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Treble Damages Under RICO: Characterization and Computation

Congress provided the treble damage provision of the Racketeer Influenced and Corrupt Organizations Act¹ (RICO) as one of the “new remedies” to deal with organized crime in the United States,² a “highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption.”³ Section 1964(c) of RICO creates a private cause of action enabling “[a]ny person⁴ injured in his business or property⁵ by rea-

1 Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1982)). Congress enacted RICO on October 15, 1970, as Title IX of the Organized Crime Control Act of 1970.

2 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose).

RICO’s “legislative history clearly demonstrates that . . . [Congress] intended [RICO] to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.” *Russello v. United States*, 104 S. Ct. 296, 302 (1983). “[T]he primary purpose of RICO [was to address] the infiltration of legitimate businesses” *United States v. Turkette*, 452 U.S. 576, 591 (1981). Nevertheless, “courts are all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate organizations by racketeers.” *United States v. Altomare*, 625 F.2d 5, 7 n.7 (4th Cir. 1980) (emphasis added). As such, they faithfully reflect the teaching of *Turkette*, 452 U.S. at 590 (“unpersuaded that Congress . . . confined [RICO to] *only* the infiltration of legitimate business”) (emphasis in original). Rejected, too, has been the notion that RICO “applies *only* to organized crime in the classic ‘mobster’ sense.” *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.) (emphasis added), *cert. denied*, 449 U.S. 830 (1980). Legitimate businesses “enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming [RICO] is being misconstrued.” *Sedima, S.P.R.L. v. Imrex Corp.*, 105 S. Ct. 3275, 3287 (1985).

3 Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922 (Statement of Findings and Purpose).

4 RICO defines person as any “individual or entity capable of holding a legal or beneficial interest in property.” 18 U.S.C. § 1961(3) (1982). As such, it includes not only private individuals, but public bodies. *See, e.g.*, *Federal Deposit Ins. Corp. v. Hardin*, 608 F. Supp. 348 (E.D. Tenn. 1985) (FDIC); *Pennsylvania v. Cianfrani*, 600 F. Supp. 1364 (E.D. Pa. 1985) (state government); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 644 (D. Alaska 1982) (local government).

5 Congress limited recovery to injury to business or property. *See Drake v. B.F. Goodrich Co.*, 782 F.2d 638 (6th Cir. 1986) (claim for toxic chemical personal injury and wrongful death denied); *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 501 (W.D. Wis. 1985) (claim for personal injuries in products liability claim dismissed); *Local 355 v. Pier 66 Co.*, 599 F. Supp. 761, 765 (S.D. Fla. 1984) (no RICO claim for incidental legal fees); *Callan v. State Chem. Mfg. Co.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984) (no RICO claim for mental anguish, loss of self esteem, and confidence or damage to reputation). *But see James v. Meinke*, 778 F.2d 200, 207 (5th Cir. 1985) (consequential damages, even in absence of out-of-pocket damages, may be recovered); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498-99 (9th Cir. 1985) (interference with expert witness depleted final settlement fund);

son of⁶ a violation of [RICO to] sue . . . [and] recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."⁷ While potential claimants have increased their use of the civil RICO treble damage provision,⁸ several issues touching on the character and computation of the treble damages remain unanswered.

Issues concerning damages are generally resolved by classifying the character of the recovery. Traditionally, damages have been thought to fall into one of two mutually exclusive and exhaustive categories: compensatory⁹ or punitive.¹⁰ Because RICO treble damages are a hybrid form of damages, however, they do not comfortably fit within either category.¹¹

Alexander Grant & Co. v. Tiffany Indus., 770 F.2d 717, 719 (8th Cir. 1985) (on remand after *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985)) (damages include legal expenses and damage to business reputation), *cert. denied*, 106 S. Ct. 799 (1986).

6 "[B]y reason of" language simply imposes a proximate cause requirement on plaintiffs. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985). See also *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969) ("causal connection" in antitrust).

7 18 U.S.C. § 1964(c) (1982).

8 One commentator noted that only thirteen cases involving civil RICO had been published by 1981. See Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 n.7 (1982). No separate statistics on RICO litigation are kept by the Administrative Office of the United States Courts. It may be possible, however, to make estimates from the information published. See generally ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1983). Approximately 250,000 civil cases are filed each year. *Id.* at 122. Private litigants filed slightly more than 145,000 of the civil cases. *Id.* at 121. All forms of extortion, racketeering, and threat of prosecutions amounted to 478. *Id.* at 320. Securities, commodities, and exchange related civil filings made up 3,000. *Id.* at 164. Fraud related filings made up 2,000. *Id.* at 345. Accordingly, if most securities and fraud cases were also RICO cases, RICO filings would approximate 5,000, less than 2% of all federal filings. In addition, the Department of Justice estimated that 65% of all civil RICO filings had an independent basis of federal jurisdiction. Accordingly, the litigation seems to be neither wholly new nor of floodgate proportions. See also ABA SECTION OF CORPORATION, BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55 (1985) (one reported civil RICO case in 1972; nine reported decisions before 1980; 300 published and unpublished opinions on civil RICO by 1985; only nine reported cases in which treble damages awarded).

9 Compensatory damages are awarded primarily to compensate victims for their injuries. RESTATEMENT (SECOND) OF TORTS § 903 comment a (1979); W. HALE, HANDBOOK ON THE LAW OF DAMAGES 3 (1896). They are automatically awarded upon the establishment of the fact, cause, and extent of the harm. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 14 (1935).

10 Punitive damages are awarded to punish egregious conduct. RESTATEMENT (SECOND) OF TORTS § 908 (1979); W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS § 2 (5th ed. 1984). They are within the discretion of the jury to award based upon the degree of wrongfulness of the conduct and the defendant's wealth. C. MCCORMICK, *supra* note 9, at § 84; K. REDDEN, PUNITIVE DAMAGES § 2.7 (1980 & Supp. 1985).

11 See *United States v. Bornstein*, 423 U.S. 303, 313-17 (1976); *Huntington v. Attrill*, 146 U.S. 657, 666-79 (1892). For a discussion of the hybrid nature of RICO treble damages, see Goering, *The Characterization of Treble Damages: Conflict Between a Hybrid Mode of Recovery and Jurisprudence of Labels*, in TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MATERIALS ON RICO 428 (G. Robert Blakey ed. 1980). See also ABA

Like compensatory damages, treble damages are mandatory once the victim establishes liability and the extent of the harm.¹² While treble damages are awarded to compensate the victim, they go beyond the scope of compensatory damages and make the victim whole for any accumulative harm.¹³ Unlike punitive damages, treble damages are not discretionary either in award or amount,¹⁴ they are not based upon an amount adjudged necessary to punish or deter,¹⁵ and they are not commensurate with the willful, wanton, or reckless conduct of the wrongdoer.¹⁶ As such, RICO treble damages are neither awarded for the same reasons nor in the same manner as either compensatory or punitive damages. Rules that have developed reflecting the traditional dichotomy of compensatory or punitive damages, if mechanically applied to RICO, threaten, therefore, to frustrate its multi-faceted character. Instead, courts should develop rules under RICO in accord with Congress' intent that its treble damage provision serve its broad remedial purposes.

Part I of this note analyzes RICO's purposes in light of its legislative history and its statutory language. The purposes of the treble damage provision are then used as a framework against which issues touching upon treble damages can be appropriately resolved.

CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION 116-25 (1985).

12 See note 27 *infra* and accompanying text. See also *Edwards v. Travelers Ins.*, 563 F.2d 105, 118-19 (6th Cir. 1977) (Tenn. law; mandatory); *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970) (antitrust mandatory), *cert. denied*, 400 U.S. 1020 (1971); *McMahon Food Co. v. Call*, 406 N.E.2d 1206 (Ind. App. 1980) (IND. CODE § 34-4-30-1 (1976); treble damages for theft mandatory).

13 Accumulative harm is that harm falling outside the range of legal damages, too elusive and indeterminate for adequate measurement by traditional damage principles. See *Brady v. Daly*, 175 U.S. 148, 154 (1899) (inherent difficulty in proving the amount of damages actually sustained); *Beacon Folding Machine Co. v. Rotary Machine Co.*, 17 F.2d 934, 935 (D. Mass. 1927) (multiple damages provide adequate compensation when strict rules of law would not afford it); *Burnett v. Ward*, 42 Vt. 80, 84-85 (1869) (remedial statute allows recovery of accumulative damages for sheep killing). See generally Vold, *Are Threefold Damages Under the Antitrust Act Penal or Compensatory?*, 28 Ky. L.J. 117 (1940).

While courts refer to the award of single damages as actual damages, they are more accurately labeled "legal" damages. A plaintiff may suffer actual harm for which the law will not provide damages; for example, mental distress. See *W. PROSSER & W. KEETON*, *supra* note 10, at § 12. Moreover, the burden of proof imposed on the plaintiff to prove a legal injury, proximate cause, and reasonable certainty as to the amount may exclude certain types of harm from recovery. Finally, the opportunity costs and psychological effort associated with litigation are not recoverable. Accordingly, accumulative damages compensate plaintiffs for actual harm not otherwise recoverable as legal damages.

