

The Standard of Proof in Civil RICO Actions for Treble Damages: Why the Clear and Convincing Standard Should Apply

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO)¹ was passed by Congress in 1970 as a part of the Organized Crime Control Act of 1970.² The RICO legislation provides civil remedies³ as well as criminal remedies.⁴ Civil actions may be brought by the Attorney General of the United States⁵ or by any person harmed in his person or business by a violation of the predicate criminal acts.⁶

The substantive requirements of a civil RICO action are identical to those for a criminal proceeding.⁷ In other words, the plaintiff in a civil action will only be entitled to relief once the elements of a criminal violation of the statute have been proven. A prior conviction of a criminal violation of the RICO statute is not necessary to bring a civil action,⁸ although it is necessary to prove the predicate elements of a criminal violation.⁹

A logical issue in this path of reasoning is a determination of the proper standard of proof for the predicate criminal acts in a civil RICO action. Since the predicate acts are necessarily criminal and since it is not necessary to show a prior conviction on these acts to prevail, should the plaintiff be held to a higher standard of proof than the ordinary civil standard of "by a preponderance of the evidence"?

The Supreme Court has stated in dicta that the standard of proof to be applied to the predicate criminal acts is lower than the criminal standard of "beyond a reasonable doubt."¹⁰ However, the Court specifically left unanswered the question of what the proper standard of proof should be.¹¹ Several of the circuit courts have stated in dicta that

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1. 18 U.S.C. 1961-1968 (1982).
 2. PUB. L. No. 91-452, 84 Stat. 922 (1970).
 3. 18 U.S.C. 1964 (1982).
 4. 18 U.S.C. 1963 (1982).
 5. 18 U.S.C. 1964(b) (1982).
 6. 18 U.S.C. 1964(c) (1982).
 7. 18 U.S.C. 1964 (1982).
 8. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985).
 9. 18 U.S.C. 1963 (1982).
 10. *Sedima*, 473 U.S. at 491.
 11. *Id.*

the proper standard in a civil RICO action is the ordinary civil action standard of preponderance of the evidence.¹²

Recently, the Seventh Circuit was the first appellate court to address the standard of proof question when it was directly in issue.¹³ The Seventh Circuit held that the proper standard of proof in a civil RICO action is the ordinary civil "preponderance" standard.¹⁴

There remain several circuits which have not addressed the standard of proof issue.¹⁵ The time is ripe to closely analyze the issue and decide the appropriate standard of proof based on a complete consideration of all of the relevant factors. This Note will advocate that the proper standard of proof is the higher standard of "clear and convincing evidence," taking a position opposite to the courts which have already addressed the issue.

A. *The RICO Statute*

The RICO statute is a powerful tool to use against those who violate specified criminal acts. The statute makes it unlawful to invest income derived from a pattern of racketeering activity in any enterprise affecting interstate commerce,¹⁶ acquire or maintain an interest in such an enterprise

12. *Wilcox v. First Interstate Bank*, 815 F.2d 522, 531 (9th Cir. 1987); *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987); *Armco Indus. Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 480-481 (5th Cir. 1986); *U.S. v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 279-280 n.12 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

13. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302-1303 (7th Cir. 1987)(U.S. App. pending.).

14. *Id.*

15. The first, fourth, sixth, eighth and tenth circuits have not addressed the standard of proof issue in civil RICO.

16. 18 U.S.C. 1962(a) (1982).

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for the purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

through a pattern of racketeering activity,¹⁷ conduct or participate in the affairs of such enterprise through a pattern of racketeering activity,¹⁸ or conspire to do any of these activities.¹⁹ "Racketeering activity" includes a range of offenses from kidnapping to mail and interstate wire fraud.²⁰ To come under the statute, at least two of the predicate offenses have to be committed within ten years of each other and must constitute a "pattern."²¹ Additionally, the offenses must be committed within an

17. 18 U.S.C. 1962(b) (1982).

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18. 18 U.S.C. 1962(c) (1982).

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

19. 18 U.S.C. 1962(d) (1982).

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

20. 18 U.S.C. 1961(1) (1982) provides:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

21. 18 U.S.C. 1961, 1962 (1982).

“enterprise.”²²

The criminal penalties include imprisonment and fines as well as injunctive relief and divestiture.²³ The civil remedies include injunctive relief and divestiture.²⁴ The Attorney General of the United States may initiate a civil RICO action,²⁵ as can any person injured in his property or business.²⁶ “Person” includes individuals as well as entities capable of holding an interest in property.²⁷ Individuals bringing a civil action are entitled to recover treble damages should they prevail.²⁸

B. *The Call For Reform*

There is a large and growing sentiment that the civil aspect of RICO is getting out of control in the number and variety of suits that have been brought under the statute.²⁹ It is argued that the current use of civil RICO was never intended nor envisioned to encompass such a wide range of civil actions.³⁰ The greatly expanded use of civil RICO is

22. 18 U.S.C. 1961, 1962 (1982).

23. 18 U.S.C. 1963 (1982).

24. 18 U.S.C. 1964(a) (1982).

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

25. 18 U.S.C. 1964(b) (1982).

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

26. 18 U.S.C. 1964(c) (1982).

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

27. 18 U.S.C. 1961(3) (1982).

28. 18 U.S.C. 1964(c) (1982).

29. See Broucher, *Closing the Floodgates in the Aftermath of Sedima*, 31 N.Y.L. SCH. L. REV. 133 (1986); LaCovara and Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-86); Note, *Congress Responds to Sedima: Is There A Contract Out on Civil RICO?*, 19 LOY. L.A.L. REV. 851 (1986).

30. *Id.*

probably due to its treble damages provision which is not only a great temptation in itself, but also carries great leverage for settlement value.³¹ While sitting on the Ninth Circuit, Justice Kennedy wrote a concurring opinion in the case of *Schreiber Distribution Co. v. Serv-Well Furniture Co.*³² in which he pointed to the great potential for misuse of civil RICO, saying:

The potential range of criminal prosecution under the federal mail and wire fraud laws is vast, made so in part by expansive judicial interpretation. The reach of those statutes exists against a backdrop of prosecutorial discretion, however, discretion which, if sensitively exercised, operates as a check to the improvident exertion of federal power. No such check operates in the civil realm. A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of the Racketeer Influenced and Corrupt Organizations Act.

