COMMENTS

Tax Fraud and Civil RICO: Implications for Business and Governmental Entities

Congress enacted the Racketeer Influenced and Corrupt Organizations (RICO) statute to combat organized criminal activity, but plaintiffs have increasingly sought civil RICO's treble damages against myriad defendants not normally associated with organized crime. States have also participated in this proliferation. These expansive applications led courts to attempt to limit civil RICO's use, but in a landmark RICO case, Sedima, S.P.R.L. v. Imrex Co., *the Supreme Court mandated a broad RICO scope.*

Recently, the state revenue departments of Illinois and Michigan have tested the limits of this scope by instituting civil RICO actions for treble damages against business taxpayers. The Seventh Circuit permitted Illinois' action, while the Sixth Circuit denied Michigan's claim. Eighteen other states joined Michigan's unsuccessful amici curiae appeal. The Seventh and Sixth Circuits thus conflict, and Michigan plans to appeal its adverse judgment to the ultimate arbiter of such disputes — the United States Supreme Court.

INTRODUCTION

In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations[1] (RICO)[2] statute to eradicate organized criminal activity

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[1] Title IX, Pub. L. No. 91-452, §§ 901-902, 84 Stat. 922, 941-948 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986)). RICO is one of twelve substantive titles of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922 (1970).

[2] One court suggested that the RICO acronym has a derivative meaning—one particularly significant in the tax fraud context:

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in the United States.[3] Congress used existing federal and state crimes characteristic of this activity as underlying RICO predicate offenses.[4] Congress then provided enhanced federal remedies against those who commit a pattern of such crimes.[5] Mail, wire, and securities fraud are the most often alleged predicate acts.[6] The enhanced remedies include civil treble damages,[7] criminal fines, and imprisonment.[8] Congress thus designed RICO to bolster inadequate existing federal and state

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> Given the statute's very awkward title and the convenient acronym it generated, this Court has always suspected the person who christened the legislation was a movie buff with a sense of humor. In "Little Caesar," the first Hollywood gangster movie of the early 30s (a prototype that spawned an entire genre), Edward G. Robinson played the thinly disguised Al Capone leading role—and was named "Rico."

Parnes v. Heinhold Commodities, Inc., 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982).

[3] OCCA, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

[4] *See* Comment, *Civil RICO and Its Application to "Garden Variety" Fraud Within the Sixth Circuit*, 13 N. KY. L. REV. 463, 463-64 (1987) [hereafter Comment, *Civil RICO*]; Comment, *Reading the "Enterprise" Element back into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100, 101 (1981).

[5] *See generally* 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986); Zuckerman & Hunterton, *RICO and Tax Fraud: Return(s) to Racketeering*, 18 CRIM. L. BULL. 204, 205-06 (1982).

[6] *See* Southgate, *Is Your Small Business Client a Racketeer?*, THE COMPLEAT LAW., Spring 1987, at 18 (citing a Justice Department study that 91% of RICO claims involve mail, wire, and securities fraud); *see also* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 500 (1985) (stating that the breadth of RICO's predicate offenses, in particular wire, mail, and securities fraud, explains civil RICO's extraordinarily broad scope); Eastern Corp. Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1534 (D. Mass. 1986) (citing *Sedima*, *supra*).

[7] RICO's § 1964 provides four forms of civil relief. 18 U.S.C. § 1964 (1982 & Supp. IV 1986). Section 1964(c) provides that any person whose business or property is injured as the result of a § 1962 violation may recover treble damages. *Id.* § 1964(c) (1982). This section's recovery includes the cost of suit and reasonable attorney's fees. *Id.* For a discussion of RICO's additional civil remedies, see *infra* note 212 and accompanying text.

[8] 18 U.S.C. § 1963(a) (1982 & Supp. IV 1986) provides RICO's criminal penalty provision. The statute provides maximum fines of $25,000, maximum imprisonment of 20 years, or both, and forfeiture of any interests, security, claims, property, or contractual rights obtained through a pattern of racketeering activity. *Id.* For discussion of RICO's criminal forfeiture provisions, see United States v. Marubeni Am. Corp., 611 F.2d 763, 769 (9th Cir. 1980); United States v. Thevis, 474 F. Supp. 134, 138 (N.D. Ga. 1979); United States v. Meyer, 432 F. Supp. 456, 461 (W.D. Pa.), *rev'd on other grounds sub nom.* United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977); Comment, *A Proposal to Reform Criminal Forfeiture Under RICO and CCE*, 97 HARV. L. REV. 1929 (1984). For discussion of the constitutionality of RICO's criminal forfeiture on the right to counsel, see Brickey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986).

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remedies against organized criminal activity.[9]

Although Congress enacted RICO principally to fight organized crime,[10] Congress expressly directed courts to construe RICO liberally[11] to encompass a broad range of criminal activity,[12] including commercial frauds.[13] In the early 1980s the Justice Department increased criminal

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[9] Congress sought to deter organized crime "by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies . . . ." OCCA, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Congress also found that "organized crime continues to grow . . . because sanctions and remedies available [before RICO were] unnecessarily limited in scope and impact." *Id.*; *see also* 116 CONG. REC. 35,203 (1970) (quoting Rep. McClory that "the Act places in the hands of the prosecution a number of necessary weapons in order to deal with the sophisticated operations of organized crime").

[10] Congress found that:

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption;
> (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation;
> (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes;
> (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and
> (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

OCCA, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

[11] *See id.* § 904(a), 84 Stat. 922, 947 (1970) (directing that courts liberally construe RICO "to effectuate its remedial purposes").

[12] Courts agree that Congress preferred an overinclusive RICO scope to one that did not entirely encompass all possible organized criminal activity. *See* Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 390-91 (7th Cir. 1984), *aff'd*, 473 U.S. 606, 609 (1985) (per curiam); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984); Papai v. Cremosnik, 635 F. Supp. 1402, 1410-11 (N.D. Ill. 1986).

[13] The term "ordinary commercial frauds" includes "garden variety disputes over the

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prosecutions against this type of criminal activity.[14] At the same time, civil RICO actions proliferated[15] because of RICO's enhanced

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interpretation of statutes or contracts." Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U. L. REV. 55, 55 (quoting I. Nathan's statement on behalf of the American Property and Casualty Insurance Industry, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary 5 (July 24, 1985)). Such frauds include those committed by respected bankers, governors, court systems, industrial giants, and major securities brokers whose criminal conduct "did not involve momentary lapses in judgment but carefully conceived programs, premeditated schemes to cheat, thieve and gain unfair economic and competitive advantage and benefit." *Id.* (quoting P. Feigin, Chairman, Special Projects Comm., Enforcement Section, North American Securities Administration Ass'n, Before the Senate Comm. on the Judiciary 12 (July 31, 1985)). Such conduct also includes other "garden variety" business disputes such as breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, and disparagement. Agency Holding Corp. v. Malley-Duff Assocs., Inc., 107 S. Ct. 2759, 2763 (1987).

Authorities agree that Congress intended RICO to apply to these ordinary commercial frauds. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 498-500 (1985); Schacht v. Brown, 711 F.2d 1343, 1353 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Papai*, 635 F. Supp. at 1410-11; Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 253 n.47 (1982); *see also* 116 CONG. REC. 35,204 (1970) (quoting Rep. Poff that "every effort was made to produce a strong and effective tool with which to combat organized crime — and at the same time deal fairly with all who might be affected by this legislation — whether part of the crime syndicate or not"); McClellan, *The Organized Crime Control Act of 1970 (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 142-43 (1970) (stating that the listed offenses are not characteristic solely of organized crime, but also include offenses commonly committed by persons outside of organized crime).

[14] The Administration's emphasis on federal criminal white-collar prosecutions influenced RICO's dramatic proliferation. Hengstler, *Corporations Under the Gun*, A.B.A. J. 32 (June 1, 1987) (observing a nearly fourfold increase in federal RICO prosecutions). Another author suggested that "[t]he headlong rush by disappointed businesses to tag their competitors or former partners as 'racketeers' " caused RICO's dramatic increase. Southgate, *supra* note 6, at 16-17 (comparing civil RICO claims to "sheep in wolf's clothing: fraud actions masquerading as civil RICO claims").

[15] Of all 270 civil RICO decisions adjudicated before 1985, only 3% (nine cases) were decided in the 1970s, 2% in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. *See Sedima*, 473 U.S. at 481 n.1 (quoting REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55 (1985)). Furthermore, 46% of all civil RICO cases were decided in 1984 even though the statute had existed for 15 years. *See* Southgate, *supra* note 6, at 17; *see also* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1042-43 (1980). Before RICO's proliferation, the handful of cases filed during the previous decade demonstrated a perceived lack of incentive to bring a civil RICO action. *Id.*

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remedies.[16] However, these plaintiffs brought most civil RICO actions against legitimate commercial entities[17] rather than archetypical mobsters.[18] Courts believed that plaintiffs' use of civil RICO went beyond Congress' primary intent to deter organized crime.[19]

RICO's enhanced remedies also attracted state and local governments.[20] These entities brought RICO actions to recover for such crimes

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[16] *See Sedima*, 473 U.S. at 504 (Marshall, J., dissenting); Comment, *Civil RICO*, *supra* note 4, at 465. "In recent years, federal courts have experienced an increase in civil [RICO] suits seeking treble damages and attorney's fees . . . ." Goldsmith & Keith, *supra* note 13, at 56. Justice O'Connor stated that "the mechanism chosen to [remedy economic injury] in both the Clayton Act and RICO is the carrot of treble damages." *Agency Holding*, 107 S. Ct. at 2764.

[17] "Legitimate and respected" business entities are businesses one normally does not associate with organized criminal activity. *E.g.*, Aetna Casualty & Surety Co.; A.H. Robins Company, Inc.; Alexander Grant & Co.; Allstate Insurance Co.; American Broadcasting Co.; Arthur Andersen & Co.; Bache Halsey Stuart Shields; Bear Stearns & Co.; Chase Manhattan Bank; Citibank, N.A.; Coopers & Lybrand; Dean Witter Reynolds; Drexel Burnham Lambert, Inc.; E.F. Hutton & Co.; Exxon Corp.; Ford Motor Co.; General Motors Corp.; Lehman Bros.; Merrill Lynch, Pierce, Fenner & Smith; Miller Brewing Co.; Morgan Stanley & Co.; Paine, Webber, Jackson & Curtis, Inc.; Pantry Pride, Inc.; Price Waterhouse & Co.; Prudential Bache Securities, Inc.; Prudential Life Insurance Co.; Rockwell International Corp.; Shearson/American Express, Inc.; State Farm Fire & Casualty Insurance Co.; State Farm Mutual Automobile Insurance Co.; Touche Ross & Co.; Underwriters at Lloyds, London. *See* Note, *Congress Responds to* Sedima*: Is There a Contract Out on Civil RICO?*, 19 LOY. L.A.L. REV. 851, 857 n.28 (1986). *Sedima* stated that Congress intended RICO to affect both "legitimate" and "illegitimate" enterprises since the former "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Sedima*, 473 U.S. at 499.

[18] In 1985 one study found that of 270 civil RICO cases pending at trial courts, 40% involved securities fraud, 37% involved common-law commercial fraud, and only 9% involved organized criminal activity. *See Sedima*, 473 U.S. at 499 n.16 (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55-56 (1985)). Another study found that of 132 published RICO decisions in 1984, 57 (43%) involved securities transactions, 38 (29%) involved commercial and contract disputes, and less than 10 (7%) involved organized criminal activity. *See id.* (citing AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, THE AUTHORITY TO BRING PRIVATE TREBLE-DAMAGE SUITS UNDER 'RICO' SHOULD BE REMOVED 13 (Oct. 10, 1986)). The Court also cited the opinion of many courts that RICO was being used against respected businesses to the exclusion of archetypical mobsters. *Id.* at 499-500.

[19] The Supreme Court observed that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Id.* at 500. This statement reflected the consensus of many lower courts. *See id.* at 499-500.

[20] As RICO proliferated, states and localities began to file civil RICO actions. *See, e.g.*, Alcorn County, Miss. v. United States Interstate Supplies, Inc., 731 F.2d 1160, 1167-70 (5th Cir. 1984) (county sued to recover for fraudulent overbillings); Schacht v.

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as fraudulent overbillings,[21] bribery of officials,[22] payroll payments to "ghost workers,"[23] and fraudulently procured tax assessments.[24] Theoretically a defrauded governmental entity could maintain a limitless variety of civil RICO actions,[25] because most fraudulent transactions involved some use of the wires or mails.[26] Thus, any entity or person subject to state or local taxation or regulation potentially faced civil RICO liability for treble damages.[27]

Because of their concern with RICO's expansive civil application, courts imposed various limitations on RICO's scope, including an organized crime or racketeering injury nexus.[28] However, in a landmark

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Brown, 711 F.2d 1343, 1346-50 (7th Cir.) (state director of insurance sued state insurer), *cert. denied*, 464 U.S. 1002 (1983); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 542 (E.D.N.Y. 1987) (municipality sued city officials for bribery scheme); Town of Kearney v. Hudson Meadows Urban Renewal, 648 F. Supp. 1412, 1418 (D.N.J. 1986) (municipality sued town officials for bribery and rescission of lease), *rev'd on other grounds*, 829 F.2d 1263 (3d Cir. 1987); Pennsylvania v. Cianfrani, 600 F. Supp. 1364, 1366-68 (E.D. Pa. 1985) (state sued senator for fraudulent payroll payments to "ghost workers"); County of Cook v. Lynch, 560 F. Supp. 136, 139 (N.D. Ill. 1982) (county sued county officials for bribery scheme and fraudulent real estate tax assessments); Municipality of Anchorage v. Hitachi Cable Ltd., 547 F. Supp. 633, 644 (D. Alaska 1982) (municipality sued for bribery scheme).

[21] *See Alcorn County*, 731 F.2d 1160.

[22] *See County of Cook*, 560 F. Supp. 136; *Municipality of Anchorage*, 547 F. Supp. 633.

[23] *See Cianfrani*, 600 F. Supp. 1364.

[24] *See County of Cook*, 560 F. Supp. 136.

[25] *See* Tannenbaum & Molo, *State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing the Economic Effects of Unlawful Conduct*, 35 BAYLOR L. REV. 1, 5 (1983). The authors state that "[t]he situations in which a state or local agency might use RICO appear theoretically limitless." *Id.* This statement implies that governments' use of RICO is unlimited in scope.

[26] Given the prevalent use of mail and telephones in commercial transactions, nearly every fraud case involves some mail or wire use. *See id.*; Comment, *Civil RICO*, *supra* note 4, at 488.

