

ARBITRATING WITH THE MAFIA: WHY CIVIL RICO STATUTES ARE IMPROPERLY USED AND HOW CLASS ACTION ARBITRATION MAY PROVIDE JUST COMPENSATION FOR FORGOTTEN VICTIMS

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I. INTRODUCTION

From the nineteenth century onward, the United States has been overwhelmed by the rise of organized crime.¹ For generations, criminal organizations have “infiltrated the social and economic fabric”² of society and committed heinous crimes in almost every way imaginable.³ For decades, pop culture and Hollywood have been infatuated with criminal organizations.⁴ Movies, television shows, books, and podcasts have portrayed these organizations as interesting and complex entities.⁵ In most cinematic programs, the leaders of these mob organizations are the protagonists.⁶ Hollywood may portray fictional mob bosses as such, but in reality, their organizations often contain ruthless murderers.⁷ What seems to get lost in America’s true crime craze are the victims—the small business owners who have repeatedly suffered from bribery and extortion, and the individuals who are victims of drug trafficking or forced prostitution.⁸ To this day, many small

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¹ The first known criminal organization was known as “The Forty Thieves,” in New York City around the 1800s. *Origins of Organized Crime*, CRIME MUSEUM, <https://www.crimemuseum.org/crime-library/organized-crime/origins-of-organized-crime> (last visited Oct. 12, 2020).

² *Transnational Organized Crime*, FBI, <https://www.fbi.gov/investigate/organized-crime> (last visited Oct. 12, 2020) [hereinafter *Transnational Organized Crime*].

³ *Id.*; *Typical Activities of Organized Crime*, CRIME MUSEUM, <https://www.crimemuseum.org/crime-library/organized-crime/typical-activities-of-organized-crime/> (last visited Oct. 12, 2020) [hereinafter *Typical Activities of Organized Crime*].

⁴ Peter Maas, *Film; Why We Love the Mafia in the Movies*, N.Y. TIMES (Sept. 9, 1990), <https://www.nytimes.com/1990/09/09/movies/film-why-we-love-the-mafia-in-the-movies.html>.

⁵ See, e.g., Maria Konnikova, *Why Do We Admire Mobsters?*, NEW YORKER (Sept. 16, 2015), <https://www.newyorker.com/science/maria-konnikova/why-do-we-admire-mobsters>.

⁶ *Id.*

⁷ *Transnational Organized Crime*, *supra* note 2.

⁸ *Id.*

business owners are forced to pay astronomically high fares to these organizations and are said to receive “protection” in return.⁹

This Note will examine the statutes that were meant to provide victims of organized crime with avenues of recovery and show why those avenues have not been successful. One proffered solution to fixing these statutes would be a complete redrafting, but case law and legislative history have shown that this is not something that Congress is willing to do.¹⁰ Alternatively, another solution is to provide and encourage arbitration, more specifically class action arbitration, for victims of organized crime. I propose that class action arbitration in cases involving criminal organizations is a better suited alternative to redrafting the relevant statutes.

Part II of this Note will introduce the statutes that were drafted and implemented to eradicate organized crime and illustrate how the statutes are utilized. Part II will also examine the current status of organized crime, and its relationship with a technologically advanced world. Part III will contemplate why the current statutes are not useful for victims of organized crime. Part IV of this Note will propose class action arbitration as a possible remedy.

II. BACKGROUND

A. *RICO: Racketeering Influenced and Corrupt Organizations Act*

To combat organized crime, Congress passed the Racketeer Influenced and Corrupt Organizations Act (“RICO”) in 1970.¹¹ RICO statutes are responsible for the arrests of some of the most famous mob bosses in modern times.¹² RICO was introduced as a

⁹ One study in England showed that criminal organizations target local/small businesses. Nick Tilly & Matt Hopkins, *Organized Crime and Local Businesses*, 8 *CRIMINOLOGY & CRIM. JUST.* 443, 443 (Nov. 2008).

¹⁰ See *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 256 (1989) (stating that “Congress has done nothing in the interim further to illuminate RICO’s key requirement of a pattern of racketeering”).

¹¹ *Racketeer Influence and Corrupt Organizations Act (RICO)*, NOLO, <https://www.nolo.com/legal-encyclopedia/content/rico-act.html> (last visited Oct. 12, 2020); 18 U.S.C. §§ 1961–68.

¹² Nathan Koppel, *They Call it RICO, and it is Sweeping*, *WALL ST. J.* (Jan. 20, 2011, 5:14 PM), <https://www.wsj.com/articles/SB10001424052748704881304576094110829882704>; *Four Gambino Crime Family Members and Associates Plead Guilty in Manhattan Federal Court*, U.S.

response to decades of failed prosecutions against mob bosses,¹³ Congress sought to pass a statute that made it easier to convict members of criminal organizations.¹⁴ By adding more avenues to convict criminal organizations, RICO became a “specialized tool for prosecutors to combat a monster called ‘organized crime.’”¹⁵ Essentially, the statutes allow prosecutors to bundle up broader evidence from multiple cases and sources that would otherwise not stand alone.¹⁶

The drafters of these statutes primarily intended to use RICO in *criminal* actions against illegal activities, but they also included a clause that allowed for *private* actions.¹⁷ The civil action RICO clause was meant to give the victims an opportunity to recover damages from corrupt and criminal organizations.¹⁸ It was—and

ATT’Y OFF. PRESS RELEASE (Feb. 17, 2012), <https://archives.fbi.gov/archives/newyork/press-releases/2012/four-gambino-crime-family-members-and-associates-plead-guilty-in-manhattan-federal-court>; *Members and Associates of Genovese Crime Family Charged in Manhattan Federal Court With Racketeering Conspiracy And Related Offenses*, U.S. ATT’Y OFF. PRESS RELEASE (Jan. 10, 2018), <https://www.justice.gov/usao-sdny/pr/members-and-associates-genovese-crime-family-charged-manhattan-federal-court>.

¹³ “It took years for prosecutors to put together legal cases; eventually, 20 men were charged with obstruction of justice and found guilty. But all the convictions were overturned and the mafioso went free.” Lorraine Boissoneault, *A 1957 Meeting Forced the FBI to Recognize the Mafia—and Changed the Justice System Forever*, SMITHSONIAN MAG. (NOV. 14, 2017), <https://www.smithsonianmag.com/history/1957-meeting-forced-fbi-recognize-mafiaand-changed-justice-system-forever-180967204/>.

¹⁴ *Criminal RICO: 18 U.S.C. §§1961–1968, A Manual for Federal Prosecutors*, U.S. JUST. DEP’T (May 2016), <https://www.justice.gov/usam/file/870856/download>.

¹⁵ Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in Reves*, 51 WASH. & LEE L. REV. 61, 64 (1994).

¹⁶ Koppel, *supra* note 12; “[O]rganized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.” S. REP. NO. 617, 91st Cong., 1st Sess. at 76–78 (1969) [hereinafter S. REP. NO. 91–617].

¹⁷ In a manual for RICO, the civil provision of RICO was left to a mere footnote. “The RICO Act also provides for civil remedies and other procedural requirements against persons who engage in racketeering activities, which are set forth at 18 U.S.C. §§ 1964–68.” *RICO Guideline*, OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, https://www.ussc.gov/sites/default/files/pdf/training/primers/2018_Primer_RICO.pdf; 18 U.S.C. § 1964.

¹⁸ “In proposing the addition of a private treble damages action ‘similar to the private damage remedy found in the anti-trust laws,’ Representative Steiger asserted that ‘those who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of Title IX’s prohibitions.’ DAVID B. SMITH & TERRENCE G. REED, *CIVIL RICO* ¶ 1.01 (2004); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487 (1985); 91st Cong., 2d Sess., 520 (1970).

still is—common practice for a criminal organization to blackmail and steal from small businesses in local communities.¹⁹

Structurally, RICO is codified under 18 U.S.C. §§ 1961–68.²⁰ Section 1962 prohibits a person from acquiring any interest in an “enterprise” that commits a “pattern of racketeering activity,” § 1963 lays out the criminal penalties, and § 1964 lists the civil remedies.²¹ RICO not only changed the course of this country’s criminal history, but it also changed civil law. This Note will delineate how RICO’s criminal provisions successfully prosecuted and dismantled some of the most notorious criminal networks; and how § 1964, the civil statute, has been less successful.²² A provision that was thrown into the statute at the last minute, § 1964(c) calls for treble damages and attorney’s fees for all victims of organizations that are subject to § 1962.²³ This treble damages provision, and, more broadly, all of RICO’s civil provisions, are the essential focus of this Note.²⁴ Later, I will discuss the original intent of § 1964 and what ought to change in order to provide just compensation to all those who have succumbed to the corruptions of organized crime.

B. *Organized Crime Today*

Forty years after Congress passed RICO and made it easier for both prosecutors to convict, and for victims to recover in cases against organized crime, the statutes’ effect on the organized crime rates is somewhat skewed. While the most prevalent and well-known mob bosses are no longer significantly active,²⁵ organized crime has shifted and adapted to both modern times and modern

¹⁹ See *Transnational Organized Crime*, *supra* note 2.

²⁰ 18 U.S.C. §§ 1961–68.

