based and should be determined by the jury, not by the court on a motion for summary judgment.[94] But when the plaintiff introduces no evidence from which the court can infer that due diligence was exercised to learn the facts of the cause of action, the claim of fraudulent concealment is treated no more than a plea of ignorance and is not sufficient to avoid the statute of limitations.[95] Similarly, when an unrebutted affidavit submitted by the defendant shows that the plaintiff knew of his cause of action, summary judgment will be granted.[96]

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[93] Saylor v. Lindsley, 391 F.2d 965, 970 (2d Cir. 1968) (securities stockholder derivitive action, 15 U.S.C. § 78aa (1976)).

[94] Johns Hopkins Univ. v. Hutton, 422 F.2d 1124, 1131 (4th Cir. 1970). The court was not addressing due diligence in connection with the federal doctrine of fraudulent concealment. Rahter, the court was reviewing the reasonable diligence requirement of section 13 of the Securities Act of 1933, 15 U.S.C. § 77m (1976). Citing Dole v. Rosenfeld, 229 F.2d 855, 858 (2d Cir. 1956), the court found that when the judge is a trier of fact, the standard of diligence is a question of law; but when a jury is the trier of fact, the jury should make the findings. Where a jury is demanded, summary judgment should not be granted when the facts give rise to conflicting inferences on the issue of reasonable diligence. Id.

[95] Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 574 (4th Cir. 1976) (antitrust). See also, Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (antitrust); Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 234 (6th Cir.), cert. denied, 419 U.S. 997 (1974) (antitrust).

[96] Weinberger v. Retail Credit Co., 498 F.2d 552, 554 (4th r. 1974) (antitrust).

2. Concealment

¶ 32 Bailey v. Glover[97] discussed two kinds of concealment cases:

> 1) where "the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other,";[98] and
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> 2) "where the party remains in ignorance without any fault or want of diligence or care on his part . . . though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."[99]

In simple terms, the cases divide between those where affirmative acts of concealments have been employed and those where the activities themselves conceal the cause of action and are considered self concealing.[100] In other words, the plaintiff must show some conduct of the defendant's, whether it was self-

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[97] 88 U.S. (21 Wall.) 342 (1874) (bankruptcy fraud).

[98] Id. at 347.

[99] Id. at 348.

[100] See Tomera v. Gault, 511 F.2d 504, 510 (7th Cir. 1975) (securities fraud).

concealing conduct or affirmative acts of concealing, which, under the circumstances of the case, would lead a reasonable person to believe that he did not have a claim for relief.[101] It is not important that the defendant did not take further steps to impede discovery after committing the wrong because the conduct that constitutes concealment may take place before or after the cause of action accrues.[102]

¶ 33 In absence of a fiduciary relationship between the plaintiff and defendant,[103] mere silence[104] or failure to disclose on the part of the defendant[105] is not enough to

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[101] See Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978) (antitrust action).

[102] Gaetzi v. Carling Brewing Co., 205 F. Supp. 615, 620 (E.D. Mich. 1962) (antitrust violation).

[103] Klein v. Spear, Leeds & Kellogg, 306 F. Supp. 743, 749 (S.D.N.Y. 1969) (securities fraud, 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5 (1978). The plaintiff need not prove active concealment. He must only show that he remained ignorant of the fraud of his fiduciary without fault or want of due diligence or care on his part. Id.

[104] Wood v. Carpenter, 101 U.S. 135, 143 (1879) (fraudulent representations by judgment debtor about the amount he was worth); Gaetzi, 205 F. Supp. 615, 620 (E.D. Mich. 1962) (antitrust). Cf. Glazer Steel Corp. v. Toyomenta, Inc., 392 F. Supp. 500, 503 (S.D.N.Y. 1974) (antitrust). The defendants resisted answering the interrogatories and in the history of discovery of the case, several judges and magistrates held that the defendants were under a "duty to speak." The court found that "[i]n these circumstances their failure to do so [speak] may well have constituted an act of concealment." Id.

