CIVIL RICO LITIGATION INVOLVING BANKS:
THE DEVELOPING CASE LAW

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I. INTRODUCTION

The recent proliferation of civil actions seeking treble damages and other relief under the Racketeer Influenced and Corrupt Organizations Act (RICO) has included numerous lawsuits involving banks. Since 1980, more than thirty civil RICO lawsuits, many seeking class action status, have been instituted by borrowers who claim that the defendant banks fraudulently misrepresented the "prime rate" of interest charged on loans and the manner in which such interest was calculated. Banks have also been involved as plaintiffs and defendants in a multitude of civil RICO actions alleging fraud in connection with a wide variety of other commercial transactions, including the purchase and sale of securities.

While there is a considerable body of commentary and analysis dealing generally with RICO's civil provisions, little attention has been focused on the particular impact of the statute on banks and

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1. RICO was enacted as title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1983)). Prior to 1980, there were only a few reported judicial opinions dealing with private civil RICO actions; today, there are at least 100.

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the banking community. It is imperative, however, that banks and their counsel be apprised of the potential uses and abuses of this federal civil remedy. When a bank has been injured by unlawful conduct, RICO may provide a potent treble damages remedy which is otherwise unavailable under either federal or state law. On the other hand, when a bank is sued for allegedly violating RICO, it must confront not only the possibility of a treble damages assessment but also the stigma resulting from allegations that it has engaged in “racketeering” activity. Moreover, when the RICO suit is brought as a class action, the bank’s exposure increases dramatically since it becomes potentially liable for treble damages to hundreds or even thousands of claimants.

The district courts have differed sharply in their constructions of the scope and applicability of RICO’s civil provisions, and the key issues are only now beginning to be addressed by the federal courts of appeals. As one of the original draftsmen of RICO has noted, it is possible to draw from the reported decisions “an opinion to support


any position.’’ Some courts have interpreted RICO narrowly and have imposed strict standing and causation requirements in an effort to prevent it from supplanting traditional statutory and common law remedies for fraud. Other courts, however, have rejected such limitations and have permitted civil RICO actions to proceed on the merits, even in the absence of evidence linking the defendant to ‘‘organized crime,’’ as that term is commonly understood.

The decisions rendered to date highlight the need for creative lawyering when representing banks in civil RICO litigation. The legal sufficiency of a RICO claim is frequently challenged by a motion to dismiss for failure to state a cause of action. As such, a plaintiff bank must anticipate the sophisticated defenses that have evolved, and will continue to develop, as jurists and litigants alike become attuned to the nuances and subtleties of the statute. Similarly, a defendant bank must be fully cognizant of those defenses and must be prepared to assert them decisively and promptly by appropriate preliminary motions. Also, when class action status is sought, the defendant bank should seek immediate discovery in order to defeat the class action entirely or at least narrow the scope of the purported class.

It is the purpose of this article to outline various actions involving banks brought pursuant to the RICO statute, as well as the courts' interpretations of that statute, so that litigators may more effectively initiate and defend RICO suits.

II. SYNOPSIS OF THE STATUTORY SCHEME

RICO is primarily a criminal statute aimed at curting the infiltration of business enterprises by organized crime.’ To facilitate this goal, Congress has provided ‘‘enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.’’ This comprehensive enforcement scheme includes criminal

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5. See Turkette, 452 U.S. at 591 (the ‘‘legislative history forcefully supports the view that the major purpose of Title IX [RICO] is to address the infiltration of legitimate business by organized crime’’); Russello, 104 S. Ct at 302 (‘‘[t]he legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots’’).
sanctions\textsuperscript{7} and civil remedies\textsuperscript{8} in actions brought by the federal government. Additionally, there is a private civil cause of action, section 1964(c), permitting any person who has been "injured in his business or property by reason of a violation of section 1962" of the statute to sue in federal court for treble damages, costs, and attorneys' fees.\textsuperscript{9}

A private civil litigant must plead that he was injured by the defendant's violation of section 1962, the substantive heart of RICO.\textsuperscript{10} Each of the seven constituent elements which comprise a section 1962 violation has been broadly defined by Congress and each must be alleged.\textsuperscript{11} They include: (1) a person (the defendant)\textsuperscript{12} (2) through the commission of two or more acts (3) constituting a pattern\textsuperscript{13} (4) of racketeering activity\textsuperscript{14} (5) directly or indirectly has invested in,\textsuperscript{15} acquired or main-

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\textsuperscript{10} \textit{Mass,} 719 F.2d at 5.

\textsuperscript{11} \textit{Id.} at 17.

\textsuperscript{12} The term "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1983).

\textsuperscript{13} A "pattern" of racketeering activity exists when two or more acts of racketeering activity occur within a ten-year period. \textit{Id.} at § 1961(5).

\textsuperscript{14} The term "racketeering activity" encompasses a wide variety of specifically enumerated state and federal criminal violations, including mail fraud, wire fraud, and fraud in the sale of securities, as well as murder, kidnapping, gambling, arson, bribery, extortion, and various other offenses. 18 U.S.C. § 1961(1) (1976 & Supp. V 1981). As one commentator has noted, "RICO's unanticipated potential to federalize common law fraud arises from the statute's inclusion of federal mail and wire fraud as possible predicate offenses." \textit{Judicial Restriction, supra} note 2, at 1104. For example, to establish a violation of the federal mail fraud statute, 18 U.S.C. § 1341, only a "scheme or artifice to defraud" and use of the mails in furtherance thereof must be shown. \textit{See United States v. Lebovitz,} 669 F.2d 894, 896 (3d Cir.), \textit{cert. denied,} 456 U.S. 929 (1982). "The concept of fraud in § 1341 is to be construed very broadly," \textit{United States v. States,} 488 F.2d 761, 764 (8th Cir. 1973), \textit{cert. denied,} 417 U.S. 909 (1974); and, "the parameters of the term 'scheme or artifice to defraud' are not limited to common law concepts of fraud or false pretenses," \textit{United States v. Kelly,} 507 F. Supp. 495, 498 (E.D. Pa. 1981).

\textsuperscript{15} 18 U.S.C. § 1962(a) (1983) states in pertinent part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

\textit{Id.}
tained an interest in\textsuperscript{16} or participated in,\textsuperscript{17} (6) an enterprise\textsuperscript{18} (7) the activities of which have affected interstate or foreign commerce.\textsuperscript{19}

RICO provides the private civil claimant with several distinct procedural, evidentiary, and remedial advantages. It creates an independent basis for federal jurisdiction which can be used to litigate pendent state law claims.\textsuperscript{20} It contains broad venue provisions permitting service on and jurisdiction over persons who might not otherwise be amenable to suit in state court or in federal diversity actions,\textsuperscript{21} and it has broad subpoena powers to compel the attendance of witnesses located in other judicial districts more than 100 miles from the court.

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\textsuperscript{16} 18 U.S.C. § 1962(b) (1983) states: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." \textit{Id.}

\textsuperscript{17} 18 U.S.C. § 1962(c) (1983) states: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

In addition, pursuant to 18 U.S.C. § 1962(d) (1983), it is unlawful for any person to conspire to violate subsections (a), (b), or (c) of § 1962. \textit{Id.}

\textsuperscript{18} An “enterprise” is defined as any “individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” \textit{Id.} at § 1961(4).

\textsuperscript{19} \textit{Mosco v. First Nat’l Bank of Atlanta}, 97 F.R.D. 683 (N.D. Ga. 1983), a prime rate overcharge case, the court retained federal jurisdiction over plaintiff’s pendent state law claims after dismissing the federal RICO claims, since the statute of limitations would have barred plaintiff from refiling the pendent claims in state court. \textit{Id.} at 688-90. Accordingly, even if federal RICO claims are dismissed prior to trial, the plaintiff may still be able to prosecute his pendent state law claims in federal court, thereby continuing to reap the benefits of the liberal federal rules governing pleading, discovery, and maintenance of a class action. \textit{Cf. Luebke v. Marine Nat’l Bank of Neenah}, No. 83-392, slip op. at 2 (E.D. Wis. July 25, 1983) (available Oct. 24, 1983, on LEXIS, Genfed library, Dist file) (state courts may have concurrent jurisdiction to adjudicate private civil RICO actions).

\textsuperscript{20} Federal RICO claims are frequently joined with pendent state law claims arising out of the same common nucleus of facts. \textit{See infra} note 34. Under United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966), if the federal claim is settled or dismissed prior to trial, the district court has discretion to retain federal jurisdiction over pendent state claims or to dismiss them. \textit{See, e.g., Lentino v. Fringe Employee Plans, Inc.}, 611 F.2d 474 (3d Cir. 1979) (where plaintiff’s federal claim was dropped before trial leaving pendent state law claims, but since the case had proceeded for more than a year with extensive discovery, the district court did not err in retaining federal jurisdiction over plaintiff’s state law claims). In \textit{Kleiner v. First Nat’l Bank of Atlanta}, 97 F.R.D. 683 (N.D. Ga. 1983), a prime rate overcharge case, the court retained federal jurisdiction over plaintiff’s pendent state law claims after dismissing the federal RICO claims, since the statute of limitations would have barred plaintiff from refiling the pendent claims in state court. \textit{Id.} at 688-90. Accordingly, even if federal RICO claims are dismissed prior to trial, the plaintiff may still be able to prosecute his pendent state law claims in federal court, thereby continuing to reap the benefits of the liberal federal rules governing pleading, discovery, and maintenance of a class action. \textit{Cf. Luebke v. Marine Nat’l Bank of Neenah}, No. 83-392, slip op. at 2 (E.D. Wis. July 25, 1983) (available Oct. 24, 1983, on LEXIS, Genfed library, Dist file) (state courts may have concurrent jurisdiction to adjudicate private civil RICO actions).

for “good cause” shown.\textsuperscript{22} Because the predicate acts of racketeering activity need only occur within ten years of one another, it provides an opportunity for extensive discovery into an opponent’s business affairs\textsuperscript{23} and permits a party to pursue claims based on acts for which redress might be barred in a nonracketeering civil action by the applicable statute of limitations.\textsuperscript{24} The burden of proof appears to be the traditional “preponderance of the evidence” standard, even though the underlying criminal violations would be subject to proof “beyond a reasonable doubt” if tried in a separate criminal proceeding and even though common law fraud is generally required to be proved in civil cases by “clear and convincing evidence.”\textsuperscript{25} Finally, RICO permits the recovery of treble damages and attorneys’ fees,\textsuperscript{26} and also

\textsuperscript{22} Id. at § 1965(c).