²¹ 18 U.S.C. §§ 1962–64.

²² 18 U.S.C. § 1964.

²³ “This provision was added in the House of Representatives after the Senate already had passed its version of the RICO bill; the House itself adopted a civil remedy provision almost as an afterthought; and the Senate thereafter accepted the House’s version of the bill without even requesting a Conference.” Sedima, 473 U.S. at 507 (Marshall, J., dissenting).

²⁴ “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.” 18 U.S.C. § 1964 (internal citations omitted).

²⁵ See *The Demise of the Mafia*, HIST. (Feb. 22, 2019), <https://www.history.com/topics/crime/the-demise-of-the-mafia> [hereinafter *Demise of the Mafia*].

crimes.²⁶ For example, in 2017, United States citizens lost around 1.4 billion dollars at the hands of criminal organizations specializing in cybercrime.²⁷ The number of cybercrimes is rising consistently, and criminal organizations are now targeting business email accounts and gaining access to their networks.²⁸ Once these organizations gain access to a small business's system, the cyber-criminal demands a ransom (usually in cryptocurrency) by threatening to wipe all of the company's files if they refuse to pay (known as "ransomware").²⁹ No one is immune to these criminal organizations: anyone from small businesses to libraries and governments of large cities have all been victims of these cyber-criminal organizations in 2019 alone.³⁰

Aside from "ransomware," many of these cyber-criminal organizations also specialize in identity theft.³¹ The FBI estimates that more than sixty million dollars were taken from victims through identity theft and that number is going to continue to rise.³² While some of these cyber-crimes are committed by a single criminal behind a computer, many of them originate from a group of criminals acting under the umbrella of a larger organization.³³ Most famously, the organization "Anonymous" has hacked the websites of

²⁶ Organized crime is a changing and flexible phenomenon. *Organized Crime*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/organized-crime/intro.html> (last visited Oct. 12, 2020).

²⁷ *Latest Internet Crime Report Released*, FBI (May 7, 2018), <https://www.fbi.gov/news/stories/2017-internet-crime-report-released-050718>.

²⁸ *2017 Internet Crime Report*, FBI INTERNET CRIME COMPLAINT CTR. 12 (2017), https://pdf.ic3.gov/2017_IC3Report.pdf [hereinafter *Internet Crime Report*].

²⁹ *Id.* at 13.

³⁰ Manny Fernandez et al., *Ransomware Attack Hits 22 Texas Towns, Authorities Say*, N.Y. TIMES (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/us/texas-ransomware.html?module=Inline>; Niraj Chokshi, *Hackers are Holding Baltimore Hostage: How They Struck and What's Next*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/us/baltimore-ransomware.html?module=inline>.

³¹ *Internet Crime Report*, *supra* note 28; See *Study: Small Business Fraud on the Rise*, AM. BANKERS ASS'N (Oct. 2, 2019), <https://bankingjournal.aba.com/2019/10/study-small-business-fraud-on-the-rise/> [hereinafter *Small Business Fraud on the Rise*].

³² *Internet Crime Report*, *supra* note 28.

³³ Jim Parise, *Heads Up: Cybercriminals are Businesspeople*, CFO (Aug. 2, 2019), <https://www.cfo.com/cyber-security-technology/2019/08/heads-up-cybercriminals-are-businesspeople/>; *E.g.*, *5 Cyber Crime Groups Making Organizations Uneasy*, CYBERPOLICY, <https://cyberpolicy.com/cybersecurity-education/5-cybercrime-groups-making-organizations-uneasy> (last visited Oct. 12, 2020) [hereinafter *5 Cyber Crime Groups*]; See Tom McKay, *German Police Raid Data Center and Alleged Cyber Crime Hub Based Out of Former NATO Bunker*, GIZMODO (Sept. 28, 2019, 6:20 PM), <https://gizmodo.com/german-police-raid-data-center-and-alleged-cybercrime-h-1838575040>; See also Marcin Kleczynski, *The New Mafia is Here—How Can Businesses Fight Back?*, CBR (Mar. 9, 2018), <https://www.cbronline.com/in-depth/new-mafia-can-businesses-fight-back>.

Donald Trump, ISIS, and the World Trade Organization.³⁴ However, not all of these cyber-criminal organizations are sophisticated enough to target politicians and terrorist organizations because their servers and firewalls are far more complex than small business owners.³⁵ Nearly half of online attacks are now perpetrated against small businesses as many of them do not have the proper technology to protect themselves.³⁶

Cybersecurity is only one of the many areas that criminal organizations are now involved in. Other international “emerging crimes” are organ trafficking, maritime crime and piracy, forest crime, and trafficking in cultural property.³⁷ Across these areas, many victims suffer physical, emotional, and financial abuse.³⁸ While in past decades the United States has successfully taken down many organizations that ran bribery and counterfeiting schemes, there is now an emergence of new crimes and new organizations that continue to victimize countless people.³⁹

Further, RICO’s success in taking down the “old school” criminal organizations is only relative; the Italian, Russian, Albanian, Irish mafias, among others, are still active.⁴⁰ Although on a much

³⁴ 5 *Cyber Crime Groups*, *supra* note 33.

³⁵ “What all of this paints, though, is not the oft-imagined image of a shadowy hacker with pseudo-magical powers. Instead, a lot of this activity is carried out by people with a few technical skills but who are ultimately quite lazy.” See Chris Baraniuk, *It’s a Myth that Most Cyber-Criminals are ‘Sophisticated’*, BBC (July 26, 2017), <https://www.bbc.com/future/article/20170726-why-most-hackers-arent-sophisticated>.

³⁶ “With 43% of online attacks now aimed at small businesses, a favorite target of high-tech villains, yet only 14% prepared to defend themselves, owners increasingly need to start making high-tech security a top priority, according to network security leaders.” Scott Steinberg, *Cyberattacks Now Cost Companies \$200,000 on Average, Putting Many Out of Business*, CNBC (Oct. 13, 2019, 10:30 AM), <https://www.cnbc.com/2019/10/13/cyberattacks-cost-small-companies-200k-putting-many-out-of-business.html>.

³⁷ *Emerging Crimes*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/organized-crime/intro/emerging-crimes.html>.

³⁸ See, e.g., *Organ Trafficking: The Unseen Form of Human Trafficking*, ACAMS TODAY (June 26, 2018), <https://www.acamstoday.org/organ-trafficking-the-unseen-form-of-human-trafficking/>.

³⁹ *Demise of the Mafia*, *supra* note 25; *Internet Crime Report*, *supra* note 28; *Small Business Fraud on the Rise*, *supra* note 31.

⁴⁰ Andrew Ford, *Mob NJ: The Mafia is Still Here, Tied to Port Newark and the Suburbs*, APP (Mar. 28, 2019, 5:00 AM), <https://www.app.com/story/news/investigations/2019/03/28/nj-mob-the-mafia-is-still-here-port-newark-suburbs/3268727002/>; *The Mafia Today*, THE WEEK (Apr. 21, 2019), <https://theweek.com/articles/835970/mafia-today>; *Transnational Organized Crime*, *supra* note 2.

smaller scale, some communities and small businesses are still being victimized.⁴¹

Lastly and arguably most notably, this country, as well as the rest of the world, continues to be riddled with a drug trafficking epidemic.⁴² Mexican drug organizations, like the Sinaloa and Jalisco cartels, are distributing deadly drugs to America.⁴³ From 2011 to 2016, drug poisoning was the leading cause of injury death in America.⁴⁴ Sometimes, “bad batches” of certain drugs are distributed within a small town killing many people in a short amount of time.⁴⁵ Most commonly, Chinese drug traffickers are said to be lacing their drugs with fentanyl, a lethal synthetic opioid.⁴⁶ While drug and narcotics trafficking clearly falls under the prohibited activities listed in § 1961, drug traffickers can also be convicted of many other illegal activities since they are usually engaged in other crimes as well.⁴⁷ These drug organizations are usually involved in possession of illegal weapons, bribery, and illegal gambling.⁴⁸

As previously noted, there has been a significant decline in activity from the most commonly known criminal organizations, but there has not been a total eradication.⁴⁹ On the contrary, criminal organizations involved in drug and narcotics trafficking “continue to represent [a] significant threat to public health, law

⁴¹ See, e.g., Anisa Jibrell, *Fenton Business Owner Pleads Guilty to Racketeering Charges in Mortgage Services Scam*, CRAIN'S DET. BUS. (May 2, 2019, 9:28 AM), <https://www.crainstetroit.com/courts/fenton-business-owner-pleads-guilty-racketeering-charges-mortgage-services-scam>.

⁴² Holly Hedegaard et al., *Drug Overdose Death in the United States, 1999–2017*, NCHS DATA BRIEF No.329 (Nov. 2018), <https://www.cdc.gov/nchs/data/databriefs/db329-h.pdf>.

⁴³ *DEA Releases 2018 National Drug Threat Assessment*, DEA (Nov. 2, 2018), <https://www.dea.gov/press-releases/2018/11/02/dea-releases-2018-national-drug-threat-assessment-0> [hereinafter *2018 National Drug Threat Assessment*].

