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# A Three-Ring Circus: The Exploitation of Civil Rico, How Treble Damages Caused It, and Whether Rule 11 Can Remedy The Abuse

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## NOTES & COMMENTS

### A Three-Ring Circus:

# The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy The Abuse

Nicholas L. Nybo\*

#### INTRODUCTION

My personal interest in the Racketeer Influenced and Corrupt Organizations Act (“RICO”) began upon reading John Kroger’s *Convictions: A Prosecutor’s Battles Against Mafia Killers, Drug Kingpins, and Enron Thieves*.<sup>1</sup> Kroger, the former Oregon

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\* Candidate for Juris Doctor, Roger Williams University School of Law, 2013; Bryant University, 2010. To my mother and father, the opportunities that I have had are, without exception, a product of your hard work and love. To my sister, Emily, our constant differences of opinion have always kept my conceded (and conceited) stubbornness from metastasizing into full-fledged ignorance. A special thanks to Professor Colleen Brown for both her assistance on this Comment, as well as her guidance in the creation of this legal writer. Credit for the title belongs to Tom Pagliarini. Finally, thanks to all of the editors on the Roger Williams Law Review for their substantive recommendations and dogged efforts in editing this Comment. All mistakes and opinions (legitimate or otherwise) belong to the author.

1. JOHN KROGER, *CONVICTIONS: A PROSECUTOR’S BATTLES AGAINST MAFIA*

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Attorney General<sup>2</sup> and a former federal prosecutor in the Eastern District of New York,<sup>3</sup> provides a detailed account of both the innate difficulties in prosecuting organized criminals as well as the specific ways in which RICO combats those difficulties.<sup>4</sup> While used sparingly at first, Kroger documents how, once familiar with its provisions, federal prosecutors employed RICO to fervently attack the sources of the mafia's power and elusiveness.<sup>5</sup> My initial reaction to the account was one of great reverence for both RICO's efficacy and Congress's acumen in creating such an effective tool. Then I found out about the circus.

In 2010, Feld Entertainment, Inc. ("Feld"), the corporation that owns Ringling Brothers and Barnum & Bailey's circus ("Ringling Bros."), filed a civil complaint against a group of animal activist organizations in D.C. District Court alleging that these groups, along with their attorneys and other parties, had acted as an organized crime syndicate in filing and prosecuting a fraudulent Endangered Species Act ("ESA") claim, which charged Feld with abusing its Asian elephants.<sup>6</sup> While the details of the fraud that the activist groups perpetrated upon both Feld and the courts are certainly shocking, more alarming is Feld's gross exploitation of RICO, a powerful tool designed to rid our country of organized crime, to earn a quick buck.<sup>7</sup> Unfortunately, as statistics below will indicate, Feld's abuse of RICO is not an isolated incident.<sup>8</sup>

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KILLERS, DRUG KINGPINS, AND ENRON THIEVES (2008) [hereinafter KROGER, CONVICTIONS].

2. OREGON DEP'T OF JUSTICE, <http://www.doj.state.or.us/> (last visited Aug. 30, 2012).

3. KROGER, CONVICTIONS, *supra* note 1, at 41.

4. *See id.* at 127-233.

5. *See id.* at 210-216.

6. Complaint and Demand for Jury Trial at 7-14, Feld Entertainment, Inc. v. ASPCA, No. 1:07-01532-EGS (D.D.C. Feb. 16, 2010) [hereinafter *Feld Complaint*].

7. 18 U.S.C. § 1964(c) (2006) permits a private plaintiff to sue others for RICO violations which cause injury to plaintiff's business or property and includes a treble damages provision allowing for the recovery of "threefold the damages [plaintiff] sustains and the cost of the suit."

8. Throughout this Comment, the discussion may, in certain circumstances, paint Feld as the antagonist given their alleged abuse of the RICO statute. It's important to recognize, at the outset, that Feld is indeed a victim of an extensive fraud and deserves to be compensated for its injuries. RICO, however, is not the appropriate remedy.

This Comment will explore how the civil RICO statute is being exploited, with a particular focus on the *Feld* litigation, and the potential solutions available to curb this exploitation. It would be difficult to engage in a discussion of the misuse of a particular statute without a cursory understanding of its background and, therefore, Part I will engage in a brief overview of the history and legislative purpose of RICO. Part II will explore the empirical data indicating that RICO has sustained, and continues to sustain, widespread abuse. Part III will outline the facts of the *Feld* litigation as just one example of how plaintiffs, with eyes on their wallets and not on the law, have exploited this statute. Finally, Part IV will explore possible remedies with a particular focus on the efficacy of relying on Rule 11 of the Federal Rules of Civil Procedure as a modest, yet effective, deterrent. Ultimately, this Comment will advocate for federal courts to actively employ their broad discretion under Rule 11 to sanction RICO abusers in an effort to reserve this important cause of action for legitimate claimants. While this remedy is certainly not without its limitations, as detailed in Part (IV)(B)(1)-(4), the Rule has certain features that render it an effective tool.

#### I. A BRIEF BACKGROUND OF RICO

During the mid 20<sup>th</sup> century, the American mafia posed one of the most pressing problems facing the United States criminal justice system.<sup>9</sup> Its power and success stemmed, in part, from its

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9. KROGER, CONVICTIONS, *supra* note 1, at 210 (“If you made a list of serious crime issues in the United States back in 1975, the mafia would have headed the list.”); *see also* United States v. Turkette, 452 U.S. 576, 588 (1981) (“Congress finds 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; [and] (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

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creative organizational structure,<sup>10</sup> as well as the federal government's relative lack of jurisdiction over many of the crimes committed by these organizations.<sup>11</sup> In response to these problems, Congress passed RICO in 1970.<sup>12</sup> The Act includes 18 U.S.C. § 1962(a)-(d),<sup>13</sup> enumerating prohibited conduct, 18 U.S.C. § 1964(a), giving the government certain civil remedies to thwart ongoing RICO violations,<sup>14</sup> and 18 U.S.C. § 1964(c), creating a

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its citizens.”).

10. Former Assistant United States Attorney and current New York federal district court judge John Gleeson has observed that:

One characteristic of organized crime is that the most culpable and dangerous individuals rarely do the dirty work. Although the organization's leaders are ultimately responsible for its crimes, they typically deal through intermediaries and limit their own participation to behind-the-scenes control and guidance. Consequently, their guilt usually cannot be proved by the testimony of victims or eyewitnesses or by forensic evidence. And they never confess.

KROGER, *CONVICTIONS*, *supra* note 1, at 214.

11. “Congress can criminalize conduct only if it affects interstate commerce or some other clear federal interest. Everything else . . . must be left to the fifty states. . . . Because of this traditional limit, many of the most important crimes committed by the mafia were not violations of federal law . . .” *Id.* at 213. Commentators have also suggested that for a long period of time the Federal Bureau of Investigation actively avoided investigating the American mafia. *Id.* at 140. Theories posited for why the FBI steered clear of organized crime have been formulated as follows:

Some believe that [J. Edgar Hoover, director of the FBI from 1924-1972] was being blackmailed by mobsters who knew about his (supposed) homosexuality. Other scholars believe that Hoover did not regard organized crime as a national problem [or he] feared that FBI agents would be corrupted if they became involved in investigating the vice crimes that the mafia was engaged in (gambling, drugs, and so on) . . . Still other scholars emphasize that Hoover did not want to divert resources away from investigating communists and political subversives.

*Id.* at 140-41 (quoting JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS* 10-11 (2006)).

12. *See* 18 U.S.C. §§ 1961-1968 (2006).

13. 18 U.S.C. § 1962(a) criminalizes the receipt of income derived from a pattern of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(b) criminalizes the investment of income, derived from racketeering activity, into a legitimate business. 18 U.S.C. § 1962(c) criminalizes the association with an enterprise engaged directly or indirectly in a pattern of racketeering activity. Finally, 18 U.S.C. § 1962(d) criminalizes conspiracy to commit any of the conduct prohibited under § 1962(a)-(c). 18 U.S.C. § 1962 (2006).

14. In 1982, a federal court judge invoked § 1964(a) to oust mob

private cause of action.

Section 1964(c), the primary focus of this Comment, creates a cause of action for private plaintiffs who can prove that they have suffered an injury to their business or property as a result of conduct prohibited under Section 1962(a)-(d).<sup>15</sup> RICO provides for this private civil remedy to afford protection to “the honest businessman who [is] damaged by unfair competition from the racketeer businessman.”<sup>16</sup> Congress intended the civil remedy to strengthen the impact of RICO as “an effective deterrent to further expansion of organized crime’s economic power.”<sup>17</sup> Moreover, the United States Supreme Court has recognized the civil RICO statute as a congressional effort to empower citizens to act as “private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate.”<sup>18</sup>

Regardless of the specific phrasing, Congress’s goal was clear: to protect society and the economy from the ill effects of organized crime. While Congress’s aim in passing RICO was certainly commendable and RICO has been a successful tool in alleviating this country’s organized crime problem,<sup>19</sup> statistics suggest that

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leadership from the Teamsters Local 560, a union of more than 35,000 members, and appointed a trustee to control the union. KROGER, CONVICTIONS, *supra* note 1, at 215.