\textsuperscript{23} At least one court, however, has acknowledged the potential for abuse of discovery in private RICO actions. In Spencer Cos. v. Agency Rent-A-Car, Inc., [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 98,361 (D. Mass. 1981), the court stayed discovery on RICO claims until plaintiff proved that it had suffered compensable injury. Id. at 92,217. The court expressed doubt that Congress had intended to expose the RICO defendant to pretrial discovery of every aspect of its business for a 10-year period. Id.

\textsuperscript{24} As explained in Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1046 (D. Utah 1983):

A private damages action under § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 . . . . must be initiated within three years of the alleged violation in Utah . . . . After that time has passed, however, the challenged activity can be coupled with an allegation of another crime to form the basis of a RICO charge. Thus, although the 10b-5 action is lost after three years, it is actionable under RICO for ten years.


may provide a plaintiff equitable relief.27

III. CIVIL RICO ACTIONS INVOLVING BANKS

A. Prime Rate Overcharge Cases

Within just the past few years, more than thirty civil RICO lawsuits28 have been filed against banks throughout the country attacking the rate of interest, corresponding to the prime rate, which is charged on loans.29 These prime rate overcharge cases, which have


27. See 18 U.S.C. § 1964(a) (1983). The few courts that have ruled on the issue are divided. Compare Colonial Bank of Ala., N.A. v. Micheel, No. 83 H 2060 S (N.D. Ala. Aug. 31, 1983) (granting a temporary restraining order in action where it appeared that defendants would remove assets from the jurisdiction unless restrained) and Willcuts v. Jefferson Trust & Sav. Bank of Peoria, No. 81-1153, slip op. at 4 (C.D. Ill. Apr. 21, 1982) (private civil RICO plaintiffs are entitled to seek equitable relief with Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983) (equitable relief is not available under § 1964 to private civil RICO plaintiffs) and NSC Int'l Corp. v. Ryan, 531 F. Supp. 362, 363-64 (N.D. Ill. 1981) (remedy under § 1964(c) is legal, not equitable, in nature). See also Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983) (noting that "substantial doubt" exists as to whether a private RICO plaintiff is entitled to equitable relief, but denying such relief in any event because plaintiff failed to prove a substantial likelihood of success on the merits); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97 (6th Cir. 1982) (injunction granted but apparently on basis of common law breach of fiduciary duty claim which was pendent to federal RICO count); Bennett v. Berg, 685 F.2d 1053, 1064-65 (8th Cir. 1982), 710 F.2d 1361 (1983) (en banc) (declining to reach the "difficult question" whether equitable relief is available to private RICO plaintiff); Aetna Cas. & Sur. Co. v. Liebowitz, 570 F. Supp. 908, 911 (E.D.N.Y. 1983) (whether a preliminary injunction is available to a private party under § 1964 is an open question); Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 84-85 (W.D.N.Y. 1982) (§ 1964(a), at most, permits courts to enter orders "to prevent and restrain" violations of § 1962); Vietnamese Fishermen's Ass'n v. Ku Klux Klan, 518 F. Supp. 993, 1014 (S.D. Tex. 1981) (assuming that equitable relief is available but denying the issuance of an injunction because plaintiffs had failed to show a substantial likelihood of success on the merits); Trane Co. v. O'Connor Sec., No. 83-7336, slip op. at 3 (2d Cir. Sept. 19, 1983) (available Oct. 20, 1983, on LEXIS, Gfened library, Cir file) (expressing doubt as to the propriety of private party injunctive relief under RICO, especially where garden-variety securities law violations are predicates for the RICO violation).


29. See, e.g., Morosani v. First Nat'l Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983); Charing Cross, Inc. v. Riggs Nat'l Bank of Washington, No. 82-2207
been widely publicized by the financial press,\(^30\) typically allege that the bank represented to the borrower that its interest rate was related to a "prime rate," defined as the lowest rate charged by the bank to its most creditworthy customers; that these representations were fraudulent because the bank's best customers obtained loans at rates lower than the stated prime rate;\(^31\) that the bank used the United States


31. Significantly, as part of a survey initiated in February 1981, Representative Fernand J. St Germain, chairman of the House Committee on Banking, Finance and Urban Affairs, requested information from the chief executive officers of the nation's 10 largest banks concerning the relationship between the banks' announced or published prime rate and their actual commercial lending practices. In their responses, all 10 banks acknowledged that from time to time some business customers did borrow at rates below the banks' announced or published prime rates. See Staff of House Comm. on Banking, Finance, and Urban Affairs, 97th Cong., 1st Sess., An Analysis of Prime Rate Lending Practices at the Ten Largest United States Banks 4, 9 (Comm. Print 1981). As a result of the survey it was concluded, inter alia, that "the prime rate . . . is not the lowest commercial lending rate available at the banks" and that "[t]he phrase 'prime rate' is shopworn and its meaning vir-
mails to transmit inflated interest statements to the borrower; and that the bank is liable under RICO for treble the amount of the interest overcharge. In some cases it is also alleged that RICO has been violated because the bank agreed to compute interest on a "360-day" or a "365-day" basis, while in fact interest was computed on a "365/360-day" basis, resulting in higher interest payments by the borrower. The federal RICO count is frequently joined with other federal statutory claims or with pendent state law claims alleging common law fraud, breach of contract, and breach of fiduciary obligations.

_Comment, Legal Aspects of the Use of "Ordinary Simple Interest,"_ 40 U. Chi. L. Rev. 141, 142 (1972). See Koos v. First Nat'l Bank of Peoria, 496 F.2d 1162, 1164 (7th Cir. 1974) (computation of interest on a 365/360-day basis was permissible under an exception to state usury law); American Timber & Trading Co. v. First Nat'l Bank of Or., 511 F.2d 980, 982 n.1 (9th Cir. 1973), _cert. denied_, 421 U.S. 921 (1975) (computation of interest on 365/360-day basis resulted in interest charges which were unlawful under state and federal law); Silverstein v. Shadow Lawn Sav. & Loan Ass'n, 51 N.J. 30, 36, 237 A.2d 474, 477 (1968) (use of the 365/360-day method raised borrower's annual rate from 5.50% to 5.57%).

1. Potential Legal Defenses

In defending a prime rate overcharge action under RICO, the bank should consider filing a preliminary motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. While the substance of such a motion will depend on the particular allegations of the complaint, the precedent applicable in the jurisdiction, and the bank’s litigation strategy, the bank should explore several potential defenses which have been advanced in prime rate overcharge cases and other civil RICO actions. These include: (a) failure to allege a connection between the defendant and organized crime, (b) failure to allege a distinctive RICO injury, and (c) failure to set forth averments of liability and fraud with specificity.

a. Connection With Organized Crime

A defense frequently asserted in civil RICO actions is that the complaint does not state a claim for relief because it fails to allege any link between the defendant and organized crime. In several earlier decisions, this defense was sustained on the ground that RICO, despite its express civil remedy and the breadth of its statutory language, is primarily criminal legislation which was not intended to apply to ordinary business disputes or to supplant traditional federal and state law remedies for fraud.

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35. See generally Mannino, Prime Rate Overcharge Cases: How to Exorcise the RICO Devil, 101 BANK. L.J. 196 (1984) [hereinafter cited as Overcharge Cases].

The majority of recent decisions, however, including decisions rendered by three federal courts of appeals, hold that the civil RICO plaintiff is not required to plead or prove that the defendant is connected with organized crime. While these decisions acknowledge that the primary purpose of RICO is the eradication of organized crime in the United States, they conclude that Congress intentionally drafted broad legislation regulating criminal behavior rather than criminal status, since an attempt to define "organized crime" in the statute would have generated substantial constitutional and evidentiary difficulties.

1981 (available Oct. 30, 1983, on LEXIS, Genfed library, Dist. file) (civil RICO counterclaim dismissed because defendants did not allege that plaintiffs were members of organized crime); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (RICO "was aimed not at legitimate businesses but at combating 'a society of criminals who seek to operate outside of the control of the American people and their governments'") (citation omitted).


38. See, e.g., Morosani, 703 F.2d at 1222.

39. See, e.g., Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983) ("[t]he language of the statute ... does not premise a RICO violation on proof or allegations of any connection with organized crime"); Schacht v. Brown, 711 F.2d 1343, 1353-54 (7th Cir. 1983) (application of RICO is not restricted to members of organized crime); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982) ("the better reasoned approach is one which rejects any attempt to interpret RICO as creating a status offense aimed only at organized crime in any colloquial sense of that phrase"); Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp. 657, 659-70 (W.D. Mich. 1983) (only Congress, not the courts, can limit RICO's application to organized crime); Ralston v. Capper, 569 F. Supp. 1575, 1579 (E.D. Mich. 1983) (RICO creates a functional offense rather than a status offense and does not require organized crime allegations); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1239-40 (S.D.N.Y. 1983) (the legislative history clearly establishes that Congress intentionally declined to limit the reach of RICO to defendants with connections to organized crime); Kimmel v. Peterson, 565 F. Supp. 476, 490-93 (E.D. Pa. 1983) (civil RICO plaintiff is not required to prove that the defendant is linked to organized crime); Windsor Assoc., Inc. v. Greenfeld, 564 F. Supp. 273, 277-78 (D. Md. 1983) (though it is clear that the existence of organized crime was the motivating force behind RICO's enactment, it is equally clear that Congress recognized that so limiting RICO would make it an ineffective and perhaps even unconstitutional means of thwarting criminal activity); Taylor v. Bear Stearns & Co., [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,533, at 97,093 (N.D. Ga. 1983) (Congress rejected an affiliation with organized crime requirements as unworkable and possibly unconstitutional); Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47, 49 (N.D. Cal. 1982) (Congress did not limit RICO's scope to persons connected with organized crime but instead provided remedies against persons engaging in particular activities); D'Iorio v. Adonizio, 554 F. Supp. 222, 230-31 (M.D. Pa. 1982) (requiring a nexus with organized crime would be of doubtful constitutionality and in most cases would impose an insuperable barrier to federal court jurisdiction in
Significantly, consistent with the majority position, the United States Court of Appeals for the Eleventh Circuit and at least five federal district courts have recently held that a prime rate overcharge complaint under RICO need not contain allegations that the bank is connected to organized crime or that it has engaged in conduct traditionally associated with organized crime.\textsuperscript{40} In each of these cases, the defendant bank unsuccessfully contended that RICO should not apply to prime rate overcharge claims because no organized criminal activity was alleged by the plaintiff borrowers.

