Partaker or Prey? Futures Commission Merchants Under Civil RICO and the Commodity Exchange Act

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PARTAKER OR PREY? FUTURES COMMISSION MERCHANTS UNDER CIVIL RICO AND THE COMMODITY EXCHANGE ACT

I. Introduction

As an industry grows and prospers, litigation connected with that industry inevitably increases. Since 1970, the aggregate volume of commodity futures contracts traded on designated contract markets (exchanges) has swelled from about fourteen million to over 228 million.1

1. Section 2(a)(1)(A) of the Commodity Exchange Act defines "commodity" as wheat, cotton, rice, corn, oats, barley, rye, flaxseed, butter, eggs, fats and oils, soybeans, livestock, frozen concentrated orange juice, other enumerated products, "and all other goods or articles, ... and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in" except onions. 7 U.S.C. § 2 (1982).

A commodity futures contract is an agreement between a seller and buyer that the seller will deliver and the buyer will accept, at a price agreed on through competitive bidding on an exchange floor, a specified quantity and grade of an identified commodity during a defined period in the future. I P. JOHNSON, COMMODITIES REGULATION § 1.03, at 8 (1982) [hereinafter JOHNSON]. Every aspect of a futures contract is standardized except the price, which is negotiated by and disseminated to other traders. Leist v. Simplot, 638 F.2d 283, 286 (2d Cir. 1980), aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). Contract standards describing the quantity (size), quality (grade), and delivery terms (time, place and method) make futures contracts fungible and, hence, easy to trade. Curran, 456 U.S. at 358.

2. The Commodity Exchange Act (CEA) defines a board of trade as any incorporated or unincorporated exchange or association of persons in the business of buying or selling any commodity, or receiving the same for sale on consignment. CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982). Section 4(a) of the Act prohibits transactions for the purchase or sale of a commodity for future delivery unless "such transaction is conducted on or subject to the rules of a board of trade which has been designated by the [Commodity Futures Trading] Commission as a 'contract market' for such commodity." 7 U.S.C. § 6(a) (1982). Section 5 of the CEA lists the conditions and requirements that must be met for the Commission (CFTC) to designate a board of trade as a "contract market." See 7 U.S.C. § 7 (1982). The CFTC is the federal agency charged with regulating the commodity exchanges and accounts, agreements and transactions executed on these exchanges. See CEA §§ 2(a)(1)(A), 2(a)(1)(B)(2)(A), 7 U.S.C. §§ 2, 4a(a)(1) (1982).

The following excerpt from a Second Circuit opinion outlines the fundamentals of
Several years after Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO or the Act) in 1970, customers

the futures markets and the role of their participants:

The person who has sold a futures contract, i.e., someone committed to deliver the commodity in the future, is said to be in a “short” position. Conversely, someone committed to accept delivery is “long” . . . [Outside of the] rare instances [in which delivery of the commodity actually occurs], the short and the long must liquidate their positions prior to the close of trading in the particular futures contract . . . . A person seeking to liquidate his futures position must form an opposite contract for the same quantity, so that his obligations under the two contracts will offset each other. Thus, a short who does not intend to deliver the commodity must purchase an equal number of long contracts; a long must sell an equal number of short contracts. Money is made or lost in the price differential between the original contract and the offsetting transaction. If the price of the future[s contract] has declined [between the time of the initial and offsetting trans-

actions], . . . the short will realize a profit; if the futures price has risen [between the time of the initial and offsetting transactions], . . . the long will realize a profit . . . .

. . . An individual [customer] wishing to invest in the futures market approaches a “futures commission merchant” (FCM) . . . . The FCM will demand a “margin” payment from the customer, which is simply a security deposit designed to protect against adverse price movements . . . . The FCM relays its customer’s order to one of its “floor brokers” trading on the exchange. The broker stands on the outside of a “pit” or “ring” around which are gathered other persons trading the same [futures] contract . . . . Contracts are made by “open outcry”. . . . Someone willing to enter the contract responds across the pit . . . . and the deal is made. Observers . . . record the transaction and feed the information into a communications system, publicizing it to other[s] . . . . The broker [subsequently] relays the particulars [which are the price and quantity] of the deal to the FCM, who informs the customer.

Leist, 638 F.2d at 286-87 (citation omitted) (emphasis added).

3. See Futures Industry Association (FIA), Volume of Futures Trading 1960 Through 1987 (Graph).


5. A customer is “any person trading, intending to trade, or receiving or seeking advice concerning any commodity interest.” CFTC Reg. § 166.1(c), 17 C.F.R. § 166.1(c) (1987). In general, a “commodity interest” refers to “[a]ny contract for the purchase or sale of any commodity for future delivery, traded on or subject to the rules of a contract market.” CFTC Reg. § 166.1(b)(1), 17 C.F.R. § 166.1(b)(1) (1987).

There are two types of customers: “hedgers” and “speculators.” Hedgers are persons who take a position in the futures market opposite to their interests in a physical (cash) commodity. I Johnson, supra note 1, § 1.12, at 38. They seek the profit generated by the production or processing of the particular commodity. Curran, 456 U.S. at 359. To protect that profit, hedgers utilize the futures markets to transfer the risks they inevitably confront in the “spot” or cash market. See Leist, 638 F.2d at 287. CFTC regulations define “bona fide hedging” as “transactions or positions in a contract for future delivery on any contract market . . . where such transactions
of the commodity futures industry began to use "civil RICO" as

or positions normally represent a substitute for transactions to be made or positions to be taken at a later time in a physical marketing channel, and where they are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise." CFTC Reg. § 1.3(z), 17 C.F.R. § 1.3(z) (1987).

The owner (potential seller) of a commodity enters into equivalent short futures contracts to hedge against declining prices. Leist, 638 F.2d at 287. Because movements in futures and cash prices normally correspond, Cargill, Inc. v. Hardin, 452 F.2d 1154, 1157 (8th Cir. 1971), cert. denied sub nom. Cargill, Inc. v. Butz, 406 U.S. 932 (1972), any loss caused by a decline in the price of the cash commodity is generally offset by a corresponding gain in the futures market, which accrues upon liquidation of the futures position. Leist, 638 F.2d at 287-88. Similarly, a processor (potential buyer) of a commodity can hedge against price increases by purchasing the equivalent futures contracts. Id. at 287. A loss caused by higher prices for the cash commodity is offset by the profits generated in the futures market upon liquidation of the futures position. Id. at 287-88.

In this sense, the futures markets serve an important "insurance" function, Cargill, 452 F.2d at 1158, whose benefits "extend beyond the immediate participants in the transactions." Leist, 638 F.2d at 288. Indeed, Congress has concluded, "Because hedging of price risks in a futures market enables a merchant to reduce the exposures he has in doing business, he is able to operate on a lower profit margin with consequent lower prices to the consumer." Id. (emphasis added) (quoting H.R. REP. No. 975, 93d Cong., 2d Sess. 132-33 (1974)) [hereinafter H.R. REP. No. 975]; see S. REP. No. 1131, 93d Cong., 2d Sess. 18, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 5843, 5859.

Commodity futures markets could not function, however, if hedgers were the sole participants. Leist, 638 F.2d at 288. Having no interest in the underlying cash market, speculators are essential because they assume the risks that hedgers endeavor to shift. Id. Speculators seek financial rewards by taking positions in the futures markets. Curran, 456 U.S. at 359. These speculators—who represent all segments of the public—bear the price risks that hedgers are unwilling to endure solely for the opportunity of profit. Leist, 638 F.2d at 288 (quoting H.R. REP. No. 975, supra, at 138). Congress has long recognized the importance of this group and its role in the industry:

The activity of speculators is essential to the operation of a futures market in that the composite bids and offers of large numbers of individuals tend to broaden a market, thus making possible the execution with minimum price disturbance of the larger trade hedging orders. By increasing the number of bids and offers available at any given price level, the speculator usually helps to minimize price fluctuations rather than to intensify them. Without the trading activity of the speculative fraternity, the liquidity, so badly needed in futures markets, simply would not exist. Trading volume would be restricted materially since, without a host of speculative orders in the trading ring, many larger trade orders would simply go unfilled.

Id. (emphasis added).

6. RICO provides three remedies. See RICO §§ 1963-1964, 18 U.S.C. §§ 1963-1964 (1982 & Supp. IV 1986). "Civil RICO," which is the subject of this Note, permits a private plaintiff to recover treble damages for injury to his business or property caused by a violation of § 1962 of RICO. Id. § 1964(c) (1982). See infra notes 12-28 and accompanying text for a discussion of pertinent RICO provisions. Another remedy, "criminal RICO," allows the Justice Department to prosecute violations of § 1962, and includes the following penalties: a fine of not more than $25,000,

7. See infra note 25 for cases involving the use of RICO by commodity futures customers. In fact, the Supreme Court noted that of 270 district court RICO decisions decided before 1985, only 3% (nine cases) were decided prior to 1980. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481 n.1 (1985).

8. The Commodity Exchange Act performs a prophylactic function: it prohibits the impairment of the normal operations of the futures markets, and protects the customers or users of those markets from harmful conduct by customers' agents and fiduciaries. See I Johnson, supra note 1, § 1.85, at 191; see also infra note 31 (discussing fiduciary nature of customers' relationships with futures commission merchants (FCMs)). Experts generally refer to “impairment” of the futures markets as market manipulation and to the “harmful conduct” of customers' agents and fiduciaries as fraud. See II Johnson, supra note 1, § 5.00, at 231.

Market manipulation is the conscious causation of an artificial price of a commodity in the cash or futures markets or both. I T. Russo, Regulation of the Commodity Futures and Options Markets § 12.10, at 12-17 (1987) [hereinafter Russo]. Fraud, on the other hand, encompasses a host of activities that may be perpetrated against a customer including (1) "churning,” (2) unauthorized trading, (3) failing to segregate customer funds, (4) misrepresentation, (5) making false account statements or records and (6) noncompetitive trading. See I Johnson, supra note 1, § 1.88, at 194-95. These activities are largely prohibited by the CEA's “anti-fraud” § 4b.

Unauthorized trading occurs when an FCM effects a trade on behalf of its customer without his specific or written authorization. See II JOHNSON, supra note 1, § 5.46, at 339-40; see Haltmier v. CFTC, 554 F.2d 556, 560 (2d Cir. 1977); Silverman v. CFTC, 549 F.2d 28, 31-32 (7th Cir. 1977). CFTC regulations, which prohibit unauthorized trading, define “specifically authorized” as a customer’s enumeration of both the commodity and the quantity of futures contracts based on that commodity he wants bought or sold. See CFTC Reg. § 166.2, 17 C.F.R. § 166.2 (1987); see also Couch v. Shearson/American Express, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,209, at 32,575 (CFTC Aug. 20, 1986) (cancelling customer’s prior order to comport with trading position intended by subsequent order was not unauthorized). Like “churning,” unauthorized trading generates illicit income for an FCM in breach of its fiduciary duty towards its customers. See Karlen v. Ray E. Friedman & Co. Commodities, 688 F.2d 1193, 1196 (8th Cir. 1982); Herman v. T & S Commodities, Inc., 592 F. Supp. 1406, 1413-19 (S.D.N.Y. 1984); Austin v. Lundgren, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,004, at 31,981 (CFTC Apr. 16, 1986); see also 1 Russo, supra, § 12.36, at 12-70 (essence of unauthorized trading is breach of fiduciary duty).

An FCM’s use of its customers’ funds, other than as margin or security for their trade positions, constitutes a conversion of those funds. See II JOHNSON, supra note 1, § 5.54, at 365-66; see Lincolnwood, ¶ 21,986, at 28,238 n.50; In re Clancy, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,905, at 23,676 (CFTC Sept. 25, 1979), modified and aff’d, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,126, at 24,564 (CFTC Nov. 25, 1980); Carfield v. Comstock Inv. Mgmt. Corp., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,607, at 22,506-07 (CFTC May 11, 1978). “Margin” is the amount of money a customer deposits with his FCM to secure or guarantee the futures contracts executed on his behalf. F. HORN, TRADING IN COMMODITY FUTURES 77 (2d ed. 1984) [hereinafter HORN]; see Crabtree Invs., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 577 F. Supp. 1466, 1470 n.7 (M.D. La.), aff’d without opinion, 738 F.2d 434 (5th Cir. 1984). In theory, margin money protects both the seller and the buyer of a futures contract from a default by the other in the event of an adverse price movement. HORN, supra, at 77. The customer deposits “initial margin” with the FCM when he first opens his account. See Crabtree, 577 F. Supp. at 1470 & n.7. “Maintenance margin” is required of the customer when the market has moved in a direction adverse to his position, thereby diminishing the equity of his initial margin by more than 25%. Id. at 1470 n.8; HORN, supra, at 77. Thus, when a customer’s account equity falls below this amount, the FCM issues a “margin call” requiring the customer to deposit additional funds to restore his account to its initial equity. Crabtree, 577 F. Supp. at 1470 n.8; see HORN, supra, at 77.

The segregation of customer funds such as margin money from FCM (house) funds is unambiguously mandated in § 4d(2) of the CEA: [FCMs must treat all money, securities and property they receive] to margin, guarantee, or secure the trades or contracts of any customer . . . or accruing to such customer as the result of such trades or contracts, as belonging
to such customer. Such money, securities, and property shall be separately accounted for and shall not be commingled with the funds of such [futures] commission merchant.

7 U.S.C. § 6d(2) (1982). Moreover, conversion of customer funds may also implicate the anti-fraud provisions of § 4b of the Act set forth infra. See Clancy, ¶ 21,126, at 24,561 & n.4; Carfield, ¶ 20,607, at 22,506; Johnson, supra note 1, § 5.54, at 366.

Although an FCM must treat all its customers' funds as belonging strictly to them, CEA § 4d(2), 7 U.S.C. § 6d(2) (1982); CFTC Reg. § 1.20(c), 17 C.F.R. § 1.20(c) (1987); Johnson, supra note 1, § 1.36, at 105, the FCM may pool its customers' funds into a clearly identified account for convenience or investment purposes. Johnson, supra note 1, § 1.36, at 105. Section 4d(2) of the CEA expressly allows such funds to be invested in certain guaranteed federal and state obligations, provided the investments are made in accordance with CFTC regulations. 7 U.S.C. § 6d(2) (1982). Commission Reg. §§ 1.26-1.27 require FCMs to maintain specific records of such investments, 17 C.F.R. §§ 1.26-1.27 (1987); however, Reg. § 1.29 permits FCMs to retain any income realized on the investments, including interest and resale income. 17 C.F.R. § 1.29 (1987); see Crabtree, 577 F. Supp. at 1473; Russo, supra, § 4.26, at 4-44.

In addition to the duty to segregate customer funds, FCMs must also disclose all material facts regarding or affecting customers' accounts. Johnson, supra note 1, § 5.49, at 353. This duty of disclosure, grounded in common law and firmly rooted under § 4b of the CEA, impels FCMs and their employees—as well as other industry professionals standing in a fiduciary relationship with a customer—to "exercise the utmost good faith and to fully and fairly disclose all material facts." Russo, supra, § 12.33, at 12-60 (emphasis in original); see Gordon v. Shearson Hayden Stone, Inc., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,016, at 23,973 (CFTC Apr. 10, 1980), aff'd mem. sub nom. Shearson Loeb Rhoades, Inc. v. CFTC, 673 F.2d 1339 (9th Cir. 1982). Of course, the amount of disclosure required depends on the extent to which the customer relies upon the professional's judgment to trade. Johnson, supra note 1, § 5.49, at 353. Compare Gordon, ¶ 21,016, at 23,974 & 23,981 n.37 (customer "reposed trust and confidence" in the broker) with Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367, 371-72 (7th Cir. 1978) (customer made "all the investment decisions"). See infra note 31 for the factors considered to determine the extent of a customer's reliance on the professional. Despite potential liability under § 4b, however, the lure of earning commissions or other income through the customer sometimes entices certain industry professionals to breach the fiduciary duty owed to their customers by omitting or misrepresenting material facts. See, e.g., Valek v. Murlas Commodities, Inc., 2 Comm. Fut. L. Rep. (CCH) ¶ 23,908, at 34,216 (CFTC Sept. 9, 1987) (FCM's agent misrepresented his experience to induce customer to allow agent to trade the customer's account, which was then "churned"); Seligman v. First Commodity Corp., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,790, at 34,085 (CFTC Aug. 13, 1987) (FCM's agent made material misrepresentations to customers solely to generate additional commissions); Beatty v. Comvest, Inc., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,213, at 25,065 (CFTC June 17, 1981) (FCM induced customer to invest by misrepresenting various facts in violation of § 4b of CEA).