⁴⁴ *2018 National Drug Threat Assessment*, U.S. DEP'T OF JUST. DRUG ENF'T ADMIN. (Oct. 2018), <https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NTA%20final%20low%20resolution.pdf>.

⁴⁵ Rebecca Lurye, *Crack Overdoses Catch Hartford Off Guard, Killing Five in Three Days; Drug Deaths Rising Overall*, HARTFORD COURANT (June 5, 2019, 1:35 PM), <https://www.courant.com/breaking-news/hc-br-hartford-fentanyl-overdose-deaths-20190605-whruysgjdna17a3feprppo7phm-story.html>.

⁴⁶ See Alan Rappeport, *U.S. Puts Sanctions on Chinese Nationals Over Fentanyl Trafficking*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/trump-sanctions-chinese-nationals-fentanyl.html>; *Fentanyl*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/fentanyl> (last visited Sept. 13, 2020).

⁴⁷ 18 U.S.C. § 1961(1); *RICO Indictment Charges “110 Gang”*, DEA (Oct. 29, 2018), <https://www.dea.gov/press-releases/2018/10/29/rico-indictment-charges-110-gang>.

⁴⁸ *Transnational Organized Crime*, *supra* note 2.

⁴⁹ See *The Demise of the Mafia*, *supra* note 25.

enforcement, and national security in the United States.”⁵⁰ Further, it can be argued that the definition of criminal organizations is much broader now than it was during RICO’s enactment. The current status of organized crime is complex; the old school organizations are still prevalent, although on a much smaller scale, and new organizations are emerging with the advancement of technology.⁵¹ The question this Note aims to address is whether RICO has helped victims of organized crime, and if not, what can be done to change that?

C. *How Civil RICO is Used Today*

Although there are plenty of new criminal organizations, it is hard to argue against the overall success of the criminal RICO statutes. The drafters of the RICO statutes aimed to specifically take down La Cosa Nostra, and it can be argued that the statutes accomplished that goal.⁵² The “mobsters” of the past no longer have the same prowess and influence over this country.⁵³ With that said, the success of the civil RICO statutes is less clear and harder to quantify. The drafters of civil RICO intended to provide a channel of recovery for victims of racketeering and organized crime, but has this happened?⁵⁴ Statistically, that does not appear to be the case. By 1985, it was reported that only nine percent of all civil RICO pleadings involved someone generally associated with criminal activities.⁵⁵ This does not mean that § 1964 is a forgotten statute hanging in the congressional abyss; on the contrary, over the past decade there have been triple the amount of federal civil

⁵⁰ 2018 National Drug Threat Assessment, *supra* note 43.

⁵¹ *The Demise of the Mafia*, *supra* note 25; *Internet Crime Report*, *supra* note 28; *Small Business Fraud on the Rise*, *supra* note 31.

⁵² S. REP. NO. 91-617, *supra* note 16; *The Demise of the Mafia*, *supra* note 25.

⁵³ “But for the most part, the mob has lost a lot of its power and appeal. Increased security and advances in technology have made mafia members more wary of violence and less likely to bring their children into the ‘family business.’” Rowena Lindsay, *Organized Crime Bust: How Does the ‘Old School’ Mafia Work Today?*, CHRISTIAN SCI. MONITOR (Aug. 5, 2016), <https://www.csmonitor.com/USA/USA-Update/2016/0805/Organized-crime-bust-How-does-the-old-school-Mafia-work-today>.

⁵⁴ S. REP. NO. 91-617, *supra* note 16.

⁵⁵ (including “[A]rson, bribery, commercial bribery, embezzlement, extortion, gambling, theft, political corruption”) Arthur F. Mathews et al., *Report of the Ad Hoc Civil RICO Task Force*, A.B.A. COR. BANKING & BUS. L. SECTION, 56 (Mar. 28, 1985), http://theamazonpost.com/post-trial-brief-pdfs/brief/59b_ReportoftheAdHocCivilRICOtaskForceBankingandBusinessLaw55-56.pdf; *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985).

RICO suits than criminal.⁵⁶ In 2018, 1,405 civil RICO suits were filed; more than doubling the 693 suits filed the year prior.⁵⁷

Today, plaintiffs are most likely incentivized to plead civil RICO because of the treble damages provision.⁵⁸ In 2018, in wake of the #MeToo movement, a RICO class action was filed against Harvey Weinstein, the tarnished film producer and sex offender.⁵⁹ The court dismissed this action under RICO because the plaintiffs could not show that Mr. Weinstein was acting within a criminal “enterprise,” as RICO requires.⁶⁰ With that said, other class actions have been more successful: twenty-two plaintiffs jointly filed suit against the Diocese of Buffalo claiming to be victims of clerical sexual abuse.⁶¹ The Diocese of Buffalo and Harvey Weinstein are not alone; cigarette companies, New York City’s Department of Education, and the Atlanta Public School System have all been linked with RICO.⁶²

It is imperative to consider whether civil RICO is a successful statute, and the answer depends on one’s definition of “success.” On one hand, civil RICO claims are frequently pled, and victims of both sexual and financial abuse use RICO as an avenue of recovery. This level of popularity for a statute would normally imply some sort of success, but as mentioned prior, there is another side to the statistics. It seems that everyone is putting the treble damages provision to good use except the intended class, victims of organized crime. In other words, when RICO was enacted the

⁵⁶ *Anti-Racketeering Civil Suits Jump in 2018*, TRAC REPS. (Oct. 30, 2018), <https://trac.syr.edu/tracreports/civil/535/> [hereinafter *Anti-Racketeering Civil Suits*].

⁵⁷ *Id.*

⁵⁸ Peter J. Henning, *RICO Lawsuits are Tempting, but Tread Lightly*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/business/dealbook/harvey-weinstein-rico.html>.

⁵⁹ Gene Maddaus, *Judge Dismisses RICO Class Action Against Harvey Weinstein*, VARIETY (Sep. 13, 2018, 2:14 PM), <https://variety.com/2018/biz/news/harvey-weinstein-rico-class-action-1202941398/>.

⁶⁰ *Id.*

⁶¹ *RICO Suit Against Buffalo Diocese Alleges Conspiracy in Sexual Abuse Cases*, CATH. NEWS AGENCY (Aug. 15, 2019, 11:55 AM), <https://www.catholicnewsagency.com/news/rico-suit-against-buffalo-diocese-alleges-conspiracy-in-sexual-abuse-cases-50374>.

⁶² Colby Hamilton, *State Cigarette Tax Evasion RICO Lawsuit Gets Green Light From Manhattan US Judge*, N.Y.L.J. (May 31, 2019, 4:02 PM), <https://www.law.com/newyorklawjournal/2019/05/31/state-cigarette-tax-evasion-rico-lawsuit-gets-green-light-from-manhattan-us-judge/?slreturn=20191030210612>; Susan Edelman, *Queens Lawmaker Calls for Federal Probe of Grade Fraud in NYC Schools*, N.Y. POST (Nov. 9, 2019, 4:16 PM), <https://nypost.com/2019/11/09/queens-lawmaker-calls-for-federal-probe-of-grade-fraud-in-nyc-schools/>; LaJuana Davis, *RICO and the Atlanta Public Schools Cheating Scandal*, EDUC. L. PROF. BLOG (May 7, 2013), https://lawprofessors.typepad.com/education_law/2013/05/rico-and-the-atlanta-public-schools-cheating-scandal.html%20.

statute was intended to combat La Cosa Nostra and other mafias, but this has not been the case.⁶³ In this sense exclusively, the failures of civil RICO are apparent because the victims the drafters of RICO intended to protect are not bringing claims under these statutes.

III. DISCUSSION

A. *RICO's Complexity and Ambiguity Deters Victims from Coming Forward*

Part II of this Note examined how civil RICO is being used and who is using it. Civil attorneys and plaintiffs are incentivized to use this provision, because it is one of the rare statutes that awards treble damages.⁶⁴ The possibility of recovering triple the amount of compensatory damages is a significant reason why many people are suing under civil RICO, but also why a majority of civil RICO cases are dismissed by courts.⁶⁵

One reason why victims of organized crime are not bringing civil RICO suits is because the statutes are quite complex.⁶⁶ This complexity lies in the four elements of a RICO claim a plaintiff must prove.⁶⁷ A plaintiff must show: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”⁶⁸

The first element of § 1962 that the plaintiff must prove is “conduct.”⁶⁹ This means that not only would a victim need to show an actual injury, but they would also need to show that the defen-

⁶³ S. REP. NO. 91-617, *supra* note 16, at 76–78.

⁶⁴ “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. . . .” 18 U.S.C. § 1964(c) (internal citations omitted).

⁶⁵ “Unfortunately for plaintiffs, there are onerous requirements for the complaint to show that there is enough evidence to allow the lawsuit to move forward as a RICO case. Judges take a dim view of efforts to turn what look like ordinary state law claims into federal cases by claiming a RICO violation. For that reason, RICO cases often don’t survive the pleading stage.” Henning, *supra* note 58.