14 See note 27 *infra* and accompanying text; *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 358-65 (Ind. 1982) (punitive damages discretionary with jury).

15 See, e.g., *Shahrokhfar v. State Farm Mut. Auto. Ins. Co.*, 634 P.2d 653, 658-59 (Mont. 1981) (punitive damages may not be reduced by comparative negligence since their purpose is to punish).

16 See, e.g., *Smith v. Miliken*, 247 Ga. 369, 371-72, 276 S.E.2d 35, 37-38 (1981) (purpose of exemplary damages regulates amount).

With this framework in mind, Part II discusses several issues that may be expected to arise in RICO litigation dealing with characterization. Part II suggests solutions to these issues based upon the underlying purposes of RICO. Part III then considers several problems surrounding the computation of treble damages, again suggesting solutions to these problems based upon the underlying purposes of RICO.¹⁷

I. A Framework For Resolving Issues Concerning Treble Damages Under RICO

A. Congressional Intent

Congress modeled RICO's treble damage provision, section 1964(c), after the antitrust treble damage provision, section 4 of the Clayton Act.¹⁸ Congress did this to reflect the necessary remedial scheme that would "curtail—and eventually . . . eradicate—the vast expansion of organized crime's economic power."¹⁹ To avoid the

17 The topics discussed in this note do not exhaust the issues that touch on the character or computation of treble damages under RICO. Issues not discussed in this note but which can be similarly resolved according to the purposes of RICO include: (1) *in pari delicto* as a defense; *see, e.g.*, *Eichler v. Berner*, 105 S. Ct. 2622, 2628-29 (1985) (§ 10(b) of Securities Exchange Act of 1934 not limited by common law *in pari delicto*); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968) (common law *in pari delicto* rule rejected for antitrust), *overruled on other grounds*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); (2) the informing of the jury of the presence of the treble factor; *see, e.g.*, *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974) (antitrust; no), *cert. denied*, 420 U.S. 992 (1975); (3) the duty to mitigate; *see, e.g.*, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) (must minimize equal employment damages); RESTATEMENT (SECOND) OF CONTRACTS § 350 (1979) (mitigate damages); RESTATEMENT (SECOND) OF TORTS § 918 (1979) (mitigate damages); (4) the burden of proof; *see generally* Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566 (1985); (5) the treatment of treble damages in bankruptcy; and (6) the measure of damages; *compare* *Smith v. Bolles*, 132 U.S. 125, 129-30 (1889) (fraud; naturally and proximately out of pocket) *with* *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1384 (N.D. Ill. 1984) (includes benefit of bargain, i.e., lost profits) *and* *Wilkinson v. Paine, Webber, Jackson & Curtis, Inc.*, 585 F. Supp. 23, 29 (N.D. Ga. 1983) ("property" not limited to business and includes loss of stock value).

18 15 U.S.C. § 15 (1982).

19 116 CONG. REC. 35,193 (Sen. Poff), 35,196 (Cong. Celler), 36,296 (1970). *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 276 n.117 (1982) [hereinafter cited as *Civil Action*] (cited with approval in *Russello v. United States*, 104 S. Ct. 296, 303 (1983)). *See also* *Organized Crime Control, Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 538, 543-44 (1970).

RICO's legislative history began in 1951 with the Kefauver Committee, whose focus included infiltration by organized criminal elements into legitimate businesses. In 1967, the President's Commission on Law Enforcement and Administration of Justice recommended that Congress adopt antitrust-type remedies to control underworld activities, particularly in legitimate businesses. THE CHALLENGE OF CRIME IN A FREE SOCIETY: FINAL REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 208 (1967). In response, Senator Hruska and Congressman (now Justice) Poff introduced companion legislation that included criminal and civil sanctions and public and

restrictive precedence of the antitrust laws, however, but make full use of the remedial scheme of the treble damage provision, Congress enacted section 1964(c) separate from the Clayton Act.²⁰

Congress provided guidelines for interpreting RICO and the treble damage provision. RICO's legislative history, statutory language, and statutory construction consistently reflect Congress' intent that RICO's treble damage provision serve broad remedial purposes.²¹

Because the language of the statute is the most reliable evidence of congressional intent, it is the place to begin the analysis.²² Absent ambiguity or a clearly expressed contrary intent, the language of the statute is conclusive evidence of Congress' intent.²³ Congress' intent is nowhere more clearly expressed than in subsection 904(a) of Title IX of the Organized Crime Control Act of 1970. This subsection directs that RICO's "provisions . . . shall be liberally construed to effectuate its remedial purposes."²⁴ This directive reflects several aspects of Congress' intent. First, it specifically instructs the courts to construe RICO's provisions liberally.²⁵ Sec-

private enforcement mechanisms in both Houses of Congress. *See, e.g.*, S. 2048, 90th Cong., 1st Sess. (1967); 113 CONG. REC. 17,999 (1967). The ABA reviewed the bills and endorsed their concepts, but recommended that Congress draft them outside of the antitrust statutes to give them a broader impact. *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1816, S. 2022, S. 2122, S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 259 (statement), 556 (report) (1969) (House Hearings at 537 (statement), 556 (report)) [hereinafter cited as *Hearings on S. 30*]. Subsequently, Senator Hruska and Congressman Poff drafted and introduced new legislation in both houses that followed the ABA's recommendation. *See, e.g.*, S. 1623, 91st Cong., 1st Sess. (1969); 115 CONG. REC. 6995-96 (1969). Senator McClellan introduced S. 30 based on a number of recommendations of the President's Crime Commission. S. 30, 91st Cong., 1st Sess. (1969); 115 CONG. REC. 769 (1969). S. 1861 was integrated into S. 30 as Title IX of the Organized Crime Control Act of 1970 and passed by both Houses of Congress and signed into law on October 15, 1970. 116 CONG. REC. 36,296 (1970). Based upon the recommendations of the ABA, the treble damage provision that had not appeared in S. 1861 was restored in the House. *See Civil Action, supra*, at 275 n.115. For a thorough treatment of RICO's legislative history, see *Civil Action, supra*, at 249-80; Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMPLE L. REV. 1009, 1014-20 (1980). *But see* ABA SECTION OF CORPORATION, BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 122-26 (1985) (criticizing Blakey).

20 *See* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3287 (1985). *See also* 115 CONG. REC. 6995, 9567 (1969); 116 CONG. REC. 972 (1970).

21 *See, e.g.*, H.R. REP. NO. 1549, 91st Cong., 2d Sess. 57-58 (1970) (The House Judiciary Committee noted that § 1964 "contain[ed] broad remedial provisions for reform.").

22 *United States v. Turkette*, 452 U.S. 576, 580 (1981).

23 *Russello v. United States*, 104 S. Ct. 296, 299 (1983) (quoting *Turkette*, 452 U.S. at 580).

24 Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 922, 947.

25 *See generally Note, RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

ond, it classifies RICO as a remedial measure.²⁶ Third, the plural form of "purposes" reflects Congress' awareness of the multi-dimensional purposes of RICO. Finally, its use of the word "shall" mandates that courts follow this directive in interpreting RICO.²⁷ Further, Congress recognized that RICO would overlap other remedial schemes. Congress provided that "[n]othing in RICO shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO.²⁸ Thus, RICO's remedial scheme, including the treble damage provision, supplements, but does not supplant, existing federal or state law that may redress similar

26 S. REP. NO. 617, 91st Cong., 1st Sess. 82 (1969) ("remedial rather than penal"). When Congress classifies a remedy as not "penal," courts will not lightly re-examine the question. *United States v. Ward*, 448 U.S. 242, 248-51 (1980) (civil penalty classified as such for all purposes, including self-incrimination); *Rex Trailer Co. v. United States*, 350 U.S. 148, 150-54 (1956) (Court would not transform double damage provision of Property Surplus Act of 1944 into a criminal penalty since Congress characterized it as remedial); *Helwig v. United States*, 188 U.S. 605, 613 (1903) (if it is clearly the will of Congress that the provision not be regarded as a penalty, a court must be governed by that will). That classification overrides the federal common law that may have pointed in the other direction. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 312-15 (1981) (statute controls over federal common law).