15. Specifically, § 1964(c) provides that:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney’s fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C. § 1964(c) (2006).

16. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 473 (2006) (citations omitted).

17. 116 CONG. REC. 36296 (1970).

18. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987).

19. It has been estimated that the American mafia currently possesses less than five percent of the power that they wielded in the late 1970’s which spurred Kroger to note that “[i]n contemporary America the most influential

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the civil statute has sustained, and continues to sustain, abuse from private plaintiffs and their attorneys, who are enchanted by the statutory provision allowing for recovery of treble damages<sup>20</sup> and attorney's fees.<sup>21</sup>

## II. THE SMOKING GUN: STATISTICAL EVIDENCE OF ABUSE

One would imagine—because a civil RICO cause of action requires the plaintiff to establish that the defendant has committed a serious federal crime—that the percent of criminal RICO prosecutions would be at least relatively proportional to civil litigation.<sup>22</sup> One would be wrong. Between 2001 and 2006, there was an average of 759 civil RICO claims filed per year,<sup>23</sup> while, in those same years, a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office.<sup>24</sup>

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mafia family is not the Colombos or the Gambinos; it is the Sopranos. The mafia is no longer a public threat. It has become a cultural artifact." KROGER, *CONVICTIONS*, *supra* note 1, at 210.

20. Treble damages are "[d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed." BLACK'S LAW DICTIONARY 449 (9th ed. 2009).

21. Treble damages and attorney's fees are not the only incentives for plaintiffs to file RICO suits. RICO also provides for more liberal venue and service of process. 18 U.S.C. § 1965(b) authorizes that:

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

18 U.S.C. § 1965(b) (2006).

22. Certainly, a modicum of disparity would naturally arise given the heightened "beyond a reasonable doubt" burden of proof required for a criminal prosecution as opposed to the "preponderance of the evidence" burden in civil suits.

23. Caroline A. Mitchell, Jordan Cunningham & Mark R. Lentz, *Returning RICO to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. §1961(4)*, 13(1) *FORDHAM J. CORP. & FIN. L.* 1, 3 (2008).

24. See KRISTIN M. FINKLEA, *CONG. RESEARCH SERV.*, R 40525, *ORGANIZED CRIME IN THE UNITED STATES: TRENDS AND ISSUES FOR CONGRESS 15* (2010). This average only indicates the number of cases that were referred to the United States Attorney's Office ("USAO") for prosecution by federal agencies. Presumably, the number of cases that were actually prosecuted would be even lower than this average, given that the USAO likely does not prosecute each case referred to it, however the average cases actually prosecuted were not provided in the report.

Furthermore, a 2002 study found that, of the 185 RICO cases decided by federal appellate courts between 1999 and 2001, 145 cases (seventy-eight percent) were civil and only 40 were criminal.<sup>25</sup> These statistics indicate that civil litigants are filing RICO lawsuits based on conduct that federal prosecutors have little to no interest in thwarting. On the other hand, these results may have been precisely what Congress had in mind, recognizing that the Department of Justice has limited resources and, therefore, encouraging private plaintiffs to step in when federal resources are inadequate.<sup>26</sup>

The more alarming statistic, however, is that, of the civil RICO cases filed between 1999 and 2001, approximately seventy percent resulted in dismissals or successful summary judgment motions by defendants (later affirmed on appeal).<sup>27</sup> In fact, of the 145 civil RICO cases, only three (two percent of the total) culminated in a final victory for the plaintiffs.<sup>28</sup> This data would suggest that the recent disparity between civil and criminal RICO cases is not a product of the legitimate differences in financial resources or the varying burdens of proof, but rather is a function of private plaintiffs filing frivolous claims that falter before a jury is impaneled.

The abuse that these numbers reflect is not a new discovery. This realization began as early as 1985, when Supreme Court Justice Byron White cited an American Bar Association Task Force study which “found that of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% ‘allegations of criminal activity of a type generally associated with professional criminals.’”<sup>29</sup> These statistical imbalances prompted Justice White to observe that “[i]nstead of being used

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25. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 & n.111 (2002) [hereinafter *Private Justice*].

26. Recall the Supreme Court’s observation in 1987 that one of the purposes of the RICO civil provision is to encourage private citizens to help combat “a serious national problem for which public prosecutorial resources are deemed inadequate.” *Agency Holding Corp.*, 483 U.S. at 151.

27. *Private Justice*, *supra* note 25, at 22.

28. *Id.*

29. *Sedima v. Imrex, Co.*, 473 U.S. 479, 499 n.16 (1985) (citation omitted). A second study found that, of 132 published civil RICO decisions, 95 involved either securities or contractual disputes. *Id.*

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against mobsters and organized criminals, [civil RICO had] become a tool for everyday fraud cases brought against ‘respected and legitimate enterprises.’”<sup>30</sup>

## III. “THE GREATEST SHOW ON EARTH”: FELD ENTERTAINMENT, INC V. ASPCA

Current civil RICO litigation between Feld Entertainment, Inc. and a group of animal rights activists presents a perfect illustration of the exploitation of civil RICO. The story behind this litigation began in July of 2000 when the activist groups<sup>31</sup> and a handful of former employees of Ringling Bros. circus, including Thomas Rider,<sup>32</sup> filed suit against Feld Entertainment and Ringling Bros., alleging that the circus had been physically abusing its Asian elephants in violation of the Endangered Species Act (“ESA”).<sup>33</sup> The D.C. District Court dismissed the case for lack of standing,<sup>34</sup> but the circuit court reversed after finding that standing for the suit was based upon Rider’s alleged “aesthetic injuries” suffered while witnessing the prolonged abuse of elephants that Rider had cared for during his employment with the circus.<sup>35</sup>

After the reversal, the animal rights groups dismissed their original claim, but in 2003 re-filed the same claim in the same court.<sup>36</sup> A bench trial began on February 4, 2009 and concluded on March 18 when the district court judge ruled in favor of Feld after finding that the evidence presented at trial was insufficient

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30. *Id.* at 499. (internal quotation marks omitted).

31. These groups included: the American Society for the Prevention of Cruelty to Animals, the Animal Welfare Institute, and the Fund for Animals. *See* Complaint for Declaratory and Injunctive Relief, American Society for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, No. 1:03CV02006 (D.D.C. Sept. 26, 2003).

32. Rider worked as an elephant “handler” for Ringling Bros. from June 1997 until November 1999. *Id.*

33. *See id.*

34. *ASPCA v. Ringling Bros. & Bailey Circus*, 317 F.3d 334, 335 (D.C. Cir. 2003). The court found that, at the dismissal stage, Rider had sufficiently pled an “aesthetic injury” in witnessing the abuse to the elephants with which he had formed a powerful bond. *Id.* at 337-38.

35. *ASPCA v. Feld Entm't, Inc.*, 677 F. Supp. 2d 55, 65-66 (D. D.C. 2009). Rider claimed that his feelings for the elephants resembled the feeling he had for his own children and grandchildren. *Id.* at 87.

36. *Id.* at 60.

to establish that Rider had standing to sue.<sup>37</sup> The district court found that Rider was “essentially a paid plaintiff and fact witness who [was] not credible”<sup>38</sup> and that, therefore, the plaintiffs had failed to establish standing.<sup>39</sup> The district court based its finding on evidence that Rider had been compensated nearly \$200,000 by the activist groups and their lawyers, as well as the numerous inconsistencies within Rider’s own testimony.<sup>40</sup> This time, the D.C. Circuit Court affirmed the district court’s ruling.<sup>41</sup>

This adjudication has not, however, marked the end of litigation between the circus and the activists. In February 2010, Feld Entertainment filed suit against a group of defendants, which included all of the plaintiffs from the earlier litigation as well as additional activist groups<sup>42</sup> and the attorneys who represented the groups in the original ESA litigation.<sup>43</sup> The complaint alleges that these activists, their attorneys, and Rider had engaged in a wide array of criminal conduct<sup>44</sup> in an effort to manufacture a lawsuit against Feld Entertainment.<sup>45</sup> The

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37. *Id.* at 101.

38. *Id.* at 67.

39. *See* *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 180-81 (2000) (establishing Article III standing requirements as follows: “[A] plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision”).

40. *ASPCA*, 677 F. Supp. 2d at 78, 83-89. The inconsistencies referenced by the court in rejecting Rider’s testimony as not credible included, but were not limited to, (1) Rider’s rejecting numerous opportunities to visit the elephants he claimed to have such a close relationship with, (2) Rider’s inability to identify the elephants by name on videotape, and (3) a videotape of Rider calling one of the elephants a “bitch.” *Id.*

41. *ASPCA v. Feld, Enm’t, Inc.*, 659 F.3d 13, 21 (D.C. Cir. 2011) (“As to . . . standing, the district court disbelieved Rider and found, as a matter of law, that Rider did not have the personal attachment he claimed and did not, as he claimed, suffer from the elephants’ mistreatment. Nothing in these findings reflects an erroneous application of our case law.”).