⁶⁶ “Many civil RICO claims fail because plaintiffs cannot fit their allegations within the statute’s rather complex requirements. Failure to meet any of those elements leads courts to dismiss the action.” Peter J. Henning, *The Magic of RICO*, N.Y. TIMES (Dec. 17, 2009, 1:22 PM), <https://dealbook.nytimes.com/2009/12/17/the-magic-of-rico/>.

⁶⁷ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

⁶⁸ *Id.*

⁶⁹ *Id.*

dant was the one who *caused* the injury.⁷⁰ Under the “conduct” clause of § 1962, it would not be enough to show that an organization has committed a pattern of racketeering activities, but that the *actual defendant* was involved in the conduct.⁷¹ For some victims of organized crime, this can be an insurmountable hurdle. In many instances, they are not exposed to the leaders and/or “higher-ups” of these organizations.⁷²

Further, if the victims are seeking monetary compensation, it would be unwise to only sue the lower members of the criminal organization; rather they would need to reach the top of the organization. The problem is that the victim would need to learn the organizational structure—who the bosses are, where the money is—and once the victim finds all this information, they would then need to show that the bosses were the ones who instructed the lower members to commit the racketeering activities.⁷³ Proving that the defendant committed a crime, while acting on behalf of an organization, requires an incredible amount of resources, and a victim, deprived of finances, may not be able to obtain such resources.⁷⁴ Thus, the first element of § 1962 makes it difficult for plaintiffs to bring civil suits.

The second clause of civil RICO is a “pattern.”⁷⁵ RICO requires the plaintiff to show that the defendant’s crimes were not singular, but a pattern, and § 1961(5) defines a pattern as “at least *two acts* of racketeering activity.”⁷⁶ However, by using the words

⁷⁰ Daniel J. Polatsek, *Pleading Standing and Proximate Cause in Civil RICO Claims*, *PRACTICING LITIGATOR* 1, 1–2 (Jan. 2006), https://katten.com/files/21324_Pleading_Standing_And_Proximate_Cause_In_Civil_RICO_Claims—Polatsek.pdf.

⁷¹ “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. § 1962(c).

⁷² “Lieutenants and soldiers avoid gathering in groups so as to be less vulnerable to the wiretap or surveillance photo.” Brad Hamilton, *The New Mafia is Wising Up and Keeping Quiet*, *N.Y. POST* (Sept. 29, 2018, 11:03 PM), <https://nypost.com/2018/09/29/the-new-mafia-is-wising-up-and-keeping-quiet/>.

⁷³ “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. § 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. at 479, 483 n.4 (1985).

⁷⁴ “But physically monitoring suspects is an expensive and complicated proposition—in both money and manpower.” David Wise, *Militants Will Always Get Through for One Reason: Money*, *REUTERS* (Feb. 22, 2015), <http://blogs.reuters.com/great-debate/2015/02/22/fighting-terror-the-complex-factors-in-deciding-who-to-watch/>.

⁷⁵ *Sedima*, 473 U.S. at 495 (1985).

⁷⁶ 18 U.S.C. § 1961(5) (emphasis added).

“at least,” the statute left itself open for interpretation.⁷⁷ For example, the Court in *Sedima, S.P.R.L. v. Imrex Co.*, stated that showing two acts of racketeering may not be enough to meet the statutory requirements, because it depends on what the crimes were and the time elapsed between both crimes.⁷⁸ Surely, two acts committed decades apart should not be able to be used to prove a pattern. The Court looked into the legislative history of RICO and found that two separate and distinct acts are not enough to meet the § 1961(5) requirement because there must be both a relationship between the two activities, and a threat for those activities to continue.⁷⁹ This is now known as the “relationship plus continuity” test.⁸⁰

Justice Scalia stated in *H. J. Inc. v. Northwestern Bell Tel. Co.*, that the *Sedima* “relationship plus continuity” decision led to the “widest and most persistent Circuit split on an issue of federal law in recent memory.”⁸¹ Justice Scalia was referring to the differences in defining what constitutes a “pattern” and “continuity.”⁸² There, the Court was reviewing the Eighth Circuit’s interpretation of a “pattern of racketeering activity.” The Eighth Circuit held that a pattern needed to consist of two distinct acts apart of “multiple illegal schemes.”⁸³ In other words, the Eighth Circuit interpreted the *Sedima* test to mean that a single practice of illegal activities would be insufficient.⁸⁴ This means that a plaintiff would need to prove two different types of *schemes*:⁸⁵ one loan-sharking scheme may not be enough to establish a pattern under the Eighth Circuit’s interpretation of *Sedima* and RICO, even if multiple crimes were committed.⁸⁶ For example, in *H. J., Inc.*, the Eighth Circuit found that a “single fraudulent scheme” was not enough to meet the *Sedima* requirement; the plaintiff had to have shown that the defendant engaged in other criminal activities elsewhere.⁸⁷

⁷⁷ *Id.*

⁷⁸ “The implication is that while two acts are necessary, they may not be sufficient.” *Sedima*, 473 U.S. at 496, n.14.

⁷⁹ *Id.*

⁸⁰ *Int'l Data Bank v. Zepkin*, 812 F.2d 149, 154 (4th Cir. 1987) (quoting *Sedima*, U.S. 473 at 496).

⁸¹ *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J. concurring).

⁸² *Id.*

⁸³ *Id.* at 234.

⁸⁴ *Id.*

⁸⁵ Note the difference between a “crime” and a “scheme.”

⁸⁶ *H. J. Inc.*, 492 U.S. at 234.

⁸⁷ *Id.*

The Eighth Circuit's interpretation of *Sedima's* continuity test is vastly different than the interpretation in other jurisdictions. In *United States v. Jennings*, the Sixth Circuit found where a defendant made two telephone phone calls regarding distributing narcotics, there was enough of a "pattern" to meet the *Sedima* test; even though the calls were made only two hours apart.⁸⁸ The difference between the two interpretations are apparent; while the Sixth Circuit found that a "pattern" exists even where two acts that are related, like the telephone calls made only hours apart, the Eighth Circuit requires two entirely different schemes.⁸⁹ Thus, it is more than likely that the Eighth Circuit would have found Jennings to have committed only one criminal scheme (narcotic distribution), and therefore would find no "pattern." Following the framework set forth by the Eighth Circuit's interpretation, it can be assumed that even if the prosecutors provided one hundred of Jennings' phone calls spanning a few weeks, the RICO allegations still would have been dismissed because there was only one criminal scheme.

What we see from these two examples, from two different jurisdictions, is how different a "pattern" can be interpreted. In one case, a pattern of criminal activity meant making two phone calls about distributing narcotics, while in another case it meant that two different types of crimes committed.⁹⁰ To complicate matters further, the Court under *H. J. Inc. v. Northwestern Bell Tel. Co.* rejected both of these interpretations of *Sedima*.⁹¹ While the Eighth Circuit's interpretation was too narrow, the Sixth Circuit's interpretation was far too broad.⁹² Although the Court recognizes that RICO may have been poorly drafted and the word "pattern" poorly defined, it nevertheless reaffirms the *Sedima* decision instead of offering a solution or a new definition.⁹³ The pattern requirement is an area of the law that is in linguistic limbo. Thirty years ago, the Court recognized that RICO is poorly written, but the legislatures have not made any significant changes.⁹⁴ RICO's

⁸⁸ 842 F.2d 159, 162 (6th Cir. 1988).

⁸⁹ *Id.*; *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 234 (1989).

⁹⁰ *H.J. Inc.*, 492 U.S. at 234.

⁹¹ *Id.* at 237 ("In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.").

⁹² *Id.*

⁹³ *Id.* at 243 ("The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.").

⁹⁴ *Id.*; See recent amendments to 18 U.S.C. § 1961.

“pattern” requirement is only one example of how confusing, ambiguous, and complex these statutes can be. The complexity acts as a deterrent for victims of organized crime. For many victims, the possibility of recovering treble damages may be outweighed by the probability of losing because of RICO’s ambiguity.

RICO’s complexity is not the only reason why victims of organized crime are not bringing lawsuits. The last element, “racketeering activity,” is defined by a laundry list of crimes.⁹⁵ In civil suits, showing that these crimes occurred may not be difficult if the defendant was already criminally convicted, but what happens when victims of organized crime want to sue the organizations and the prosecutors have not done so? This question was addressed at length in *Sedima*. The Court found that there is no legislative history and nothing in the statute that prohibits civil RICO cases where the defendant has not been criminally convicted.⁹⁶

Although civil RICO suits against defendants who have not been criminally convicted are undeniably permitted, there is still a requirement for the plaintiff to show that prohibited activities *actually* occurred.⁹⁷ This adds an extra burden for an already difficult civil statute; victims of organized crime do not have the same resources that prosecutors have. This burden is also apparent in the “enterprise” element of RICO.⁹⁸ Section 1961(4) defines an “enterprise” as an “individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁹⁹

The “enterprise” element requires victims of organized crime to show some sort of hierarchal structure.¹⁰⁰ In cases where the defendants have not been charged criminally, this is yet another

⁹⁵ Christopher Reinhart, *Definition of Racketeering*, OLR RES. REP. (Aug. 10, 2006), <https://www.cga.ct.gov/2006/rpt/2006-R-0484.htm> (“The federal crimes include bribery, various fraud offenses, gambling offenses, money laundering, a number of financial and economic crimes, obstructing justice or a criminal investigation, murder for hire, and sexual exploitation of children. The state crimes include murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and drug crimes.”).