The creation of false records or reports is another form of misrepresentation, one which not only deceives the customer, but possibly others as well. Johnson, supra note 1, § 5.53, at 363; see CFTC v. Pyne Commodities Corp., 502 F. Supp. 194, 196 (S.D.N.Y. 1980), aff'd mem., 681 F.2d 801 (2d Cir. 1981). Section 4b(B) of the CEA clearly proscribes the willful falsification of customers' reports or records by anyone acting on their behalf. 7 U.S.C. § 6b(B) (1982); see In re Shatner, [1986-
Once the customer has placed his order with an FCM or a broker, he intends to have his order forwarded to a particular contract market for execution. See Clark, Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act, 27 Emory L.J. 1175, 1188 n.46 (1978) [hereinafter Clark]. FCMs and their agents may trade for their own or affiliated accounts as well as for customers' accounts. 1 Russo, supra, § 4.16, at 4-25. This practice is known as dual trading. Id. Thus, besides the temptation to generate additional commissions, FCMs and their affiliated persons, which term includes employees, see CFTC Reg. § 155.1, 17 C.F.R. § 155.1 (1987), may be tempted to abuse their knowledge of customers' orders to effect personal transactions before the market is affected by the execution of the customers' orders. 1 Johnson, supra note 1, § 1.37, at 107.

Noncompetitive trades are those removed from normal market forces, stripping the customer of any meaningful execution of his trades. See 1 Russo, supra, § 12.47, at 12-96 to 12-97. “Bucketing,” for example, involves a failure to transmit a customer's order to an exchange “ring” for execution, or otherwise “filling” that order without subjecting it to “open outcry” in an exchange ring. 1 Johnson, supra note 1, § 2.27, at 257-58; see Pyne, 502 F. Supp. at 195-96; In re Siegel Trading Co., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,452, at 21,840 (CFTC July 26, 1977), vacated on other grounds, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,637, at 22,602 (CFTC June 21, 1978). If the firm or broker, while pretending a contract was formed on an exchange, does not cause the order to be so executed and instead places the order in its or his own “bucket,” that firm or broker is guilty of bucketing the customer's order. See Clark, supra, at 1188 n.46. In short, this practice plainly deprives the customer of his right to the competitive execution of his trades. II Johnson, supra note 1, § 5.37, at 301. Such actions may also violate CEA § 4h, which makes it unlawful to falsely represent that an order was executed on an exchange. See 7 U.S.C. § 6h (1982); In re Cayman Assocs., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,033, at 32,050 (CFTC Apr. 21, 1986).

The improper or noncompetitive execution of a customer’s order by an industry professional invariably causes that order to be wagered against that of the professional's: he wins only if the customer loses, even if his gain is not directly drawn from the customer's loss. See Clark, supra, at 1188 n.46. Section 4b(D) of the CEA, codified at 7 U.S.C. § 6b(D) (1982), focuses on the improper execution of a customer's orders, irrespective of whether the customer benefits. II Johnson, supra note 1, § 5.37, at 302. The “evil” which the section seeks to remedy is not so much fraud, but a breach of fiduciary duty; that is, the failure of the customer's agent—whether it be an FCM, its affiliated persons, or other industry professionals—to strictly advance the interests of the customer. See Clark, supra, at 1188 n.46. Note 31, infra, discusses this fiduciary agency relationship in detail and lists specific CFTC regulations designed to bolster this relationship.

The anti-fraud § 4b of the CEA, which prohibits commodity fraud such as churning, unauthorized trading, misrepresentation, false accounting and noncompetitive trading, states in pertinent part:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, ... for or on behalf of any other person, or (2) for any person ...

(A) to cheat or defraud or attempt to cheat or defraud such other person;
change Act (CEA). The CEA, promulgated to protect the futures markets and their participants from market manipulation and fraud, allows customers to recover actual damages for injuries sustained by violations of the statute.

Civil RICO, however, entitles "any person" to recover *treble damages* if he has been injured in his business or property "by reason of" a defendant's violation of section 1962 of the Act. Section 1962(a), for example, prohibits "any person" from using

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person. . . .

7 U.S.C. § 6b (1982 & Supp. IV 1986). The section, therefore, applies to contract market members (e.g., FCMs and their agents or employees) acting in a representative or fiduciary capacity for other persons (i.e., customers). See II Johnson, supra note 1, § 5.40, at 324. But see Hill v. Bache Halsey Stuart Shields, Inc., 790 F.2d 817, 823-24 (10th Cir. 1986) (although FCM owed customer fiduciary duty, § 4b violation requires willful conduct as it "makes no mention of fiduciary duties"). See infra notes 19-32 and accompanying text for an explanation of how the above commodity fraud becomes actionable under RICO.


10. See infra notes 77-125 and accompanying text. See supra note 8 for a description of commodity market manipulation and fraud.

11. See infra notes 110-15, 313-19 and accompanying text.

12. RICO § 1964(c), 18 U.S.C. § 1964(c) (1982); see infra note 14 and accompanying text.

13. See supra note 12.

14. Section 1964(c) of RICO provides the following:

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.


15. RICO § 1962, 18 U.S.C. § 1962 (1982); see infra note 28 and accompanying text. The term "person" includes any individual or entity capable of holding a legal
or investing any income derived directly or indirectly from a "pattern of racketeering activity" in an "enterprise" that affects interstate commerce.18

The large umbrella of "racketeering activity" defined in section 1961(1)(B) of RICO contains acts which are indictable under certain provisions of title 18 of the United States Code, including mail fraud and wire fraud.19 Mail fraud is committed by using the mails to execute a scheme or artifice to defraud.20 Mailings are considered in furtherance of a scheme to defraud if they are incidental to an essential part of that scheme.21 The wire fraud statute is equally broad.22 "All that is needed for violation[s] of this [statute] are a

or beneficial interest in property. RICO § 1961(3), 18 U.S.C. § 1961(3) (1982). See infra notes 166-96 and accompanying text for a discussion of whether the same corporation may be both the culpable "person" and the "enterprise" under RICO.


19. 18 U.S.C. § 1961(1)(B) (Supp. IV 1986). Other listed provisions of title 18 include § 201 (bribery), § 664 (embezzlement from pension and welfare funds), §§ 891-894 (extortiuone credit transactions), § 1084 (transmission of gambling information), § 1503 (obstruction of justice), § 1951 (interference with commerce), § 1952 (racketeering), § 1955 (illegal gambling operations) and § 1956 (laundering monetary instruments). The individual acts of racketeering activity, such as mail or wire fraud, are usually described as "predicate offenses" or "predicate acts." Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 386 (7th Cir. 1984), aff'd per curiam, 473 U.S. 606 (1985).

20. 18 U.S.C. § 1341 (1982); see United States v. Wormick, 709 F.2d 454, 461-62 (7th Cir. 1983). When one acts with knowledge that use of the mails will follow in the ordinary course of business, or when such use can reasonably be foreseen even though not actually intended, then he "causes" the mails to be used. Pereira v. United States, 347 U.S. 1, 8-9 (1954).

21. Wormick, 709 F.2d at 462.

22. United States v. Calvert, 523 F.2d 895, 903 (8th Cir. 1975) (citation omitted), cert. denied, 424 U.S. 911 (1976). Wire fraud is committed by transmitting or causing to be transmitted "by means of wire, radio, or television communication in interstate
scheme to defraud and at least one jurisdictional telephone call made in furtherance of that scheme. 23 Each mailing or use of the wires, although promoting a single scheme to defraud, constitutes a separate offense under the mail and wire fraud statutes. 24

The typical commodity fraud proscribed by the CEA requires use of the mails or wires to perpetrate the fraud against the customer, thereby giving rise to claims of mail or wire fraud. 25 Once a defendant has committed the predicate acts of mail or wire fraud, a customer can generally satisfy RICO's "pattern" element by proving that two acts of racketeering activity occurred within ten years of each other, 26 although certain jurisdictions require more. 27


27. The Supreme Court has stated that while two racketeering acts are necessary, they may not be sufficient to constitute a pattern. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14. Indeed, two isolated acts do not constitute a pattern; it is continuity and a relationship between the acts that produce a pattern. Id. (quoting S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969) [hereinafter S. REP. No. 617]).

The First, Fourth, Eighth and Tenth Circuits require a "pattern" to consist of more than a single fraudulent scheme. See Madden v. Gluck, 815 F.2d 1163, 1164 (8th Cir. 1987), cert. denied, 108 S. Ct. 86 (1987); Condict v. Condict, 815 F.2d 579,
Civil RICO's treble-damages provision thus provides an enticing remedy for commodity futures customers if the requisites of the RICO cause of action can be satisfied. Because civil RICO can...
be directed against "any person" who causes injury to a customer's business or property, potential targets include those persons handling a customer's commodity futures account: futures commission

collection of unlawful debt.

In Sedima, the Supreme Court summarized the above pleading requirements:
Section 1962 . . . makes it unlawful for "any person" . . . to use money derived from a pattern of racketeering activity to invest in an enterprise, . . . or to conduct an enterprise through a pattern of racketeering activity. . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim [for treble damages] under § 1964(c).


29. See supra note 15 and accompanying text.

30. See RICO § 1964(c), 18 U.S.C. § 1964(c) (1982); supra notes 14, 28 and accompanying text. The business at stake in the customer's account may concern the physical commodity interests of a hedger, and the property at stake could, of course, be the money of the speculator. See supra note 5 for a description of these persons and their interests in the commodity futures markets.

31. A customer generally establishes his commodity futures account with a futures commission merchant (FCM). The term "futures commission merchant" includes the following:

[i] Individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends any credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982). The FCM is the commodities market equivalent of the securities market brokerage or wire house. 1 Russo, supra note 8, § 4.01, at 4-5. Not only is the FCM the liaison for customers—performing such services as opening their accounts, accepting their orders, forwarding these orders to the floor of the contract market for execution, confirming those executions, and accepting margin money as required—the FCM is the salesman for the industry to attract those customers. 1 JOHNSON, supra note 1, § 1.33, at 101. FCMs must be registered with the Commodity Futures Trading Commission (CFTC). CEA § 4d(1), 7 U.S.C. § 6d(1) (1982).

An FCM fulfills its liaison and salesman functions through its employees and agents. 1 JOHNSON, supra note 1, § 1.33, at 101; 1 Russo, supra note 8, § 4.02, at 4-5. Such employees and agents include associated persons, introducing brokers, commodity trading advisors, commodity pool operators and floor brokers. All must be registered with the CFTC. See CEA §§ 4d(1), 4e, 4k(1), 4m(1), 7 U.S.C. §§ 6d(1), 6e, 6k(1), 6m(1) (1982). The liability of FCMs for the acts of such employees and agents under the CEA and RICO is discussed infra at notes 157-65, 221-353 and accompanying
text, respectively.

An associated person (AP), known also as an account executive (AE), is someone affiliated with an FCM "as a partner, officer, or employee ... in any capacity that involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged." CEA § 4k(1), 7 U.S.C. § 6k(1) (1982). Associated persons are the individuals who usually solicit and deal directly with customers with respect to their accounts. I Russo, supra note 8, § 4.02, at 4-5. Quite frequently, a customer's only direct contact with an FCM is through its AP. I Johnson, supra note 1, § 1.43, at 117.

Introducing brokers (IBs) are individuals who solicit or accept customer orders, but, unlike APs, do not accept customer monies to margin or secure those orders. CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982). The function of an IB, formerly known as an "agent of an FCM," remains unchanged: he solicits customers or accepts their orders, or does both, on behalf of FCMs. See 1 Russo, supra note 8, § 4.03, at 4-6 to 4-7.

A commodity trading advisor (CTA) is "any person who, for compensation or profit, engages in the business of advising others ... as to the value of or the advisability of trading" in the futures markets, with certain exceptions. CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982). Commodity trading advisors earn their livelihood by rendering advice, including trading strategies and price predictions, to commodity customers. I Johnson, supra note 1, § 1.53, at 132. A commodity pool operator (CPO) is a person engaged in an investment trust, syndicate or similar type of business who solicits or receives money, securities or property from others for the purpose of trading on the commodity markets. CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982). Commodity pools are organizations that sell limited interests or shares to investors, raising capital to invest wholly or partially in commodity markets. I Johnson, supra note 1, § 1.59, at 143. A customer shares in any profits generated by the investments, but sustains losses limited to his interest in the organization. See id.

The solicitation and acceptance of customer orders by FCMs through their agents and employees would be of little value, however, if those orders were not executed by certain dynamic individuals. See I Johnson, supra note 1, § 1.48, at 123. These individuals, known as floor brokers, stand in the "ring" or "pit" of a contract market (exchange) to purchase or sell futures contracts on behalf of others, subject to the rules of the exchange. CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982). Acting as agents for FCMs in the execution of customers' orders, floor brokers endeavor to execute or fill those orders in the terms and in accordance with the policies of the FCM from which the orders came. I Johnson, supra note 1, § 1.48, at 123. Floor brokers, as do FCMs and certain of their agents and employees, earn income from customers, by charging fees (brokerage) for each contract executed for customers' accounts. I Johnson, supra note 1, § 1.48, at 123.

It is not always clear, however, whether a futures industry professional is acting as an FCM's agent to subject the FCM to liability under the CEA, and possibly RICO. An agent is a person authorized by another to act for him. See H. Reuschlein & W. Gregory, Handbook on the Law of Agency and Partnership § 7, at 14 (1979) [hereinafter Reuschlein & Gregory]. The CFTC has set forth the following guidelines to decipher whether any or all of the above industry professionals are acting as an agent for an FCM:

With regard to agency, there must obviously be some connection (disclosed or undisclosed) between the alleged principal [FCM] and the purported agent. Evidence might exist showing, for example, that the agent is the employee of the principal; that the principal has referred to the individual as its agent; that the principal has knowingly allowed the individual to represent himself to third parties as an agent of the principal; that the principal has a mutually beneficial business arrangement with the agent
whereby each solicits business for the other; or that the principal's employees work hand in hand or out of the same office as does its alleged agent...