[27] Tannenbaum & Molo, *supra* note 25, at 5. Since regulated or taxed entities or persons must interact with government, all those interacting through the mail or telephone possibly fell within RICO's ambit. *See id.* If they fraudulently interacted and directly injured the government, the agency could bring a RICO action. *Id.*

[28] Courts adopted one of three requirements to limit RICO's scope, with the different circuits developing separate preferences. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1406 (N.D. Ill. 1986). The first requirement stated that a RICO "enterprise" could be only a legitimate business. *See* United States v. Turkette, 632 F.2d 896, 899-906 (1st Cir. 1980), *rev'd*, 452 U.S. 576, 579-85 (1981). The Supreme Court rejected this limitation in *Turkette*, 452 U.S. at 579-85. The second restriction required a distinct "racketeering injury" apart from injury of the predicate acts themselves. *See* Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 413-14 (8th Cir. 1984). The

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civil RICO case, *Sedima, S.P.R.L. v. Imrex Co.*,[29] the Supreme Court abrogated the major restrictive requirements.[30] The Court maintained that Congress intended a broad RICO statute; thus, only Congress could limit RICO's application.[31] This decision facilitated even more expansive civil RICO actions.[32] In fact, just two months later,[33] the Seventh Circuit interpreted *Sedima* as allowing a state governmental plaintiff to use civil RICO in a manner previously unattempted — against a taxpayer.[34]

In *Illinois Department of Revenue v. Phillips*[35] the Illinois Department of Revenue recovered civil RICO treble damages against a business taxpayer.[36] Since a state revenue agency had never used civil

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third restriction required an organized crime nexus (*i.e.*, a prior criminal RICO conviction). *See* Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied sub nom.* Moss v. Newman, 465 U.S. 1025 (1984); Schacht v. Brown, 711 F.2d 1343, 1353-54 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983). The Supreme Court eliminated these latter two restrictions in *Sedima*, 473 U.S. at 479.

[29] 473 U.S. 479 (1985).

[30] *Id.* at 490-98.

[31] *Id.* at 499-500.

[32] *See State May Recover Triple Damages for Tax Fraud*, 29 TRIAL LAW. GUIDE 531, 541 (1986). The article states: "There is little doubt but that after the decisions of the Supreme Court in American Nat. Bank & Trust Co. of Chicago v. Haroco, Inc. and Sedima, S.P.R.L. v. Imrex Co. there has been an explosion of RICO litigation which will continue unless Congress intervenes." *Id.* (citations omitted); *see also* Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 833 (N.D. Ill. 1985) (stating that "*Sedima* . . . clearly creates a whole new ballgame"); Cohen, *Civil RICO Under Fire: Will White Collar Criminals Be Exempted?*, 4 ANTIOCH L.J. 153, 159-61 (1986) (observing that *Sedima*'s rejection of standing limitations creates a broad RICO construction); Southgate, *supra* note 6, at 17 (noting that most observers expect a dramatic increase in civil RICO filings after the *Sedima* decision).

[33] The Court decided *Sedima* on July 1, 1985; the Seventh Circuit decided *Phillips* on August 27, 1985. While the time differential is only two months, *Sedima* was very influential in the Seventh Circuit's decision. *See Phillips*, 771 F.2d at 316. The *Phillips* court declared that "in light of [*Sedima*, a Supreme Court decision] not available to the district court, . . . we must agree, however reluctantly, with the Department of Revenue." *Id.*

[34] The *Phillips* court observed that a state's use of civil RICO against a taxpayer was an issue of first impression. *Id.* at 312. Under criminal RICO, prosecutors have alleged both tax fraud and RICO allegations against the same defendants, but the tax fraud was prosecuted under the Internal Revenue Code instead of under RICO. *See* United States v. Frumento, 563 F.2d 1083, 1084-85 (3d Cir. 1977); United States v. Vignola, 464 F. Supp. 1091, 1094-95 (E.D. Pa. 1979). For discussion of criminal RICO and tax fraud prosecutions, see Zuckerman & Hunterton, *supra* note 5, at 225-27.

[35] 771 F.2d 312 (7th Cir. 1985).

[36] *Id.* at 312, 317.

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RICO against tax (mail) fraud,[37] the court first debated whether the state revenue department had civil RICO standing.[38] The court reluctantly granted standing, fearing that state revenue agencies would inundate courts with civil RICO claims against taxpayers.[39]

The number of potentially affected taxpayers justifies the court's fear.[40] Because taxpayers virtually always mail tax returns,[41] those filing with fraudulent[42] or even less culpable[43] intent possibly face civil

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[37] The actual statutory basis for civil RICO tax fraud is violation of the Federal Mail Fraud Statute, 18 U.S.C. § 1341 (1982). This statute proscribes the use of the mails to execute "any scheme or artifice to defraud." *Id.* "[M]ailing fraudulent state sales tax returns qualifies as mail fraud." *Phillips*, 771 F.2d at 313. For examples of other cases holding that the mailing of state tax returns constitutes federal mail fraud, see United States v. Miller, 545 F.2d 1204, 1216 & 1216 n.17 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977); United States v. Mirabile, 503 F.2d 1065, 1066-67 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); United States v. Flaxman, 495 F.2d 344, 348-49 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). *But see* United States v. Henderson, 386 F. Supp. 1048, 1052 (S.D.N.Y. 1974) (rejecting use of mail fraud statute in connection with federal income tax returns).

[38] *Phillips*, 771 F.2d at 314-17.

[39] *Id.* at 316-17.

[40] Taxpayers annually file approximately 150 million tax returns to the Internal Revenue Service (IRS). 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 683 (S. Kadish ed. 1983) [hereafter CRIME AND JUSTICE]. Some authors predicted that the *Phillips* decision may have opened the "hole in the dike" for civil RICO tax fraud claims against state taxpayers. 2 D. MCGOWEN, D. O'DAY & K. NORTH, CRIMINAL AND CIVIL TAX FRAUD § 25.04 (1986) [hereafter CIVIL TAX FRAUD]. This inundation has not yet occurred, however. *See infra* note 140.

[41] *See* Zuckerman & Foley, *Tax Fraud — Lawyer Beware*, 63 MICH. B.J. 240 (Mar. 1984); Zuckerman & Hunterton, *supra* note 5, at 207. To file a return, the IRS instructs taxpayers to mail the tax return. *See* 1040 FEDERAL INCOME TAX FORMS AND INSTRUCTIONS 3 (1987); INSTRUCTIONS FOR PREPARING 1040EZ AND 1040A 3, 5 (1987). State tax forms are similar. *See, e.g.*, CALIFORNIA 1987 RESIDENT INCOME TAX FORMS AND INSTRUCTIONS 22 (1987); COLORADO 1987 INCOME TAX FORMS AND INSTRUCTIONS 3 (1987); ILLINOIS IL-1040 INSTRUCTIONS—INDIVIDUAL INCOME TAX RETURN—1987 1-2 (1987); MASSACHUSETTS RESIDENT INCOME TAX FORM; ALL SCHEDULES & INSTRUCTIONS 6, 18 (1987); MICHIGAN 1987 INCOME TAX RETURNS AND HOMESTEAD PROPERTY TAX CREDIT CLAIMS 4, 16, 20, 22, 24, 26, 28, 30, 31 (1987); NEW YORK STATE RESIDENT INCOME TAX RETURN IT-201-P PACKET 6, 19 (1987); PENNSYLVANIA 1987 INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS 9, 13, 28 (1987).

[42] One commits felony tax fraud by "willfully attempt[ing] in any manner to evade or defeat any tax . . . or the payment thereof." I.R.C. § 7201 (1987). Thus, filing a false return or failing to file with knowledge of an obligation constitute tax fraud. CRIME AND JUSTICE, *supra* note 40, at 686-87. Unlike other crimes, though, tax fraud requires knowledge of the law. *Id.* at 686. Negligently omitting income or negligently taking unlawful deductions do not constitute tax fraud. *Id.*; *see Tax Fraud*, 19 AM. CRIM. L. REV. 427, 427-29 (1981); *see also* United States v. Garber, 607 F.2d 92, 97-

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RICO liability. Accordingly, the *Phillips* court implored Congress to constrain such expansive civil RICO applications. Judge Bauer called his *Phillips* decision a "distress flag" to Congress to limit RICO's application to cases such as tax fraud.[44]

A sister circuit responded to this distress flag by rejecting the action. In *Michigan Department of Treasury, Revenue Division v. Fawaz*[45] the Sixth Circuit Court of Appeals affirmed the district court's decision refusing to extend civil RICO actions to tax fraud.[46] The district court had held that the Michigan Department of Treasury *lacked* civil RICO standing to recover treble damages against a business taxpayer.[47] The lower court stated that the public policy implications of a contrary ruling would be staggering.[48] State agencies would barrage federal courts with "vindictive civil RICO actions against tax cheaters."[49]

This Comment analyzes the "standing" dispute and proposes a statutory solution eliminating civil RICO's treble damages as a tax fraud remedy. Part I examines civil RICO and its application in *Phillips* and *Fawaz* to tax fraud.[50] Part II compares the arguments for and against

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98 (5th Cir. 1979); Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 4-5 (1966); Uhlfelder, *Justice Department Considers Plan to Make Failure to File a Felony*, 35 TAX NOTES 539, 539-40 (May 11, 1987); Zuckerman & Foley, *supra* note 41, at 240-42. *See generally* I.R.C. §§ 7201-7215 (1987).

[43] While negligently omitting income or negligently taking unlawful deductions do not constitute tax fraud, one filing a correct return but failing to pay all tax due or failing to file a required return may still commit tax fraud. CRIME AND JUSTICE, *supra* note 40, at 686-87. If the entity engages in an affirmative act likely to mislead or conceal income or assets and tax evasion is a motive, the entity commits this tax fraud. *Id.*; *see Tax Fraud*, *supra* note 42, at 432-33; *see also* Spies v. United States, 317 U.S. 492, 497-500 (1943); Uhlfelder, *supra* note 42, at 539; Zuckerman & Foley, *supra* note 41, at 240-42.

[44] *Phillips*, 771 F.2d at 317. Judge Bauer stated:

> Perhaps we can take solace in the fact that the Illinois Department of Revenue promised in oral argument that such tax collection cases will be few, but we doubt, once the cause of action is established, that this will be true. We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as [this].

Id.

[45] 653 F. Supp. 141 (E.D. Mich. 1986), *aff'd*, No. 86-1809 (6th Cir. May 9, 1988) (unpublished decision on file with *U.C. Davis Law Review*).

[46] *Id.* at 143.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See infra* notes 54-116 and accompanying text.

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state revenue agencies' using civil RICO against state tax cheaters.[51] Part III argues that, even if federal and state revenue agencies do have standing, they should not recover treble damages against taxpayers.[52] Part IV proposes a statutory solution limiting RICO's civil awards in tax fraud cases while retaining RICO's criminal remedies.[53]

I. Civil RICO and Its Application to Tax Fraud

The RICO statute generally prohibits "any person"[54] from conducting a pattern[55] of racketeering activity[56] or conspiring to do

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[51] *See infra* notes 117-96 and accompanying text.

[52] *See infra* notes 197-211 and accompanying text.

[53] *See infra* notes 212-38 and accompanying text.

[54] " '[P]erson' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1982). A RICO "person" includes any person or business entity required to file tax returns. *See* Zuckerman & Hunterton, *supra* note 5, at 218; *see also Phillips*, 771 F.2d at 316-17 (declaring that civil RICO tax fraud defendant is RICO "person").

[55] A pattern of racketeering activity requires at least two violations within 10 years of any of RICO's enumerated predicate offenses. 18 U.S.C. § 1961(5) (1982); *see Sedima*, 473 U.S. at 496 n.14. In *Sedima* the Supreme Court stated that a "pattern" of racketeering requires both "continuity" and "relationship" among predicate acts. *Id.*

"Continuity" requires that defendant's acts constitute ongoing criminal activity as opposed to sporadic, unrelated, and isolated acts. *Sedima*, 473 U.S. at 496 n.14. The Seventh Circuit adds that these continuous acts must occur at different points in time or involve different victims. Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986). "Relationship" requires that the predicate acts be committed somewhat closely in time to one another, involve the same victim(s), or involve the same type of misconduct. *See Sedima*, 473 U.S. at 496 n.14; *Morgan*, 804 F.2d at 975; Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986).

Despite this guidance, federal courts have developed three distinct "pattern" tests: "related acts," "multiple criminal episodes," and "multiple fraudulent schemes." *See Morgan*, 804 F.2d at 974; Selan, *Interpreting RICO's "Pattern of Racketeering Activity" Requirement After* Sedima*: Separate Schemes, Episodes or Related Acts?*, 24 Cal. W.L. Rev. 1, 2 (1988). Courts presently tend to adopt "multiple criminal episodes" or "multiple fraudulent schemes." *See* Cohen, *supra* note 32, at 162. Only courts adopting "related acts" or "multiple criminal episodes" always permit civil RICO tax fraud actions.

Of these three "pattern" tests, the first test is least restrictive and requires only two or more separate yet "related acts." *See* R.A.G.S. Couture Inc. v. Hyatt, 774 F.2d 1350, 1352-55 (5th Cir. 1985). Under this test, a defendant commits a separate act each time she mails a fraudulent tax return. *See generally Phillips*, 771 F.2d at 313. Since each mailing furthers a fraud against the state revenue department, her mailings are related. *See generally id.* Thus, a civil RICO tax fraud action involving multiple mailings to the same agency easily survives this test. *See* Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986).

The Fifth Circuit adopted this test in *R.A.G.S. Couture Inc.*, 774 F.2d 1350. Later

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cases from other circuits question whether this test fulfills *Sedima*'s continuity and relationship prongs. *See* Kovian v. Fulton County Nat'l Bank & Trust Co., 647 F. Supp. 830, 834-37 (N.D.N.Y. 1986); Schaafsma v. Marriner, 641 F. Supp. 576, 579 (D. Vt. 1986); Eastern Corp. Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1536 (D. Mass. 1986); *see also* 116 CONG. REC. 18,940 (1970) (quoting Sen. McClellan that " 'pattern' itself requires the showing of a relationship; . . . proof of two acts of racketeering activity, without more, does not establish a pattern"). More recently, a Fifth Circuit Court advised its district courts to adopt a more stringent "pattern" requirement. *See* Smokey Greenshaw Cotton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280 n.7 (5th Cir. 1986).