[105] King & King Enterprises v. Champlain Petroleum Co., 446 F. Supp. 906, 912 (E.D. Okla. 1978) (antitrust).

show concealment. "There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."[106] Concealment is not shown by the mere ignorance of evidence,[107] or by the failure to discover one's action,[108] or by evidence of improper legal advice.[109] That price regulations involve complicated accounting procedures and that price information resulting from these procedures is not self-revealing are not examples of self-concealing activities.[110] A denial of an

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[106] Wood v. Carpenter, 101 U.S. 135, 143 (1879) (fraudulent representation by judgment debtor about how much he was worth).

[107] Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977) (overcharges in violation of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §754(a)(1) (1976)) (citing Wood v. Carpente 101 U.S. 135, 143 (1879) which stated there must be reasonable diligence), cert. denied, 433 U.S. 994 (1978); Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 87 (2d Cir.) (antitrust), cert. denied, 368 U.S. 821 (1961); Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 117 (D. Conn. 1978) (antitrust).

[108] Public Service Co. of v. General Elec. Public Serv. Co. of N.M. v. General Elec. Co., 315 F.2d 306, 310 (10th Cir.) (antitrust) (delay in discovery concerns actions or inactions of the plaintiff while wrongful active concealment is a positive action by the defendant; therefore, a refusal to toll the statute for failure to discover is not equal to a refusal to toll the statute when the cause of action is actively, wrongfully concealed), cert. denied, 374 U.S. 809 (1963), City of Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 278 (8th Cir.) (antitrust), cert. denied, 371 U.S. 912 (1962), cert. denied, 373 U.S. 914 (1963).

[109] General Aircraft Corp. v. Air American, Inc., [1979] 5 Trade Reg. Rep. (CCH) ¶ 62452 at 76677 (D.D.C. Jan. 30, 1979).

[110] Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977) (Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1) (1976)).

accusation of wrongdoing does not constitute fraudulent concealment[111] "were such an answer was in practical effect no more than a failure to disclose the existence of a cause of action."[112] But where the plaintiff reasonable relies on the denial, the denial may constitute fraudulent concealment.[113]

¶ 34 The purpose for the concealment is immaterial, "[I]t is the lack of knowledge of the facts which would give it a cause of action, and its [the plaintiff's] inability for that reason to bring suit, that tolls the statute."[114] Concealment must have been done, however, by the party asserting the statute of limitations as a bar to the action.[115]

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[111] General Aircraft Corp. v. Air American, Inc., [1979] 5 Trade Reg. Rep. (CCH) ¶ 62452 at 76677 (D.D.C. Jan. 30, 1979) (antitrust); King & King Enterprises v. Champlain Petroleum Co., 446 F. Supp. 906, 912 (1978) (antitrust).

[112] Suckow Borax Mines Consol. Inc. v. Borax Consol., Ltd., 185 F.2d 196, 209 n. 10 (9th Cir. 1950) (antitrust), cert. denied, 340 U.S. 943 (1951); Burnham Chem. Co. v. Borax Consol., Ltd., 170 F.2d 569, 573-74 & n. 4 (9th Cir. 1948) (antitrust), cert. denied, 336 U.S. 924 (1949).

[113] Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978) (antitrust). The court found that although an affirmative act of denying wrongdoing may constitute fraudulent concealment under some circumstances, it was not so here. The plaintiff's reliance on the defendant's denial was not reasonable. Id.

[114] American Tobacco Co. v. People's Tobacco Co., 204 F. 58, 63 (5th Cir. 1913) (antitrust).

[115] Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324, 1327 (D.D.C. 1977) (securities action).

3. Affirmative Acts of Concealment

¶ 35 In summary, affirmative acts must be proved in actions not sounding in fraud unless a conspiracy is involved. If the action sounds in fraud and the fraud conceals itself, affirmative concealment need not be proved. Affirmative acts must be proved in cases based on a fraud that is not by its nature self-concealing.

¶ 36 A fraud conceals itself when a plaintiff could not uncover it even by the exercise of due diligence.[116] A self-concealing fraud is different from an affirmative concealment in that "the defendant does only what is necessary to perpetrate the fraud and that alone makes the fraud unknowable.[117] In securities fraud cases, if the defendant's activities conceal themselves, the statute will be tolled even when no affirmative acts are made to conceal them.[118] In some fraud cases, the language used to describe self concealment is much stronger.