It is most unlikely that Congress envisaged use of the RICO statute in a case such as the one before us, but we are required to follow where the words of the statute lead Thus, federal power inches forward when a statute is left unattended, whether from Congress' indifference or its acquiescence.³³

Members of Congress have also recognized that RICO is exceeding its originally conceived limits and that there is a need to reform the statute. In the 99th Congress, three bills were introduced to reform RICO by making the elements more difficult to prove.³⁴ The bills were an attempt to make the RICO language clearer³⁵ and to reduce the stigma of the label of racketeer.³⁶

In the 100th Congress, first session, a bill was introduced in the Senate which would limit recovery of treble damages by private individuals.³⁷ To recover treble damages, the individual would have to prove a prior criminal conviction of the RICO offenses.³⁸ Without a prior conviction, the individual would be limited to actual damages with punitive damages up to twice the amount of the actual damages if it

31. Note, *Congress Responds to Sedima: Is There A Contract Out On Civil RICO?*, 19 LOY. L.A.L. REV. 851, 867-870 (1986).

32. 806 F.2d 1393 (9th Cir. 1986).

33. *Id.* at 1402 (Kennedy, Circuit Judge, concurring) (citations omitted).

34. S. 1521, 99th Cong., 1st Sess. (1985); H.R. 2517, 99th Cong., 1st Sess. (1985); H.R. 2943, 99th Cong., 1st Sess. (1985).

35. S. 1523, 100th Cong., 1st Sess. (1985).

36. H.R. 2517, 99th Cong., 1st Sess. (1985).

37. S. 1523, 100th Cong., 1st Sess. (1987).

38. *Id.* at C(2)(A).

is proven by clear and convincing evidence that "the defendant acted in conscious and wanton disregard of the consequences of the defendant's actions to the plaintiff."³⁹ The punitive damages are not allowed if federal or state securities laws already provide an available remedy, express or implied.⁴⁰ Additionally, punitive damages would only be awarded at the discretion of the trier of fact after taking eight enumerated balancing factors into account.⁴¹ A similar bill was introduced in the House of Representatives with almost identical provisions as to treble damages.⁴² Another bill introduced in the House kept the treble damages intact, but invoked a penalty for frivolous claims equal to treble the actual cost of the action, including reasonable attorney's fees.⁴³

From recent law review articles and proposed legislation, it appears there is a movement afoot to significantly alter RICO to make it more difficult to bring an action and more difficult to recover treble damages. One method of accomplishing these purposes would be to increase the standard of proof to require clear and convincing evidence, a stricter standard than the ordinary civil standard of preponderance of the evidence for the predicate criminal acts.

The RICO statute does not specify the proper standard of proof to be applied to the predicate criminal acts. The correct standard of proof in civil RICO actions is properly a question for the courts to decide. As the Supreme Court stated in *Woodby v. INS*,⁴⁴ "[t]he question of what degree of proof is required is the kind of question which has been traditionally left to the judiciary to resolve."⁴⁵ The degree of proof that should be adopted is "clear and convincing evidence."

II. HISTORY OF THE COURTS ADDRESSING THE STANDARD OF PROOF IN CIVIL RICO

In 1985, the Supreme Court discussed the standard of proof for civil RICO actions in *Sedima, S.P.R.L. v. Imrex Co., Inc.*⁴⁶ Prior to *Sedima*, there was a split between the circuits over whether a prior criminal conviction for the predicate offenses was necessary before a civil action for treble damages could be initiated.⁴⁷ In deciding that a

39. *Id.* at C(2)(B)(ii)(II)(cc).

40. *Id.* at C(2)(b)(ii)(bb).

41. *Id.* at 3(A-H).

42. H.R. 2983, 100th Cong., 1st Sess. (1987).

43. H.R. 3240, 100th Cong., 1st Sess. (1987).

44. 385 U.S. 276 (1966).

45. *Id.* at 284.

46. 473 U.S. 482 (1985).

47. The split was between the Seventh and Second Circuit Courts of Appeal. *Haroco, Inc. v. American Nat'l Bank & Trust of Chicago*, 747 F.2d 384 (7th Cir. 1984),

prior conviction was not necessary to a private civil RICO action, the Court said:

We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. There is no indication that Congress sought to depart from this general principle here *But we do not decide the standard of proof issue today.*⁴⁸

The proper standard of proof in a civil RICO action was not at issue in *Sedima* and the court properly labeled its statements as dicta.⁴⁹

Following the decision in *Sedima*, several of the circuit courts addressed the standard of proof issue in dicta. In *United States v. Local 560 of International Brotherhood of Teamsters*,⁵⁰ the Third Circuit affirmed in dicta the district court's ruling that the standard of proof in civil RICO actions was by a preponderance of the evidence. In a footnote, the court gave the issue some analysis, basing its decision in part on the three part balancing test stated in *Santosky v. Kramer*⁵¹ to determine whether a higher standard should be used.⁵² The court referred to other situations in which higher standards of proof have and have not been used,⁵³ and factually compared them to the case at issue. Finally, the

held that it was not necessary to plead or prove a prior criminal conviction to recover treble damages in a civil RICO action. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), held that a private action could only proceed against a defendant who had already been criminally convicted of the predicate acts.

48. *Sedima*, 473 U.S. at 491, (emphasis added) (citations omitted).

49. *Id.*

50. 780 F.2d 267 (3d Cir. 1985).

51. 455 U.S. 745, 754 (1982). The three part balancing test consisted of: "(1) the private interests affected by the proceeding; (2) the risk of error created by the state's chosen proceeding; and (3) the countervailing government interest supporting use of the challenged procedure." The court in *Local 560* ruled that the defendants faced neither criminal sanctions nor any significant deprivations of liberty and that the nature of the remedy was remedial and not punitive, thereby reducing the risk of error, 780 F.2d 267 at 279-80 n.12, citing *United States v. Cappelto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Farmers Bank of Delaware v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978); *Heinhold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979).