The second test for establishing a "pattern" of racketeering requires defendant's predicate acts to occur in "multiple criminal episodes." *See* Mullin & Assocs., Inc. v. Bassett, 632 F. Supp. 532, 540-41 (D. Del. 1986); Graham v. Slaughter, 624 F. Supp. 222, 225 (N.D. Ill. 1985); Allington v. Carpenter, 619 F. Supp. 474, 478 (S.D. Cal. 1985). Courts adopting this test require related acts both distanced in time from one another and distinctly injurious enough to constitute separate episodes. American Bonded Warehouse Corp. v. Campagnie Nationale Air France, 653 F. Supp. 861, 863, 866 (N.D. Ill. 1987); *Allington*, 619 F. Supp. at 478. Acts are distinctly injurious if they result in "independent harmful significance" and independently injure the plaintiff. *See* Ghouth v. Conticommodity Servs., Inc., 642 F. Supp. 1325, 1336-37 (N.D. Ill. 1986); *Louisiana Power*, 642 F. Supp. at 809.

Thus, mailings of fraudulent tax returns must be sufficiently distanced in time to constitute separate criminal episodes. *See generally Phillips*, 771 F.2d at 313. The civil RICO tax fraud action survives this test if multiple mailings to the same agency are sufficiently separate in time and substance. *See* Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-93 (9th Cir. 1987); Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1112 (7th Cir. 1987).

The Second, Seventh, Ninth, and Eleventh Circuits have adopted this test. *See Sun Sav. & Loan*, 825 F.2d at 192-93; Architectural Bldg. Prods. Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1469 (9th Cir. 1987); *Morgan*, 804 F.2d at 975-76; United States v. Teitler, 802 F.2d 606, 611-12 (2d Cir. 1986); National Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 970-71 (11th Cir. 1986); *Phillips*, 771 F.2d at 313. *But see* Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828, 831-33 (N.D. Ill. 1985) (Seventh Circuit district court case adopting "multiple fraudulent schemes").

The third test requires not only separate yet related acts, but also that the predicate acts occur in "multiple fraudulent schemes." *See* Holmberg v. Morrisette, 800 F.2d 205, 210-211 (8th Cir. 1986). This test requires separate yet related acts to satisfy *Sedima*'s "continuity" prong. *See Superior Oil*, 785 F.2d at 257; H.J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419, 424 (D. Minn. 1986); *Louisiana Power*, 642 F. Supp. at 808. The plaintiff must then show that defendant previously committed the same or similar racketeering activities or is engaged in other criminal activities elsewhere. *See Holmberg*, 800 F.2d at 210-11; *Superior Oil*, 785 F.2d at 257.

Thus, a defendant mailing fraudulent tax returns to the same agency engages in only one scheme — to defraud that state's revenue department. *See Marks*, 811 F.2d at

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so.[57] A defendant must conduct the activity while employed by or associated with[58] an "enterprise"[59] that affects interstate or foreign commerce.[60] The defendant's conduct through this enterprise must result[61]

1112; Brandt v. Schal Assocs., Inc., 664 F. Supp. 1193, 1198-99 (N.D. Ill. 1987); *Eastern Corp. Fed. Credit Union*, 639 F. Supp. at 1536. *See generally Phillips*, 771 F.2d at 312-13. Therefore, civil RICO tax fraud actions involving only one agency fail this test, unless a defendant harms several agencies or engages in separate schemes. *See Kovian*, 647 F. Supp. at 834-38; *Schaafsma*, 641 F. Supp. at 581. *But see H.J. Inc.*, 648 F. Supp. at 426 (accepting single scheme).

The Eighth and Tenth Circuits have adopted this test. *See* Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326, 329 (8th Cir. 1986); *Holmberg*, 800 F.2d at 210-11; *Superior Oil*, 785 F.2d at 257; Simon v. Fribourg, 650 F. Supp. 319, 323 (D. Minn. 1986); Torwest DBC, Inc. v. Dick, 628 F. Supp. 163, 165-67 (D. Colo. 1986), *aff'd*, 810 F.2d 925 (10th Cir. 1987). For a further discussion of how different courts of appeals have interpreted the *Phillips* pattern of mailings, see *infra* notes 79 & 233 and accompanying text.

[56] Commission of any of RICO's predicate acts constitutes "racketeering activity." *See* 18 U.S.C. § 1961 (1982 & Supp. IV 1986). These acts include nine state law felonies, punishable by imprisonment for more than one year, and over 30 groups of federal crimes, including mail, wire, and securities fraud. *See id.* § 1961(1) (listing all possible RICO offenses).

[57] One violates RICO by conspiring to violate any of § 1962(a)-(c)'s provisions. *Id.* § 1962(d). To plead conspiracy, a plaintiff need show only that defendant was "adequately informed" of her associates' racketeering conduct. *See* Lewis *ex rel.* Nat'l Semiconductor Corp. v. Sporck, 646 F. Supp. 574, 580-81 (N.D. Cal. 1986).

[58] A defendant "associates with" an "enterprise" by investing in, acquiring or maintaining an interest in, or conducting or participating in the conduct of the "enterprise." 18 U.S.C. § 1962(a)-(c) (1982); *see* City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 543-44 (E.D.N.Y. 1987); Southgate, *supra* note 6, at 18-19. A tax evader almost always violates at least one of these subsections. *See* Zuckerman & Hunterton, *supra* note 5, at 220.

[59] " '[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1982). The enterprise must be a continuing organization, formal or informal, and must have an existence separate from the pattern of activity in which it has engaged. *See* Southgate, *supra* note 6, at 18-19. Most courts considering the issue have held that governments can be RICO "enterprises." *See* United States v. Angelilli, 660 F.2d 23, 30-33 (2d Cir. 1981).

[60] 18 U.S.C. § 1962(a)-(c) (1982). A RICO plaintiff need show only minimal impact on interstate or foreign commerce. *See* United States v. Barton, 647 F.2d 224, 233-34 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 543 (E.D.N.Y. 1987); Meineke Discount Muffler Shops, Inc. v. Noto, 548 F. Supp. 352, 354 (E.D.N.Y. 1982). Plaintiff's showing that defendant placed an interstate telephone call in connection with her allegedly fraudulent activity fulfills this requirement. *See* United States v. Malatesta, 583 F.2d 748, 754 (5th Cir. 1978), *aff'd on reh'g*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962 (1979). Mailing articles through the United States mail additionally impacts interstate commerce. *See supra* note 37.

[61] Courts have liberally construed the "causation" requirement. *See* United States v.

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in direct injury to the plaintiff.[62] To sustain a civil RICO action, a plaintiff must plead[63] and prove[64] the above activities[65] by a preponder-

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Farris, 614 F.2d 634, 639 (9th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980); *Lewis*, 646 F. Supp. at 580.

[62] The "direct injury" element requires that an aggrieved entity directly suffer the alleged injury. *See* Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985). The entity cannot be a mere conduit through which injury occurs. *See* Illinois v. Life of Mid-America Ins. Co., 805 F.2d 763, 764-67 (7th Cir. 1986) (state attorney general not directly injured by scheme to defraud state's consumers); *Phillips*, 771 F.2d at 314 (state revenue department directly injured by tax fraud scheme); Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984) (plaintiff directly injured by bank's fraudulent interest rate calculations), *aff'd*, 473 U.S. 606 (1985) (per curiam); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 653 (7th Cir. 1984) (oil wholesaler directly injured by "ponzi" scheme to procure fraudulent sales); Bunker Ramo Corp. v. United States Farms, Inc., 713 F.2d 1272, 1287-88 (7th Cir. 1983) (corporation directly injured by falsified purchase orders); Jones v. Basking, Flaherty, Elliott and Mannino, P.C., 670 F. Supp. 597, 598-600 (W.D. Pa. 1987) (former employee claiming susceptibility to tax fraud prosecution not directly injured by law firm's tax fraud); Lawaetz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1284 (D.V.I. 1986) (family members operating hotel with own funds directly injured by bank's fraudulent loan guarantees); Kouvakis v. Inland Steel Co., 646 F. Supp. 474, 477 (N.D. Ind. 1986) (former employee who refused to participate in fraudulent scheme not directly injured by defendant's harassment and abuse); Gilbert v. Prudential-Bache Sec., Inc., 643 F. Supp. 107, 109 (E.D. Pa. 1986) (securities investors not directly injured by brokerage firm's activities); *In re* American Reserve Corp., 70 Bankr. 729, 732-33 (N.D. Ill. 1987) (trustee for bankrupt corporation not directly injured by accounting firm's fraud).

Thus, in *Carter*, defendant fraudulently procured lower tax assessments, resulting in higher taxes for county taxpayers. *Carter*, 777 F.2d at 1174. Even though the taxpayers had to pay higher taxes, the court denied these county taxpayers civil RICO standing. *Id.* at 1176. The taxpayers suffered only *de minimus* injury. *Id.* The court held that the county revenue department suffered the direct injury, since it was defrauded of substantial tax revenue. *Id.* The court reasoned that if the county agency recovered from defendant, the taxpayers would benefit by subsequent lower taxes or refunds of the overassessed amounts. *Id.* Other courts have also stringently construed the "direct injury" requirement. *See Sedima*, 473 U.S. at 496; *Jones*, 670 F. Supp. at 599-600; *Lawaetz*, 653 F. Supp. at 1284; *Gilbert*, 643 F. Supp. at 109.

[63] A plaintiff must plead each element of the RICO cause of action. *See Sedima*, 473 U.S. at 496; *Lewis*, 646 F. Supp. at 579; Zuckerman & Hunterton, *supra* note 5, at 222.

[64] A plaintiff must prove each element of the RICO cause of action. *See* United States v. Turkette, 452 U.S. 576, 583 (1981); Papai v. Cremosnik, 635 F. Supp. 1402, 1406 (N.D. Ill. 1986); Zuckerman & Hunterton, *supra* note 5, at 222.

[65] Courts require plaintiff to plead and prove that (1) defendant acted (2) through an enterprise (3) in a pattern (4) of racketeering activity. *See Sedima*, 473 U.S. at 496; *Phillips*, 771 F.2d at 313; Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied sub nom.* Moss v. Newman, 465 U.S. 1025 (1984); Southgate,

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ance of the evidence.[66] Unlike nonfraud RICO actions requiring only federal notice pleading,[67] a RICO plaintiff must also plead fraud with detailed statements of particularity.[68] RICO actions are subject to a four-year statute of limitations.[69]

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supra note 6, at 18. Plaintiff must also establish that defendant's enterprise (5) affects interstate or foreign commerce and (6) resulted in (7) direct injury to her. *See generally Sedima*, 473 U.S. at 496-97; *Phillips*, 771 F.2d at 314; *Moss*, 719 F.2d at 17; Southgate, *supra* note 6, at 18.

[66] Although a criminal RICO prosecutor's burden of proof is "beyond a reasonable doubt," a civil RICO plaintiff's burden is only "preponderance of the evidence." *See Sedima*, 473 U.S. at 491; Parnes v. Heinhold Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980); Rubin & Zwirb, *The Economics of Civil RICO*, 20 U.C. DAVIS L. REV. 883, 884 (1987).

[67] *See* Goldsmith & Keith, *supra* note 13, at 87-92. The authors state that FED. R. CIV. P. 8(a)(2)'s notice pleading, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," does not conflict with Rule 9(b)'s particularity requirement. *Id.* at 89-90. The authors cite one court justifying Rule 9(b)'s application to RICO cases:

> Rule 9(b) has been justified on the ground that fraud embraces a wide variety of potential conduct, so that a defendant needs a substantial amount of particularized information in order to prepare a response. Fraud claims also offer the claimant an extra negotiating point that may help force settlement. Finally, a charge of fraud is a serious matter with attendant consequences to a person's reputation and goodwill. No one should be subject to such harm unless the accuser makes specific allegations.

Id. at 90 n.153 (quoting Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984)).

[68] *See* Bosse v. Crowell, Collier & MacMillan, 565 F.2d 602, 611 (9th Cir. 1977); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 545 (E.D.N.Y. 1987); FED. R. CIV. P. 9(b). To plead tax fraud with particularity, a tax agency must allege defendant's tax fraud with detailed statements through any of the following sources:

> (1) taxpayer's own books, records, and admissions;
> (2) inside eyewitness to taxpayer's false entries or secretion of income;
> (3) outsiders, whose records or testimony permit reconstruction of transactions with the defendant;
> (4) evidence of net worth increases;
> (5) evidence of expenditures;
> (6) evidence of bank deposits exceeding reported taxable income.

See Duke, *supra* note 42, at 31; *Tax Fraud*, *supra* note 42, at 429-32; Zuckerman & Hunterton, *supra* note 5, at 225-27.

[69] The Supreme Court established a four-year civil RICO statute of limitations. *See* Agency Holding Corp. v. Malley-Duff Assocs., Inc., 107 S. Ct. 2759, 2767 (1987). Prior to the Court's decision on June 22, 1987, Congress allowed state judiciaries to determine RICO's appropriate statute of limitations. State courts usually adopted the state's analogous limitations period prescribed for actions based on statute or the state catch-all limitations period. *See* Tellis v. United States Fidelity & Guar. Co., 805 F.2d

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Courts dismiss most civil RICO claims for insufficient pleadings.[70] However, once a plaintiff adequately pleads the required RICO elements, courts grant standing.[71] While courts usually grant RICO standing to state and local governments,[72] a defendant may contest this issue.[73] The issue of standing arose in both *Phillips* and *Fawaz* when each defendant filed a Rule 12(b)(6) motion to dismiss.[74] Both defendants challenged the state revenue agencies' standing to bring civil RICO actions against tax fraud.[75]

A. Phillips — *Standing Granted*

In *Phillips*[76] the defendant operated a retail gas and car wash business in Illinois.[77] State law required the business to file monthly gross

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741, 743 (7th Cir. 1986); Goldsmith & Keith, *supra* note 13, at 98-99; *see also* Wilson v. Garcia, 471 U.S. 261, 267-80 (1985); Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239, 249 (2d Cir.), *cert. denied*, 473 U.S. 906 (1985). For judicial reaction to Congress' silence on the applicable statute of limitations period, see *infra* note 228.

[70] One author observes that "RICO claims are often susceptible to motions on the pleadings; the best initial defense to a civil RICO case is to force plaintiffs to prove the elements of the claim." Southgate, *supra* note 6, at 17. Another author observes that most frivolous RICO actions fail at the pleading stage. *See* Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 837 (1987). Most pleading attacks question the "direct injury," "pattern," and "enterprise" allegations. *See* Goldsmith & Keith, *supra* note 13, at 86.

[71] Only directly injured plaintiffs have standing. *See Sedima*, 473 U.S. at 496; Haroco v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam). A plaintiff also has standing only if she can demonstrate an injury resulting from defendant's "enterprise" racketeering. *See Sedima*, 473 U.S. at 496; Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 807-08 (E.D. La. 1986); Schaafsma v. Marriner, 641 F. Supp. 576, 581 (D. Vt. 1986).

[72] For examples of government standing, see cases cited *supra* note 20.