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[116] Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 120 (D. Conn. 1978) (securities fraud, 15 U.S.C. §78j(b) (1976)).

[117] Id.

[118] Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945 (D.N.J. 1978) (securities fraud, 15 U.S.C. § 78j(b) (1976)) (as originally formulated by Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874), the doctrine of fraudulent concealment does not require active concealment by the defendant); Puttkammer v. Stifel, Nicholaus & Co., Inc., 365 F. Supp. 495, 497 (N.D. Ill. 1973) (securities fraud, 15 U.S.C. § 78 j(b) (1976), citing Bailey v. Glover). Cf. Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 118 (D. Conn. 1978) (securities fraud, 15 U.S.C. § 78j(b) (1976)). The court discussed Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961) and City of Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1964) and found that the statements about the affirmative act requirment were not material to the decisions. The court concluded

For example,

> Only where the substantive fraud includes active concealment directly thwarting diligent efforts to discover wrongdoing can that substantive fraud suffice to toll the statute of limitations. If this were not so, there would be, in effect, no statute of limitations in any fraud action.[119]

¶ 37 In cases where the substantive cause of action is not based on fraud, for example antitrust monopoly cases, the plaintiff must show "that defendants concealed the basic facts that would reveal the existence of their monopolistic behavior . . . that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence."[120] In securities actions that are not in themselves based on fraud, the plaintiff must also show the defendant's act(s) that fraudulently concealed their claim.[121]

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hat the Second Circuit had not definitely determined whether ffirmative acts of conccealment must be established or whether a fraud that conceals itself is sufficient. The court failed to note that it was dealing with a fraud action while City of Detroit and Moviecolor were not. For a discussion about the difference between the New York and federal doctrines see Saylor v. Lindsley, 302 F. Supp. 1174, 1187 n. 28 (S.D.N.Y. 1969) (securities fraud). The court found the federal doctrine of fraudulent concealment more liberal than that of New York. New York requires an affirmative individual act of concealment while the federal doctrine (where the fraud is committed by a fiduciary) requires only that the plaintiff remain ignorant without fault or want of due diligence or care of his own. Id. citing Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874).

[119] Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945 (D.N.J. 1978) (securities fraud, 15 U.S.C. § 10(b) (1976)) (citations omitted).

[120] City of Detroit v. Grinnel Corp., 495 F.2d 448, 460-61 (2d Cir. 1974) (antitrust). See also Lukenas v. Bryce's Mt. Resort, 538 F.2d 594, 597 (4th Cir. 1976) (Interstate Land Sales Full Disclosure Act of 1968, 15 U.S.C. 1701-1720 (1976)); General Aircraft Corp. v. Air America, Inc., [1979] 5 Trade Reg. Rep. (CCH) ¶ 62452 at 76676 (D.D.C. Jan. 30, 1979 (antist).

[121] Ingenito v. Bermec Corp., 441 F. Supp. 525, 553 n. 26 (S.D.N.Y. 1977) (securities action, 15 U.S.C. § 77m (1976)).

¶ 38 There is a wrinkle for non-fraud actions; it is possible that no affirmative act of concealment is required in restraint of trade conspiracy cases.[122] This seems logical because conspiracies generally involve conduct that is self-concealing. It is not only the presence of a conspiracy that tolls the statute, but also that the defendant's conduct "necessarily had the effect of thwarting or long delaying discovery that an actionable wrong had occurred."[123] This requirement is necessary because conspiracies are secretive by their nature. If no restrictions were made for the doctrine of fraudulent concealment, the doctrine would undermine the statute of limitations severally for conspiracy cases as well as for fraud cases. Mere nondisclosure or denial of the existence of the conspiracy will not constitute a fraud to toll the statute.[124] Even so, direct misrepresentations to the plaintiff are not necessary to toll the statute. Any act that conceals the

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[122] Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 87 (2d Cir.), cert. denied, 368 U.S. 821 (1961). The court did not decide the question but read American Tobacco Co. v. People's Tobacco Co. 204 F. 58 (5th Cir. 1913) as not requiring affirmative acts in restraint of trade cases. See also Crummer Co. v. DuPont, 255 F.2d 425, 432 (5th Cir.) (antitrust conspiracy to force plaintiff out of business) (fraudulent use of government agencies whose investigations are kept secret by law tolled the statute), cert. denied, 358 U.S. 884 (1958).