42. Feld’s complaint included as defendants the Animal Protection Institute and the Wildlife Advocacy Project.

43. *See generally, Feld Complaint, supra* note 6.

44. The complaint alleged that the defendants had violated federal and state laws prohibiting bribery, gratuity payments, mail fraud, wire fraud, money laundering, and obstruction of justice. *Id.* at 102-128.

45. *Id.* at 1.

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plaintiff avers that the defendants violated 18 U.S.C. § 1962(c)<sup>46</sup> and 18 U.S.C. § 1962(d),<sup>47</sup> given that the activist groups and their lawyers had engaged in (and conspired to engage in) an eight-year bribery scheme, which paid Rider nearly \$200,000 for false testimony to establish standing for the ESA lawsuit against Feld.<sup>48</sup> Furthermore, the plaintiff asserts that, throughout this scheme, the defendants evaded taxes, provided false answers in interrogatories and depositions, and laundered Rider's bribe money through false legal bills.<sup>49</sup> Feld requests treble damages which have been estimated in the range of sixty million dollars, calculated from their alleged twenty million dollars spent defending the fraudulent ESA lawsuit.<sup>50</sup> Of course, this number does not include the attorney's fees to which Feld may be entitled with respect to the legal costs incurred in prosecuting this RICO suit. At the time of publication, the defendants had yet to file an answer to the complaint or any motions to dismiss the complaint.

While this set of facts certainly presents an invidious scheme by the activists to commit fraud, federal crime, and gross legal malpractice, the question remains whether these overzealous animal lovers and their attorneys are truly the kind of "organized criminals"<sup>51</sup> that Congress envisioned punishing when it enacted

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46. § 1962(c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, [from] conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

47. § 1962(d) prohibits "any person [from] conspir[ing] to violate any of the provisions of subsection (a), (b), or (c) of this section."

48. *Feld Complaint*, *supra* note 6, at 3.

49. *Id.*

50. HUMANEWATCH.ORG, [http://humanewatch.org/index.php/site/post/rico\\_update\\_was\\_hsus\\_involved\\_in\\_a\\_pay-to-play\\_racket/](http://humanewatch.org/index.php/site/post/rico_update_was_hsus_involved_in_a_pay-to-play_racket/) (last visited Aug. 30, 2012).

51. Certainly, legitimate organized criminals engage in witness tampering, however it tends to be a bit more violent than what Feld has alleged:

Between 1975 and 1994 more than fifty-five people were murdered in the [Charlestown, Massachusetts] neighborhood. According to news reports, the police and Charlestown residents knew who committed nearly all the murders, for there were often eyewitnesses. Unfortunately, no one in the community was willing to step forward and testify against the killers, for Charlestown was ruled by the Irish Mob, and it enforced a strict code of silence . . . In the United States, roughly 60 percent of murders are eventually solved by the

RICO in 1970.<sup>52</sup> Or is Feld exploiting this federal statute—as Justice Byron White opined in 1985<sup>53</sup>—to transform a simple fraud case into a sixty million dollar pay day?

#### IV. TAMING THE LION: POTENTIAL REMEDIES FOR THE ABUSE

Of course the easy response would be to blame Feld for its greed and head to the movies next time the circus is in town. However, Henry Ford, famous American industrialist and founder of Ford Motor Company, once recommended: “Don’t find a fault. Find a remedy.”<sup>54</sup> Given that Feld is certainly not alone in its RICO misuse (as indicated by the data set forth in Part II) it would seem prudent to follow Ford’s advice and attempt to determine whether there exists a potential remedy for this problem. The following discussion will break into three sections. Section A will briefly examine three solutions that have been, in one form or another, attempted but will ultimately (in this author’s opinion) not solve the issue. Section B, on the other hand, will introduce Rule 11 of the Federal Rules of Civil Procedure as a modest, yet potentially powerful tool in combating RICO abuse. This Section will also closely scrutinize Rule 11’s limitations as a deterrent. Finally, Section C will set forth an ultimate recommendation regarding the manner in which federal courts can begin to preserve RICO for victims of true organized crime.

##### A. What Remedies Have Been Tried?

The following three remedies have, with varying success, been

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police. Because of the code of silence, that figure in Charlestown was less than 25 percent.

KROGER, CONVICTIONS, *supra* note 1, at 22.

52. It is true that Congress intended RICO to reach legitimate businesses that had strayed from their path of noncriminal activity into certain criminal conduct. *Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985) (“Congress wanted to reach both ‘legitimate’ and ‘illegitimate’ enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.”). However, Congress had no intent to punish “isolated offenders.” *Id.* at 496 n.14 (“The target of RICO is thus not sporadic activity. . . . RICO [is] ‘not aimed at the isolated offender.’”).

53. *Id.* at 499.

54. *Director, Bureau of Workers’ Disability Compensation v. BMC Mfg., Inc.*, 504 N.W.2d 695, 699 n.5 (Mich. Ct. App. 1993).

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attempted to curb RICO misuse: self-policing, narrow statutory construction, and alternate formulations of RICO legislation. The United States Attorney's Office utilizes (with great success) RICO self-policing, numerous federal courts have (with little success) attempted to narrowly construe certain provisions of RICO, and many states (with undetermined success) have passed RICO legislation far more modest than their federal counterpart. Unfortunately, these solutions, for a variety of reasons, will likely not be effective in solving this issue on the federal civil level.

### 1. *Self-Policing*

One laissez faire solution to the exploitation of RICO would be simply to encourage more self-policing. Generally speaking, self regulation in the legal profession has sustained heavy criticism: "Due to an inherent conflict of interest, lawyers cannot be expected to regulate their own members effectively."<sup>55</sup> In the criminal RICO context, the United States Attorney's Office has successfully regulated itself by requiring that federal prosecutors receive formal approval from the Criminal Division prior to filing any RICO charges.<sup>56</sup> This system of self-policing is effective in criminal prosecutions given the immense financial burden that RICO prosecutions impose on the government<sup>57</sup> coupled, of course, with the absence of any treble damages temptations. There are, however, certain benefits that federal prosecutors derive from

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55. Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2598 (1996) (touting legal malpractice lawsuits as the most effective manner in which to regulate the practice of law).

56. U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-110.101 (1997) available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/110mcrm.htm#9-110.101](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm#9-110.101) (last visited Aug. 30, 2012) ("No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division."). The Manual further states that "it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved." *Id.* at § 9-110.200.

57. "Mafia investigations are [ ] prohibitively expensive. . . . [Y]ou cannot bring the mob to justice unless you are willing to devote a significant amount of time and money to sophisticated, long-term, proactive investigations that may, in the end, fail to reach any conclusive results." KROGER, CONVICTIONS, *supra* note 1, at 139-140.

filing RICO charges such as “prejudicial spillover,”<sup>58</sup> a product of the more permissive joinder rules in RICO prosecutions.<sup>59</sup> Nevertheless, these tactical advantages pale in comparison to the “pot of treble damages gold” at the end of the civil RICO rainbow.

## 2. *Narrow Judicial Construction*

A second approach would be for district courts to construe the provisions of RICO more narrowly in an attempt to ensure that RICO is used legitimately against actual criminal organizations.<sup>60</sup>

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58. Kroger described “prejudicial spillover” as follows:

In any criminal investigation against multiple targets, your proof is inevitably going to be strong against some defendants and weak against others. If you have to try each defendant separately, you win the strong cases and lose the weak ones. If, however, you can put together all the defendants in one trial, the jury will have a tough time keeping the defendants and evidence clear and separate in their minds. Over the length of the trial, the strong proof against some defendants will “spill over” and “infect” the defendants against whom your evidence is weak, and this gives you a very good chance of running the table—of convicting the whole bunch.

*Id.* at 216.

59. The Federal Rules of Criminal Procedure only allow prosecutors to join multiple defendants under the same indictment if “they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions.” FED. R. CRIM. P. 8(b). Moreover, the Rules only allow multiple offenses to be joined in one indictment when the offenses “are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.” FED. R. CRIM. P. 8(a). However, if RICO is charged, then multiple (seemingly unrelated) crimes or defendants can be joined as parts of the overarching enterprise. Kroger recalled one such joinder: “In a case filed in 2000 against Colombo boss Alphonse Persico and his underlings . . . I combined in one indictment eleven defendants and a dozen different crimes: loan-sharking, money laundering, three separate extortion schemes, illegal gambling, securities fraud, telecommunications fraud, and marijuana and Ecstasy dealing.” KROGER, CONVICTIONS, *supra* note 1, at 216.

