RICO Damages: Look to the Clayton Act, Not the Predicate Act

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INTRODUCTION

Since the enactment of RICO in 1970,1 almost no attention has been paid to civil RICO damages2 by the courts,3 Congress,4 or commentators.5

The author who has previously given the most consideration to the problem6 urges that RICO damages be measured by looking to the underlying predicate acts and utilizing the most analogous civil measure of damages.7 Thus, "[i]n the case in which the defendant bank allegedly falsified interest calculations to plaintiff's detriment,

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1. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982). In this Article, familiarity with the basic structure and terminology of RICO is assumed. All references are to the statute before its amendment in October, 1984.

2. However, other civil RICO issues have received extensive coverage. See bibliography in this Symposium.


5. As shown by the bibliography included in this symposium, there are now literally hundreds of papers discussing RICO. To the author's knowledge, however, only Gorelick, supra note 2 addresses the problem, and even then only briefly, following an extensive discussion of "racketeering enterprise injury." Gorelick has also written a chapter on measuring RICO damages in a new book, "Civil RICO Developments: 1984" put out by the editors of the RICO Litigation Reporter. The book was not published at the time this article went to press; however Gorelick in a phone conversation with the author described the new chapter as an expansion of the position taken in her previous paper, see supra note 3.


7. Gorelick, supra notes 3 and 5.

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the appropriate measure of damages might be the contractual measure.” By the same reasoning, in a case involving “the victim[s] of theft at the hands of a corrupt cleaning service[,] [t]heir remedy resembles a tort remedy.” Under this “predicate act method”, the measure of damages in each RICO case would vary with the predicate acts alleged and proven.9

The alternative proposed in this Article is that RICO damages be measured instead by a narrower standard based on Section Four of the Clayton Act.10 This standard would exclude damages based on contractual “expectation interests”, damages for personal injuries, and damages based on restitution or disgorgement, as well as other types of damages.11 However, it would provide an established and uniform federal measure of damages for all RICO cases.12

The superiority of a Clayton Act standard over a predicate act method is obvious if it is assumed that a “racketeering enterprise injury” requirement, already imposed by many courts at the pleading stage,13 is applicable at the damages stage.14 Such a requirement would restrict a plaintiff to damages caused by a distinct “racketeering enterprise injury.”15 By precluding recovery of any

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8. See infra note 48 for Gorelick’s complete discussions from which these quotes are taken.
9. Id.
10. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982) provides: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”
12. See infra note 47 and accompanying text.
14. The pleading rule would not necessarily be carried over to the damages stage. There was some discussion of this question at a recent seminar in New York City, reported in 1 RICO Litigation Reporter No. 3 at 399-400 (Nov. 1984). Irving B. Nathan of Arnold & Porter argued that any pleading requirement of racketeering enterprise injury should not be carried over to the stage of damages, and that all damages, including those caused by the predicate acts alone, should be trebled under RICO. Ira Lee Sorkin, Regional Administrator of the SEC in New York, disagreed, arguing that only damages flowing from a distinct RICO injury should be trebled under RICO, while damages caused solely by the predicate acts should be excluded.
15. However, determining the definition of a “racketeering enterprise injury” has
damages caused by the predicate acts, this requirement would also preclude any argument that RICO damages should be measured by a predicate act standard.\(^\text{16}\)

However, as shown below, even if a “racketeering enterprise injury” requirement is not imposed, a Clayton Act standard would be superior to a predicate act measure.\(^\text{17}\) This is because a Clayton Act standard would adhere to the language, structure, and purpose of RICO while providing a uniform federal damage measure in all RICO cases.\(^\text{18}\) In contrast, a predicate act method would not comport with the statute and would not only be unworkable but unfair.\(^\text{19}\)

I. THE CASE FOR A CLAYTON ACT MEASURE OF DAMAGES

A. Congress Intended a Clayton Act Measure to Apply in Civil RICO Cases

The sparse legislative history of the RICO statute suggests that Congress intended a Clayton Act measure of damages to apply in civil RICO cases.\(^\text{20}\)

The civil RICO damages remedy is provided by subsection 1964(c), which allows treble damages to “any person injured in his business or property by reason of a violation of section 1962...”\(^\text{21}\) The quoted language is closely modeled after Section 4 of the Clayton Act,\(^\text{22}\) which, in pertinent part, provides for treble damages to “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws...”\(^\text{23}\) By modeling RICO’s damage section on the Clayton Act’s damage section, Congress expressed its intention that the Clayton Act measure apply in civil RICO cases.\(^\text{24}\)

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\(^{16}\) See infra note 64 and accompanying text.