Agency is a fiduciary relationship that results from (1) a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and (2) consent by the other to so act. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1957) [hereinafter RESTATEMENT (SECOND)]; REUSCHELEIN & GREGORY, supra, § 12, at 31; see Berisko, ¶ 22,274, at 29,401. A fiduciary relationship arises whenever confidence is reposed by one person in another, obliging the other to act for the benefit of that person. See REUSCHELEIN & GREGORY, supra, § 67, at 121. These concepts produce a concise portrait of the usual FCM-customer relationship:

A person wishing to trade on the contract markets will open an account at an FCM and will rely upon the FCM to attend to the account's needs. Trading orders are given by the customer to the FCM, balances of the customer are controlled there, and records and reports on trading activity are generated by the FCM for the customer's benefit. I JOHNSON, supra note 1, § 1.33, at 101 (emphasis added). "To be sure, the FCM is indeed an agent of the [customer] and owes him, accordingly, a fiduciary duty." Fustok v. Conticommodity Servs., Inc. 618 F. Supp. 1082, 1088 (S.D.N.Y. 1985) (quoting Sherman v. Sokoloff, 570 F. Supp. 1266, 1269 n.10 (S.D.N.Y. 1983)); see Gordon v. Shearson Hayden Stone, Inc., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,016, at 23,981 (CFTC Apr. 10, 1980), aff'd mem. sub nom. Shearson Loeb Rhoades, Inc. v. CFTC, 673 F.2d 1339 (9th Cir. 1982); I Russo, supra note 8, § 12.37 at 12-72. But cf. Horn v. Ray E. Friedman & Co., 776 F.2d 777, 780 (8th Cir. 1985) (employment of broker by FCM did not create fiduciary relationship between them when no fiduciary relationship would exist between FCM and similarly situated customers).
Industry professionals, consisting in large part of the aforementioned employees and agents of FCMs, who establish a principal-agent relationship with their customers also owe their customers a fiduciary duty. Gordon, ¶ 21,016, at 23,981. Recognizing that the contours of this duty are defined by the way in which the professional acts, the CFTC has stated that those professionals who play an advisory role assume a broader duty. Id. The role that the industry professional assumes can be measured by the degree of control, implicit or explicit, that he exerts over the customer's account. See 1 Russo, supra note 8, §§12.34-12.35, at 12-65 to 12-66. Factors that suggest implicit control are (1) a customer's lack of sophistication regarding commodity futures; (2) his lack of trading experience; (3) a small amount of time devoted by the customer to his account; (4) significant trust or confidence reposed by the customer in the professional; (5) trades executed upon the advice of the professional or (6) the absence of prior customer approval for trades executed on his behalf. Smith v. Siegel Trading Co., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,105, at 24,454 (CFTC Sept. 3, 1980). An industry professional's explicit control over a customer's account, in which the customer has given the professional written discretion to trade on the customer's behalf, is generally known as a discretionary account. See 1 Russo, supra note 8, §4.20, at 4-32 to 4-33; see also CFTC Reg. §166.2, 17 C.F.R. §166.2 (1987) (defining discretionary account). In other words, trades may be effected for the customer without his express prior approval. II Johnso, supra note 1, §5.45, at 333. Given the volatile nature of the commodity futures markets, many customers routinely open discretionary accounts with FCMs or those acting on their behalf. Id.

Under the Commodity Exchange Act, a paramount duty imposed upon FCMs is the preservation and protection of its customers' funds against losses resulting from improper handling or mismanagement, especially by its agents or employees. See 1 Russo, supra note 8, ¶4.22, at 4-37; see also CFTC v. Commodity Fluctuations Sys., Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,654, at 30,764 (S.D.N.Y. 1985) (WESTLAW, DCT database) (FCM's duty to supervise activities of its agents included obligations to oversee agents' probable activity and to investigate customer complaints even after agency terminated). To help assure that FCMs fulfill this fiduciary duty, the CFTC has promulgated several regulations. See I Johnso, supra note 1, ¶1.37, at 106. When an FCM receives a customer's order to purchase or sell contracts, a written record must be prepared immediately. CFTC Reg. ¶1.35(a-1)(1), 17 C.F.R. ¶1.35(a-1)(1) (1987). The same procedure applies when a customer's order is directly received by an FCM's agent on the floor of an exchange. See CFTC Reg. ¶1.35(a-1)(2), 17 C.F.R. ¶1.35(a-1)(2) (1987).

CFTC Reg. ¶155.3 requires an FCM to insure that customer orders "executable at or near the [current] market price" be so executed before orders for the same commodity futures contract are executed on behalf of the FCM or any affiliated person. 17 C.F.R. ¶155.3(a) (1987). CFTC Reg. ¶155.3 also prohibits FCMs and their affiliated persons, which includes employees, see CFTC Reg. ¶155.1, 17 C.F.R. ¶155.1 (1987), from unnecessarily disclosing information regarding customers' orders. See 17 C.F.R. ¶155.3(b)(1) (1987). Its purpose is to restrict FCMs and their affiliated persons or others from using such information for their personal advantage. 1 Russo, supra note 8, ¶4.18, at 4-29 to 4-30. Once a customer's order is executed or filled in the "ring" of the contract market, a written confirmation of the transaction must be furnished to the customer. CFTC Reg. ¶1.33(b), 17 C.F.R. ¶1.33(b) (1987). Absent specific instructions from the customer to the contrary, CFTC Reg. ¶1.46(b) requires an FCM to apply a customer order that will liquidate or close out the customer's position in the market against the oldest open position of the customer. 17 C.F.R. ¶1.46(b) (1987). FCMs must also furnish their customers with monthly
Although Congress originally intended RICO to deter the infiltration of organized crime into legitimate businesses, plaintiffs utilize the Act's treble-damages remedy against legitimate businesses as well. Indeed, civil RICO's use against "legitimate" defendants far eclipses its use against organized criminals. Courts continue to struggle to interpret the broad language of RICO and Congress itself is presently considering three bills to amend the statute.

Account statements delineating the trading activity in their accounts for the previous month. CFTC Reg. § 1.33(a), 17 C.F.R. § 1.33(a) (1987).

The FCM's duties under the foregoing regulations and under the CEA are amplified by both another section of the Act and a CFTC regulation. Section 2(a)(1)(A) of the CEA makes an FCM strictly liable for the acts and omissions of its employees and agents. See 7 U.S.C. § 4 (1982). See infra notes 157-65 and accompanying text for a discussion of this section. CFTC Reg. § 166.3 requires an FCM to diligently supervise the handling of all commodity accounts "carried, operated, advised or introduced" by it or its employees and agents, as well as "all other activities of its partners, officers, employees and agents" relating to its business. 17 C.F.R. § 166.3 (1987); see Fluctuations Sys., ¶ 22,654, at 30,764 n.3.

Thus the FCM-customer relationship generally entails fiduciary duties which the FCM owes its customers. See 1 Russo, supra note 8, § 12.34, at 12-65. The FCM is obligated to utilize its customer's account for his benefit and not its own, see Smith, ¶ 21,105, at 24,453, and to avoid any action or inaction which defrauds the customer or fails to meet the fiduciary obligations owed to him. See 1 Russo, supra note 8, § 4.02, at 4-5 to 4-6. In sum, "a futures commission merchant, through its associated persons and other agents, engages for pay in the solicitation and acceptance of customers' orders, in the handling of customers' funds, or in the furnishing of trading advice, and thereby is placed in a position of trust and confidence vis-a-vis its customers." Gordon, ¶ 21,016, at 23,976 n.16 (emphasis added). The CEA recognizes this fiduciary relationship and provides against violations thereof. Id. at 23,976 (quoting In re Rosenbaum Grain Corp., 103 F.2d 656, 660 (7th Cir. 1939)).

32. See supra note 31 for a definition and discussion of this term.

33. See infra notes 46-58, 75 and accompanying text.

34. See infra notes 50-58, 166-220, 251-52 and accompanying text; see also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (instead of being used against organized criminals, RICO is being applied in everyday fraud cases against respected, legitimate businesses).


36. See infra notes 50-76, 166-220 and accompanying text.

37. Congress has not yet acted upon the three bills, which were introduced in mid-1987. Two bills propose to restrict the use of RICO against legitimate businesses. See S. 1523, 100th Cong., 1st Sess. (1987) [hereinafter S. 1523]; H.R. 2983, 100th Cong., 1st Sess. (1987) [hereinafter H.R. 2983]. Although these bills generally rule out recovery under RICO if either federal or state securities laws provide an express or implied remedy, neither bill forbids recovery for commodities-related infractions. See S. 1523, supra, at 5-6; H.R. 2983, supra, at 6. The third bill would actually broaden the scope of civil RICO, see H.R. 3240, 100th Cong., 1st Sess. (1987), adding activities indictable under the Commodity Exchange Act to RICO's list of prohibited activity. See id. at 5.
Two questions that the courts have yet to resolve are whether, for purposes of section 1962(a) of RICO, the same entity can serve as both the culpable "person" and the "enterprise" and if so, whether that entity can be held liable under the doctrine of respondeat superior for the misconduct of its employees or agents acting within the scope of their employment.

This Note considers whether a futures commission merchant may incur civil RICO liability under the doctrine of respondeat superior for the acts of its agents or employees. Part II examines the legislative and judicial development of RICO and discusses the history and regulatory framework of the CEA. Part III discusses the respondeat superior doctrine under the CEA, which imposes strict liability upon FCMs for their agents' activities, and analyzes the doctrine's potential application under RICO. Part IV of this Note concludes that in most circumstances, an FCM should be held liable under civil RICO for the acts of its agents and employees unless Congress itself determines otherwise.

II. Legislative and Judicial Development of RICO and the CEA

The Supreme Court has consistently stated that a statute should be interpreted according to its plain language absent "clear evidence" of a contrary legislative intent. The words of a statute must first be consulted—if the language is unambiguous, "that language must ordinarily be regarded as conclusive" absent a "clearly expressed legislative intent to the contrary." According to the Court, more-

38. See supra notes 18, 28 and accompanying text; infra notes 239-312 and accompanying text for a discussion of this section.
39. See supra note 15 and accompanying text; infra note 168 and accompanying text for a definition of this term.
40. See supra note 17 and accompanying text; infra note 169 and accompanying text for a definition of this term.
41. This doctrine, which means "let the master answer," BLACK'S LAW DICTIONARY 1179 (5th ed. 1979), holds that an employer is liable in certain instances for the wrongful actions of his employee occurring in the course of employment. See W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER & KEETON ON THE LAW OF TORTS § 69, at 499-500 (5th ed. 1984) [hereinafter PROSSER & KEETON]; REUSCHELEIN & GREGORY, supra note 31, § 52, at 101. See infra notes 126-56 and accompanying text for a general discussion of the respondeat superior doctrine.
42. See supra note 31 for a description of FCMs' agents and employees.
over, the plain language of a statute is the most reliable evidence of Congress’ intended meaning.\textsuperscript{45}

A. The Racketeer Influenced and Corrupt Organizations Act

The primary purpose of the Organized Crime Control Act of 1970,\textsuperscript{46} title IX of which is RICO,\textsuperscript{47} was to eradicate organized crime in the United States “by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”\textsuperscript{48} RICO focused on eliminating the infiltration of organized crime into legitimate commercial organizations.\textsuperscript{49} In an apparent effort to restrict the use of RICO against non-racketeer defendants, lower federal courts have imposed limitations which circumscribe the potential defendant and plaintiff classes\textsuperscript{50} under the Act.\textsuperscript{51}

\textsuperscript{45} Turkette, 452 U.S. at 593.


\textsuperscript{47} See supra note 4 and accompanying text.


\textsuperscript{50} The primary constriction of the defendant class resulted from the requirement that a RICO defendant be somehow linked to organized crime. See Divco Constr. & Realty Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 575 F. Supp. 712, 714-15 (S.D. Fla. 1983); Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 643 (C.D. Cal. 1983); Noonan v. Granville-Smith, 537 F. Supp. 23, 29 (S.D.N.Y. 1981). Decisions requiring a connection to organized crime are inconsistent with \textit{Sedima}, in which the Supreme Court expressly rejected a “racketeering” requirement. 473 U.S. at 494-95. The Court also rejected the Second Circuit’s holding that civil RICO actions could be maintained only against persons who had been convicted either under RICO itself or of a predicate act listed in § 1961(1) of the statute. See id. at 488-89, 493.

Before the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, for example, many courts required an allegation that a de-

Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1137 & n.11 (D. Mass. 1982) ("racketeering enterprise injury" resulting in commercial harm). Relying on its opinion in *Sedima*, in which the Supreme Court rejected the above limitations, 473 U.S. at 494-95, the Court has stated that requiring a civil RICO plaintiff to prove injury from conduct other than the predicate acts "suffers from the same defects as the amorphous and unfounded restrictions on the RICO private action we rejected in that case." American Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606, 609 (1985) (per curiam).

Despite the Supreme Court's express rejection of such restrictions, certain federal courts still impose analogous limitations under § 1962(a) of RICO: plaintiffs must show they were injured by reason of the defendant's *investment or use* of racketeering proceeds in the enterprise. Louisiana Power & Light Co. v. United Gas Pipeline Co., 642 F. Supp. 781, 805 n.21 (E.D. La. 1986); see Gilbert v. Prudential-Bache Sec., Inc., 643 F. Supp. 107, 109, 111 (E.D. Pa. 1986); Heritage Ins. Co. of Am. v. First Nat. Bank, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986); DeMuro v. E.F. Hutton, 643 F. Supp. 63, 66 (S.D.N.Y. 1986). These courts worry that to hold that trading commissions used to finance the operation of a defendant-enterprise are sufficient to state a cause of action under § 1962(a) "would turn every churning case into a RICO case." *DeMuro*, 643 F. Supp. at 67. Such courts go to great lengths to prevent "a vast and unwarranted extension of the boundaries of civil RICO." *Id.*

Other courts, following the lead of the Supreme Court, have rightly recognized that if a plaintiff must show damages by a defendant's *use or investment* of racketeering proceeds, he "will almost never prove a claim against a corporate defendant under section 1962(a)." *Louisiana Power*, 642 F. Supp. at 806. These courts, therefore, do not require the additional averment of injury by a defendant's *investment* of racketeering income. *See id. at 807; see also Roche v. E.F. Hutton & Co.*, 658 F. Supp. 315, 321 (M.D. Pa. 1986); B.F. Hirsch, Inc. v. Enright Ref. Co., 617 F. Supp. 49, 52 (D.N.J. 1985). Indeed, the Supreme Court has already determined that a complaint under RICO is *not deficient* for failing to allege an "injury separate from the financial loss stemming from the alleged acts of mail and wire fraud...." *Sedima*, 473 U.S. at 500. "Damages that 'flow from the commission of the predicate acts,' " therefore, are recoverable. Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29 (1st Cir. 1987) (quoting *Sedima*, 473 U.S. at 497). Mail and wire fraud, of course, are the predicate acts for commodity-related RICO actions. *See supra* notes 19-25 and accompanying text. A RICO claim for damages to a corporation, however, may only be sought by the corporation or its shareholders in the name and on behalf of the corporation. *Roeder*, 814 F.2d at 29; Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir.), cert. denied, 107 S. Ct. 579 (1986); Warren v. Manufacturers Nat'l Bank, 759 F.2d 542, 544 (6th Cir. 1985). Shareholders may not bring RICO derivative actions on their own behalf. *See Roeder*, 824 F.2d at 30; *Rand*, 794 F.2d at 849; *Warren*, 759 F.2d at 644-45.

fendant have some connection with organized crime.\textsuperscript{53} Congress realized, however, that "the concept of organized criminal activity is broader in scope than the concept of organized crime,"\textsuperscript{54} and hence understood that it could not draw an "effective" statute which would reach most commercial activities of organized crime and "not include offenses commonly committed by persons outside organized crime as well."\textsuperscript{55} Courts and commentators thus recognize that it is a defendant's conduct in violation of the Act, and not his status, which subjects him to liability under RICO.\textsuperscript{56} In short, Congress was well aware that although the predicate offenses listed in RICO\textsuperscript{57} lend themselves to organized commercial exploitation, such offenses are merely characteristic of, and are not committed exclusively by, organized crime members.\textsuperscript{58}

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\textsuperscript{53} See supra notes 50-51 and accompanying text. The imposition of an organized-crime restriction to limit the defendant class reflects the reluctance of many courts to allow what is essentially a "racketeering" statute to be used against "legitimate" businesses. See id. As Senator John McClellan, a sponsor and major force behind the Organized Crime Control Act of 1970, remarked:

The curious objection has been raised . . . to several of its provisions in particular, that they are not somehow limited to organized crime itself, as if organized crime were a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional concept like "white collar crime," serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances.