⁹⁶ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488 (1985) (“As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be.”).

⁹⁷ See generally 18 U.S.C. §§ 1961–64.

⁹⁸ 18 U.S.C. § 1961(4).

⁹⁹ 18 U.S.C. § 1961(4) (“‘[E]nterprise’ 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.”).

¹⁰⁰ *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 699 (6th Cir. 2000) (“Simply conspiring to commit a fraud is not enough to trigger the Act if the parties are not organized in a fashion that would enable them to function as a racketeering organization for other purposes.”).

piece of evidence that the plaintiffs in civil suits must bring forward. Often times, providing the hierarchal structure of a criminal organization is no easy task; victims of organized crime may not know the hierarchal structure of their abusers, and the organization can be very secretive.¹⁰¹ For example, in loan sharking organizations, the bosses are usually not the ones who threaten or come in contact with the victim, but rather foot soldiers are sent on their behalf.¹⁰² Establishing the “enterprise” element of RICO may require victims to do investigative research with inferior resources and fewer opportunities. Further, these organizations may be dangerous, and victims may be justifiably afraid of looking further into the criminal organization’s hierarchal structure.

The Court in *Sedima* also discussed the “enterprise” requirement.¹⁰³ There, the Court rejected a restrictive reading of RICO, and wanted to ensure the statute was interpreted broadly so as to include legitimate businesses.¹⁰⁴ While this broad definition of “enterprise” and the inclusion of legitimate businesses in RICO are beneficial for some, it can also be seen as a detriment for others. Previously, this Note provided examples of how civil RICO cases are rejected each year,¹⁰⁵ including cases involving high profile defendants that garnered significant media attention.¹⁰⁶

When the media reports on civil RICO cases, the analysis is often critical of the statute and how it is being used.¹⁰⁷ The inclusion of legitimate businesses into the “enterprise” clause of RICO provided more plaintiffs with an opportunity for recovery, but those opportunities gave RICO a poor reputation.¹⁰⁸ Victims of organized crime may read the *New York Times* and see RICO never works; thereby deterred from using the statute.

In sum, the RICO statutes are so legally and linguistically complex to the extent where victims of organized crime may reach

¹⁰¹ *John Gotti*, FBI, <https://www.fbi.gov/history/famous-cases/john-gotti> (It took five years of agents, informants, and wiretappings to for the FBI to uncover the Gambino family hierarchy.) (last visited Oct. 12, 2020).

¹⁰² Robert Hanley, *Mobster Sentenced for Loan-Sharking*, N.Y. TIMES (Nov. 5, 1977), <https://www.nytimes.com/1977/11/05/archives/mobster-sentenced-for-loansharking-reputed-gambino-family-member.html>; Dexter Filkins, *In Some Immigrant Enclaves, Loan Shark Is the Local Bank*, N.Y. TIMES (Apr. 23, 2001), <https://www.nytimes.com/2001/04/23/nyregion/in-some-immigrant-enclaves-loan-shark-is-the-local-bank.html>.

¹⁰³ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); 18 U.S.C. § 1961(4).

¹⁰⁴ *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249 (1989).

¹⁰⁵ See, Part II Section C.

¹⁰⁶ Maddaus, *supra* note 59.

¹⁰⁷ Henning, *supra* note 58; Henning, *supra* note 66.

¹⁰⁸ Henning, *supra* note 58; Maddaus, *supra* note 59.

a point of not having enough confidence in their cases. Further, the legislative history behind the “pattern” and “enterprise” clauses create burdens that are too difficult for one victim of organized crime to uncover. Civil victims do not have the same resources to meet some of the statutory burdens; while the government may have the means to obtain their information from twenty-four hour surveillance, I speculate most private citizens do not.¹⁰⁹

B. *Victim's Fear of the Criminal Organization May Prevent Them From Using Civil RICO*

RICO's complexity is certainly not the only reason why victims are discouraged from seeking recovery. Another reason for the apparent discouragement is because many victims are justifiably afraid of the criminal organizations.¹¹⁰ The fear that the victims have is accurate; criminal organizations have a strong history of tormenting those who speak out.¹¹¹ For example, the Italian Mafia has a sacred rule called the “omertà” or “code of silence.”¹¹² The code is commonly upheld between criminal organizations that do not report rival organizations to the authorities.¹¹³ “Omertà” can also be used to describe the code of silence that the victims are often forced to uphold.¹¹⁴ Small businesses were forced to pay their “pizzo,” or protection money, and to keep silent about it.¹¹⁵

¹⁰⁹ *Gotti*, *supra* note 101.

¹¹⁰ Roberto Saviano, *Mafia Organizations are More Dangerous than Terrorist Groups*, N.Y. TIMES (Nov. 20, 2015, 2:49 AM), <https://www.nytimes.com/roomfordebate/2014/04/28/is-the-mafia-europes-new-security-threat/mafia-organizations-are-more-dangerous-than-terrorist-groups>.

¹¹¹ America's witness protection program (“WITSEC”) was created through the same Act as the civil RICO statutes. 18 U.S.C. § 3521.

¹¹² *Omertà*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/omerta> (last visited Oct. 12, 2020).

¹¹³ “The American Mafia, which rose to power in the 1920s, is a separate entity from the Mafia in Italy, although they share such traditions as omerta, a code of conduct and loyalty.” *Origins of the Mafia*, HISTORY.COM (Oct. 29, 2009), <https://www.history.com/topics/crime/origins-of-the-mafia>.

¹¹⁴ “The Mafia's communicational codes, whether written, unwritten, spoken or unspoken, demonstrate a system of silence that overpowers individuals and institutions within its society.” Adriana Nicole Cerami, *The Mafia's System of Silence In Communication, Film and Literature; Perversions of Society and Transgressions of Omertà* (2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.575.1554&rep=rep1&type=pdf>.

¹¹⁵ *Pizzo*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/dictionary/italian-english/pizzo> (last visited Sept. 13, 2020); *Businessman Killed for not Paying Mafia's 'Pizzo'*, THE LOCAL

Alerting or cooperating with the authorities is a violation of the “Omertà” code, breaking this code can be extremely dangerous.¹¹⁶

This concept is not only well documented in movies, journals and other media outlets, but is not exclusive to the Sicilian or other mafias.¹¹⁷ Civil RICO suits against the mafia and other criminal organizations are prime examples of “Omertà” violations. A treble damages provision may not be a strong enough incentive for victims to risk violating Omertà.

Even if a victim is courageous enough to face the potential consequences of filing a lawsuit against criminal organizations, there is a likelihood that such a case will attract a lot of media attention. After all, our society has an unwavering obsession with mafia culture.¹¹⁸ Thus, the fear of retaliation, coupled with the fear of unwanted attention, may be reasons why victims of organized crime are not bringing lawsuits.

C. *Victims of Organized Crime Have a Poor Perception of the Court System Based on Both “Mob Lawyers” and Paid Judges*

Even if the victims were brave enough to take on the mob, they may not think a lawsuit will be fully adjudicated. Victims might be discouraged from pursuing RICO cases against members of criminal organizations because of the reputation and expertise of the “mob lawyer.” These lawyers have a reputation to be extremely detail oriented and will zealously defend their clients—often to a fault.¹¹⁹ Many will remember the time Frank Ragano went on Good Morning America to tell a story about how

(Apr. 7, 2014, 10:38 PM), <https://www.thelocal.it/20140407/businessman-was-killed-for-not-paying-mafias-pizzo> [hereinafter *Businessman killed*].

¹¹⁶ *Businessman Killed*, *supra* note 115.

¹¹⁷ Many organizations and communities, criminal or non-criminal, have codes of silence. *The Mafia in Popular Culture*, HISTORY.COM (Oct. 29, 2009), <https://www.history.com/topics/crime/the-mafia-in-popular-culture>; Rabbi Joshua Hammerman, *Sex-Abuse Cover Ups: The Mesirah Mess*, TIMES OF ISR. (June 5, 2012, 12:00 AM), <https://jewishweek.timesofisrael.com/sex-abuse-cover-ups-the-mesirah-mess/>; Phillip Hayden, *Why an Ex-FBI Agent Decided to Break Through the Blue Wall of Silence*, USA TODAY (Jan. 31, 2019, 12:28 PM), <https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002/>.

¹¹⁸ Konnikova, *supra* note 5.

¹¹⁹ Ian Fisher, *Defending the Mob: A User’s Guide; For Defense Lawyers, a Favored Strategy is to Attack and Attack Again*, N.Y. TIMES (Mar. 26, 1992), <https://www.nytimes.com/1992/03/26/nyregion/defending-mob-user-s-guide-for-defense-lawyers-favored-strategy-attack-attack.html>.

Jimmy Hoffa, infamous president of the Teamsters, asked him to relay a request to mob bosses about the assassination of President Kennedy.¹²⁰ Regardless of the story's accuracy, many may perceive these kind of lawyers as those who never lose and take unorthodox approaches.