60. An example of such narrow construction can be found in the Second Circuit’s decision in *Sedima v. Imrex, Co.*, 741 F.2d 482 (2d Cir. 1984). The Second Circuit in *Sedima* interpreted the injury element of the civil statute as requiring “that the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.” *Id.* at 496. This narrow interpretation of the injury element was rejected by the Supreme Court which emphasized that “[t]he [circuit] court’s statement that the plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological.” *Sedima v. Imrex, Co.*, 473 U.S. 479, 494 (1985).

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The flaw in that option is that such construction directly contradicts the explicit mandate levied by two fairly prominent institutions located in our nation's capitol: Congress and the Supreme Court. Congress, when passing RICO in 1970, specified that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."<sup>61</sup> The Supreme Court reiterated that a "less restrictive reading [of RICO] is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly."<sup>62</sup> Moreover, the Court in *Sedima v. Imrex, Co.* elaborated that a liberal construction of RICO is even more appropriate in civil suits than it is in criminal prosecutions.<sup>63</sup> While a narrow construction may be most attractive, it would seemingly require congressional approval.

### 3. *Repeal*

A third, more draconian solution may be to simply repeal the civil RICO statute or, at the very least, the treble damages provision contained therein. Currently, thirty-six states (and Puerto Rico) have statutes criminalizing organized crime<sup>64</sup> and, of

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61. Racketeer Influenced and Corrupt Organizations Act, ch. 96, sec. 1961, § 904(a), 84 Stat. 947 (1970).

62. *Sedima*, 473 U.S. at 497; *see also* *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008) ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.")

63. *Sedima*, 473 U.S. at 497 ("The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity.")

64. ARIZ. REV. STAT. ANN. § 13-2308 (2001); ARK. CODE ANN. § 5-74-104 (1993); CAL. PENAL CODE § 186.3 (West 1999); COLO. REV. STAT. § 18-17-104 (2008); CONN. GEN. STAT. ANN. § 53-395 (West 2007); DEL. CODE ANN. tit. 11, § 1503 (2007); FLA. STAT. ANN. § 895.03 (West 2000); GA. CODE ANN. § 16-4-4 (2011); HAW. REV. STAT. ANN. § 842-2 (LexisNexis 2007); IDAHO CODE ANN. § 18-7804 (2004); 725 ILL. COMP. STAT. ANN. 175/4 (LexisNexis 2000); IND. CODE ANN. § 35-45-6-2 (West 2012); IOWA CODE ANN. § 706A.2 (West 1999); KY. REV. STAT. ANN. § 506.120 (LexisNexis 2009); LA. REV. STAT. ANN. § 15:1353 (2005); MICH. COMP. LAWS. ANN. § 750.159i (West 2004); MINN. STAT. ANN. § 609.903 (West 2003); MISS. CODE ANN. § 97-43-5 (West 1999); NEB. REV. STAT. § 28-1355 (2009) <http://nebraskalegislature.gov/laws/statutes>; NEV. REV. STAT. ANN. § 207.400 (LexisNexis 2006 & Supp. 2011) (effective October 1, 2009); N.J. STAT. ANN. § 2C:41-2 (West 2005); N.M. STAT. ANN. § 30-42-4 (2004); N.Y. PENAL LAW § 460.20 (McKinney 2008); N.C. GEN. STAT. § 75D-4 (2011); N.D. CENT. CODE § 12.1-06.1-02 (1997); OHIO REV. CODE ANN. § 2923.32(A) (West 2006 & Supp. 2012) (effective Sept. 30, 2011); OKLA. STAT. tit. 22, § 1403 (2003); OR. REV. STAT. ANN. § 166.720 (West 2011); 18 PA.

those thirty-seven jurisdictions, only twenty-one specifically provide for a private cause of action under that statute.<sup>65</sup> Moreover, several of the states that do provide for a civil RICO cause of action, have eschewed the treble damages provision in favor of more modest damage calculations.<sup>66</sup> While not all of the states are models of RICO restraint,<sup>67</sup> these state statutes do

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CONS. STAT. ANN. § 911(b) (West 1998); R.I. GEN. LAWS § 7-15-2 (1999); TENN. CODE ANN. § 39-12-204 (2006); TEX. PENAL CODE ANN. § 71.02 (West 2011); UTAH CODE ANN. § 76-10-1603 (LexisNexis 2008); VA. CODE ANN. § 18.2-514 (2009); WASH. REV. CODE ANN. § 9A.82.060 (West 2009); WIS. STAT. ANN. § 946.83 (West 2005); P.R. LAWS ANN. tit. 25, § 971b (2008).

65. ARIZ. REV. STAT. ANN. § 13-2314.04(A) (2001); COLO. REV. STAT. § 18-17-106(7) (2008); DEL. CODE ANN. tit. 11, § 1505(c) (2007); GA. CODE ANN. § 16-14-6(c) (2011); HAW. REV. STAT. ANN. § 842-8(c) (LexisNexis 2007); IDAHO CODE ANN. § 18-7805(A) (2004); IOWA CODE ANN. § 706A.3(7) (West 1999) LA. REV. STAT. ANN. § 15:1356(E) (2005); MISS. CODE ANN. § 97-43-9(6) (West 1999); NEV. REV. STAT. ANN. § 207.470 (LexisNexis 2006); N.J. STAT. ANN. § 2C:41-4(c) (West 2005); N.M. STAT. ANN. § 30-42-6(A) (2004); N.C. GEN. STAT. § 75D-8(c) (2011); N.D. CENT. CODE § 12.1-06.1-05(1) (1997); OHIO REV. CODE ANN. § 2923.34(F) (West 2006 & Supp. 2012) (effective July 1, 2007); OR. REV. STAT. ANN. § 166.725(7)(a) (West 1990); R.I. GEN. LAWS § 7-15-4(c) (1999); UTAH CODE ANN. § 76-10-1605(1) (LexisNexis 2008); WASH. REV. CODE ANN. § 9A.82.100(1)(a) (West 2009); WIS. STAT. ANN. § 946.87(4) (West 2005); P.R. LAWS ANN. tit. 25, § 971h(d) (2008).

66. Hawaii's civil RICO statute decrees that "[a]ny person injured in the person's business or property by reason of a violation of this chapter may sue therefor in any appropriate court and *shall recover the damages the person sustains* and the cost of the suit, including reasonable attorney's fee." HAW. REV. STAT. ANN. § 842-8(c) (LexisNexis 2007) (emphasis added). Similarly, Washington's damages provision states that "[a]n action for damages filed by or on behalf of an injured person, the state, or the county *shall be for the recovery of damages* and the costs of the suit, including reasonable investigative and attorney's fees." WASH. REV. CODE ANN. § 9A.82.100(1)(c) (West 2009) (emphasis added). Moreover, Utah's civil RICO statute only allows for double recovery: "A person injured in his person, business, or property by a person engaged in conduct forbidden by any provision of Section 76-10-1603 may sue in an appropriate district court and *recover twice the damages he sustains*." UTAH CODE ANN. § 76-10-1605(1) (LexisNexis 2008) (emphasis added). Likewise, Wisconsin's civil RICO statute provides: "Any person who is injured by reason of any violation of § 946.83 or § 946.85 *has a cause of action for 2 times the actual damages sustained*, and, when appropriate, punitive damages." WIS. STAT. ANN. § 946.87(4) (West 2005) (emphasis added). On the other hand, the Wisconsin statute allows punitive damages to be recovered, as well, which may, depending on the outrageousness of the defendant's conduct, result in far greater awards than treble damage could produce.

67. Mississippi has adopted a damage provision that allows RICO plaintiffs to recover both treble damages as well as punitive damages. MISS.

indicate that many legislatures have found it possible to combat organized crime either without private civil statutes or without the treble damages provisions.<sup>68</sup>

However, despite the aforementioned success that federal RICO has had in reducing the threat that organized crime posed three decades ago, there still remains many legitimate organized crime threats to our country today which justify the need for sweeping federal RICO statutes. A 2010 report from the Congressional Research Service stated that “[o]rganized crime activities across the globe do not appear to be waning, and the National Intelligence Council has estimated that by 2025, the ‘relative power’ of criminal networks will [have] rise[n], and some countries could even be taken over and run by these networks.”<sup>69</sup> While individual states may be capable of keeping organized crime at bay without powerful civil remedies, the federal government may not be so fortunate. Setting aside the clichéd “baby with the bathwater” critique, repeal seems imprudent in the face of these continuing organized crime threats.