Thus, an amendment to the RICO bill that would have criminalized membership in the "Mafia" or "La Cosa Nostra," 116 CONG. REC. 35,343 (1970) (remarks of Rep. Biaggi), was rejected on constitutional (organizational status) and practical (evidentiy) grounds. See id. at 35,344 (remarks of Rep. Poff).


\textsuperscript{55} Id. at 18,940 (remarks of Sen. McClellan). On its face, RICO neither mentions nor requires any connection with organized crime. \textit{In re Catanella}, 583 F. Supp. 1388, 1428 (E.D. Pa. 1984). It applies to and can be used by "any person." See RICO §§ 1962, 1964(c), 18 U.S.C. §§ 1962, 1964(c) (1982); see also \textit{Sedima}, 473 U.S. at 495 (§ 1964(c) authorizes a private suit by "any person"); § 1962 makes it unlawful for "any person"—not just mobsters—to engage in the section's proscribed activities). See supra notes 14, 28 for text of applicable RICO sections.


\textsuperscript{57} See supra note 19 and accompanying text; infra notes 59-61 and accompanying text.

\textsuperscript{58} McClellan, supra note 53, at 142.
It is upon this list of predicate offenses that the courts have mantled a second limitation which is based upon the concept of federalism. Section 1961(1) of RICO defines "racketeering activity" as any act which is indictable under certain enumerated sections of title 18 of the United States Code, including mail fraud and wire fraud. Because virtually all federal courts have refused to recognize an implied private right of action under the mail and wire fraud statutes, defrauded plaintiffs must pursue their common law fraud claims in state courts. Many judges believe that the increasing reliance on the mails and wires in everyday commercial activities, in conjunction with the appeal of RICO's treble-damages provision, and the relative ease of satisfying the Act's "pattern of racketeering" requirement threatens to federalize these common law fraud claims formerly heard in state courts.

In an effort to stem this tide of "garden variety" fraud brought before them, federal courts have blocked plaintiffs' efforts by imposing additional requirements not found in the Act. The language

62. Note, Civil Rico: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101, 1104 (1982) [hereinafter Civil Rico]; see Ryan v. Ohio Edison Co., 611 F.2d 1170, 1177-79 (6th Cir. 1979); Bell v. Health-Mor, Inc., 549 F.2d 342, 346 (5th Cir. 1977); see also Sedima, 473 U.S. at 501 (Marshall, J., dissenting) (courts of appeals have consistently held that no implied federal cause of action accrues to victims under mail and wire fraud statutes).
63. Civil Rico, supra note 62, at 1104.
64. See supra notes 12-14 and accompanying text.
65. See supra notes 26-28; see also Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1353 (3d Cir. 1987) ("a number of courts have begun to use the pattern requirement to prevent RICO from reaching 'legitimate business' ").
66. Civil Rico, supra note 62, at 1105; see Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 386-87 (7th Cir. 1984), aff'd per curiam, 473 U.S. 606 (1985); Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982), modified on other grounds, 710 F.2d 1361 (en banc), cert. denied sub nom. Prudential Ins. Co. v. Bennett, 464 U.S. 1008 (1983); Ghouth v. Commodity Servs., Inc., 642 F. Supp. 1925, 1334 n.10 (N.D. Ill. 1986); see also Sedima, 473 U.S. at 501 (Marshall, J., dissenting) (majority's interpretation of RICO federalizes broad areas of state common law frauds); cf. Exeter Towers Assocs. v. Bowditch, 604 F. Supp. 1547, 1554 (D. Mass. 1985) ("most substantial business transactions involve two or more uses of the mail . . . To hold that two such uses of the mail . . . are sufficient . . . would be to sweep into federal courts, under RICO, the great majority of actions for fraud in commercial transactions").
67. See Kimmel v. Peterson, 565 F. Supp. 476, 493 n.21 (E.D. Pa. 1983); see
of the Act and its legislative history, however, display Congress’ awareness that it was ushering in a new era of federal participation in an area previously dominated by the states.\textsuperscript{68} Congress included within the definition of “racketeering activity” a number of “state” crimes\textsuperscript{69} because it perceived existing federal and state law to be inadequate; hence, RICO criminalized conduct that was already addressed by state law.\textsuperscript{70} Congress wanted a spearhead to attack the source of organized crime’s economic power “on all available fronts.”\textsuperscript{71} The Act was enacted, therefore, despite concern that it would place into federal hands substantive areas of law formerly left to the states for adjudication.\textsuperscript{72}

The implications of RICO are thus dramatic, substantially affecting federal and state efforts toredress illegal conduct.\textsuperscript{73} Additionally, Congress expressly directed that the provisions of RICO “be liberally construed to effectuate its remedial purposes.”\textsuperscript{74} Because both the plain language and the legislative history of the Act

\textit{also Sedima,} 473 U.S. at 500 (inappropriate for courts to impose amorphous standing requirements to amend statute). See \textit{supra} notes 50-51 and accompanying text for the types of judicial barriers.

\textsuperscript{68} \textit{Turkette,} 452 U.S. at 586-87. Congress expressly stated that \textit{nothing in title IX (RICO) “shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.”} \textit{Organized Crime Control Act, Pub. L. No. 91-452, tit. IX, § 904(b), 84 Stat. 922, 947 (1970). Indeed, state offenses are included in RICO’s definition of “racketeering activity” by “generic designation.”} H.R. REP. No. 1549, 91st Cong., 2d Sess. 56, \textit{reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4032. Such offenses, then, may also cause a violation of RICO. See Forsythe, 560 F.2d at 1137; see also United States v. Zemek, 634 F.2d 1159, 1164-65 n.4 (state offenses incorporated into federal racketeering and gambling statutes), cert. denied sub nom. Mazzuca v. United States, 452 U.S. 905 (1981).}

\textsuperscript{69} \textit{Turkette,} 452 U.S. at 586; \textit{see RICO § 1961(1), 18 U.S.C. § 1961(1) (Supp. IV 1986).}

\textsuperscript{70} \textit{Turkette,} 452 U.S. at 586; \textit{see Schacht v. Brown,} 711 F.2d 1343, 1353 (7th Cir.), \textit{cert. denied,} 464 U.S. 1002 (1983).

\textsuperscript{71} \textit{Russello,} 464 U.S. at 27 (quoting S. REP. No. 617, \textit{supra} note 27, at 79).


\textsuperscript{73} \textit{Schacht,} 711 F.2d at 1353. As one court astutely noted:

\begin{quote}
Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble damage proceedings—the price of eliminating all possible loopholes.
\end{quote}

\textit{Sutliff, Inc. v. Donovan Cos.,} 727 F.2d 648, 654 (7th Cir. 1984).

\textsuperscript{74} \textit{Organized Crime Control Act, Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 922, 947 (1970). The Supreme Court, stating “RICO is to be read broadly,” stressed that the liberal construction clause applies to civil RICO as well. \textit{Sedima,} 473 U.S. at 497-98.
FCMs AND CIVIL RICO

demonstrate Congress’ deliberate resolve to enact a broad statute,\(^7\) at least some courts have recognized that the judiciary should refrain from exercising the legislative function of redrafting a deliberately broad statute.\(^7\)

B. The History and Regulatory Framework of the Commodity Exchange Act

The Commodity Exchange Act (CEA)\(^7\) has been amended seven times within the past sixty-five years.\(^7\) Recognizing the benefits\(^9\) and potential hazards\(^8\) inherent in futures trading, Congress has engaged in a progressive course of regulation.\(^8\) Indeed, this reg-

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75. As Senator John McClellan, a principal sponsor of the Organized Crime Control Act, stated: 

[It] was a bill which was carefully drafted . . . to broaden federal jurisdiction over . . . corruption where interstate commerce is affected, to attack and mitigate the effects of racketeer infiltration of legitimate organizations affecting interstate commerce. . . .

[Its] passage . . . was the culmination of a year of detailed study, hearings, and consultations, and the result of one of the most thoroughly gratifying bipartisan efforts in which I have participated since coming to the Senate. McClellan, supra note 53, at 57 (footnotes omitted) (emphasis added).

76. Schacht, 711 F.2d at 1361; see Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1239-40 (S.D.N.Y. 1983); Kimmel, 565 F. Supp. at 493 n.21; see also Sedima, 473 U.S. at 499-500 (inappropriate for judiciary to limit RICO’s private action; such duty “must lie with Congress”).

77. See supra notes 9-11 and accompanying text.


79. See supra note 5; infra notes 122-25 for a summary of the “benefits.”

80. See supra note 8 for a summary of the “hazards.”

81. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 360 (1982). More than a decade prior to federal regulation of the commodity futures markets, the Supreme Court upheld the validity of agreements made by participants at the Chicago Board of Trade based primarily on their attempt to forecast the future.
ulation reflects Congress' awareness that transactions in commodity futures conducted on boards of trade or exchanges directly affect the "national public interest."\(^{82}\)

Perhaps the most significant amendment to the CEA was the inclusion of section 4b, the "anti-fraud" provision, in 1936.\(^{83}\) Section 4b prohibits any member of a contract market,\(^{84}\) or any agent or employee of any member, from defrauding any other person in connection with any order to make, or the execution of, any futures contract.\(^{85}\) The purpose of section 4b is to protect the investing public against fraud and conversion from contract market members and their agents purportedly acting on the investor's behalf.\(^{86}\)

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See Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 247-48 (1905). Writing for the majority, Justice Holmes stated that the value of speculation of this kind is "well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for [commodities in] periods of want." Id. at 247.


Such futures transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof in interstate commerce. The prices involved in such transactions are generally quoted and disseminated throughout the United States ... as a basis for determining the prices to the producer and the consumer of commodities ... and to facilitate movements thereof in interstate commerce. Such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities ... as a means of hedging themselves against possible loss through fluctuations in price. The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated ... to the detriment of the producer or the consumer and the persons handling commodities ... in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein.

Id. (quoting 7 U.S.C. § 5 (1982)).


86. See Stassen, supra note 78, at 832. Congress stated that the CEA's "fundamental purpose" was to ensure fair and honest practices in the conduct of these important
Other important changes in the CEA include the 1968 amendments\(^7\) which extended coverage of the Act to include commodities other than grains\(^8\) and strengthened enforcement of the Act’s provisions.\(^9\) Criminal penalties for market manipulation\(^9\) and for embezzlement of customer funds by FCMs were also increased.\(^1\)

In 1974, Congress enacted the Commodity Futures Trading Commission Act (CFTC Act).\(^2\) Although the value of futures trading had reached a level of over $500 billion per year,\(^3\) many large and important futures markets such as coffee, sugar, cocoa and silver remained unregulated by the federal government until the passage of the CFTC Act.\(^4\) Most significantly, the CFTC Act established a federal Commodity Futures Trading Commission (CFTC or Commission) vested with “exclusive jurisdiction” over all futures transactions traded or executed on designated contract markets.\(^5\) Moreover, the definition of “commodity” was altered to cover public markets, thereby acknowledging the interests of “that class of citizens who have a fondness, and perhaps some aptitude, for speculative investments in commodities. . . .” H.R. REP. No. 421, 74th Cong., 1st Sess. 1-3 (1936).

88. See id. § 1(a) (codified as amended at 7 U.S.C. § 2 (1982)). For example, livestock and livestock products were added. See id.
90. See supra note 8 and accompanying text.
91. See Act of Feb. 19, 1968, Pub. L. No. 90-258, § 25, 82 Stat. 26, 33-34 (codified as amended at 7 U.S.C. § 13(a)-(b) (1982)). Moreover, it became unlawful for any person (including an FCM) that received any money for deposit in a separate account to use or treat that money as belonging to the FCM or a person other than the customer who deposited the money. See id. § 6(b), 82 Stat. 26, 28 (codified as amended at 7 U.S.C. § 6d(2) (1982)).
94. Id.
almost any good—not just agricultural commodities—which was or could potentially be the subject of futures trading.96

In addition to retaining the prior statutory prohibitions against fraudulent practices and price manipulation, the CFTC Act added new remedial sections.97 For example, section 5a(11) required contract markets to provide arbitration procedures for the settlement of customer grievances and claims not exceeding $15,000.98 Section 14 empowered the Commission to grant reparations proceedings to any customer alleging damages from a contract market member's violations of the CEA, or any rule, regulation or order issued thereunder by the Commission.99 In short, the focus of the 1974 amendments to the CEA were twofold: to protect any individual who desires to participate in the futures markets100 and to develop a strong regulatory scheme that would protect customers and consumers.101

Amendments in 1978102 further strengthened the regulatory scheme of the CEA by increasing the monetary penalties for violations of the Act103 and by authorizing states to bring pares patriae actions104 on behalf of citizens.105

99. CFTC Act of 1974, Pub. L. No. 93-463, § 106, 88 Stat. 1389, 1393-95 (codified as amended at 7 U.S.C. § 18 (1982)); see Curran, 456 U.S. at 366. See infra note 317 and accompanying text for a brief discussion of this section of the CEA. A subsequent conflict now rendered moot by the 1982 amendments, discussed infra at notes 110-20 and accompanying text, arose concerning whether the new arbitration and reparation procedures authorized by the CFTC Act became the sole methods of recourse for complaints arising under the CEA. See Leist, 638 F.2d at 313. In other words, were the new procedures exclusive of or in addition to the perceived existing remedy of an implied private right of action? Id. See infra notes 106-09 and accompanying text for the Supreme Court's conclusion before the 1982 amendments.
100. 120 Cong. Rec. 30,466 (1974) (statement of Sen. Dole). Indeed, the concern to protect the commodity futures customer—hedger and speculator alike—permeated the 1974 amendments. Leist, 638 F.2d at 305.
In 1982, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, the Supreme Court held that an implied private right of action lies for injuries caused by certain violations of the CEA. According to the pattern established by prior amendments to the CEA, the Court concluded that Congress bolstered federal regulation to maintain the integrity of, and to protect persons participating in, the futures markets.


107. Id. at 390-95.

108. Id. at 394. The Supreme Court recognized that because the amendments to the Commodity Exchange Act have consistently strengthened the federal regulatory scheme, the elimination of the implied private action, a significant enforcement instrument, would “clash” with this legislative pattern. Id.

109. Id. at 389-90. The touchstone of the Supreme Court’s conclusion was the “savings clause” added to § 2 of the CEA by the CFTC Act of 1974. See id. at 386. Although § 2 of the CEA confers exclusive jurisdiction on the CFTC with respect to transactions in commodity futures, see CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982), the savings clause provides that “[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.” Id.

The savings clause was added because the exclusive jurisdiction provision raised concern that the jurisdiction of state and federal courts might be eclipsed. See *Curran*, 456 U.S. at 386. Chairman Rodino of the House Committee on the Judiciary suggested an amendment because he was worried that the provision, by itself, might be read to pre-empt state courts from enforcing futures contracts under general commercial law, or oust federal courts of their jurisdiction. *Leist*, 638 F.2d at 314. Citing antitrust jurisdiction of the commodity futures industry as an example, he asserted that it should be clarified that federal courts retained the ability to try federal claims. See id. Senator Clark observed that under the exclusive jurisdiction provision, the treble-damages provisions of bills he and Senator McGovern had introduced (which were never acted upon, id. at 318) might be prohibited along with all federal court actions. Id. at 315. To allay such fears, Congress added the savings clause and clarified in the record that “nothing in the Act would supersede or limit the jurisdiction presently conferred on courts of the United States or any state.” 120 Cong. Rec. 34,997 (1974) (statement of Sen. Talmadge) (emphasis added). RICO jurisdiction, of course, had been conferred on the courts of the United States four years earlier. See *supra* note 4 and accompanying text.

