

# Concurrent Jurisdiction Over Civil Rico Claims

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## NOTES

### CONCURRENT JURISDICTION OVER CIVIL RICO CLAIMS

In 1970 Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>1</sup> as Title IX of the Organized Crime Control Act.<sup>2</sup> Until 1982, however, no court considered whether state courts share concurrent jurisdiction with federal courts over civil<sup>3</sup> RICO claims.<sup>4</sup> Since then many courts, both state and federal, have addressed this issue, and they have reached conflicting conclusions.<sup>5</sup> No federal appellate court has yet directly considered the issue.<sup>6</sup>

Under the Supreme Court's opinion in *Gulf Offshore Co. v. Mobil Oil Corp.*,<sup>7</sup> analysis of state-court jurisdiction over a federal cause of action "begins with the presumption that state courts enjoy concur-

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<sup>1</sup> Racketeer Influenced and Corrupt Organizations Act, § 901(a), 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986).

<sup>2</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 7, 12, 15, 16, 18, 19, 21, 28, 29, 42, 45, 46, and 47 U.S.C.).

<sup>3</sup> RICO authorizes provides both criminal prosecutions for violations, 18 U.S.C. § 1963 (1982 & Supp. IV 1986), and a private cause of action, 18 U.S.C. § 1964(c) (1982).

<sup>4</sup> *Luebke v. Marine Nat'l Bank*, 567 F. Supp. 1460 (E.D. Wis. 1983) (holding jurisdiction over civil RICO concurrent).

<sup>5</sup> For cases holding jurisdiction over RICO exclusively federal, see *Spence v. Flynt*, 647 F. Supp. 1266 (D. Wyo. 1986); *Broadway v. San Antonio Shoe, Inc.*, 643 F. Supp. 584 (S.D. Tex. 1986); *Massey v. City of Oklahoma City*, 643 F. Supp. 81 (W.D. Okla. 1986); *Kinsey v. Nestor Exploration Ltd.*, 604 F. Supp. 1365 (E.D. Wash. 1985); *County of Cook v. Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983), *aff'd on other grounds*, 773 F.2d 892 (7th Cir. 1985); *Washington Courte Condominium Ass'n-Four v. Washington-Golf Corp.*, 150 Ill. App. 3d 681, 501 N.E.2d 1290 (1986); *Levinson v. American Accident Reinsurance Group*, 503 A.2d 632 (Del. Ch. 1985); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App. 3d 712, 495 N.E.2d 1132 (1986); *Maplewood Bank and Trust Co. v. Acorn, Inc.*, 207 N.J. Super. 590, 504 A.2d 819 (N.J. Super. Ct. Law Div. 1985); *Greenview Trading Co. v. Hershman & Leicher, P.C.*, 108 A.D.2d 468, 489 N.Y.S.2d 502 (N.Y. App. Div. 1985); *Main Rusk Assocs. v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985). For cases holding that states share concurrent jurisdiction over civil RICO claims, see *Contemporary Services Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885 (C.D. Cal. 1987); *Carman v. First Nat'l Bank*, 642 F. Supp. 862 (W.D. Ky. 1986); *HMK Corp. v. Walsey*, 637 F. Supp. 710 (E.D. Va. 1986); *Karel v. Kroner*, 635 F. Supp. 725 (N.D. Ill. 1986); *Cianci v. Superior Court (Poppingo)*, 40 Cal. 3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985).

<sup>6</sup> The Seventh Circuit, however, in *County of Cook v. Midcon Corp.* noted in dictum that if it had reached the issue, it would have been reluctant to uphold the district court's finding of exclusive federal jurisdiction over RICO claims. 773 F.2d 892, 905 n.4 (7th Cir. 1985).

<sup>7</sup> 453 U.S. 473 (1981).

rent jurisdiction.”<sup>8</sup> Recognizing that Congress has the power to limit a federal claim to federal courts, “the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”<sup>9</sup>

Applying the *Gulf Offshore* analysis, this Note argues that state courts share jurisdiction with federal courts over civil RICO claims. First, the language of civil RICO’s jurisdictional grant<sup>10</sup> does not constitute an explicit statutory directive of exclusive jurisdiction; the Supreme Court has interpreted similar language in another federal statute as consistent with the presumption of concurrent jurisdiction.<sup>11</sup> Second, the legislative history of RICO does not contain an unmistakable implication that Congress intended to limit civil RICO actions to federal courts.<sup>12</sup> In fact, Congress never even considered the issue of state court jurisdiction.<sup>13</sup> Finally, state court adjudication of civil RICO claims advances rather than obstructs federal interests.<sup>14</sup> State court adjudication presents injured parties with additional fora for redress and relieves federal court dockets.

This Note recommends that Congress amend the jurisdictional provision in RICO to communicate explicitly that state courts enjoy concurrent jurisdiction over civil RICO claims. Such an amendment would curb the trend of federal courts acquiescing to state court determinations of civil RICO jurisdiction when that issue arises in the *res judicata* context.<sup>15</sup> This trend poses special problems. By holding that they lack jurisdiction, state courts could clear their dockets of the rising number of RICO claims and thrust them on federal dockets. In addition, Congress should clarify the statute simply to relieve parties and courts from having to address this procedural issue and to allow them to focus on the substantive cause of action.

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<sup>8</sup> *Id.* at 478; see also *Claffin v. Houseman*, 93 U.S. 130 (1876); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

<sup>9</sup> *Gulf Offshore*, 453 U.S. at 478.

<sup>10</sup> “Any person injured in his business or property by reason of 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.” 18 U.S.C. § 1964(c) (1982).

<sup>11</sup> See *Dowd Box*, 368 U.S. 502, 507-08 (holding that the jurisdictional grant in the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982), is not an explicit statutory directive of exclusive jurisdiction). See *infra* notes 42-45 and accompanying text.

<sup>12</sup> See *infra* notes 55-76, 202-15 and accompanying text.

<sup>13</sup> See *infra* note 152 and accompanying text.

<sup>14</sup> See *infra* notes 77-112, 216-34 and accompanying text.

<sup>15</sup> See *infra* notes 235-43 and accompanying text.

## I

## BACKGROUND

## A. Determining Exclusivity of Jurisdiction

Courts presume that state and federal courts share concurrent jurisdiction over a federal cause of action.<sup>16</sup> Only three factors can rebut this presumption: (1) an explicit statutory grant of exclusive jurisdiction; (2) an unmistakable implication in the statute's legislative history that Congress intended exclusive jurisdiction; or (3) a clear incompatibility between state-court jurisdiction and the federal interests underlying the statute.<sup>17</sup> Any one of these prongs alone rebuts the presumption of concurrent jurisdiction.

1. *The Presumption of Concurrent Jurisdiction: The General Rule*

The Supreme Court has held that jurisdiction over all federal causes of action shall be presumed to be concurrent between state and federal courts.<sup>18</sup> This presumption emerges from the Constitutional grant to Congress of the power to create lower federal courts and the discretion to define the role of such lower courts.<sup>19</sup> Congress could have opted not to form lower federal courts,<sup>20</sup> leaving only state courts to adjudicate federal causes of action, subject to review by the Supreme Court.<sup>21</sup> The drafters, therefore, apparently intended concurrent jurisdiction to be "the rule, rather than the exception."<sup>22</sup> Additionally, the presumption of concurrent jurisdic-

<sup>16</sup> See *supra* note 8 and *infra* note 18.

<sup>17</sup> *Gulf Offshore*, 453 U.S. at 478 (announcing the three-pronged test to rebut the presumption of concurrent jurisdiction).

<sup>18</sup> *Id.* (holding jurisdiction concurrent over Outer Continental Shelf Land Act). See also *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (holding jurisdiction concurrent over Labor-Management Relations Act); *Clafin v. Houseman*, 93 U.S. 130 (1876) (holding jurisdiction concurrent over Bankruptcy Act of 1867).

<sup>19</sup> U.S. CONST. art. I, § 8, cl. 1, 9 ("The Congress shall have Power . . . [t]o constitute tribunals inferior to the supreme Court.").

<sup>20</sup> U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); see, e.g., *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (holding that Congress has complete power to regulate lower federal court jurisdiction).

<sup>21</sup> U.S. CONST. art. III, § 2, cl. 2.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Indeed, although federal courts had jurisdiction over some federal claims, Congress did not vest the federal courts with *general* federal question jurisdiction until 1875. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875); see 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, *MOORE'S FEDERAL PRACTICE* 0.3[2] (2d ed. 1988) (describing the origins of federal question jurisdiction).

<sup>22</sup> Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L.

tion is based upon the principle of dual state and national sovereignty in our federal system. In *Claffin v. Houseman*<sup>23</sup> the Supreme Court explained,

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. . . . The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief [over federal claims]; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.<sup>24</sup>

## 2. *Exclusive Federal Jurisdiction: Rebutting the Presumption*

The presumption of concurrent jurisdiction is rebuttable. In *Gulf Offshore Corp. v. Mobil Oil*,<sup>25</sup> the Supreme Court announced the modern test<sup>26</sup> for rebuttal when it declared that, "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."<sup>27</sup> Satisfying one of these three prongs is the only method to rebut the presumption<sup>28</sup> and to allow federal courts exclusive jurisdiction over the federal claim.

### a. *Explicit Statutory Directive of Exclusive Jurisdiction.*

An explicit statutory directive of exclusive jurisdiction will rebut the presumption of concurrent jurisdiction, thus limiting jurisdic-

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REV. 311, 314 (1976) (footnote omitted) ("Because state courts are bound by the terms of the supremacy clause to apply federal law, it seems reasonable to infer that the framers contemplated that concurrent state jurisdiction over federal causes of action would be the rule, rather than the exception.")

<sup>23</sup> 93 U.S. 130 (1876).

<sup>24</sup> *Id.* at 136-37.

<sup>25</sup> 453 U.S. 473 (1981).

<sup>26</sup> As early as 1876, the Supreme Court announced an exception to the presumption of concurrent jurisdiction when the state jurisdiction over a federal claim "is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Claffin v. Houseman*, 93 U.S. 130, 136 (1876).

<sup>27</sup> *Gulf Offshore*, 453 U.S. at 478.

<sup>28</sup> See *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982) ("Only [the *Gulf Offshore* factors] will rebut the presumption [of concurrent jurisdiction].").

tion to federal courts.<sup>29</sup> Nevertheless, the Supreme Court has not described what constitutes an explicit statutory directive. An analysis of how courts have applied this prong of the *Gulf Offshore* test to several federal statutes clarifies the appropriate standard for an explicit statutory directive of exclusive jurisdiction.

Congress has the power to confer exclusive federal court jurisdiction<sup>30</sup> or concurrent jurisdiction<sup>31</sup> over particular federal laws. Congress has explicitly granted exclusive jurisdiction to federal courts in statutes concerning federal crimes,<sup>32</sup> bankruptcy,<sup>33</sup> and patents and copyrights.<sup>34</sup> In each of these statutes, Congress included the word "exclusive" in its jurisdictional grant. Despite the presumption of concurrent jurisdiction, Congress has also provided explicitly for concurrent jurisdiction in federal statutes, such as the Federal Employers Liability Act<sup>35</sup> and the Securities Act of 1933.<sup>36</sup>

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<sup>29</sup> See *Gulf Offshore*, 453 U.S. at 478.

<sup>30</sup> See, e.g., *Bowles v. Willingham*, 321 U.S. 503, 512 (1944) ("Congress could determine whether the federal courts which it established should have exclusive jurisdiction of such cases [arising under the Emergency Price Control Act of 1942] or whether they should exercise that jurisdiction concurrently with the courts of the States."); see also 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, *MOORE'S FEDERAL PRACTICE* 0.201 (2d ed. 1987) [hereinafter 1A MOORE'S FEDERAL PRACTICE] ("Congress can determine whether the federal courts it has established should have exclusive jurisdiction of cases arising under the Constitution and laws of the United States or whether they should exercise that jurisdiction concurrently with the state courts.") (footnote omitted).

<sup>31</sup> See, e.g., *Bowles*, 321 U.S. at 512 ("Congress could determine whether the federal courts which it established . . . should exercise that jurisdiction concurrently with the courts of the States."); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898) ("leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States."); see also 1A MOORE'S FEDERAL PRACTICE, *supra* note 30, at 0.201.