[123] Gaetzi v. Carling Brewing Co., 205 F. Supp. 615, 620 (E.D. Mich. 1962) (antitrust). "It was not the mere existence of an illegal conspiracy which tolled the statute, but rather the presence of special circumstances which inevitably caused the plaintiff to remain in ignorance that a wrong had been committed." Id.

[124] Hall v. E.I. DuPont DeNemours & Co., 312 F. Supp. 358, 362 (E.D.N.Y. 1970) (antitrust).

conspiracy is sufficient,[125] no matter what the purpose, as long as the plaintiff did not know, nor should have known, of his cause of action.[126]

4. Knowledge of the Cause of Action

¶ 39 Even though there has been concealment by the defendant asserting the statute of limitations bar, this alone will not toll the statute. The plaintiff must also show that he did not know, nor should he have known, of his cause of action outside the limitations period before the action was brought.[127] If, despite the defendant's attempts at concealment, the plaintiff knew, then he cannot rely on the doctrine to toll the statutory period.[128]

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[125] Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914, 932-33 (S.D.N.Y. 1965) (antitrust price fixing conspiracy).

[126] American Tobacco Co. v. People's Tobacco Co., 204 F. 58, 63 (5th Cir. 1913) (antitrust). The alleged purpose for concealing the connection of the two companies was that one was on the "unfair list" of organized labor and if the connection was known, then the other company would have been boycotted by union labor. The court found that the concealment of the combination of the two companies was still a concealment which required the tolling of the statute. "It is thelack of knowledge of the facts which would give it a cause of action, and its inability for that reason to bring suit, that tolls the statute." Id.

[127] See, e.g., City of Detroit v. Grinnel Corp., 495 F.2d 448, 461 (2d Cir. 1974) (antitrust); Wachovia Bank & Trust Co. v. National Student Marketing, 461 F. Supp. 999, 1009 (D.D.C. 1978) (securities fraud, 15 U.S.C. §§ 78f, 78j(b) (1976)).

[128] Weinberger v. Retail Credit Co., 498 F.2d 552, 556 (4th Cir. 1974) (antitrust); Crummer Co. v. DuPont, 255 F.2d 425, 431 (5th Cir. 1958) (antitrust).

¶ 40 The difficult question is what constitutes knowledge so as to start the statute running? In general, the limitations period begins running when the material facts of the cause of action are discovered or when they should have been discovered after sufficient facts were available to put one on notice.[129] Weinberger v. Retail Credit Company[130] is a good example of what constitutes knowledge on the part of the plaintiff. The court found that although the defendant concealed his monopolistic position from others, he did not effectively conceal it from the plaintiff. The plaintiff knew of his injury, who was responsible for it, how it occurred and the methods used for concealing it. The statute was not tolled.[131]

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[129] Cook v. Avain, Inc., 573 F.2d 684, 694-95 (1st Cir. 1978 (securities fraud, 15 U.S.C. § 78j(b) (1976)); Arneil v. Ramsey, 550 F.2d 774, 780-81 (2d Cir. 1977) (securities fraud, 15, U.S.C. § 78j(b) (1976)); Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975 (securities fraud, 15 U.S.C. 77a(a) (1976)); City of Detroit v. Grinnel Corp., 495 F.2d 448, 461 (2d Cir. 1974) (antitrust action). Cf. Briskin v. Ernst & Ernst, 589 F.2d 1363, 1367 (9th Cir. 1978) (securities fraud, 15, U.S.C. § 78j(b) (1976)). The Ninth Circuit acknowledged that the federal law will toll the statute, but to determine when discovery was made, the court looked to the state's development of a discovery test. By looking to California case law, the court found that the statute runs after notice of circumstances sufficient to make a reasonable man suspicious rather than when, in the exercise of diligence, he did discover, or should have discovered, his cause of action. But the court said that the plaintiff may be charged with the facts which would have been disclosed by an investigation. This indicates that the lack of diligence was what prevented the tolling of the statute and not so much that the statute began when a reasonable man would have been suspicious. Id.