Congress’ failure to enact a treble damages remedy in the CFTC Act of 1974 bespeaks nothing of Congress’ intent to allow RICO claims for conduct violative of the CEA. See, e.g., *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 28 (2d Cir.), *cert. denied sub nom. Simplot v. Strobl*, 474 U.S. 1006 (1985) (“The fact that Congress considered and rejected a treble damage remedy for [Commodity Exchange] Act violations says nothing about its view with respect to antitrust violations”). Congress might have decided that treble damages under the antitrust laws (and under RICO) were sufficient so that no such remedy was required under the CEA. See id. “The most that can safely be implied from the rejection of [treble damages] is that it was
Further changes in the CEA enacted later that year continued this trend. The addition of section 22, for example, expressly provided what the Supreme Court had implied—a private right of action under the CEA. Congress determined that "the right of an aggrieved person to sue a violator of the Act is critical to protecting the public and fundamental to maintaining the credibility of the futures market[s]." Indeed, Congress perceived the availability of all the remedies under the CEA—arbitration, reparations, and the private right of action—as supplementing the regulatory and enforcement programs of the CFTC.

Notwithstanding that the above remedies were characterized as "exclusive remedies" for violations of the CEA, Congress broadened the role of the states as well as the applicability of federal

not Congress's purpose either to expand or contract treble damage remedies." Id.; see also Aiken v. Lerner, 485 F. Supp. 871, 877 (D.N.J. 1980) (failure of Congress to enact treble damages merely evidences reluctance to expand private recovery under existing private right).


11. See CEA § 22, 7 U.S.C. § 25 (1982). Section 22 of the CEA provides in pertinent part:

(1) Any person . . . who violates this chapter [the Commodity Exchange Act] or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in clauses (A) through (D) of this paragraph and caused by such violation to any other person—

(A) who received trading advice from such person for a fee;
(B) who made through such person any contract of sale of any commodity for future delivery . . . or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract; . . .
(D) who purchased or sold a contract referred to in clause (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

(2) . . . the rights of action authorized by this subsection and by sections 7a(11), 18, and 21(b)(10) of this title shall be the exclusive remedies under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter.

Id. (emphasis added).


13. See supra note 98 and accompanying text; infra note 316 and accompanying text for a brief discussion of this term.

14. See supra note 99 and accompanying text; infra note 317 and accompanying text for a brief discussion of this term.


and state law "to foster a coordinated and effective program to detect and prosecute those who engage in unlawful conduct." Moreover, Congress added a "controlling person" provision for actions brought by the Commission and expanded aiding and abetting liability by applying such liability to all legal proceedings arising under the CEA.

In sum, the progressive legislative history of the Commodity Exchange Act demonstrates Congress' intent to protect futures customers from market manipulation and other fraudulent conduct. Underlying this intent is the realization that a sound futures industry benefits the entire economy. The immediate beneficiaries of healthy futures markets are the producers and processors (hedgers) of commodities who minimize the risk of loss in the cash markets by trading in the futures markets. The entire nation, however, benefits indirectly from the consequent lower retail prices of those commodities.

III. Respondeat Superior

Under the common law doctrine of respondeat superior, a master or principal is liable in certain instances for the wrongful acts of

117. H.R. Rep. No. 565, supra note 112, at 104, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3871, 3953. Section 6d of the CEA was amended to permit any authorized state official to proceed in a state court against any registered person (except a floor broker or futures association) for violations of the anti-fraud provisions of the Act. 7 U.S.C. § 13a-2(8) (1982). Section 12(e) was also added to ensure that nothing in the CEA superseded or pre-empted criminal prosecution under any federal criminal statute, or the application of any federal or state statute to any futures transaction not conducted on a contract market or committed by any person not registered pursuant to the Act. CEA § 12(e), 7 U.S.C. § 16(e) (1982).

118. See CEA § 13(b), 7 U.S.C. § 13c(b) (1982). Such provision holds any person who directly or indirectly controls a violator of the CEA liable to the same extent as the violator. See id.


120. See CEA § 13(a), 7 U.S.C. § 13c(a) (1982). Prior to 1982, aiding and abetting liability applied only to administrative disciplinary proceedings. See supra note 89 and accompanying text.

121. Curran, 456 U.S. at 390; see supra notes 10-11 and accompanying text. See supra note 8 for a description of fraudulent conduct related to commodity futures transactions.


123. See supra note 5 and accompanying text for a discussion of the roles of hedgers and speculators in futures markets.


125. Id.
his servant or agent. Based on traditional agency principles, this doctrine makes an employer liable for his employee's misconduct if that conduct falls within the employee's scope of employment; his apparent authority; or when the conduct is attributable to reckless or negligent supervision by the employer. The doctrine of respondeat superior is premised upon fundamental notions of justice and public policy.

The paramount consideration has been articulated as follows: "He who expects to derive [some] advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." A principal is liable, therefore, for the wrongful acts of his agent committed in the business the agent was designated to perform even if the principal is unaware of those wrongful actions. Moreover, if the agent acts under apparent authority, the principal remains

126. Section 219 of the Restatement (Second) of Agency delineates when a master is liable for the wrongful actions of his servant:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
   (a) the master intended the conduct or the consequences, or
   (b) the master was negligent or reckless, or
   (c) the conduct violated a non-delegable duty of the master, or
   (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND), supra note 31, § 219.

127. Markham & Meltzer, supra note 89, at 1118-19.

128. See RESTATEMENT (SECOND), supra note 31, § 228; PROSSER & KEETON, supra note 41, §§ 70, at 702.

129. See RESTATEMENT (SECOND), supra note 31, §§ 8, 140, 219(2)(d), 249, 261-262; see also PROSSER & KEETON, supra note 41, § 70, at 508.

130. See RESTATEMENT (SECOND), supra note 31, § 213.

131. Markham & Meltzer, supra note 89, at 1119.

132. New York Cent. R.R. v. White, 243 U.S. 188, 204 (1917) (quoting Hall v. Smith, 2 Bing. Rep. 156, 160 (1824)); accord Guy v. Donald, 203 U.S. 399, 406 (1906) ("When a man is carrying on business in his private interest and entrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself") (Holmes, J.).

133. CFTC v. Premex, Inc., 655 F.2d 779, 784 n.10 (7th Cir. 1981) (citing Fey v. Walston & Co., 493 F.2d 1036, 1052 n.19 (7th Cir. 1974)); see Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111, 1118-19 (5th Cir. 1980).

134. "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." REUSCHELEIEN & GREGORY, supra note 31, § 23, at 61, usually arises when the principal's behavior allows a third party to mistakenly believe that the agent is acting within his actual authority. See id. § 23, at 57-58.
answerable for the agent's fraud although the agent acted solely for his own benefit. Similarly, the principal is responsible when an agent's misrepresentations cause pecuniary loss to a third party, or when an agent tortiously injures another party's business relations.

A principal's liability under the apparent authority theory, which has "long been the settled rule in the federal [court] system," is predicated upon the fact that the agent's position enables him to perpetrate a fraud upon another because, in the eyes of that third person, the agent still appears to be acting in the ordinary course of the duties entrusted to him. Thus, "the employer may be entirely blameless" and "may have exercised the utmost human foresight," but if an employee, while acting within the scope of his duties, injures another person—even in disobedience "of the employer's positive and specific command—the employer is answerable for the consequences."

Corporations are generally held accountable as principals under the same theories. Because a corporation acts only through its agents, it can be held responsible to third parties for damages caused by its agents' conduct, even if unlawful activities are perpetrated by "minor" employees without the knowledge of senior corporate officers. The general rule that a principal is answerable

135. American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982). "If a particular act is authorized, or sufficiently similar to an authorized act, finding that act to be within the [employee's apparent authority] does not require that the act have conferred any particular benefit, financial or otherwise, on the employer." Lewis v. Walston & Co., 487 F.2d 617, 624 (5th Cir. 1973).

136. Hydrolevel, 456 U.S. at 566.

137. Id.

138. Id. at 567. The Supreme Court cited several federal cases to support this conclusion. See id. at 567-68.

139. Id. at 566.

140. White, 243 U.S. at 198.


142. Blakey, supra note 51, at 292 n.151.

143. Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987); United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir.), cert. denied, 314 U.S. 618 (1941); see Minnesota Odd Fellows Home Found. v. Engler & Budd Co., 630 F. Supp. 797, 800 (D. Minn. 1986); see also New York Cent. R.R. v. United States, 212 U.S. 481, 492-95 (1909) (discussing criminal liability of corporation for acts of its agents).


145. Basic Constr. Co., 711 F.2d at 572. In this per curiam opinion affirming the criminal liability of a corporation for antitrust violations committed by its employees,
for the fraud or misrepresentations of its agent occurring within the scope of the agent’s authority or employment, therefore, applies unequivocally to corporations.\textsuperscript{146} Thus, a company can incur liability even though it did not authorize the fraud or know of its employees’ conduct.\textsuperscript{147}

In \textit{New York Cent. R.R. v. United States},\textsuperscript{148} for example, the Supreme Court upheld the criminal convictions of a railroad company and its employee.\textsuperscript{149} The Court acknowledged that there are some crimes which, by their very nature, cannot be committed by corporate entities.\textsuperscript{150} It recognized, however, that “there is a large class of offenses” where the nature of the crime “consists in purposely doing the things prohibited by statute.”\textsuperscript{151} In such cases, there is “no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents [who are] acting within the authority conferred upon them.”\textsuperscript{152}

While the company in \textit{New York Cent. R.R.} apparently benefited from its employee’s unlawful activities,\textsuperscript{153} companies have incurred

\begin{footnotes}
\item the Fourth Circuit upheld the following jury instructions regarding corporate liability:
\begin{quote}
When the act of an agent is within the scope of his employment or within the scope of his apparent authority, the corporation is held legally responsible for it. This is true even though the agent’s acts may be unlawful, and contrary to the corporation’s actual instructions. \ldots
\end{quote}
\begin{quote}
\textit{Id.} Such jury instructions, as the court of appeals noted, are amply supported by federal case law. \textit{Id.} at 573. Indeed, a “corporation which employs an agent in a responsible position cannot say that the man was only ‘authorized’ to act legally and the corporation will not answer for his violations of law which inure to the corporation’s benefit.” Continental Baking Co. v. United States, 281 F.2d 137, 150 (6th Cir. 1960); see \textit{supra} notes 140-41 and accompanying text. FCMs likewise benefit when their agents or employees perpetrate frauds upon customers. See \textit{supra} note 8.

146. \textit{Kerbs} v. Fall River Indus., Inc., 502 F.2d 731, 740-41 (10th Cir. 1974); see H. \textsc{Henn} \& J. \textsc{Alexander}, \textsc{Laws of Corporations and Other Business Enterprises} \S 184, at 479 (3d ed. 1983).

147. \textit{Kerbs}, 502 F.2d at 740-41; see \textit{supra} notes 143-45 and accompanying text; cf. Rosenthal \& Co. v. CFTC, 802 F.2d 963, 967 (7th Cir. 1986) (FCM’s ignorance of its agent’s fraud irrelevant).


149. \textit{Id.} at 489, 499. The Supreme Court stated that it is “well established that in actions for tort the corporation may be held responsible for damages for the acts of its agent within the scope of his employment,” even when the agent acts “wantonly or recklessly or against the express orders of the principal.” \textit{Id.} at 493 (citing \textit{Lake Shore \& Michigan S. R.R. v. Prentice}, 147 U.S. 101, 109, 111 (1893)). Carrying this principle to criminal law, the Court held that an agent’s acts may be controlled, in the public interest, by imputing them to the corporation and thereupon imposing criminal penalties. \textit{New York Cent. R.R.}, 212 U.S. at 494.


151. \textit{Id.}

152. \textit{Id.} at 494-95 (citations omitted).

153. \textit{Id.} at 493, 495.
\end{footnotes}
liability under the doctrine of respondeat superior for their employees' unlawful acts without deriving any benefit whatsoever. Finally, the common law rule of respondeat superior which precludes punitive damages does not apply to special statutes providing treble damages. The common law doctrine may, therefore, be specifically altered by statute.

A. Respondeat Superior Under the CEA

On its face, section 2(a)(1)(A) of the CEA imposes strict liability upon a principal for the misconduct of its agents occurring within the scope of their agency. Because the section incorporates certain

154. See, e.g., Holloway v. Howerdd, 536 F.2d 690 (6th Cir. 1976) (securities brokerage firm); American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (nonprofit corporation). In Holloway, for example, a brokerage firm was held responsible for the fraud of its employee despite neither knowing of his transgressions nor receiving commissions from those activities. Holloway, 536 F.2d at 695.

In Hydrolevel, the Supreme Court affirmed the Second Circuit's decision that a nonprofit membership corporation (ASME) was liable for violations of federal antitrust laws perpetrated by its agents acting within the scope of their apparent authority. Hydrolevel, 456 U.S. at 565, 578. ASME objected to the imposition of treble damages against it, arguing that such damages were punitive. Id. at 574. The courts, ASME asserted, traditionally refrained from imposing punitive damages upon principals for their agents' conduct under the apparent authority rule. Id. at 574-75.

The Supreme Court rejected ASME's arguments. Because treble damages both deter violations and compensate victims, the Court held the corporation fully accountable for the actions of its agents committed under their apparent authority to comport with the purposes of the antitrust laws and principles of agency law. Id. at 575-76. The Court found the apparent authority corollary of respondeat superior consistent with Congress' intention that the antitrust laws "sweep broadly," whether or not the agent intends to benefit the principal. Id. at 573-74 & n.11. The Supreme Court also noted that Congress intended antitrust liability to apply to "[e]very person" which, under the antitrust laws, includes corporations and associations. Id. at 573 n.11.


155. Hydrolevel, 456 U.S. at 576 (citing RESTATEMENT (SECOND), supra note 31, § 217 C comment c). RICO is another special statute providing treble damages for injured plaintiffs. See supra notes 12-14 and accompanying text.

156. Markham & Meltzer, supra note 89, at 1120.

157. Rosenthal, 802 F.2d at 966; In re Big Red Commodity Corp., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,623, at 30,667 (CFTC June 7, 1985). Section 2(a)(1)(A) of the Commodity Exchange Act provides the following: The act, omission, or failure of any official, agent or any other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation,
common law rules of respondeat superior,\(^\text{158}\) there is no "good faith" shield to protect the FCM from liability for its agents’ or employees’ misdeeds.\(^\text{159}\) Section 2(a)(1)(A) expressly imputes an agent’s wrongful conduct to the principal under the CEA, even in the context of criminal sanctions.\(^\text{160}\)

Under the CEA, the liability of an FCM for the acts of its agents or employees is sustained almost as a matter of course.\(^\text{161}\) In fact, the CFTC has determined that FCMs are responsible for their employees’ compliance with applicable Commission and exchange

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159. See supra note 31 for a discussion of who may be considered an agent or employee of an FCM.


161. See Rosenthal, 802 F.2d at 966; see also In re Siegel Trading Co., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,905, at 31,360 (CFTC Nov. 21, 1984) (no knowledge or participation by FCM needed as CEA specifically imputes liability for violations by those acting for it) (citing Irving Weis & Co. v. Brannan, 171 F.2d 232, 235 (2d Cir. 1948)).


Interestingly, the constitutionality of a substantially similar section in another statute was upheld by the Supreme Court more than a decade before federal regulation of the commodity futures industry. See New York Cent. R.R., 212 U.S. at 496-97. See supra notes 77-78 and accompanying text for the history of federal regulation of the futures industry.
regulations including the provisions of the CEA. The more recent amendments to the CEA, moreover, supplement rather than displace the respondeat superior framework of section 2(a)(1)(A).

B. Potential Application of Respondeat Superior Under RICO

Courts are divided on the question of whether the doctrine of respondeat superior can be applied under civil RICO. This division stems in part from an underlying conflict concerning the sections of the Act under which the doctrine should be utilized. RICO defines the terms “person” and “enterprise” very broadly. “Person” encompasses “any individual or entity capable of holding a legal or beneficial interest in property,” while “enterprise” includes “any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” The underlying conflict involves the application of these terms in sections 1962(a) and 1962(c) of the Act; that is, whether the terms can be applied simultaneously to a single organization or corporation.