Further, some of these lawyers have been known to not play by the rules, and violate the rules of professional conduct.¹²¹ For example, mob lawyers not only represent the defendant, but they represent the entire organization.¹²² Many of these lawyers tell the lower ranking members of the organizations to plead guilty in order to protect the higher ups and the enterprise generally.¹²³ This not only makes it difficult to establish the "enterprise" element of RICO, but also makes it difficult to go after the money of the organization.

In 1985, a study described mob lawyers as "the life-support system of organized crime."¹²⁴ Even though a large majority of criminal defense lawyers conduct themselves in a proper manner, the study indicated that there were enough bad lawyers to "create a serious problem."¹²⁵ Regardless of whether "mob lawyers are currently following these practices, it does not matter. The stigma and reputation of the past generation of mob lawyers continue to hang over the profession.

¹²⁰ George Lardner Jr., *Lawyer Says Hoffa Told 2 Mob Bosses to Have President Kennedy Killed*, WASH. POST (Jan. 17, 1992), <https://www.washingtonpost.com/archive/politics/1992/01/17/lawyer-says-hoffa-told-2-mob-bosses-to-have-president-kennedy-killed/9a2f68dd-19d2-450b-9246-5b2a898f94fb/>.

¹²¹ "The study, by the staff of President Reagan's Commission on Organized Crime, said that 'renegade attorneys' launder illegally obtained money, orchestrate perjured testimony, bribe court officials, use their law offices to plan crimes and tell crime bosses when underlings who are the lawyers' nominal clients become Government informants." Stuart Taylor Jr., *Work of Lawyers for 'Mob' Studied*, N.Y. TIMES (Mar. 12, 1985), <https://www.nytimes.com/1985/03/12/us/work-of-lawyers-for-mob-studied.html>; Lardner, *supra* note 120; Fisher, *supra* note 119; "[M]afia keeps a nationwide stable of "trusted" attorneys who regularly produce perjured testimony, arrange payoffs and even turn against their own clients if they show signs of cooperating with the government." George Lardner Jr., *Mob Stable Of Lawyers Described*, WASH. POST (Jan. 30, 1986), <https://www.washingtonpost.com/archive/politics/1986/01/30/mob-stable-of-lawyers-described/18065da7-5ad7-4982-b43b-5547514af9bd/>.

¹²² "One of them, who has become a Government informant, was described as a veteran representative of a 'La Cosa Nostra Family.'" Taylor, *supra* note 121.

¹²³ "Individual clients always took a back seat to the mob's interests." Lardner, *supra* note 120.

¹²⁴ Taylor, *supra* note 121.

¹²⁵ *Id.*

D. *The Arguments For and Against the Legality of Civil RICO Arbitration*

The current framework of civil RICO deters victims of organized crime from bringing suits. Arbitrating a case against a criminal organization is something that many courts have not openly considered or discussed. In *Shearson/American Express Inc. v. McMahon*, the Supreme Court held that private action RICO suits are generally arbitrable.¹²⁶ In that case, the Court found that the District Court erred in denying RICO claims to go to arbitration.¹²⁷ The District Court's reasoning was that it would violate public policy for a RICO suit to go to arbitration, and that such matters should be heard before a judge.¹²⁸ The Supreme Court overturned this decision on the grounds that private action RICO suits are arbitrable because there is nothing in the legislative history of RICO that would suggest otherwise.¹²⁹

From this decision, there have been many civil RICO suits that went to arbitration instead of litigation; however, most of those (if not all) RICO suits involved "legitimate businesses."¹³⁰ Part II outlined how many legitimate businesses are being sued under civil RICO because of the treble damages provision, and *Shearson* gave those businesses the opportunity to arbitrate.¹³¹ Civil RICO arbitrations take place where the defendant is a bank, hospital, or insurance firms, but not yet the "archetypal, intimidating mobster[s]."¹³²

Even though *Shearson* expressly allowed Civil RICO arbitrations, that case was about a legitimate business (American Express).¹³³ One would think that *Shearson* would also apply to illegitimate businesses and criminal organizations, since those organizations are the very defendants RICO intended to shut down.

¹²⁶ "[T]here is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

¹²⁷ *Id.*

¹²⁸ *Id.* at 224; *McMahon v. Shearson/American Express Inc.*, 618 F. Supp. 384, 387 (S.D.N.Y. 1985).

¹²⁹ *McMahon*, 482 U.S. 220.

¹³⁰ *Id.* at 224; *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting).

¹³¹ *McMahon*, 482 U.S. 220.

¹³² *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987); *Sedima*, 473 U.S. at 499 (Marshall, J. dissenting).

¹³³ *McMahon*, 482 U.S. 220.

However, there is one section in the *Shearson* decision that one could argue otherwise.¹³⁴

The special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises. The private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute.¹³⁵

From these few sentences, the Western District of Pennsylvania said in *Aluminium Bahrain B.S.C. v. Dahdaleh*, “[u]nless a RICO case involves ‘allegations of criminal activity normally associated with professional criminals’ involved in organized crime, RICO claims may be submitted to arbitration.”¹³⁶ The *Dahdaleh* court held that RICO, a statute designed to combat organized crime, is not arbitrable where the defendant is a criminal organization.¹³⁷ The *Dahdaleh* decision was recognized in *Abrams v. Chesapeake Energy Corp.*, another Pennsylvania district court, but has not been recognized elsewhere.¹³⁸

Notice that the *Dahdaleh* court ruled against the arbitrability of claims against criminal organizations when it did not have to; that case did not involve a defendant who was accused of activities normally associated with organized crime, rather the case was “more analogous to the ‘run of the mill civil RICO cases.’”¹³⁹ There was seemingly no need to interpret *Shearson* the way this court did. On its face, the Supreme Court in *Shearson* held that RICO actions are arbitrable, and the Western District of Pennsylvania Courts narrowed this ruling by restricting arbitration to the “run of the mill” cases, when it did not have to.¹⁴⁰ Especially since *Shearson* said, “nothing in RICO’s text or legislative history otherwise demonstrates congressional intent to make an exception to the Arbitration Act for RICO claims.”¹⁴¹

¹³⁴ *Id.* at 242.

¹³⁵ *Id.*

¹³⁶ *Aluminium Bahr. B.S.C. v. Dahdaleh*, 17 F. Supp. 3d 461, 471 (W.D. Pa. 2014).

¹³⁷ *Id.*

¹³⁸ *Abrams v. Chesapeake Energy Corp.*, No. 4:16-CV-1343, 2017 U.S. Dist. LEXIS 209905, at *35 (M.D. Pa. Dec. 21, 2017).

¹³⁹ *Dahdaleh*, 17 F. Supp. 3d at 472.

¹⁴⁰ *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

¹⁴¹ *Id.* at 242.

One district court's interpretation of *Shearson* is not enough to say with any confidence that arbitrating against criminal organizations is prohibited. The arbitrability of a civil RICO case against the "archetypal mobster" has only been discussed by a few courts in one jurisdiction, and those cases did not involve a defendant being accused of acts normally associated with organized crime.¹⁴² The answer to whether victims currently have the ability to arbitrate a civil RICO case against their abusers is not definitive. One possible reason for this uncertainty is because not enough victims are coming forward for the courts to answer this question.

Lastly, although the legality of class action arbitration against criminal organizations is unclear, it should not matter for the sake of this Note. This Note's proposal is not that victims *can* arbitrate, but that victims *should* arbitrate. If these claims are currently arbitrable, then victims should be encouraged to take this route; and if these claims not currently arbitrable, then Congress *ought* to fix that and then encourage victims to arbitrate.

In sum, this part of the Note discussed some of the many reasons why victims of organized crime are not bringing civil RICO lawsuits against the mob. RICO's complex statutory language and fear of both the mob and their lawyers act as deterrents for victims seeking justice. Part IV will now offer this Notes proposal, class action arbitration.

IV. PROPOSAL

Civil RICO was designed to provide victims of criminal organizations with an avenue of recovery.¹⁴³ A little more than a decade after RICO was enacted, less than 10% of all RICO cases involved activities normally associated with organized crime.¹⁴⁴ Part III of this Note discussed and analyzed various reasons why the very class of victims RICO intended to protect are not taking advantage of the treble damages provision.¹⁴⁵ One obvious solution to this problem is to either redraft or revise the statute's complex and ambiguous terms. However, *H. J. Inc. v. Northwestern Bell Tel. Co.*, a case where the Supreme Court acknowledged the

¹⁴² *Aluminium Bahr. B.S.C. v. Dahdaleh*, 17 F. Supp. 3d 461, 471-72 (W.D. Pa. 2014); *Chesapeake Energy*, 2017 U.S. Dist. LEXIS 209905, at *35.

¹⁴³ S. REP. NO. 91-617, *supra* note 16, at 76-78.

¹⁴⁴ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985).

¹⁴⁵ *See* Part III.

issues with the statute, was decided decades ago and the legislature has not yet redrafted the ambiguities.¹⁴⁶ Congress may never properly revise these statutes, and therefore, in my opinion, the next best solution is alternative dispute resolution in the form of class action arbitrations against criminal organizations.