52. *Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d at 279 n.12.

53. Cited were: *Santosky v. Kramer*, 455 U.S. 745 (1982)(preponderance standard sufficient to balance defendant's risks in proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979)(Texas standard of clear, unequivocal and convincing in involuntary commitment proceedings is not violative of due process); *Woodby v. INS*, 385 U.S. 276 (1966)(clear, unequivocal and convincing standard of proof is necessary for deportation proceedings).

court cited the Supreme Court's dicta in *Sedima* as support for its decision.⁵⁴

The Fifth Circuit addressed the standard of proof issue in *Armco Industrial Credit Corp. v. SLT Warehouse Co.*⁵⁵ The court adopted the preponderance standard in dicta relying on the "strong suggestion" of the Supreme Court in *Sedima*.⁵⁶ The Court in *Armco*, however, left the issue open by stating, "[s]ince the [Supreme] Court did not view the . . . standard of proof issue as 'close to the constitutional edge,' we are reluctant to inject another judicial construct into a statute that we are commanded to construe broadly."⁵⁷

Both the Second⁵⁸ and Ninth⁵⁹ Circuits have stated in dicta that the preponderance standard is proper. The Ninth Circuit rested its decision on the dicta in *Sedima* and stated: "While there may be sound arguments that a greater burden of proof should apply, . . . we do not depart from the Supreme Court's directive in *Sedima* and the many courts which have applied the preponderance standard."⁶⁰ Additionally, several district courts have stated in dicta that a preponderance standard is appropriate.⁶¹

The first circuit court to rule on the standard of proof issue as a direct holding was the Seventh Circuit in *Liquid Air Corp. v. Rogers*.⁶² The standard of proof was directly at issue and the court gave a fairly substantial analysis of its reasoning for holding for the preponderance standard.⁶³ The court cited the opinion in *Sedima* as well as the circuit and district courts which had concluded that preponderance was sufficient.⁶⁴ The court distinguished the cases which had held for a higher standard of proof when significant interests greater than money were

54. *Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d at 280.

55. 782 F.2d 475 (5th Cir. 1986).

56. *Id.* at 481.

57. *Id.*

58. *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987).

59. *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 531 (9th Cir. 1987).

60. *Id.* at 532.

61. *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 1001 (D. Minn. 1986); *Bosteve, Ltd. v. Marauszski*, 642 F. Supp. 197, 202 n.7 (E.D.N.Y. 1986); *Owl Constr. Co., Inc. v. Ronald Adams Contractor, Inc.*, 642 F. Supp. 475, 477 (E.D. La. 1986); *Platsis v. E.F. Hutton & Co.*, 642 F. Supp. 1277, 1309 (E.D. Pa. 1986) *aff'd*, 829 F.2d 13, *cert. denied*, 108 U.S. 1227; *Stainton v. Tarantino*, 637 F. Supp. 1051, 1070 (E.D. Pa. 1986); *Kimmel v. Peterson*, 565 F. Supp. 476, 490 (E.D. Pa. 1983). In each of the above cited district court cases, the courts stated, in *dicta* only, that a preponderance standard was appropriate.

62. 834 F.2d 1297 (7th Cir. 1987).

63. *Id.* at 1302-1303.

64. *Id.* at 1302.

at stake.⁶⁵ Additionally, the court distinguished the common law fraud requirement that fraud needed to be proven by clear and convincing evidence because of the stigma attached to a fraud allegation.⁶⁶ The court held that the fraud issue was foreclosed by the Supreme Court's decision in *Herman & MacLean v. Huddleston*,⁶⁷ in which the Court held that proof by a preponderance of the evidence was sufficient in a securities fraud action.⁶⁸ The court also found that other federal statutes required proof by a mere preponderance.⁶⁹

The Supreme Court has left the standard of proof issue open, at least as far as what the proper standard is below beyond a reasonable doubt. Five of the eleven circuit courts have indicated that the standard of proof in civil RICO is by a preponderance of the evidence. However, in four of the five circuit courts the issue was addressed in dicta.⁷⁰ The courts have given two basic reasons for determining that the proper standard of proof is by a preponderance. First, the RICO legislation is analogous to other federal legislation requiring only a preponderance. Second, the interests of a defendant in a civil RICO action are not so great as to require a higher standard of proof.

The standard of proof in civil RICO actions should be higher than the ordinary civil standard of a preponderance of the evidence. The interests of the defendant are higher than the interests of the plaintiff and are great enough to require that the plaintiff be burdened with a higher standard of proof. Additionally, there are significant differences in both the intent and effect of other federal legislation that the courts have cited as being analogous to the RICO legislation. These differences are great enough to distinguish the RICO standard of proof from the preponderance standard required by the other legislation. The proper standard of proof for the predicate criminal acts in a civil RICO action for treble damages should be by clear and convincing evidence.

III. STANDARDS OF PROOF

A. *In General*

There are three basic standards of proof: (1) Beyond a Reasonable Doubt, used mainly in criminal cases; (2) By a Preponderance of the

65. *Id.* at 1302-1303.

66. *Id.* at 1303.

67. 459 U.S. 375 (1983).

68. *Liquid Air*, 834 F.2d at 1303 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983)).

69. *Id.* at 1303.

70. *See* note 11, *supra*.

Evidence, used mainly in civil cases for money damages; and (3) By Clear and Convincing Evidence, a standard used in civil cases where there is more at stake than money damages.⁷¹

In every case there is a risk that the factfinder may reach its verdict erroneously. The purpose of establishing a standard of proof is to balance the risk to the defendant of an erroneous verdict with a corresponding burden on the plaintiff.⁷²

The first aspect of the risk of an erroneous verdict is the actual interests risked. In a civil action for compensatory damages, the interests risked by the plaintiff and the defendant are the same: the plaintiff risks the value of his injuries which is roughly equivalent to the amount of the damages. This is also what the defendant risks.⁷³ Thus, in this situation, it is only necessary that one party prevail by a preponderance since neither party runs a greater risk.