27 *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (use of the word "shall" in the statute, though not entirely controlling, is of significant importance and indicates an intention that the statute shall be construed as mandatory). *See also* *Minor v. Mechanics Bank of Alexandria*, 26 U.S. (1 Pet.) 46, 64 (1828) ("ordinary meaning of the language must be presumed to be intended"; construction must give effect to the true intent and object of the legislature in the enactment of the statute). *But see* *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1242 (W.D. Okla. 1984) ("Although Congress used the verb 'shall' in § 1964(c), it is not necessarily mandatory.") (citing 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 57.03 (1973)). Contrary to the court's use of C. SANDS, *supra*, in *Summers*, § 57.03 also states that the form of the verb used in a statute is the single most important contextual consideration in determining whether a statute is mandatory or discretionary. Sands concedes that it is not the sole determinant and that its natural connotation can be overcome by other considerations. Nonetheless, the ordinary meaning of the work impliedly indicating Congress' intent "should always be favored." *Id.*

28 Pub. L. No. 91-452, tit. IX, § 904(b), 84 Stat. 922, 947 (1970); *see Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 392 (7th Cir. 1984) ("Congress enacted RICO in order to supplement, not supplant, the available remedies since it thought those remedies offered too little protection for the victims."), *aff'd*, 105 S. Ct. 3291 (1985). *See also* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983) (Marshall, J.) (cumulative construction furthers broad remedial purposes). *But see* *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3292, 3293-96 (1985) (Marshall, J., dissenting) (RICO federalizes state law claims and displaces or supersedes federal remedial schemes); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1308 (D. Colo. 1984) (RICO claim dismissed where adequate state remedy).

conduct.²⁹ Congress itself has set the context within which RICO must be construed in its attack on sophisticated crime.³⁰

B. *Supreme Court Interpretation of RICO*

Since its enactment, the United States Supreme Court has noted that RICO is "both preventative and remedial."³¹ In *Sedima, S.P.R.L. v. Imrex Co.*,³² the Supreme Court, in reflecting upon RICO's legislative history, observed that the "legislative statements about novel remedies and attacking crime on all fronts . . . [reflect the spirit in which] all of the Act's provisions should be read."³³ The court continued by stating that:

RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach . . . but also of its admonition that RICO is to "be liberally construed to effectuate its remedial purposes." The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering injury.³⁴

²⁹ Such provisions are common features of federal legislation. See, e.g., 15 U.S.C. § 77p (1982) (securities), 29 U.S.C. § 1144(d) (1982) (ERISA), and 15 U.S.C. 2072(c) (1982) (consumer products). As such, RICO does not, for example, preempt state legislation. See *Alvers v. State of Indiana*, 489 N.E.2d 83 (Ind. App. 1986) (Indiana antiracketeering law not preempted by federal RICO).

³⁰ *Haroco*, 747 F.2d at 392 (RICO enacted to supplement, not supplant, available remedies).

The liberal construction directive in RICO has its roots in efforts in the nineteenth century to undo legislative reform. Judicial hostility at that time to reform efforts were reflected in the "abstract canons of statutory interpretation . . . : strict construction of statutes in derogation of the common law; [and] strict construction of penal statutes The effect was to put a primarily obstructive if not destructive connotation on the process of statutory interpretation." W. HURST, *THE GROWTH OF AMERICAN LAW* 186 (1950). Legislatures reacted: "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 174 (1974). See also E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 421 (1951).

The rule of strict construction in federal law is not of constitutional status. *Tarrant v. Ponte*, 751 F.2d 459, 465-66 (1st Cir. 1985). It is merely a principle of statutory construction. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954), cannot be fairly cited for the proposition that civil provisions that play a role in the imposition of criminal sanctions must be narrowly construed, since the Supreme Court refused to follow it in *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 373-75 (1975) ("We cannot agree . . . that every section of an act establishing a broad regulatory scheme must be construed as a 'penal' provision . . . merely because two sections of the Act . . . provide for civil and criminal penalties." *Id.* at 375.).

³¹ *United States v. Turkette*, 452 U.S. 517, 593 (1981). See also *United States v. Capetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). *But see Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D. Colo. 1984) (treble damage statutes, like criminal statutes, must be strictly construed; ambiguities should be resolved in favor of lenity).

³² 105 S. Ct. 3275 (1985).

³³ *Id.* at 3286.

³⁴ *Id.*

The Supreme Court has thus endorsed Congress' guidelines for interpreting RICO and its provisions.³⁵ The Court has been faithful to the liberal construction clause and consistent in looking first to the purposes and goals of RICO before resolving issues concerning the application of the provisions of the statute.³⁶

C. *The Treble Damage Provision*

Congress' general directive to liberally construe all of RICO's provisions and the Supreme Court's instruction to read RICO broadly are particularly pertinent to the treble damage provision.³⁷ That courts must liberally construe RICO and that RICO should supplement other available remedies provide explicit guidelines for resolving questions about section 1964(c). Similarly, the Supreme Court's language about RICO's broad remedial purposes suggests that courts use the treble damage provision to fulfill the remedial goals of RICO in fighting crime.

Treble damages have unique characteristics that can be creatively used to address the problems of sophisticated crime.³⁸ Treble damages can be used to (1) encourage private citizens to bring RICO actions,³⁹ (2) deter future violators,⁴⁰ and (3) compen-

35 *Id.* (RICO is to be read broadly); *Russello v. United States*, 104 S. Ct. 296 (1983) (RICO is remedial); *Turkette*, 452 U.S. at 587 (RICO "shall be liberally construed").

36 *Sedima*, 105 S. Ct. at 3284 (noted Congress' underlying concerns); *Turkette*, 452 U.S. at 590 ("In view of the purposes and goals of the Act . . .").

37 *Sedima*, 105 S. Ct. at 3285 n.14 ("language [in another part of the Act] may be useful in interpreting other sections of the Act").

38 Treble damages blend features of compensatory damages and deterrence to create an effective remedial tool. They compensate the victim, but unlike traditional damages, they also compensate for accumulative harm. By providing full compensation for all legal and accumulative harm, they further act as an incentive to private citizens to bring suit against RICO violators and, since they are mandatory, they create a strong deterrent. See notes 11-16 *supra* and accompanying text.

The way to deter any activity is to make its costs larger than its benefits. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 164 (2d ed. 1977). Deterrence is not, however, unique to treble damages; it is a common feature of all damages. Compensatory damages also deter. *Id.* at 154. Indeed, compensatory damages may sometimes produce the amount of deterrence necessary to inhibit wrongful conduct. *Id.* at 143. When they do not, multiple damages can be used to ensure that the expected benefits discounted by the likelihood of getting caught will not exceed the anticipated costs, including opportunity costs and potential liability costs. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 226 (1976). For other views regarding an economic analysis of the law, see Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 *AM. CRIM. L. REV.* 419 (1980); K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* (1976).

39 *Sedima*, 105 S. Ct. at 3285; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to . . . violations.") (emphasis in original) (apropos of § 4 of the Clayton Act); *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965); *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165 (5th Cir. 1984) (incentives to enlist the aid of civil claimants in deterring racketeering). See also R. POSNER, *ECONOMIC ANALYSIS OF LAW*

sate victims for all accumulative harm.⁴¹ These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.

Identifying these elements as goals for the treble damage provision and then striving to meet them increases enforcement, which increases the likelihood of violators being caught; discourages other violators, which will reduce the amount of sophisticated crime committed in the future; and makes victims whole again, which relieves the crippling effect of crime.⁴² By recognizing that they can use RICO's treble damage provision to spur litigation, compensate, and deter, courts will consider the provision expansively as a means of dealing effectively with crime. Thus, courts should resolve issues concerning treble damage awards with these three purposes in mind. Only then can the broad, far-reaching intent of Congress be fully accomplished.⁴³

II. Issues Turning on the Nature of the Treble Damage Award

Several issues arise in litigation that touch on the characterization of the relief sought. Because Congress characterized RICO as remedial and directed that the statute be construed broadly, the following issues should be resolved according to that characterization and consistent with a liberal construction of the treble damage provision.

A. *Survival*

When the plaintiff in a RICO action dies prior to judgment, the question arises whether the representatives of the plaintiff's estate may continue to pursue the RICO cause of action. Alternatively,

400, 462 (1977) (receipt of damages necessary to give victim incentive to shoulder the burdens involved in the enforcement of law).

40 *Russello v. United States*, 104 S. Ct. 296, 303 (1983). See R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 221-222 (1976).

41 *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982) (Congress sought to provide ample compensation to victims of antitrust violations). "Adequate relief or compensation is the main goal." S. REP. NO. 307, 97th Cong., 1st Sess. 1273 (1981) (a later Congress, recodifying the laws, reiterated the goals of RICO). See also note 13 *supra*; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 221-22 (1976).

42 See 115 CONG. REC. 5874 (1969) (statement of Sen. McClellan); *Hearings on S. 30, supra* note 19, at 497. Like the antitrust laws, RICO creates a "private enforcement mechanism that . . . deter[s] violators . . . and provide[s] ample compensation to the victims" *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982).

43 Roscoe Pound suggests that the goal of law should be to "secure *all* interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests as a whole." 3 R. POUND, *JURISPRUDENCE* 330-34 (1959). Accordingly, courts should attempt to secure the three interests of RICO's treble damages without sacrificing any one element or frustrating the statutory scheme of RICO.

when the defendant in a RICO action dies prior to judgment, the question becomes whether the defendant's estate will be liable for the RICO treble damages judgment. The answers to these questions have traditionally depended upon the characterization of the damages sought.⁴⁴ A claim for compensatory damages usually survives the death of the plaintiff or the defendant, whereas a claim for punitive damages does not survive.⁴⁵ A civil RICO cause of action, however, involves an award of treble damages which is neither compensatory nor punitive in nature.⁴⁶ Therefore, traditional analysis does not resolve the question of survival of a RICO cause of action for treble damages.