\(^{17}\) See infra notes 20-47 and accompanying text.


\(^{19}\) See infra notes 64-94 and accompanying text.

\(^{20}\) Blakey & Gettings, Basic Concepts, supra note 18, at 1040.

\(^{21}\) 18 U.S.C. § 1964(c) (1982) provides:

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

\(^{22}\) See Blakey & Gettings, Basic Concepts, supra note 18, at 1040. See also Bennett v. Berg, 685 F.2d 1053, 1058 (8th Cir. 1982) (“Section 1964(c) provides a private cause of action modeled on the antitrust laws”).


\(^{24}\) “Given the similarity of language and circumstances between the antitrust provisions and those of [RICO], there is no reason to believe that many of these antitrust
The limited discussion and testimony in the legislative history supports this conclusion. The chief discussion in the legislative history of § 1964(c) is by Representative Poff, a sponsor of RICO in the House, who described § 1964(c) as “another example of the antitrust remedy being adopted for use against organized criminality.” The private treble damages remedy was inserted by the House into the final bill based on a report of the American Bar Association, which urged adoption of a RICO treble damage remedy patterned on antitrust remedies such as section 4 of the Clayton Act. The testimony of the A.B.A. president, Edward L. Wright, before the House emphasized the close connection between § 1964(c) and the Clayton Act: “[W]e would recommend an amendment to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act.” This has been described as “the absolutely critical testimony leading to the inclusion of section 1964(c) in the House version of the bill. . . .” It certainly provides additional support for a Clayton Act measure of damages.

B. Application of a Clayton Act Measure Would Be Workable and Fair

Application of a Clayton Act measure of damages in civil RICO
cases would require a factfinder to calculate injury to plaintiff’s “business” or “property”31 caused by defendant’s RICO violations.32

The key terms, “business” and “property,” have been defined in Clayton Act cases rather broadly.33 Business “encompasses practically all industrial and commercial enterprises, including those of nonprofit plaintiffs and labor unions,” while property is used in its “naturally broad and inclusive meaning.”34 Because “business” and “property” have been construed so broadly, a Clayton Act measure of damages would be flexible enough to fit various fact patterns.35

However, as mentioned above, a Clayton Act measure would exclude some forms of damage.36 It would not measure damages by the contractual standard, which includes damages based on “expectation interests.”37 It would exclude damages for physical and psychological injuries to the person.38 It would also presumably prevent restitutionary or disgorgement awards from being included.

31. See supra notes 21 and 23.
32. See supra note 11.
33. See Blakey & Gettings, Basic Concepts, supra note 18, at 1041 (footnotes omitted):

[the courts have interpreted “business” in its ordinary sense. It encompasses practically all industrial and commercial enterprises, including those of nonprofit plaintiffs and labor unions. The second term, “property,” has also been held to have a “naturally broad and inclusive meaning.” It is wider in scope and more extensive than the word “business.” Property includes, for example, expenditures to defend against patent infringement suits and a labor union’s opportunity to obtain members. The interest of the taxpayer or citizen, however, is not considered business or property. Moreover, personal injuries and loss of consortium are not injuries to property under Section 4.

34. Id.
35. Id. n.150 and n.154.
36. See supra note 11.
38. As used in the Clayton Act, the phrase “business or property” has uniformly been held to exclude damages for personal injuries. Reiter v. Sonotone Corp., 422 U.S. 330, 339 (1979) (“the phrase ‘business or property’ retains restrictive significance. It would, for example, exclude personal injuries suffered”). Two recent decisions have held that psychological damages are not available under RICO. Callan v. State Chemical Manufacturing Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984) (RICO does not allow damages for mental anguish, loss of self-esteem and confidence, or damaged reputation); Cuzzupe v. Paparone Realty Co., No. 83-4485, slip op. (D.N.J. Nov. 1, 1984) (granting defendant’s motion to strike damage claims for mental and emotional distress based on proximity to noxious landfill); and see Van Schaick v. Church of Scientology of California, Inc., 535 F. Supp. 1125 (D. Mass. 1982) (discussing RICO claim for emotional distress). See also Bankers Trust Co. v. Rhoades, 741 F.2d 511, 513 (2d Cir. 1984):