<sup>32</sup> 18 U.S.C. § 3231 (1982) ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). Courts have interpreted this language to grant explicitly exclusive federal jurisdiction. See, e.g., *United States v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986) ("Federal district courts have original exclusive jurisdiction over all offenses against the laws of the United States."); *Curley v. United States*, 130 F. 1, 5-6 (1st Cir.), *cert. denied*, 195 U.S. 628 (1904).

<sup>33</sup> 28 U.S.C. § 1334(a) (Supp. IV 1986) ("Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11."). Both state and federal courts have interpreted this language to grant exclusive jurisdiction to federal courts. See, e.g., *Stout v. Green*, 131 F.2d 995 (9th Cir. 1942); *Franckowiak v. Nelson*, 223 Neb. 9, 387 N.W.2d 707 (1986).

<sup>34</sup> 28 U.S.C. § 1338(a) (1982) ("Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."). State and federal courts have interpreted this language to grant exclusive jurisdiction to federal courts. See, e.g., *Topolos v. Caldeway*, 698 F.2d 991 (9th Cir. 1983); *Van Prods. Co. v. General Welding & Fabricating Co.*, 419 Pa. 248, 213 A.2d 769 (1965).

<sup>35</sup> 45 U.S.C. § 56 (1982) ("The jurisdiction of the courts of the United States . . . shall be concurrent with that of the courts of the several States."). The Supreme Court held that state courts have jurisdiction over claims under this provision. See *Burnett v.*

Congress included the word "concurrent" in both jurisdictional grants.

Unfortunately, many jurisdictional grants lack such clarity. Ambiguous phrases such as "may be brought in any district court of the United States,"<sup>37</sup> "may sue . . . in any district court of the United States,"<sup>38</sup> and "may institute an action . . . in the United States district court"<sup>39</sup> cause difficulty. Courts must determine whether these ambiguous jurisdictional grants confer exclusive or concurrent jurisdiction. The word "may" as a permissive<sup>40</sup> rather than a mandatory<sup>41</sup> term might permit suit in federal-court but not forbid state-court adjudication.

Most courts have held that jurisdictional grants containing the word "may" in this context fail to rebut the presumption of concurrent jurisdiction. *Charles Dowd Box Co. v. Courtney*<sup>42</sup> (hereinafter *Dowd Box*), in which the Supreme Court construed § 301(a) of the Labor Management Relations Act of 1947,<sup>43</sup> is the seminal case in-

New York Cent. R.R., 380 U.S. 424 (1965) (confirming state court jurisdiction over FELA claims).

<sup>36</sup> 15 U.S.C. § 77v(a) (1982) ("The district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter."). See, e.g., *Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817 (9th Cir. 1975) (state courts share concurrent jurisdiction with federal courts over claims under the Securities Act).

<sup>37</sup> Labor Management Relations Act, § 301(a), 29 U.S.C. § 185(a) (1982). See also *Petroleum Marketing Practices Act*, § 105(a), 15 U.S.C. § 2805(a) (1982) ("may be brought, without regard to the amount in controversy, in the district court of the United States").

<sup>38</sup> Bank Holding Company Act, tit. 1, § 106(e), 12 U.S.C. § 1975 (1982). See also *Racketeer Influenced and Corrupt Organizations Act*, § 901(a) 18 U.S.C. 1964(c) (1982) ("may sue . . . in any appropriate United States district court.").

<sup>39</sup> National Flood Insurance Act, title XIII, § 1333, 42 U.S.C. § 4053 (Supp. IV 1986) [hereinafter NFIA].

<sup>40</sup> See *Harper v. National Flood Insurers Ass'n*, 494 F. Supp. 234, 239 (M.D. Pa. 1980) (construing the word "may" in NFIA as permissive and therefore consistent with presumption of concurrent jurisdiction); *Burrell v. Turner Corp.*, 431 F. Supp. 1018, 1020 (N.D. Okla. 1977) (same); see also *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962) (construing "may" in the Labor Management Relations Act to grant concurrent jurisdiction); *Ted's Tire Serv., Inc. v. Chevron U.S.A., Inc.*, 470 F. Supp. 163, 165 (D. Conn. 1979) (construing "may" in the Petroleum Marketing Practices Act to grant concurrent jurisdiction). But see *Schultz v. Director, Fed. Emergency Management Agency*, 477 F. Supp. 118 (C.D. Ill. 1979) (finding that "may" in the jurisdictional grant of NFIA was not intended to define the proper forum for claims); *Dunkle v. National Flood Insurers Ass'n*, 432 F. Supp. 489 (M.D. Pa. 1977) (same).

<sup>41</sup> Some courts have suggested that the terms "shall" or "must be brought in district courts" indicate exclusive jurisdiction. See *Dowd Box*, 368 U.S. at 506 ("[Section § 301 of the Labor Management Relations Act] provides that suits . . . 'may' be brought in the federal district courts, not that they must be."); *Harper*, 494 F. Supp. at 239 (noting the widely accepted interpretation that "shall" is construed as mandatory or directive, while "may" is construed as merely permissive or discretionary).

<sup>42</sup> 368 U.S. 502 (1962).

<sup>43</sup> Labor Management Relations Act, § 301(a), 29 U.S.C. § 185(a) (1982).

interpreting the use of "may" in a jurisdictional grant. The statute directs that "[s]uits for violation . . . may be brought in any district court of the United States. . . ."44 The Supreme Court summarily dismissed the notion that this statutory language confers exclusive jurisdiction to federal courts. It noted that the language merely gives federal courts jurisdiction over such claims without suggesting exclusivity.<sup>45</sup> Other courts have relied upon the distinction between permissive and mandatory language that *Dowd Box* first suggested. For example, courts analyzing the language of the Bank Holding Company Act<sup>46</sup> and the Petroleum Marketing Practices Act<sup>47</sup> have held that the use of the word "may" in the Acts' jurisdictional grants fails to rebut the presumption of concurrent jurisdiction.<sup>48</sup> Courts interpreting the National Flood Insurance Act (NFIA)<sup>49</sup> typically apply the *Dowd Box* analysis and conclude that the phrase "may institute an action . . . in the United States district court"<sup>50</sup> comports with the presumption of concurrent jurisdiction.<sup>51</sup>

Courts' application of the *Gulf Offshore* three-pronged test to various federal statutes sheds light on the nature of an explicit statutory directive of exclusive jurisdiction: statutes explicitly grant exclusive jurisdiction by using the word "exclusive" in the

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<sup>44</sup> *Id.*

<sup>45</sup> *Dowd Box*, 368 U.S. at 506 ("It has not been argued, nor could it be, that § 301(a) speaks in terms of exclusivity of federal court jurisdiction over controversies within the statute's purview. . . . It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be.").

<sup>46</sup> Bank Holding Company Act, tit. 1, § 106(e), 12 U.S.C. § 1975 (1982) ("may sue therefor in any district court of the United States").

<sup>47</sup> Petroleum Marketing Practices Act, § 105(a), 15 U.S.C. § 2805(a) (1982) ("may be brought . . . in the district court of the United States").

<sup>48</sup> See *Lane v. Central Bank of Alabama, N.A.*, 756 F.2d 814 (11th Cir. 1985) (interpreting the Bank Holding Company Act to confer concurrent jurisdiction); *Ted's Tire Serv. v. Chevron U.S.A., Inc.*, 470 F. Supp. 163 (D. Conn. 1979) (interpreting the Petroleum Marketing Practices Act to confer concurrent jurisdiction).

<sup>49</sup> National Flood Insurance Act, Pub. L. No. 90-448, tit. XIII, 82 Stat. 572 (codified as amended in scattered sections of 42 U.S.C.).

<sup>50</sup> 42 U.S.C. § 4053 (Supp. IV 1986).

<sup>51</sup> See *Harper v. National Flood Insurers Ass'n*, 494 F. Supp. 234, 239 (M.D. Pa. 1980) (construing the NFIA as consistent with presumption of concurrent jurisdiction); *Burrell v. Turner Corp.*, 431 F. Supp. 1018, 1020 (N.D. Okla. 1977) (same). *But see* *Dunkle v. National Flood Insurers Ass'n*, 432 F. Supp. 489 (M.D. Pa. 1977) (arguing that "may" in the jurisdictional grant of the NFIA was not intended to define the proper forum for claims); *Schultz v. Director, Fed. Emergency Management Agency*, 477 F. Supp. 118 (C.D. Ill. 1979) (same).

The courts have generally relied on the *Dowd Box* distinction between permissive and mandatory language. See, e.g., *Kelly v. Director, Fed. Emergency Management Agency*, 549 F. Supp. 8, 12 (D. Mass. 1981) ("The grant of jurisdiction in § 4053 [using the word "may"] is phrased in permissive terms."); *Bains v. Hartford Fire Ins. Co.*, 440 F. Supp. 15, 16 (N.D. Ga. 1977) (Congress's use of the permissive term "does not reflect an intent to completely exclude state court review of flood insurance problems.").

jurisdictional grant<sup>52</sup> and explicitly grant concurrent jurisdiction by using the word "concurrent" in the jurisdictional grant.<sup>53</sup> Because the use of the permissive term "may" in a jurisdictional grant fails to communicate an explicit statutory directive of exclusive jurisdiction,<sup>54</sup> the presumption of concurrent jurisdiction prevails.

b. *Unmistakable Implication of Exclusive Jurisdiction from Legislative History.*

The presumption of concurrent jurisdiction may be rebutted by an unmistakable implication of exclusive jurisdiction from legislative history.<sup>55</sup> The Supreme Court first suggested that a statute may imply exclusive jurisdiction from its legislative history in *Claffin v. Houseman*.<sup>56</sup> Yet the Supreme Court has never clearly explained the notion of implied exclusivity.

Judicial handling of the Sherman<sup>57</sup> and Clayton Antitrust Acts<sup>58</sup> evidences the confusion surrounding the *Claffin* notion of implied exclusivity.<sup>59</sup> The jurisdictional language of both statutes provides that civil suits "may be" brought in federal district courts.<sup>60</sup> Despite this permissive jurisdictional language, courts have uniformly concluded that jurisdiction under both the Sherman and Clayton Acts is exclusively federal.<sup>61</sup>

Courts finding exclusive jurisdiction under the Sherman and Clayton Antitrust Acts fail to explain their holdings.<sup>62</sup> Courts may have found the Acts to confer exclusive jurisdiction because each Act's legislative history reveals that Congress rejected amendments

<sup>52</sup> See *supra* notes 32-34 and accompanying text.

<sup>53</sup> See *supra* notes 35-36 and accompanying text.

<sup>54</sup> See *supra* notes 42-51 and accompanying text.

<sup>55</sup> See *Gulf Offshore*, 453 U.S. at 478; see *supra* note 17 and accompanying text.

<sup>56</sup> 93 U.S. 130, 137 (1876) ("This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.").

<sup>57</sup> Sherman Act, 15 U.S.C. §§ 1-17 (1982).

<sup>58</sup> Clayton Act, 15 U.S.C. §§ 12-27 (1982 & Supp. IV 1986).

<sup>59</sup> See *Redish & Muench*, *supra* note 22, at 316 ("The experience with the Sherman and Clayton antitrust acts is illustrative of the *Claffin* rule's lack of guidance.").

<sup>60</sup> Clayton Act, § 4, 15 U.S.C. § 15 (1982) ("[A]ny 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"). Sherman Act, § 4, 15 U.S.C. § 4 (1982) ("The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title. . .").

<sup>61</sup> See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) ("federal antitrust claims are within the exclusive jurisdiction of the federal courts."); *General Inv. Co. v. Lake Shore & M. S. Ry.*, 260 U.S. 261 (1922) (holding jurisdiction over Sherman Act exclusively federal).