At the other extreme are criminal cases which require the highest standard of proof, beyond a reasonable doubt, because of the great risk that the defendant bears should the verdict be erroneous. Society has determined that the importance of ensuring that innocent people are not punished is much greater than the importance of letting a guilty person go unpunished. Hence, the defendant incurs a much greater risk of an erroneous verdict, which is balanced by a much higher standard of proof.⁷⁴

Besides a comparison of the interests risked by the plaintiff and the defendant, another aspect to the risk placed upon the defendant is the likelihood that the type of allegation made will be true:

In the absence of precedent, the likelihood that the *type of allegation* made by the party with the burden of persuasion is true controls how much proof must be adduced to meet that burden. Put more precisely, there is an inverse relationship between the likelihood that the *type of claim*, as opposed to the particular claim, which the burden-bearer is alleging is true and the degree of persuasiveness which will be demanded. Thus, if it is unlikely that a type of allegation can be supported, clear and convincing evidence will be required to meet the burden of persuasion.⁷⁵

71. See *In re Winship*, 397 U.S. 358 (1970); *United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978).

72. *In re Winship*, 397 U.S. 358, 369 (1969) (Harlan, J., concurring).

73. *Id.*

74. *Id.* at 372.

75. *General Motors Corp. v. Toyota Motor Co., Ltd.*, 467 F. Supp. 1142, 1173 (S.D. Ohio 1979).

Thus, the type of allegation that is made and the likelihood that the allegation will be true are factored into determining the burden of proof.

B. Clear and Convincing vs. Clear, Unequivocal and Convincing

Between the two extremes of the preponderance standard and the beyond a reasonable doubt standard there is a continuum of increasing probabilities of risk for the defendant.⁷⁶ Accordingly, there should be an increased burden on the plaintiff to compensate for the defendant's increased risk. The standard of proof used in this middle ground is some form of "clear and convincing" evidence.⁷⁷ Although the names differ between jurisdictions, there are basically two standards of proof between preponderance and beyond a reasonable doubt; "clear and convincing" and "clear, *unequivocal* and convincing."

The clear and convincing standard is used where moral turpitude is implied.⁷⁸ Examples of allegations involving moral turpitude include libel, fraud, securities fraud, and undue influence.⁷⁹ One federal court has quantified the certainty necessary for a factfinder to be convinced under the clear and convincing standard.⁸⁰ The factfinder must be certain to at least a 70% probability in order to find for the burdened party under a clear and convincing standard.⁸¹ This compares to the greater than 50% certainty necessary to find under a preponderance standard. Besides quantification,

[c]lear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It . . . is more than a mere preponderance . . . [and] does not mean clear and unequivocal."⁸²

Clear and convincing is to be distinguished from clear, *unequivocal* and convincing. "In situations where the various interests of society are pitted against restrictions on the liberty of the individual, a more demanding standard is frequently imposed, such as proof by clear, *unequivocal*, and convincing evidence."⁸³ A quantifiable amount that has

76. *United States v. Fatico*, 458 F. Supp. 388, 403 (E.D.N.Y. 1978).

77. *Id.* at 404-05.

78. *Id.*

79. *Id.* at 404.

80. *General Motors Corp. v. Toyota Motor Co., Ltd.*, 467 F. Supp. 1142 (S.D. Ohio 1979).

81. *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978).

82. *Hobson v. Eaton*, 399 F.2d 781, 784 n.2 (6th Cir. 1968) (quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954)).

83. *In re Ballay*, 482 F.2d 648, 662 (D.C. Cir. 1973)(emphasis added).

been used for the clear, unequivocal, and convincing standard is that the factfinder should be convinced of the truth of the proposition by more than an 80% probability.⁸⁴

The Supreme Court has recognized the application of the clear, unequivocal, and convincing evidence standard to non-criminal cases where an individual's liberty interest is at stake. Examples of this include loss of citizenship and deportation proceedings.⁸⁵ The Supreme Court has also recognized the clear, unequivocal, and convincing standard as not violative of due process in state civil commitment cases.⁸⁶

It is recognized that there are two middle standards of proof, the lower of which is clear and convincing. In the only two opinions which have attempted any analysis of the standard of proof for the predicate criminal acts in civil RICO (*United States v. Local 560*⁸⁷ and *Liquid Air Corp. v. Rogers*⁸⁸), both courts have grouped the two standards under the one heading of "clear and convincing."⁸⁹ Both courts cited the Supreme Court cases of *Addington v. Texas*⁹⁰ and *Woodby v. INS*⁹¹ as cases requiring only clear and convincing evidence for deprivation of important individual rights.⁹² The cases cited required clear, unequivocal, and convincing evidence to deprive an individual of a liberty interest in a civil case.⁹³ These circuit courts, however, failed to recognize the difference between the two standards. Without recognizing the difference, it is impossible to correctly balance the interests risked with the proper standard of proof.

C. Application to Civil RICO

A civil RICO defendant incurs the risk of an erroneous verdict both in the likelihood that the claim asserted is true and in the interests risked. The elements of a civil RICO action are difficult at best to prove. Not only does the plaintiff have to show at least two separate

84. *Fatico*, 458 F. Supp. at 405 (1978).

85. *Woodby v. INS*, 385 U.S. 276 (1966).

86. *Addington v. Texas*, 441 U.S. 418 (1978).

87. 780 F.2d 267 (3rd Cir. 1985).

88. 834 F.2d 1297 (7th Cir. 1987).

89. *Local 560 of Int'l. Bhd. of Teamsters*, 780 F.2d at 279-80 n.12; *Liquid Air Corp.*, 834 F.2d at 1302-03.

90. 441 U.S. 418 (1978).

91. 385 U.S. 276 (1966).

92. *Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d at 279-80 n.12; *Liquid Air*, 834 F.2d at 1303.