The requirement that the injury be to the plaintiff’s business or property means that the plaintiff must show a proprietary type of damage. For example, a person physically injured in a fire whose origin was arson is not given a right to recover for his personal injuries; damage to his business or his buildings is the type of injury for which § 1964(c) permits suit.
in figuring treble damages 39 (thus a RICO plaintiff would be allowed treble damages, but would be denied treble restitution or disgorgement). 40

Of course, not every Clayton Act damage principle would be applicable in civil RICO cases. 41 It would be up to the courts, on a case-by-case basis, to apply those Clayton Act damage principles which fit the language, structure and purposes of RICO, discarding those that do not. Courts would thus have to decide at least the following questions:

1. Should a RICO plaintiff have to show that its damages were caused by defendant’s RICO violation, as opposed to other conduct of the defendant that was lawful? This problem of allocating losses to defendant’s unlawful conduct has been a major problem in antitrust cases. 42

39. Restitutionary relief or disgorgement would presumably not be included in Clayton Act treble damages, because damages under the Clayton Act are based on actual loss to plaintiff, not disgorgement of defendant’s gain. See generally Von Kalinowski, 161 Business Organizations § 115.01-05 (1984) (Von Kalinowski).

40. If RICO plaintiffs had the option to choose a restitutionary or disgorgement measure and then treble it, their monetary recoveries in some cases would increase dramatically. For example, consider the facts in the well-known case of Janigan v. Taylor, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965). In Janigan, a corporate insider bought stock from his shareholders for $40,000 and sold it less than two years later for approximately $700,000. Using a restitutionary measure of damages, the court awarded plaintiffs the full sale price of the stock realized by defendant, amounting to 17 ½ times the purchase price paid to plaintiffs. The facts in Janigan would certainly support a RICO claim if brought today (at least outside the federal courts in the Second Circuit). If restitutionary measures were available to measure RICO damages, plaintiffs would be entitled to treble their $700,000 recovery, leading to a damage award more than fifty times the purchase price of the stock.

One recent case appears to have upheld a claim for restitutionary relief as part of RICO treble damages, at least at the pleading stage, DeMent v. Abbott Capital Corp., 589 F. Supp. 1378 (N.D. Ill. 1984). In DeMent, plaintiffs alleged violations of various federal and Illinois statutes, common law torts and breaches of contract. The court denied defendant’s motion for summary judgment on the RICO count, which sought damages, subject to trebling, and that included return of all fees paid to certain directors and consultants. The court held that such restitutionary relief could be obtained at law and thus could be obtained under RICO’s provisions for “damages.” Moreover, even if such relief were better classified as equitable restitution, the court held that it represented “a form of relief available to a private RICO plaintiff.” Id. at 1382. Under a Clayton Act measure of RICO damages, plaintiffs in DeMent could not bring this restitutionary claim as part of their request for treble damages, but only as a single-damage federal statutory or pendent claim.

41. The A.B.A. suggested to the drafters of RICO that RICO should not be enacted as an amendment to the antitrust laws, due to antitrust restrictions on standing, proximate cause, direct injury, etc., which were “appropriate in a purely antitrust context” but which “could create inappropriate and unnecessary obstacles” to RICO plaintiffs. S.2048 and S.2049, 91st Cong., 1st Sess., 115 Cong. Rec. 6994-95 (1969). See Fricano, Civil RICO: An Antitrust Plaintiff’s Considerations, 52 ANTITRUST L.J. 361, 361 (1983). (RICO “may provide a means of circumventing judicially imposed limitations on antitrust claims. . . .”) It seems clear that not all antitrust concepts should be applied to restrict measurements of RICO damages. See supra note 13. Which antitrust concepts should be applied and which not is best left to the courts.