<sup>62</sup> See, e.g., *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436 (1920) (concluding without reasoning that jurisdiction over the Clayton Act is exclusively federal); *Kurek v. Pleasure Driveway and Park Dist.*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) (same); *Banana Distrib. Inc. v. United Fruit Co.*, 269 F.2d 790 (2d Cir. 1959) (same).

to make jurisdiction expressly concurrent.<sup>63</sup> Further examination of the legislative history, however, indicates that in rejecting the amendment to the Sherman Antitrust Act, Congress intended jurisdiction to remain concurrent;<sup>64</sup> conversely, in rejecting the amendment to the Clayton Antitrust Act, Congress intended jurisdiction to be exclusively federal.<sup>65</sup>

Courts also may have found implied exclusive jurisdiction under the Clayton Act because Congress enacted it to complement the Sherman Act,<sup>66</sup> and courts have limited actions under the Sherman Act to federal courts. The conflict between the legislative history and judicial interpretation of the Acts arises at least partially from the *Clafin* Court's failure to specify guidelines for determining circumstances which imply exclusive jurisdiction.<sup>67</sup>

Courts also have difficulty applying the *Clafin* test when interpreting congressional silence on jurisdictional issues.<sup>68</sup> Before the Supreme Court interpreted the Outer Continental Shelf Lands

<sup>63</sup> See 51 CONG. REC. 9662-64 (1914) (A rejected amendment to the Clayton Antitrust Act proposed an explicit directive of concurrent jurisdiction over civil actions.).

<sup>64</sup> A proposed amendment to the Sherman Act would have made jurisdiction explicitly concurrent, but Congress rejected it. Congress assumed that Sherman Act jurisdiction was already concurrent. As one senator remarked during floor debate, "[This statute as it stands without amendment] leaves everybody . . . to sue anybody who wrongs him . . . in a State court if he chooses to do so. So I . . . make the suggestion to him that his amendment is quite useless and unnecessary." S. Doc. No. 147, 57th Cong., 2d Sess., 316 (1903). See also Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 510 n.13 (1957) (discussing Sherman Act's legislative history).

<sup>65</sup> See 51 CONG. REC. 9662-64 (1914).

<sup>66</sup> Congress passed the Clayton Act to expand the limited scope of the Sherman Act. The chief deficiency of the Sherman Act is that its standards are too high. It requires monopoly, attempted monopoly or anticompetitive effects to comprise a violation. In response, Congress enacted the Clayton Act, which has been called an "incipiency" statute because it prohibits activities which tend to produce anticompetitive effects in the economy. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 713 (1977) (The Clayton Act was "enacted to supplement the Sherman Act and to arrest incipient Sherman Act violations."). See, e.g., *Locker v. American Tobacco Co.*, 121 App. Div. 443, 449, 106 N.Y.S. 115, 119 (1907), in which the court noted,

We may eliminate from consideration the statutes of the United States [Sherman Act § 1] . . . because they have no bearing upon the cause of action here presented. They relate only to matters in restraint of trade or commerce between or among the several states of the Union or with foreign nations, and for a violation of their provisions redress must be sought in the federal courts, which alone have jurisdiction.

See also *Glasofer Motors v. Osterlund, Inc.*, 180 N.J. Super., 433 A.2d 780 (N.J. Super. Ct. App. Div. 1981). See *Redish & Muench, supra* note 22, at 317 (This confusion over congressional intent "was at least partially attributable to the failure of the Supreme Court to enunciate standards for the determination of implied exclusivity.").

<sup>67</sup> See *Redish & Muench, supra* note 22, at 317 (This confusion over Congressional intent "was at least partially attributable to the failure of the Supreme Court to enunciate standards for the determination of implied exclusivity.").

<sup>68</sup> For a more thorough discussion of this and other examples, see *id.* at 319-25.

Act<sup>69</sup> (OCSLA) to confer concurrent jurisdiction, both state and federal courts had held jurisdiction to be exclusively federal.<sup>70</sup> OCSLA's jurisdictional grant gives federal district courts original jurisdiction but does not specify whether such jurisdiction is exclusive or concurrent.<sup>71</sup> In *Gravois v. Travelers Indemnity Co.*,<sup>72</sup> a state court held that OCSLA's legislative history implies exclusive federal court jurisdiction. The court compared OCSLA to the Jones Act,<sup>73</sup> reasoning that because Congress specified concurrent jurisdiction under the Jones Act but not under OCSLA, Congress must have intended exclusive jurisdiction under OCSLA.<sup>74</sup> Contrary to the presumption of concurrent jurisdiction, the court mistakenly interpreted congressional silence to imply exclusive jurisdiction.<sup>75</sup> The Supreme Court corrected this mistake in *Gulf Offshore Co. v. Mobil Co.*, holding OCSLA jurisdiction concurrent.<sup>76</sup>

Unfortunately, courts have not defined what constitutes an unmistakable implication of exclusive jurisdiction from legislative history. An analysis of the judicial treatment of the Sherman, Clayton and Outer Continental Shelf Lands Acts fails to supply uniform

<sup>69</sup> Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982).

<sup>70</sup> See, e.g., *Fluor Ocean Servs., Inc. v. Rucker Co.*, 341 F. Supp. 757, 760 (E.D. La. 1972) (federal court holding jurisdiction over OCSLA exclusively federal); *Gravois v. Travelers Indem. Co.*, 173 So.2d 550 (La. Ct. App. 1965) (state court declaring lack of jurisdiction over OCSLA claim). Cf. *Huson v. Chevron Oil Co.*, 430 F.2d 27, 30 (5th Cir. 1970) ("the federal Trial Court . . . is the Court to which Congress committed primary, if not exclusive, jurisdiction. . ."), *aff'd on other grounds*, 404 U.S. 97 (1971).

<sup>71</sup> The Act posits that the United States shall have exclusive *political* jurisdiction over the shelf lands, but it does not mandate exclusive *judicial* jurisdiction. The statute's political jurisdictional grant reads, "The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. . . ." OCSLA, § 4(a)(1), 43 U.S.C. § 1333(a)(1) (1982).

The statute's judicial jurisdictional grant provides that the United States district courts "shall have jurisdiction of cases and controversies arising out of, or in connection with any operation conducted on the outer Continental Shelf. . . . Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose." OCSLA, § 23(b)(1), 43 U.S.C. § 1349(b)(1) (1982).

<sup>72</sup> 173 So. 2d 550 (La. Ct. App. 1965).

<sup>73</sup> Merchant Marine Act of 1920 (Jones Act) § 20, 46 U.S.C. § 688(a) (1982) ("Jurisdiction . . . shall be under the court of the district in which the defendant employer resides or in which his principal office is located.(").

<sup>74</sup> *Gravois*, 173 So. 2d at 556. ("The failure to [specify concurrent jurisdiction as in the Jones Act] shows their intention to retain [exclusive] jurisdiction in the United States Courts.").

<sup>75</sup> *Id.*

<sup>76</sup> *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 482-83 (1981) ("We do not think the legislative history of OCSLA can be read to rebut the presumption of concurrent state-court jurisdiction, given Congress' silence on the subject in the statute itself.").

principles that would clarify the second prong of the *Gulf Offshore* test.

c. *Clear Incompatibility Between State-Court Adjudication and Federal Interests*

Even if a statute makes no reference to exclusive or concurrent jurisdiction and even if its legislative history fails to imply exclusive federal jurisdiction unmistakably, federal courts may still retain exclusive jurisdiction over a federal claim if state-court adjudication of the claim would jeopardize federal interests.<sup>77</sup> This third prong of the *Gulf Offshore* test requires a “disabling incompatibility” between state-court jurisdiction and federal interests to rebut the presumption of concurrent jurisdiction.<sup>78</sup> The Supreme Court has identified three factors for determining when state-court adjudication jeopardizes federal interests, thus justifying exclusive federal jurisdiction: “the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.”<sup>79</sup>

In *Gulf Offshore*, the Supreme Court addressed whether state-court jurisdiction over the Outer Continental Shelf Lands Act<sup>80</sup> would frustrate the operation of that Act. The Court concluded that because the Act fills gaps in its coverage with state law where state law is “applicable and not inconsistent,”<sup>81</sup> and because state law often will determine claims under the federal OCSLA statute, the three factors of uniformity, expertise and hospitality did not rebut the presumption of concurrent jurisdiction. The Court explained,

These factors [uniformity, expertise, and hospitality] cannot support exclusive federal jurisdiction over claims whose governing

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<sup>77</sup> *Id.* at 478 (As part of its three-pronged test for rebutting the presumption of concurrent jurisdiction, the Supreme Court announced that “a clear incompatibility between state-court jurisdiction and federal interests” may rebut the presumption.)

<sup>78</sup> *Id.* at 477 (citing *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962)).

<sup>79</sup> *Gulf Offshore*, 453 U.S. at 483-84, citing *Redish & Muench*, *supra* note 22, at 329-35; see also Note, *Exclusive Jurisdiction of Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 511-15 (1957).

<sup>80</sup> 43 U.S.C. §§ 1331-1356 (1982).

<sup>81</sup> *Gulf Offshore*, 453 U.S. at 480 (“All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial ‘gaps’ in the coverage of federal law, OCSLA borrows the ‘applicable and not inconsistent’ laws of the adjacent States as surrogate federal law.”). See 43 U.S.C. § 1333(2)(A) (1982). That subsection reads in pertinent part,

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . , the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf. . . .

43 U.S.C. § 1333(2)(A) (1982).

rules are borrowed from state law. There is no need for uniform interpretation of laws that vary from State to State. State judges have greater expertise in applying these laws and certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.<sup>82</sup>

In *Gulf Offshore*, the Supreme Court stated that courts should consider uniformity of interpretation as a federal interest in favor of exclusive federal jurisdiction.<sup>83</sup> The Supreme Court has indicated, however, that uniform interpretation is attainable without exclusive jurisdiction.<sup>84</sup> In *Great Northern Railway v. Merchants Elevator Co.*,<sup>85</sup> the appellant contended that both federal and state courts lacked initial jurisdiction over cases involving construction of an interstate tariff because separate determinations by various courts would destroy uniformity under the tariff. The appellant argued that the Interstate Commerce Commission must interpret the statute first to ensure uniformity.<sup>86</sup> The Supreme Court rejected this argument. Because interstate tariffs constitute federal law, the Supreme Court can review any construction of them. Accordingly, Supreme Court review is sufficient to foster uniform interpretation.<sup>87</sup>

The Supreme Court extended this reasoning and conclusion in

<sup>82</sup> *Gulf Offshore*, 453 U.S. at 484.

<sup>83</sup> *Id.* at 483-84.

<sup>84</sup> *See, e.g.*, *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1922) (the desire for uniformity over the construction of interstate tariffs does not relieve federal and state courts of jurisdiction to construe those tariffs before the Interstate Commerce Commission does); *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 665-66 (1961) (the desire for uniformity of interpretation of the Natural Gas Act does not divest state courts of jurisdiction over claims arising under that Act because oversight by the Supreme Court will insure uniformity); *see also Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 864 (2d Cir. 1986) (suggesting that the desire for uniform interpretation alone does not require exclusive jurisdiction of a federal common law claim), *cert. denied*, 107 S. Ct. 929 (1987).

<sup>85</sup> 259 U.S. 285 (1922).

<sup>86</sup> *Id.* at 289. Although this might appear an administrative law question concerning the exhaustion of state remedies, the Supreme Court analyzed the issue in jurisdictional terms. It specifically addressed the effect on uniformity if state and federal courts had jurisdiction to construe an interstate tariff before the Interstate Commerce Commission had such an opportunity. *Id.* at 290-91.

<sup>87</sup> *Id.* In response to the argument that the interests of uniformity required resort to the Interstate Commerce Commission before one could resort to the courts, Justice Brandeis maintained,

This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not re-

interpreting the Natural Gas Act.<sup>88</sup> In *Pan American Petroleum Corp. v. Superior Court*<sup>89</sup> the petitioner argued that state-court adjudication of suits under the Natural Gas Act would threaten uniform regulation under the Act.<sup>90</sup> Rejecting this contention, the Court applied its analysis from *Great Northern Railway*.<sup>91</sup> The Court added that "it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."<sup>92</sup> The Supreme Court's ability to review state court decisions mitigates the damage to uniformity from state-court adjudication.<sup>93</sup> Thus, the desire for uniformity alone does not require exclusive jurisdiction.