[130] 498 F.2d 552, (4th Cir. 1974) (Sherman Act violation--monopolization, or attempt to monopolize, the national credit-reporting market).

[131] Id. at 556.

¶ 41 Although the statute will be tolled until the plaintiff discovers his cause of action, it will not wait until the plaintiff "becomes aware of all the various aspects of the alleged fraud,"[132] nor until the information is confirmed,[133] but only until the plaintiff should have discovered the general scheme,[134] or until he had enough facts to be on inquiry notice of a potential claim.[135] If the plaintiff fails to inquire into the legal significance of the facts known to him and those facts make out a cause of action, then the plaintiff cannot depend on the doctrine of fraudulent concealment to toll the

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[132] Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 410 (2d Cir. 1975) (securities fraud, 15 U.S.C. §78j(b) (1976). See also Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 341 (5th Cir. 1971) (copyright infringement, 17 U.S.C. § 115(b) (1976)); Japanese War Notes Claim Ass'n of Phil., Inc. v. United States, 373 F.2d 356, 359 (Ct. Cl.) (claim against the United States by a Phillipine Corporation for reimbursement for counterfeit Japanese money issued by the United States during Japanese occupation of the Phillipines), cert. denied, 389 U.S. 971 (1967); Ingenito v. Bermec Corp., 441 F. Supp. 525, 554 (S.D.N.Y. 1977) (securities fraud actions, 15 U.S.C. §§ 77k, 771(2) (1976)).

[133] Cole v. Kelly, 438 F. Supp. 129, 139 (C.D. Cal. 1977) (damage action for unauthorized electronic surveillance).

[134] Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 410 (2d Cir. 1975) (securities fraud) (quoting Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970) (securities fraud).

[135] Ingenito v. Bermec Corp., 441 F. Supp. 525, 554-55 (S.D. N.Y. 1977) (securities action, 15 U.S.C. § 77m (1976)).

statute, even when those facts alone do not trigger inquiry and the defendants falsely represented the legal significance of those facts.[136] This is true even if the Justice Department tells the plaintiff that his complaint involves no violation.[137] Also, the plaintiff cannot rely on the complexity of the laws to toll the statute as long as his knowledge of the facts would lead him to the discovery of the details of his claim if followed up with diligence.[138] Ignorance of the law does not stop the limitations period from running.[139]

¶ 42 What constitutes knowledge in conspiracy cases is that the plaintiff knows not just that he is injured by the defendants, but that the injury is caused by a conspiracy. In an early anti-trust, conspiracy case, American Tobacco Co. v. People's Tobacco Co.,[140] the trial judge charged the jury that

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[136] Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265, 1269 (7th Cir. 1975) (securities fraud, 15 U.S.C. §§ 78f, 78j(b) (1976)).

[137] Starview Outdoor Theatre, Inc. v. Paramount Film Distributing Corp., 254 F. Supp. 855, 857 (N.D. Ill. 1966) (anti-trust action).

[138] Alabama Bancorporation v. Henley, 465 F. Supp. 648, 655-56 (N.D. Ala. 1979) (securities fraud, 15 U.S.C. § 78n (1976)).

[139] Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265, 1269 (7th Cir. 1975) (securities fraud).

[140] 204 F. 58 (5th Cir. 1913).

the statute begins running

> from the moment he [the plaintiff] knew he could bring an action against somebody to recover his damages, although he might not have known who the person was, or he might not have known how he was going to prove his action . . . .[141]

The Fifth Circuit found that, as a whole, the jury charge presented the question of prescription fairly, but the court specifically approved of only one sentence[142] noting that the rest of the charge may be subject to criticism. The court went on to say that although the plaintiffs knew they were losing profits and that such loss was caused by the competition of Craft Tobacco Company, this knowledge was not sufficient to give the plaintiff a cause of action under the Sherman Act. Prescription would run only when the plaintiffs knew that they had a cause of action, i.e., when they "know or ought to have known of the agreement or arrangement called 'a combination or conspiracy' on the part of the other tobacco companies against it."[143]

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[141] Id. at 60 (quoting from the trial judge's jury charge).