Thus, in the first prime rate overcharge case to reach a federal appellate court, the Eleventh Circuit held in Morosani v. First National Bank of Atlanta\textsuperscript{41} that a prime rate overcharge theory might state a claim for relief under RICO insofar as a bank is charged with obtaining money by false pretenses through use of the United States Postal Service to further the alleged scheme.\textsuperscript{42} The complaint in Morosani alleged that the bank had agreed to charge interest at a particular percentage rate above the rate charged to the bank’s “best and most creditworthy commercial customers” and to compute interest on a “360-day year simple interest basis.”\textsuperscript{43} Instead, plaintiff asserted, the bank charged a higher interest rate than that agreed upon and exacted additional interest by utilizing a 365/360-day computation method.\textsuperscript{44}

The district court granted the bank’s motion to dismiss the RICO allegations,\textsuperscript{45} incorporating by reference its order in the case of Kleiner v. First National Bank of Atlanta.\textsuperscript{46} In Kleiner, which involved facts similar to those in Morosani,\textsuperscript{47} the court held that even though plaintiff’s overcharge

\textsuperscript{40} RICO matters); Gilbert v. Bagley, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,483, at 96,794 (M.D.N.C. 1982) (while “organized crime” provided the occasion to pass RICO, it did not provide the sole subject of the legislation); Hanna Mining Co. v. Norcen Energy Resources, Ltd., 574 F. Supp. 1172 (N.D. Ohio 1982) (civil RICO plaintiff need not even allege that defendant is a member of organized crime). See Judicial Restriction, supra note 2, at 1106; Everybody’s Darling, supra note 2, at 665.


\textsuperscript{42} 703 F.2d 1220 (11th Cir. 1983).
\textsuperscript{43} Id. at 1221-22.
\textsuperscript{44} Id. at 1221.
\textsuperscript{45} Id.


\textsuperscript{47} Plaintiff in Kleiner alleged that he had executed promissory notes calling for interest of one percent above the “prime rate,” which was defined in the notes
charge claims "on their face . . . fit within the broad ambit of RICO," they did not state a claim for relief because they were not "a recognized form of criminal activity" and had not "traditionally been treated as criminal in nature." Characterizing RICO's civil remedy as "an additional weapon in the crime-fighting arsenal which is incidental to an actual or potential criminal prosecution," the court stated that the question whether the bank's conduct was criminal in nature should not be made in the first instance by a civil jury, but rather "should emanate from traditions first established in criminal law." The court further hypothesized that "[i]t may well be that entitlement to the civil remedy in section 1964 should be conditioned upon a criminal conviction or at least an indictment."

On interlocutory appeal the Eleventh Circuit reversed, holding that the district court had erred in dismissing the complaint on the theory that the bank's alleged misconduct was not "a recognized form of criminal activity." In a brief opinion, the court explained: "Obtaining money by false pretenses, if proved, clearly falls within the traditional definition of criminal activity and is specifically prohibited by 18 U.S.C.A. § 1341 . . . when, as alleged here, the services of the United States Postal Service are used to further the alleged scheme."

Likewise, in Wilcox Development Co. v. First Interstate Bank of Oregon, N.A., another prime rate overcharge case, the bank moved to dismiss the complaint on the ground that in order to maintain a civil RICO action, plaintiffs were required to allege a connection between the defendants and organized crime. While conceding that RICO was enacted to combat organized crime, the court rejected the bank's arguments and sustained the sufficiency of the complaint. Basing its decision on the legislative history of RICO, the court declared that "Congress, as the rate available to the bank's most creditworthy commercial borrowers. While the notes were outstanding, the bank mailed plaintiff periodic interest statements reflecting an interest rate of one percent above the bank's published prime rate. Plaintiff contended that he actually paid interest in excess of what the notes called for because many of the bank's commercial borrowers were charged interest at rates lower than the published prime rate. Id. at 1021.

48. Id. at 1022.
49. Id.
50. Id.
51. Id. at n.2.
52. Morosani, 703 F.2d at 1222.
53. Id. (footnote omitted).
55. Id., slip op. at 2.
56. Id.
well aware of the difficulties in defining ‘organized crime’, decided no connection between defendants and a racketeering group is required to maintain a civil RICO action.”  

Indeed, the court further observed, “Congress eschewed such an approach in favor of one that looks to the nature of certain predicate acts normally associated with organized crime, regardless of who committed them.”

The same result was reached in Coastal Steel Corp. v. Chemical Bank. In that case, the plaintiff alleged that the bank had violated RICO by charging excessive interest on loans tied to its prime rate. Although the bank contended that RICO is inapplicable to “garden variety” fraud claims or to legitimate enterprises not connected to organized crime, the court held that the allegations of the complaint set forth a cause of action within the “literal terms of the statute” and that there was no evidence of a congressional intent to limit RICO to persons connected to organized crime. Both the language and the legislative history of RICO, the court concluded, indicate “that Congress did intend the civil RICO remedy to be far-reaching enough to combat racketeering-type conduct by persons not associated with organized crime.”

Coastal Steel was expressly followed in Mooney v. New Jersey National Bank, which involved claims that the bank, in violation of RICO, had employed fraudulent and illegal practices in calculating the “prime commercial rate” of interest charged on plaintiffs’ loans and in computing interest on a 365/360-day basis. Finding that RICO violations are dependent upon criminal behavior, rather than criminal status, the court upheld the sufficiency of the complaint against arguments by the bank that RICO is limited in scope to defendants linked to organized crime or to transactions traditionally recognized as a form of criminal activity.

57. Id.
58. Id. Subsequently, however, the court granted summary judgment in favor of the bank on the grounds that plaintiffs had improperly sued the enterprise rather than the person who conducted the affairs of the enterprise and had failed to prove a racketeering enterprise injury. 1984-1 Trade Cas. (CCH) ¶ 65,959 (D. Or. 1984).
60. Id., slip. op. at 14.
61. Id. at 15.
63. Id., slip. op. at 4.
64. Id. at 5-6. Subsequently, on motion of the bank, the district court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b) to the United States Court of Appeals for the Third Circuit, identifying as the controlling question of law: “Should claims brought under the civil action provision of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) be dismissed because
In Willcuts v. Jefferson Trust & Savings Bank of Peoria, the court overruled similar contentions by the bank that RICO was intended only to arrest the spread and influence of organized crime and not to create a cause of action against legitimate businesses. Hence, even though plaintiffs admitted that there was no connection between the bank and organized crime, the court held that their prime rate overcharge complaint stated a claim for relief because RICO applies to all situations proscribed by the literal terms of the statute.

The court in Charing Cross, Inc. v. Riggs National Bank of Washington also joined "the growing number of courts that reject claims suggesting that civil RICO suits must have a nexus with organized crime." While finding it "undisputed" that RICO was enacted to address the problem of organized crime in the United States, the court held that Congress, rather than undertaking the "impossible task" of defining "organized crime," created a "broad statute" whose scope "extends far beyond activities relating to organized crime." Accordingly, the court denied the bank's motion to dismiss plaintiffs' prime rate overcharge claims based on RICO.

These decisions demonstrate that the bank, in formulating defenses to prime rate overcharge claims under RICO, should not rely exclusively, or even primarily, on the theory that RICO is inapplicable absent some nexus between the bank and organized crime. While such a defense enjoyed a limited measure of success in earlier cases, the trend in more recent decisions has been to permit civil RICO actions to proceed on the merits without allegations of organized criminal activity. Nevertheless, it is submitted that banks in prime rate overcharge cases should continue to assert the lack of involvement with organized crime as one of their defenses. Many federal courts of appeals, as well as the Supreme Court, have not yet had an opportunity to decide

(a) the defendant is not linked to organized crime and/or (b) the transaction challenged is not a recognized form of criminal activity?" Brief for Appellant at 1, Mooney v. New Jersey Nat'l Bank, No. 83-5579 (3d Cir. filed Sept. 10, 1983). The Third Circuit granted the bank permission to appeal on July 28, 1983, and the appeal was docketed on August 10, 1983. Id. at 4. In its brief on the merits, the bank has also requested the Third Circuit to decide two issues not adjudicated by the district court: whether the prime rate overcharge complaint is legally deficient because it (a) alleges injury caused solely by the predicate acts of racketeering, and (b) fails to identify a "person" distinct from the alleged RICO "enterprise." Id. at 2, 19-28. See infra text accompanying notes 71-94.