And so the struggle for a solution continues. But perhaps such close scrutiny of the history, purpose, and text of RICO has led to a bit of myopia. There are, of course, general rules which prohibit attorneys and their clients from abusing the law and treating baseless lawsuits as lottery tickets. Given that the above remedies are impractical, specifically prohibited, or otherwise flawed, can Rule 11 of the Federal Rules of Civil Procedure serve

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CODE ANN. § 97-43-9(6) (West 1999) (“Any person who is injured by reason of any violation of the provisions of this chapter shall have a cause of action against any person or enterprise convicted of engaging in activity in violation of this chapter for threefold the actual damages sustained and, when appropriate, punitive damages.”). Mississippi’s statute does, however, require a criminal conviction for the cause of action to accrue. *Id.*

68. Notice that none of the three states with the cities most traditionally associated with organized crime problems (Boston, New York City, and Chicago) have private civil provisions. Massachusetts, in fact, currently has no organized crime legislation and Illinois’s very narrow criminal statute only implicates organized crime syndicates engaging in narcotics trafficking. 724 ILL. COMP. STAT. ANN. 175/4 (LexisNexis 2000).

69. CONGRESSIONAL RESEARCH SERVICE, *supra* note 24, at 15. The report by the Congressional Research Service found that serious organized crime threats currently include Russian groups, such as the “Vory V Zakone,” Asian groups, such as the Yakuza, “the Big Circle,” and the Fuk Ching, and human smuggling rings in Albania (made popular by the 2008 major motion picture *Taken*). *Id.* at 17-20.

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as an adequate remedy to thwart the problem of RICO exploitation?

B. Deterrence under Rule 11

Rule 11 of the Federal Rules of Civil Procedure, in part, provides for the imposition of both pecuniary and non-pecuniary sanctions upon attorneys—and, on occasion, their clients—when those attorneys file papers with the court which are not supported by a reasonable inquiry<sup>70</sup> or otherwise lack merit. Specifically, Rule 11(b) mandates that, by signing a court document,<sup>71</sup> an attorney certifies that:

(1) [the document] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.<sup>72</sup>

Accordingly, plaintiffs' attorneys who use RICO to scare defendants into settling basic fraud cases or attempt tenuous RICO "Hail Marys" with their sights set on treble damages may

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70. Courts have adopted the Advisory Committee's determination of what amounts to a "reasonable inquiry:"

What constitutes reasonable inquiry may depend on such factors as how much time for investigation was available for the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656, 659 (M.D.N.C. 1985) (citing FED. R. CIV. P. 11 advisory committee's notes).

71. Rule 11(a) requires that every document filed with the court be signed.

72. FED. R. CIV. P. 11(b)(1)-(4).

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run afoul of Rule 11's requirements.<sup>73</sup> The Supreme Court has recognized "that the central purpose of Rule 11 is to deter baseless filings in District Court."<sup>74</sup> More specifically, the 1983 Advisory Committee Notes recognize that the primary purpose of Rule 11 is to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."<sup>75</sup>

Rule 11 appears to be a perfect fit to help curb the misuse of RICO and, in fact, some circuits have already used Rule 11 to punish RICO litigants when their pleadings run astray of the Rule's standards.<sup>76</sup> More specifically, Rule 11(b)(1) and 11(b)(2) seem the most helpful tools to deter plaintiffs from filing

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73. Notably, these attorneys may also run afoul of the rules of professional conduct. Specifically, the language of Model Rule of Professional Conduct 3.1 is strikingly similar to that used in Rule 11: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL CODE OF PROF'L CONDUCT R. 3.1. However, there are a few key differences between the functioning of the rules of professional conduct and Rule 11:

Rule 3.1 and FRCP 11 articulate similar standards, but there are important distinctions between them. . . . Violation of Rule 3.1 can result in bar disciplinary action against an attorney. A violation of FRCP 11 is punished not by the state bar but the judge in the civil action, and it can result in nonmonetary directives or monetary sanctions against a lawyer or a party. . . . FRCP 11 has a "safe harbor" provision not found in Rule 3.1. If an opposing party makes a motion complaining that a lawyer has violated FRCP 11, the lawyer may withdraw the allegedly frivolous pleading within 21 days after opposing counsel's motion and suffer no sanction other than having to pay the attorneys' fees that the opposing party incurred for making the motion.

LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 602-03 (2008) [hereinafter LERMAN, *ETHICAL PROBLEMS*].

74. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (U.S. 1990).

75. FED. R. CIV. P. 11 advisory committee's note.

76. *See Brandt v. Shal Associates*, 960 F.2d 640 (7th Cir. 1992) (affirming nearly \$450,000 in Rule 11 sanctions after the plaintiff's attorney had filed a civil RICO complaint which failed to allege any pattern of racketeering or fraudulent conduct required to sustain a civil RICO charge); *see also Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991) (affirming over \$1 million in attorney's fees and costs ordered by the district court after the court found that the RICO plaintiffs had no evidence of proximate cause to support their claim); *see also O'Ferral v. Trebol Motors Corp.*, 45 F.3d 561 (1st Cir. 1995) (affirming nearly \$12,000 in Rule 11 sanctions after plaintiffs filed a trumped up RICO complaint based on a "garden variety consumer deception" fact pattern).

illegitimate RICO claims.<sup>77</sup> For instance, if Feld and its attorneys are alleging RICO for the purposes of publicly embarrassing the animal rights groups, scaring them into quick settlement, and/or making a grab for treble damages without any legitimate legal justification, Rule 11(b)(1) and (b)(2) would represent avenues of viable recourse for both the defendants and the court.<sup>78</sup> Unfortunately, Rule 11 is not without its own limitations. Specifically, there are four idiosyncrasies within the language or application of Rule 11 which, while certainly not fatal to its ultimate effectiveness, will limit the efficacy of the Rule as a deterrent against civil RICO misuse.<sup>79</sup>

1. *Finding Refuge in a “Safe Harbor”*

Rule 11 contains a “safe harbor” provision which requires litigants, prior to filing a Rule 11 motion for sanctions with the court, to present their opponents with the basis for the motion and to allow the opponent a twenty-one-day period to withdraw or

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77. For the most part, abuses of RICO do not stem from factual lies or exaggerations by the plaintiffs, but rather from plaintiffs attempting to stretch the RICO laws so that their facts fall within its purview. For instance, Feld has not (to the author’s knowledge) made any false factual statements or denials. The alleged malfeasance arises from their untenable application of the law. Therefore, Rules (11)(b)(3) and 11(b)(4), which punish parties for unsupported factual contentions, would not be the most helpful tools to correct the misuse.

78. The irony of Rule 11 being discussed in the context of the *Feld Entertainment* litigation is that the activists’ scheme was certainly sanctionable under Rule 11. Of course, Rule 11 does not provide for treble damages.

79. The following critiques focus on Rule 11’s specific application to RICO. Rule 11 has been subject to other general critiques:

[S]ome asserted that the Rule has had a “chilling effect” on advocacy, particularly on the ability of counsel to advance novel theories of recovery or legal contentions. Others asserted that the Rule had a disproportionate impact on plaintiffs’ counsel, particularly in civil rights litigation. Some commentators criticized the Rule as generating a veritable “cottage industry” of sanctions practice, spawning satellite litigation that was encouraged by the Rule’s provision, which authorized litigants to recover attorneys’ fees for pursuing sanctions motions. Others expressed concern that the Rule reduced civility among counsel.

Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1010 (1999) [hereinafter *Second Look*].

otherwise cure the contested pleading.<sup>80</sup> The goal of the safe harbor provision, added during the 1993 Amendments, has been recognized as promoting a “civility among attorneys and between bench and bar [that is] furthered by having attorneys communicate with each other with an eye toward potentially resolving their differences prior to court involvement.”<sup>81</sup> However, this provision has also been animadverted as allowing “litigants to be more cavalier about their fact investigations and legal research because they [can] withdraw a challenged written representation with impunity.”<sup>82</sup>

Accordingly, the safe harbor provision could allow surreptitious RICO plaintiffs to “test the waters” by filing a fraudulent RICO complaint and waiting to see how the defendant responds, knowing that they will always have the option of curing the “error” later without incurring any liability. On the other hand, there is evidence indicating that this provision has not had such a harmful impact on the efficacy of Rule 11. In June 1995, two years after the safe harbor provision had been enacted, the Federal Judicial Center conducted a study revealing that, of the 148 federal judges surveyed, only thirty-nine percent responded that the safe harbor provision had decreased the amount of Rule 11 filings.<sup>83</sup> Moreover, the safe harbor provision only shields litigants from motions made by opposing parties, and, therefore, does not protect litigants against courts imposing sanctions *sua sponte* and pursuant to Rule 11(c)(3).<sup>84</sup> Finally, while the safe

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80. Specifically, Rule 11(c)(2) provides:

A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected *within 21 days after service* or within another time the court sets.

FED. R. CIV. P. 11(c)(2) (emphasis added).

81. *Ridder v. City of Springfield*, 109 F.3d 288, 294 (6th Cir. 1997).

82. *Second Look*, *supra* note 79, at 1023. “In 2005, the House of Representatives approved H.R. 420, which would have eliminated the safe harbor provision from FRCP 11 . . . The bill was not approved by the Senate and did not become law.” LERMAN, *ETHICAL PROBLEMS*, *supra* note 73, at 603 n.15.