Analysis of this issue in light of the legislative history and the statutory language indicates that RICO claims for treble damages ought to survive the defendant's death.⁴⁷ RICO is a remedial measure. To encourage private citizens to bring suit and to assure victims full compensation for their injury, treble damage actions should survive.⁴⁸ Otherwise, the defendant's estate would retain

44 See, e.g., *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884) (action for penalties and forfeitures does not survive death of plaintiff).

Under a federal statute, survival is a question of federal law. *Carlson v. Green*, 446 U.S. 14, 23 (1980) (under federal civil rights statute survival is a question of federal law). See *Cox v. Roth*, 348 U.S. 207, 210 (1955) (action under Jones Act, 46 U.S.C. § 688 (1982), survives death of a tortfeasor in light of Congress' express intent to provide for seamen); *Moore v. Backus*, 78 F.2d 571, 575 (7th Cir. 1935) (antitrust action survives death of injured party based on 4 Edw. 3, allowing survival of actions against trespassers to recover damages). *But see* *RSE, Inc. v. H & M, Inc.*, 90 F.R.D. 185, 186-87 (M.D. Pa. 1981) (treble damages under antitrust not recoverable from defendant's estate; cases cited).

45 1 T. SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* 710 (9th ed. 1912). Courts justified this distinction by stating that when the defendant was deceased the damages would no longer serve as punishment. See generally W. PROSSER & W. KEETON, *supra* note 10, at §§ 125A-127.

Some state statutes and case law, however, provide for the survival of all actions. See, e.g., IND. CODE § 34-1-1-1 (1976); *Atlas Properties, Inc. v. Didich*, 226 So. 2d 684 (Fla. 1969) (survival of all actions in Florida); *Davis v. State ex rel. Long*, 119 Ind. 555, 557, 22 N.W. 9, 10 (1839) (including penalties).

46 See note 11 *supra* and accompanying text.

47 *State Farm Fire & Cas. Co. v. Caton*, 540 F. Supp. 673, 677-83 (N.D. Ind. 1982). The court concluded that RICO treble damages are remedial in nature. Both the underlying action and the claim for treble damages survived the defendant's death. *But see* *Summers v. FDIC*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984) (treble damages do not survive beyond actual damages against receiver). The District Court of the United States for the Western District of Oklahoma correctly decided that treble damages should not survive against a receiver of a defunct bank; however, it erroneously based its holding on the characterization of treble damages as penal. RICO's treble damages are remedial. They should not survive against the receiver of a defunct bank because, as between two innocent parties—the plaintiff and the receiver—the receiver should not bear the burden of the loss. See *Holly v. Missionary Soc'y of the Protestant Episcopal Church*, 180 U.S. 284, 295 (1901) (Court will not transfer loss to another equally innocent party).

48 To make recovery dependent upon the defendant's survival would discourage plaintiffs from initiating and pursuing RICO causes of action. In addition to denying victims compensation for their injuries, this would reduce enforcement of RICO. Without the aid of private citizens enforcing RICO, the responsibility would lie with governmental agencies

any benefit gained from unlawful activity while denying the victim his right to recovery. A rule that dismisses a plaintiff's claim upon the death of the defendant may also encourage the murder of RICO defendants.⁴⁹

To completely remove the corrupting influence of organized crime, courts should also keep the treble damage remedy available to the plaintiff's estate in spite of the plaintiff's death. Courts should not leave the plaintiff's estate uncompensated because of the fortuitous death of the plaintiff.⁵⁰ Furthermore, to dismiss a claim upon the death of the plaintiff could encourage defendants, fearful of a substantial treble damage judgment, to seek their own remedy and kill the plaintiff, especially if the defendants are connected to organized crime. The civil provisions must continue to pose a threat to all RICO defendants regardless of the presence of a live plaintiff.⁵¹

whose resources are already limited. See *Sedima*, 105 S. Ct. at 3284; TASK FORCE ON ORGANIZED CRIME FOR THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 14-15 (1967). To illustrate the extent of private enforcement, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions, 84% were instituted by private plaintiffs. U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). Less enforcement would also minimize the broad deterrent effect on those who engage in unlawful conduct.

49 On June 5, 1981, State Farm Fire & Casualty Co., a victim of a fraudulent settlement claim which was part of an arson-for-profit scheme, filed a RICO action to recover \$46,000 in treble damages. On November 21, 1981, one of the defendants was found murdered in Las Vegas with a single bullet through his head. *State Farm Fire & Cas. Co. v. Caton*, 540 F. Supp. 673, 674-675 (N.D. Ind. 1982).

In organized crime groups, nominees may be used to hold property belonging to other members of the organization. Where the nominee is being sued under RICO and the property actually belongs to another member of the organized crime group, the actual property owner may have an incentive to kill the defendant if the RICO suit will be dismissed upon the defendant's death. Other members of the group may also have an incentive to kill the defendant if the RICO lawsuit will expose other members of the group to liability.

A facet of contemporary organized crime violence indicative of the extent to which some will go to avoid prosecution and liability is the violence directed towards judicial and prosecutorial officials. See, e.g., *N.Y. Times*, Dec. 15, 1982, at 10, col. 1 (conviction of killers of Judge John H. Wood, Jr.); *id.*, March 14, 1982, at 18, col. 3 (review of plots against judges, prosecutors, and investigators taking part in drug cases); *id.*, April 16, 1982, at 7, col. 6 (indictment of "narcotics smuggler and a hired killer . . . on charges of murdering the Federal District Judge" scheduled to preside over a drug case against them). This violence redirected towards defendants in a civil RICO suit would allow organized crime members to control which suits are litigated by virtue of their decision to kill the defendant.

50 It would be quite inequitable to deny any remedy because of death or corporate dissolution of the party to representatives of an individual whose business was destroyed. *United Copper Securities v. Amalgamated Copper Co.*, 232 F. 574, 578 (2d Cir. 1916) (antitrust).

51 See 127 CONG. REC. 28,217 (1981) (in 1980, 23,000 murders; in 1979, only 73 % of the murders were cleared by arrest; 1,280 organized crime killings). See also *Sen. Special Comm. to Investigate Organized Crime in Interstate Commerce*, Interim Rep., S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951); *Organized Crime & Use of Violence: Hearings Before Permanent Sub-*

Allowing the treble damage provision to survive the death of either the plaintiff or defendant ensures active enforcement and strong deterrence which, in turn, enhances RICO's remedial effort.

B. *Summary Judgment*

Generally, a party may obtain an award of damages by summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure if the amount of damages is not in dispute.⁵² A plaintiff cannot recover punitive damages on summary judgment, however, because punitive damages are within the discretion of the jury.⁵³ Based on this distinction, courts should allow plaintiffs to recover RICO treble damages on a motion for summary judgment. Like compensatory damages, RICO treble damages are mandatory and automatically awarded once the plaintiff proves the fact, cause, and extent of the injury.⁵⁴ In addition, the amount of plaintiff's damages are automatically trebled and involve no discretion on the part of the jury or the court. Furthermore, nothing in the language of Rule 56 prohibits recovery of treble damages where the amount is not in dispute.⁵⁵ Thus, to reduce costs of litigation and increase efficiency, once a plaintiff establishes liability and if the amount of damages are not at issue,⁵⁶ courts should award treble damages upon a motion for summary judgment. Merely trebling the damages should not alone bar granting a motion for summary judgment on the damages issue.

comm. on Investigation of the Senate Comm. on Governmental Affairs, 96th Cong., 2d Sess. Parts 1 & 2 (1980); note 48 *supra*.

52 FED. R. CIV. P. 56(c). See *Douglass v. First Nat'l Realty Corp.*, 437 F.2d 666 (D.D.C. 1970) (summary judgment awarded to plaintiff for damages, reimbursable expenses, and costs of the action); *United States v. Natale*, 99 F. Supp. 102 (D. Conn. 1950) (summary judgment granted to plaintiff for treble damages under Housing and Rent Act of 1947).

53 C. McCORMICK, *supra* note 9, at § 85.

54 The civil remedy provision of RICO states that "treble damages *shall* be recovered." 18 U.S.C. § 1964(c) (1982) (emphasis added). See note 27 *supra*; *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 878 (7th Cir. 1970) (antitrust mandatory), *cert. denied*, 400 U.S. 1020 (1971).

55 FED. R. CIV. P. 56.

56 Courts do not favor summary judgment in antitrust litigation because of the multiple and complex issues that are usually involved. *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). However, in actions involving per se antitrust violations, summary judgment may be appropriate. *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). Thus, in RICO suits where the plaintiff has previously established a substantive RICO violation through a criminal RICO proceeding and the damage amount is readily ascertainable, summary judgment may be appropriate. *But see Cook County v. Lynch*, 620 F. Supp. 1256, 1261 (N.D. Ill. 1985) (indictment and conviction order were not sufficient basis for granting motion for summary judgment).