65. No. 81-1153 (C.D. Ill. Apr. 21, 1982) (order denying motion to dismiss).
66. Id., slip op. at 4.
67. Id. at 4-5.
69. Id., slip op. at 10.
70. Id. at 9.
civil RICO questions, and assertion of this defense in the district court will ensure that it is preserved for subsequent appellate consideration.

b. **Distinctive RICO Injury**

Although the Eleventh Circuit in *Morosani* rejected the view that the bank’s alleged misconduct must be a “recognized form of criminal activity,” it did not expressly rule that the prime rate overcharge complaint stated a cause of action. Instead, it urged the district court on remand to consider “several other theories” asserted by the bank “to support its contention that the treble damage provisions of RICO do not apply to the facts” alleged in prime rate overcharge cases.71

One such “other theory” of defense was sustained in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, where the district court held that a prime rate overcharge claim does not allege the type of injury or damage for which RICO provides a civil remedy.72 Plaintiffs in *Haroco* alleged that the interest rate on loans they obtained from the bank was “one per cent [sic] over the bank’s prime rate” and that the bank defined its prime rate as “[t]he rate of interest charged by the bank to its largest and most creditworthy commercial borrowers for 90-day unsecured commercial loans.”73 Plaintiffs contended that they were defrauded because the bank’s actual prime rate was less than the rate represented by the bank, and that the bank’s alleged fraudulent scheme was furthered by transmitting inflated interest bills to the plaintiffs through the United States mails.74

Although the facts alleged in *Haroco* were materially indistinguishable from those in *Morosani*, the court dismissed the complaint on a ground not addressed by the Eleventh Circuit. Thus, the court held that the injury claimed by plaintiffs—the payment of excessive interest by reason of the bank’s allegedly fraudulent misrepresentation of its prime rate—was suffered only by reason of a predicate of-

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71. *Morosani*, 703 F.2d at 1222. The Eleventh Circuit declined to consider the bank’s other theories because the appeal was interlocutory in nature. *Id.* On remand, the district court deferred ruling on the bank’s theories that the complaint should be dismissed because plaintiff lacked standing to sue and had failed to allege injury by reason of a § 1962(c) violation. *Morosani v. First Nat’l Bank of Atlanta*, 581 F. Supp. 945 (N.D. Ga. 1984).

72. 577 F. Supp. 111 (N.D. Ill. 1983) (order granting motion to dismiss). [Recently, the Seventh Circuit rejected the “specific RICO injury” defense endorsed by the district court in *Haroco*.*Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3496 (U.S. Jan. 15, 1985) (No. 84-822). In its opinion, however, the Seventh Circuit acknowledged that there is a split of authority as to the viability of that defense and that “there does not appear to be a clear weight of authority at the district court level either for or against the racketeering injury requirement.” *Id.* at 387.]

73. 577 F. Supp. at 112.

74. *Id.*
fense (mail fraud), and not "by reason of a violation of section 1962," as expressly required by section 1964(c). According to plaintiffs' prime rate overcharge claims were held insufficient to state a cognizable claim for relief under RICO.

In so holding, the Haroco court relied on the "plain language" of section 1964(c) which permits private treble damages actions only when a person has been injured in his business or property "by reason of a violation of section 1962" of the statute. The court concluded that in order to have standing to sue under RICO, plaintiff must allege a distinctive "RICO injury" (i.e., an injury resulting from a violation of section 1962) and not merely an injury resulting from the commission of an offense that is included within the statute's definition of racketeering activity, such as mail fraud or securities fraud. The court analogized this "RICO injury" requirement to the "antitrust injury" requirement enunciated by the Supreme Court in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

There, the Supreme Court held that in order to recover the enhanced remedy of treble damages provided in the Clayton Act for injuries suffered "by reason of anything forbidden in the antitrust laws," plaintiffs must prove "antitrust injury," which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

As further support for its conclusion, the Haroco court noted the "wide acceptance" by other federal courts of the theory that plaintiffs lack standing to sue under RICO unless they have been injured "by reason of" a violation of section 1962. Indeed, numerous recent decisions, in cases not involving prime rate overcharge claims, have held that section 1964(c) does not permit recovery for injuries caused solely by predicate acts of racketeering. Rather, conclude these courts, the

75. Id. at 114-115; accord, Wilcox Dev. Co. v. First Interstate Bank of Oregon, N.A. 1984-1 Trade Cas. (CCH) ¶ 65,959 (D. Or. 1984) (prime rate overcharge case).
76. 577 F. Supp. at 113.
77. Id.
79. Brunswick, 429 U.S. at 489. The Supreme Court clarified that antitrust injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Id.
80. 577 F. Supp. at 113.
injury suffered by a civil RICO plaintiff must result from the additional conduct which violates section 1962, as, for example, where the defendant derives an "illegitimate advantage" in operating or investing in an enterprise through racketeering activity, or where an "infusion of money from a pattern of racketeering activity into the enterprise" enhances the defendant's ability to harm the plaintiff. In addition, a smaller number of courts, noting the close parallels between RICO's civil provisions and the federal antitrust laws, have more narrowly

RICO plaintiff must allege a "racketeering enterprise injury"). Richardson v. Shearson/American Express Co., 573 F. Supp. 133 (S.D.N.Y. 1983) ("the only injury that may be redressed in a civil RICO suit must result from a violation of section 1962"); In re Action Indus. Tender Offer, 572 F. Supp. 846, 849-52 (E.D. Va. 1983) (although RICO does not require allegations that the defendant is linked to organized crime, it does require proof of an injury resulting from a pattern of racketeering and corruption and not from the commission of predicate acts which are compensable under federal or state law); Friedlander v. Nims, 571 F. Supp. 1188 (N.D. Ga. 1983) (RICO does not provide a remedy for fraud per se, but only for the operation of enterprises through a pattern of racketeering activity); Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983) (plaintiff's injuries must derive from the "pattern of racketeering activity" which violates § 1962 rather than directly from the underlying acts which combine to constitute that pattern); aff'd, sub nom., No. 83-7636 (2d Cir. July 26, 1984); Moss v. Morgan Stanley, Inc., 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983) (plaintiff's injury must be caused by a distinctive RICO violation and not simply by the commission of a predicate offense such as mail fraud or federal securities fraud, aff'd on other grounds, 719 F.2d 5 (2d Cir. 1983); Erbaum v. Erbaum, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772, at 93,922 (E.D. Pa. 1982) (in order for an injury to be caused by a violation of § 1962, "something more than an injury stemming from racketeering activity must be alleged), appeal dismissed, 709 F.2d 1491 (3d Cir. 1983); Johnsen v. Rogers, 551 F. Supp. 281, 285-86 (C.D. Cal. 1982) (in drafting § 1964(c) Congress did not intend to provide an additional remedy for already compensable injuries caused by predicate acts); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1008 (C.D. Cal. 1982) (the requirement that the RICO injury occur "by reason of" a violation of § 1962 is "the most meaningful limitation" that can be imposed on § 1964(c)); Bays v. Hunter Sav. Ass'n, 539 F. Supp. 1020, 1024 (S.D. Ohio 1982) (RICO does not provide a remedy for injuries resulting from the commission of predicate crimes and "was never intended to transform violations of state law into federal crimes absent proof . . . that the defendant participated in the affairs of an enterprise through a pattern of racketeering activity"); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1136 (D. Mass. 1982) (§ 1964(e) addresses "only a specific sort of injury arising out of racketeering"); Landmark Sav. & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) ("something more or different than injury from predicate acts is required for a plaintiff to have standing to recover treble damages under the RICO statute"). But see infra note 86.


84. The legislative history of RICO reveals that Congress was concerned about the threat posed by organized crime to the free market system:

Often . . . the [criminal] organization, using force and fear, will attempt to secure a monopoly in the service or product of the business. When the campaign is successful, the organization begins to extract a premium price
held that the plaintiff in a civil RICO action must allege a "competitive" or "commercial" injury in order to have standing to sue.95

Application of the concept of a distinctive "RICO injury" to the facts typically alleged in a prime rate overcharge case suggests several defenses which should be thoroughly explored by the bank. As held in Haroco, because the injury in a prime rate overcharge case typically results only from the alleged predicate acts of mail fraud (the mailing of fraudulently inflated interest bills to the borrower), it can be asserted that the plaintiff does not have standing to sue because RICO requires an injury resulting from the operation of an enterprise through a pattern of racketeering activity, namely, an injury resulting "by reason of" a violation of section 1962. In addition, the argument can be made that the plaintiff lacks standing to sue under RICO because an overcharged borrower does not sustain injury to any "competitive" interest.

It should be recognized, however, that while many courts have limited RICO's reach to cases in which a distinctive "RICO injury" or "competitive injury" is alleged, several other courts have decisive-

from customers. Purchases by infiltrated businesses are always made from specified allied firms. With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system... Force or fear limits choice, ultimately reduces quality, and increases prices... Competitors can thus be effectively eliminated and customers can be effectively confined to sponsored suppliers.


85. See, e.g., Bankers Trust Co., 566 F. Supp. at 1241 ("it seems appropriate to limit the extraordinary private remedy of § 1964 to the class of plaintiffs who have suffered a competitive injury by reason of the defendant's racketeering activities"); Noland v. Gurley, 566 F. Supp. 210, 218 (D. Colo. 1983) (RICO was intended to protect those whose businesses have been infiltrated and damaged by § 1962 violations); Johnson, 551 F. Supp. at 283 (plaintiff suing under § 1964(e) must allege "a commercial injury caused by the conducting of an enterprise's affairs through a pattern of racketeering activity"); Van Schick, 535 F. Supp. at 1136-37 (since RICO was designed for "those whose businesses have been infiltrated" by violations of § 1962, § 1964(e) requires an allegation of commercial injury caused by such conduct); North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980) (plaintiff must allege how it was "injured competitively" by the RICO violation in order to state a cause of action under § 1964(e)).

In Haroco, however, the court noted that the required RICO injury is not necessarily competitive or commercial in nature. 577 F. Supp. at 114; accord Landmark Sav. & Loan, 527 F. Supp. at 208-09 ("[c]ompetitive injuries and racketeering enterprise injuries would frequently overlap, but they are not necessarily the same").
ly rejected such theories as contrary to congressional intent. These courts reason that competitive injury is not the only type of harm that RICO was intended to cure and that the imposition of a special RICO injury requirement would produce the anomalous result of denying standing to the direct victims of racketeering activity.