Section 1962(c) prohibits any person employed by or associated with any enterprise that affects interstate commerce from directly,
or indirectly, conducting or participating in such enterprise’s affairs through a pattern of racketeering activity.\textsuperscript{170} Virtually all courts which have considered whether the “enterprise” and the “person” in section 1962(c) may be the same entity have determined that the “enterprise” and the “person” must be distinct.\textsuperscript{171} The Eleventh Circuit’s ruling in United States v. Hartley\textsuperscript{172} is the only major decision to the contrary,\textsuperscript{173} notwithstanding the fact that a corporation, which is expressly included in the definition of “enterprise,”\textsuperscript{174} “obviously qualifies as a ‘person’ under RICO and may be subject to RICO liability.”\textsuperscript{175} Although the overwhelming majority of courts refuse to follow Hartley,\textsuperscript{176} some courts have recognized that had the Eleventh Circuit held otherwise, it would have allowed a corrupt organization to escape liability.\textsuperscript{177} A few decisions, including Hartley, have even suggested that redrafting the complaint

\begin{itemize}
  \item \textsuperscript{170} 18 U.S.C. § 1962(c) (1982). See supra note 28 for the full text of this provision.
  \item \textsuperscript{172} 678 F.2d 961 (11th Cir. 1982), \textit{cert. denied}, 459 U.S. 1170 (1983).
  \item \textsuperscript{173} See id. at 988. In Hartley, a corporation perpetrated various frauds against the federal government through agents which included a vice president, a plant manager, and low level employees. See \textit{id.} at 965-67. Despite the defendants’ complaints of an “emasculation” of § 1962(c), \textit{id.} at 988 n.43, the court held that a corporation may simultaneously fulfill the roles of the defendant (“person”) and the enterprise under that section. \textit{Id.} at 988-90. The court of appeals, recognizing that under ordinary principles of corporate liability (respondeat superior) a company is liable for the acts of its agents and employees, \textit{id.} at 988 n.43, was incredulous that the individuals associated with a corporation could be prosecuted under RICO, but that the corporation or enterprise could not. See \textit{id.} at 989.
  \item \textsuperscript{174} See supra notes 17, 169 and accompanying text for the definition of “enterprise.”
  \item \textsuperscript{175} Haroco, 747 F.2d at 401; see Rogers, 834 F.2d at 1306; see also RICO § 1961(3), 18 U.S.C. § 1961(3) (1982) (“person” is individual or entity capable of holding an interest in property). See \textit{generally} \textit{D. del. Code Ann. tit. 8, §§ 122(2), 122(4) (1983)} (former section granting corporation power to sue and be sued in all courts, and latter enabling a corporation to own, use or otherwise deal in or with real or personal property, or any interest therein, wherever situated); N.Y. Bus. Corp. Law §§ 202(2), 202(4) (McKinney 1986) (same).
  \item \textsuperscript{176} See supra note 171 and accompanying text.
  \item \textsuperscript{177} See Enright Ref. Co., 751 F.2d at 633; see also Haroco, 747 F.2d at 401.
against the company\textsuperscript{178} or charging the company under section 1962(a)\textsuperscript{179} would have harmonized the result in that case with the majority view.\textsuperscript{180}

The latter suggestion that a corporation may be properly charged as both the "person" and the "enterprise" under section 1962(a) has been adopted in five circuits\textsuperscript{181} and rejected in one.\textsuperscript{182} Courts outside those circuits have likewise split on the issue.\textsuperscript{183} Section 1962(a) makes it unlawful for any person who directly or indirectly received any income from a pattern of racketeering activity to directly, or indirectly, use or invest any part of that income to acquire any interest in, establish, or operate any enterprise affecting interstate commerce.\textsuperscript{184} The courts which permit the culpable person and enterprise to be the same entity under section 1962(a) do so in order to hold the corporation liable when it is the "perpetrator" of the illegal activity;\textsuperscript{185} that is, when "corporate agents engage in a pattern of racketeering activity\textsuperscript{186} redounding to the benefit of the corporation."\textsuperscript{187}

\textsuperscript{178} See Hartley, 678 F.2d at 989.
\textsuperscript{179} See Haroco, 747 F.2d at 401 n.18.
\textsuperscript{180} See Enright Ref. Co., 751 F.2d at 633.
\textsuperscript{181} See Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1307 (7th Cir. 1987) (citing Masi v. Ford City Bank & Trust Co., 779 F.2d 397, 401-02 (7th Cir. 1985)); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213-14 (10th Cir. 1987); Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1360-61 (3d Cir. 1987); Wilcox v. First Interstate Bank, 815 F.2d 522, 529 (9th Cir. 1987) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986)); Schofield v. First Commodity Corp., 793 F.2d 28, 31-32 (1st Cir. 1986).
\textsuperscript{186} See supra notes 16-27 and accompanying text for the content of this element of RICO.
\textsuperscript{187} Haroco, 747 F.2d at 401.
Courts which require the person and the enterprise to be distinct from one another refuse to impose treble damage liability upon a corporation for the misdeeds of its lower level employees, especially when it is merely the "instrument" or "victim" of the wrongful activity. In such instances, "no salutary remedial purpose would be served by attributing the conduct of an individual involved in the pattern of racketeering activity to the individual or entity playing the role of the enterprise." These competing interests were neatly balanced in the leading Seventh Circuit opinion in *Haroco v. American Nat'l Bank & Trust Co.* The use of the terms "employed by" and "associated with" [in section 1962(c)] appears to contemplate a person distinct from the enterprise. As we read subsection (c), the "enterprise" and the "person" must be distinct. However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator. As we parse subsection (a), a "person" (such as a corporation-enterprise) acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity if the person uses the income in the establishment or operation of an enterprise affecting commerce. Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it.

In short, the language of section 1962(a) permits corporations to serve as both the RICO person and the RICO enterprise. Although a literal reading of RICO tracks the Supreme Court's scrutiny of

188. *Id.*; see infra notes 202-07 and accompanying text.
191. *Id.* at 400-02 (footnote omitted) (emphasis added and in original); see also *Schofield*, 793 F.2d at 31 ("[t]he language in section 1962(a) does not require a relationship between the person and the enterprise as does section 1962(c), and so it does not require the involvement of two separate entities").
192. *Schofield*, 793 F.2d at 32; see *supra* note 181 and accompanying text.
the Act, other courts equate the two subsections rather than contrast them. These tribunals have found, "in light of the identical terminology" used in each subsection, "if it is inappropriate to plead [the same] identity in [section] 1962(c), it is then inappropriate to plead it under section 1962(a)."

Courts are likewise at odds over the applicability of the respondeat superior doctrine under sections 1962(a) and 1962(c). Two basic arguments have been posited against using the doctrine to impose RICO liability under section 1962(c). The first argument emanates from a plain reading of the section—the application of respondeat superior renders section 1962(c) moot because such application controverts the section’s language. In other words, the doctrine should not be used "to accomplish an end-run around [the] required distinction between [the] person and [the] enterprise under section 1962[(c)]." Thus an attempt to hold the corporation-enterprise

193. Masi, 779 F.2d at 402; see supra notes 44-45, 50 and accompanying text.
194. See, e.g., Computer Sciences, 689 F.2d at 1190 ("[w]e conclude that 'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit"). As another court stated:
One can interpret the lack of a required nexus between person and enterprise in section 1962(a) to indicate the need for a more distinct pleading of enterprise and statute violator because the statute contemplates an enterprise which can be entirely unrelated to the predicate acts. . . . [A] section 1962(a) "enterprise" can be the bounty purchased with the racketeering profits, the entity used to "launder" the ill-gotten gains.
Rush, 628 F. Supp. at 1197.
195. Schofield, 793 F.2d at 31.
198. See Schofield, 793 F.2d at 32; see also Rogers, 834 F.2d at 1306-07.
199. Rush, 628 F. Supp. at 1194; see Haroco, 747 F.2d at 401 n.18. See supra notes 167-96 and accompanying text for a discussion of the person/enterprise dichotomy.
liable under section 1962(c) by applying the doctrine of respondeat superior would circumvent the section, accomplishing indirectly what it denies directly. The second argument, based on policy considerations, reflects a reluctance to allow lower corporate employees to thrust treble damage liability on a "wholly unwitting" corporation. To impose such liability on a company for the alleged misconduct of its lower level employees when the company is an "instrument" or "victim" of their racketeering activity, it is argued, would be an obvious distortion of the Act. Because the "person" who is answerable under RICO must have been actively engaged in the pattern of racketeering activity, an anomalous result of RICO liability would be inflicted upon corporations which serve merely as "conduits" of that activity. Moreover, even if companies willfully failed to supervise their employees, such inaction would not amount to a knowing or intentional participation by the corporations in their employees' racketeering activities. In short, the civil liability of corporations under RICO should be based on their knowing or intentional participation in the illicit acts, not mere negligence or recklessness.

In Hartley, however, the Eleventh Circuit stated:

Since a corporation is liable for the acts of its agents and employees, it permits an employee's activities to serve as proof of the two predicate acts required by section 1962(c). This is simply a reality to be faced by corporate entities. With the advantages of incorporation, must come the [attendant] responsibilities.

Other courts, following the lead of the Supreme Court in American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., have stated

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201. Schofield, 793 F.2d at 33.
203. See supra notes 188-89 and accompanying text.
205. Dakis, 574 F. Supp. at 760.
207. Id.
209. See supra notes 19-25 and accompanying text for a discussion of predicate acts under RICO usually committed in the course of commodities fraud.
210. Hartley, 678 F.2d at 988 n.43.
that when a federal statute, such as RICO, imposes civil liability upon those persons who violate its provisions, normal rules of agency law apply absent evidence of contrary congressional intent.\textsuperscript{212} Thus some courts have found the twin doctrines of apparent authority and respondeat superior wholly applicable against corporations under section 1962(c).\textsuperscript{213} Again, the use of respondeat superior principles under section 1962(c) has been criticized as ostensibly obliterating the person/enterprise distinction required under the section.\textsuperscript{214} This criticism is based on the belief that, because the culpable "person" and the "enterprise" must be separate entities under section 1962(c), applying the doctrine to hold the corporation-enterprise liable would circumvent both the language and design of the section.\textsuperscript{215}

Courts have determined, however, that a corporation's liability for the acts of its employees or agents is amply provided for in section 1962(a), under which the person and the enterprise need not be distinct.\textsuperscript{216} Accordingly, such courts find that companies can be susceptible to RICO damages if their actions or policies permit the racketeering activity that RICO was designed to deter.\textsuperscript{217} In short, when the fruits of that activity accrue to a corporation-enterprise, that enterprise may then be reached under section 1962(a).\textsuperscript{218} Moreover, while such company's use of the illicit proceeds

\textsuperscript{212} See Connors, 666 F. Supp. at 453; Tryco, 634 F. Supp. at 1334; see also Morley, 610 F. Supp. at 811 (respondeat superior, normally applicable in criminal realm, is equally applicable in either criminal or civil RICO cases).

\textsuperscript{213} See supra note 197.


\textsuperscript{215} American Nat'l Bank, 647 F. Supp. at 1032; see supra notes 198-201 and accompanying text.

\textsuperscript{216} American Nat'l Bank, 647 F. Supp. at 1032; see Rogers, 834 F.2d at 1306-07; Petro-Tech, 824 F.2d at 1360; Serv-Well, 806 F.2d at 1398; Haroco, 747 F.2d at 401 n.18. See supra notes 181-96 and accompanying text for a discussion of the person/enterprise dichotomy under § 1962(a) of RICO.

\textsuperscript{217} The First Circuit agreed that corporations should not escape liability when their actions or policies allow the type of racketeering activity outlawed by RICO, although such companies could not be reached under § 1962(c). Schofield, 793 F.2d at 33. The court relied on § 1962(a), however, to demonstrate that its restrictive reading of § 1962(c) does not insulate corporations from all liability. Id. at 31 n.2.

\textsuperscript{218} See Rogers, 834 F.2d at 1306; Petro-Tech, 824 F.2d at 1361; Serv-Well, 806 F.2d at 1398; American Nat'l Bank, 647 F. Supp. at 1033; B.F. Hirsch, Inc. v. Enright Ref. Co., 617 F. Supp. 49, 52 (D.N.J. 1985). See supra note 50 for courts which require plaintiffs to prove that they were injured by corporations' use or investment of racketeering income.
will rarely harm the plaintiff directly, the plaintiff's loss is necessarily linked to the enterprise's gain.\textsuperscript{219} It is therefore argued that the doctrine of respondeat superior can promote the legitimate reach and express language of section 1962(a) when the doctrine is mustered against corporations that profit from their agents' racketeering activities.\textsuperscript{220}

IV. Futures Commission Merchants Under Civil RICO

The commodity futures industry substantially affects the nation's commerce.\textsuperscript{221} The expanding federal regulation of the industry under the CEA, which has progressively protected customers, demonstrates the importance of futures markets to that commerce.\textsuperscript{222} In regulating the futures industry and its participants, the CEA regulates futures commission merchants who typically maintain fiduciary relationships with their customers.\textsuperscript{223}

Under the CEA, FCMs are held strictly liable for the acts or omissions of their agents and employees.\textsuperscript{224} The CEA expressly states, however, that nothing contained in it shall supersede or limit the jurisdiction of any federal or state court.\textsuperscript{225} Because corporations can act only through their agents and employees,\textsuperscript{226} corporations are usually held responsible for the misconduct of their agents or employees under federal and state law.\textsuperscript{227} FCMs profit either directly

\begin{itemize}
\item \textsuperscript{219} American Nat'l Bank, 647 F. Supp. at 1033.
\item \textsuperscript{220} See Rogers, 834 F.2d at 1306-07; Petro-Tech, 824 F.2d at 1360-61; Serv-Well, 806 F.2d at 1398; Haroco, 747 F.2d at 401 n.18; American Nat'l Bank, 647 F. Supp. at 1033; see also Abelson v. Strong, 644 F. Supp. 524, 534 (D. Mass. 1986) ("a corporation's responsibility for the acts of its agents should be determined under § 1962(a)"); Ghouth v. Conticommodity Servs., Inc., 642 F. Supp. 1325, 1330 (N.D. Ill. 1986) (although plaintiff was not necessarily relying on respondeat superior, even if FCM's agent was the sole actor, FCM could be directly liable as it profited from fraud); Dunham v. Independence Bank, 629 F. Supp. 983, 990 n.8, 991 (N.D. Ill. 1986) (activities of employee attributable to bank in straight respondeat superior terms; bank could be held liable under § 1962(a) of RICO). But see Onesti v. Thomson McKinnon Sec., Inc., [1986-1987 Transfer Binder] RICO Bus. Disp. Guide (CCH) ¶ 6,557, at 6,746 (N.D. Ill. 1987) (WESTLAW, DCT database) (respondeat superior inapplicable in § 1962(a) cases). Indeed, "so long as the enterprise does in fact benefit from the racketeering activity challenged, there is no reason why ... an injured third party may not recover from the enterprise." Petro-Tech, 824 F.2d at 1361.
\item \textsuperscript{221} See supra notes 77-82, 121-25 and accompanying text.
\item \textsuperscript{222} See supra notes 83-120 and accompanying text.
\item \textsuperscript{223} See supra note 31 and accompanying text.
\item \textsuperscript{224} See supra notes 157-65 and accompanying text.
\item \textsuperscript{225} See supra note 109 and accompanying text.
\item \textsuperscript{226} See supra notes 143-45 and accompanying text.
\item \textsuperscript{227} See supra notes 142-56 and accompanying text.
\end{itemize}
or indirectly from the usual misconduct (fraud) perpetrated by their employees and agents against customers. Such fraud inevitably involves the use of the mails or wires, thereby giving rise to RICO's jurisdiction.