C. *Tax Consequences*

Many claimants are now filing civil RICO suits against corporations and businesses.⁵⁷ When the RICO defendant's activities qualify as a trade or business under the tax code, businesses may seek to deduct from their income a RICO judgment as an ordinary and necessary business expense.⁵⁸ Thus, the issue arises as to whether RICO treble damages should be deductible for federal income tax purposes. In addition to meeting the statutory requirements of being ordinary and necessary,⁵⁹ case law has imposed an additional requirement that the deduction not frustrate a sharply defined public policy as evidenced by a governmental declaration.⁶⁰

Under section 162 of the Internal Revenue Code (IRC) the payment of a fine or penalty to the government,⁶¹ and two-thirds of an antitrust judgment, is not deductible as an ordinary and necessary business expense.⁶² This section, however, does not provide for the treatment of other multiple damage awards, including RICO treble damages. RICO treble damages are not a fine or penalty paid to the government for the violation of any law, and thus should not be disallowed as a business expense deduction under

57 See, e.g., *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667 (W.D. Mich. 1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231 (S.D.N.Y. 1983); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636 (C.D. Cal. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983).

58 26 U.S.C. § 162(a) (1982). Section 162(a) allows as a deduction "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ."; see *Helvering v. Hampton*, 79 F.2d 358 (9th Cir. 1935) (civil judgment arising out of business matter allowable as deduction; taxpayer deducted amount paid in settlement of a judgment for cancellation of a lease for fraud and restitution).

A RICO treble damage payment must, however, meet the general test for determining the deductibility of a business expense. Thus, the payment of a RICO treble damage judgment must not be for a capital item, must be proximately related to the business of the taxpayer and not another person, must be ordinary and necessary and, in the case of an individual, must not be personal to him. See 4A MERTENS LAW OF FEDERAL INCOME TAX § 25.71 (1985 & Supp. 1986). Courts cannot establish a general rule as to the deductibility of the payment of RICO damages as a business expense because the tax treatment of such a payment must be made on a case-by-case basis depending upon the nature of the claim in respect of which payment is made. *Anchor Coupling Co. v. United States*, 427 F.2d 429, 433 (7th Cir. 1970), cert. denied, 401 U.S. 908 (1971).

59 Before Congress codified the antitrust exception in § 162(g), the Internal Revenue Service found antitrust payments to be ordinary and necessary within the meaning of § 162. Rev. Rul. 64-224, 1964-2 C.B. 52.

60 *Lilly v. Commissioner*, 343 U.S. 90, 96-97 (1952).

61 26 U.S.C. § 162(f) (1982) provides: "No deduction shall be allowed under subsection (a) for any fine or similar penalty paid to a government for the violation of any law."

62 26 U.S.C. § 162(g) (1982) provides:

If in a criminal proceeding a taxpayer is convicted of a violation of the antitrust laws, or his plea of guilty or nolo contendere to an indictment or information charging such a violation is entered or accepted in such a proceeding, no deduction shall be allowed under subsection (a) for two-thirds of any amount paid or incurred.

section 162(f) of the IRC. Congress modeled RICO's treble damage provision after the Clayton Act's damage provision;⁶³ and, therefore, the two provisions might be treated similarly under section 162(g) of the IRC. An analogy between the purposes and congressional intent of RICO treble damages and antitrust treble damages, however, is not complete enough to suggest that they should be treated the same.⁶⁴ Nonetheless, while the statutory language does not expressly disallow a deduction for RICO treble damages,⁶⁵ such a deduction should not be allowed on public policy grounds.

RICO treble damages present a classic case for applying the public policy exception to the business expense deduction. In *Tank Truck Rentals, Inc. v. Commissioner*,⁶⁶ the Supreme Court applied a public policy test and disallowed the deduction of fines imposed for violation of state maximum truck weight laws. Even though the expenses may have been "necessary," the Court disallowed them because allowing the deduction would frustrate state policy by diluting the penalty for violating the law.⁶⁷ Similarly, to permit a RICO violator to gain a tax advantage through deducting the amount of the payment, thereby minimizing the degree of impact, would minimize the deterrent effect and frustrate the purpose and

63 See notes 18-20 *supra* and accompanying text.

64 While their language may be similar, Congress specifically enacted RICO outside the antitrust laws. Moreover, in early antitrust cases, when the courts developed many of the rules concerning the treatment of antitrust treble damages, the courts considered treble damages a penalty designed to punish violators of the antitrust laws. *Sun Theatre Corp. v. RKO Radio Pictures*, 213 F.2d 284, 287 (7th Cir. 1954) (penal). Modern cases discuss antitrust treble damages as a remedy for victims of antitrust violations; see *American Soc'y of Mech. Eng., Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 574-75 (1982) (antitrust treble damage provision designed in part to punish past violators, to deter, and to provide a remedy for the victims of antitrust); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Congress specifically classified RICO as a remedial statute. See also Taggart, *Fines, Penalties, Bribes, and Damage Payments and Recoveries*, 25 TAX. L. REV. 611, 615 (1970).

65 The Senate Finance Committee, commenting on the codified exceptions in § 162, in fact, described them as "all inclusive." S. REP. NO. 91-552, 91st Cong., 1st Sess. 274 (1969).

66 356 U.S. 30 (1958). See also *Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958).

67 *Tank Truck Rentals*, 356 U.S. at 35. Congress codified this public policy exception in section 162(f). Statutory penalties are not deductible from gross income because a penalty is a punishment inflicted by the state upon those who commit acts violative of the fixed public policy of the sovereign. To permit the violator to gain a tax advantage through deducting the amount of the judgment as a business expense, and thus to mitigate the degree of his punishment, would frustrate the purpose and effectiveness of that public policy. *Commissioner v. Longhorn Portland Cement Co.*, 148 F.2d 276, 277 (5th Cir.) (antitrust), *cert. denied*, 326 U.S. 728 (1945). While RICO treble damages are not a punishment inflicted by the government, they are used to impose liability upon those who violate the public policy of the sovereign. To allow a RICO defendant to mitigate the amount of his liability by allowing him to deduct the RICO judgment as a business expense would frustrate the purpose and effectiveness of that policy.

effectiveness of RICO. While treble damages provide compensation to the person harmed, they serve the additional purpose of deterrence.⁶⁸ As with fines and penalties, removing the threat of the full impact of treble damages would give potential RICO defendants less reason to avoid such unlawful conduct.

D. *Insurance*

The terms of a particular insurance policy⁶⁹ and state law⁷⁰ usually dictate the scope of insurance coverage. When a policy is ambiguous or silent on the coverage of RICO treble damages, however, the courts may have to decide the availability of insurance coverage.⁷¹ A general explicit exception that limits coverage to fortuitous losses precludes insurance coverage for RICO treble damages.⁷² On the other hand, under the doctrine of construction that requires that courts interpret ambiguities against the drafter-insurer,⁷³ RICO treble damage awards may be covered. The inquiry does not stop here, however. Even though the terms of a policy may allow coverage of RICO treble damages, courts still have to face the broader question of whether allowing coverage of RICO treble damages violates public policy.⁷⁴

Most policies cover compensatory damage awards but exclude from coverage punitive damages.⁷⁵ Because RICO treble damages are neither compensatory nor punitive,⁷⁶ courts should decide the issue based upon the policies behind the RICO treble damage

68 See notes 40-41 *supra* and accompanying text.

69 The standard insurance policy provides coverage for "all sums which the insured may become legally obligated to pay as damages" because of bodily injury or property damage. See generally I J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* ch. 7 (1985); King, *The Insurability of Punitive Damages: A New Solution To An Old Dilemma*, 16 WAKE FOREST L. REV. 345 (1980).

70 Compare *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964) (compensatory and punitive damages covered by insurance) with *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962) (only compensatory damages covered by insurance in Florida).

71 See I J. GHIARDI & J. KIRCHER, *supra* note 69, § 72.25. Whether an insurance policy covers statutory multiple damages varies depending upon the court's interpretation of the statute as to its purpose and nature, the type of acts covered, and the policy of the jurisdiction relative to the effect and purpose of multiple damages. *Id.*

72 R. KEETON, *BASIC TEXT ON INSURANCE LAW* § 5.4, at 288 (1974) (a requirement that the loss be accidental to qualify for liability of an insurer is implicit, when not express, because of the very nature of insurance).

73 *Alcoa S.S. Co. v. United States*, 338 U.S. 421, 425 (1949) (contract to be strictly construed against the drafter).

74 See, e.g., *Cieslewicz v. Mutual Serv. Cas. Ins. Co.*, 84 Wis. 2d 91, 267 N.W.2d 595 (1978).

75 See I J. GHIARDI & J. KIRCHER, *supra* note 69, § 7.02. But see King, *supra* note 69; K. REDDEN, *supra* note 10, at § 9.1 (list of state jurisdictions permitting insurance coverage for punitive damages).