In particular, in a prime rate overcharge decision handed down subsequent to Haroco, the court in Charing Cross, Inc. v. Riggs National Bank of Washington refused to adopt either a "competitive injury" requirement or a "racketeering enterprise injury" requirement as elements of a civil RICO action. With respect to the former theory, the court determined that "[r]equiring that plaintiffs be in competition with defendant or belong to a business infiltrated by defendant, would, as a practical matter, severely restrict RICO claims, contrary to its broad purpose." With respect to the latter theory, the court characterized the concept of a distinctive RICO injury as arbitrary and undefined, adding that the adoption of such a vague standing requirement would unreasonably restrict civil RICO actions in a manner not intended by Congress. Therefore, while a defense based upon failure to allege a distinctive RICO injury might prove more viable in a prime rate overcharge case than a defense based upon failure to allege a connection to organized crime, banks should be aware that considerable precedent exists for rejection of such a defense.

86. See e.g. Schacht, 711 F.2d at 1357 (imposing a requirement of "competitive injury" neither effectuates congressional intent nor fulfills the purpose of RICO); Bennett, 685 F.2d at 1059, aff'd on rehearing, 710 F.2d 1361 (8th Cir. 1983) (en banc) (an allegation of commercial or competitive injury is not required under RICO because Congress did not view the objectives of RICO and the antitrust laws as coterminous); Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) (there is no basis in the language or legislative history of RICO to support a "competitive injury" or "racketeering enterprise injury" requirement); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983) (neither "racketeering injury" nor "competitive injury" requirements are consistent with the legislative history of RICO); Kimmel v. Peterson, 565 F. Supp. 476, 493-95 (E.D. Pa. 1983) (concept of competitive or commercial injury is an "artificial barrier" not warranted by the language, purpose, or history of RICO); Wilkinson v. Paine, Webber, Jackson & Curtis, Inc., [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,198, at 95,797 (N.D. Ga. 1983) (§ 1964(c) not limited to "business" or "competitive" injuries); Hanna Mining Co. v. Norcen Energy Resources Ltd., 574 F. Supp. 1172 (N.D. Ohio 1982) (it is unnecessary for the civil RICO plaintiff to prove or even allege a "competitive injury" or "racketeering enterprise injury"); Martin Yale Industries, Inc. v. Master Juvenile Prod., Inc., No. 80 C 1722, slip op. at 2 (N.D. Ill. Sept. 6, 1983) (available Oct. 20, 1983, on LEXIS, Genfed library, Dist file) (RICO permits a suit by anyone injured in his business or property consistent with any of the four prohibitions contained in § 1962).

87. See supra note 86.
89. Id., slip op. at 12.
90. Id. at 13-14.
c. Specificity of the Complaint

Two closely related defenses, both of which challenge the specificity of the allegations of the complaint, should also be explored by the bank in a prime rate overcharge case under RICO. First, the complaint may be subject to dismissal if it fails to allege one or more of the component elements of a section 1962 violation. For example, if a prime rate overcharge complaint names the bank as the sole defendant and also identifies the bank as the “enterprise,” it may be dismissed on the theory that RICO requires the identification of a “person” (the defendant) who is separate and distinct from the “enterprise” and who conducts the affairs of the enterprise through a pattern of racketeering activity. Such a defense was asserted, but not adjudicated, in Haroco. Even if the prime rate overcharge complaint alleges the existence of each element of a section 1962 violation, it

91. See supra text accompanying notes 10-19; Rae v. Union Bank, 725 F.2d 478, 480-81 (9th Cir. 1984) (dismissing civil RICO complaint which failed to identify an enterprise or allege a pattern of racketeering activity); Van Schaik, 535 F. Supp. at 1138 (civil RICO complaint dismissed for failure, inter alia, to identify specific predicate acts, the time period in which they were committed and specific injury); Moss, 719 F.2d at 19 (where plaintiff was unable as a matter of law to state a claim for securities fraud, the RICO complaint was dismissed for failure to allege that defendants had engaged in “racketeering activity” in violation of § 1962).

92. See, e.g., Bennett, 685 F.2d at 1061-62 (complaint which does not allege an “enterprise” that is separate from the “person” who conducts its affairs through a pattern of racketeering activity is deficient); Willamette Sav. & Loan v. Blake & Neal Fin. Co., 577 F. Supp. 1415, 1426-27 (the RICO “person” is not the same as the RICO “enterprise”); Parnes, 548 F. Supp. at 23-24 (plaintiff must identify the person who violated § 1962 by conducting the affairs of an enterprise in an unlawful manner); Fields v. National Republic Bank of Chicago, 546 F. Supp. 123, 124-25 (N.D. Ill. 1982) (plaintiff alleging a violation of § 1962(c) must identify a person liable to him who participated in the affairs of a separate enterprise through a pattern of racketeering activity); Bays, 539 F. Supp. at 1024 (the element that raises the underlying criminal act to a RICO violation is the defendant person’s interaction with a separate enterprise); Van Schaik, 535 F. Supp. at 1136 (defendant cannot constitute both the violator of § 1962 and the enterprise); States Sec. Ins. Co. v. Mercantile Bond Agency, Inc., No. 83 C 285, slip op. at 3 (N.D. Ill. Sept. 2, 1983) (available Oct. 10, 1983, on LEXIS, Genfed library, Dist file) (RICO only reaches “persons” employed by or associated with the enterprise and does not make it unlawful to be an enterprise); D&G Enter. v. Continental Ill. Nat’l Bank & Trust Co. of Chicago, 574 F. Supp. 263, 270 (N.D. Ill. 1983) (the RICO cause of action must be asserted against the person who engaged in the unlawful conduct and not against the enterprise); In re Action Indus. Tender Offer, 572 F. Supp. at 849 (the term “enterprise” was meant to refer “to a being different from, not the same as or part of,” the person whose behavior RICO was designed to prohibit). But see United States v. Hardley, 678 F.2d 961 (11th Cir. 1982) (a corporation may simultaneously be a RICO defendant and the RICO enterprise), cert. denied, 103 S. Ct. 815 (1983). Two federal district courts, citing Hardley, have held without discussion that the bank in a prime rate overcharge case may be both the “person” and the “enterprise.” Mooney v. New Jersey Nat’l Bank, No. 82-3193, slip op. at 5; Coastal Steel Corp. v. Chemical Bank, No. 82-1714, slip op. at 14.

93. Since the court in Haroco dismissed the prime rate overcharge complaint
may still be legally deficient if the allegations are wholly conclusory in nature and are not supported by concrete factual assertions. 94

Second, Rule 9(b) of the Federal Rules of Civil Procedure in
dependently requires in all civil actions, including civil RICO actions, that “the circumstances constituting fraud . . . be stated with

94. See, e.g., Ralston v. Capper, 569 F. Supp. 1575, 1580-81 (E.D. Mich. 1983) (although plaintiffs alleged mail fraud as a predicate act, they did not plead the two predicate acts within 10 years necessary to sustain a claim of "pattern of racketeering activity"); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1150-53 (D.N.J. 1983) (complaint alleging that four defendants were "enter-
prises" was insufficient where it did not clarify whether all four defendants comprised one enterprise or whether each defendant separately constituted an enterprise, where it did not specify the individual roles that each of the defendants played within the enterprise(s) and where it did not distinguish the enterprise(s) from the alleged predicate acts of racketeering activity).

95. Fed. R. Civ. P. 9(b). See Bennett, 685 F.2d at 1062 (Rule 9(b) applies in
civil RICO actions); Ralston v. Capper, 569 F. Supp. 1575, 1581 (E.D. Mich. 1983) (defendant in civil RICO action is entitled to know the specific predicate acts and the enterprise alleged by plaintiffs); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1156 (D.N.J. 1983) (civil RICO complaint deficient under Rule 9(b) where it failed to describe the date, place, or time of the alleged fraud or misrepresentations); Mauriber v. Shearson/American Express, Inc., 546 F. Supp. 391, 397 (S.D.N.Y. 1982) (alleged securities law violations which constituted predicate acts of racketeering were not pleaded with sufficient particularity under Rule 9(b)); Taylor v. Bear Stearns & Co., [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,533, at 97,094 (N.D. Ga. 1983) (Rule 9(b) is particularly applicable in civil RICO actions since a RICO suit generates such unfavorable publicity that it would be "uncons-

96. Bennett, 685 F.2d at 1062 (complaint which stated the time, place, and con-
tent of only some alleged misrepresentations and which merely attributed false statements to "various other defendants" was deficient under Rule 9(b)); accord Eaby v. Richmond, 561 F. Supp. 131, 136 (E.D. Pa. 1983).
cient specificity to establish "probable cause" that crimes were committed. Accordingly, if the prime rate overcharge complaint does not specifically apprise the bank of the charges against it, the bank should move for its dismissal or for a more definite statement of the plaintiff's claim.

It is submitted that defenses which challenge the specificity and adequacy of the complaint will be seriously considered even by courts which refuse to apply organized crime or standing limitations in civil RICO actions. Courts, thoroughly familiar with the operation of Rule 9(b) in more traditional litigation contexts, may be more readily inclined to dismiss a civil RICO action on narrow pleading grounds which do not require extensive forays into the complex and contradictory jurisprudence of RICO.

Despite the possible availability of these and other defenses to prime rate overcharge claims, it must again be emphasized that the

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98. Rule 12 of the Federal Rules of Civil Procedure authorizes not only a motion to dismiss the complaint for failure to state a claim for relief, Fed. R. Civ. P. 12(b)(6), but also a motion for a more definite statement when the complaint "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Id. at 12(e).

99. See, e.g., Ralston v. Capper, 569 F. Supp. 1575, 1581 (E.D. Mich. 1983) (although a court does not have authority to impose organized crime or competitive injury limitations on RICO, it must nevertheless insist that "plaintiffs adhere to statutory requirements in pleading their claim"); Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1158 (D.N.J. 1983) ("[t]he precise scope of RICO is a difficult determination and one that need not be reached in view of the [pleading] deficiencies of plaintiff's complaint"); Kaushal v. State Bank of India, 556 F. Supp. 576, 579 (N.D. Ill. 1983) (although RICO's provisions sweep broadly and must be liberally construed, plaintiffs' claims must meet the literal requirements of the statute); Taylor, 572 F. Supp. at 657 (court refused to adopt organized crime requirement but dismissed complaint for failure to comply with Rule 9(b)); Moss, 719 F.2d at 5 (although Second Circuit rejected view that RICO is limited to organized crime contexts and does not apply to garden variety fraud claims, it dismissed the complaint for failure to allege "racketeering activity").