Yet uniformity remains a factor in the analysis. Perhaps courts should consider the latitude statutes afford for the interpretation of federal rights in determining the significance of uniformity. If the statute is specific, the "likelihood of future judicial gloss is comparatively limited,"<sup>94</sup> and state-court adjudication poses a lesser threat to uniform interpretation. Conversely, if the statute is vague, affording courts "wide latitude in developing federal rights,"<sup>95</sup> state-court adjudication could jeopardize national uniformity of those rights.

The second factor in determining whether state-court adjudication jeopardizes federal interests is the relative expertise of federal and state judges in deciding questions of federal law. Courts have not elucidated standards for determining when expertise of federal judges weighs in favor of exclusive jurisdiction. The Supreme Court concluded in *Gulf Offshore*, however, that federal judges actually have less expertise than state judges over federal statutes incorporating state law as their governing rules.<sup>96</sup>

The third factor addresses the hospitality that state courts may extend to federal claims. Federal courts have prevented state courts from interfering with federal programs and federal claims to which

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quire that in every case where the construction of a tariff is in dispute there shall be a preliminary resort to the Commission.

*Id.*

<sup>88</sup> Natural Gas Act, 15 U.S.C. §§ 717-719o (1982).

<sup>89</sup> 366 U.S. 656 (1961).

<sup>90</sup> *Id.* at 665.

<sup>91</sup> *Id.* at 665-66.

<sup>92</sup> *Id.* at 665.

<sup>93</sup> Nevertheless, the overly burdened Supreme Court docket suggests that the Court can promote uniformity in few statutory schemes.

<sup>94</sup> Redish & Muench, *supra* note 22, at 331.

<sup>95</sup> *Id.*

<sup>96</sup> *Gulf Offshore*, 453 U.S. at 484 ("State judges have greater expertise in applying" laws "whose governing rules are borrowed from state law."); *see supra* note 82 and accompanying text.

they are unsympathetic.<sup>97</sup> For example, state courts lack jurisdiction to control directly the actions of federal officials by mandamus,<sup>98</sup> or by injunction.<sup>99</sup> Civil rights actions provide a classic example of state-court inhospitality to federal claims. The danger of state court antagonism is severe because the Acts are designed to enforce federal rights against state action.<sup>100</sup> In *Alabama Ex. Rel. Gallion v. Rogers*,<sup>101</sup> the federal district court denied Alabama courts jurisdiction to enjoin the United States Attorney General from procuring documents under the Civil Rights Act of 1960.<sup>102</sup> The district court offered two alternative bases for its holdings. First, it held that section 305 of the Act<sup>103</sup> vested exclusive jurisdiction in federal courts.<sup>104</sup> Second, it held that state courts may not enjoin the acts of federal officers nor even review their discretion.<sup>105</sup>

The danger of state-court antagonism is least severe with regard to federal statutes that incorporate state law principles.<sup>106</sup> Such statutes do not warrant exclusive federal jurisdiction. The interests of the locality will coincide with the federal claim because the law of the locality governs it. If state courts have sympathy for certain principles under state law, there is no reason to believe that

<sup>97</sup> AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 167 (1969), *quoted in* Redish & Muench, *supra* note 22, at 330 n.76 ("Where the difficulty is not misunderstanding of federal law, but lack of sympathy—or even hostility—toward it, there is a marked advantage in providing an initial federal forum. Such attitudes are perhaps less common among federal judges, chosen and paid by the national government, and enjoying the protection of life tenure, than they are in the state judiciary.").

<sup>98</sup> See, e.g., *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821) (holding that state courts lacked subject matter jurisdiction to issue a writ of mandamus to a federal officer); see also *Armand Schmoll, Inc. v. Federal Reserve Bank*, 286 N.Y. 503, 37 N.E.2d 225 (1941), *cert. denied*, 315 U.S. 818 (1942) (same).

<sup>99</sup> See, e.g., *Ex Parte Shockley*, 17 F.2d 133 (N.D. Ohio 1926); *Pennsylvania Turnpike Comm'n v. McGinnes*, 179 F. Supp. 578 (E.D. Pa. 1959), *aff'd per curiam*, 278 F.2d 330 (3d Cir. 1959), *cert. denied*, 364 U.S. 820 (1960).

<sup>100</sup> *Alabama ex. rel. Gallion v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam sub. nom. Dinkens v. Rogers*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961). The court asserted that "the entire history of the [Civil Rights] Act reflects that it was and is designed to provide a means of enforcing the basic federally guaranteed rights of citizenship (to vote) against state action." *Id.* at 852.

<sup>101</sup> *Id.*

<sup>102</sup> Civil Rights Act of 1960, § 303, 42 U.S.C. § 1947b et seq. (1982).

<sup>103</sup> 42 U.S.C. § 1974d (1982).

<sup>104</sup> *Alabama ex. rel. Gallion*, 187 F.Supp. at 852 (Applying the then prevailing *Claffin* language, the court reasoned that state court jurisdiction would be "incompatible from the 'particular nature of the case' and would frustrate national purposes.").

<sup>105</sup> *Id.* ("[T]he state court . . . injunction . . . was in violation of the basic legal principle that state courts are without jurisdiction to review the discretion or enjoin the acts of federal officers.").

<sup>106</sup> *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 484 (1981) ("State judges . . . certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.").

they will lack sympathy for those same principles when incorporated into federal law.<sup>107</sup>

Some commentators suggest that a potentially burdensome number of claims under a new statute supports a finding of concurrent jurisdiction if only to relieve pressure on the federal docket.<sup>108</sup> Concurrent jurisdiction distributes the caseload between state and federal fora.

In sum, it is difficult to rebut the presumption of concurrent jurisdiction by showing an incompatibility between state-court adjudication and federal interests. First, the desire for uniformity alone fails to indicate a clear incompatibility between state-court adjudication and federal interests because Supreme Court review promotes uniformity.<sup>109</sup> Second, it is difficult to conclude that the expertise of federal judges mandates exclusive federal jurisdiction in the absence of any standard for making such a determination.<sup>110</sup> Third, few statutory claims spark the kind of state-court antagonism toward the federal claim that may require exclusive jurisdiction.<sup>111</sup> A recent federal appellate court expressed the difficulty of rebutting the presumption of concurrent jurisdiction through this third prong of the *Gulf Offshore* analysis as follows: "Mindful of the cautions expressed by the Supreme Court concerning exclusivity of federal statutory claims, we think it would take a truly extraordinary set of circumstances to demonstrate that a claim arising under federal common law is within exclusive federal court jurisdiction."<sup>112</sup>

#### B. RICO: Its Evolution and Synthesis

In an effort to apply properly the *Gulf Offshore* test to civil RICO, this Note briefly examines the origins and evolution of RICO. It describes the context from which RICO arose, the problems Congress intended it to address, and the legislative history of the statute, paying close attention to the origin of RICO's jurisdictional

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<sup>107</sup> *Id.*

<sup>108</sup> See Redish & Muench, *supra* note 22, at 334 ("[I]f the number of claims under the statute is likely to be burdensome, a court might properly find jurisdiction to be concurrent, in order to distribute the projected case load among the federal and state judicial systems."); see also Note, *supra* note 64, at 516 ("When a large number of cases are expected to arise under a particular statute . . . efficient distribution of the case burden suggests that exclusive jurisdiction is inappropriate.").

<sup>109</sup> See *supra* notes 83-95 and accompanying text.

<sup>110</sup> See *supra* note 96 and accompanying text.

<sup>111</sup> See *supra* notes 97-107 and accompanying text.

<sup>112</sup> *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 864 (2d Cir. 1986) (holding that state courts share concurrent jurisdiction over the federal common law claim of "money had and received" and the federal common law claim of fraud), *cert. denied*, 479 U.S. 1055 (1987).

grant. In addition, this section illustrates judicial treatment of civil RICO claims.

### 1. *Origin of RICO*

Throughout the 1950s and 1960s, Americans became increasingly aware of the effects of organized crime on society. In 1951, the Special Committee to Investigate Organized Crime (the Kefauver Commission) exposed organized crime's infiltration into legitimate business activities.<sup>113</sup> In response, the American Bar Association (ABA) created the ABA Commission on Organized Crime.<sup>114</sup> By 1960, the Senate Select Committee on Improper Activities in the Labor and Management Field (the McClellan Committee) revealed the corruption of labor unions by criminal elements.<sup>115</sup> Later, the McClellan Committee exposed the Mafia's (or La Cosa Nostra's) national structure.<sup>116</sup> Finally, in 1968, the President's Committee on Law Enforcement and Administration of Justice (the Katzenbach Commission) released a report explaining organized crime's tactics in acquiring control of legitimate businesses<sup>117</sup> and suggesting antitrust-type measures for curbing this infiltration.<sup>118</sup> This report encouraged Congress to enact legislation

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<sup>113</sup> S. REP. NO. 141, 82d Cong., 1st Sess. 33 (1951) ("One of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises."). See also Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014 n.21 (1980).

The Kefauver Commission listed the following as those industries invaded by organized crime: advertising, amusement, appliances, automobiles, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drug stores, electrical equipment, florists, food, football, garment, gas, hotels, import/export, insurance, jukebox, laundry, liquor, loans, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap, shipping, steel surplus, television, theatres and transportation. S. REP. NO. 307, 82d Cong., 1st Sess. 170-81 (1951) [hereinafter KEFAUVER COMM'N].

<sup>114</sup> *Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 538, 544 (1970) [hereinafter *House Hearings on S.30*].

<sup>115</sup> See generally S. REP. NO. 1784, 87th Cong., 2d Sess. (1962) (describing various influences and perversions of organized crime on organized labor); S. REP. NO. 621, 86th Cong., 2d Sess. (1960) (same).

<sup>116</sup> See generally S. REP. NO. 72, 89th Cong., 1st Sess. (1965) (illustrating the organizational structure of certain "families"); see also Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249 (1982).

<sup>117</sup> The Commission noted, "Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADM. OF JUSTICE 190 (1967) [hereinafter KATZENBACH COMM'N].

<sup>118</sup> *Id.* at 208. This suggestion constitutes the origin of civil RICO. Blakey & Gettings, *supra* note 113, at 1015 n.25 (the insight of the easier civil standard of proof,

officially permitting the Department of Justice to use the antitrust theories it had creatively applied in combating racketeering in labor unions.<sup>119</sup>

Against this backdrop, in 1967 Senator Roman L. Hruska introduced Senate bills 2048 and 2049, precursors of RICO. Senate bill 2048 proposed amending the Sherman Antitrust Act to prohibit investment of unreported income into a business and contained both criminal and civil enforcement mechanisms.<sup>120</sup> Senate bill 2049 proposed supplementing S.2048 by prohibiting the investment of proceeds of criminal activity in a business enterprise.<sup>121</sup> In 1969, Senator John L. McClellan introduced Senate bill 30 which lacked a provision like RICO.<sup>122</sup> Later, Senators McClellan and Hruska jointly introduced Senate bill 1861<sup>123</sup> to strengthen S.30. Senate bill 1861 evolved into RICO.

Congress clearly enacted RICO to curb the infiltration of organized crime into legitimate business activities.<sup>124</sup> The Senate Ju-

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extensive discovery and antitrust remedies "was the origin of the two-track approach—criminal and civil—of RICO.")

<sup>119</sup> See KATZENBACH COMM'N, *supra* note 117, at 465-86 (endorsing legislation to specifically allow the U.S. Attorney to use antitrust weapons in combatting organized crime); *see, e.g.*, *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94 (1962) (federal government brought civil action against a labor union, one of its business agents, and four self-employed independent contractors who were members of the union to terminate violations of § 1 of the Sherman Act); *United States v. Pennsylvania Refuse Removal Ass'n*, 357 F.2d 806 (3d Cir.) (the government charged that defendants conspired to violate § 1 of the Sherman Act by agreeing "to fix prices, allocate customers, rig bids and coerce other refuse removers to join the conspiracy"), *cert. denied*, 384 U.S. 961 (1966); *United States v. Bitz*, 282 F.2d 465 (2d Cir. 1960) (the indictment alleged violations of sections 1 and 2 of the Sherman Act for, among other things, a combination and conspiracy among defendants to restrain members of the union in their wholesale distribution of newspapers and magazines by coercing and compelling them to pay defendants various sums of money as a prerequisite to getting labor contracts with the union, to avoid strikes or the continuation of current strikes).