76 See note 11 *supra* and accompanying text.

award and the overall goal of the RICO statute. The court used this approach in *Northwestern Casualty Co. v. McNulty*⁷⁷ in declining coverage for punitive damages. The court reasoned that if the insurer paid the punitive damages, the defendant would not be punished, but rather society as a whole would pay through higher insurance premiums. This would undermine the punishment aspect of punitive damages and contravene public policy.⁷⁸ Similarly, if the courts allowed a RICO defendant to avail himself of insurance coverage for his RICO liability, the deterrent effect of the treble damage award would be substantially diminished, if not eliminated. Knowledge that an insurance policy would cover any subsequent judgment erases the threat of being held liable for a RICO violation.

Allowing insurance coverage for RICO damages would make available to the plaintiff the assets of the insurance company, thereby increasing the likelihood of recovering full compensation. Nonetheless, allowing a defendant to insure himself against criminal conduct violates public policy.⁷⁹ Removing direct liability from the wrongdoer and imposing it on society contravenes the deterrent goal of RICO. Society as a whole, through insurance premiums, would pay for the criminal conduct of a few. Even where a policy's language is broad enough to include RICO treble damages, the law should not allow coverage. Allowing coverage would give wrongdoers free reign to obtain insurance to cover their wrongful activity, thereby absolving themselves of all personal liability. This would seriously frustrate the purposes and effectiveness of RICO.

E. *Contribution and Indemnification*

A right of contribution⁸⁰ arises under federal law in one of two ways: through the affirmative creation of a right of action by Con-

⁷⁷ 307 F.2d 432 (5th Cir. 1962) (insured brought garnishment action against insurer to recover under an automobile insurance policy; the court held that public policy prohibited construing policy as covering liability for punitive damages).

⁷⁸ *Id.* at 434.

⁷⁹ See Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 52 (1980); Note, *Insurance Against the Assessment of Punitive Damages*, 20 U. MIAMI L. REV. 192 (1965). A substantive violation of RICO necessarily involves the commission of at least two predicate acts. 18 U.S.C. §§ 1962-1964 (1982). The patterns of racketeering necessary for a RICO violation may be grouped into four broad, but not mutually exclusive, groups: (1) violence, (2) provision of illegal goods and services, (3) corruption in the labor movement or among public officials, and (4) commercial and other forms of fraud. See *Civil Action*, *supra* note 19, at 300-306.

⁸⁰ Contribution is an equitable remedy that permits a person who has discharged more than a fair share of a common liability to recover from another who is also liable for the wrong. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 87-88 (1981). No right to contribution existed at common law for joint tortfeasors. W. PROSSER & W. KEETON, *supra* note 10, at 336; RESTATEMENT (SECOND) OF TORTS § 886(A)(3) (1979). This common law rule was based on the notion that as between joint tortfeasors, the law should

gress, either expressly or impliedly, or through the power of the courts to fashion a federal common law of contribution.⁸¹ Nothing in RICO refers to a right of contribution. If the right exists, it must be an implied right or a common law right fashioned by the courts.

The Supreme Court decided contribution was not available under the antitrust laws in *Texas Industries, Inc. v. Radcliff Materials*.⁸² The Court noted that because the antitrust statutes are silent as to a right of contribution, the Court had to determine whether an implied right existed. After reviewing the legislative history and considering other relevant factors,⁸³ the Court concluded that Congress neither explicitly nor impliedly intended to create a right of contribution.⁸⁴ The Court next considered whether the right of contribution fell within the exceptions to the general rule that there is no federal common law.⁸⁵ Federal common law exists only in those narrow areas in which a federal rule of decision is necessary to protect uniquely federal interests or those areas where Congress has given the courts the power to formulate substantive law.⁸⁶ The Court concluded that contribution does not fall into one of the exceptions to the rule that there is no federal common law because it does not implicate " 'uniquely federal interests' of the kind that oblige courts to formulate federal common law."⁸⁷ Finally, the court neither accepted nor rejected the policy concerns presented by both parties in *Texas Industries* surrounding the right to contribution. "[R]egardless of the merits of the conflicting arguments [the

not lend its aid to have one tortfeasor compel others to share in the damage judgment intended to compensate the victims.

81 *Northwest Airlines*, 451 U.S. at 90-91 (no right to contribution under Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964; court declined to fashion a right under federal common law). See generally Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 130-134 (1932).

82 451 U.S. 630 (1981). A purchaser of concrete sued Texas Industries alleging conspiracy to raise concrete prices in violation of § 1 of the Sherman Act, and sought treble damages under § 4 of the Clayton Act. Texas Industries sought contribution from Radcliff Industries, a co-conspirator.

83 The Court considered the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief. *Id.* at 639. The Court noted that the antitrust laws were enacted, not for the benefit of participants in a conspiracy to restrain trade, but for the protection and benefit of an entirely distinct class. *Id.* Second, the Court pointed out that damages were intended to deter future wrongdoers, not ameliorate wrongdoers' liability. *Id.* Finally, the Court considered the absence of any reference in the legislative history that Congress was concerned with softening the blow on joint wrongdoers. Finding none, the Court concluded that Congress did not expressly or impliedly intend to create a right of contribution. *Id.*

84 *Id.* at 640.

85 *Id.*

86 *Id.* Those uniquely federal rights that allow an exception to the rule that there is no common law are the rights and obligations of the United States, interstate and international disputes, and admiralty cases. *Id.* at 641-42.

87 *Id.* at 642.

right to contribution] is a matter for Congress, not the courts, to resolve."⁸⁸

Like the antitrust laws, RICO does not provide an express or implied right to contribution.⁸⁹ Nor does a right to contribution under RICO fall into one of the instances where the federal courts have the power to formulate federal common law. Contribution under RICO does not involve "uniquely federal interests" that oblige the courts to formulate a federal common law.⁹⁰ Moreover, nothing in the legislative history suggests that Congress intended the courts to have the power to formulate such a right.⁹¹ In *Boone v. Beacon Building Corp.*,⁹² the United States District Court of New Jersey applied the reasoning of *Texas Industries* to deny the right to contribution in a RICO action. The court found that no right to contribution under RICO exists. The court reasoned that because of the absence of any congressional intent to ameliorate the liability of wrongdoers and the continuing existence of the antitrust statutory scheme without amendment, upon which RICO was modeled, defendants have no right to contribution under RICO.⁹³

A similar analysis applies to claims for indemnity. The right to indemnity under RICO could arise as an implied right under the statute or as part of the federal common law.⁹⁴ RICO, however, does not create an implied cause of action for indemnity, nor does a claim for indemnity qualify as a uniquely federal interest.⁹⁵ Thus, courts should not create a right to indemnity.⁹⁶

88 *Id.* at 646.

89 Neither RICO's text nor legislative history mention the right to contribution or a desire to soften the blow of liability to wrongdoers. See *Boone v. Beacon Bldg. Corp.*, 613 F. Supp. 1151, 1154-55 (D.N.J. 1985) (no right to contribution under RICO). That Congress knew how to create a right to contribution is evidenced by the express actions for contribution under § 11(f) of the Securities Act of 1933, 15 U.S.C. § 77k(f) (1982), and §§ 9(e) and 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e) and 78r(b) (1982).

90 *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Civil RICO provides a private cause of action to redress private injuries. RICO actions do not involve rights or obligations of the United States, interstate or international disputes, or admiralty. See note 86 *supra* and accompanying text.

91 *Texas Indus.*, 451 U.S. at 645.

92 613 F. Supp. 1151 (D.N.J. 1985). Purchasers of homes in the vicinity of a toxic land-fill sued the builders, realtors, landfill operators, and the township. Numerous co-defendants cross-claimed against the township for contribution and indemnification.

93 *Id.* at 1155. See also *Miller v. Affiliated Financial Corp.*, 624 F. Supp. 1003, 1004 (N.D. Ill. 1985) (no contribution under federal RICO).

94 See *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 90-95 (1981).

95 *Central Ill. Sav. & Loan Ass'n v. Dupage County Bank*, 622 F. Supp. 1493, 1498-99 (N.D. Ill. 1985) (RICO primarily affects only the division of liability between private parties). See also *Miller*, 624 F. Supp. at 1004 (no indemnification under federal RICO).

96 *Dupage County Bank*, 622 F. Supp. at 1500 (no indemnity for intentional tortfeasor).