93. In *Addington v. Texas*, the Court upheld a Texas standard of clear, unequivocal and convincing evidence for a civil commitment proceeding. 441 U.S. at 433. In *Woodby v. INS*, the Court held that a clear, unequivocal and convincing standard was necessary to deport a legal alien. 385 U.S. at 286.

predicate acts within ten years of each other, but he also has to show that the two acts established a "pattern" and that they were committed within an enterprise separate and distinct from the defendant.⁹⁴ Establishing these elements in addition to establishing the predicate acts is more difficult than establishing the predicate acts alone. Therefore, it is less likely that the plaintiff will be able to meet his burden of persuasion. Accordingly, because of the type of action brought, the standard of proof for a civil RICO action should be higher than the standard of proof for the predicate acts alone.

In a civil RICO action for treble damages, there is no risk that the defendant will be deprived of his liberty: at most he will only lose money. Therefore, the clear, unequivocal, and convincing standard should not apply. However, if the plaintiff should prevail, he would be entitled to treble damages plus costs which includes reasonable attorney's fees.⁹⁵ Using a simple balancing test, the defendant risks more than three times the interest of the plaintiff in case of an erroneous verdict. This imbalance of risk should be compensated by a corresponding increase in the burden placed on the plaintiff. The clear and convincing standard would strike the proper balance as the defendant is running three times the risk of the plaintiff yet does not stand to be deprived of a liberty interest.

IV. CLEAR AND CONVINCING EVIDENCE FOR CIVIL RICO BECAUSE IT IS AN ALLEGATION INVOLVING MORAL TURPITUDE

The increased risk to the defendant is not limited to money. The defendant risks the stigma of being labeled as a racketeer, a criminal, and/or one who commits fraud. These labels involve the moral turpitude of the defendant and are valid reasons for a corresponding increase to the plaintiff's burden by an increase in the standard of proof.⁹⁶

A. Label of Racketeer

In *Exeter Towers Associates v. Bowditch*,⁹⁷ the court held that "Congress manifested an intent that these [civil RICO] remedies be available only in relation to activities having some association with 'racketeering' as that term is used in ordinary discourse."⁹⁸ The dictionary defines racketeer as one who operates a "racket" which is defined as: "3. An organized illegal activity, such as bootlegging or the extortion

94. 18 U.S.C. 1962 (1982).

95. 18 U.S.C. 1964(c) (1982).

96. *United States v. Fatico*, 458 F. Supp. 388, 404-05 (E.D.N.Y. 1978).

97. 604 F. Supp. 1547 (D. Mass. 1985).

98. *Id.* at 1553.

of money from legitimate businessmen by threat or violence. 4. Informal, a dishonest scheme, trick, business activity, etc.”⁹⁹

It necessarily follows that one who has a civil RICO allegation brought against him stands a good chance of being labeled as one who participates in organized crime or dishonest schemes or tricks. The court in *United States v. Guiliano*¹⁰⁰ reversed a jury’s guilty verdict on a bankruptcy fraud count because of the possible prejudice to the defendant resulting from a RICO count brought in conjunction with the bankruptcy fraud allegation.¹⁰¹ The court stated:

One of the hazards of a RICO count is that when the Government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of targeting a defendant with the label of ‘racketeer’ tainted the conviction on an otherwise valid count.¹⁰²

Courts have recognized that there is a stigma attached to the label of racketeer. In *Haroco v. American National Bank and Trust Co.*,¹⁰³ the Seventh Circuit held that in pleading a civil RICO action, the allegations in the complaint must be pleaded with sufficient particularity so as to satisfy Federal Rules of Civil Procedure rule 9(b).¹⁰⁴ The reason for this requirement is to ensure that the defendant will not be stigmatized as a racketeer and one who commits fraud based on frivolous allegations in a complaint.¹⁰⁵ Addressing the strict pleading requirement under FRCP 9(b), the Court in *Exeter Towers* ruled that “[t]he need for particularity of pleading is increased because of the ‘in terrorem’ effect that is associated with charges of racketeering activity.”¹⁰⁶ While particularity of pleading is not an issue in this Note, the requirement for particularity is an indication of the stigma attached to the label of racketeer.

The Supreme Court recognized that civil RICO actions stigmatize the defendant when it said in *Sedima*: “As for stigma, a civil RICO action leaves no greater stain than do a number of other civil pro-

99. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Copyright 1973 by Random House, Inc., New York, NY.

100. 644 F.2d 85 (2d Cir. 1981).

101. *Id.*

102. *Id.* at 89.

103. 747 F.2d 384 (7th Cir. 1984), *aff’d*, 473 U.S. 606 (1985).

104. Fed. R. Civ. P. 9(b) states:

(B) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

105. *Haroco*, 747 F.2d at 405.

106. *Exeter Towers Assoc. v. Bowditch*, 604 F. Supp. 1547, 1552 (D. Mass. 1985).

ceedings.”¹⁰⁷ The Court did not explain the other civil proceedings to which it referred, but implicitly recognized that some “stain” is left on the defendant by a civil RICO action.

Two of the proposed pieces of legislation concerning RICO from the 100th Congress changed the phrase “racketeer influenced and corrupt organizations” to “pattern of unlawful activity.”¹⁰⁸ This is evidence of the sensitivity that exists to labeling a party a “racketeer.”

A civil RICO allegation suggests that the defendant is a “racketeer.” The strong possibility of the stigma of this label is an unfair burden on the defendant. The risk of an unfair stigma on the defendant requires the balancing factor of a higher standard of proof, such as clear and convincing evidence, to be placed on the plaintiff.

B. Criminal Nature of RICO

1. *Criminal Protection vs. A Higher Standard of Proof.*—While on its face the RICO provisions for treble damages are civil, arguments have been made that the provisions are essentially criminal.¹⁰⁹ In order to bring a civil action, it is necessary to prove all of the elements for a criminal RICO action.¹¹⁰ While a defendant to a civil RICO action cannot suffer criminal penalties, it is plain that it must be proven that he committed the criminal acts for the plaintiff to prevail.¹¹¹ The defendant must necessarily suffer the label of criminal without any of the safeguards of a criminal proceeding (including standard of proof).¹¹² It has been argued that one who does not incur the risk of criminal penalties is not entitled to criminal procedural protections.¹¹³ However, that argument does not take into account the risk of the stigma of “criminal.”