[73] After plaintiff files a complaint pleading the seven RICO elements, defendants usually raise the standing issue in a Rule 12(b)(6) motion to dismiss and in accompanying moving papers. *See Phillips*, 771 F.2d at 312; City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 540 (E.D.N.Y. 1987); *Fawaz*, 653 F. Supp. at 142. In *Phillips* the district court stated that the revenue department pleaded a valid RICO claim (*i.e.* successfully pleaded RICO's seven elements). *Phillips*, 771 F.2d at 313, 316. Nonetheless, the district court granted defendant's 12(b)(6) motion to dismiss on standing objections. *Id.* at 314, 316.

[74] FED. R. CIV. P. 12(b)(6) is a motion to dismiss for "failure to state a claim upon which relief can be granted."

[75] *See Phillips*, 771 F.2d at 317; *Fawaz*, 653 F. Supp. at 142, 144.

[76] 771 F.2d 312 (7th Cir. 1985).

[77] *Id.* at 313. This business constituted defendant's enterprise through which he committed tax fraud.

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receipts and sales tax statements and to remit monthly payment of the indicated tax due.[78] Over a nine month period, the defendant mailed nine separate fraudulent state tax returns and payments to the Illinois Department of Revenue (IDR),[79] defrauding that entity of $14,500 in tax revenue.[80] IDR filed a civil RICO tax fraud complaint to recover the evaded amount.[81]

The district court agreed that IDR's complaint stated a valid RICO claim.[82] Nonetheless, the court denied IDR standing,[83] stating that RICO did not authorize a federal action for state tax collection cases.[84] The Seventh Circuit reversed,[85] holding that judicial precedent[86] had established standing for these actions. *Sedima*'s dictum suggesting that

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[78] *Id.*; *see also* ILL. ANN. STAT. ch. 24, § 8-11-1 (Smith-Hurd 1962 & Supp. 1987); *id.* ch. 111 ⅔, § 704.03 (Smith-Hurd Supp. 1987); *id.* ch. 120, § 440-53 (Smith-Hurd 1974 & Supp. 1987).

[79] Later courts considered the *Phillips* pattern of mailings to constitute "related acts" and "multiple criminal episodes." *See* Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-93 (9th Cir. 1987); Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1112 (7th Cir. 1987); Lewis *ex rel.* Nat'l Semiconductor Corp. v. Sporck, 646 F. Supp. 574, 581-82 (N.D. Cal. 1986); Ghouth v. Conticommodity Servs. Inc., 642 F. Supp. 1325, 1338 (N.D. Ill. 1986); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 809 (E.D. La. 1986). Since *Phillips* basically ignored *Sedima*'s "pattern" dictum, however, "pattern" was not influential in the court's decision. *See* Brandt v. Schal Associates, Inc., 664 F. Supp. 1193, 1198 & 1198-99 n.11 (N.D. Ill. 1987); Cohen, *supra* note 31, at 162 & 162 n.50. The *Phillips* court relied instead upon a pre-*Sedima* decision, United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978), which held that each mailing in a fraudulent scheme is a separate offense, two or more of which constitute a "pattern."

[80] The court stated that defendant's fraud directly injured IDR. *Phillips*, 771 F.2d at 313.

[81] Defendant Phillips' use of the United States mail to execute the tax fraud violated the Federal Mail Fraud Statute. *Phillips*, 771 F.2d at 313; *see supra* note 37.

[82] *Phillips*, 771 F.2d at 313.

[83] *Id.* at 314.

[84] *Id.*

[85] *Id.* at 317.

[86] The *Phillips* court focused on three cases establishing judicial precedent for governmental standing: Alcorn County, Miss. v. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984) (county had standing to recover for fraudulent billings); County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982) (county had standing to sue for bribery and conspiracy to obtain fraudulent real estate tax assessments); Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D. Md. 1980) (state and city had standing to sue city official for fraudulently rigging competitive bidding on demolition project). *Phillips*, 771 F.2d at 315-16. Each case involved an injury to the county as a commercial enterprise. *Id.* at 316. Even though *Phillips* involves the state as a commercial enforcer, the *Phillips* court refused to distinguish the case on this ground. *Id.*

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RICO standing should be liberally granted supported this holding.[87] In addition, the appellate court concluded that Congress had granted standing to state agencies to bring these civil RICO actions.[88]

B. Fawaz — *Standing Denied*

In *Fawaz*[89] the defendant operated a retail gasoline business[90] and was required to file state sales tax returns.[91] The defendant was charged with underpayment of state tax.[92] In 1983 the Michigan Department of Treasury (MDT) obtained a criminal conviction against the defendant under state law resulting in a restitution order for $295,000 in delinquent taxes.[93] Three years later,[94] MDT filed a civil RICO tax fraud action in federal court,[95] basing its claim on the de-

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[87] *Id.* at 316-17.

[88] The *Phillips* court reviewed several judicial authorities. These authorities directed courts to recognize Congress' intent that states have RICO standing: *Sedima*, 473 U.S. at 497 n.15; Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 399 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam); Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983). *See Phillips*, 771 F.2d at 316-17.

[89] 653 F. Supp. 141 (E.D. Mich. 1986), *aff'd*, No. 86-1809 (6th Cir. May 9, 1988).

[90] *Id.* at 142. This business constituted defendant's enterprise through which he committed tax fraud.

[91] *Id.*

[92] The *Fawaz* district court did not mention how often the defendant mailed fraudulent returns. *Id.* However, the prosecution's 12-count information implies monthly mailings. *Id.* The Sixth Circuit decision confirms monthly mailings. *Fawaz*, No. 86-1809 at 1. Both courts merely concluded that the mailings constituted a "pattern of racketeering." *Id.*

[93] The defendant was fined, placed on probation, and ordered to make restitution. *Fawaz*, 653 F. Supp. at 142. As one probation condition, the Michigan Department of Treasury (MDT) required defendant to pay his $240,000 tax liability plus $55,000 in interest and penalties. *Id.* Defendant must pay this deficiency at the rate of at least $5,000 per month. *Fawaz*, No. 86-1809 at 1.

[94] Although four years elapsed from the last predicate act to MDT's filing, neither the defendant nor the court raised the RICO statute of limitations issue. *See Fawaz*, 653 F. Supp. at 141-43. Since this decision preceded the Supreme Court's decision establishing RICO's four-year statute of limitations, the *Fawaz* district court could have adopted an analogous state limitations period to bar the action. *See supra* note 69 and accompanying text.

[95] *Id.* Although defendant's mailings directly injured the MDT, the fact that MDT obtained a restitution order for the deficient tax before filing the RICO action negated the "direct injury" requirement. *Fawaz*, 653 F. Supp. at 143; *see* Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985) (holding that a defrauded entity must suffer direct loss to have civil RICO standing).

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fendant's use of the mails to perpetrate the fraud.[96]

The district court rejected the *Phillips* holding[97] and held that MDT lacked civil RICO standing to claim section 1964(c) treble damages against taxpayers.[98] The court stated that *Sedima*'s broad interpretation mandate did not encompass a state government's attempt to prosecute its own citizens in federal court for state sales tax violations.[99] Only the Michigan legislature could expand state tax fraud remedies.[100] Furthermore, granting MDT standing would permit the state agency to recover quadruple damages.[101] MDT appealed in an amici curiae brief written by Professor G. Robert Blakey[102] and joined by eighteen other states.[103]

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[96] For discussion of the federal mail fraud statute and its application to civil RICO tax fraud, see *supra* note 37.

[97] *Fawaz*, 653 F. Supp. at 143.

[98] *Id.*

[99] *Id.* at 142-43.

[100] The court stated that the Michigan legislature was apparently content with the tax fraud remedies it provided. *Id.* at 143. If not, the legislature would have patterned tax fraud remedies after civil RICO's treble damages. *Id.*

[101] *Id.* (stating that defendant's criminal state law penalty payment together with civil RICO's treble damages amount to quadruple damages). The court found such extensive civil recovery excessive. *Id.*

[102] Professor Blakey has been called "the father (or the midwife) of RICO." Zuckerman & Hunterton, *supra* note 5, at 213. Professor Blakey is a Professor of Law and Director, Notre Dame Institute on Organized Crime, Notre Dame School of Law. *Id.* at 213 n.44. He was Chief Counsel to the Senate Subcommittee on Criminal Laws and Procedures at the time RICO was written. *Id.* Besides the Sixth Circuit, the Seventh Circuit has also recognized his RICO expertise. *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1410-11 (N.D. Ill. 1986).

[103] The 18 states that joined in the amici curiae brief are: Arizona, California, Connecticut, Idaho, Illinois, Indiana, Mississippi, Nebraska, New Mexico, New York, North Carolina, Ohio, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin. Telephone interview with E. David Brockman, Assistant Attorney General in Charge of Collections Division, Michigan Department of Attorney General (June 20, 1988). Three to four additional states will join this group if the case is appealed to the United States Supreme Court. *Id.* The states joined in the appeal because they believe the *Fawaz* decision "threatens to eviscerate [RICO's] important anti-corruption remedy for governmental units." Brief for Appellant at 3, Michigan Dep't of Treasury, Revenue Div. v. Fawaz, No. 86-1809 (6th Cir. May 9, 1988) (on file with *U.C. Davis Law Review*) [hereafter Blakey Brief]. The states view any restriction of RICO's scope as "ominous, particularly in a period of increasing governmental expenditures at the State and local level, as the federal government plays a smaller role in social welfare programs, and in a period of heightened awareness of fraud against the government." *Id.* Thus, the states urged the court "to set its hand against th[e] unconstitutional encroachment of article I legislative power by an article II court." *Id.*

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In an unpublished opinion,[104] the Sixth Circuit affirmed.[105] However, the appellate court disagreed with the district court, stating that MDT was a RICO "person" having standing to bring a RICO action.[106] The court reasoned that *Sedima* mandated such an interpretation.[107] However, the court held that since MDT recovered civil damages in state court, MDT had elected its remedy and recovered, thereby negating RICO's required direct injury element.[108] In fact, the appellate court distinguished *Phillips* on this ground.[109] The court observed that in *Phillips* IDR's initial action was a RICO action in district court, whereas in *Fawaz* MDT initially proceeded against the taxpayer in a state criminal proceeding.[110]

More important, the Sixth Circuit stated that the defendant lacked a sufficient nexus to organized crime — Congress' target in enacting RICO.[111] The court said that to allow a civil RICO tax fraud action against a person not associated with organized crime would be a demeaning "tortured exercise of statutory construction [inconsistent with] the intent of those in Congress."[112] This ruling effectively reinstated one of the restrictive requirements *Sedima* abrogated.[113] Consequently, MDT filed a petition for rehearing en banc, which is presently pending.[114] If this petition is unsuccessful,[115] MDT plans to file a writ of certiorari to the United States Supreme Court.[116]

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[104] Michigan Dep't of Treasury, Revenue Div. v. Fawaz, No. 86-1809 (6th Cir. May 9, 1988). The Sixth Circuit denied MDT's application to have the decision published. Telephone interview with E. David Brockman, Assistant Attorney General in Charge of Collections Division, Michigan Department of Attorney General (June 15, 1988) [hereafter Brockman Interview]. The opinion was most likely unpublished since it was narrowly applied to the facts and parties in the case. *Id.*

[105] *Fawaz*, No. 86-1809 at 5.

[106] *Id.* at 2.

[107] *Id.*

[108] *Id.* at 3.

[109] *See id.* at 4-5.

[110] *Id.*

[111] *Id.* at 3-4.

[112] *Id.* at 4.

[113] *See* Petition for Rehearing En Banc for Appellant at 1-3, Michigan Dep't of Treasury, Revenue Div. v. Fawaz, No. 86-1809 (6th Cir. May 9, 1988) (on file with *U.C. Davis Law Review*) [hereafter Rehearing Brief].

[114] *See id.*

[115] Since petitions for rehearing en banc usually are not successful, MDT believes the petition will most likely be denied. Brockman Interview, *supra* note 104.

[116] *Id.*

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II. State Revenue Departments' Use of Civil RICO Against Tax Fraud

The Seventh Circuit decision in *Phillips* and Sixth Circuit decision in *Fawaz* disagree whether state revenue agencies can recover RICO's federal treble damages against state taxpayers. This disagreement centers on three main issues. First, should state revenue departments be able to recover federal remedies against state tax cheaters? Second, do public policy concerns against federal and state recovery for like offenses outweigh judicial precedent? Third, do state revenue agencies need civil RICO's enhanced remedies to bolster their own existing state remedies? Courts considering whether to allow civil RICO's use against tax cheaters must consider these issues.

A. *States Recovering Federal Remedies for State Law Violations*

The first issue *Phillips* and *Fawaz* raise is whether state revenue departments should be able to recover federal remedies against state tax cheaters. In *Phillips* the district court dismissed IDR's complaint to prevent the use of civil RICO as "a vehicle for federal jurisdiction and treble damages in state sales tax fraud cases."[117] The *Fawaz* district court decision concurred with this determination and asserted two rationales for its support.

1. Legislative History

The *Fawaz* district court observed that RICO's legislative history is silent regarding standing for state tax collecting bodies.[118] The court stated that the logical interpretation of this silence is that "Congress never contemplated that states would attempt to [pursue] the statute's remedies in a [state] sales tax collection context."[119] From this silence the district court inferred that Congress did not intend to federalize state tax claims.[120]

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[117] *Phillips*, 771 F.2d at 316.

[118] *Fawaz*, 653 F. Supp. at 142.

[119] *Id.*

[120] *See id.* at 142-44. A criminal RICO case also supports *Fawaz*' position. *See* United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976), *aff'd in part, remanded in part*, 591 F.2d 1347 (4th Cir.), *district court aff'd on reh'g*, 602 F.2d 653 (4th Cir. 1979) (en banc). *Mandel* stated:

> The legislative history of Title IX of the organized [sic] Crime Control Act contains no express consideration of the question whether an "enterprise" may include such public entities as governments and states. It would be difficult to infer from this legislative silence any authority to

The *Phillips* appellate court also observed that legislative history is silent on this issue.[121] However, *Phillips* cited judicial precedent to conclude that "the importation of state claims into federal court is inherent in RICO's purpose."[122] These judicial authorities observed that Congress' failure to anticipate all of civil RICO's applications does not imply that Congress would have excluded the action.[123] Instead, the court reasoned that Congress preferred a broad RICO statute, even if overin-

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> construe the statute broadly so as to include public entities. . . . [T]he purpose of Title IX . . . is a remedial one, concerned with ending the monopolistic influences on the free market system caused by the violent and criminal tactics used by organized crime in taking over interests in legitimate businesses. Nothing in the legislative history indicates any concern over the use of such tactics in the subversion of states or governments.