83. JOHN SHAPARD, *FED. JUD. CTR. REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 4* (1995).

84. *Second Look*, *supra* note 79, at 1021 (“[T]he safe harbor provision is a

harbor provision hinders the Rule's effectiveness in stopping frivolous claims from being filed, the provision does not stop Rule 11 from serving the ultimate goal: extracting frivolous civil RICO claims from the (already congested) judicial process. Whether these claims are never filed in the first place or they are withdrawn after being filed, Rule 11 will still ensure that they never come before a jury.

## 2. *Rewarding the Guilty*

A second concern, given the compensatory nature of Rule 11 sanctions, is whether defendants in RICO cases actually deserve to be compensated.<sup>85</sup> Courts have recognized that, while deterrence is certainly the primary purpose behind Rule 11 sanctions, the sanctions can also compensate the defendants through the imposition of attorney's fees.<sup>86</sup> However, in many cases involving potential RICO abuse, the defendants (while not as guilty as the plaintiffs allege) are far from innocent parties deserving of compensation. By way of example, consider the defendants in the *Feld* litigation; while they may not be racketeers, they still dragged a federal court through almost nine years of expensive litigation<sup>87</sup> based solely on perjured testimony

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limited refuge for the alleged violator. Thus, although the amended Rule may insulate an attorney from opposing counsel's attack, the Rule will not necessarily preclude the court from imposing sanctions." Rule 11(c)(3) allows the court, on its own initiative, to require any party (regardless of representation) to justify why a certain filing has not violated the provisions of Rule 11(b)(1)-(4). Rule 11(c)(5)(B) allows the court to sanction the party after the court has granted that party the opportunity to be heard on the matter.

85. Rule 11(c)(4) allows courts to order "payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

86. *Brown v. Fed'n of State Medical Boards*, 830 F.2d 1429, 1437 (7th Cir. 1987) ("[O]ne of the goals of Rule 11 is to impose costs on the careless or reckless lawyer. Compensation is one thrust of Rule 11.").

87. U.S. District Judge Emmet Sullivan noted in his 2009 opinion finding in favor of *Feld*:

To say that this case has involved highly litigious, complex, and protracted discovery and motions practice is to profoundly understate the history of this case. . . . Significant judicial resources were expended, particularly during the more than five years of discovery in this matter, in order to advance this litigation to trial. *ASPCA v. Feld, Inc.*, 677 F. Supp. 2d 55, 59 n.5 (D.D.C. 2009).

for which they paid nearly \$200,000. Does that conduct deserve to be compensated? Should those defendants not be required to pay their own attorney's fees—per the “American Rule”<sup>88</sup>—given that they were the ones who started this entire litigation in 2000?

Feld is certainly not an isolated example; many civil RICO cases involve defendants who have committed fraud,<sup>89</sup> insider trading,<sup>90</sup> and a slew of other crimes, and to compensate their malfeasance seems unfair. On the other hand, if the plaintiffs did engage in a bad faith attempt<sup>91</sup> to exploit RICO, in an effort to fraudulently obtain (among other things) attorney's fees from the defendants, then a logical (even symmetrical) punishment for that bad faith attempt may in fact be attorney's fees. Moreover, the Advisory Committee addressed this concern, during the 1993 Amendments to Rule 11, when it stated that “since the purpose of Rule 11 is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into the court as a penalty.”<sup>92</sup> Ultimately, the court, as previously discussed, has very broad discretion in not only the amount of sanctions but also to whom the sanctions are to be paid<sup>93</sup> and, therefore, the compensation issue can be fairly easily resolved by district courts requiring that the sanctions be paid to the court and not to the defendants.

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88. *See* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (“In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.”).

89. *See* *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254 (3d Cir. 2007) (RICO claim based on insurance company's discontinuing plaintiff's insurance benefits after plaintiff suffered a heart attack as part of a larger scheme to reduce the company's more expensive payouts).

90. *See* *Commercial Union Assurance Co. v. Milken*, 17 F.3d 608 (2d Cir. 1994) (RICO claim filed against Michael Milken and his brother Lowell arising out of their, now infamous, insider trading scheme).

91. Notably, the bad faith exception to the American Rule regarding attorney's fees may apply in many scenarios where RICO has been abused by the plaintiff. *See* *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 n.6 (1986) (“[C]ourts traditionally have recognized three other exceptions to the ‘American Rule’ . . . courts are empowered to award fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”).

92. FED. R. CIV. P. 11 advisory committee's note.

93. FED. R. CIV. P. 11(c)(4) (“The sanction may include . . . an order to pay a penalty into court.”).

### 3. *Rule 11(c)(5)(A) and Problems with Deterrence*

A third problem with attempting to use Rule 11 to control RICO plaintiffs stems from Rule 11(c)(5)(A), which states in part that “[t]he court must not impose a monetary sanction against a represented party for violating Rule 11(b)(2).”<sup>94</sup> Presumably, the rationale behind Rule 11(c)(5)(A) is that parties’ legal arguments are within the authority and expertise of their attorneys—this is why they are hired—so any misconduct or negligence regarding those legal arguments should fall solely upon the shoulders of those attorneys. Since Rule 11(c)(5)(A) prohibits the actual plaintiff from being financially punished by the courts for a Rule 11(b)(2) violation, it provides no deterrence for the clients not to push the line between tenable and untenable RICO claims. Of course, that party’s attorney is still subject to the Rule, but one could easily imagine that an aggressive client, offering one-third of its treble damages recovery (in Feld’s case, an estimated sixty million dollars), may be awfully difficult to rebuff.

On the other hand, courts have recognized that “[a]n attorney has a professional duty to dismiss a baseless motion or lawsuit, *even over client’s objection*, and to do so promptly on learning that the client’s position is without merit.”<sup>95</sup> If attorneys refuse to put their reputation (and wallets) on the line for their client’s frivolous legal claims then Rule 11 will remain an effective deterrent to RICO abuse, regardless of the Rule 11(c)(5)(A) exception.<sup>96</sup> Unfortunately, common experience suggests that there will always be an attorney willing to take such risks for a wealthy client.<sup>97</sup>

### 4. *Rule 11(b)(2)’s “Warranted by Existing Law” Standard*

Arguably the most troublesome problem in relying on Rule 11 to correct RICO exploitation arises out of the inherent difficulty of

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94. FED. R. CIV. P. 11(c)(5)(A). Recall that Rule 11(b)(2) prohibits the submission of documents that set forth legal contentions which are determined to be unwarranted by existing law or otherwise frivolous.

95. *Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 661 (M.D.N.C. 1985) (emphasis added).

96. Note that Rule 11(c)(5)(A) shields only represented parties. Accordingly, if a party moves forward *pro se* (possibly because no attorney will take their case) the Rule will provide no shield for those parties.

97. This truism is, of course, not limited to the legal profession.

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judging Rule 11(b)(2) violations given the numerous legal uncertainties within RICO jurisprudence.<sup>98</sup> Under Rule 11(b)(2), an attorney incurs liability if he makes “legal contentions [that are not] warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”<sup>99</sup> For instance, the Supreme Court has determined that the statute of limitations for a civil RICO claim will be four years.<sup>100</sup> Therefore, a plaintiff who argues that a ten-year-old RICO claim is still actionable could be sanctioned under 11(b)(2) as his argument would be frivolous in the face of clear Supreme Court precedent. The concern with RICO is that there are many areas where its requirements remain unclear, leaving courts to wonder when plaintiffs are making “unwarranted” legal arguments. Such areas include, but are not limited to, how RICO claims toll and accrue,<sup>101</sup> how long racketeering activity must last for it to become a “pattern” as required under Section 1962(c),<sup>102</sup> and how a plaintiff can establish that the members of an alleged RICO enterprise had a “common purpose” in conducting their

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98. The Second Circuit has warned that the “[m]ere lack of clarity in the general state of some areas of RICO law cannot shield every baseless RICO claim from rule 11 [sic] sanctions.” *O’Malley v. New York City Transit Auth.*, 896 F.2d 704, 709 (2d Cir. 1990). The court in *O’Malley* stated that “[o]nce a [Rule 11] violation is shown to exist, the district court may not ignore the command of [Rule 11]: ‘sanctions shall be imposed.’” *Id.* However, that decision was superseded by the aforementioned 1993 Amendments to Rule 11. See *Hoatson v. N.Y. Archdiocese*, No. 05 Civ. 10467(PAC), 2007 WL 431098, at \*9 n.13 (S.D.N.Y. Feb. 8, 2007) (“The portion of *O’Malley* making sanctions mandatory upon finding a violation of Rule 11 was overruled by the 1993 amendment to Rule 11, leaving the imposition of sanctions within the district court’s discretion.”).

99. FED. R. CIV. P. 11(b)(2).

100. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987).

101. See generally, Carli McNeill, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85(3) NOTRE DAME L. REV. 1231 (2010) (discussing the United States Supreme Court’s jurisprudence regarding accrual and tolling theory as applied to civil RICO’s four year statute of limitations).