In *United States v. Cappetto*,¹¹⁴ the Seventh Circuit denied criminal protections to a defendant in a civil RICO action stating, “[A] civil proceeding to enjoin those [predicate] acts is not rendered criminal in character by the fact that the acts are also punishable as crimes.”¹¹⁵

107. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 492 (1985).

108. S. 1523, 100th Cong., 1st Sess. (1987) and H.R. 2983, 100th Cong., 1st Sess. (1987).

109. Note, *Civil RICO Is A Misnomer: The Need For Criminal Procedural Protections In Actions Under 18 U.S.C. 1964*, 100 HARV. L. REV. 1288 (1987).

110. 18 U.S.C. 1964(c) (1982).

111. 18 U.S.C. 1964 (1982).

112. See generally Note, *supra* note 105, at 1291.

113. See *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

114. *Id.*

115. *Id.* at 1357.

The court in *United States v. Local 560*¹¹⁶ cited *Cappetto* as precluding the "criminal nature" argument for a higher standard of proof in civil RICO.¹¹⁷ However, the *Cappetto* case can be distinguished in several ways.

First, *Cappetto* was an injunctive proceeding brought by the United States government and not a private action for treble damages.¹¹⁸ More importantly, the court was concerned with whether the defendant was entitled to *criminal procedural protections*.¹¹⁹ The court only addressed the standard of proof issue insofar as to say that a defendant was not entitled to a criminal, "beyond a reasonable doubt," standard.¹²⁰ The argument here is not for criminal procedural protections but merely for a standard of proof that better reflects the risks that a defendant incurs in a civil RICO action, including the risk of being labeled as a criminal. The court in *Cappetto* seemed to recognize this distinction when it refused to declare the proper standard of proof, opting only to say that a defendant is not entitled to a criminal standard.¹²¹

While complete criminal protection may not be appropriate where no risk of criminal penalty exists, there needs to be some safeguard to protect against the incidental risks that go along with criminal accusations. Those risks should be balanced against the middle standard of proof: the clear and convincing standard.

2. *The RICO Treble Damages Provision is Punitive.*—In *Cappetto*, the court declared that civil RICO is remedial and not punitive.¹²² However, the action in *Cappetto* was for injunctive relief and was taken by the United States government: it was not a private action for treble damages.¹²³

Courts have been unsure whether punitive damages should be awarded in civil RICO actions for treble damages. The court, in *Moravian Development Corp. v. Dow Chemical Co.*,¹²⁴ held that punitive damages should not be awarded in civil RICO actions for treble damages.¹²⁵ The court compared civil RICO actions for treble damages to the treble damage remedy of the Sherman Antitrust Act. The Sherman Antitrust Act does not permit punitive damages in addition to the treble damages.¹²⁶

116. 780 F.2d 267 (3d Cir. 1985).

117. *Id.* at 279, n.12.

118. *Cappetto*, 502 F.2d at 1354.

119. *Id.* at 1355 (emphasis added).

120. *Id.* at 1357.

121. *Id.*

122. *Id.*

123. *Id.* at 1359.

124. 651 F. Supp. 144 (E.D. Pa. 1986).

125. *Id.* at 150.

126. *Id.* at 149-150 (citing *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980)).

The court, in disallowing punitive as well as treble damages in the civil RICO action stated: "The legislative history of RICO describes the RICO treble damages provision as 'another example of the antitrust remedy being adapted for use against organized criminality.'"¹²⁷

Another district court has also been hesitant to award punitive damages on top of a civil RICO claim for treble damages. In *Al-Kazemi v. General Acceptance & Investment Corp.*,¹²⁸ the court denied a request for \$150,000 in punitive damages stating, "[i]n view of the treble damages award for the RICO violation, an award of \$50,000 in punitive damages will be sufficient to deter similar conduct by defendants in the future."¹²⁹

The clear implication of the courts' decisions is that the treble damages provision of civil RICO is at least somewhat punitive. Hence, there is no need to award punitive damages in addition to the treble damages. That part of the treble damages which exceeds the value of the plaintiff's injury should rightly be considered punitive.

Some states already require a clear and convincing standard of proof for punitive damages levied on claims that require only a preponderance standard for compensatory damages.¹³⁰ Because the treble damages provision of civil RICO is punitive, the federal courts should take a cue from the state courts and require a clear proof for civil RICO actions brought for treble damages.

C. Fraud

In many jurisdictions fraud must be proven by a standard of proof higher than a mere preponderance of the evidence, usually clear and convincing evidence.¹³¹ At common law, two forces were at work to

127. *Id.* at 150 (citing 116 CONG. REC. 35295 (1970)).

128. 633 F. Supp. 540 (D.D.C. 1986).

129. *Id.* at 544.

130. *District of Columbia*, *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238, 245 (D.D.C. 1986); *New York*, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (2d Cir. 1967); *Indiana*, *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 363 (Ind. 1982); *Maine*, *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Wisconsin*, *Chomicki v. Wittekind*, 381 N.W.2d 561, 565, 128 Wis. 2d 188 (Wis. App. 1985).

131. At least thirteen jurisdictions require civil fraud to be proven by clear and convincing evidence. There is also federal authority which requires proving fraud by the clear and convincing standard. *Lalone v. United States*, 164 U.S. 255 (1896); *United States v. American Bell Tel. Co.*, 167 U.S. 224 (1897); *United States v. Hays*, 35 F.2d 948 (10th Cir. 1929); *Bowen v. B.F. Goodrich Co.*, 36 F.2d 306 (6th Cir. 1929); *Northwestern Mut. Life Ins. Co. v. West*, 62 D.C. App. 381, 68 F.2d 428 (D.C. Cir. 1933); *Lopinto v. Haines*, 185 Conn. 527, 441 A.2d 151 (1981); *Weininger v. Metro. Fire Ins. Co.*, 359 Ill. 584, 195 N.E. 420 (1935); *Harvey v. Phillips*, 193 Ia. 231, 186 N.W. 910 (1922); *Kansas Mill Owners & Mfr's Mut. Ins. Co. v. Rammelsberg*, 58 Kan. 531, 50 Pac. 446 (1897); *Gatchell v. Gatchell*, 127 Me. 328, 143 A. 169 (1928); *Conner v. Groh*, 90 Md. 674, 45

bring about the higher standard of proof. First, there was a presumption that all men were honest.¹³² To rebut that presumption a plaintiff had to show dishonesty by clear and convincing evidence.¹³³ Second, to label someone as having committed fraud was so onerous as to require a higher standard of proof to balance the increased risk.¹³⁴ The Federal Rules of Civil Procedure also recognize the danger to the defendant of the "fraud" label by requiring a higher pleading burden on the plaintiff for allegations of fraud.¹³⁵