42. See Falls City Industries v. Vanco Beverage, 460 U.S. 428 (1983) (“If some of
2. Should a RICO plaintiff be required to demonstrate "but for" causation, by showing that its general damages would not have occurred "but for" defendant's RICO violation?43
3. Should a RICO plaintiff be precluded from recovering losses that were passed on to its customers or suppliers, in the form of price increases or otherwise?44

In short, there would still be ample work for judges and lawyers in adapting Clayton Act damage principles to RICO cases.45 Incorporation of a Clayton Act measure into § 1964(c) would however provide the rudiments of a "general damages" measure for civil RICO cases.46 This would provide certainty and predictability in measuring damages, and would advance the important interests of judicial economy, fair notice to litigants, equality of results and achievement of settlements.47

II. THE CASE AGAINST A PREDICATE ACT MEASURE OF DAMAGES

A. Congress Did Not Intend a Predicate Act Measure to Apply in Civil RICO Cases

In contrast to a relatively uniform Clayton Act measure of damages, a predicate act measure would calculate damages in each RICO case by looking to the underlying predicate act or acts, and utilizing the most analogous civil measure of damages.48

Vanco's injury was attributable to the price discrimination, Falls City is responsible to that extent)." (Emphasis added) See also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) ("wrongful conduct rule" limits damages to the price differential caused by defendant's wrongful conduct).

43. On causation requirements under the Clayton Act, see Von Kalinowski, supra note 24, § 115.02(3)(b)(i).
44. See the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a, 13b, 21a (1982) and Koob, DAMAGES IN ANTITRUST CASES in Determining and Proving Damages in Business Litigation at 216-17 (1984) ("In actions involving the Robinson-Patman Act, the weight of authority is that the measure of damages is not the difference between what the plaintiff paid and the price paid by the favored buyer but rather the damage to the plaintiff's business measured by lost profits").
45. See supra notes 42-43 and accompanying text.
46. See Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 3.2 at 138 (1973).
47. Id.
48. See Gorelick, supra note 3, at 14-15, whose discussion is quoted in full below:

In the case in which the defendant bank allegedly falsified interest calculations to plaintiff's detriment, the appropriate measure of damages might be the contractual measure. Contract damages protect the expectations of the parties and place the plaintiff where he would have been had the contract been fulfilled. . . . Similarly, the customer of the securities broker who invested in unsuitable securities could ask to be returned to the position he would have been in had his instructions been followed. Thus, in many section 1962(c) cases—where the plaintiff is injured by an enterprise operated through a pattern of racketeering activity—the remedy may well look like a contractual one.

But there will be other section 1962(c) plaintiffs who have no "contract"
There is no indication that Congress intended RICO damages to be measured by looking to the underlying predicate act or acts.\textsuperscript{49} The language of section 1964(c) makes no reference to predicate acts, and there is no indication in the legislative history that damages in civil RICO cases should be measured by analogy to the predicate acts.

Furthermore, the structure of RICO does not easily embrace a predicate act measure of damages.\textsuperscript{50} Section 1961 of RICO defines the operative terms of the statute, including “predicate acts” and the term “pattern of racketeering activity.”\textsuperscript{51} Section 1962, in four

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49. See supra notes 20-31 and accompanying text.

50. As Professor Blakey pointed out to this author in conversation, the Supreme Court has itself relied on the structure of RICO as a guide to proper construction of the statute. See Russello v. United States, 104 S. Ct. 296, 300 (1983). (“We are fortified in this by our examination of the structure of the RICO statute.”)

51. 18 U.S.C. section 1961 (1) reads as follows:

As used in this chapter —

(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 984 (relating to embezzlement from pension and welfare funds), section 891-84 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (c) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to
subsections, establishes four possible RICO violations, defined in terms of relations between “patterns of racketeering activity” and “enterprises.” 52 Section 1963 establishes criminal penalties for violations of section 1962, 53 and section 1964 establishes civil remedies: labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

52. 18 U.S.C. Section 1962: Provide for the following prohibited activities
(a) 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 in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer are held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any on class, and does not confer, either in law or in fact, the power to elicit one or more directors of the issuer.
(b) 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.
(c) It shall be unlawful for any person employed by or associated with any enterprise 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.
(d) It shall be unlawful for any person to conspire to violate any of the provision of subsections (a), (b), or (c) of this section.
53. 18 U.S.C. Section 1963:
(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both. 
(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.
(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to
for violations of section 1962.54