100. The defendant bank could also argue that RICO does not prohibit interest rate overcharges because it specifically deals with lending prohibitions in 18 U.S.C. § 1961(6), relating to "unlawful debts," which are defined as including "the business of lending money ... at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." See Mannino, Defending Banks in "Prime Rate" Overcharge Cases Filed Under the Racketeer Influenced and Corrupt Organizations Act, in Pa. B. Inst., Emerging Areas of Litigation Affecting Banks and Other Financial Institutions 180 (1983). The "collection of unlawful debt" can serve as the basis for a § 1962 violation. See supra notes 15-17 & 32. Under the doctrine of expressio unius est exclusio alterius, it is arguable that other lending practices do not fall within the coverage of the statute. See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) ("when legislation expressly
present state of the law with respect to the scope and applicability of RICO's civil provisions is unsettled. Because many courts have rejected attempts to impose organized crime\textsuperscript{101} and standing\textsuperscript{102} limitations on RICO, banks would be well-advised, as a precautionary measure, to reexamine their lending practices in light of the allegations raised by plaintiffs in the prime rate overcharge cases filed to date.\textsuperscript{103} The State of Delaware, for example, recently enacted legislation\textsuperscript{104} which, \textit{inter alia}, eliminates interest rate ceilings on loans and permits the terms of loans to be negotiated by the borrower and the bank.\textsuperscript{105} The legislation further permits banks to calculate interest on the basis of a year ranging from 360 to 366 days.\textsuperscript{106} In formulating loan policies pursuant to this legislation, Delaware banks should be apprised of the challenges made in prime rate overcharge cases to the methods used by banks in fixing and calculating interest rate charges.

2. Implications for Class Action Certification

Although many of the prime rate overcharge cases alleging a RICO cause of action seek class action status under Rule 23 of the Federal

\footnotesize{provides a particular remedy or remedies, court should not expand the coverage of the statute or subsume other remedies\textsuperscript{\textendash}).

The defendant bank should also explore whether the prime rate overcharge claim is barred by theories of laches, waiver, estoppel, or release, see Overcharge Cases, supra note 35, at 211-12, or by the applicable statute of limitations. Because there is no express statute of limitations set forth in RICO governing private civil actions under § 1964(c), many courts have selected the state statute of limitations for the most analogous state claim, which in most cases has been that for common law fraud. See, e.g., D'Iorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982) (applying six-year Pennsylvania statute for fraud); State Farm Fire & Cas. Co., v. Estate of Caton, 540 F. Supp. 673, 685 (N.D. Ind. 1982) (applying six-year Indiana statute for fraud); Willcutts v. Jefferson Trust & Sav. Bank of Peoria, No. 81-1153, slip op. at 5-6 (C.D. Ill. Apr. 21, 1982) (applying five-year Illinois statute for fraud in prime rate overcharge case). \textit{But see} Gilbert v. Bagley, [Current Binder] Fed. Sec. L. Rep. (GCH) ¶ 99,483, at 96,797 (M.D.N.C. 1982) (applying two-year North Carolina blue sky law limitations period).

101. See supra text accompanying notes 36-37.

102. See supra text accompanying notes 81-90.

103. According to one report, the recent proliferation of prime rate overcharge cases has already "led many banks to rewrite their loan contracts to change their definition of the prime rate or drop it altogether for a 'base rate' or something similar." Adams, \textit{Jackie Kleiner: Lawyer, Teacher, and the Bane of the 'Banksters,'} Am. Banker, June 9, 1983, at 1. Nevertheless, it has also been suggested that additional prime rate overcharge actions will be filed because numerous loans based on the prime rate remain outstanding and because many smaller banks have not modified their loan agreements. Ranh, \textit{Prime Rate RICO Suits in Trouble?}, 5 Nat'l L.J., Sept. 5, 1983, at 3.

Rules of Civil Procedure, only two courts have squarely addressed the issue, and both courts have denied class action certification.

In Wilcox Development Co. v. First Interstate Bank of Oregon, N.A., the court refused to grant class action status to prime rate overcharge claims under RICO even though it had previously denied the bank’s motion to dismiss the complaint for failure to state a cause of action. Plaintiffs in Wilcox, who also alleged violations of the Sherman Act and pendant state law breach of contract claims, sought to represent a class of approximately 8,500 persons comprising all borrowers from the defendant bank “who have been charged interest on an obligation pursuant to an evidence of indebtedness utilizing the term ‘prime rate’ or words having the equivalent meaning.” Plaintiffs contended that each loan based on a prime rate represented a class member because there was a common definition of “prime rate” (the lowest interest rate available to the bank’s most creditworthy borrowers), and that all members of the class must have understood the term “prime rate” to have this meaning.

The court, however, held that class action certification of plaintiffs’ RICO claims, antitrust claims, and state law breach of contract claims was inappropriate because plaintiffs had failed to demonstrate

106. Id. at § 963.
107. See, e.g., Charing Cross, Inc. v. Riggs Nat’l Bank of Wash., No. 82-2207, slip op. at 3 (D.D.C. Oct. 7, 1983) (order denying motion to dismiss); Hareco, 577 F. Supp. at 112 (order granting motion to dismiss). Pursuant to Rule 23(a), an action may be certified as a class action only if “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a).

In addition, one of the three subparts of Rule 23(b) must be satisfied. Subpart (3) of Rule 23(b), which is most often applied in actions seeking monetary damages, governs class actions when “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . .” Fed. R. Civ. P. 23(b)(3). In Vietnamese Fishermen’s Ass’n v. Ku Klux Klan, 518 F. Supp. 993, 1000 (S.D. Tex. 1981), class action treatment of RICO claims under Rule 23(b)(2) was stipulated to by the parties. A class action is appropriate under Rule 23(b)(2) when “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .” Fed. R. Civ. P. 23(b)(2).

110. 97 F.R.D. at 442-43.
111. Id. at 445. It is unclear from the court’s opinion whether this definition of “prime rate” was contained in the bank’s written loan agreements.
that the putative class members shared their understanding of the term "prime rate." Since individual inquiry into each class member's understanding or knowledge of the term "prime rate" would be necessary to determine whether or not that person was a member of the class, the court ruled that the numerosity and predominance requirements of Rule 23 had not been satisfied.

The Wilcox court further held that class certification could not be granted on the RICO claims due to plaintiffs' failure to proffer a reasonable method for proving injury and damages on a class-wide basis. Characterizing "individual injury" as the "crux" of private RICO claims, the court emphasized that because "[i]nterest rates are not a homogeneous product with an unchanging price during the life of the RICO . . . violations," the determination of plaintiffs' damages would require an examination of "[e]ach loan and every day of the relevant time period." Without the existence of a mechanical damages formula, which plaintiffs had failed to provide, the court estimated that trial of the damages portion of the case alone would take almost three years. Accordingly, class certification was deemed inappropriate because individual issues concerning injury in fact and damages predominated in the RICO claims.

Subsequently, the district court in Kleiner v. First National Bank of Atlanta refused to certify plaintiff's prime rate overcharge claims under RICO for class action treatment. The court held that such claims could not be maintained as a class action "because individual inquiry would be required to determine whether each putative class member had been defrauded." The predominance of individual issues, added the court, also required the denial of class action certification with respect to plaintiff's claims that the bank had overcharged its borrowers by utilizing a 365/360-day method of computing interest.

112. Id.
113. Id. at 445. The court held, nevertheless, that plaintiffs had satisfied the requirements of commonality, typicality, and representativeness set forth in Rule 23(a)(1)-(4). Id.; see supra note 107.
114. 97 F.R.D. at 446-47.
115. Id. at 447 & n.4.
116. Id. In Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 968 (1978), cited in Wilcox, the court noted that a class action might not be manageable where the case involves "a commodity available in different varieties or at fluctuating prices" since it is then necessary to examine each damage claim individually. Id. at 68 n.24 (citation omitted).
118. Id. slip op. at 1.
119. Id.
It should be noted, however, that in an earlier separate opinion the Kleiner court characterized Wilcox as "clearly wrong" insofar as it denied class action certification to prime rate overcharge claims based on state law breach of contract theories. Thus, with respect to plaintiffs' pendent breach of contract claims, the court in Kleiner certified three separate classes comprising more than 2,000 persons who had borrowed money from the bank over a three to five year period and who had signed notes stating either that interest would be paid at a percentage rate "in excess of the rate charged by [the] bank from time to time to its best commercial borrowers with respect to ninety (90) day borrowings" or that interest would be calculated on a "per annum" basis or a "360-day year simple interest basis."121

The determinative factor in the court's decision to grant class action status to plaintiff's prime rate overcharge claims based on breach of contract was its finding that the interpretation of terms such as "prime rate," "best and most creditworthy commercial borrowers," and "360-day year simple interest basis," all of which were contained in the bank's standard loan contracts, was a predominant issue common to all class members.122 In so ruling, the Kleiner court expressly refused to follow Wilcox since, in the absence of any showing that the bank's loan agreements were ambiguous, the interpretation of those contracts would be governed by objective, rather than subjective, criteria.123 The court further determined, in contrast to Wilcox, that it would be unsound as a matter of public policy to rule broadly that a form contract issued by a bank was subject to different interpretations based on the various understandings of individual borrowers.124

Wilcox and Kleiner underscore the importance for banks named as defendants in prime rate overcharge cases under RICO to contest class action allegations of the complaint as vigorously as they defend against the plaintiff's substantive contentions. As these cases illustrate, the assertion of appropriate class action defenses can succeed in narrowing the bank's potential liability to the damages suffered by a single borrower. Conversely, failure to mount a vigorous defense against the class action may result in a treble damages award in favor

120. 97 F.R.D. 683, 693 (N.D. Ga. 1983). This particular ruling was made by the district court after its dismissal of the RICO claims but prior to remand of the case by the Eleventh Circuit. See supra text accompanying notes 41-53.
121. 97 F.R.D. at 698.
122. Id. at 692-93. The inclusion of these terms in the bank's written loan agreements may factually distinguish Kleiner from Wilcox. See supra note 111.
123. 97 F.R.D. at 694.
124. Id.
of hundreds or even thousands of class members. Banks should therefore explore all potential class action defenses through discovery early in the litigation and demand a hearing to resolve contested factual issues.\textsuperscript{125}

Such discovery resulted in the denial of class certification in \textit{Beaver Falls Thrift Corp. v. Commercial Credit Business Loans, Inc.}\textsuperscript{126} The plaintiff, who sought to represent a class consisting of commercial loan customers of defendant, contended that the defendant improperly calculated interest payments pegged to the prime rate.\textsuperscript{127} The court, however, denied the plaintiff’s motion for class certification on the ground that its claim was subject to the unique defense that it had released the claim by entering into an amendment to the original loan contract. Because the existence of this defense rendered plaintiff’s claim atypical of the claims of the class as a whole, plaintiff was determined to be an inadequate class representative.\textsuperscript{128}

\subsection*{B. Securities and Commercial Cases}

Banks have been involved as litigants in numerous civil RICO actions in addition to those discussed above. While premised on allegations of fraudulent conduct, typically mail fraud or securities fraud, all of these cases arise out of diverse and often complex factual settings which illustrate the creative potential of the civil RICO cause of action.