[142] "Therefore it is a question of fact for you to determine in connection with this case, whether or not the plaintiff knew, or ought to have knwon, more than one year before this petition was filed, that he had suffered an actionable injury." Id. at 61.

[143] Id.

¶ 43 In American Tobacco, the requisite knowledge to start the statute running was knowledge of facts sufficient to constitute a cause of action. This meant that the plaintiff needed to know of his injury, who caused it, and that a conspiracy existed against him.

¶ 44 In Suckow Borax Consolidated, Inc. v. Borax Consolidated, Ltd.,[144] the plaintiffs' claimed they did not know of a formal conspiracy against them nor of its exact dates, terms, or objectives.[145] The court held that knowledge of the precise elements of a general conspiracy was not necessary, and found that the appellants knew and believed 1) they were being damaged by the defendants, 2) the defendants were the cause of the damage, and 3) these acts violated the antitrust laws.[146] The "ultimate and determinative facts constituting the legal basis of this action were known to the appellants"[147] and therefor the statute was tolled.

¶ 45 In Crummer v. DuPont[148] the plaintiff alleged that the defendants' use of government agencies, whose investigations were kept secret by law, constituted fraudulent concealment.

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[144] 185 F.2d 196 (9th Cir. 1950) (antitrust action), cert. denied, 340 U.S. 943 (1951).

[145] Id. at 209.

[146] Id.

[147] Id.

[148] 255 F.2d 425 (5th Cir.) (antitrust action), cert. denied. 358 U.S. 884 (1958).

The plaintiff admitted that he knew of his injury, but claimed that he exercised due diligence and still could not uncover the conspiracy against him any sooner. On appeal from a summary judgment, the Fifth Circuit held that on these facts, it could not be said as a matter of law that the plaintiffs had knowledge of their cause of action before the statute of limitations ran.[149] The court stipulated that the plaintiff must realize he is the victim of a conspiracy; it is not enough that he knows several defendants, individually, tried to run him out of business.[150]

¶ 46 In explaining the more stringent jury charge for knowledge found in American Tobacco, Crummer declared that the appellate court merely approved of the trial judge's charge "because the charge, if not correct, was more favorable to the appellant [defendant] than it was entitled to."[151] In discussing Suckow, Crummer stated that the Suckow court observed that the plaintiff knew of all the parties to the conspiracy, the existence of the conspiracy, and their damages before the limitations period ended.[152]

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[149] Id. at 432.

[150] Id. at 431.

[151] Id.

[152] Id.

¶ 47 In summary, knowledge that begins the statute running is knowledge of sufficient facts that make out a cause of actic If a conspiracy is part of the cause of action, then that, too, must be known before the statute of limitations begins to run. The statute will probably not wait to run until one knows all the parties to the conspiracy and will certainly not wait until all the particulars of the cause of action are fleshed out.

5. Inquiry Notice and Due Diligence and Care

¶ 48 Before any action is brought, the plaintiff must first realize or be suspicious that he might have a cause of action. At this point of suspicion or knowledge, the plaintiff is said to be on "inquiry notice," and from then on, he must exercise due diligence and care in discovering the facts of his potential claim. If sufficient facts are available to the plaintiff to put him on notice of a potential cause of action,[153] or if th circumstances should have aroused his suspicions,[154] and he did not then exercise due diligence to learn of his cause of action, he cannot use the fraudulent concealment doctrine to toll the

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[153] Arneil v. Ramsey, 550 F.2d 774, 781-82 (2d Cir. 1977) (securities fraud, 15 U.S.C. § 78j(b) (1976)); Alabama Ban-Corp. v. Henley, 465 F. Supp. 648, 652 (N.D. Ala. 1979) (proxy fraud, 15 U.S.C. § 78n (1976)).