At the remedies stage, criminal and civil, only the existence of a section 1962 violation is required; no distinction is made between different violations of section 1962 based on different predicate acts.55 Furthermore, special remedies are provided for section 1962 violations, without reference to the underlying predicate acts.56 On the criminal side, the special remedies are twenty years in jail, a $25,000 fine and forfeiture of the defendant’s interests. On the private civil side, the remedy is treble damages based on injury to business or property (and perhaps also equitable relief).57 Just as the criminal remedies apply regardless of the underlying predicate acts, so should the civil.58

the convicted person. All provisions of law relating to the dispositing of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

54. 18 U.S.C. Section 1964:
(a) The district courts of the United States shall have jurisdiction to prevent and restrain violation of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

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

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

55. See supra note 52.

56. See Sedima, 741 F.2d at 494, ("RICO was intended not simply to provide additional remedies for already compensable injuries, but rather to provide added remedies and procedures to fight certain specific kinds of organized criminality").


58. Id.
Moreover, a predicate act measure of damages would call into play policies in conflict with those behind RICO. The policies underlying the prohibition of white slave traffic\textsuperscript{59} are very different from the policies underlying the prohibition of mail fraud,\textsuperscript{60} which are different again from the policies underlying the securities laws,\textsuperscript{61} all of which differ from the policies underlying RICO.\textsuperscript{62} Application of a damage measure based on the underlying predicate acts might advance the policies behind those predicate acts at the expense of the policies behind RICO.\textsuperscript{63}

B. Application of a Predicate Act Measure Would Be Unworkable and Unfair

A predicate act measure of damages would attempt to find and apply the damages measure from the state or federal civil law most closely analogous to the predicate act or acts. However, such a method would quickly become mired in characterizations and analogies that would lead to endless debate and uncertainty.\textsuperscript{64}

A few predicate acts are closely analogous to civil causes of action: for example, the predicate act of "fraud in the sale of securities" has been construed to be practically identical to federal securities fraud.\textsuperscript{65} Other predicate acts are less closely analogous to

\textsuperscript{59} Purpose "to protect women who were weak from men who were bad." Wyatt v. United States, 362 U.S. 525, 530 (1960) quoting Denning v. United States, 253 F. 463, 465 (5th Cir. 1918).

\textsuperscript{60} Purpose to protect "the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect . . . ." Durand v. United States, 161 U.S. 306, 314 (1896). See also United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting) (mail fraud statute is "first line of defense" against fraudulent activity).


\textsuperscript{62} The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922-23 (1970), contains a "Statement of Findings and Purpose" that concludes with the following paragraph:

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

\textsuperscript{63} Id.

\textsuperscript{64} See infra note 66 and accompanying text.

civil causes of action for example, mail and wire fraud are only somewhat similar to common-law fraud; suits based on extortionate credit transactions are only somewhat similar to actions for usury or to actions challenging unfair contracts; suits based on bribery and interference with commerce are only somewhat similar to certain federal and state antitrust claims; suits based on murder are only somewhat similar to actions for wrongful death; suits based on kidnapping are only somewhat similar to actions for false imprisonment. Still other predicate acts under RICO cannot be easily analogized to any civil cause of action, for instance, predicate acts involving narcotics or other dangerous drugs, counterfeiting, obstruction of justice, obstruction of criminal investigations, obstruction of state or local law enforcement, interstate transportation of wagering paraphernalia, or participation in white slave traffic.

Even where a RICO violation consists of multiple occurrences of a run of the mill predicate act, courts might be hard pressed to choose the "most analogous" general damage measure. To take a common example, where RICO claims are based on multiple acts of mail fraud occurring in the course of a complicated business deal, the measure of damages might come from fraud as easily as from contract. The problem would become more difficult if the predicate act were more exotic, and therefore less analogous to any civil cause of action.