<sup>120</sup> S. 2048, 90th Cong., 1st Sess. (1967). Senator Hruska hoped to incorporate the methods of antitrust laws, arguing during floor debate that "[t]he antitrust laws now provide a well established vehicle for attacking anticompetitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinarily broad and flexible remedies ought to be used more extensively against the 'legitimate' business activities of organized crime." 113 Cong. Rec. 17,999 (1967).

<sup>121</sup> S.2049, 90th Cong., 1st Sess. (1967). S.2049 prohibited (1) the acquisition of an interest in a business affecting interstate commerce with income derived from listed criminal activities and (2) the agent of a corporation from authorizing the corporation to engage in any of the listed criminal activities. *Blakey & Gettings*, *supra* note 113, at 1015-16 n.27.

<sup>122</sup> S.30, 91st Cong., 1st Sess., 115 CONG. REC. 39,906 (1969) (This bill later evolved into the Organized Crime Control Act of 1970.).

<sup>123</sup> The Corrupt Organizations Act of 1969, S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-9571 (1969).

<sup>124</sup> The report from the Senate Committee on the Judiciary noted that "[RICO] has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. NO. 617, 91st

diciary Committee released a voluminous list of infiltrated businesses<sup>125</sup> and identified the perverse effects of organized crime, noting that the current criminal laws could not remedy the problem.<sup>126</sup> RICO provided new criminal remedies in the form of criminal forfeitures<sup>127</sup> and new civil remedies roughly modeled after antitrust law.<sup>128</sup>

## 2. *Brief Legislative History of RICO*

The legislative history of RICO reveals that although Congress was influenced by antitrust remedies,<sup>129</sup> Congress carefully drafted RICO outside the scheme of antitrust law.<sup>130</sup> Although the early precursors of RICO<sup>131</sup> proposed amendments to the Sherman Act to combat organized crime, Congress elected to adopt antitrust mechanisms in a separate statutory scheme.

While neither the Senate nor the House took any action on RICO's forerunners, S.2048 and S.2049, the American Bar Association (ABA) studied them extensively. The ABA endorsed the use of the machinery of the antitrust statutes to attack organized crime, but recommended that "any such legislation be enacted as an independent statute and not be included in the Sherman Act, or any other antitrust law."<sup>132</sup> It recommended an independent statute because the goal of antitrust law—free competition—might not always coincide with the goal of curtailing organized crime.<sup>133</sup> A separate statutory scheme for organized crime control provisions would also relieve the statutory remedies from the restrictive judicial prece-

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Cong., 1st Sess. 76 (1969) [hereinafter *1969 Senate RICO Report*]; see also *Russello v. United States*, 464 U.S. 16, 26 (1983) (remarking that RICO is aimed to combat the influence of organized crime in legitimate enterprises); *United States v. Turkette*, 452 U.S. 576, 591 (1981) (same).

<sup>125</sup> See KATZENBACH COMM'N, *supra* note 117, at 190.

<sup>126</sup> *Id.* at 78. The Katzenbach Commission's Report contends that penalties of fine and imprisonment cannot remove organized crime from legitimate business because organized syndicates still retain their property. When the property of the syndicate remains, "new leaders will step forward to take the place of those we jail." H.R. Doc. No. 105, 91st Cong., 1st Sess. (1969) (quoting President Nixon's remarks in his message on "Organized Crime" of April 23, 1969).

<sup>127</sup> *1969 Senate RICO Report*, *supra* note 124, at 79-80.

<sup>128</sup> *Id.* at 80-83.

<sup>129</sup> *Id.*

<sup>130</sup> See Blakey, *supra* note 116, at 280 ("Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would *not* be limited by antitrust concepts like 'competitive,' 'commercial,' or 'direct or indirect' injury.") (emphasis in original).

<sup>131</sup> See *supra* notes 121-22 and accompanying text.

<sup>132</sup> See *House Hearings on S.30*, *supra* note 114, at 149.

<sup>133</sup> See Blakey, *supra* note 116, at 255 ("[T]he ABA suggested that the underlying theory of the antitrust law—the maintenance of competition—might make the direct use of the antitrust laws maladapted to the goal of curtailing organized crime's influence in the underworld.").

dents appropriate in antitrust law.<sup>134</sup>

On January 15, 1969, Senator McClellan introduced the Organized Crime Control Bill (S.30).<sup>135</sup> At that time the bill included no provisions like RICO. On March 20 of that year, Senator Hruska proposed S.1623,<sup>136</sup> which provided for civil and criminal attacks on organized crime.<sup>137</sup> Later, Senators McClellan and Hruska jointly introduced Senate bill 1861 (the Corrupt Organizations Act),<sup>138</sup> from which RICO evolved.<sup>139</sup> Initially, S.1861 lacked the treble damages and the private equitable relief that RICO would eventually provide.<sup>140</sup> Explaining the new bill, Senator McClellan remarked that it borrowed many of its remedies from the antitrust laws, but he added that it carried "no intention . . . of importing the great complexity of antitrust law enforcement into"<sup>141</sup> the enforcement of S.1861. Congress eventually adopted S.1861 as title IX of S.30.<sup>142</sup>

On January 23, 1970, the Senate passed S.30 by a vote of 73 to 1.<sup>143</sup> The ABA endorsed S.30, suggesting a number of amendments including a provision for a private treble damages action.<sup>144</sup> Section 4 of the Clayton Act which provides for treble damages<sup>145</sup> influenced the ABA's suggestion.<sup>146</sup> The House Judiciary Committee amended title IX of S.30 to include the treble damage remedy,<sup>147</sup> adopting almost verbatim the language of section 4 of the Clayton Act.<sup>148</sup> The House finally passed S.30 by a vote of 341 to 26.<sup>149</sup>

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<sup>134</sup> *House Hearings on S. 30, supra* note 114, at 149 (If the statutory schemes were not separated "a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context. . .").

<sup>135</sup> S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969).

<sup>136</sup> S. 1623, 91st Cong., 1st Sess. (1969).

<sup>137</sup> *See Blakey, supra* note 116, at 261.

<sup>138</sup> The Corrupt Organizations Act of 1969, S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-71 (1969).

<sup>139</sup> *See generally* Blakey, *supra* note 116, at 262-83 (discussing the history of S. 1861 from its introduction to its evolution into RICO).

<sup>140</sup> *See id.* at 262 ("As introduced S. 1861 did not . . . expressly include provisions for private equitable relief or treble damages.").

<sup>141</sup> 115 CONG. REC. 9567 (1969).

<sup>142</sup> S. REP. NO. 617, 91st Cong., 1st Sess. 83 (1969).

<sup>143</sup> 116 CONG. REC. 972 (1970).

<sup>144</sup> *House Hearings on S.30, supra* note 114, at 543-44 (statement of Edward L. Wright, President-elect of the ABA).

<sup>145</sup> Clayton Act, § 4, 15 U.S.C. § 15 (1982).

<sup>146</sup> *See House Hearings on S. 30, supra* note 114, at 543-44 (statement of Edward L. Wright, President-Elect of the ABA) ("In the portion seeking to add a proposed Section 1964, 'Civil Remedies,' we 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.").

<sup>147</sup> H.R. 19586, 91st Cong., 2d Sess. (1970).

<sup>148</sup> *Compare* the language of section 4 of the Clayton Act which reads in pertinent part,

The Senate accepted the House amendments to S.30 without a conference,<sup>150</sup> and on October 15, 1970, the President signed the bill, including RICO, into law.<sup>151</sup>

The legislative history reveals that neither Congress as a whole nor RICO's drafters ever considered the issue of exclusive or concurrent jurisdiction over civil RICO claims. As G. Robert Blakey, the chief counsel to the Senate Subcommittee on Criminal Laws and Procedures and RICO's principal drafter, remarked, "There is nothing on the face of the statute or in the legislative history' that touches on the question of concurrent jurisdiction. . . . 'To my knowledge, no one even thought of the issue.'"<sup>152</sup>

### 3. *Civil RICO in the Courts*

Congress enacted RICO primarily to provide another tool to combat the pervasive problem of organized crime's infiltration into legitimate businesses.<sup>153</sup> Unfortunately, RICO's treble damages provision and its provision returning plaintiff's litigation costs have attracted private litigants in ordinary business disputes to attach civil RICO counts to claims involving commercial fraud,<sup>154</sup> breach of contract,<sup>155</sup> and other activities unconnected to organized

[A]ny 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 in the district in which the defendant resides or is found or has an agent, 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.

15 U.S.C. § 15(a) (1982) *with* the language of § 1964(c) of RICO,

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.

18 U.S.C. § 1964(c) (1982). The committee's other amendments narrowed the scope of the bill. For example, Congress narrowed the statutory definition of "unlawful debt" to exclude debts from legal gambling, Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. § 1961(6) (1982)), and restricted the statutory definition of "pattern of racketeering activity" to at least two occurring within ten years of each other. Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. § 1961(5) (1982)); *see also* Blakey & Gettings, *supra* note 113, at 1020.

<sup>149</sup> 116 CONG. REC. 35,363 (1970).

<sup>150</sup> 116 CONG. REC. 36,296 (1970).

<sup>151</sup> 116 CONG. REC. 37,264 (1970).

<sup>152</sup> Flaherty, *Two States Lay Claim to RICO*, NAT'L L.J., May 7, 1984, at 10, col. 2 (quoting G. Robert Blakey).

<sup>153</sup> *See supra* notes 113-28 and accompanying text.

<sup>154</sup> *See, e.g.*, *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352 (E.D. Mich. 1983) (plaintiffs contended that insurers' and underwriters' refusal to pay claims in an effort to force a lower settlement coupled with the use of the mails violated RICO).

<sup>155</sup> *See, e.g.*, *American Soc'y of Contemporary Medicine, Surgery & Ophthalmology v. Murray Communications, Inc.*, 547 F. Supp. 462 (N.D. Ill. 1982) (plaintiff asserted breach of contract along with use of the mails violated RICO).

crime.<sup>156</sup> RICO includes wire, mail and securities fraud within its definition of racketeering activity.<sup>157</sup> This allows most plaintiffs in litigation involving ordinary business disputes to allege reasonably that facts underlying the dispute suggest a pattern of racketeering activity under RICO.<sup>158</sup> One survey shows that few civil RICO actions actually involve cases of organized criminal activity.<sup>159</sup>

In response to these perceived misuses of civil RICO, some courts created limitations to restrict RICO's scope.<sup>160</sup> Most courts, however, have retained the broad approach, refusing to add judicial gloss to RICO's plain language.<sup>161</sup> The Supreme Court has rejected judicial attempts to limit the scope of RICO. In *Sedima, S.P.L.R. v. Imrex Co.*,<sup>162</sup> the Court expressly rejected a restriction that would prohibit a plaintiff from maintaining a civil RICO suit against a defendant unless the defendant had already been convicted of a criminal RICO offense.<sup>163</sup> It reasoned that the word "conviction" appears nowhere in RICO and the language of RICO suggests that the civil defendant need not be convicted in order to face civil liability.<sup>164</sup> The Court also rejected the judicially created "racketeering

<sup>156</sup> See, e.g., *Congregation Beth Yitzhok v. Briskman*, 566 F. Supp. 555 (E.D.N.Y. 1983) (concerning control of a Chassidic congregation).

<sup>157</sup> See Boucher, *Closing the RICO Floodgates in the Aftermath of Sedima*, 31 N.Y.L. SCH. L. REV. 133, 135 n.8 (1986).

<sup>158</sup> *Id.* at 134-35.

<sup>159</sup> ABA SECTION OF CORP. BANKING & BUSINESS LAW, REPORT OF THE AD HOC CIVIL RICO TASK FORCE 56 (1985) [hereinafter RICO TASK FORCE REPORT]. Of the 270 civil RICO cases reported by trial courts through 1984, only nine percent involved "allegations of criminal activity of a type generally associated with professional criminals." *Id.* Forty percent involved securities fraud, 37% involved common law fraud in a commercial setting, 4% involved antitrust and unfair competition, 4% involved bribery, 3% involved fraud not related to securities or to business transactions, 2% involved labor related matters, and 1% involved theft or conversion. *Id.* at 55-56. In addition the report tracked a recent explosion of civil RICO claims. Of the 270 cases, 43% were decided in 1984, the last year studied, 33% in 1983, 13% in 1982, 7% in 1981, 2% in 1980, and only 3% in the decade of the 1970s. *Id.* at 55.