102. Contrast *Tabas v. Tabas*, 47 F.3d 1280, 1293 (3d Cir. 1995) (“[T]his court has faced the question of continued racketeering activity in several cases, each time finding that conduct lasting no more than twelve months did not meet the standard.”), with *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 242 (2d Cir. 1999) (“[T]his Court has never held a period of less than two years to constitute a ‘substantial period of time’ [for RICO].”).

crimes.<sup>103</sup> Given the numerous and varied interpretations of the “common purpose” requirement, all of which have been argued before and adopted by different courts, the following discussion will focus on this area of discrepancy and how these divergent views can confuse a court’s Rule 11(b)(2) determination.

*An (Un)Common Purpose.*

While the RICO statutes are silent as to any “common purpose” requirement,<sup>104</sup> the Supreme Court has engrafted that language onto the enterprise element. In 1981, the Court decided *United States v. Turkette* and reiterated that the federal government, in a RICO prosecution, must prove that the defendants were all involved in a criminal enterprise.<sup>105</sup> The Court further stated that this criminal enterprise does not have to be a legal entity, but can merely constitute “a group of persons associated together for a *common purpose* of engaging in a course of conduct.”<sup>106</sup> In doing so, the Court took a rare and, for many, welcome step towards making RICO allegations more difficult to

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103. A unique aspect of RICO violations is the requirement that a plaintiff or prosecutor prove that the enterprise acted with a common purpose when committing its crimes. *United States v. Turkette*, 452 U.S. 576, 583 (1981). The majority of crimes committed in the United States are ones which, by their definition, can be committed by one person. Over 71 percent of the 13 million arrests reported in 2010 involved what might be referred to as “solo crimes.” Excluded from those crimes were prostitution and gambling, given that those crimes require at least two people. Also excluded was the “all other crimes” category given the uncertainty regarding what crimes fall into that group. FEDERAL BUREAU OF INVESTIGATION, 2010 UNIFORM CRIME REPORT, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl29.xls> (last visited Aug. 30, 2012). Certainly all of these “solo crimes” are capable of being transformed into a group crime based on the willingness of other parties; but it is difficult in many cases to determine the exact reason why criminals collaborate to commit crime. Fortunately for prosecutors in the average case, the reason why individuals come together to commit crime is usually not relevant; however, in RICO cases, the individual’s purpose for joining the criminal enterprise is not only relevant—it must be proven as an element of the crime.

104. 18 U.S.C. §§ 1961-1968 (2006).

105. 452 U.S. at 580 (“[18 U.S.C. §] 1962(c) makes it unlawful ‘for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.’”).

106. *Id.* at 583. (emphasis added).

prove; however it also took a not-so-rare and, for many judges and litigators, not-so-welcome step in making an already murky area of law more opaque. Just how common does each participant's purpose have to be for the group to qualify as an enterprise?

The D.C. Circuit, where Feld's complaint was filed, has been fairly silent on this issue. Most recently, in *United States v. Richardson*, the court merely affirmed the district court's ruling that the defendants' alleged common purpose of "obtain[ing] money or other property by robbery" was sufficient to sustain a RICO conviction.<sup>107</sup> The court, however, refrained from any further discussion regarding a specific common purpose standard that it would apply in future cases.<sup>108</sup> This vacuum opens the door for an array of "nonfrivolous" arguments regarding what the applicable standard should be.

There are at least three available arguments regarding how litigants may satisfy *Turkette's* common purpose requirement. The Second Circuit has taken the strictest view of the common purpose requirement, mandating that "the individuals must share a common purpose to engage in a particular *fraudulent* course of conduct and work together to achieve such purposes."<sup>109</sup> While the Seventh Circuit eschews any requirement that the common purpose be fraudulent, their standard is similarly high, requiring that all of the parties to the enterprise have the exact same purpose.<sup>110</sup> Lastly, the Eleventh Circuit has, by far, the most lax common purpose jurisprudence. This circuit merely requires that the parties to the alleged enterprise have "the same or similar objective."<sup>111</sup> The Eleventh Circuit has, in fact, gone so far to say

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107. 167 F.3d 621, 625 (D.C. Cir. 1999).

108. *Id.* at 626.

109. *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d. Cir. 2004) ("Plaintiffs have [ ] failed to allege . . . each participant's role in the alleged course of fraudulent or illegal conduct.").

110. *Baker v. IBP, Inc.*, 357 F.3d 685, 691-92 (7th Cir. 2004). In *Baker*, the Seventh Circuit rejected the plaintiffs' RICO allegations because, *inter alia*, one defendant's purpose for committing the crimes was to pay its employees exceedingly low wages, while another's purpose was to help the first in an effort to be paid for its services, and yet a third defendant had the purpose of assisting the first merely because they were members of the same ethnic group. *Id.* Judge Easterbrook found these purposes to be fatally "divergent" and, therefore, the group did not satisfy the common purpose requirement. *Id.*

111. *Williams v. Mohawk Industries*, 465 F.3d 1277, 1285-86 (11th Cir.

that the common purpose element may be satisfied if all of the parties have the common goal of making money.<sup>112</sup>

Contrasting the Eleventh Circuit's interpretation with the Seventh Circuit's interpretation makes abundantly clear just how unclear this common purpose requirement is. Add the Second Circuit's "fraudulent" language and determining whether a particular plaintiff's common purpose argument is "warranted by existing law" becomes a very difficult task.<sup>113</sup> As the common purpose debate is but one of many areas within RICO jurisprudence open to multiple interpretations, courts must find a way to enhance their ability to distinguish between frivolous and legitimate arguments.

*Argument Identification and Candor with the Court.*

One option to aid courts in determining whether a particular argument for extending, modifying, or reversing the law is frivolous, is mandatory "argument identification." One circuit court described the theory and function of argument identification

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2006). In a case with facts more or less identical to those in *Baker*—employer and other agencies partner together to hire and harbor illegal immigrants intending to lower labor costs—the Eleventh Circuit, unlike the Seventh Circuit, found that the common purpose element had been met. The Eleventh Circuit explicitly rejected the Seventh's common purpose formula and stated:

In our circuit, however, there has never been any requirement that the "common purpose" of the enterprise be the sole purpose of each and every member of the enterprise. In fact, it may often be the case that different members of a RICO enterprise will enjoy different benefits from the commission of predicate acts. This fact, however, is insufficient to defeat a civil RICO claim. Rather, all that is required is a common purpose.

*Id.* at 1286.

112. *United States v. Church*, 955 F.2d 688, 698 (11th Cir. 1992). This statement is remarkable given that financial gain presumably ranks fairly high on the list of reasons why people commit crimes and, therefore, the Eleventh Circuit has all but eliminated the common purpose requirement.

113. In the *Feld* litigation for example, there are three distinct groups of defendants—the activists, the attorneys, and Tom Rider—each of whom had a specific, arguably separate, purpose for joining the enterprise. The activist groups joined for the fundraising boost, the attorneys joined for the legal fees, and Rider joined for the bribe money. Under the Second and Seventh Circuits' narrow interpretations, these divergent purposes would likely not suffice, however under the Eleventh Circuit's lax approach the parties' general goal of financial gain would be sufficient.

as follows:

[T]he question is not whether the law exists, but whether it pertains in the jurisdiction in which the law is being asserted. Jurisdiction A might recognize the tort of “XYZ” which Jurisdiction B does not. A lawyer in B could not in good faith submit a complaint based on an XYZ cause of action asserting that XYZ is the existing law merely because XYZ is a legitimate cause of action in A. Instead, the lawyer would be required to inform the court that she recognized that XYZ was not yet a cognizable action in B but that she believed that the law of B should be extended, modified, or reversed to incorporate the tort of XYZ. Only then would the lawyer have satisfied her obligations under Rule 11.<sup>114</sup>

Such argument identification would require Feld’s attorneys, who would likely advocate for the Eleventh Circuit’s lax common purpose standard, to inform the district court of the vacuum in this area of the D.C. Circuit’s RICO jurisprudence. Also, it would require them to explain reasons why, despite not being binding authority, the court should adopt the Eleventh Circuit’s standard. Similarly, the defendants’ attorneys, who would likely suggest the Seventh Circuit’s strict common purpose standard be applied, would be compelled to do the same. In this way, the D.C. District Court would be fully apprised of the relevant law and, thus, be in the best position to make an informed decision regarding which standard would be adopted.

Mandatory argument identification was considered by the Advisory Committee in the Spring of 1991 while the committee drafted the 1993 Amendments to Rule 11.<sup>115</sup> The Spring 1991 draft of Rule 11 stated, in part, that a paper must be “warranted by existing law or, *if specifically identified as such*,<sup>116</sup> by a

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114. *De Sisto College v. Line*, 888 F.2d 755, 766 (11th Cir. 1989), *cert. denied*, 495 U.S. 952 (1990).