Several of the predicate criminal acts for a civil RICO action (and perhaps the most widely used) are based in fraud or *crimen falsi*.¹³⁶ These acts include counterfeiting, embezzlement, mail fraud, wire fraud, unlawful welfare fund payments, and securities fraud.¹³⁷

Other federal statutes dealing with fraud use the clear and convincing standard of proof. The False Claims Act¹³⁸ allows the United States government to use fraud as a defense against parties bringing contract claims against it.¹³⁹ In order to use the defense, fraud must be proven by clear and convincing evidence.¹⁴⁰

The dissent in *Wilcox v. First Interstate Bank*¹⁴¹ (an action for treble damages predicated upon mail fraud) recognized three things about the majority ruling to support preponderance as the proper standard of proof

A. 1024 (1900); *Wright v. Medlar*, 176 Okla. 555, 56 P.2d 395 (1936); *Metro. Casualty Ins. Co. v. N.B. Leshner Co.*, 152 Or. 161, 52 P.2d 1133 (1935); *Pusic v. Salak*, 261 Pa. 512, 104 A. 751 (1918); *Bank of Pocahontas v. Ferimer*, 161 Va. 37, 170 S.E. 591 (1933); *Des Moines Auto Co. v. Tracy*, 158 Wash. 23, 290 P. 423 (1930); *Hunt v. Hunt*, 91 W. Va. 685, 114 S.E. 283 (1922); *In re Ball's Estate*, *Ball v. Boston*, 153 Wis. 27, 141 N.W. 8 (1913).

132. *In re Winship*, 397 U.S. 358, 363 (1969).

133. *Id.*

134. *See generally id.* at 363-64.

135. *See supra* note 100.

136. *Crimen falsi* is defined as:

Term generally refers to crimes in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense which involves some element of deceitfulness, untruthfulness, or falsification bearing on witness' propensity to testify truthfully In the *civil law*, the crime of falsifying; which might be committed either by writing, as by the forgery of a will or other instrument; by words, as by bearing false witness, or perjury; and by acts, as by counterfeiting or adulterating the public money, dealing with false weights and measures, counterfeiting seals, and other fraudulent and deceitful practices.

BLACK'S LAW DICTIONARY 335 (5th ed. 1979).

137. 18 U.S.C. 1961(1) (Supp. 1987).

138. 31 U.S.C. 3729-33 (Supp. 1986).

139. *Hageny v. United States*, 570 F.2d 924 (Ct. Cl. 1978).

140. *Id.* at 933.

141. 815 F.2d 522 (9th Cir. 1987) (Boochever, J., dissenting).

in civil RICO cases: (1) the authority the majority relied upon was dicta; (2) the standard of proof for common law fraud was by clear and convincing evidence; and (3) Oregon followed the common law standard.¹⁴² The dissent proposed that the standard of proof should be the same as for the predicate act standing alone where there was an express or implied private right of action.¹⁴³ But,

[w]here there is no right to sue privately, courts should look to the most analogous common law action, usually a tort, for the appropriate burden of proof. Most states, but not all, require plaintiffs to establish fraud by clear and convincing evidence [I]f the burden of proof for RICO claims is by a preponderance of the evidence, [a defendant] is exposed to treble damages for the same acts that failed to establish liability at common law.¹⁴⁴

Many civil RICO actions are predicated upon some type of fraud.¹⁴⁵ Because the clear and convincing standard of proof has been seen as essential to protecting a defendant's interests in civil fraud actions, a defendant's interests should likewise be protected in a civil RICO action predicated upon fraud. A civil RICO defendant is subjected to the same risk of the stigma of one who commits fraud. That risk is so onerous a burden that it demands a corresponding rise in the standard of proof—from the preponderance to the clear and convincing standard.

V. CIVIL RICO IS DISTINGUISHABLE FROM OTHER FEDERAL LEGISLATION WHICH OFFERS BOTH CIVIL AND CRIMINAL REMEDIES; SPECIFICALLY, SECURITIES AND ANTI-TRUST LEGISLATION

The courts which have addressed the standard of proof issue in civil RICO have compared RICO to other federal legislation which requires only a preponderance standard. The court in *Liquid Air Corp. v. Rogers* ruled that clear and convincing evidence was not necessary in a civil RICO action based on mail and wire fraud because of the Supreme Court's decision in *Herman and MacLean v. Huddleston*,¹⁴⁶ a *securities fraud* action which held that preponderance was the proper standard of proof.¹⁴⁷ The court in *Liquid Air* acknowledged that treble damages is

142. *Id.* at 533.

143. *Id.*

144. *Id.* at 533-34.

145. See Arthur and White, *Civil RICO After Sedima: The New Weapon Against Business Fraud*, 23 HOUS. L. REV. 743, 767 (1986); Note, *Civil RICO and Its Application to "Garden Variety" Fraud within the Sixth Circuit*, 13 N. KY. L. REV. 463 (1987).

146. 459 U.S. 375 (1983).

147. *Liquid Air*, 834 F.2d 1297 at 1303 (citing *Herman & MacLean*, 459 U.S. 375).

not an available remedy under the securities laws and cited the treble damages remedy available under the Clayton Antitrust Act as additional authority for its position.¹⁴⁸ Treble damages actions under the antitrust laws require only a preponderance standard as per the Supreme Court's decision in *Ramsey v. United Mine Workers*.¹⁴⁹ The court in *United States v. Local 560* also cited *Herman & MacLean* in ruling for a preponderance standard of proof in civil RICO.¹⁵⁰ Federal securities legislation, as well as federal anti-trust legislation, is clearly distinguishable from RICO.