Were Congress to address the issues of contribution and indemnification⁹⁷ in light of the purposes of RICO, they should create a right to contribution, but decline to create a right to indemnification. Allowing contribution among joint tortfeasors increases the likelihood that most or all wrongdoers will be held liable and thus share the consequences of the wrong.⁹⁸ Contribution would thus promote private enforcement and thereby increase deterrence.⁹⁹ Maximizing enforcement and deterrence enhances the remedial goals of RICO. Congress, on the other hand, should deny a right to indemnity. Allowing a wrongdoer to escape all liability by passing on his liability to another would seriously frustrate RICO's purposes of enforcement and deterrence.¹⁰⁰ Indemnification could undo the law's judgment and undermine enforcement efforts, and therefore should not be allowed under RICO.¹⁰¹

III. Computing the Final Treble Damage Award

Several issues also arise concerning the computation of the final treble damage award in a RICO cause of action. Resolving these issues turns on the characterization and liberal construction of the treble damage provision. Determining solutions to these computation problems with the treble damages' purposes foremost in mind will further RICO's underlying goals.

A. *Prejudgment Interest*

On its face, RICO does not provide for prejudgment interest. When faced with the decision of whether it should award prejudg-

97 Thirty-nine states and the District of Columbia have fashioned rules of contribution; ten initially through judicial action, the remainder through legislation. *Northwest Airlines*, 451 U.S. at 87 n.17.

98 See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 1-9, 12 U.L.A. 57-107 (1975 & Supp. 1986). This Model Act may not be sufficient, however, to provide a statutory right to contribution under RICO because § 1(b) denies a right to contribution to any tortfeasor who intentionally (willfully or wantonly) caused or contributed to the injury. Nonetheless, it may serve as a guide. Furthermore, should the legislature decide to provide a right to contribution under RICO, it should remove the procedure for obtaining contribution from the cause of action for damages between the plaintiff and the defendant. Otherwise, the focus of the litigation may shift from the plaintiff's cause of action and claim for damages to the issue of liability among the tortfeasors. The right to contribution should be allowed if it increases deterrence and insures that all wrongdoers risk exposure to liability. All efforts, however, should be made to prevent it from interfering with the plaintiff's cause of action and right to recovery.

99 *Texas Indus.*, 451 U.S. at 636.

100 See Stone, *supra* note 79, at 47-56. "It is better that lawmakers, prosecutors, and sentencing authorities act responsibly in deciding what is, and what is not, a delict for which the agent should be the final bearer of the risk. Once that decision is made, after due consideration . . . it is in principle senseless to stand by and allow the enterprise participants, by agreement among themselves, to deflect the collective judgment." *Id.* at 51.

101 *Id.* at 55.

ment interest in other areas of the law, the Supreme Court has repeatedly held that:

In the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court.¹⁰²

Courts that have considered the availability of prejudgment interest where a statute provides for doubling or trebling the damages have first determined whether the damages were intended as remedial or penal.¹⁰³ Because Congress explicitly characterized RICO treble damages as remedial, courts should award prejudgment interest.¹⁰⁴ Not only is the availability of interest consistent with the overall remedial purposes of RICO, it is also consistent with the compensatory goal of the treble damage provision because prejudgment interest makes the plaintiff whole.¹⁰⁵

102 *Rodgers v. United States*, 332 U.S. 371, 373 (1947) (citing *Royal Indem. Co. v. United States*, 313 U.S. 289, 295-97; *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 352 (1939)). See also *Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB*, 331 F.2d 720, 729 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).

103 *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 638 F.2d 661, 663 (3d Cir. 1981) (prejudgment interest recoverable under patent law). *But see United States v. Globe Remodeling Co.*, 196 F. Supp. 652, 658 (D. Vt. 1960) (supp. op. 1961) (interest not recoverable under False Claims Act action for multiple damages).

104 See text accompanying note 24 *supra*; *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945) (doubled unpaid wages are liquidated damages under Fair Labor Standards Act of 1938).

Interest awarded to compensate victims for deprivation of the monetary value of their loss actually has two components: prejudgment interest and postjudgment interest. Interest from the date of the loss until the date of judgment is prejudgment interest and can be viewed either as interest or as an element of damages. Postjudgment interest, on the other hand, is usually provided for by statute for liquidated claims for the loss of the use of money from the date of judgment until paid. 28 U.S.C. § 1961 (1982). See *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 (9th Cir. 1984) (plaintiff entitled only to postjudgment interest from date of first judgment to date of second judgment because the claim was not liquidated until the first judgment), *cert. denied*, 105 S. Ct. 963 (1985).

Thus, in a RICO claim, the court must decide if the claim is liquidated and whether the plaintiff is entitled to prejudgment interest from the date of injury to the date of judgment. Where the RICO claim resembles a common law tort rather than contract damages, the plaintiff cannot recover interest for delay in payment because the damages are not assessed until the date of trial. *Contractor Utility Sales Co. v. Certain-Teed Corp.*, 748 F.2d 1151, 1157-58 (7th Cir. 1984) (prejudgment interest denied in fraud action), *cert. denied*, 105 S. Ct. 1397 (1985).

105 *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 638 F.2d 661, 663 (3d Cir. 1981) (patent infringement).

Once the court determines within its discretion¹⁰⁶ that a plaintiff is entitled to prejudgment interest,¹⁰⁷ the problem becomes one of computing it. A liberal computation of prejudgment interest allows the court to base the amount of interest on the actual damage amount, then add the amount of interest to the other damages and multiply the total amount by three.¹⁰⁸ A restrictive construction of the rule results in a lower amount because it requires the court to compute the prejudgment interest on the amount of actual damages, treble the actual damages, and then add to it the amount of prejudgment interest.¹⁰⁹

The policies behind RICO and the purposes for a private cause of action suggest that courts take the liberal view in computing prejudgment interest in RICO actions. A broad remedial interpretation treats the loss of the use of money as an element of harm as easily measurable as lost profits or lost sales.¹¹⁰ While Congress did not specifically enumerate this in RICO, Congress directed that the courts construe the remedy provision broadly.¹¹¹ In addition, a liberal construction acknowledges that prejudgment interest is an element of damages that courts should add with all other damages before trebling to compute the final award.¹¹²

106 The decision to award prejudgment interest in a particular case lies within the trial judge's discretion. *Lodges 743 & 1746 v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); *Smith v. Pro-Football, Inc.*, 528 F. Supp. 1266, 1275 (D.D.C. 1981).

107 *Blau v. Lehman*, 368 U.S. 403, 414 (1962). Courts award prejudgment interest in federal actions where the damages are derived from a pecuniary injury and the court can determine the amount of damages with reasonable certainty. *United Aircraft*, 534 F.2d at 447.

108 For example: actual damages (\$100,000) x interest (10%) = prejudgment interest (\$10,000). (Actual damages (\$100,000) + prejudgment interest (\$10,000)) x 3 = total award (\$330,000). *Cf.* note 109 *infra*.

109 For example: actual damages (\$100,000) x interest (10%) = prejudgment interest (\$10,000). (Actual damages (\$100,000) x 3 = treble damages (300,000)). Prejudgment interest (\$10,000) + treble damages (\$300,000) = total award (\$310,000).

110 *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656 (1983) (patent infringement suit); *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1389 (Fed. Cir. 1983) (patent infringement suit; prejudgment interest awarded to compensate for delay in payment of damages); *see Note, Insurer's Liability for Prejudgment Interest: A Modern Approach*, 17 U. RICH. L. REV. 617 (1983).

111 *See* text accompanying note 24 *supra*.

112 *See Hanna v. American Motors Corp.*, 724 F.2d 1300, 1311 (7th Cir.) (because Congress instructed that courts construe the Viet Nam Era Veterans' Ready Assistance Act of 1974 liberally, prejudgment interest was a proper ingredient of the "make whole" remedy and should have been granted), *cert. denied*, 104 S. Ct. 3512 (1984).

B. *Punitive Damages*

Punitive damages serve to punish particularly egregious conduct.¹¹³ In a RICO civil action, punitive damages could be used to punish wrongdoers for particularly flagrant violations of RICO. The first question is whether punitive damages can be awarded in addition to treble damages under federal law.¹¹⁴ If not, they may still be awarded under state law. Where state law permits recovery of punitive damages, punitive damages could be awarded if a state claim is joined with the federal RICO claim.¹¹⁵

Some courts may refuse to award punitive damages in addition to treble damages on the grounds that punitive damages would duplicate the treble damage award.¹¹⁶ This view, however, confuses the purposes of a treble damage award with the purpose of punitive damages. Such a rule reads into treble damages a punishment effect never intended by Congress. Punitive damages do not duplicate treble damages either in purpose or in characteristics.¹¹⁷ Punitive damages are a discretionary award used to punish the willful, wanton conduct of a defendant. Moreover, Congress intended treble damages not as a means for punishing the defendant, but as a remedy for the plaintiff.¹¹⁸

113 *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). See also RESTATEMENT (SECOND) OF TORTS § 908 (1979); W. PROSSER & W. KEETON, *supra* note 10, at § 2; C. McCORMICK, *supra* note 9, at § 77.

114 Punitive damages are normally available in federal courts. *Carlson v. Green*, 446 U.S. 14, 22 (1980). In some areas of the law, however, courts have not allowed punitive damages. See, e.g., *Local 20 Teamsters Union v. Morton*, 377 U.S. 252 (1964) (where state law displaced by federal law, no punitive damages); *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. 1979) (antitrust) (citing without further analysis *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936)), *cert. denied*, 446 U.S. 918 (1980).