A. *What Would Arbitration Solve?*

Criminal RICO made it easier for prosecutors to federally convict members of criminal organizations.¹⁴⁷ That is not to say that convicting these criminals is easy; on the contrary, even under RICO, prosecutors need to provide a significant amount of evidence prior to obtaining a conviction.¹⁴⁸ This can often be expensive and arduous to attain.¹⁴⁹ The “enterprise” element of RICO requires proof of the criminal organization’s structural hierarchy and this can be difficult to produce because of some complex structures where members take the Omertà oath of silence.¹⁵⁰ Collecting the evidence to satisfy the “enterprise” clause where the defendant has not yet been criminally prosecuted is a burden that may be insurmountable for a lone victim. Class action arbitration would solve this issue for victims in civil RICO cases.

One reason why class action arbitration would solve the issues of evidence, is because of the plurality of the plaintiffs. By pooling the resources of the class, the evidence needed to win a civil RICO suit may be more attainable; giving credence to the phrase “strength in numbers.” What may not be attainable for the lone victim, may be attainable by a class of victims.

¹⁴⁶ “The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act’s intended scope.” *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 243 (1989); *See* recent amendments to 18 U.S.C. § 1961.

¹⁴⁷ “In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations (RICO) Act, which proved to be one of the most powerful tools used to take down mobsters” *Demise of the Mafia*, *supra* note 25.

¹⁴⁸ *See Gotti*, *supra* note 101.

¹⁴⁹ *Joe Pistone, Undercover Agent*, FBI, <https://www.fbi.gov/history/famous-cases/joe-pistone-undercover-agent> (last visited Oct. 12, 2020). “Over more than four years, the FBI and its partners gathered a mountain of records and evidence and utilized an array of investigative capabilities. They conducted surveillance on multiple players on multiple continents, sometimes around the clock. They traced and analyzed thousands of telephone calls, often from remote pay phones.” *Pizza Connection*, FBI, <https://www.fbi.gov/history/famous-cases/pizza-connection> (last visited Oct. 12, 2020).

¹⁵⁰ *Mafia Org Chart*, FBI, <https://www.fbi.gov/file-repository/mafia-family-tree.pdf/view> (last visited Oct. 12, 2020).

The benefit of pooling resources together is not exclusive to class action arbitrations: all class actions have this perk. What makes class action arbitration more suitable for civil RICO, as opposed to other forms of class action litigation, is that the arbiter is subject to a simplified set of evidentiary and procedural rules.¹⁵¹ By taking away some of the complexities of RICO, victims may feel more confident in their cases in arbitration as opposed to litigation. Moreover, in many ways, arbitrations are synonymous with privacy and are a good alternative to litigation when the victim does not want a lot of media attention.¹⁵² If all parties in a case agree, arbitration allows them to keep the content of their resolutions confidential and private.¹⁵³ If the victim values their privacy, arbitration provides a better alternative to litigation. However, not all types of arbitration have the same advantages. The standard plaintiff versus defendant arbitration does not solve a critical aspect of privacy in this case, as it does not protect the victim's identity from criminal organizations.¹⁵⁴ Class action arbitration allows for more privacy than the standard arbitration.

Victims of organized crime need more than anonymity to the outside world, rather, they need anonymity from the very party against whom they are bringing the action.¹⁵⁵ The usual forms of arbitration do not solve these issues because both parties are usually in the same room.¹⁵⁶ If victims are afraid to bring their claims in the courtroom because of a general lack of anonymity, there is no incentive for standard arbitration. Class action arbitrations would provide victims with a platform that gives them the opportunity to recover damages in a more comfortable setting because they may feel more comfortable with other similarly situated victims. A class of victims who sue a criminal organization together, may not fear the organization as much as they would if they were to bring a suit on their own. Thus, for more reasons than one, class

¹⁵¹ Barbara Kate Repa, *Arbitrations Pros and Cons*, NOLO, <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html> (last visited Oct. 12, 2020).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ “[T]he assumption that arbitration will always protect confidential information can be misleading and is certainly overbroad.” Laura A. Kaster, *Confidentiality in U.S. Arbitration*, 5 N.Y. DISP. RES. L. 23 (Spring 2012), <https://www.mediate.com/mediator/attachments/26226/Confidentiality%20in%20Arbitration%20DRSNewsSpr12.pdf>.

¹⁵⁵ Simon I. Singer, *The Fear of Reprisal and the Failure of Victims to Report a Personal Crime*, 4 J. OF QUANTITATIVE CRIMINOLOGY 289, 290–92 (1988).

¹⁵⁶ *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.

action arbitrations would alleviate some, but not all, of the fears in suing the mob.

As mentioned earlier, one of the many reasons why victims are afraid to bring their claims against criminal organizations is because the victims may be afraid of the “mob lawyer.”¹⁵⁷ With arbitration, most of that fear should go away because the power of an attorney to influence a jury is no longer present.¹⁵⁸ Moreover, the mob has had a historically strong influence over the court system.¹⁵⁹ Although the mob’s influence has dwindled in the past few decades, their victims may not trust the current court system deciding their case because they could not trust the court system of twenty or thirty years ago.¹⁶⁰ One of the benefits of arbitration is that, in many cases, both parties can decide who they want to arbitrate the case.¹⁶¹ In cases where the parties can agree on an arbitrator, the victims will likely feel comfortable with the arbitrator’s neutrality because they helped select them. However, in situations where the parties cannot mutually agree on an arbitrator, the court will select one from the approved list of arbitrators from the American Arbitration Association (“AAA”) and select one with expertise in the area of law to be arbitrated.¹⁶² If the victim feels that the arbitrator is partial to a party, then they may object to the arbitrators continued service and the AAA will determine if the arbitrator is subject to disqualification.¹⁶³

Whether the victim’s current fear and speculations of the legal system is rational is not of much importance. The mob may no longer have control over the courts, but some victims may *think* they do.¹⁶⁴ Arbitration would solve this issue; victims may feel more comfortable in front of an arbitrator rather than a judge because they know that the criminal organization did not have complete control over who is deciding the case. For victims who

¹⁵⁷ See Part III Section C; Fisher, *supra* note 119; Lardner, *supra* note 120.

¹⁵⁸ Jean Murray, *The Difference Between Arbitration and Litigation*, BALANCE SMALL BUS. (July 29, 2020), <https://www.thebalancesmb.com/arbitration-vs-litigation-what-is-the-difference-398747>.

¹⁵⁹ See Nicholas Pileggi, *The Mob and the Machine*, N.Y. MAG. (Apr. 30, 2008), <http://nymag.com/news/features/crime/46610/index1.html>.

¹⁶⁰ *Demise of the Mafia*, *supra* note 25.

¹⁶¹ *Arbitrator Selection*, AM. ARB. ASS’N, <https://www.adr.org/ArbitratorSelection> (last visited Oct. 12, 2020).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See generally, Jan Van Dijk, *Mafia Markers: Assessing Organized Crime and its Impact Upon Societies*, TRENDS IN ORGANIZED CRIME 10, 39–56 (Oct. 9, 2007), <https://doi.org/10.1007/s12117-007-9013-x>.

historically perceived the court system to be biased and bribed, arbitration may serve as a creative alternative simply because of its neutrality and originality.

Class action arbitration for civil RICO suits is not a perfect marriage. The reader may wonder why criminal organizations would prefer arbitration over litigation, and how they are supposed to be incentivized to leave the courtroom. All the reasons why victims would be incentivized to choose arbitrations are reasons why the defendants would want to stay away from it. How can we ensure that criminal organizations participate in arbitration? If a law were to make civil RICO arbitrations mandatory for any plaintiff who can reasonably show that the defendant has engaged in crimes normally associated with organized crime, there would be no need for incentives since arbitration would be mandatory. However, it may also be the case that the criminal organization would prefer arbitration over litigation, and there is no need to make anything mandatory.

Many readers may take issue with the discussion about the potential benefits for criminal organizations; and justifiably so. Why would anyone want the criminal organizations to benefit from class action arbitration? Our legal system should not compromise with criminals nor pass any laws to their benefit. However, without a mandatory arbitration clause, incentives for criminal organizations to arbitrate are crucial for providing the victims with a better avenue of recovery. Essentially, any incentive for the criminal organization is a benefit for the victim.

Criminal organizations may prefer to arbitrate civil RICO cases for many reasons; some of those reasons may be the same incentives as the victims. For example, the criminal organization would highly value the privacy that arbitration provides.¹⁶⁵ For many mob bosses, publicity is enemy number one, and any cases handled outside of litigation may be preferred.¹⁶⁶ Further, these arbitrations will likely end in settlements that are less than treble damages. It would be unwise to predict with confidence whether there are enough incentives for the criminal organization to voluntarily opt into arbitration, but certainly some incentives exist.

In sum, class action arbitrations combine the anonymity of being in a class with the legal flexibility of arbitration. Victims of organized crime no longer must live in total fear of mob retaliation, nor do they have to worry about not having enough resources to

¹⁶⁵ See Hamilton, *supra* note 72.