Of course, where the pattern of racketeering activity includes several different predicate acts, such as fraud in the sale of securities, mail fraud, wire fraud, interstate transportation of stolen property, or bribery and extortion, the choice of a measure of damages becomes much more difficult. For example, most civil RICO cases alleging "fraud in the sale of securities" also allege mail fraud and wire fraud, just as securities, mail and wire fraud are normally connected in criminal prosecutions. Damages resulting from these different predicate acts cannot simply be segregated and measured by different general rules, since the different predicate acts often arise out of the same conduct and result in a single injury. It is

67. Id.
68. See supra note 66.
69. Fraud damages are generally "out of pocket" damages.
70. Contract cases generally result in "benefit of the bargain" or "expectation interest" damages.
71. For example, fraud in the sale of securities, mail fraud, wire fraud, interstate transportation of stolen property, bribery and extortion.
72. See Brickey, 1 Corporate Criminal Liability § 8.01 at 361 (1984) ("In a sample of 55 criminal securities cases 30, or roughly 55%, involved charges of both securities fraud and mail and/or wire fraud").
73. Id.
unclear how a court could justify the choice of one measure of damages over another in these circumstances.74

These problems would be compounded by difficult choice of law problems.75 As noted many years ago by McCormick, "The diversity . . . of the doctrines [of damages], and of the extent and manner of their use as between the states themselves become every year more pronounced."76 For example, in conversion cases the states now follow three different rules on when to measure the value of the property converted: 1) the value at the time of conversion; 2) the highest value between the date of conversion and the date of trial; 3) the highest value between the date plaintiff had notice of the conversion and the date by which he should have replaced the missing property.77 The difference can, of course, be very significant—even given the fact that RICO damages are trebled. Similar examples abound.78 They provide a graphic illustration of just how complex and unworkable a predicate act method would be.79

Despite these serious problems with a predicate act measure, two arguments might be advanced in its support.80 The first argument is that RICO ought to protect all of the interests implicated by the underlying predicate acts.81 Thus, if the underlying predicate act involves interference with or breach of contract, expectation interests ought to be protected by applying (and then trebling) a con-

74. Id.
76. Id.
77. Dobbs, HANDBOOK OF THE LAW OF REMEDIES, § 5.14, at 404 (1973); see also McCormick, supra note 75 at 465-466.
78. For example, in RICO cases based on kidnapping, the most analogous civil measure of damages might be that for false arrest. In false arrest cases, most but not all states include in damages all expenses incurred by a plaintiff after release on bail in defense of the underlying proceedings. McCormick, DAMAGES, § 107, at 377 (1935). The difference between the majority and minority positions, again could be very significant, especially after trebling, making too much depend on the outcome of the choice-of-law problem.
79. For an inkling of the difficulties that would arise, consider the continuing confusion surrounding the statute of limitations governing civil RICO claims, where the rule has been to look to the "most analogous" state law statute of limitations. After years of litigation, courts continue to disagree about what statute of limitation applies in RICO cases. See Best, The Racketeer Influenced and Corrupt Organizations Act: Hardly a Civil Statute, in RICO: Expanding Uses in Civil Litigation 58 (1984) ("Adopting state limitation laws is a source of potential confusion since different limitation periods would apply to the same RICO offenses in different states. Indeed, even one state might have several potentially applicable limitations statutes. Complex choice of law problems may obviously arise when interstate racketeering acts are involved. Because of the complexity and uncertainty in this area a civil RICO suit should be filed as soon as an investigation discloses sufficient facts to allege the elements of the offense").
80. See also, Gorelick, supra notes 3, 5 and 48.
81. Id.
tract-type measure of damages. If instead the predicate act inflicts personal injuries, those interests ought to be protected by awarding (and then trebling) personal injury damages.

However, this argument ignores the fact that Congress imposed a requirement of injury to "business or property." Congress thereby expressed the intention to exclude some forms of damages, and indicated that other interests were not paramount. Civil RICO plaintiffs certainly have the option of asserting pendent claims seeking tort damages to recover for personal injuries, contract damages to protect expectation interests, and fraud claims to obtain restitution, etc. Civil RICO plaintiffs also have the option of asserting independent federal claims such as federal securities law claims. While such claims would not qualify for trebling under RICO, they would still be part of a plaintiff's suit. The only limit on monetary awards would be avoidance of duplicative damages. This appears to afford adequate protection to the interests implicated by the predicate acts, without doing violence to the statutory restriction of damages to those involving plaintiff's "business or property."