[154] Hupp v. Gray, 500 F.2d 993, 996-97 (7th Cir. 1974) (securities fraud, 15 U.S.C. § 78j(b) (1976)) (quoting Morgan v. Koch, 419 F.2d 993, 998 (7th Cir. 1969) (securities fraud)).

limitations period.[155] The statute will not wait for the plaintiff's leisurely discovery of his cause of action.[156] Therefore, the limitations period does not begin to run only when the plaintiff knows of the "ultimate and determinative facts" of his cause of action, but also when, by the exercise of due diligence and care, he should have known of these facts.

¶ 49 The diligence requirement was first set out in Bailey v. Glover:[157] if the plaintiff remains in ignorance of the fraud "without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered."[158] In the holding, Bailey declared that there must be "no negligence or laches on the part of a plaintiff incoming to the knowledge of the fraud . . . ."[159] The diligence requirement was re-affirmed in Wood v. Carpenter,[160]

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[155]"There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself." Wood v. Carpenter, 101 U.S. 135, 143 (1879). See also Wachovia Bank & Trust Co. v. National Student Marketing, 461 F. Supp. 999, 1009 (D.D.C. 1978) (securities fraud, 15 U.S.C. §§ 78f, 78j(b) (1976)).

[156]Klein v. Bower, 421 F.2d 338, 343 (2d Cir. 1970) (securities, 15 U.S.C. § 78g(1976)). See also Cook v. Airen, Inc., 573 F.2d 685, 696 (1st Cir. 1978) (securities fraud, 15 U.S.C. § 78j(b) (1976)); Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265, 1269 (7th Cir. 1975) (securities fraud, 15 U.S.C. §§ 78f, 78j(b) (1976)); Wachovia Bank & Trust Co. v. National Student Marketing, 461 F. Supp. 999, 1008 (D.D.C. 1978) (securities fraud, 15 U.S.C. §§ 77g(a), 78j(b) (1976)).

[157]88 U.S. (21 Wall.) 342 (1874) (bankruptcy fraud).

[158]Id. at 348 (dicta).

[159]Id. at 349.

[160]101 U.S. 135 (1879) (fraudulent representations by judgment debtor regarding the amount he was worth).

where the Supreme Court stated: "There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself . . . . [T]he delay which has occurred must be shown to be consistent with the requisite diligence."[161]

¶ 50 What are sufficient facts to put one on notice or cause suspicion is determined by the factual context of each case.[162] One court stated that when there is "any fact or circumstance which would arouse the suspicions of a reasonable person, that person has sufficient notice so that he must make inquiry."[163] This quotation shows that courts look to the objective "reasonable person," but even though cases state that they use an objective standard, the test is not strictly objective. The courts have taken into consideration: 1) the nature of the specific fraud alleged;[164] 2) the opportunity to discover the

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[161] Id. at 143.

[162] Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265, 1268 (7th Cir. 1975) (securities fraud, 15 U.S.C. §§ 78f, 78j (b) (1976)).

[163] Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945 (D.N.J. 1978) (securities fraud, 15 U.S.C. § 78j(b) (1976)).

[164] Hupp v. Gray, 500 F.2d 993, 996-97 (7th Cir. 1974) (securities fraud); Morgan v. Koch, 419 F.2d 993, 997 (7th Cir. 1969) (securities fraud); Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 9 (5th Cir. 1967) (securities fraud) ("A fraud which is flagrant and widely publicized may require the defrauded party to make immediate inquiry. On the other hand, one artfully concealed or convincingly practiced upon its victim may justify much greater inactivity."); Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 946-47 (D.N.J. 1978) (securities fraud). See also Cook v. Avien, Inc., 573 F.2d 685, 696 (1st Cir. 1978) (securities fraud) (nature of the misrepresentation).

concealment;[165] 3) subsequent actions of the parties;[166] 4) fiduciary relationships;[167] 5) the plaintiff's sophistication and expertise in the financial field;[168] 6) his knowledge of related proceedings;[169] and 7) his position in the industry.[170]

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[165] deHass v. Empire Petroleum Co., 435 F.2d 1223, 1226 (10th Cir. 1970) (securities fraud, 15 U.S.C. § 78j(b) (1976)); Tobacco & Allied Stocks, 143 F. Supp. 323, 331 (D. Del. 1956), aff'd, 244 F.2d 902 (3d Cir. 1957) (securities violations--failure of a majority stockholder to reveal special facts to the minority during a sale of stock). See also Cook v. Avien, Inc., 573 F.2d 685, 696-97 (1st Cir. 1978) (securities fraud) (opportunity to discover the misrepresentation).