<sup>160</sup> See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984) (requiring a criminal RICO conviction for civil RICO liability), *rev'd* 473 U.S. 479 (1985); *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1240 (S.D.N.Y. 1983) (adopting the racketeering injury requirement), *aff'd sub. nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984); *Harper v. New Japan Sec. Int'l Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982) (adopting the racketeering injury requirement); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975) (creating a "nexus to organized crime" requirement).

<sup>161</sup> See, e.g., *Schacht v. Brown*, 711 F.2d 1343, 1351, 1356 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 490-91 (E.D. Pa. 1983); *Meineke Discount Muffler Shops, Inc. v. Noto*, 548 F. Supp. 352, 354 (E.D.N.Y. 1982).

<sup>162</sup> 473 U.S. 479 (1985).

<sup>163</sup> *Id.* at 488.

<sup>164</sup> *Id.* at 488 ("The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word 'conviction' does not appear in any relevant portion of the statute. To the contrary, the predicate acts involve conduct that is 'chargeable' or 'indictable' and 'offense[s]' that are 'punishable,' under various criminal statutes.") (citations omitted).

injury requirement" which required civil RICO plaintiffs to prove damages beyond those caused by the predicate acts of the alleged RICO offense.<sup>165</sup> The Court rejected this limitation, remarking that it felt "hampered by the vagueness of that concept,"<sup>166</sup> calling the requirement "amorphous,"<sup>167</sup> and finding no hint of it in the statute.<sup>168</sup> It concluded that, in fact, RICO provides remedies for damages caused by the predicate acts.<sup>169</sup> While a number of district courts required some connection between the defendant and organized crime<sup>170</sup> every circuit court directly considering this limitation on civil RICO has rejected it.<sup>171</sup>

Even though many courts, including the Supreme Court, have addressed RICO claims, some elements of RICO remain ambiguous.<sup>172</sup> Most notably, no court has clearly defined a "pattern of

<sup>165</sup> See, e.g., *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1240-41 (S.D.N.Y. 1983) ("The words of § 1964 expressly require that a private plaintiff be injured 'by reason of a violation of section 1962'. . . . Unless these words have no effect, . . . plaintiff's injuries must derive from the 'patteru of racketeering activity' which violates § 1962 rather than directly from the underlying acts which combine to constitute that pattern."), *aff'd sub. nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (1984); *Johnsen v. Rogers*, 551 F. Supp. 281 (C.D. Cal. 1982) (same); *Harper v. New Japan Sec. Int'l Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982) (adopting the racketeering injury requirement); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (adopting the racketeering injury requirement because if none existed every bad faith breach of contract or common law fraud in which defendant used the mails would violate RICO).

<sup>166</sup> *Sedima*, 473 U.S. at 494.

<sup>167</sup> *Id.* at 495.

<sup>168</sup> *Id.* ("Given that 'racketeering activity' consists of no more and no less than commission of a predicate act, § 1961(1), we are initially doubtful about a requirement of a 'racketeering injury' separate from the harm from the predicate acts. A reading of the statute belies any such requirement.").

<sup>169</sup> *Id.* at 497 ("[T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern. . . .").

<sup>170</sup> In *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975), for example, the plaintiff alleged that a telephone answering service violated RICO by mailing fraudulent bills to its customers. The court did not recognize plaintiff's RICO claim because plaintiff failed to allege that the answering service was a member of "a society of criminals operating outside the law." *Id.* at 113. See also *Hokama v. E.F. Hutton, Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983) (adopting the nexus to organized crime requirement for a civil RICO claim by holding that "plaintiffs must allege some link to organized crime, however defined"); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983) (adopting the nexus to organized crime requirement).

<sup>171</sup> See, e.g., *Schacht v. Brown*, 711 F.2d 1343, 1353-56 (7th Cir. 1983) (finding both the statutory language and legislative history of RICO to authorize suits against defendants with no connection to organized crime); see *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983) (refusing to add the nexus to organized crime requirement to RICO's language), *cert. denied*, 465 U.S. 1025 (1984); *Bennett v. Berg*, 685 F.2d 1053, 1063-64 (8th Cir. 1982) (concluding that RICO's legislative history rejects the nexus to organized crime requirement), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983).

<sup>172</sup> See generally Comment, *Civil RICO After Sedima: An Exercise in Restraint*, 22 LAND & WATER L. REV. 153, 159-68 (1987) (analyzing in detail ambiguous elements in RICO).

racketeering activity."<sup>173</sup> Section 1961(5) requires at least two acts of racketeering, but the Supreme Court has commented that "while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.'" <sup>174</sup> The Court failed to announce when two or more acts create a pattern and when they do not. Lower courts have not arrived at a uniform interpretation.<sup>175</sup>

## II

### ANALYSIS: CONCURRENT JURISDICTION OVER CIVIL RICO CLAIMS

Any analysis addressing the question of jurisdiction under civil RICO,<sup>176</sup> or under any federal statute, begins with the presumption

<sup>173</sup> 18 U.S.C. § 1961(5) (1982). See Goldsmith, *RICO and "Pattern: The Search for Continuity Plus Relationship*," 73 CORNELL L. REV. 971 (1988).

<sup>174</sup> *Sedima*, 497 U.S. at 496 n.14.

<sup>175</sup> See, e.g., *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) (rejecting an argument that each predicate act had to occur in separate criminal episodes to constitute a pattern); *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985) (holding that each predicate act in a single scheme is an act that can contribute to a pattern); *Alexander Grant & Co. v. Tiffany Indus., Inc.*, 770 F.2d 717, 718 n.1 (8th Cir. 1985) (defining a pattern as "continuity plus relationship" rather than sporadic activity), *cert. denied*, 474 U.S. 1058 (1986); see also Comment, *supra* note 172, at 159-61 (reviewing various courts' interpretations of a "pattern of racketeering activity").

<sup>176</sup> The RICO jurisdictional issue usually arises in one of three contexts. First, a defendant in state court may move to dismiss the RICO claim against him for lack of subject-matter jurisdiction. See, e.g., *Cianci v. Superior Court (Poppingo)*, 40 Cal.3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985) (denying demurrer to RICO claim by declaring jurisdiction over civil RICO). Second, a defendant in federal court may assert res judicata as an affirmative defense to a RICO claim brought after state court litigation. See, e.g., *Carman v. First Nat'l Bank*, 642 F. Supp. 862 (W.D. Ky. 1986) (denying defendant's motion for summary judgment which maintained that plaintiffs were precluded by a prior state judgment); *Karel v. Kroner*, 635 F. Supp. 725 (N.D. Ill. 1986). The doctrine of res judicata precludes not only what was actually litigated in a previous action but also that which could have been litigated. See *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (res judicata provides that a valid judgment binds the parties "not only as to every matter which was offered and received to sustain or defeat a claim or demand, but as to any other admissible matter which might have been offered for that purpose.") (quoting *Cromwell v. County*, 94 U.S. 351, 352 (1876)); see also WRIGHT, MILLER & COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4406 (quoting the language of *Commissioner v. Sunnen* and reiterating its holding). But a state court judgment cannot have preclusive effect if the state court lacked jurisdiction to hear the claim. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 26(1)(c) (1980) (plaintiff is not precluded from raising a subsequent action if the court in the prior action lacked subject matter jurisdiction to hear that claim). Third, a plaintiff may argue that removal of a civil RICO case to a federal district court is improper because the state court in which he brought the action lacked competence to hear it. See, e.g., *Contemporary Servs. Corp. v. Universal City Studios, Inc.*, 655 F. Supp. 885 (C.D. Cal. 1987) (federal court had removal jurisdiction over civil RICO claim because California state courts have such jurisdiction). Removal jurisdiction of federal courts, 28 U.S.C. § 1441(a) (1982), is derivative of the jurisdiction of the original state court. See *Lambert Run Coal Co. v. Baltimore & O. R.R.*, 258 U.S.

that state courts share concurrent jurisdiction.<sup>177</sup> The presumption of concurrent jurisdiction may only be rebutted by an explicit statutory directive of exclusive jurisdiction,<sup>178</sup> by an unmistakable implication of exclusive jurisdiction from the legislative history of the statute,<sup>179</sup> or by a clear incompatibility between state-court adjudication of the federal claim and the federal interests embodied in it.<sup>180</sup> RICO satisfies none of these three factors.

#### A. No Explicit Statutory Directive of Exclusive Jurisdiction Under RICO

RICO's jurisdictional grant contains neither an explicit statutory directive of concurrent jurisdiction nor an explicit directive of exclusive jurisdiction. Instead it employs permissive language similar to that which the Supreme Court has already determined comports with the presumption of concurrent jurisdiction.<sup>181</sup> As such, the language of RICO's jurisdictional grant cannot support a conclusion of exclusive jurisdiction.

The RICO jurisdictional grant provides that "Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may* sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee."<sup>182</sup> Such a grant does not constitute an explicit directive of exclusive jurisdiction because it fails to employ the word "exclusive."<sup>183</sup> Similarly, the grant does not explicitly provide concurrent jurisdiction because the word "concurrent" does not appear in it.<sup>184</sup>

Courts almost uniformly have held that language similar to the jurisdictional language in RICO fails to rebut the presumption of concurrent jurisdiction. They reason that the word "may" does not preclude state-court adjudication because it represents a permissive

377, 382 (1922) ("If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none [through removal], although it might in a like suit originally brought there have had jurisdiction."); *but see* 1A MOORE'S FEDERAL PRACTICE, *supra* note 30, 0.157[3.3] (noting that 28 U.S.C. § 1441 (1982) allows the federal court to acquire jurisdiction over an exclusively federal action brought in state court.).

<sup>177</sup> See *supra* notes 18-24 and accompanying text.

<sup>178</sup> See *supra* notes 25-54 and accompanying text.

<sup>179</sup> See *supra* notes 55-76 and accompanying text.

<sup>180</sup> See *supra* notes 77-112 and accompanying text.

<sup>181</sup> See, e.g., *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (construing the use of the word "may" in the jurisdictional language of the Labor Relations Act as permissible and hence conferring concurrent jurisdiction.); see also *supra* notes 42-51 and accompanying text.

<sup>182</sup> 18 U.S.C. § 1964(c) (1982) (emphasis added).

<sup>183</sup> See *supra* notes 32-34 and accompanying text.

<sup>184</sup> See *supra* notes 35-36 and accompanying text.

rather than a restrictive term.<sup>185</sup> Similarly, the permissive language of RICO fails to limit claims to federal courts; the language constitutes no explicit statutory directive of exclusive jurisdiction.

No court, either state or federal, has directly asserted that the jurisdictional language of RICO provides an explicit statutory directive of exclusive jurisdiction. Courts finding federal jurisdiction over RICO have generally based their conclusion on RICO's legislative history<sup>186</sup> or on the incompatibility of state-court jurisdiction with federal interests in civil RICO claims.<sup>187</sup> One district court<sup>188</sup> and one state court<sup>189</sup> have held, however, that an *in pari materia*<sup>190</sup> reading of RICO indicates exclusive jurisdiction because section 1961<sup>191</sup> of the Act defines predicate acts in terms of federal substantive crimes, because section 1963<sup>192</sup> criminal prosecutions fall within exclusive federal jurisdiction, because section 1965<sup>193</sup> venue and process provisions apply only in federal courts, and because section 1966<sup>194</sup> empowers only the United States Attorney General to act thereunder.<sup>195</sup>

These courts start from the mistaken premise that reading a statute *in pari materia* can reveal an explicit statutory directive of exclusive jurisdiction. Explicit directives could not call for such sublime deduction and still be labeled explicit. Hence, all statutes containing an explicit directive of exclusive jurisdiction have employed the word "exclusive" in their text.<sup>196</sup>

<sup>185</sup> See *supra* notes 37-54 and accompanying text.