Id. at 1020 (citation omitted). *Mandel* is the only decision to exclude governments as "enterprises" through which racketeering activity occurs, and this holding has been rejected by all other courts. *See* United States v. Angelilli, 660 F.2d 23, 33 & 33 n.10 (2d Cir. 1981).

[121] *Phillips*, 771 F.2d at 317.

[122] *Id.* at 316.

[123] *Phillips* quotes Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 399 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam), and Schacht v. Brown, 711 F.2d 1343, 1356 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983). *See Phillips*, 771 F.2d at 317. *Haroco* stated:

> With respect to the case before us, it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute. Nevertheless, it does not seem fitting for us to attempt to narrow the statute in ways which are nearly impossible to rationalize merely to exclude subjects of this kind. For to say that Congress did not anticipate this subject is not to say that Congress would have excluded it if the subject had been brought explicitly to its attention. Congress appears to have preferred a broad statute, even if overinclusion might result.

Haroco, 747 F.2d at 399.

The *Schacht* court also stated:

> Even if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress. In these circumstances, to impose special standing and injury requirements cannot in our view be defended as efforts to improve or polish a statute which was carelessly or unartfully drafted. RICO may be very broad, but there was nothing careless about its drafting. When Congress deliberately chooses to unleash such a broad statute on the nation, in the absence of constitutional prohibitions, complaints must be directed to Congress rather than to the courts.

Schacht, 711 F.2d at 1356. The *Phillips* court stated that this interpretation of Congress' intent is consistent with Supreme Court authority. *Phillips*, 771 F.2d at 317.

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clusion were to result.[124]

While the *Fawaz* appellate court agreed with *Phillips* conclusion, the court interpreted the legislative history to exclude the instant action since appellee Fawaz was not the type of criminal Congress intended RICO to punish.[125] This interpretation is contrary to both Supreme Court and congressional direction. *Sedima* rejected both the organized crime and racketeering injury nexuses since these requirements were contrary to Congress' intent that RICO be liberally construed.[126] In addition, Congress enacted RICO to fight organized criminal activity, not just organized crime.[127] Any entity that engages in this activity falls within RICO's ambit.[128]

2. Judicial Authority

The *Fawaz* district court next asserted that even Supreme Court authority mandating a broad RICO interpretation does not "stretch so far

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[124] *See supra* note 12. In rejecting *Mandel*, the court in United States v. Frumento, 563 F.2d 1083, 1090-91 (3d Cir. 1977), *cert. denied sub nom.* Millhouse v. United States, 434 U.S. 1072 (1978), reasoned that interpretation of Congress' intent must comport with the Organized Crime Control Act of 1970's purpose. *Frumento* stated:

> Congress' concern was enlarging the number of tools with which to attack the invasion of the economic life of the country by the cancerous influences of racketeering activity; Congress did not confine its scrutiny to special areas of economic activity. . . . Yet, we are asked to believe that Congress' approach to a monumental problem besetting the country was myopic and artificially contained. Is it conceivable that in considering the ever more widespread tentacles of organized crime in the nation's economic life, Congress intended to ignore an important aspect of the economy because it was state operated and state controlled? We think not. . . .
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> . . . The constricted reading of the statute advocated by the appellants makes little sense; private business organizations legitimately owned and operated by the states, even though their activities substantially affect interstate commerce, would be open game for racketeers. We refuse to believe that Congress had such "tunnel-vision" when it enacted the racketeering statute or that it intended to exclude from the protective embrace of this broad statute, designed to curb organized crime, state operated commercial ventures engaged in interstate commerce, or other governmental agencies regulating commercial and utility operations affecting interstate commerce.

Id. (footnote omitted).

[125] *Fawaz*, No. 86-1809 at 3-4.

[126] *See Sedima*, 479 U.S. at 486-500.

[127] *See supra* notes 11-13 and accompanying text.

[128] *See Phillips*, 771 F.2d at 314. The *Phillips* appellate court stated that the Act does not distinguish between "state governments, consumers, competitors, or other victims in determining who qualifies as a person under the Act . . . ." *Id.*

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as to encompass a sovereign's attempt to prosecute its own citizens in a federal forum for state sales tax violations."[129] The court observed that the judicial policy considerations of a contrary ruling would be "staggering."[130] Federal courts would be inundated with state revenue agencies' civil RICO actions against tax cheaters.[131]

The *Phillips* appellate court observed this possible inundation, but reluctantly concluded that Supreme Court[132] and other judicial authority establish the federalization of state claims.[133] This federalization is the consequence of RICO's broad statute.[134] While *Phillips* admitted

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[129] *Fawaz*, 653 F. Supp. at 143.

[130] *Id.* The court in Papai v. Cremosnik, 635 F. Supp. 1402, 1410 (N.D. Ill. 1986) stated that "[t]he basic policy objective behind all of the RICO opinions is to create a net wide enough to catch organized crime yet narrow enough to avoid federalizing 'garden variety' frauds."

[131] *Fawaz*, 653 F. Supp. at 143. *Mandel* supports *Fawaz*' contention. *Mandel* stated:

> The interpretation of this statute to include "states" within the meaning of "enterprise" would clearly result in what could only be characterized as a startling departure from the traditional understanding of federal-state relationships. Unless Congress has clearly indicated its intentions to "alter sensitive federal-state relationships", courts should be reluctant to give ambiguous phrases within a statute that effect.

Mandel, 415 F. Supp. at 1021 (citation omitted).

[132] Since the *Phillips* district court decision, the Supreme Court decided American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606 (1985) (per curiam) and *Sedima*, 473 U.S. 479.

[133] The *Phillips* court acknowledged *Schacht*'s statement of RICO's effect on federal-state relationships:

> We agree that the civil sanctions provided under RICO are dramatic, and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, like most courts who have considered this issue, we believe that such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; we are therefore without authority to restrict the application of the statute.

Phillips, 771 F.2d at 316 (quoting *Schacht*, 711 F.2d at 1353 (citations omitted)). Other authorities have similarly concluded. *See* United States v. Turkette, 452 U.S. 576, 586-87 (1981) (stating that federalization of state claims is inherent in RICO's purpose); Parr v. United States, 363 U.S. 370, 389-90 (1960) (stating that Congress can federalize state law claims) (quoting Badders v. United States, 240 U.S. 391, 393 (1916)); *Haroco*, 747 F.2d at 290 (quoting *Turkette*, *supra*); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984); *Schacht*, 711 F.2d at 1353.

[134] *See Schacht*, 711 F.2d at 1353. Some commentators have observed that "RICO has completely federalized what [was] considered the province of state courts — that is the resolution of common garden variety disputes between the state's citizens." Goldsmith & Keith, *supra* note 13, at 71-72 n.78 (quoting E. O'Brien, President, Securities

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that federal courts may not be the proper place for state tax collection claims, the court deferred to judicial authority establishing these claims.[135] The *Fawaz* appellate court agreed that, in light of *Sedima* and other judicial authority,[136] states are RICO "persons" with standing to bring RICO actions.[137]

B. *Public Policy Concerns*

The second issue *Phillips* and *Fawaz* raise is whether important public policy concerns outweigh judicial precedent allowing states civil RICO recovery. In particular, the courts question whether states should be allowed to recover both federal and state remedies for like offenses. The *Phillips* appellate court followed judicial precedent[138] and authority[139] in establishing these tax actions even though the court recognized concurrent public policy issues.[140] Based upon judicial mandate, however, the Seventh Circuit concluded that it did not have authority to restrict the statute's application.[141]

Industries Association, Before the Senate Comm. on the Judiciary 5-6 (Sept. 24, 1985)).

[135] *Phillips*, 771 F.2d at 317. The court stated: "Principles of comity might suggest that the federal courts are not the proper place to pursue state tax collection claims, but the Supreme Court and this circuit have emphasized that the importation of state claims into federal court is inherent in RICO's purpose." *Id.* (citations omitted).

[136] The Sixth Circuit recognizes that *Phillips* and Alcorn County v. United States Interstate Supplies, 731 F.2d 1160, 1169 (5th Cir. 1984), establish state civil RICO standing. *Fawaz*, No. 86-1809 at 2.

[137] *Id.* at 2-3.

[138] *See supra* note 86 and accompanying text.

[139] *See supra* note 88 and accompanying text.

[140] The *Phillips* court "reluctantly" granted standing since IDR and other state revenue agencies could institute enough civil RICO actions to seriously burden federal courts. *Phillips*, 771 F.2d at 316-17. The court especially implored Congress to limit RICO's application to cases such as tax fraud. *Id.* at 317. The *Phillips* court's fear of inundation has not yet materialized, however, since IDR has filed only six civil RICO tax fraud cases in the intervening three years. Telephone interview with Frank Zera, Special Assistant to Attorney General, Revenue Prosecution Unit, Illinois Attorney General (June 24, 1988) [hereafter Zera Interview]. Mr. Zera states that civil RICO tax fraud actions are "carefully screened" to abide by IDR's statement at oral argument that such tax collection cases would be few. *Id.* The Illinois Attorney General chooses cases based upon the openness or flagrancy of the tax fraud or the dollar amount of the fraud. *Id.* Of the six cases, most were either barred by RICO's then analogous statute of limitations period or resolved before trial. *Id.* The Michigan Attorney General would use civil RICO only against "blatantly egregious" tax fraud violators. (Telephone interview with Marci B. McIvor, Assistant Attorney General, Michigan Department of Attorney General (July 7, 1988)).

[141] *Phillips*, 771 F.2d at 317.

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1. Dual Recovery

While the *Fawaz* district court alluded to judicial authority, it based its decision on "deep-rooted" public policy reasons.[142] *Fawaz* asserted that states should not be given federal remedies for matters of state and local concern.[143] The *Fawaz* district court reasoned that allowing both federal and state remedies for the same offense provides a windfall recovery.[144]

Courts have rejected the dual recovery theory in criminal RICO cases, since a RICO violation is a federal offense which only supplements the underlying predicate state offense.[145] This rationale should a

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[142] *Fawaz*, 653 F. Supp. at 143.

[143] *Id.* The *Fawaz* court stated:

> There are deep-rooted public policy questions at stake here. A department of the State of Michigan is seeking to exact, through the federal RICO statute, a sanction not prescribed by state law — yet it seems to us that sanctions imposed upon tax violators are a matter of state public policy.

Id. The *Mandel* court similarly argued:

> It is simply untenable to argue that Congress, without saying so, intended to federalize crimes involving the acts of a public official in conducting the government of a state. In the absence of clear Congressional intent, courts traditionally should be reluctant to give a broad construction to a criminal statute which would transform matters primarily of local concern into federal felonies.

United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976), *aff'd in part, remanded in part*, 591 F.2d 1347 (4th Cir.), *district court aff'd on reh'g*, 602 F.2d 653 (4th Cir. 1979) (en banc).

[144] The *Fawaz* court observed that MDT was pursuing both the civil RICO claim and the state tax fraud remedy. *Fawaz*, 653 F. Supp. at 143. If successful, MDT would obtain "a judgment for the amount of tax owing, plus interest and penalties, which will equal the tax due and the treble damages provided for in RICO." *Id.* The court reasoned that the state does not need the treble damage recovery; in fact, this state law recovery negates RICO's necessary direct injury element. *Id.*

[145] *See* United States v. Frumento, 563 F.2d 1083, 1087-88 (7th Cir. 1977); United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971); United States v. Karigiannis, 430 F.2d 148, 150 (7th Cir.), *cert. denied*, 400 U.S. 904 (1970). The *Frumento* court stated:

> Section 1961 *et seq.* of the Federal Racketeering Act [RICO] forbids "racketeering," not state offenses per se. The state offenses referred to in the federal act are definitional only; racketeering, the federal crime, is defined as a matter of legislative draftsmanship by reference to state law crimes. This is not to say, as the dissent suggests, that the federal statute punishes the same conduct as that reached by state law. The gravamen of section 1962 is a violation of federal law and "reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage."

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fortiori apply to civil RICO's broader provisions.[146] In its rehearing brief, MDT asserted that the dual recovery theory has been rejected in civil RICO as well.[147] The brief continues that RICO's " 'no supercession clause'[148] strongly indicates that RICO was specifically intended to supplement rather than supplant existing causes of action."[149] Since Congress used an existing body of federal and state law as RICO predicate offenses, Congress must have intended an entity to assert both the underlying offense and the RICO violation as causes of action.[150]

2. State Recovery Negating RICO's Direct Injury

The *Fawaz* district court asserted that MDT's recovery negates RICO's necessary direct injury element.[151] MDT argued before the district court that a civil RICO tax fraud remedy is exemplary.[152] Many

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Frumento, 563 F.2d at 1087 (quoting, in part, *Cerone*, 452 F.2d at 286). *Cerone* also considered this federal-state relationship:

> [The federal statute] does not enlarge state criminal statutes at all because it punishes the use of facilities in interstate commerce in furtherance of enterprises violative of state statutes; it does not punish substantive violations of the state statutes per se.

Id. at 1088 (quoting *Cerone*, 452 F.2d at 286-87).

Applying this reasoning to civil RICO, a defendant violates federal law when she commits racketeering activity. 18 U.S.C. § 1962 (1982). Any person injured by that activity may institute civil RICO proceedings. *Id.* § 1964 (1982 & Supp. IV 1986). The RICO statute does not distinguish "between state governments, consumers, competitors, or other victims in determining who qualifies as a [RICO] person. . . ." *Phillips*, 771 F.2d at 314. Therefore, a state revenue agency that is injured by a state law tax fraud violation is also injured by a RICO mail fraud violation. *See id.* at 313; *Fawaz*, 653 F. Supp. at 142. This agency is thus entitled to RICO's federal treble damage remedy. *See Phillips*, 771 F.2d at 316-17. A court may preclude this access, however, when the "person" recovers for the injury under state law. *Fawaz*, 653 F. Supp. at 143-44.

[146] *See* Blakey Brief, *supra* note 103, at 9. Professor Blakey observes that "RICO's civil scope is broader than its criminal scope." *Id.*

[147] Rehearing Brief, *supra* note 113, at 5. The Brief cites Pennsylvania v. Cianfrani, 600 F.2d 1364 (E.D. Pa. 1985), as one case in which defendants raised the election of remedies defense. *Id.* The court rejected that defense and held the state capable to obtain both a federal civil RICO and state remedy. *Id.*

[148] Rehearing Brief, *supra* note 113, at 3-4. The "no supercession clause" states at Pub. L. No. 91-452, § 904(b), 84 Stat. 947: "Nothing in this title shall supercede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title."

[149] Rehearing Brief, *supra* note 113, at 3-4.

[150] *See id.* at 3-7.