The second argument that might be advanced in favor of a predicate act measure is that the strongest possible weapons should be available to a RICO plaintiff, since RICO damages are only available against defendants proved to have committed a pattern of racketeering activity. This argument, however, is weak at best. There

82. Id.
83. Id.
84. See supra note 23 and accompanying text.
85. For example, damages for personal injuries are excluded. See supra note 38.
86. For example, consider the contractual expectation interests of businessmen. See supra note 37.
87. Civil RICO plaintiffs may also apply to the government for restitution of property forfeited by the convicted RICO defendant. The award of such restitution is within the unreviewable discretion of the Department of Justice and the Attorney General.
88. The plaintiff could bring such claims in a federal court, even without RICO claims.
89. For example, consider the facts of Janigan v. Taylor, supra note 40 and accompanying text. If Janigan were brought today under RICO, damages could be awarded for three times the difference between the value of plaintiff's stock at the time of sale ($40,000 plus X) and the price paid by the defendant ($40,000), in other words, three times X. Restitution might then be awarded on top of this, pursuant to a federal securities or state law pendent claim, requiring defendant to disgorge the ultimate sale price of the stock ($700,000), minus its value at the time defendant bought the stock from plaintiff ($40,000 plus X). This would provide both RICO treble damages and restitution, while avoiding duplication of damages. Cf. Alcorn County v. United States Interstate Supplied, Inc., 731 F.2d 1160, 1170 n.16 (5th Cir. 1984) (discussing duplication of damages in the context of punitive and treble damages).
90. Cf. Blakey, Reflections, supra note 4, at 237, 290 n.150 (1983) ("if [RICO's] language is ambiguous, that construction which would 'effectuate its remedial purpose' by providing enhanced sanctions and new remedies' ought to be adopted (citation omitted")

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must be some limits on RICO damages, in recognition of established damage principles concerned with the avoidance of windfalls to plaintiffs, establishment of proper incentives to plaintiffs and defendants to settle, and avoidance of economic waste.91 Surely, RICO plaintiffs cannot be allowed simply to choose the method of measuring damages that results in the largest award, and then treble it. Such a method would be completely uncertain and unpredictable,92 and would sacrifice too many established principles of damage law to the single goal of deterring RICO violators.

CONCLUSION

A predicate act method would encourage RICO plaintiffs to advance every possible analogy and characterization in search of the most lucrative measure of damages.93 It would thus lead to abusive RICO damage theories, similar to the abusive RICO liability theories that have plagued the courts for the past several years.94

In contrast, a Clayton Act method would make the measurement of RICO damages relatively simple and predictable.95 It would provide treble damages where they most clearly further the purposes of RICO, while still allowing recovery of single damages via pendent claims to enforce other policies embodied in other laws.96 It would also prevent RICO from being used as a launching pad for overly "creative" damage theories, alleged by plaintiffs seeking recoveries far beyond their injuries and far beyond anything available under pre-existing law.

A Clayton Act method should thus be welcomed by the many judges who have decried the tide of abusive civil RICO suits and cast about for some way to bring those suit into line with pre-existing law.97 It should also be welcomed by businessmen who, if

91. See Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 3.2 at 145-46 (1973).
92. Moreover, it would result in forum shopping.
93. See supra note 92 and accompanying text.
94. See supra notes 64-81 and accompanying text.
95. See supra notes 32-63 and accompanying text.
96. However, it should be noted that under any measure of damages, some RICO violations might not give rise to pendent claims or civil RICO treble damage claims. Consider a defendant who engages in a pattern of racketeering activity by selling narcotics to high school students. The students (or their parents) probably could not show injury to their business or property as required for a RICO treble damage claim. It is also unclear whether state law would provide a damage remedy. If RICO is held to provide equitable relief to private plaintiffs, injunctive relief might be available. Otherwise, this type of case would be relegated to criminal prosecutors, not civil plaintiffs.
97. See generally Sedima S.P.R.L. v. Imrex Co., Inc., 741 F2d 482 (2d. Cir. 1984) and cases cited therein.
they must be subjected to civil RICO “prosecution,” are best served by a civil RICO damages measure that adheres to the language, structure and purpose of the statute.