In *Hansen*, however, the plaintiff sought trebled punitive damages. The court dismissed the claim for trebled punitive damages, but provided no analysis for its holding. The court simply stated that "[i]n trebling the amount of actual damages, it seems indisputable that the statutes carry their own symbol of punishment. The plaintiff can only recover what the statutes give him." *Id.* Courts should dismiss a claim for trebled punitive damages; but not because punitive damages are not allowed in an antitrust cause of action. Punitive damages serve a different function than treble damages and should be computed separately, but both should be recoverable.

115 See notes 28-29 and accompanying text.

116 See *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1170 n.16 (5th Cir. 1984). The court raised the question whether both treble damages and punitive damages could be awarded but declined to answer it within the procedural posture of the case.

117 See notes 10, 14-16 *supra* and accompanying text.

118 116 CONG. REC. 36,296 (1970) (Sen. Doyle) (RICO will prove to be an effective deterrent); S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969) (While "it is necessary . . . to free the channels of commerce from predatory activities, . . . there [was] no intent to visit punishment on any individual: the purpose [was] civil. Punishment as such [was] limited to the criminal remedies."). See also *Brady v. Daly*, 175 U.S. 148, 157 (1899) ("Although punishment, in a certain and very limited sense, may be the result of the statute . . . so far as the wrongdoer is concerned, it [is] clear such is not its chief purpose, which is the award of

When the circumstances justify a punitive damage award in addition to the treble damages authorized by section 1964(c), the court should award both, either under federal or state law.¹¹⁹ Allowing punitive damage awards in addition to treble damages does not usurp or thwart the compensatory and enforcement purposes of RICO's treble damages. In fact, punitive damages may enhance the deterrence effect of RICO's treble damages by discouraging others from engaging in sophisticated crime.

Even if the federal courts determine that punitive damages are not recoverable in addition to RICO treble damages, where state law permits recovery of punitive damages, a court may award punitive damages if the plaintiff joins a state claim with the federal RICO claim.¹²⁰ In such a case, the problem will be one of computation.

The language of the statute resolves the computation problem. Section 1964(c) enables a plaintiff to recover *threefold the damages he sustains*.¹²¹ Because punitive damages are not based upon the harm suffered by the plaintiff, but instead upon an amount adjudged necessary to punish the wrongdoer, they do not duplicate treble damages. Punitive damages awarded on either a state claim or under federal RICO are not part of the damages the plaintiff sustains. Therefore, courts should not treble punitive damages but should award them in addition to the treble damages when justified by the circumstances.

C. Settlements

A third computation problem arises when multiple defendants are involved in a RICO suit and some but not all of the defendants settle with the plaintiff before trial. When a court renders a judgment against any remaining defendants, the treatment of the settle-

damages . . ."). See generally Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON L. REV. 17 (1983).

119 See *Banderas v. Banco Central del Ecuador*, 461 So. 2d 265 (Fla. Dist. Ct. App. 1985) (court affirmed four million dollar treble damages award plus an eight million dollar punitive damage award in foreign exchange fraud under Florida RICO).

120 RICO's remedies supplement, rather than supplant, other federal or state remedies. See note 28 *supra* and accompanying text. Several state RICO statutes explicitly provide for the recovery of punitive damages. See FLA. STAT. ANN. § 895.05(7) (West Supp. 1986); GA. CODE ANN. § 26-3406 (1981 & Supp. 1985); IND. CODE ANN. §§ 34-4-30.5-5(b)(1), (b)(4) (West 1983 & Supp. 1985); MISS. CODE ANN. § 97-43-9(6) (Supp. 1985); WIS. STAT. ANN. § 946.86(4) (Supp. 1985-86).

Where state law provides for punitive damages, either under the state RICO statute or a common law claim, courts may award punitive damages if the plaintiff joins the state law violation with the federal RICO claim. *Coffee v. Permian Corp.*, 474 F.2d 1040, 1044 (5th Cir.) (securities law), *cert. denied*, 412 U.S. 920 (1973). The Securities Exchange Act of 1934, which explicitly prohibits recovery in excess of actual damages, does not bar a state claim for punitive damages. *Young v. Taylor*, 466 F.2d 1329, 1337-38 (10th Cir. 1972).

121 18 U.S.C. § 1964(c) (1982).

ment amount may affect their individual liability and the plaintiff's total recovery.

The damage award could be computed in one of two ways. The court could subtract the amount of the settlement from the plaintiff's actual damages before trebling. Alternatively, the court could subtract the amount of the settlement from the trebled amount.¹²² For example, if a plaintiff's legal damages amount to \$100,000 and two of the four co-defendants settle with the plaintiff before trial for \$15,000 each, the final award will depend upon the method of calculation used. If the court deducts the settlement payments *before* trebling, the remaining co-defendants will be liable for \$210,000.¹²³ By including the \$30,000 settlement, the plaintiff will recover a total of 240,000. If, however, the court deducts the settlement payments *after* trebling, the remaining co-defendants will be responsible for the \$270,000 and the plaintiff will recover a total of \$300,000.¹²⁴

The statute's language provides the clearest solution to this issue. Subsection 1964(c) entitles any person injured in their business or property to recover *threefold the damages he sustains*.¹²⁵ The statute defines the amount of recovery to which the plaintiff is entitled as being three times the amount of his injuries.

The United States Supreme Court faced this issue in calculating a double damage award under the False Claims Act.¹²⁶ The Supreme Court held in *United States v. Bornstein*¹²⁷ that doubling the damages before deducting any pretrial payments best comports with Congress' judgment that double damages were necessary to make victims whole.¹²⁸ Similarly, deducting the settlement amount

122 *Compare* *Hydrolevel Corp. v. American Soc'y of Mech. Eng.*, 635 F.2d 118, 130 (2d Cir. 1980) (damages in antitrust actions determined by trebling the damages, then deducting the amount paid in settlement), *aff'd*, 456 U.S. 556 (1982) *with* *United States v. Klein*, 230 F. Supp. 426, 443 (W.D. Pa. 1964) (damages under False Claims Act determined by taking credits against the actual damages and then doubling the remainder).

123 $100,000 - 30,000 = 70,000 \times 3 = 210,000$.

124 $100,000 \times 3 = 300,000 - 30,000 = 270,000$. Including the settlement amount of \$30,000, the plaintiff recovers \$300,000.

125 18 U.S.C. § 1964(c) (1982).

126 31 U.S.C. § 3729 (1982).

127 423 U.S. 303 (1976). The United States brought an action under the False Claims Act against a subcontractor to recover a forfeiture of \$2,000 plus an amount equal to double the amount of damages sustained on account of a false claim presented to the United States. The Supreme Court held that the damages were to be doubled before any compensatory payments previously made were subtracted. The Court reasoned that the focus of the forfeiture provision was on the conduct of the person from whom the government sought to collect the forfeiture so that the United States could collect three of the \$2,000 forfeitures for the three shipments.

128 423 U.S. at 315. *See also* *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 391-95 (4th Cir. 1982) (rejects defense of claim reduction; settlement proceeds to be deducted after trebling actual damages in antitrust cause of action), *cert. denied*, 461 U.S. 914 (1983);

from the trebled amount also comports with Congress' purpose behind RICO's treble damages and ensures that the plaintiff receives the full amount of compensation to which RICO entitles him.¹²⁹ The alternative calculation, which subtracts the settlement amount before trebling, results in a smaller total recovery than by deducting the settlement after trebling the actual damages. The alternative calculation also puts a premium on litigation and discourages settlement agreements.¹³⁰ Thus, to fulfill RICO's goal of compensation and to avoid punishing those who compromise by settlements, the settlement payments should be deducted after trebling.

IV. Conclusion

Faced with a problem of national dimensions, and the knowledge that the available "sanctions and remedies" were "limited in scope and impact,"¹³¹ Congress sought in RICO "to establish . . . new remedies"¹³² sufficient to redress the wrong and remove the evil. Courts should keep RICO's broad remedial purposes foremost in mind when resolving issues that touch on the use of treble damages in a RICO action.

"[T]he Office of all the Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . , and to add force and life to the cure and remedy, according to the true intent of the makers of the Act."¹³³ Courts should not restrict their view of the treble damage tool by traditional damage principles, but should construe RICO liberally enough to accomplish RICO's broad remedial purposes.

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Wainwright v. Kraftco. Corp., 58 F.R.D. 9, 11-12 (N.D. Ga. 1973) (antitrust co-conspirators liable for entire amount of damages reduced by settlement after trebling).

129 *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir. 1957) ("It is not the policy of the law to encourage litigation at the expense of compromise."), *cert. denied*, 355 U.S. 835 (1957).

130 See note 7 *supra* and accompanying text.

131 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923.

132 *Id.*

133 *Heyden's Case*, 76 Eng. Rep. 637, 638 (1584).