<sup>186</sup> See *infra* note 204 and accompanying text.

<sup>187</sup> See, e.g., *Levinson v. American Accident Reins. Group*, 503 A.2d 632, 635 (Del. Ch. 1985) (relying on similarity to the Clayton Act, uniformity of interpretation and expertise of federal judges).

<sup>188</sup> *Kinsey v. Nestor Exploration Ltd.*, 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985).

<sup>189</sup> *Main Rusk Assocs. v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985) (following the holding in *Kinsey v. Nestor Exploration*).

<sup>190</sup> *In pari materia* is defined as "upon the same matter or subject." Statutes *in pari materia* should be construed together. BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

<sup>191</sup> 18 U.S.C. § 1961 (1982 & Supp. IV 1986).

<sup>192</sup> 18 U.S.C. § 1963 (1982 & Supp. IV 1986).

<sup>193</sup> 18 U.S.C. § 1965 (1982).

<sup>194</sup> 18 U.S.C. § 1966 (Supp. IV 1986).

<sup>195</sup> *Kinsey v. Nestor Exploration Ltd.*, 604 F. Supp. 1365, 1370 (E.D. Wash. 1985).

In the instant case, if one views the statutory scheme dealing with RICO broadly, then there are most assuredly indicia militating in favor of exclusivity. See 18 U.S.C. § 1961 (predicate acts defined in terms of substantive federal crime); § 1963 (criminal prosecutions exclusively federal by unmistakable implication); § 1965 (extended venue and process provisions applicable only in federal courts); § 1966 (only Attorney General empowered to act thereunder); § 1967 (limited to actions involving the United States); and § 1968 (only Attorney General may act thereunder).

*Id.*

<sup>196</sup> See *supra* notes 32-34 and accompanying text.

Furthermore, these courts are mistaken in their analysis of RICO. In noting that section 1961 defines predicate acts in terms of federal substantive crimes, they forget that section 1961(1)(A) defines predicate acts in terms of state substantive laws.<sup>197</sup> In noting that criminal prosecutions under section 1963 are limited to federal courts, the courts fail to recognize that Congress has explicitly granted exclusive jurisdiction over all federal crimes to federal courts.<sup>198</sup> These courts also fail to consider, that Congress may have limited RICO's venue and process provisions to federal court based on a belief that it can more legitimately prescribe federal-court procedure than state-court procedure.<sup>199</sup> The fact that section 1966 empowers only the United States Attorney General to act thereunder sheds no light on the jurisdictional issue because section 1966 applies only to actions instituted by the United States as a party.<sup>200</sup>

Notwithstanding these cases, the clear weight of authority, both in the interpretations of RICO and comparable statutes, supports the proposition that the jurisdictional language in RICO creates no explicit statutory directive of exclusive jurisdiction. The legal standards for interpreting jurisdictional grants, emanating from *Dowd Box*,<sup>201</sup> support this notion.

#### B. No Unmistakable Implication of Exclusive Jurisdiction from RICO's Legislative History

The legislative history of RICO provides no unmistakable implication of exclusive jurisdiction. The legislative history reveals that neither Congress nor RICO's drafters ever considered the issue of exclusive or concurrent jurisdiction over civil RICO claims.<sup>202</sup> If neither Congress nor the drafters considered the jurisdictional issue, RICO's legislative history cannot contain an unmistakable implication that Congress intended exclusive jurisdiction over

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<sup>197</sup> That subsection reads, "(1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . ." 18 U.S.C. § 1961(1)(A) (Supp. IV 1986).

<sup>198</sup> 18 U.S.C. § 3231 (1982); *see supra* note 32.

<sup>199</sup> Perhaps Congress holds this belief because the Constitution charges it with the power to create and define lower federal courts. U.S. CONST. art. I, § 8. The legislative history of RICO sheds no light on this idea.

<sup>200</sup> 18 U.S.C. § 1966 (Supp. IV 1986) (allowing the United States Attorney General to expedite an action instituted by the United States in a district court if, in his opinion, the case holds general public importance).

<sup>201</sup> 368 U.S. 502 (1962); *see supra* notes 42-45 and accompanying text.

<sup>202</sup> *See supra* notes 129-52 and accompanying text.

RICO.<sup>203</sup>

Several courts have nonetheless found that the legislative history of RICO provides an unmistakable implication of exclusive jurisdiction.<sup>204</sup> These courts hold that in adopting the language of the Clayton Act as RICO's jurisdictional grant,<sup>205</sup> Congress intended to incorporate the Clayton Act's exclusive jurisdiction into RICO.<sup>206</sup>

Courts have interpreted jurisdiction under both the Sherman Act and the Clayton Act as exclusively federal.<sup>207</sup> The legislative history of these laws shows that Congress enacted both laws after rejecting amendments to provide explicit concurrent jurisdiction.<sup>208</sup> RICO, however, has no similar legislative history. While pending in Congress, no one proposed an amendment to make jurisdiction under RICO explicitly concurrent or explicitly exclusive.<sup>209</sup> Again, no one considered the jurisdictional question.<sup>210</sup>

Perhaps courts' interpret the Clayton Act as granting exclusive jurisdiction because the Clayton Act joins the Sherman Act as part of the larger antitrust statutory scheme and courts have found jurisdiction under the Sherman Act to be exclusively federal.<sup>211</sup> Although RICO incorporates antitrust language, the legislative history clearly shows that Congress specifically drafted RICO outside the antitrust scheme. Precursors to RICO, S.2048 and S.2049 proposed amendments to the Sherman Act to combat organized crime,<sup>212</sup> but Congress never considered these bills. Congress later passed versions drafted specifically outside the antitrust scheme to

<sup>203</sup> See *HMK Corp. v. Walsey*, 637 F. Supp. 710 (E.D. Va. 1986) (suggesting that if no one thought of the jurisdictional issue, no unmistakable implication of exclusive jurisdiction can exist).

<sup>204</sup> See, e.g., *Massey v. City of Oklahoma City*, 643 F. Supp. 81 (W.D. Okla. 1986) (adoption of the Clayton Act language into RICO presents an unmistakable implication that Congress intended exclusive jurisdiction over civil RICO claims); *County of Cook v. Midcon Corp.*, 574 F. Supp. 902 (N.D. Ill. 1983) (same), *aff'd on other grounds*, 773 F.2d 892 (7th Cir. 1985); *Washington Courte Condominium Ass'n-Four v. Washington-Golf Corp.*, 150 Ill. App. 3d 681, 501 N.E.2d 1290 (1986) (same); *Greenview Trading Co. v. Hershman & Leicher, P.C.*, 108 A.D.2d 468, 489 N.Y.S.2d 502 (1985) (same).

<sup>205</sup> See *supra* note 148.

<sup>206</sup> See, e.g., *County of Cook*, 574 F. Supp. at 912 ("Legislators must have known that courts have construed virtually identical language as giving federal courts exclusive jurisdiction over antitrust claims. It would be anomalous for this court to hold that the jurisdictional grant in the RICO statute did anything other than create exclusive federal jurisdiction over civil claims by persons injured by violations of 18 U.S.C. § 1962."); *Greenview Trading*, 108 A.D.2d at 471, 489 N.Y.S.2d at 504-05 (restating the exact language of *County of Cook*).

<sup>207</sup> See *supra* notes 61-62 and accompanying text.

<sup>208</sup> See *supra* notes 62-65 and accompanying text.

<sup>209</sup> See *Blakey & Gettings*, *supra* note 113, at 1020 (discussing amendments proposed to S. 30).

<sup>210</sup> See *supra* note 152 and accompanying text.

<sup>211</sup> See *supra* note 61 and accompanying text.

<sup>212</sup> See *supra* notes 120-21 and accompanying text.

avoid the restrictive precedents of antitrust law.<sup>213</sup> Consequently, the mere use of antitrust language does not mean that RICO is part of the antitrust statutory scheme nor that jurisdiction must be consistent with antitrust jurisdiction.

On closer inspection, RICO's adoption of the Clayton Act language fails to provide an unmistakable implication that Congress intended to convey exclusive jurisdiction. Courts utilizing the Clayton Act analogy must impute to Congress a consideration of the jurisdictional issue and an intent to make jurisdiction exclusive. It is difficult to believe that a majority of a diverse collective body such as Congress would follow this thought process to reach the conclusion of exclusive jurisdiction without a word about the issue in the legislative history. The legislative history indicates that Congress adopted the language of the Clayton Act only to provide a treble damages remedy for private RICO claimants like that in the Clayton Act.<sup>214</sup> This purpose in no way implicates the jurisdictional issue.<sup>215</sup>

### C. No Clear Incompatibility Between State-Court Adjudication and Federal Interests

RICO fails to satisfy the third prong of the *Gulf Offshore* test, whether there exists a "disabling incompatibility" between state court adjudication and the federal interests embodied in the statute.<sup>216</sup> As noted earlier, the Second Circuit recently has remarked that rebuttal of the presumption of concurrent jurisdiction through this prong of the analysis "would take a truly extraordinary set of circumstances."<sup>217</sup> An analysis of RICO under this third prong reveals no clear incompatibility between state adjudication and federal interests to rebut the presumption of concurrent jurisdiction.

Exclusive federal jurisdiction will not promote uniform inter-

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<sup>213</sup> See *supra* notes 129-52 and accompanying text.

<sup>214</sup> Congress adopted the language of section 4 of the Clayton Act at the ABA's suggestion. But the ABA merely sought a private cause of action for treble damages. See *supra* notes 144-48 and accompanying text.

<sup>215</sup> See, e.g., *County of Cook*, 773 F.2d at 905 n.4 (dictum) ("We doubt whether the analogy to antitrust law is sufficiently strong to conclude that because jurisdiction over antitrust cases is exclusively federal, RICO jurisdiction necessarily must follow suit); see also *Karel v. Kroner*, 635 F. Supp. 725, 731 (N.D. Ill. 1986) ("Given the absence of indication that Congress even considered the issue, as well as the intended breadth and remedial goals of RICO, we cannot find the required implication [of exclusive jurisdiction.]); *Cianci v. Superior Court (Poppingo)*, 40 Cal. 3d 903, 911-14, 710 P.2d 375, 378-80, 221 Cal. Rptr. 575, 578-80 (1985) (concluding that the legislative history of RICO fails to provide an unmistakable implication of exclusive jurisdiction because Congress never considered the issue and because the Clayton Act language was adopted to provide private relief rather than exclusive jurisdiction).

<sup>216</sup> See *supra* notes 83-112 and accompanying text.

<sup>217</sup> *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 864 (2d Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987); see *supra* note 112 and accompanying text.

pretation of RICO. First, much of the law applicable to RICO is not conducive to uniform interpretation since the content of many predicate acts depends on state law which varies from state to state.<sup>218</sup> As the Supreme Court announced in applying this third prong to another federal statute incorporating state law, “[t]here is no need for uniform interpretation of laws that vary from State to State.”<sup>219</sup> Moreover, Supreme Court review of federal questions can direct uniform interpretation.<sup>220</sup>

The Supreme Court has taken steps to preserve uniform interpretation of RICO. It has reduced the opportunities for judicial gloss by binding itself closely to RICO’s statutory text.<sup>221</sup> In *Sedima, S.P.R.L. v. Imrex Co.*,<sup>222</sup> for example, the Court rejected two judicially developed restrictions designed to limit RICO claims to activities more closely associated with organized crime.<sup>223</sup> Certain elements of the RICO cause of action remain unclear, leaving some room for varying state court interpretations. It does not appear that in the RICO context exclusive jurisdiction will promote uniformity of interpretation. Indeed, federal courts have developed all of the judicial glosses that jeopardized uniform interpretation of RICO before *Sedima*.<sup>224</sup>

No evidence suggests that federal judges enjoy greater expertise over civil RICO claims than state judges. In fact, state judges may have superior expertise in applying the incorporated state law defining predicate acts.<sup>225</sup> State adoption of “little RICO” statutes has afforded state courts with even more opportunities to address concepts in RICO beyond the predicate acts.<sup>226</sup> Commentators

<sup>218</sup> 18 U.S.C. § 1961(1)(A) (Supp. IV 1986). In addition, section 1961(6) makes the definition of “unlawful debt” partially contingent on state or municipal law. 18 U.S.C. § 1961(6) (1982). Interpretation of the predicate acts cannot be uniform unless the state law definitions and elements of those predicate acts are uniform as well.