[151] *Fawaz*, 653 F. Supp. at 143-44.

[152] *Id.*

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other federal and state tax recoveries are also exemplary.[153] The *Fawaz* district court countered that MDT's contention violates RICO's purpose — to compensate victims of racketeering activity.[154] RICO's treble damage recovery presupposes "an underlying compensable injury to be trebled."[155] This injury is negated when the state recovers the evaded amount under state law.[156]

The Sixth Circuit agreed with this conclusion that MDT's restitution order precluded their recovering under RICO.[157] The appellate court stated that MDT elected its remedy and recovered; therefore, MDT no longer sustained the direct injury necessary to qualify to bring a RICO action.[158] In its rehearing brief MDT countered that federal courts should not impose a common law election of remedies requirement on federal statutes absent the need for a federal rule of decision.[159] MDT stated that the election of remedies is not needed in the present case.[160] Moreover, MDT's brief asserted that "the United

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[153] One author observes that the

> prosecution of prominent people — politicians, entertainers, and gangsters — can provide enormous free publicity for the enforcement program, conveying the message that tax evaders are vigorously prosecuted, no matter how powerful they may be or how high their social position. The publicity value of one such prosecution may be the equivalent of hundreds of prosecutions of rank-and-file taxpayers.

CRIME AND JUSTICE, *supra* note 40, at 685.

[154] *Fawaz*, 653 F. Supp. at 144.

[155] *Id.*

[156] *Id.* at 143-44.

[157] *Fawaz*, No. 86-1809 at 3. The Sixth Circuit cites the following cases to support its position: Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); St. Paul Fire & Marine Ins. Co. v. Michigan Nat'l Bank of Detroit, 660 F.2d 196, 199-200 (6th Cir. 1981); Rutter v. King, 57 Mich. App. 152, 226 N.W.2d 79 (1974).

[158] *Fawaz*, No. 86-1809, at 3.

[159] Rehearing Brief, *supra* note 113, at 3. To support this assertion, the Brief cites Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981).

[160] Rehearing Brief, *supra* note 113, at 4. The Brief states that:

> The doctrine of election of remedies applies only where "conflicting and inconsistent remedies are sought on the basis of conflicting and inconsistent rights." Newman v. Avco Corp. Aerospace Structures Division, 451 F.2d 743 (6th Cir. 1971). . . . The doctrine of election of remedies simply does not apply to a Plaintiff who prosecuted a Defendant for violating criminal laws of the state and subsequently filed a civil RICO action seeking civil damages resulting from Defendant's pattern of criminal conduct. Petitioner's duty to prosecute those individuals who violate the criminal laws of the State of Michigan is not inconsistent with its right to initiate a civil RICO action. Petitioner's remedy (if a criminal conviction can be

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States Supreme Court, the Sixth Circuit, and the other circuits have been extremely reluctant to impose an election of remedies requirement [to] statute[s] . . . intended to provide supplemental remedies to those already available. . . ."[161]

C. *States' Adequate Tax Fraud Remedies*

The *Fawaz* district court argued further that state revenue agencies do not need civil RICO's enhanced remedies to bolster their own existing state remedies.[162] The *Fawaz* court reasoned that if the Michigan legislature thought MDT needed treble damage recovery, the legislature would have enacted this recovery as part of state law.[163] The Sixth Circuit concurred, stating that "[i]f the attorney general wishes to avail himself of a civil remedy not now prescribed by state law when collecting unpaid taxes, his desire should be brought to the attention [of] Michigan's legislature."[164] That state RICO acts do not provide treble

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> called a remedy) is not inconsistent with the remedy Petitioner seeks under RICO.

Id. at 4-5.

[161] *Id.* at 5. To support this statement, the Rehearing Brief, *supra* note 113, at 5, cites the following cases: Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Quinn v. Digiulian, 739 F.2d 637 (D.C. Cir. 1984); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); *Newman*, 451 F.2d at 43. *Id.*

[162] *Fawaz*, 653 F. Supp. at 143.

[163] *Id.* The *Fawaz* court reasoned:

> The Michigan legislature could have easily enacted its own statute patterned after RICO to impose treble damages on state tax violators if it chose to do so. The fact that it has not, leads us to conclude that the Michigan legislature is content with the sanctions it has already provided.

Id. The court in United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976), *aff'd in part, remanded in part*, 591 F.2d 1347 (4th Cir.), *district court aff'd on reh'g*, 602 F.2d 653 (4th Cir. 1979) (en banc) agreed with the *Fawaz* court's rationale in the broader context of states' use of RICO. *Mandel* argued:

> [A]t least part of Congress' concern in enacting Title IX of the Organized Crime Control Act was to enable the relatively small businessman operating in interstate commerce, who was most in need of protection from the criminal tactics of an interstate network of racketeers, to invoke the protection of the federal laws. But governments and states do not stand in the same position as the small businessman when it comes to fighting infiltration by organized crime or protecting themselves against racketeering acts. States have their own adequate resources to combat threats to their integrity leveled by organized crime; states have laws regulating the behavior of public officials that are adequate to protect a state from any racketeering acts engaged in by that official.

Id.

[164] *Fawaz*, No. 86-1809 at 4.

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damage recovery further supports this contention.[165] Nonetheless, that state revenue agencies have brought civil RICO actions demonstrates their belief that they are entitled to treble damage recovery.[166]

1. State Tax Law Remedies

State revenue agencies are, however, given unusually broad powers and means to recover evaded taxes.[167] In Illinois, for example, IDR can impose a payment obligation on evaded taxes[168] plus fines,[169] penalties,[170] interest,[171] tax liens,[172] and foreclosures.[173] The Illinois civil tax fraud penalty is seventy-five percent of the tax deficiency plus other assessments.[174] In Michigan, MDT can also recover the evaded taxes[175] plus fines,[176] penalties,[177] interest,[178] tax liens,[179] and foreclosures.[180] The Michigan civil tax fraud penalty is 100% of the tax deficiency plus interest.[181]

In *Fawaz* MDT obtained a restitution order for $55,000 in fines, penalties, and interest under state law in addition to the $240,000 tax

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[165] *See infra* note 193 and accompanying text.

[166] Both IDR and MDT sought to recover only § 1964(c) treble damages. *See infra* note 214 and accompanying text.

[167] *See infra* notes 202-03 and accompanying text.

[168] *See* ILL. ANN. STAT. ch. 120, §§ 10-1001 to -1002 (Smith-Hurd 1970 & Supp. 1987).

[169] *Id.*

[170] For Illinois sales tax violations, IDR imposes penalties under *id.* ch. 120 § 444 (Smith-Hurd 1970). For Illinois income tax violations, IDR imposes penalties under *id.* §§ 10-1001 to -1002, 10-1004 to -1005 (Smith-Hurd 1970 & Supp. 1987).

[171] For Illinois sales tax violations, IDR imposes interest under *id.* ch. 120, § 444 (Smith-Hurd 1970). For Illinois income tax violations, IDR imposes interest under *id.* § 10-1003 (Smith-Hurd 1970 & Supp. 1987).

[172] For Illinois sales tax violations, IDR imposes tax liens under *id.* § 444a (Smith-Hurd 1970). For Illinois income tax violations, IDR imposes tax liens under *id.* § 11-1101 (Smith-Hurd 1970 & Supp. 1987).

[173] *See id.* §§ 692, 706, 713, 719-720, 11-1108 to -1109.

[174] *Id.* § 10-1002(b).

[175] *See* MICH. STAT. ANN. §§ 7.657(21), 7.657(23) (Callaghan 1984 & Supp. 1988).

[176] *See id.* §§ 7.657(27)-(28). Michigan misdemeanor tax fraud is punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both. *Id.* Michigan felony tax fraud is punishable by a fine of not more than $5,000 or imprisonment for not more than five years, or both, plus the costs of prosecution. *Id.*

[177] *See id.* §§ 7.657(23)-(25), 7.657(27)-(28).

[178] *See id.* §§ 7.657(23)-(25).

[179] *See id.* § 7.657(29).

[180] *See id.*

[181] *Id.* § 7.657(23).

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liability.[182] The *Fawaz* district court concluded that MDT had adequately recovered for the defendant's tax fraud.[183] MDT's state law recovery adequately compensated the loss.[184] Since states are given such unusually broad tax recovery powers and means to compensate their losses, the Sixth Circuit asserted that they will not have the underlying uncompensable injury necessary for civil RICO's treble damages.[185]

2. State RICO Acts

To provide state agencies additional remedies, some states have enacted their own RICO statutes.[186] In fact, the Michigan legislature is currently considering such a statute.[187] These acts parallel the federal RICO statute with some important exceptions to civil RICO tax fraud.[188] For example, the underlying predicate offenses do not include

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[182] *See Fawaz*, 653 F. Supp. at 142.

[183] *See id.* at 143-44.

[184] *Id.*

[185] *See id.*

[186] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2314 (1978 & West Supp. 1987); CAL. PENAL CODE § 186 (West Supp. 1988); COLO. REV. STAT. §§ 18-17-101 to -109 (1986 & Supp. 1987); CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West 1985); DEL. CODE ANN. tit. 11, §§ 1501-1511 (Supp. 1986); FLA. STAT. ANN. §§ 895.01-.09 (West Supp. 1988); GA. CODE ANN. §§ 26-3401 to -3414 (Harrison 1988); HAWAII REV. STAT. §§ 842.1-.12 (1985 & Supp. 1987); IDAHO CODE §§ 18-7801 to -7805 (1987); IND. CODE ANN. §§ 35-45-6-1 to -2 (1983); MISS. CODE ANN. § 97-43-1 to -11 (1985); NEV. REV. STAT. §§ 207.350-.520 (1985); N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982); N.M. STAT. ANN. §§ 30-42-1 to -6 (1980); N.Y. PENAL LAW §§ 460-460.80 (McKinney Supp. 1988); N.D. CENT. CODE ANN. §§ 12.1-06.1-01 to -08 (1987); OHIO REV. CODE ANN. §§ 2923.31-.36 (Anderson 1987); OR. REV. STAT. ANN. §§ 166.715-.735 (1985); PA. CONS. STAT. ANN. § 911 (Purdon 1983 & Supp. 1987); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985); UTAH CODE ANN. §§ 76-10-1601 to -1606 (Supp. 1987); WASH. REV. CODE ANN. § 9A.82 (1988); WIS. STAT. ANN. §§ 946.80-.87 (West Supp. 1986).

[187] Brockman Interview, *supra* note 104.

[188] *Compare* 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986) *with* any state RICO acts cited *supra* note 186. These similarities include the pattern, enterprise, direct injury, and predicate offense requirements. *See id.* Two authors observe the following:

> A few states have enacted their own RICO legislation, which often resembles the federal statute. Although these statutes may prove useful in combatting the specific types of criminal activity for which they were designed, they lack the general breadth and versatility of the federal statute. States may use the civil provisions of RICO independently or in conjunction with their own racketeering laws to attack unlawful conduct in a variety of areas.

Tannenbaum & Molo, *supra* note 25, at 4-5 (footnotes omitted).

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mail fraud,[189] the gravamen of tax fraud.[190] Without mail fraud, a state revenue agency may not use these acts,[191] since tax fraud is not an included offense.[192]

In addition, these acts do not provide a treble damage remedy, but only dissolution of the enterprise or forfeiture of interest.[193] Since state revenue agencies usually seek only treble damages against taxpayers, they have little incentive to employ these acts.[194] The federal RICO statute thus provides the only means for state agencies to recover treble damages against tax cheaters.[195] The great weight of authority suggests that these agencies, whether federal or state, have standing to use this statute to recover treble damages.[196]

III. Why Governments Should Not Recover Treble Damages Against Taxpayers

A. *RICO's Treble Recovery Unnecessary in Tax Fraud Context*

This conclusion that RICO applies to governments has broad implications. Any injured federal, state, or local agency has standing to bring a civil RICO action on its own or its citizens' behalf.[197] However, even if Congress intended this result, Congress may not have intended revenue agencies to use civil RICO's treble damages against tax fraud.[198]

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[189] *Cf.* statutes cited *supra* note 186.

[190] *See supra* note 37.

[191] *See Phillips*, 771 F.2d at 313; *Fawaz*, 653 F. Supp. at 142.

[192] *See* statutes cited *supra* note 186.

[193] *See id.*

[194] *See infra* note 214 and accompanying text.

[195] The federal antitrust provision (15 U.S.C. § 15 (1982)) is the only provision besides RICO that allows treble damages. That statute does not provide treble damages for tax fraud, however. *See infra* note 198 and accompanying text.

[196] *See Phillips*, 771 F.2d 314-17 (citing cases and other authorities supporting state revenue agencies' civil RICO actions against tax fraud); Tannenbaum & Molo, *supra* note 25, at 5, 7 (stating that states and localities can use civil RICO against "any business or industry subject to state or local taxation or regulation"). For examples of states using RICO's civil remedies in other contexts, see *supra* note 20.

[197] *See* Tannenbaum & Molo, *supra* note 25, at 5. The authors state that "any activity [meeting] the broad RICO requirements and [resulting] in harm to state or local government's business or property is potentially subject to a civil RICO action brought by the appropriate agency on its own behalf or on behalf of injured citizens." *Id.* For discussion of government's use of civil RICO against internal corruption, see Comment, *Government Corruption and Civil RICO: Providing Compensation for Intangible Losses*, 58 N.Y.U. L. Rev. 1530 (1983).

[198] RICO's legislative history is silent on whether Congress intended RICO to apply to tax fraud. *See Phillips*, 771 F.2d at 317; *Fawaz*, 653 F. Supp. at 142; Zuckerman &

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Congress enacted RICO to provide enhanced remedies for cases in which existing federal and state remedies were insufficient.[199] Existing federal and state tax fraud remedies already sufficiently protect governments' interests.[200] The Justice Department, in fact, does not use civil RICO against federal tax cheaters because Congress has given the Internal Revenue Service (IRS) sufficient tax fraud remedies through existing law and procedures.[201]

Hunterton, *supra* note 5, at 213. However, Congress refused to amend the federal antitrust treble damage recovery (15 U.S.C. § 15 (1982)) to include "intentionally unreported income." *See Sedima*, 473 U.S. at 514-15 (Marshall, J., dissenting); Zuckerman & Hunterton, *supra* note 5, at 213. Congress rejected the amendment because the antitrust lobby did not want tax-related racketeering as part of antitrust substantive law. Zuckerman & Hunterton, *supra* note 5, at 213.

[199] *See supra* note 9 and accompanying text; *see also Sedima*, 473 U.S. at 497 (stating that predicate acts must constitute "an activity which RICO was designed to deter"); Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 387 (7th Cir. 1984) (stating that plaintiff's harm must result from activity RICO was designed to deter), *aff'd*, 473 U.S. 606 (1985) (per curiam).