Thus, as plaintiffs, banks have brought suit under RICO against participants in a securities syndication operation for fraud in connection with the purchase and sale of securities;\textsuperscript{129} against an investment

\textsuperscript{125} As in class action litigation arising under the federal antitrust and securities laws, banks in prime rate overcharge cases should obtain discovery concerning, \textit{inter alia}, the definition, size, and composition of the alleged class, deficiencies of the representative plaintiff, conflicts of interest between the representative plaintiff and the purported class members, unique defenses to which the representative plaintiff is subject and deficiencies of the representative plaintiff’s counsel. See generally Mannino, Levin & Walsh, \textit{Representing Banks in Litigation under the Trust Indenture Act, 1983 Pa. B. Inst., Emerging Areas of Litigation Affecting Banks and Other Financial Institutions} 1, 4-10 [hereinafter cited as \textit{Representing Banks}]; Mannino, \textit{Defending Antitrust Class Actions}, 3 Rev. Litigation 265 (1983).


\textsuperscript{127} \textit{Id.} at 69. The opinion of the court does not identify the legal theories, including RICO, on which plaintiff based its suit.

\textsuperscript{128} \textit{Id.} at 71-72. The defendant bank in \textit{Kleiner v. First Nat’l Bank of Atlanta} relied upon \textit{Beaver Falls} in contending that class certification should be denied because plaintiff was subject to a unique personal defense which made his claim atypical of the class claims. The \textit{Kleiner} court, however, distinguished \textit{Beaver Falls} as a case where there was a "substantial question" whether plaintiff had released its claim. 97 F.R.D. at 695-96 n.14. No such substantial question was found to exist in \textit{Kleiner. Id.}

banker for churning and fraudulently mismanaging a securities account;\textsuperscript{130} against certified public accountants for issuing false and misleading financial reports which materially overstated the revenues, earnings, and net worth of a company indebted to the bank;\textsuperscript{131} against corporate borrowers and their principals for fraudulently inducing the bank to make loans and transfer negotiable instruments;\textsuperscript{132} and against corporate principals for concealing assets in the course of a bankruptcy proceeding.\textsuperscript{133}

Conversely, banks have been named as defendants in civil RICO actions for failing to disclose the details of renegotiated loans,\textsuperscript{134} failing to return collateral for loans,\textsuperscript{135} participating in a commodities fraud scheme,\textsuperscript{136} fraudulently inducing the purchase of corporate and partnership assets,\textsuperscript{137} reneging on an agreement to finance the acquisition of real estate,\textsuperscript{138} and fraudulently foreclosing on a business.\textsuperscript{139} As in the prime rate overcharge cases, the courts in these actions involving banks have differed in opinion concerning the applicability of RICO's treble damages remedy to ordinary commercial disputes for which other less extreme remedies exist under federal or state law.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{132} Colonial Bank of Ala., N.A. v. Micheel, No. 83 H 2050 S (N.D. Ala. filed Aug. 31, 1983).
\item \textsuperscript{134} Bays v. Hunter Sav. Ass'n, 539 F. Supp. 1020 (S.D. Ohio 1982).
\item \textsuperscript{139} Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984); Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983).
\end{itemize}
1. Threshold RICO Requirements

a. The Criminal Nature of the Defendant's Conduct

In one of the earliest reported decisions construing the requirements of civil RICO, Farmers Bank of Delaware v. Bell Mortgage Corp.,141 the bank alleged that fifty-one corporate and individual defendants had engaged in securities fraud in violation of RICO, the federal securities laws, and state law. One of the individual defendants moved to dismiss the bank’s complaint on the ground that he could not be held civilly liable because he had never been convicted of violating RICO or the alleged predicate acts of racketeering. The court held, however, that a civil cause of action under section 1964(c) is not conditioned upon a previous conviction of the defendant under the criminal provisions of the statute.142 “It is only necessary,” the court explained, “that the plaintiff prove the elements of the Act [RICO] by a preponderance of the evidence in order to be awarded damages in a civil action.”143

Similarly, the sufficiency of the complaint in Crocker National Bank v. Rockwell International Corp.144 was upheld notwithstanding arguments that the bank had failed to allege a nexus between the defendants and organized crime. In that case, the bank alleged that it had been fraudulently induced to spend more than $17 million for “securities”

S. Ct. 683 (1983) (purchasers of securities who claim they were defrauded by misrepresentations in a registration statement have an implied right to sue under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), notwithstanding the express remedy for such misstatements provided by § 11 of the Securities Act of 1933, 15 U.S.C. § 77(k)).


143. 452 F. Supp. at 1280.

consisting of investment packages offered by a computer leasing firm to finance the purchase of new equipment.145 Named as defendants were the leasing firm, one of its lessees, its investment banker, and its law firm. In addition to claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, the bank brought suit for treble damages under RICO on the theory that defendants had participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity consisting of multiple acts of securities fraud, mail and wire fraud, obstruction of justice, and interstate transportation of stolen property in furtherance of a nationwide scheme to defraud the bank and other investors.146

Rejecting the defendants' contention that the complaint was deficient because it did not contain allegations linking them to organized crime, the court held that there is no indication in either the language or the legislative history of RICO that Congress intended to limit the scope of the civil remedy to persons connected with organized crime or to those activities commonly thought of as racketeering.147 To the contrary, the court explained, "Congress focused on particular activities and provided remedies against persons engaging in them."148 Any attempt to limit the application of RICO to organized crime, emphasized the court, would be "largely unworkable" since there is "no reasoned way to determine what activities are commonly associated with organized crime . . . ."149

By contrast, judicial reluctance to apply RICO to ordinary business disputes led the court in *Katzen v. Continental Illinois National Bank & Trust Co.*,150 to dismiss a RICO complaint brought by a real estate speculator who charged that the bank had divulged information about certain property and ultimately had sold that property to other investors. Holding that the bank's alleged conduct did not constitute the type of behavior proscribed by the mail fraud and wire fraud statutes, the court found the complaint deficient for failure to plead a pattern of racketeering activity. Moreover, stressing that defendants


147. 555 F. Supp. at 49.

148. Id.

149. Id. at 50.

invariably are offended by the imputation of criminality when subjected to the private remedies fashioned in RICO, the court reminded the parties' counsel of their procedural obligation of good faith, and admonished them to "handle this case for what it is—a commercial action involving a disappointed investor who may or may not have a claim against the defendants."  

Displaying a similar concern that courts control the "overenthusiastic use of RICO" by distinguishing between well-founded and frivolous claims at the pleading stage, the court in Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co. ruled that the party asserting civil RICO claims must allege the required two acts of racketeering with sufficient specificity to show there is probable cause that crimes were committed. The court stated that "[a] factual statement similar to a bill of particulars is needed in pleadings that allege a violation of the RICO treble damages provision," since without such a standard of specificity RICO would be "virtually limitless" in its application. Factual specificity is also required, the court opined, because the private damage action under RICO may be based on alleged criminal activity from ten years earlier, making it difficult for the defendant to prepare his defense unless he is specifically apprised of all material facts. Accordingly, the court rejected the bank’s RICO counterclaim because it did not state the material facts with enough specificity to establish probable cause that the plaintiff had engaged in two predicate acts of racketeering.

b. The Character of Plaintiff’s Injury

The courts in civil RICO actions involving banks have likewise disagreed on the issue of plaintiff’s standing to institute a civil action under RICO. For example, in Crocker National Bank v. Rockwell International Corp., the court held that the wording "by reason of" in section 1964(c) does not limit recovery to damages that are distinct

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151. Id., slip op. at 4.
152. Id. Rule 11, Fed. R. Civ. P. 11, as amended effective Aug. 1, 1983, provides in pertinent part that the signature of an attorney on a pleading constitutes a certificate by him "that to the best of his knowledge, information, and belief formed after reasonable inquiry" the pleading is "well grounded in fact and is warranted by existing law . . . and is not interposed . . . to harass or to cause unnecessary delay or needless increase in the cost of litigation." Id.
154. Id. at 1045-46.
155. Id. at 1046.
156. Id.
157. Id. at 1047.
158. 555 F. Supp. 47 (N.D. Cal. 1982).
from damages caused by the predicate acts. The court concluded that imposition of such a limitation would severely undermine the key purpose of RICO's treble damages remedy: to "divest the association of the fruits of its ill-gotten gains." In addition, the court noted that RICO does not require the plaintiff to allege a "competitive" injury since it perceived from the legislative history that Congress was concerned not only with general harm to competition, but also with harm to individual legitimate businesses, such as the investment losses allegedly suffered by the bank.