[166] Morgan v. Koch, 419 F.2d 993, 997 (7th Cir. 1969) (securities fraud). See also Cook v. Avien, Inc., 573 F.2d 685, 697 (1st Cir. 1978) (securities fraud).

[167] Hupp v. Gray, 500 F.2d 993, 997 (7th Cir. 1974) (securities fraud); Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 9 (5th Cir. 1967) (securities fraud); Tobacco & Allied Stocks, Inc., 143 F. Supp. 323, 331 (D. Del. 1956), aff'd 244 F.2d 902 (3d Cir. 1957) (securities). See also Morgan v. Koch, 419 F.2d 993, 997 (7th Cir. 1969) (securities fraud) (consider the relationships between the various parties).

[168] deHass v. Empire Petroleum Co., 435 F.2d 1223, 1226 (10th Cir. 1970) (securities fraud, 15 U.S.C. § 78j(b) (1976)); Tobacco & Allied Stocks Inc., 143 F. Supp. 323, 331 (D. Del. 1956), aff'd, 244 F.2d 902 (3d Cir. 1957) (securities).

[169] deHass v. Empire Petroleum Co.,435 F.2d 1223, 1226 (10th Cir. 1970) (securities fraud); Tobacco & Allied Stocks, Inc., 143 F. Supp. 323, 331 (D. Del. 1956), aff'd, 244 F.2d 902 (3d Cir. 1957) (securities).

[170] deHass v. Empire Petroleum Co., 435 F.2d 1223, 1226 (10th Cir. 1970) (securities fraud); Tobacco & Allied Stocks, Inc., 143 F. Supp. 323, 331 (D. Del. 1956), aff'd, 244 F.2d 902 3d Cir. 1957) (securities).

As can be seen by these considerations, courts use an objectiv subjective standard. One case stated that the language in cases describing the standard suggests that the hypothetical reasonable man standard is used rather than the subjective standard of a reasonable man with the plaintiff's characteristic.[171] But the court also noted the plaintiff's knowledge of, and responsibility for, developing real estate stating that should they use the subjective standard, under these circumstances, the plaintiff should have inquired further.[172] Another securities case specifically rejected the plaintiff's subjective test of actual knowledge and found that a "more objective approach" was proper.[173] In so doing, the court did not specifically reject a subjective/objective approach.

¶ 51 The following cases are examples of when courts have found that the plaintiff was on inquiry notice: 1) when a stock price dropped contrary to plaintiff's expectations, the

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[171] Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 116-17, (D. Conn. 1978) (securities fraud, 15 U.S.C § 78j(b) (1976)) (citing Hupp v. Gray, 400 F.2d 993, 997 (7th Cir. 1974) and Morgan v. Koch, 419 F.2d 993, 998 (7th Cir. 1969).

[172] Id. at 117 & n. 6.

[173] Azalea Meats, Inc. v. Muscat, 386 F.2d 5, 8-9 (5th Cir. 1967) (securities fraud), reversing, 246 F. Supp. 780 (S.D. Fla. 1965).

plaintiff was required to investigate further because he was on notice of a possible fraud,[174] and 2) an unusually high interest rate for its time should have put a plaintiff on notice, alone; also, early mortgage defaults, guarantee of the interest rate by the defendant, and knowledge that the property's equity was his assurance of a sound investment were circumstances requiring the plaintiff's investigation into the transaction.[175]

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[174] Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 946 (D.N.J. 1978) (securities fraud).

[175] Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 115 (D. Conn. 1978) (securities fraud, 15 U.S.C § 78j(b) (1976)).