<sup>219</sup> *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 484 (1981) (determining jurisdiction over the Outer Continental Shelf Lands Act to be concurrent).

<sup>220</sup> See *supra* notes 83-95 and accompanying text.

<sup>221</sup> *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488 (1985) (rejecting the proposition that a defendant must be criminally convicted of a RICO violation before the court can impose civil liability because the statutory text defines predicate acts as “indictable” or “chargeable”); *id.* at 495 (rejecting the “racketeering injury requirement” because “[a] reading of the statute belies any such requirement”).

<sup>222</sup> 473 U.S. 479 (1985).

<sup>223</sup> See *supra* notes 162-69 and accompanying text.

<sup>224</sup> See *supra* notes 160-69 and accompanying text.

<sup>225</sup> See *Gulf Offshore*, 453 U.S. at 484 (applying the third prong of the rebuttal test to OCSLA and concluding that federal courts have no greater expertise over a federal claim when the federal claim incorporates state law as its governing rules).

<sup>226</sup> States that have adopted their own versions of civil RICO include Arizona (ARIZ. REV. STAT. ANN. §§ 13-2301 - 13-2317 (1978 & Supp. 1987)), Colorado (COLO. REV. STAT. §§ 18-17-101 - 18-17-109 (1986 & Supp. 1987)), Delaware (DEL. CODE ANN. tit. 11 §§ 1501-1511 (1987)), Florida (FLA. STAT. ANN. §§ 895.01-895.09 (West Supp. 1988)),

have remarked that "there may be situations where state courts have gained considerable experience by enforcing similar state laws. . . ." <sup>227</sup>

No state-court inhospitality to federal RICO claims exists to jeopardize federal interests. As noted in the context of civil rights litigation, state courts may display disdain for federal claims when the interests of the locality differ greatly from federal interests.<sup>228</sup> But twenty-two states in all regions of the nation have already shown that they share the same interest expressed in RICO by enacting their own versions of that statute.<sup>229</sup> Furthermore, state courts are more than likely to be sympathetic to RICO claims because they may in fact be applying state law. In applying the third prong in similar circumstances, the Supreme Court remarked that state judges "certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law."<sup>230</sup>

Finally, concurrent jurisdiction relieves some of the burden from the federal dockets. As the ABA's Ad Hoc Task Force on Civil RICO reported,<sup>231</sup> the number of civil RICO claims in federal court alone has skyrocketed over recent years, and given the *Sedima* Court's rejection of judicial limitations on civil RICO,<sup>232</sup> this trend may continue. Some state courts hear civil RICO claims now. Exclusive jurisdiction would add these cases to the federal dockets.

No clear incompatibility between state-court adjudication of RICO claims and federal interests exists to rebut the presumption of concurrent jurisdiction. State court adjudication of civil RICO

Georgia (GA. CODE ANN. §§ 16-14-1 - 16-14-15 (1981), Hawaii (HAW. REV. STAT. §§ 8421 - 842-12 (1976)), Idaho (IDAHO CODE §§ 18-7801 - 18-7805 (1987)), Indiana (IND. CODE ANN. §§ 35-45-6-1, 2 (Burns 1986 & Supp. 1988)), Mississippi (MISS. CODE ANN. §§ 97-43-1 - 97-43-11 (Supp. 1988)), Nevada (NEV. REV. STAT. ANN. §§ 207.350-207.520 (Michie 1986)), New Jersey (167 N.J. STAT. ANN. §§ 2c:41-1 - 41-6.2 (West 1982)), New Mexico (N.M. STAT. ANN. §§ 30-42-1 - 30-42-6 (1984)), New York (N.Y. PENAL LAW §§ 460.00-460.80 (McKinney Supp. 1988)), North Carolina (N.C. GEN. STAT. §§ 75D-1 - 75D-14 (1987)), North Dakota (N.D. CENT. CODE §§ 12.1-06.1-05 - 12.1-06.1-08 (1985 & Supp. 1987)), Ohio (OHIO REV. CODE ANN. §§ 2923.31-2923.36 (Anderson 1987)), Oregon (OR. REV. STAT. §§ 166.715-166.735 (1985)), Pennsylvania (18 PA. CONS. STAT. ANN. § 911 (Purdon 1983 & Supp. 1988)), Rhode Island, (R.I. GEN. LAWS §§ 7-15-1 - 7-15-11 (1985)), Utah (UTAH CODE ANN. §§ 76-10-1601 - 76-10-1608 (1987)), Washington (WASH. REV. CODE ANN. §§ 9A.82.010-9A.82.900 (Supp. 1987)), and Wisconsin (WIS. STAT. ANN. §§ 946.80-946.87 (West Supp. 1987)). In addition "little RICO" statutes are pending in Alaska, Massachusetts, Oklahoma, and Tennessee.

<sup>227</sup> Redish & Muench, *supra* note 22, at 334.

<sup>228</sup> See *supra* notes 97-99 and accompanying text.

<sup>229</sup> See *supra* note 226.

<sup>230</sup> *Gulf Offshore*, 453 U.S. at 484 (applying the factor of possible state-court inhospitality to claims under OCSLA and concluding that state courts will not harbor antagonism for a federal claim that incorporates state law as its governing rule).

<sup>231</sup> See *supra* note 159 and accompanying text.

<sup>232</sup> See *supra* notes 163-76 and accompanying text.

claims will advance rather than jeopardize the federal interests expressed in RICO. Because RICO defines so many of the predicate acts upon which a claim can be based in terms of state substantive law,<sup>233</sup> RICO does not require exclusive federal jurisdiction to promote uniformity of interpretation. Additionally, the incorporation of state law means that federal judges enjoy no greater expertise over RICO claims than state judges. Indeed, on some RICO issues, state judges may have greater expertise than federal judges. Furthermore, state adoption of "little RICO" statutes<sup>234</sup> indicates that state are sympathetic to RICO claims. Finally, concurrent jurisdiction advances federal interests by relieving some of the burden from the federal dockets.

### III PROPOSAL

This Note proposes that Congress amend section 1964(c) of RICO to include an explicit statutory directive of concurrent jurisdiction over civil RICO claims. The jurisdictional language of RICO in its amended form should read:

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, *which shall share concurrent jurisdiction with the courts of the several States*, and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Such an amendment would resolve the jurisdictional issue and free litigants to concentrate on the substantive aspects of RICO.

More importantly, this amendment would curb a recent trend of federal-court deference to state-court denial of jurisdiction over RICO when a claimant raises the jurisdictional issue to rebut a defense of *res judicata*.<sup>235</sup> For example, in *Cullen v. Margiotta*,<sup>236</sup> the

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<sup>233</sup> 18 U.S.C. § 1961(1)(A) (Supp. IV 1986). That section provides, (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year. . . .

<sup>234</sup> See *supra* note 226.

<sup>235</sup> See, e.g., *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir. 1987) (In giving alternative arguments for dismissing a RICO claim, the court noted that a federal court is required by 28 U.S.C. § 1738 to give a state court judgment the same preclusive effect as the courts of the state could give it and concluded that New York courts would not give a dismissal of a RICO claim by another New York court *res judicata* effect because New York courts have held that they lack jurisdiction over those claims), *cert. denied sub nom. Nassau County Republican Comm. v. Cullen*, 107 S. Ct. 3226 (1987). Cf. *Printing Mart-Morristown, Inc. v. Rosenthal*, 650 F. Supp. 1444, 1449-50 (D.N.J. 1987) (without deciding the jurisdictional issue under RICO, the court held that the plaintiff was required to

Second Circuit held that *res judicata* did not preclude the plaintiff's RICO claim because the New York courts, in which he brought an earlier action without asserting a RICO claim, had held that they lack jurisdiction over RICO claims.<sup>237</sup> The court reasoned that, as the analog of the full faith and credit clause of the Constitution,<sup>238</sup> 28 U.S.C. § 1738<sup>239</sup> requires federal courts to give the same preclusive effect to state court judgments as other courts of that state would give them.<sup>240</sup> Federal courts cannot give a state court judgment *greater* preclusive effect than the courts of the state would give it.<sup>241</sup> A state court judgment cannot have preclusive effect if the state court lacks jurisdiction to hear the claim.<sup>242</sup> Thus, the *Cullen* court concluded that a prior state court judgment does not bar a subsequent RICO action in federal court when the courts of the state have determined that they lack jurisdiction to hear RICO claims.<sup>243</sup> Therefore, without amendment of the statute, RICO claims that would otherwise be brought in state court will be thrust onto the federal courts. This result will duplicate the litigation required to adjudicate the case and will also add to the burden on federal dockets by removing the defense of *res judicata* in certain circumstances.

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raise its RICO claims in state court to allow the state court an opportunity to decide whether it has jurisdiction, especially given the conflict of authority on this issue).

<sup>236</sup> 811 F.2d 698 (2d Cir.), *cert. denied sub nom. Nassau County Republican Comm. v. Cullen*, 107 S. Ct. 3226 (1987).

<sup>237</sup> *Id.* at 732.

<sup>238</sup> U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceeding of every State. . . .").

<sup>239</sup> 28 U.S.C. § 1738 (1982). The statute provides in pertinent part,

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1982).

<sup>240</sup> *Cullen*, 811 F.2d at 732.

<sup>241</sup> See *Marrrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985) ("This proposition [that § 1738 allows a federal court to give a state-court judgment greater preclusive effect than the state courts themselves would give it], however, was rejected by [the Supreme Court]."); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (remanding a district court's dismissal of a 42 U.S.C. § 1983 claim because it was unclear whether the district court applied state or federal preclusionary law; if federal preclusionary law under 28 U.S.C. § 1738 could give a state court judgment greater preclusive effect than the courts of the state would give, there would be no reason to remand).

<sup>242</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1980) (plaintiff is not precluded from raising a claim in a subsequent action if the court of the prior action lacked subject matter jurisdiction to hear that claim).

<sup>243</sup> *Cullen*, 811 F.2d at 732 (allowing RICO claim because under New York law claim is not barred if the court in the prior action lacked subject matter jurisdiction over the claim and because New York regards RICO jurisdiction as exclusively federal).

IV  
CONCLUSION

State courts share concurrent jurisdiction with federal courts over civil RICO claims. The analysis of such a jurisdictional question begins with the presumption of concurrent jurisdiction. The analysis also provides three prongs which can rebut the presumption,<sup>244</sup> none of which successfully rebuts the presumption of concurrent jurisdiction over civil RICO claims. RICO's jurisdictional grant provides no explicit statutory directive of exclusive jurisdiction. Courts have held similar language in other statutes to be consistent with the presumption.<sup>245</sup> Nothing in RICO's legislative history provides an unmistakable implication that Congress intended to limit RICO to federal courts; the legislative history provides no evidence that Congress ever considered or addressed the question of exclusive or concurrent jurisdiction.<sup>246</sup> State-court adjudication of federal claims does not jeopardize federal interests. The incorporation of state laws in defining the predicate acts of a RICO violation negates the possibility of uniform interpretation of those acts and also dispels fears that state courts lack the expertise to hear these claims.<sup>247</sup> Additionally, state adoption of their own versions of RICO indicates that state courts have sympathy for this federal cause of action.<sup>248</sup>

To eliminate lingering confusion over RICO's jurisdictional grant, Congress should amend RICO to convey explicitly concurrent jurisdiction to state courts. Such an amendment will save the time of courts and of litigants in contesting this issue. It will also curb the recent deferral of federal courts to state court determinations of their own jurisdiction over RICO when the jurisdictional issue arises in the *res judicata* context.

*Basil J. Musnuff*

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<sup>244</sup> See *supra* notes 18-22 and accompanying text.

<sup>245</sup> See *supra* notes 37-54 and accompanying text.

<sup>246</sup> See *supra* notes 202-03, 208-10 and accompanying text.

<sup>247</sup> See *supra* notes 233-34 and accompanying text.

<sup>248</sup> See *supra* notes 229-30 and accompanying text.