A somewhat contrary result was arrived at in Landmark Savings & Loan v. Loeb, Rhoades, Hornblower & Co. In that case, the bank brought suit under the Securities Act of 1933, the Securities Exchange Act of 1934, and RICO, alleging that defendants had engaged in fraudulent conduct and churning in connection with the bank's purchase and sale of securities. While the court ruled that RICO does not require allegations that plaintiff suffered a "competitive injury," it nevertheless held that "something more or different than injury from predicate acts is required for a plaintiff to have standing" to sue for treble damages under RICO. That "something more," the court explained, is a "racketeering enterprise injury" which might occur "if a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise." Because the injury alleged by the bank was suffered "by reason of fraud in which the mails happened to be used," and not by reason of a racketeering enterprise injury, the court dismissed the bank's RICO claims while sustaining the sufficiency of its alternative claims under the federal securities laws. "The victims of predicate crimes," the court added, "almost always have a cause of action for direct damages under federal or state law."

Failure to allege a distinctive RICO injury was also the basis for dismissal of the bank's RICO complaint in Bankers Trust Co. v. Feldesman. The bank claimed that the defendants, substantially in-

159. Id. at 49.
160. Id. at 49 (quoting Turkette, 452 U.S. at 585).
161. Id. at 49.
163. Id. at 207.
164. Id. at 207-08.
166. Id.
167. Id.
debted to the bank, fraudulently concealed the acquisition of major assets in order to obtain a favorable discharge of their debts in a bankruptcy proceeding. While acknowledging that it is not necessary for the plaintiff in a RICO action to show a connection between the defendants and organized crime, the court held that the "plaintiff’s injury, to be cognizable under RICO, must be caused by a RICO violation and not simply by the commission of a predicate offense, such as mail fraud or federal securities fraud." Although the court declined to define precisely the components of a RICO injury, it found it “appropriate to limit the extraordinary private remedy of § 1964 to the class of plaintiffs who have suffered a competitive injury by reason of the defendant’s racketeering activities.” Support for this conclusion was gleaned from the legislative history of RICO, which in the court’s view contained no evidence that Congress intended “to provide a plaintiff with a windfall recovery for ordinary injuries which are otherwise compensable.” Thus, having discovered no indicia of a congressional intent “to sweep all ordinary injuries occasioned by the predicate criminal acts within the dragnet” of RICO’s treble damages remedy, the court held that the bank’s complaint was legally insufficient to state a claim for relief under RICO because the injury alleged was a direct result of “an ordinary, albeit complex, bankruptcy fraud” and not a consequence of any “independent pattern of racketeering activity.”

c. The Identity of a Statutory Person

At least three courts have dismissed RICO claims against banks for failure to identify a statutory “enterprise” separate and distinct from the statutory “person” whose conduct is proscribed by section 1962. In *Bays v. Hunter Savings Association*, plaintiffs filed a class

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169. *Id.* at 1236-38.
170. *Id.* at 1239-40. The court found that Congress rejected an “organized crime” restriction because of definitional and constitutional problems inherent in the concept of organized crime. *Id.*
171. *Id.* at 1241.
172. *Id.*
173. *Id.*
174. *Id.* The court deemed it “illogical” that “a plaintiff suing under the federal securities laws could recover only one-third of the damages recoverable by a person suing under RICO for the identical injury.” *Id.* (footnote omitted).
175. *Id.* at 1242.
action complaint contending that the bank had violated the Truth-in-Lending Act by failing to disclose the details of renegotiated loan terms to borrowers. Subsequently, plaintiffs sought leave to add a RICO claim on the theory that the bank's actions constituted fraud which had been effectuated through use of the United States mails. The court, however, denied plaintiffs' motion to amend because, even though plaintiffs alleged that the bank was an "enterprise," they did not identify any "person" associated with the enterprise who conducted its affairs through a pattern of racketeering activity. "In all cases" the court reasoned, "the person defined by the Act is the defendant and is always distinct from the enterprise. It is clear that the element which raises the underlying criminal act to a RICO violation is the defendant's interaction with the enterprise." Thus, the bank could be charged with a RICO violation only if it were alleged to be a "person" associated with a separate enterprise which conducted the affairs of that enterprise through a pattern of racketeering activity.

Citing Bays with approval, the court in D&G Enterprises v. Continental Illinois National Bank & Trust Co. of Chicago likewise dismissed a civil RICO complaint which alleged that the defendant bank was the statutory enterprise. Although plaintiffs contended that the bank had violated RICO and the federal securities laws by fraudulently inducing them to invest in various oil and gas partnerships, their complaint was held to be legally deficient because it did not name as the defendant a person who participated in the affairs of a separate enterprise through a pattern of racketeering activity.

A similar analysis led to the dismissal of the RICO complaint in Fields v. National Republic Bank of Chicago which charged that the

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178. Id. at 1021-22. The complaint was filed as a class action on behalf of all persons who had entered into consumer credit transactions with the defendant bank. Id.
179. Id.
180. Id. at 1023.
181. Id. at 1024.
182. Id. The court found it "clear" that RICO does not apply to allegations that a business defrauded its customers through use of the mails and that the statute was never intended to transform violations of state law into federal crimes absent proof of an additional element: that the defendant participated in the affairs of an enterprise through a pattern of racketeering activity." Id.
184. Id. at 270. See also In re Longhorn Sec. Litig., 573 F. Supp. 278 (W.D. Okla. 1983) (a related action in which D&G Enterprises' counterclaim against a different bank was similarly dismissed because it identified the bank as both the "person" and the "enterprise").
bank, through use of the United States mails, had fraudulently increased the interest rate on loans made to the plaintiff and had failed to return certain beneficial interests in land trusts assigned as collateral for those loans. Characterizing the plaintiff as a "lemming drawn to the sea" who followed the "unfortunately all-too-prevalent trend" of seeking to transform a state law cause of action into a federal treble damages action, the court found that the plaintiff had not identified a "person" who had participated in the affairs of an enterprise (the bank) through a pattern of racketeering activity. That defect, concluded the court, caused the RICO claim to fail entirely. Moreover, the court noted, even if the plaintiff was viewed as the enterprise and the bank as the person, the claim would still be deficient because there was no allegation that plaintiff engaged in, or that his activities affected, interstate commerce.

2. Prospective RICO Applications

One area which undoubtedly is ripe for the application of civil RICO theories, but which has not yet yielded any reported decisions, is litigation involving defaulted bonds. Banks frequently serve as indenture trustees for bond issues pursuant to trust indenture agreements which regulate the conduct of the trustee and the corporate issuer during the period the bonds are outstanding. In recent years, as the number of corporate bankruptcies and bond defaults has sharply escalated, bondholders have sought to recover the loss of their investments from

186. Id. at 124.
187. Id.
188. Id.
189. Id. at 125.
190. For example, during fiscal 1977 alone, 358 trust indentures relating to nearly $25 billion in securities were filed with the Securities and Exchange Commission. 43 SEC ANN. REP. 118 (1977). See generally J. Kennedy et al., Corporate Trust Administration and Management (2d ed. 1975); Johnson, Default Administration of Corporate Trust Indentures: The General Nature of the Trustee's Responsibility and Events of Default, 15 St. Louis U.L.J. 203 (1970).
191. One analyst, noting the "staggering" growth of corporate bankruptcies over the past decade, has estimated that between 1969 and 1979, the number of annual business filings for bankruptcy mushroomed by 91%, from 15,430 to 29,500. Rankin, Bankruptcies Surge Amid Credit Spiral, N.Y. Times, Jan. 6, 1980, § 12 (National Economic Survey), at 50.
the trustee banks under a variety of federal and state law theories of liability.\textsuperscript{193} Several of the defendant banks, in turn, have instituted actions against allegedly liable third parties, such as the issuer of the bonds and its officers, directors, underwriters, and accountants.\textsuperscript{194} In those instances where fraud is alleged by the bondholders, the trustee bank or other involved parties in connection with a defaulted issue of bonds, RICO could provide a novel basis for the imposition of civil liability and the recovery of treble damages.\textsuperscript{195}

IV. CONCLUSION

Commercial disputes involving banks have generated a significant proportion of the civil RICO actions filed to date. Response to these lawsuits has been volatile and sharply divided as courts and the bar undertake the difficult task of applying this facially broad statute to a myriad of factual settings.\textsuperscript{196} Whether seeking to assert a RICO cause of action offensively or defending against such charges, banks and their counsel should continually survey the evolving case law in order to develop creative and informed strategies.

In developing these strategies, particular consideration should be given to three frequently litigated RICO issues. Initially, it should be determined whether the complaint alleges a distinctive RICO in-


\textsuperscript{195} In the opinion of one commentator, however, the assertion of civil RICO claims in defaulted bonds litigation would result in “manifest unfairness” to the defendants because of the “hyper-sensitive nature of the bond market to even a breath of impropriety.” Schreiber, \textit{RICO: A Source of Treble Damages in Defaulted Bonds Litigation}, 1982 \textit{Prac. L. Inst.}, Defaulted Bonds: Remedies and Related Litigation 285, 294.

\textsuperscript{196} The Section of Criminal Justice of the American Bar Association has recommended amendments to RICO that would, \textit{inter alia}, replace the term “racketeering activity” with the less pejorative phrase “criminal activities” and require that a “pattern of criminal activity” include at least one offense other than mail fraud and wire fraud. \textit{Report to the House of Delegates}, 1982 A.B.A. Sec. CRIM. JUST. 112C, at 3-4.
jury as opposed to an injury suffered solely by reason of a predicate offense. Secondly, the complaint should be examined to ensure that it alleges with particularity all of the requisite elements of a section 1962 violation. Failure of the RICO plaintiff to satisfy these two requirements may result in the granting of a motion to dismiss or a motion for a more definite statement. At present, however, the law in these areas remains unsettled.

Finally, the bank as defendant should assert in its pleadings that plaintiff has failed to allege a link between the bank and organized crime. Although this defense has been rejected by several courts, such action will ensure the preservation of this defense for subsequent appellate consideration. The bank should also be aware of the advantages of employing vigorous discovery in RICO class action suits. With these considerations in mind, banks and their counsel will be better prepared to litigate potential RICO claims.