A. Securities Legislation

First, the securities legislation is distinguishable from RICO on its face in the remedies available. There is no treble damage provision for civil actions under the securities laws as there is in civil RICO.¹⁵¹ Because much of the increased risk to the defendant comes from the treble damages remedy available in civil RICO, a statute without a treble damages remedy is clearly distinguishable as to the standard of proof.

Besides the facial differences of available remedies, the securities laws impose a higher standard of behavior on the securities industry. The Supreme Court held, in *Herman & MacLean v. Huddleston*,¹⁵² that the proper standard of proof in a civil securities fraud action is by a preponderance of the evidence.¹⁵³ The Court distinguished the standard of proof in a civil securities fraud action from common law fraud. The Court found that one of the purposes of the Securities and Exchange Acts of 1933 and 1934 was to protect the public safety by imposing a higher standard of conduct on the securities industry.¹⁵⁴ The Court quoted itself from the case of *Blue Chip Stamps v. Manor Drug Stores*¹⁵⁵ when it said:

[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable. Moreover, the antifraud provisions of the securities laws

148. 834 F.2d 1297, 1303 (citing the Clayton Antitrust Act, 15 U.S.C. 12, 13, 14 to 19, 19a, 20, 21, 22 to 27).

149. 401 U.S. 302 (1970).

150. *United States v. Local 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 279 n.12 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

151. *See generally* 15 U.S.C.

152. 459 U.S. 375 (1983).

153. *Id.* at 388 (1983).

154. *Id.* at 389.

155. 421 U.S. 723, 744-745 (1975).

are not co-extensive with common law doctrines of fraud We therefore find reference to the common law in this instance unavailing.¹⁵⁶

The court in *Huddleston* found that, given the congressional intent to impose a higher standard of conduct on the securities industry, the proper standard of proof was the preponderance standard.¹⁵⁷

Previous to the *Huddleston* decision, the Supreme Court had been even stronger in ruling on the purpose of securities legislation passed after the stock market crash of 1929. In *Securities and Exchange Commission v. Capital Gains Research Bureau*,¹⁵⁸ the Court observed that "[a] fundamental purpose, common to these statutes [passed in the wake of the crash of 1929], was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."¹⁵⁹

The securities laws apply to a particular segment of society (the securities industry), and impose a much higher standard of conduct on that segment for particular reasons. RICO does not impose a higher standard of behavior on a given group of persons; the predicate acts are prohibited under criminal laws, and RICO is applicable to everyone. RICO is a system of remedies for criminal acts committed in a particular way.¹⁶⁰ Both from the actual provisions of RICO and the securities legislation as well as the ends to be achieved, the two pieces of legislation differ significantly. Therefore, the standard of proof in a securities action is not analogous to the standard of proof in civil RICO.

B. Anti-Trust Laws

In holding for a preponderance standard of proof in civil RICO actions for treble damages, the Seventh Circuit in *Liquid Air Corp. v. Rogers* analogized the civil RICO remedies to the civil remedies of the antitrust laws which allow for treble damages and require only a preponderance standard of proof.¹⁶¹ However, the antitrust legislation is distinguishable from civil RICO in its purpose and use.

The court in *Metro Cable Co. v. CATV of Rockford, Inc.*¹⁶² held that the purpose of the antitrust laws was to regulate commerce so as to prevent monopolies.¹⁶³ Activities which fall outside of the area of

156. 459 U.S. at 388-9.

157. *Id.* at 389.

158. 375 U.S. 180 (1963).

159. *Id.* at 186.

160. *See generally* Title 18 United State Code.

161. 834 F.2d at 1303.

162. 516 F.2d 220 (7th Cir. 1975).

163. *Id.* at 227.

commerce and trade are not regulated by the antitrust laws "even though the purpose and effect of the concerted activities is to eliminate competition."¹⁶⁴ The Supreme Court's holding in *Ramsey v. United Mine-workers*, that a mere preponderance was the proper standard of proof for a treble damages action under the antitrust laws,¹⁶⁵ should be balanced against Congress' strong purpose of regulating commerce in order to prevent restraint of trade.

The RICO provisions for private civil actions were designed as another tool to use against organized crime.¹⁶⁶ However, the *de facto* use of the treble damages remedy by private civil litigants has been as a new remedy for ordinary business fraud, and not primarily as a weapon against organized crime.¹⁶⁷

The analogy between the two statutes is that Congress' purpose in enacting each statute is strong enough to override the added risks on the defendant. Therefore, those additional risks do not need to be balanced against a higher standard of proof: a preponderance standard will suffice. However, with the original purpose of the private civil remedies available under RICO having *de facto* changed, there is no longer a compelling reason not to protect the defendant from the additional risks he incurs. Because the original purpose of civil RICO no longer exists to balance the preponderance standard, the analogy between RICO and the antitrust laws fails as to the standard of proof. The proper standard of proof in civil RICO actions for treble damages remains the clear and convincing standard.

VI. CONCLUSION

There is no doubt that organized crime is a problem that should be addressed by giving prosecutors the necessary tools to combat it. There is also good reason for making these tools broad and flexible and for putting remedies against such crime into the hands of private civil litigants. The RICO legislation goes a long way toward accomplishing these goals. However, the ends never justify the means where the means are unfair and unjust. Granting private civil litigants the power to bring treble damages actions within the broad scope of RICO places too great a risk on the defendant. These risks include the lower likelihood that a RICO action can be successfully brought, the increased interests risked

164. *Id.* at 227-228.

165. 401 U.S. 302 (1971).

166. See generally Lacovara and Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-86).

167. *Id.* at 13-23.

by the defendant from the treble damages, and the risk to the defendant's reputation from allegations which involve moral turpitude. These risks must be balanced with an appropriate standard of proof, which in this case, is the standard of clear and convincing evidence.

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