[200] Justice Weinfeld explained that, in existing tax fraud remedies, "Congress has enacted legislation [affording] adequate protection of the public interest in the collection of income taxes." United States v. Henderson, 386 F. Supp. 1048, 1053 (S.D.N.Y. 1974); *see also* Sansone v. United States, 380 U.S. 343, 350-51 (1965) (stating that tax laws are "a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of *every* duty under the income tax law and to provide a penalty suitable to *every* degree of delinquency") (quoting Spies v. United States, 317 U.S. 492, 497 (1943) (emphasis added)).

[201] Telephone interview with department official, United States Department of Justice, Organized Crime and Racketeering — Criminal Division (June 17, 1988); telephone interview with department official, United States Department of Justice, Tax Division (June 17, 1988). Some authors have offered the following explanation why the federal government has not used RICO against tax fraud:

> The primary reason that the mail and wire fraud provisions have not been used more frequently in criminal tax cases is because of the control exercised over such cases by the Criminal Section, Tax Division, Department of Justice, which seems to prefer revenue offenses to general crimes provisions. This preference is probably based on the idea that, to effect maximum voluntary compliance with the tax laws, "tax crimes" ought to be prosecuted as "tax crimes.". . . It is likely that [the Department of Justice] will eventually attempt to bring civil RICO suits for treble damages against taxpayers who have been convicted of tax offenses[,] who have been the subject of aborted criminal tax cases[, or] taxpayers involved in illicit activities such as narcotics, organized crime, and certain fraudulent tax shelters. Once procedures and precedent are in place, it can be expected that the civil RICO's super-penalty will be applied against General Enforcement Program taxpayers.

CIVIL TAX FRAUD, *supra* note 40, at 962.

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B. Government's Adequate Existing Tax Remedies

Federal and state revenue departments can obtain both civil and criminal remedies for tax fraud under existing law.[202] The civil remedies include repayment, fines, penalties, tax liens, and interest.[203] The criminal remedies include fines, imprisonment, and payment of costs of prosecution.[204] The successful prosecutions for tax evasion of organized

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[202] Consider, for example, the IRS' numerous criminal and civil penalties:

> Criminal prosecutions perform a limited, if vital, role in tax enforcement, for myriad reasons. Many noncriminal monetary sanctions are available that can be assessed and collected administratively, with much less cost to the government, and can directly produce additional revenue. The most extreme civil sanction is applicable to persons required to collect and pay over taxes, for example, an employer required to withhold taxes from an employee's wages: the penalty for willful noncompliance is 100 percent of the tax (I.R.C. § 6671 (1982)). Anyone else whose underpayment in whole or *in part* is "due to fraud" may be compelled to pay a penalty of 50 percent of the underpayment (§ 6653(b)). One who fails to file a return without reasonable cause can be penalized up to 25 percent of the tax due (§ 6651(a)(1)). All these penalties are in addition to the tax and interest thereon.
>
> The civil penalties are not in lieu of criminal penalties. Both can be imposed on the same taxpayer for the same conduct. Indeed, if a taxpayer is successfully prosecuted for a tax offense, civil penalties are routinely imposed thereafter, and the taxpayer is estopped to contest any issue, such as fraud, found against him in the criminal prosecution. Civil penalties are assessed in thousands of cases every year, and over a billion dollars in penalties are collected. In addition to civil monetary penalties, the IRS has numerous devices to make noncompliance costly, including embarrassing, time-consuming audits, arbitrary assessments, and liens on bank accounts and other property.

CRIME AND JUSTICE, *supra* note 40, at 684 (citations omitted); *see also* United States v. National Bank of Commerce, 472 U.S. 713, 719-33 (1985) (holding that the IRS has right to levy joint bank accounts even against some nondelinquent parties); Collins, *Money Laundering Used to Evade Taxes; Antilaundering Legislation Urged*, J. ACCOUNTANCY, Nov. 1985, at 27 (observing the effectiveness of income tax laws in attacking illegal activities); Comment, *IRS Tax Liens on Joint Bank Accounts*, 52 MO. L. REV. 117 (1987) (commenting on *National Bank of Commerce*, *supra*). For examples of similar state remedies, see CAL. REV. & TAX. CODE §§ 19401-19414 (West 1983 & Supp. 1988); ILL. ANN. STAT. ch. 120, §§ 444-444a, 706-720, 10-1001 to -1101 (Smith-Hurd 1970 & Supp. 1987); MICH. STAT. ANN. §§ 7.657(21)-.657(29) (Callaghan 1984 & Supp. 1988); *supra* notes 167-81 and accompanying text.

[203] *See* 10 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION §§ 55.01-.62 (1988); *supra* note 202.

[204] I.R.C. § 7201 (1987) states that, upon conviction for felony tax fraud, defendant may be fined up to $100,000 ($500,000 if a corporation), imprisoned up to five years, or both, and compelled to pay the costs of prosecution. These remedies are in addition

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criminal syndicates and of organized criminals such as Al Capone and Dutch Schultz demonstrate the effectiveness of these remedies.[205] Moreover, some state RICO acts provide states additional remedies such as enterprise dissolution or forfeiture of interest.[206]

Congress did not intend RICO to supplement government's existing adequate remedies against tax (or mail) fraud violators.[207] Thus, in the tax fraud context, the *Fawaz* district and appellate courts correctly argued that governments have sufficient existing remedies.[208] In *Fawaz* the district court feared that, if successful, MDT would recover treble damages[209] in addition to criminal sanctions.[210] Federal and state revenue and exaction agencies should not recover such extensive civil damages.[211]

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to any other remedies provided by law. *Id.* I.R.C. § 7203 (1987) states that, upon conviction for misdemeanor tax fraud, defendant may be fined up to $25,000 ($100,000 if a corporation), imprisoned up to one year, or both, and compelled to pay the costs of prosecution. These remedies are also in addition to any other remedies provided by law. *Id.* For examples of similar state remedies, see *supra* notes 176 & 202.

[205] *See* Zuckerman & Hunterton, *supra* note 5, at 217. The authors state:

> These [tax fraud] laws have historically been applied to the "skimming" (or diversion) of funds from Las Vegas casinos to organized crime interests, the prosecution of some of the nation's most notorious gangsters, and the corruption of public officials. In each such application, the tax laws were used not to enforce the collection of revenue, per se, but to punish various forms of commercial crime perpetrated as part of an organized, criminal, profit-oriented activity.

Id. (footnotes omitted). In H. MESSICK, SECRET FILE 21-72 (1969), the author observes that government prosecution and conviction for tax fraud was the most effective sanction against such notorious criminals as Al Capone, Jose Enrique Miro, Max Hassell, Waxey Gordon, Dutch Schultz, and Edward Levinson. *See also* E. KEFAUVER, CRIME IN AMERICA 10 (1968); G. TYLER, ORGANIZED CRIME IN AMERICA 14 (1962).

[206] *See supra* note 193 and accompanying text.

[207] *See Sedima*, 473 U.S. at 500-01 (Marshall, J., dissenting) (arguing that Congress could not have intended RICO to apply to any person fraudulently interacting with an entity through the mails); *see also Plaintiffs Need Not Establish Distinct "Racketeering Injury" Beyond That Injury Resulting from Predicate Acts Themselves, in Order to Maintain Private Civil Actions*, 29 TRIAL LAW. GUIDE 531, 531-39 (1986).

[208] For a discussion of *Fawaz*' public policy arguments, see *supra* notes 162-64 and accompanying text.

[209] *Fawaz*, 653 F. Supp. at 143.

[210] *Id.* at 142.

[211] Congress modeled RICO's treble damages after the federal antitrust treble damages. *See Sedima*, 473 U.S. at 485-88; *Phillips*, 771 F.2d at 314; H.R. 1549, 91st Cong., 2d Sess., 116 CONG. REC. 35,295 (1970) (statement of Rep. Steiger that RICO's treble damages were "another example of the antitrust remedy being adapted for use against organized criminality"). Since Congress determined that no entity should recover more than treble damages for an action, MDT's quadruple recovery is a

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IV. A Statutory Solution

A. *Amendment to Section 1964*

This Comment proposes a statutory solution to the controversy over using civil RICO against tax fraud. Congress could answer *Phillips'* "distress flag" by enacting the following amendment to section 1964:

PROPOSED AMENDMENT TO ADD SECTION 1964(E):

> (e) No federal, state, or local agency charged with the collection of revenue may use section 1964(c) remedies to recover evaded taxes or other revenue fraudulently concealed through a violation of section 1962. This subsection, however, does not preclude the governmental agency from employing other section 1964 civil remedies or section 1962 criminal sanctions against the taxpaying entity.

This amendment eliminates the civil RICO section 1964(c) treble damage, attorney's fee, and cost of suit remedies against tax fraud violators. Congress enacted the section 1964(a), (b) & (d) remedies[212] to restrict or dissolve the activities of organized criminal syndicates.[213] Since tax collection agencies use RICO for treble damage recovery, they are not likely to invoke these other sections.[214] Maintaining these other

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windfall which Congress did not intend. *See Fawaz*, 653 F. Supp. at 143-44.

[212] If the government cannot eradicate an organized criminal syndicate through non-RICO means, and tax evasion is the syndicate's only prosecutable offense, § 1964(a) allows the government to dissolve or reorganize the entity. 18 U.S.C. § 1964(a) (1982). This section also permits the government to order divestiture of any entity's ownership in an enterprise or to place reasonable restrictions on future activities or investments. *Id.*; *see* United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); Zuckerman & Hunterton, *supra* note 5, at 225-27. This section provides a deterrent against organized crime that other tax fraud remedies do not address. *Cf. supra* notes 202-04 and accompanying text.

Section 1964(b) allows the Attorney General to institute proceedings. 18 U.S.C. § 1964(b) (1982 & Supp. IV 1986). This section also allows courts to issue restraining orders or other prohibitions pending final determination. *Id.*; *see Cappetto*, 502 F.2d at 1358-59; Zuckerman & Hunterton, *supra* note 5, at 227. This section also provides a deterrent against organized crime that other tax fraud remedies do not address. *Cf. supra* notes 202-04 and accompanying text.

Section 1964(d) allows the United States government to use defendant's criminal RICO conviction in any later civil proceedings. 18 U.S.C. § 1964(d) (1982). This conviction is res judicata for civil liability. *Id*; *see Cappetto*, 502 F.2d at 1358-59. Revenue agencies already employ this remedy. *Cf. supra* note 202.

[213] Congress designed civil RICO's forfeiture provisions to "free the channels of commerce from all illicit activity." United States v. Barber, 476 F. Supp. 182, 189 (S.D. W. Va. 1979) (quoting S. REP. NO. 91-617, 91st Cong., 1st Sess. 79 (1969)); *see also* Zuckerman & Hunterton, *supra* note 5, at 215-17.

[214] *See, e.g.*, *Phillips*, 771 F.2d at 312-13 (stating that IDR sought only § 1964(c)

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remedies, however, preserves the government's "trump card" against organized crime.[215] The amendment thus upholds Congress' intent to primarily deter organized criminal activity.

The proposed amendment maintains the criminal RICO action because prosecution for tax evasion often has been one of the only means to convict organized criminal figures.[216] In addition, tax evasion is "a common activity"[217] and "difficult to detect."[218] Eradication of the entire RICO action could advance the current nationwide proliferation of tax and other types of fraud.[219] The proposed amendment satisfies the *Phillips* and *Fawaz* courts, yet still provides a sufficient federal and state deterrent against organized crime and fraud.

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treble damage recovery); *Fawaz*, 653 F. Supp. at 142 (stating that MDT sought only § 1964(c) treble damage recovery). Since revenue agencies collect tax from taxable income, their imposing other § 1964 remedies against entities is self-defeating. These other restrictions may impede the business' operations, resulting in lower revenue and subsequently lower tax payments. *Fawaz* did, in fact, hold that MDT did not have standing only for § 1964(c) treble damage recovery. *Fawaz*, 653 F. Supp. at 143.

[215] A "trump card" is "an influential factor or final resource." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2455 (3d ed. 1986). Since a revenue or other governmental agency's use of § 1964(a), (b) & (d)'s civil forfeiture provisions is discretionary, the agency may use these provisions as a last resort to absolve an organized criminal syndicate. *See Barber*, 476 F. Supp. at 189; Zuckerman & Hunterton, *supra* note 5, at 215-17. Authors have, in fact, described civil RICO as "the ultimate potential civil penalty." CIVIL TAX FRAUD, *supra* note 40, at 961.

[216] *See* CRIME AND JUSTICE, *supra* note 40, at 685-86. The author observed that:

> Throughout most of the twentieth century, criminal tax enforcement has been employed not merely for raising revenue but, as one commissioner of internal revenue put it, for "rooting out of our society certain undesirables." Tax prosecutions were a potent weapon in the government's arsenal during Prohibition — the aim was not to collect revenue but to prevent the unlawful production and sale of liquor — and they continue to be a powerful tool in the war against organized crime and corrupt politicians.

Id. (citations omitted); *see also supra* note 205 (citing examples of successful use of the tax laws against organized crime). For examples of cases involving government prosecution of organized criminals for tax evasion, see United States v. Giacalone, 574 F.2d 328 (6th Cir. 1978); United States v. Costello, 221 F.2d 668 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956); Capone v. United States, 56 F.2d 927 (7th Cir.), *cert. denied*, 286 U.S. 553 (1932).

[217] Deane, *Tax Evasion, Criminality and Sentencing the Tax Offender*, 21 BRIT. J. CRIMINOLOGY 47, 57 (1981); *see* CRIME AND JUSTICE, *supra* note 40, at 683.

[218] Edelhertz, *Transnational White-Collar Crime: A Developing Challenge and Need for Response*, 53 TEMP. L.Q. 1114, 1119 (1980) (quoting Assistant Attorney General M. Carr Ferguson, United States Dept. of Justice, Tax Division).

[219] *See* UNITED STATES DEPARTMENT OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL 42 (1984); *see also* Goldsmith, *supra* note 70, at 833 n.31.

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B. *Reasons for a Statutory Solution*

1. Congress' Remedial Authority

The statutory solution is most acceptable since judicial and other authorities agree[220] that Congress is the proper remedial body.[221] In response to many pleas, Congress has already considered but failed to enact several bills.[222] One author suggested a nine-point compromise

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[220] These authorities also agree, however, that Congress and the courts can function together to develop a "meaningful concept of pattern." *Sedima*, 473 U.S. at 500; *see also* Papai v. Cremosnik, 635 F. Supp. 1402, 1407 (N.D. Ill. 1986) (noting that "*Sedima* did acknowledge . . . [that] it is the role of the courts, as well as Congress, to 'develop a meaningful concept of pattern' ").