115. William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 31 (1994) [hereinafter *Entering a New Era*].

116. *Id.* Similar language had already been adopted in the Rule 11(b)(3) and 11(b)(4) provisions which require that:

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials

nonfrivolous argument for the extension, modification, or reversal of existing law.”<sup>117</sup> Prior to this draft version of Rule 11, the circuits had been split as to whether argument identification was required.<sup>118</sup> Ultimately, the argument identification clause of the 1991 draft was eliminated from the final version of the 1993 Amendments, but the committee notes to those amendments do state that: “Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under [Rule 11].”<sup>119</sup>

Unfortunately, these committee notes leave the issue of argument identification up to the courts’ discretion. It would seem prudent, however, in an area of law so saturated with the “XYZ” jurisdictional differences mentioned at the start of this discussion, that courts should lean towards requiring RICO attorneys to be particularly forthcoming in contrasting those arguments which are soundly supported by existing law from those which are attempts to modify or extend existing law. Such a requirement would alleviate many of the concerns belying a heavy reliance on Rule 11(b)(2) as a regulator of RICO misuse.<sup>120</sup>

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of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

117. *Entering a New Era*, *supra* note 115 (quoting GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 204 (2d ed. 1994)).

118. *Contrast* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986) (holding that argument identification would create “a conflict between a lawyer’s duty to zealously represent his client . . . and the lawyer’s own interest in avoiding rebuke”) and *Mary Ann Pensiero v. Lingle*, 847 F.2d 90, 96 (3d Cir. 1988) (“[C]ounsel may not be found to have violated Rule 11 merely for failing to ‘label’ the argument advanced.”), *with* *Maciosek v. Blue Cross & Blue Shield United*, 930 F.2d 536, 542 (7th Cir. 1991) (“[W]e reiterate that [plaintiff’s attorney’s] failure to discuss or distinguish existing law warranted sanctions.”).

119. *Entering a New Era*, *supra* note 115 (quoting FED. R. CIV. P. 11 advisory committee’s notes).

120. Moreover, Rule 3.3(a)(2) of the Model Rules of Professional Conduct states that: “A lawyer shall not knowingly: . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” However, as discussed *supra* in note 73, there are certain shortcomings to the professional conduct rules’ functionality as a deterrent. Moreover, Rule 3.3(a)(2) assumes the presence of directly adverse, binding authority and does not contemplate such diverging, persuasive authorities

## C. Recommendation

Quite clearly, as the above discussion indicates, there are certain limitations on Rule 11 as an effective deterrent to the abuses set out in Part III. But, despite those limitations, Rule 11 retains one undeniable strength: vast discretionary breadth for federal district courts.<sup>121</sup> Rule 11(c)(4) states that “[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”<sup>122</sup> Moreover, district court decisions to grant Rule 11 sanctions receive an exceeding amount of appellate deference.<sup>123</sup> Courts’ broad discretion to sanction offenders serves

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that courts are frequently left to struggle with in many areas of RICO law.

121. In *Crank v. Crank*, one Texas district judge, in response to an attorney’s violations of Rule 11(b)(2) and 11(b)(3), mandated the following:

[W]ithin 30 days of the date this memorandum opinion and order is filed, [the offending attorney] shall submit to the defendants, through their counsel of record, and to their counsel of record, letters of apology for asserting claims that the court has held above are sanctionable. The letters shall not contain qualifying or conditional language.

No. CIV.A. 3:96-CV-1984-., 1998 WL 713273, at \*6 (N.D. Tex. Oct. 8, 1998). The district judge went even further to specify that phrases such as “[b]ecause the court has required that I do so, I am apologizing” and “[a]lthough I disagree with the court’s decision, I am apologizing” as the type of “qualifying or conditional language” that would violate the order. *Id.* at \*6 n.5.

122. FED. R. CIV. P. 11(c)(4). While the rule specifies no particular factors for courts to take into account when fashioning a remedy, the Advisory Committee Notes contemplate the following considerations:

Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants.

FED. R. CIV. P. 11 advisory committee’s notes.

123. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (“[A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court’s Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”).

as an ideal balance to Congress and Supreme Court mandates for broad construction of the RICO statute. For instance, if the D.C. District Court in the *Feld* litigation decided to saddle Feld and their attorneys with even a tenth of the treble damages that they have requested<sup>124</sup>—assuming that is what the federal court found “sufficient to deter future violations”—one could imagine that plaintiff’s attorneys across the country would take far more care in evaluating the legitimacy of their client’s RICO claims before filing suit. Such a sanction would send the message that, while this country certainly needs litigants to penalize bona fide organized criminal syndicates, fraudulent exploitation of that need will be met with its own penalties.

The position advocated by this Comment is not that Rule 11 will completely thwart all RICO malfeasance, but rather that when a district court is faced with a brazen misuse of RICO—as this author would suggest the *Feld* litigation presents—the court should utilize its expansive discretion in punishing the parties (attorneys and clients alike) responsible. Some courts have hesitated in using their broad Rule 11 discretion.<sup>125</sup> That is unfortunate.<sup>126</sup> One North Dakota district court, in denying a

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124. Recall that, while not specified in the complaint, Feld’s treble damages have been estimated at sixty million dollars.

125. “[A]ppellate courts have forcefully suggested that trial courts should consider which sanction ‘constitutes the least severe sanction that will adequately deter the undesirable conduct.’” *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1490 (8th Cir. 1994) (quoting *Pope v. Federal Express*, 974 F.2d 982, 985 (8th Cir. 1992)) (reducing the district court’s Rule 11 sanctions from approximately \$25,000 to less than \$9,000).

126. There are certainly good arguments to be made supporting courts’ reticence in ordering Rule 11 sanctions, especially with regards to parties’ arguments for extending or reversing existing law. One such argument has been articulated as follows:

The importance of permitting good faith arguments for outcomes that are inconsistent with existing law cannot be understated. If lawyers were not permitted to make such arguments, they could not urge changes in the common law and could not ask courts to correct erroneous or outdated precedents. The law would become frozen. Because ethical standards encourage American lawyers to challenge even recent precedents if they seem wrongly decided, courts, including the Supreme Court, can correct their own mistakes relatively quickly. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (statutes making it a crime for persons of the same sex to engage in private sexual activity violated the due process clause), *overruling Bowers v. Hardwick*, 478 U.S. 186 (1986) (because it was incorrectly

RICO defendant's motion for Rule 11(b)(1) and 11(b)(2) sanctions, commented that "both parties are big boys. They engaged in protracted, and often contumacious litigation. Each side used every arrow in their respective quiver."<sup>127</sup> While the circuit court admonished the district court for its "perfunctory generalized response," it ultimately affirmed the denial of Rule 11 sanctions given the extreme level of deference afforded to lower courts in such matters.<sup>128</sup> The district court's rationale was shortsighted and dangerous. Whether parties are experienced "big boys" or their litigation is lengthy<sup>129</sup> should be irrelevant, as the injury caused by RICO abuse is sustained by, not only the opposing party, but also by the courts. Courts should, in defense of their dockets and the legitimacy of the RICO statute, feel uninhibited, if not compelled, to order Rule 11 sanctions—when the limitations discussed above do not so preclude—against parties who misuse this important statute.

#### CONCLUSION

RICO has been, and continues to be, an invaluable tool in this country's war against organized crime. But there is no doubt that it is being abused. Feld Entertainment has provided an interesting and current example of how a legitimate fraud claim can be trumped up into an illegitimate RICO claim for treble damages. How can courts begin to counteract a sixty million dollar incentive to misuse RICO without destroying the civil

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decided).

LERMAN, *ETHICAL PROBLEMS*, *supra* note 73, at 600 n.7. However, because civil RICO litigation rarely, if ever, gives rise to weighty constitutional or civil rights issues, such reticence to punish tenuous legal arguments is less warranted. Moreover, since RICO remains, at its core, a statute aimed at punishing criminal behavior there is certainly an interest in keeping the law in that area stable to allow the citizenry to remain on notice as to what type of behavior will constitute a violation.

127. *Teamsters Nat'l Freight Indus. Negotiating Comm. ex rel. Teamsters Local Union Nos. 116, 120, 123, 346, & 544 v. MME, Inc.*, 116 F.3d 1241, 1242 (8th Cir. 1997).

128. *Id.* ("[W]e afford the judgment of the district court great deference. . . . [W]e [ ] find no abuse of discretion in the district court's denial of Rule 11 sanctions.").

129. One would imagine that litigation would be far less protracted—and in many cases nonexistent—if parties refrained from inventing bases for lawsuits.

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*A THREE RING CIRCUS*

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remedy for those who truly need it? The solution needs to be one that both preserves the purpose and functionality of the remedy for legitimate RICO claimants, while strongly discouraging frauds. Reliance on Rule 11 is a logical starting point. By exercising the broad discretion permitted under Rule 11, federal courts can and should levy harsh sanctions against fraudulent RICO claimants. Treble damages are a powerful carrot and, therefore, deterrence will only be accomplished with an equally powerful stick.