As Congress has expressly directed that RICO be construed broadly, a fair reading of section 1962(a) allows a corporation, even a "legitimate" one, to assume the roles of both the culpable "person" and the "enterprise." Corporations, therefore, may appropriately incur civil RICO liability for the racketeering activity of their agents or employees in section 1962(a) cases. Thus, if the requisites of the Act are met, FCMs should be subject to RICO liability and its attendant treble-damages provision. Legally and rationally, such a result appears to be sound.

As a practical matter, however, the result seems outrageous. For example, courts have noted with disbelief that a plaintiff suing under the securities laws may receive one-third the damages of a plaintiff suing under RICO for essentially the same injury. Undoubtedly, some courts are reluctant to allow a "racketeering" statute to operate against respected or legitimate businesses; nonetheless, both the plain language and legislative history of RICO clearly contemplate such a result. Two substantive arguments can

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228. See supra note 8 and accompanying text.
229. See supra note 25 and accompanying text.
231. See supra notes 73-76 and accompanying text.
232. See supra notes 50-58 and accompanying text; see also Moran, supra note 51, at 732 n.6 (mentioning courts' aversion to the use of RICO against legitimate businesses).
233. See supra notes 181-92 and accompanying text. A constricted reading of § 1962(a) serves only to contort it. One district court respecting Fourth Circuit precedent, for instance, declined to allow the culpable person and enterprise to be the same entity. See Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 609 F. Supp. 1055, 1064-65 (D. Md. 1985). The court nonetheless refused to dismiss the complaint against the brokerage firm (the "person") because the firm and its employees via an association in fact constituted an appropriate "enterprise" under RICO. Id. at 1065. The court (and the plaintiffs) could have expended less energy and imagination by simply including the brokerage firm within the definitions of "enterprise" and "person" under § 1962(a). A narrow reading of § 1962(a), moreover, may literally insulate corporations from the Act's reach. Schofield, 793 F.2d at 32; see supra note 50 and accompanying text.
234. See supra notes 197-220 and accompanying text.
235. See supra notes 12-32 and accompanying text for the requisites of RICO in commodity cases.
236. See supra note 14 for RICO's treble-damages provision.
238. Moran, supra note 51, at 732-33 & n.6; see supra notes 43-76 and accompanying text.
be raised, however, against using section 1962(a) to reach futures commission merchants. The first emanates from the face of section 1962(a) of RICO; the second from the language of section 22 of the CEA.

A. The "Principal" Requirement in Section 1962(a)

Section 1962(a) makes it unlawful for any person to receive any income directly or indirectly derived from a pattern of racketeering activity "in which such person has participated as a principal within the meaning of section 2, title 18, United States Code." to directly or indirectly use or invest any part of such income, or the proceeds thereof, in the establishment or operation of any enterprise affecting interstate commerce.239 Cognizant that the RICO "person" includes both individuals and entities,240 section 2 of title 18 of the United States Code provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.241

Thus, section 1962(a) seems to require some active participation by the defendant in the racketeering activity, not just passive acceptance of illicit income derived from that activity.242

As originally proposed in Congress, section 1962(a) did not require that the offender be considered a principal in the unlawful activity.243 The section could, therefore, have been misused against innocent recipients of illicit funds such as shareholders, operators and other employees of a "legitimate" enterprise who received the income in the form of dividends or salaries.244 In response to a request by the Senate Subcommittee on Criminal Laws and Procedures for

240. See supra notes 15, 167-68, 174-75 and accompanying text.
242. See Misapplication, supra note 144, at 596.
comments on the pending legislation, the Justice Department opined that section 1962(a) would suffer from vagueness problems. The department also feared that the section could be construed too narrowly, paring its usefulness to the point of redundancy in light of other federal statutes. To prevent such misapplication of section 1962(a), the phrase requiring the defendant to participate as a principal within the meaning of section 2 of title 18 of the United States Code was added.

As one court has noted, the "principal" limitation was included in section 1962(a) to clarify that its substantive offenses did not pertain to legitimate businessmen. The court did not, and indeed, could not, state that the section did not apply to legitimate businesses—plaintiffs utilize RICO against all types of businesses. In fact, before the Supreme Court decided United States v. Turkette, a few courts had concluded that section 1962(a) applied only to legitimate businesses. Because a company or business acts solely through its agents or employees, liability under section 1962(a) is predicated upon the racketeering acts of the corporation's employees or agents in which the corporation, through such agents or employees, becomes a principal for purposes of the section.

Congress obviously envisioned this result. Two provisions from an earlier bill were incorporated into the final RICO Act: the "principal" requirement in section 1962(a) and the treble damage civil remedy provided in section 1964(c). Section 2(a) of the earlier bill limited liability to a person who directly or indirectly received income from any criminal activity "in which such person has participated as a principal within the meaning of section 2, title 18, United States Code." Section 2(b) of that same bill also provided:

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245. See Measures, supra note 243, at 404.
246. See id. at 405-06.
247. See id. at 406.
248. See id. at 405-06.
249. See Loften, 518 F. Supp. at 851.
250. See supra notes 33-35 and accompanying text.
252. Tarlow, supra note 244, at 315-16.
253. See supra notes 143-45 and accompanying text.
254. See supra notes 216-20 and accompanying text; infra notes 255-70 and accompanying text.
Whoever, being a director, officer, or agent of a corporation who has authorized, ordered, or performed any act which constitutes in whole or in part a violation of subsection (a) by such corporation, shall be guilty of a misdemeanor and shall be fined not more than $5,000 or imprisoned not more than one year, or both.\textsuperscript{257}

Notwithstanding the language addressing section 2 of title 18 of the United States Code, Congress therefore, undoubtedly recognized that the illegal actions of a company's agent could cause that company to violate the strictures of RICO if the corporation received the forbidden fruits of those actions. The final form of section 1962(a), moreover, deleted the word "knowingly" before the phrase "received any income," thus impliedly nullifying scienter on the part of the "person" in receipt of income derived from a pattern of racketeering activity.\textsuperscript{258}

Whether cast as "apparent authority,"\textsuperscript{259} respondeat superior,\textsuperscript{260} or "direct liability,"\textsuperscript{261} the impact of section 1962(a) remains unchanged: The corporation which directly or indirectly benefits from a pattern of racketeering activity is subject to RICO's treble damages.\textsuperscript{262} Without a tangible monetary gain "redounding to the benefit of the corporation,"\textsuperscript{263} a company could not be held answerable under section 1962(a) because the section requires the defendant-company to receive and use or invest the illicit income, or the proceeds thereof, in that company's establishment or operation.\textsuperscript{264}

Since the defendant-corporation must accept such illicit income, section 1962(a) also requires that the plaintiff demonstrate the nature, source and disposition of those funds consumed by that enterprise.\textsuperscript{265} This additional burden could easily be surmounted by a commodity futures customer. Futures commission merchants, whether they want

\begin{footnotes}
\item[257] Id. at 40.
\item[259] See supra notes 134-47 and accompanying text.
\item[260] See supra notes 126-56 and accompanying text.
\item[261] See Schofield, 793 F.2d at 32 & n.3; see also Ghouth, 642 F. Supp. at 1330-31 (FCM allegedly directly involved in fraud).
\item[262] See supra notes 185-91, 216-20 and accompanying text.
\item[263] Haroco, 747 F.2d at 401.
\item[265] See Schofield, 793 F.2d at 31 n.2; Kirschner v. Cable/Tel Systems Corp., 576 F. Supp. 234, 242 (E.D. Pa. 1983); Moran, supra note 51, at 777-78 n.256; Tarlow, supra note 244, at 321; Misapplication, supra note 144, at 596.
\end{footnotes}
to or not, consistently reap the "rewards" of their agents' or employees' frauds in the forms of commissions or interest income.  

Perhaps this is one reason why Congress has held FCMs strictly liable for their employees', or agents', violations of the CEA since the inception of federal regulation of the commodity futures industry.  

By acquiring illicit commissions or interest income based on those commissions, an FCM may violate section 1962(a) because it is directly or indirectly receiving income derived from a pattern of racketeering activity perpetrated by its agents or employees and using that income in its operation.  

A customer could easily trace the ill-gotten gains of an FCM on the basis of the number of transactions, the commission rates charged, and applicable interest rates. Even outside the commodity futures industry, such tracing has not generally encumbered the prosecution of a section 1962(a) claim. Indeed, use by an enterprise of any amount of income derived from RICO's unlawful activities, even "to purchase janitorial supplies," may violate the section.  

If the acts of the FCM's agents or employees are not, as they should be, considered the acts of the FCM sufficient to make the FCM a principal, a breach by the FCM of its fiduciary duty toward its customers may be enough. This fiduciary duty arises out of the FCM-customer relationship. Accordingly, the CFTC has promulgated numerous regulations to minimize the opportunity for an

266. See supra note 8 and accompanying text.  
267. See supra notes 157-65 and accompanying text.  
269. See Tarlow, supra note 244, at 321; see also United States v. McNary, 620 F.2d 621, 629 (7th Cir. 1980) (allegation of indirect investment of proceeds of racketeering activity into enterprise is sufficient); see, e.g., Ford City Bank, 779 F.2d at 399 (bank withdrew $11,208.31 from depositor's account).  
270. Tarlow, supra note 244, at 316.  
271. See supra note 31 and accompanying text.  
273. See supra note 31 for a thorough discussion of the FCM-customer relationship.
FCMs to breach that duty,\textsuperscript{274} including a regulation which requires FCMs to diligently supervise the "activities of its partners, officers, employees and agents."\textsuperscript{275}

Courts have recognized liability under section 2 of title 18 of the United States Code where the "principal" has an affirmative duty to act and fails to take such action.\textsuperscript{276} Under RICO, moreover, a defendant's complicity in one type of unlawful activity regarding the operations of the enterprise can make that defendant answerable for other unlawful actions about which it has no knowledge or responsibility.\textsuperscript{277} FCMs have a duty and a responsibility to protect their customers from fraud perpetrated by their employees or agents.\textsuperscript{278} Thus, an FCM's acquiescence to a particular unlawful act or its failure to protect its customers could render the company a principal for purposes of section 1962(a) of RICO.\textsuperscript{279}

The primary shield raised by futures commission merchants and other organizations is \textit{Parnes v. Heinold Commodities, Inc.}\textsuperscript{280} In \textit{Parnes}, the court protected the defendant from RICO liability for the fraud committed by two of its floor brokers acting under their apparent authority.\textsuperscript{281} The court observed that principles of respondeat superior, "perhaps permissible to establish ordinary civil liability, would be bizarre indeed as a means to warp the facts alleged in this case into the RICO mold."\textsuperscript{282} The court thus refused to allow "malfeactors at a low corporate level [to] thrust treble damage liability on a wholly unwitting corporate management and shareholders."\textsuperscript{283} The court does not appear to have taken into consideration, however, the special relationship between an FCM and its customers,\textsuperscript{284} as well as established jurisprudence concerning apparent authority.\textsuperscript{285}

\textsuperscript{274} See \textit{supra} note 31 for pertinent CFTC regulations.
\textsuperscript{275} CFTC Reg. \S 166.3, 17 C.F.R. \S 166.3 (1987).
\textsuperscript{276} See \textit{Local 560}, 780 F.2d at 284.
\textsuperscript{277} See United States v. Melton, 689 F.2d 679, 684 (7th Cir. 1982) (quoting United States v. Elliot, 571 F.2d 880, 902 (5th Cir.), \textit{cert. denied}, 439 U.S. 953 (1978)).
\textsuperscript{278} See \textit{supra} notes 8, 31, 157-65 and accompanying text.
\textsuperscript{279} Cf. \textit{Roche}, 658 F. Supp. at 318 n.5 (FCM's employees committed fraud through their association with FCM); \textit{Ghouth}, 642 F. Supp. at 1330 (FCM may have authorized employee's fraudulent actions from which it profited).
\textsuperscript{280} 548 F. Supp. 20 (N.D. Ill. 1982).
\textsuperscript{281} See \textit{id}.
\textsuperscript{282} \textit{Id.} at 24 n.9.
\textsuperscript{283} \textit{Id}.
\textsuperscript{284} See \textit{supra} note 31 and accompanying text; \textit{infra} notes 286-301 and accompanying text.
\textsuperscript{285} See \textit{supra} notes 134-47 and accompanying text; \textit{infra} notes 302-12 and accompanying text.
Both the courts and the Commodity Futures Trading Commission have recognized that a futures commission merchant, through its employees and agents, "engages for pay in the solicitation and acceptance of customers' orders, in the handling of customers' funds, or in the furnishing of trading advice, and thereby is placed in a position of trust and confidence vis-a-vis its customers."286 Thus the courts and the Commission have made clear that FCMs and their agents stand in a fiduciary relationship to those customers on whose behalf they act.287 Accordingly, both the courts and the CFTC have consistently held FCMs to a high standard of care and duty which arises out of FCMs' fiduciary relationships with their customers.288

The Commodity Exchange Act, moreover, makes FCMs wholly responsible for both the acts and omissions of their employees and agents.289 This strict respondeat superior liability is regularly enforced against futures commission merchants290 with good reason—individual agents who deal with customers represent those customers' only direct contact with FCMs in most instances.291 The entire nature of an FCM's business—the solicitation, acceptance, and handling of customer accounts for profit—is performed through its agents and employees.292 Even the court in Parnes recognized that the defendant had over 100 branch offices in the United States through which its employees or agents handled customer accounts.293 For "malefactors

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287. See supra note 286.

288. See supra notes 8 and 31 for a discussion of FCMs' duties relating to customers.


290. See supra note 162 and accompanying text.

291. See supra notes 31, 286 and accompanying text.

292. See id.

293. Parnes, 548 F. Supp. at 21 n.3. Interestingly, the defendant did not hesitate to bring a RICO action against its own agent. See Heinold Commodities, Inc. v. Elliott & F.J.E. Trading Co., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,566 (N.D. Ill. 1987) (WESTLAW, DCT database). In Elliott, F.J.E. Trading Company agreed to manage a branch office of the plaintiff in Texas to solicit commodity futures and options brokerage business exclusively on behalf of the plaintiff. Id. ¶ 23,566, at 33,480. The agreement further provided that F.J.E. would receive 45% of the commissions charged by the plaintiff for customer trades. See id. at 33,480-81. If the plaintiff can utilize RICO to recover the losses it suffers as a result of its employee's or agent's fraudulent activities, should the same remedy be denied its customers whose business was solicited exclusively on its behalf by its agent?
at a low corporate level,'" these agents are bestowed with the high level of responsibility of dealing directly with the customer and his hard-earned money as representatives of the futures commission merchant.

Moreover, the "wholly unwitting" FCM utilizes the monies obtained from its agents' handling of customers' accounts whether those accounts are handled honestly or fraudulently. Professor G. Robert Blakey, the primary drafter of RICO, has commented that the Parnes court incorrectly construed RICO. The fact that the defendant inevitably earned commissions when its employees acted under their apparent authority to continuously defraud customers "make the agency not a 'victim,' but a [principal], which hardly casts the agency in a sympathetic role."