[221] *See, e.g.*, *Sedima*, 473 U.S. at 499-500 (stating that any RICO defect "is inherent in the statute as written, and its correction must lie with Congress"); Morgan v. Bank of Waukegan, 804 F.2d 970, 977 (7th Cir. 1986) (stating that courts would respect Congress' narrowing of civil RICO); *Phillips*, 771 F.2d at 317 (stating that the judiciary is not the proper remedial body to restrict RICO); Schacht v. Brown, 711 F.2d 1343, 1361 (7th Cir.) (stating that "it is not [the judiciary's role] to reassess the cost and benefits associated with the creation of a dramatically expansive . . . tool for combating organized crime"), *cert. denied*, 464 U.S. 1002 (1983); *Papai*, 635 F. Supp. at 1410 (quoting *Schacht*, *supra*); Edelhertz, *supra* note 218, at 1043 (stating that "the question of court burden is one that ought to be addressed by Congress and not by the courts, especially when Congress has mandated that the courts construe the statute liberally to effectuate its remedial purposes").

[222] Six amendments have gained widespread recognition. These are:

1. H.R. 2943, 99th Cong., 1st Sess. (1985), requiring that:
   (a) defendant be criminally convicted of a RICO § 1962 violation before civil RICO remedies could be imposed.
2. S. 1521, 99th Cong., 1st Sess. (1985), requiring that:
   (a) plaintiffs suffer a competitive investment or other business injury as the result of a violation of § 1962;
   (b) at least one predicate act alleged be other than mail, wire, or securities fraud; and
   (c) plaintiffs award defendants attorney's fees if a court finds plaintiff's claim "frivolous and without merit."
3. H.R. 2517, 99th Cong., 1st Sess. (1985), requiring "fraud-plus" that:
   (a) defendant's predicate acts each occur within five years of an indictment separate in time and place but interrelated by a common scheme, plan or motive;
   (b) RICO's conspiracy provision, § 1962(d) be deleted;
   (c) a natural person cannot constitute an "enterprise"; and
   (d) RICO's name be changed to "Criminal Enterprises and Corruption of Enterprises Act," thus avoiding the use of the pejorative term "racketeering activity."
4. H.R. 3985, 99th Cong., 2d Sess. (1986), requiring that:
   (a) pattern equal separate transactions but allowing predicate acts to be unrelated to one another yet related to the "enterprise"; and

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plan encompassing many of these reforms.[223] These bills are controversial, however, since they propose(d) altering civil RICO's remedies and RICO's "pattern," "direct injury," and "enterprise" elements.[224]

(b) a new definition of predicate acts, § 1961(11), be adopted replacing the definitional section, § 1961(1), the predicate acts of mail and wire fraud, and the interstate transport of stolen property;

5. H.R. 4892, 99th Cong., 2d Sess. (1986), requiring that:

(a) pattern equal separate transactions but allowing the predicate acts to be unrelated to one another yet related to the "enterprise";

(b) the same definition of predicate acts be adopted as H.R. 3985, § 1961(11) with some additional predicate acts;

(c) a statute of limitations period of four (4) years be imposed;

(d) not only injuries to business or property be recoverable but also personal injuries, excluding pain and suffering, plus injunctive relief;

(e) defendants award plaintiffs attorney's fees if that plaintiff prevails either through settlement or injunctive relief;

(f) agreements to arbitrate be adopted unless a "broad societal or public interest" dictates otherwise or a contract of adhesion is involved; and

(g) plaintiffs award defendants attorney's fees if a court finds plaintiff's suit frivolous or abusive.

6. H.R. 5445, 99th Cong., 2d Sess., 132 CONG. REC. H9365-66 (1986), requiring that:

(a) RICO's vicarious liability be restricted;

(b) no treble damages be awarded to private claimants;

(c) a statute of limitations period of three (3) years be imposed;

(d) an increased burden of proof for fraud claims be imposed; and

(e) Congress eliminate RICO's racketeering label.

See generally, Cohen, *supra* note 32, at 174-79; Goldsmith, *supra* note 70, at 848-58.

[223] Professor Goldsmith has proposed the following nine-point "compromise" package:

(1) eliminating the racketeering label to state "Pattern of Illicit Activity" instead of "Racketeer Influenced and Corrupt Organizations";

(2) making certain RICO claims subject to arbitration;

(3) tightening the pattern requirement to mean at least three illicit activity violations within a five-year period. These activities must demonstrate continuing illicit conduct and relatedness either to each other or to the enterprise except when, in the case of fraud, each violation must also constitute a separate criminal episode;

(4) increasing the burden of proof to "clear and convincing" instead of "preponderance of the evidence";

(5) reducing the remedy from treble to double damages;

(6) establishing limited respondeat superior liability;

(7) providing a statute of limitations period of three (3) years;

(8) imposing more stringent civil pleading requirements (particularity);

(9) providing a double damage counsel fee penalty for frivolous suits.

See Goldsmith, *supra* note 70, at 858-83.

[224] *See* Cohen, *supra* note 32, at 174-80; Goldsmith, *supra* note 70, at 848-58. *See generally supra* notes 222-23.

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"Plaintiff" factions fear that reform will emasculate civil RICO's effectiveness, while "defendant" factions desire reform to constrain RICO's overinclusive scope.[225]

2. Congress' Easiest Adoption of the Proposed Solution

Since the proposed solution is free from the controversial provisions of these other bills,[226] Congress could enact it more easily than the others. Moreover, this amendment addresses a narrow action only recently advanced — civil RICO tax fraud. Adopting this amendment would thus only negligibly affect RICO's substance and procedure. The amendment thereby preserves Congress' broad RICO mandate and simultaneously eliminates a civil RICO action seemingly unpopular from its inception.[227]

C. *Other Attempts to Remedy RICO*

Congress' inaction in many RICO areas, though, has generated much judicial hostility.[228] This hostility extends to civil RICO as well,

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[225] *See* Cohen, *supra* note 32, at 157-58, 168-80; Goldsmith, *supra* note 70, at 829-30.

[226] *Compare* this Comment's statutory amendment, which does not change RICO's "pattern," "direct injury," or "enterprise" elements, *with* those bills discussed at *supra* notes 222-23, many of which affect these requirements.

[227] *See generally Phillips*, 771 F.2d at 316-17 (stating reluctance to establish the civil RICO tax fraud action); *Fawaz*, 653 F. Supp. at 141 (stating that public policy concerns direct against establishing the civil RICO tax fraud action).

[228] For an example of judicial hostility to Congress' inaction concerning RICO, see Tellis v. United States Fidelity & Guar. Co., 805 F.2d 741, 747-49 (7th Cir. 1986) (Ripple, J., dissenting), *reh'g and reh'g en banc denied*, 107 S. Ct. 3255 (1987). Before the Supreme Court's establishment of civil RICO's four-year statute of limitations, Circuit Judge Ripple discussed, in dissent, RICO's lack of a statute of limitations and other problems:

> Fixing the statute of limitation for a particular cause of action is a legislative function. Indeed, it is not a particularly difficult or complex legislative function. In most circumstances, it can be handled in a sentence. Yet, in a significant number of statutory schemes of nationwide application, Congress has failed to fulfill this basic responsibility and has left the courts to spend hundreds of hours — and thousands of dollars in government money — searching for a substitute solution. Meanwhile, justice is delayed, not only in the cases in which limitation issues arise but also in the many cases, often raising far more serious questions, which must wait while this tedious process takes place.
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> . . . .
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> This court's deviation from the course of decision emerging in other circuits has one salutary aspect. Perhaps the Congress will now complete

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since courts can do little authoritatively to limit civil RICO's broad scope and application.[229] But while the judiciary has relegated to Congress the remedial role, courts, practitioners, and other interests have not entirely refrained from making remedial attempts.[230]

Of these attempts, the *Sedima* Court suggested that courts use RICO's "pattern" requirement to restrict civil RICO's scope.[231] Several courts have taken this suggestion.[232] Thus, those courts adopting the "multiple fraudulent schemes" test have somewhat limited the possibility of a civil RICO tax fraud action.[233] A defendant must defraud several governmental entities or engage in separate schemes to satisfy the "pattern" requirement.[234]

> its legislative work and permit the courts to use their time more effectively by applying rather than making law.

Id. at 747-49 (Ripple, J., dissenting) (footnote omitted).

[229] *See* Morgan v. Bank of Waukegan, 804 F.2d 970, 978 (7th Cir. 1986) (Ripple, J., concurring) (recognizing courts' lack of authority to restrict RICO); Cohen, *supra* note 32, at 163 (observing courts' limited authority to restrict RICO).

[230] *See* Illinois v. Life of Mid-America Ins. Co., 805 F.2d 763, 765-67 (7th Cir. 1986) (describing different factions' attempts to limit civil RICO).

[231] *See Sedima*, 473 U.S. at 500; *The Supreme Court, 1984 Term*, 99 HARV. L. REV. 312, 320-21 (1985); Comment, *Civil RICO*, *supra* note 4, at 490-91.

[232] *See* Papai v. Cremosnik, 635 F. Supp. 1402, 1407 (N.D. Ill. 1986).

[233] *See supra* note 55. Courts adopting the "multiple fraudulent schemes" test have basically rejected the *Phillips* mailings as a pattern, since the mailings defraud only one agency and thus comprise just a single scheme. *See* Kovian v. Fulton County Nat'l Bank & Trust Co., 647 F. Supp. 830, 834-37 (N.D.N.Y. 1986) (rejecting the *Phillips* mailings as a "pattern"); Schaafsma v. Marriner, 641 F. Supp. 576, 581 (D. Vt. 1986) (questioning whether the *Phillips* mailings constitute a "pattern"). *But see* H.J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419, 426 (accepting the *Phillips* mailings as a "pattern"). The *Fawaz* court did not state whether defendant's mailings constituted "related acts," "multiple criminal episodes," or "multiple fraudulent schemes." *See generally Fawaz*, 653 F. Supp. at 141-44. No subsequent court has considered which test the *Fawaz* court applied to establish "pattern."

Speaking generally of the "multiple fraudulent schemes" definition of "pattern," one author observed:

> The significance of the restrictive interpretation is that it represents a move by some federal courts to halt the spread of what they see as a deluge of civil RICO actions. In the process, by requiring different criminal schemes as a prerequisite for civil liability, these courts have effectively over-criminalized civil RICO. . . . Taken literally, this insistence on continuing, separate criminal behavior implies that no matter how sophisticated or lengthy a fraudulent scheme may be, the remedial effect provided by Congress under RICO will be denied an injured plaintiff because a single scheme is involved.

Selan, *supra* note 55, at 11-12.

[234] *See supra* notes 55 & 233 and accompanying text. In a civil RICO tax fraud case

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In addition, a well-informed "RICO Bar" has successfully limited RICO's scope through pleading attacks,[235] resulting in few actual RICO awards.[236] This bar, with other business and labor interests,[237] has also conducted a substantial lobbying campaign.[238] None of these attempts, however, affects the nation as uniformly or is as simple to adopt as the proposed amendment.

CONCLUSION

Phillips and *Fawaz* question whether a state department of revenue has standing to recover civil RICO treble damages for state tax fraud claims. Since the great weight of authorities suggests that *Phillips* was decided correctly and the *Fawaz* district court decision incorrectly, these departments do have standing. The Sixth Circuit *Fawaz* decision affirmed this conclusion, even though the court found other grounds to deny the action. Similar federal departments, such as the IRS, are likely also to have standing. Thus, any business or other entity should

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a defendant could engage in separate schemes or harm several agencies. Many states use tax forms in which the same federal income figures are used as a basis for state tax computation. *See, e.g.*, CALIFORNIA 1987 RESIDENT INCOME TAX FORMS AND INSTRUCTIONS 5 (1987); COLORADO 1987 INCOME TAX FORMS AND INSTRUCTIONS 4 (1987); ILLINOIS IL-1040 INSTRUCTIONS—INDIVIDUAL INCOME TAX RETURN—1987 2-3 (1987); MASSACHUSETTS RESIDENT INCOME TAX FORM; ALL SCHEDULES & INSTRUCTIONS 5 (1987); MICHIGAN 1987 INCOME TAX RETURNS AND HOMESTEAD PROPERTY TAX CREDIT CLAIMS 5 (1987); NEW YORK STATE RESIDENT INCOME TAX RETURN IT-201-P PACKET 9-10 (1987); PENNSYLVANIA 1987 INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS 9 (1987). Thus, one stating a fraudulent federal figure would also state a fraudulent state income tax figure. The defrauder's mailing the federal form to the IRS and the state form to the state revenue agency would harm two agencies. These separate mailings to different agencies, if sufficient in number, could constitute a "multiple fraudulent schemes" pattern.

[235] For discussion of pleading attacks against RICO, see Southgate, *supra* note 6, at 18-19.

[236] *See* Cohen, *supra* note 32, at 161; Goldsmith, *supra* note 70, at 837; Southgate, *supra* note 6, at 17. One commentator stated that, as of March 1985, only 9 out of nearly 300 civil RICO actions surveyed by the ABA Task Force had resulted in treble damage recovery. Note, *supra* note 17, at 859. The majority of the rest of the suits was dismissed. *Id.*

[237] Some of these other business and labor interests include the National Association of Manufacturers, the U.S. Chamber of Commerce, the Securities Industry Association, the American Bankers Association, the American Property and Casualty Insurance Industry, the American Council of Life Insurance, the American Institute of Certified Public Accountants, and the AFL-CIO and several of its affiliated unions. Cohen, *supra* note 32, at 168.

[238] *See id.*; Goldsmith, *supra* note 70, at 828-29.

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be appraised of possible civil RICO liability for tax fraud.

Under current law, if this entity commits tax or other fraud through a pattern of racketeering, any directly injured governmental agency may be able to recover treble damages. In many jurisdictions, a business entity can establish a "pattern" of racketeering simply by regularly mailing fraudulent tax returns. Since nearly every business must file tax returns, the potential number of civil RICO actions by government is staggering.

As a result, the *Phillips* court doubted the revenue department's statement that it would bring few civil RICO tax collection cases. Judge Bauer stated that the court could "'only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as [this]."[239] Congress has not yet acted, and cases such as *Phillips* are causing "a cascade of litigation."[240]

T. Todd Tumbleson

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[239] *Phillips*, 771 F.2d at 317.

[240] *State May Recover Triple Damages for Tax Fraud*, *supra* note 32, at 541. This cascade of litigation has not been civil RICO tax fraud actions, however. *See* Zera Interview, *supra* note 140. The Illinois Attorney General has brought only six civil RICO actions in three years. *Id.*

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