The apparent authority rule, well-settled within the federal court system, provides further support for the use of RICO against FCMs. The typical commodity frauds perpetrated against customers by employees or agents of FCMs which become answerable under RICO epitomize the rationale behind the rule: The agent's position enables him to defraud the customer because, in the eyes of that person, the employee still appears to be acting within the ordinary course of the duties entrusted to him by the FCM. Futures commission merchants, just like other corporations, act only through their agents and employees. When the act of an employee or agent

295. See supra notes 8, 31, 286 and accompanying text; see also Parnes, 548 F. Supp. at 21-22 (defendant's two employees solicited customer to open account; made misrepresentations to him; traded his account without authorization; and concealed extent of his losses).
297. See supra notes 8, 268 and accompanying text; see also Ghouth, 642 F. Supp. at 1330 (FCM charged customer commissions for unauthorized trades thereby profiting from its agent's misconduct); Parnes, 548 F. Supp. at 21-22 (although amount of commissions defendant received from its employees' fraud is not mentioned, customer suffered over $35,000 in losses as result of that fraud).
298. Moran, supra note 51, at 742 n.51.
299. See Blakey, supra note 51, at 323 n.179.
300. See supra notes 280-81, 294-97 and accompanying text.
301. Blakey, supra note 51, at 323 n.179; see also Roche, 658 F. Supp. at 321 (FCM that was perpetrator or beneficiary of its agents' racketeering activity may be both enterprise and culpable person under § 1962(a) of RICO).
302. See supra notes 134-39 and accompanying text.
303. See supra notes 138-39 and accompanying text; see also Parnes, 548 F. Supp. at 23 (employees were conducting themselves within the scope of their authority). See supra note 8 for the typical commodity fraud perpetrated by FCMs' employees or agents against customers.
304. See supra notes 31, 292-95 and accompanying text.
is within the scope of his employment or apparent authority, the FCM should, like any other company, be legally responsible for that act even under RICO.\textsuperscript{304} Given that, under federal law, corporations have been held criminally liable for the acts of their agents or employees,\textsuperscript{306} should FCMs—or other organizations for that matter—be protected from civil RICO liability merely because the penalty is treble damages?\textsuperscript{307}

The Supreme Court has already declined to grant protection from such a penalty. One month after \textit{Parnes} was decided,\textsuperscript{308} the Court affirmed treble-damages liability against a non-profit organization for its agents’ violations of federal antitrust laws, although the organization itself derived no benefit whatsoever from its agents’ anticompetitive actions.\textsuperscript{309} Thus the apparent authority rule imposes even treble damages on the entity which is, after all, best situated to prevent unlawful actions occurring through its employees’ or agents’ positions in that organization.\textsuperscript{310} In short, the apparent authority doctrine simply implements congressional intention that private litigants utilize rights of action provided by statutes to deter violations of the law.\textsuperscript{311}

\begin{itemize}
\item \textsuperscript{305} See supra notes 142-54 and accompanying text.
\item \textsuperscript{306} See supra notes 148-52 and accompanying text.
\item \textsuperscript{307} See Blakey, supra note 51, at 323 n.179.
\item \textsuperscript{309} See \textit{Hydrolevel}, 456 U.S. at 573-79.
\item \textsuperscript{310} See \textit{id.} at 572-73. The Supreme Court also noted in \textit{Hydrolevel} that the apparent authority rule comports with Congress’ desire that the antitrust laws sweep broadly. \textit{Id.} at 573 n.11. To illustrate this point, the Court highlighted that “Congress extended antitrust liability to ‘[e]very person,’ . . . and defined ‘person’ to include corporations and associations.” \textit{Id.} (citations omitted). Similarly, Congress expressly directed a broad construction of RICO. See supra note 74 and accompanying text. RICO, moreover, applies to and may be used by “any person,” under which definition a corporation also qualifies. See RICO §§ 1962, 1964(c) (1982); \textit{supra} notes 12-18, 174-75 and accompanying text.
\end{itemize}

In fact, the Court’s observations about the antitrust laws in \textit{Hydrolevel} are strikingly similar to comments made about RICO. Compare \textit{Hydrolevel}, 456 U.S. at 572 & n.10 (citations omitted) (emphasis in original) (“principal purpose of the antitrust private cause of action . . . is, of course, to deter anticompetitive practices. . . . Congress created the treble-damages remedy . . . precisely for the purpose of encouraging \textit{private} challenges to antitrust violations”) with \textit{Alcorn County v. United States Interstate Supplies, Inc.}, 731 F.2d 1160, 1165 (5th Cir. 1984) (“the provision for attorney’s fees in section 1964(c) was intended by Congress, like the provision
Finally, only FCMs "can take systematic steps to make improper conduct on the part of all [their] agents unlikely, and the possibility of civil [RICO] liability will inevitably be a powerful incentive for [FCMs] to take those steps." The requirement that a person participate as a principal in the pattern of racketeering activity from which that person directly or indirectly receives income, therefore, should not bar the operation of section 1962(a) against futures commission merchants.

B. The "Exclusive Remedy" Provision in Section 22 of the CEA

The 1982 amendments to the CEA, enacted after the Supreme Court supported an implied private right of action under the statute, expressly provide that any person who violates the CEA shall be liable for actual damages to the plaintiff caused by such violation. Congress stated that the rights of action authorized by subsection 25 (section 22 of the CEA) and by sections 7a(11) (exchange arbitrations),


312. Hydrolevel, 456 U.S. at 572.
313. See supra notes 110-20 and accompanying text.
314. See supra notes 106-09 and accompanying text.
315. See supra note 111 and accompanying text.
316. CEA § 5a(11) requires exchanges to provide "a fair and equitable procedure through arbitration . . . for the settlement of customers' claims and grievances against any member [of an exchange] or employee thereof. . . ." 7 U.S.C. § 7a(11) (1982). The $15,000 damages limitation on arbitrable controversies, supra note 98 and accompanying text, has been deleted from the section. See 7 U.S.C. § 7a(11) (1982).

Only recently, the Supreme Court determined that RICO claims are arbitrable if the underlying agreement provides for arbitration as a means for the resolution of disputes. Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332, 2335, 2345-46 (1987).


The Commodity Futures Trading Commission has promulgated regulations pertaining to arbitration. See CFTC Reg. §§ 180.1-180.5, 17 C.F.R. §§ 180.1-180.5 (1987). The Commission permits industry professionals, supra note 31, to enter into arbitration agreements with a customer provided that the customer's signature on such an agreement is not imposed as a condition precedent to the customer's utilization of the professionals' services. See CFTC Reg. § 180.3(b), 17 C.F.R. § 180.3(b) (1987). Moreover, the arbitration agreement must be endorsed separately and apart from the other provisions of the customer's agreement with the professional. See id. The arbitration agreement must also contain certain language printed in large boldface type:

Three forums exist for the resolution of commodity disputes: civil court
litigation, reparations at the Commodity Futures Trading Commission (CFTC) and arbitration conducted by a self-regulatory or other private organization.

The CFTC recognizes that the opportunity to settle disputes by arbitration may in some cases provide many benefits to customers, including the ability to obtain an expeditious and final resolution of disputes without incurring substantial costs. The CFTC requires, however, that each customer individually examine the relative merits of arbitration and that your consent to this arbitration agreement be voluntary.

By signing this agreement, you: (1) may be waiving your right to sue in a court of law; and (2) are agreeing to be bound by arbitration of any claims which you or [name] may submit to arbitration under this agreement. . . . You need not sign this agreement to open an account with [name]. See 17 C.F.R. 180.1-180.5.

CFTC Reg. § 180.3(b)(6), 17 C.F.R. § 180.3(b)(6) (1987). The plain language of the regulations and the CEA demonstrate that these regulations apply to any dispute arising out of commodity futures trading, including non-CEA claims. See Felkner v. Dean Witter Reynolds, Inc., 800 F.2d 1466, 1468-69 (9th Cir. 1986). Thus, by signing the arbitration agreement, the customer will likely be unable to litigate his RICO claim in federal court.

This author recommends Exchange arbitration proceedings as the best means through which a customer may receive a prompt, relatively inexpensive and fair resolution of his dispute or claim. As an employee of the New York Cotton Exchange, this author observed the impartiality, personal integrity and dedication of both the members of the Exchange’s Arbitration Committee and the staff. These same characteristics are likely to be found in the arbitrators and staff of other exchanges as well. Lastly, this author is both honored and gratified to have been affiliated with the men and women of the New York Cotton Exchange and Mound, Cotton & Wollan, the Exchange’s outside counsel.

317. Under the CEA, the word “person” includes individuals, associations, partnerships, corporations and trusts. CEA § 2(a)(1)(A), 7 U.S.C. § 2 (1982). Section 14 of the CEA, “Reparations Procedure,” grants the CFTC authority to hear customer complaints against persons registered under the Act. 7 U.S.C. § 18 (1982); see supra note 99 and accompanying text. In conjunction with Part 12 of the CFTC’s regulations pertaining to reparations codified at 17 C.F.R. §§ 12.1-12.408, the section simply provides that any person who wishes to complain of any violation of the CEA or any rule, regulation or order thereunder committed by any person registered under the Act “may, at any time within two years after the cause of action accrues, apply to the CFTC for an order awarding actual damages proximately caused by such violation.” CEA § 14(a), 7 U.S.C. § 18(a) (1982).


the application of RICO because the predicate acts necessary to establish RICO jurisdiction—mail or wire fraud—are intertwined with violations of the CEA\textsuperscript{320} which already prescribes the claimant's exclusive remedies.

The language of the CEA itself, however, refutes such an argument. The Act unequivocally sets forth that nothing in it "shall supersede or limit the jurisdiction conferred on courts of the United States or any State."\textsuperscript{321} This provision was enacted in 1974 to clarify that nothing in the CEA, specifically the provision vesting the CFTC with exclusive jurisdiction regarding commodity futures activities, would supersede or limit the jurisdiction conferred on federal or state courts at that time.\textsuperscript{322} Congress had already vested the federal courts with the authority to hear RICO claims four years earlier.\textsuperscript{323}

Moreover, courts have generally held that the CEA pre-empts private actions derived from other statutes only when such actions could conceivably conflict with the CFTC's regulatory role.\textsuperscript{324} As RICO actions do not infringe upon the Commission's regulatory authority, such actions are not pre-empted by the CEA.\textsuperscript{325}

Although these arguments are borne primarily under section 2 of the Commodity Exchange Act,\textsuperscript{326} they apply equally to section 22. Again, a plain reading of the CEA demonstrates that nothing in it was intended to eviscerate pre-existing jurisdiction under other federal laws.\textsuperscript{327} In order for RICO to be barred from redressing activities concurrently violative of the CEA, the later-enacted section 22 must have been clearly intended by Congress to repeal or to be a substitute for the earlier RICO Act.\textsuperscript{328} Such legislative intent "must be [manifested by a] positive repugnancy between the provisions."\textsuperscript{329} Given the sparse legislative history of section 22\textsuperscript{330} and its five-year co-

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\textsuperscript{320} See supra note 25 and accompanying text.
\textsuperscript{321} See supra note 109 and accompanying text.
\textsuperscript{322} See id.
\textsuperscript{323} See id.
\textsuperscript{326} See supra notes 321-25 and accompanying text.
\textsuperscript{329} Id.
existence with RICO, any allegation of repugnancy between the statutes is untenable.

Moreover, RICO claims do not arise under the CEA; they arise under RICO and the defendants' alleged predicate acts of mail and wire fraud. Courts have recognized a similar distinction between claims arising under the CEA and the antitrust laws, which have been traditionally applied to the commodity futures industry. In fact, more than one court has ruled that the CEA does not repeal the federal mail and wire fraud statutes. Thus, even where Congress has enacted comprehensive legislation to govern conduct in a particular field, courts have acknowledged the continued vitality of the mail and wire fraud statutes, assuring the continued vitality of RICO claims based on violations of these statutes. Although the CEA only provides for actual damages, the Act has been widely construed as preserving, not pre-empting, common law remedies for fraud based on violations of the CEA even to the extent of punitive damages.

In short, the CEA and RICO cannot be read to conflict with one another such that the former impliedly repeals the latter. The "exclusive remedies" provided in section 22 of the CEA are available for violations of "this chapter"—the Commodity Exchange Act. Similarly, RICO’s treble-damages remedy may be used by any person injured by reason of a violation of section 1962 of "this chapter"—the Racketeer Influenced & Corrupt Organizations Act. RICO and

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333. See United States v. Brien, 617 F.2d 299, 310 (1st Cir.), cert. denied, 446 U.S. 919 (1980); Abrahams, 493 F. Supp. at 300 n.8
334. See Abrahams, 493 F. Supp. at 302. See supra notes 19-25 and accompanying text for a discussion of the mail and wire fraud statutes under commodity-related RICO claims.
335. See supra notes 313-15 and accompanying text.
338. See supra notes 110-15, 316-19 and accompanying text. "Phrases such as 'under this chapter' and 'of this chapter' indicate Congress' intention to provide that the remedies under § 22 are the only remedies that the [Commodity Exchange] Act authorizes. Nowhere in the Act, however, does it say that these remedies are the only remedies available to a plaintiff." Mallen, 623 F. Supp. at 206 (emphasis in original).
339. See supra note 14 and accompanying text.
the CEA simply provide different remedies for different wrongs although similar conduct may violate both statutes, just as similar conduct may violate both the CEA and the antitrust laws. The provisions of the CEA and RICO, therefore, are not repugnant to each other; rather, they complement one another. The two Acts “can exist and be useful, side by side” in protecting the customers of the commodity futures industry. This protection, which the progressive amendments to the CEA have fortified, becomes imperative given the customer’s role in the industry and the role of the industry in the nation’s economy.

V. Conclusion

In reality, many federal courts have been more intent on redrafting than on reading RICO. The fact that RICO is used against legitimate businesses, such as futures commission merchants, does not mean that the Act is being misconstrued. As this Note has established, RICO can and should be applied against FCMs for violations of the Act perpetrated by their agents or employees acting within the scope of their employment. Given the impact of the commodity futures industry on the nation’s economy and the customer’s role therein, RICO actually assists the CEA in protecting the customer, the industry, and, most importantly, the commerce of the United States.

Under RICO, Congress provided no exception for businessmen, white collar workers, bankers, stockbrokers or commodity brokers. Although commodity fraud actionable under RICO may sometimes be characterized as “garden variety” fraud, Congress has simply provided additional means to eradicate that fraud. If Congress

340. See supra note 332 and accompanying text.
341. Cf. Abrahams, 493 F. Supp. at 303 (mail fraud statute and CEA complement each other).
342. Id. at 302 (quoting Edwards v. United States, 312 U.S. 473, 484 (1941)).
343. See supra notes 77-125 and accompanying text.
344. See supra note 5 and accompanying text.
345. See supra notes 79-82, 121-25 and accompanying text.
348. See supra notes 221-345 and accompanying text.
350. See Furman, 741 F.2d at 529.
wants to prevent "garden variety" fraud claims involving the operation of FCMs and other legitimate enterprises from metamorphasizing into RICO claims, it may do so by striking mail and wire fraud from the list of predicate acts in the statute.\textsuperscript{351} Such action must be undertaken by the legislature, however, not the courts.\textsuperscript{352}

If Congress determines that RICO claims should not be directed at futures commission merchants, it may directly proscribe such claims by amending section 22 of the Commodity Exchange Act as follows:

\begin{quote}
(2) Except as provided in subsection (b) of this section, the rights of action authorized by this subsection and by sections 7a(11), 18, and 21(b)(10) of this title shall be the exclusive remedies under this chapter and chapter 96 of title 18, United States Code,\textsuperscript{353} available to any person who sustains loss as a result of, or connected with, any alleged violation of this chapter.
\end{quote}

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\textsuperscript{352}. See supra notes 75-76 and accompanying text; see also Sun Sav. & Loan Ass'n v. Dierdorff, 825 F.2d 187, 194 (9th Cir. 1987) (courts should not erect artificial barriers to keep RICO cases off federal dockets); Kimmel v. Peterson, 565 F. Supp. 476, 493 n.21 (E.D. Pa. 1983) (improper for judiciary to narrow purposely broad statute; such action is within province of Congress).

\textsuperscript{353}. Chapter 96 of title 18 of the United States Code is, of course, RICO. See supra note 4 and accompanying text.