¹⁶⁶ See *id.*

gather the necessary evidence. However, class action arbitration does have its flaws. In most cases, the parties must mutually agree to enter arbitration, and the criminal organization may not be incentivized to do so. One solution to this problem is to provide enough incentives for the criminal organizations in these cases. Another solution is to make arbitration mandatory in cases where the plaintiff can reasonably prove that the defendant has committed a certain crime. One of those solutions is impractical while the other is arguably immoral. Neither option is perfect, but any solution is better than the current process.

B. Case Study

For nearly a century, New Jersey has been the home to some of the most notorious criminal families, and all that comes with it (mob hits, FBI raids, and famous trials).¹⁶⁷ As previously mentioned, criminal RICO statutes have made a significant impact in taking down criminal organizations, but there has not yet been a total eradication.¹⁶⁸ On the contrary, in some areas organized crime is still active.¹⁶⁹ This is especially true in New Jersey where it is quite common to read about your favorite restaurant (or other establishment) having significant connections to the mafia.¹⁷⁰

For example, in 2019, a man was arrested in New Jersey for the highly publicized murder of Francesco “Franky Boy” Cali, the “boss” of the infamous Gambino crime family.¹⁷¹ As some may recall, Cali was murdered in front of his New York home in broad daylight.¹⁷² One can infer that not only is La Cosa Nostra currently active on the east coast, but they also have the confidence to commit “true hits” in broad daylight; something that police say has not

¹⁶⁷ Thomas Moriarty, *Behind the Headlines: N.J.’s Notorious Mob Slayings*, NJ.COM (July 16, 2018), https://www.nj.com/news/2018/07/nj_notorious_mob_slayings.html.

¹⁶⁸ See Part II.

¹⁶⁹ See Moriarty, *supra* note 167.

¹⁷⁰ Jim Consoli, *(Archive) Investigators: Area Eateries Cater to Mob, Serve as Safe Havens*, NORTHJERSEY.COM (Dec. 7, 2017, 4:07 PM), <https://www.northjersey.com/story/news/bergen/lodi/2017/12/07/archive-investigators-area-eateries-cater-mob-serve-safe-havens/932109001/>.

¹⁷¹ Tom Davis, *Mob Still in NJ? 3 Big Organized Crime Cases in 2019*, PATCH (June 11, 2019, 8:22 AM), <https://patch.com/new-jersey/pointpleasant/mob-still-nj-3-big-organized-crime-cases-2019>.

¹⁷² Meghan Keneally, *A Look Into ‘Franky Boy’ Cali—the Alleged Mob Boss Assassinated in New York*, ABC NEWS (Mar. 14, 2019, 2:47 PM), <https://abcnews.go.com/US/franky-boy-cali-alleged-mob-boss-assassinated-york/story?id=61679312>.

happened in thirty years.¹⁷³ Another example is Point Pleasant, a popular beach and boardwalk destination on the Jersey shore, where three men were recently arrested for the distribution of methamphetamine, heroin, and fentanyl.¹⁷⁴ According to the court documents, these suspects are said to have strong ties to both the New Jersey and Philadelphia mafias.¹⁷⁵

Newark, the largest city in New Jersey, has both a large presence of large corporate offices and organized crime.¹⁷⁶ Many gangs and criminal organizations are active in Newark, and are often prosecuted under criminal RICO statutes.¹⁷⁷ Newark is a unique city in the sense that it has both a large airport and harbor, making it a popular city for organized crime.¹⁷⁸ In 2019, about 1.6 tons of drugs were seized in a raid by the U.S. Customs and Border Protection at Port Newark; the confiscated cocaine had an estimated value of about seventy-seven million dollars.¹⁷⁹

The murder of “Franky Boy,” the arrest of three mafiosos in Point Pleasant, and the gang violence and drugs in Newark are just a few examples of how organized crime in New Jersey is still prevalent and active. One can only imagine the number of victims of organized crime in these areas that suffer financially or physically.

¹⁷³ “‘We’re back to the 90s,’ said Rich Frankel, a former FBI special agent in charge of the criminal division in New York and current ABC News contributor. ‘We haven’t had a hit like this in at least 30 years.’” *Id.*

¹⁷⁴ Davis, *supra* note 171.

¹⁷⁵ *Id.*

¹⁷⁶ *Members of Newark’s ‘Famous Boyz’ Street Gang Admit Drug and Firearms Offenses*, U.S. DEP’T OF JUST. (Nov. 26, 2019), <https://www.justice.gov/usao-nj/pr/members-newark-s-famous-boyz-street-gang-admit-drug-and-firearms-offenses>.

¹⁷⁷ Sergio Bichao, *Union County Prosecutor: Crips Turned to White-Collar Crime to Afford Lawyers*, MY CENTRAL JERSEY (Aug. 17, 2015, 5:28 PM), <https://www.mycentraljersey.com/story/news/crime/jersey-mayhem/2015/08/17/union-county-uses-rico-indict-crips-white-collar-crime-spreed/31877777/>; *Grape Street Crips Member Arrested for Attempted Murder in Aid of Racketeering and RICO Conspiracy*, U.S. DEP’T OF JUST. (Nov. 21, 2018), <https://www.justice.gov/usao-nj/pr/grape-street-crips-member-arrested-attempted-murder-aid-racketeering-and-rico-conspiracy>; *Gang Member Charged in Connection With Two Attempted Murders As Part of RICO Conspiracy*, U.S. DEP’T OF JUST. (Aug. 12, 2019), <https://www.justice.gov/usao-nj/pr/gang-member-charged-connection-two-attempted-murders-part-rico-conspiracy>.

¹⁷⁸ *Public Transportation*, NEWARK AIRPORT, <https://www.newarkairport.com/to-from-airport/public-transportation> (last visited Oct. 12, 2020); *See The Changing Face of Organized Crime in New Jersey*, N.J. COMM’N OF INVESTIGATION, <https://www.state.nj.us/sci/pdf/ocrreport.pdf> (last visited Nov. 11, 2020).

¹⁷⁹ Rodrigo Torrejon, *About 1.6 Tons of Cocaine Seized at Port Newark, Largest Drug Bust in 25 years*, NORTHJERSEY.COM (Mar. 11, 2019, 9:44 AM), <https://www.northjersey.com/story/news/new-jersey/2019/03/11/1-6-tons-cocaine-seized-port-newark-largest-bust-25-years/3128185002/>; *\$77,000,000 in Cocaine Seized at Port of New York/Newark in Biggest Such Bust this Century: Officials*, NBC N.Y. (Mar. 11, 2019), <https://www.nbcnewyork.com/news/local/cocaine-bust-port-of-new-york-newark-millions-dollars-customs/1784039/>.

While the gangs and criminal organizations might be criminally prosecuted under RICO, the victims of organized crime are not using their civil RICO claims to obtain treble damages.¹⁸⁰

Assuming *arguendo* that class action arbitration in civil RICO cases is legal, the proposal would resemble the current AAA's supplemental rules for class arbitrations, subject to a few exceptions.¹⁸¹ For example, this Note proposes that in RICO cases, there must be at least three arbitrators. Two of the three should be mutually agreed upon, and the other should be selected at the sole discretion of the class. All arbitrators should be from an approved list provided by the AAA. In a perfect world, all the arbitrators should be trained specifically on civil RICO.

Further, the current rules have an exception to the general confidentiality rules for class actions.¹⁸² Class action arbitrations are generally made public, but that should not be the case for RICO cases that involve a defendant who is accused of crimes that are normally associated with organized crime.¹⁸³ This would protect plaintiffs from the unwanted dangers of suing a criminal organization, and it would protect the defendants who are found to have not committed the accused crimes.

Once the panel of three arbiters is selected, they will determine whether this case is suitable as a class action based on the Federal Rules of Civil Procedure.¹⁸⁴ Once they determine that the class of victims is a proper class, they should then listen to arguments as to whether the defendants properly constitute an enterprise under RICO. The arbitrators will hear arguments from both sides and make a "Final Award" in cases where the panel finds appropriate.¹⁸⁵

In this scenario, a class of victims from Newark would sue the criminal organization under RICO. Under this proposal, a class would need to meet the initial burden of showing that the organization might have committed acts normally associated with organized crime. Once that burden is met, the case would go before arbitration. The class would also be entitled to select one of the arbitrators alone, and that arbitrator should be responsible for

¹⁸⁰ See Part II.

¹⁸¹ *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N 1, 1 (Oct. 8, 2003), https://adr.org/sites/default/files/document_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

¹⁸² *Id.* at 7.

¹⁸³ *Id.*

¹⁸⁴ FED. R. CIV. P. 23.

¹⁸⁵ *Supplementary Rules for Class Arbitrations*, *supra* note 181.

communicating with the criminal organization. Collectively, two other arbitrators would be selected. Thus, creating a forum that is fair, impartial, safe, and in the shadow of the law. This will hopefully result in more victims, like those in Newark, being justly compensated for the crimes committed against them.

V. CONCLUSION

In sum, RICO was enacted to combat La Cosa Nostra and to provide victims of organized crime with the proper remedies. Civil RICO lawsuits are currently very popular because of the treble damages provision, but for many reasons, those affected by organized crime are not using the benefits that Congress gave them.¹⁸⁶ Case law and legislative history tell us that the current structure of RICO is unlikely to change, therefore this Note proposed an alternative to redrafting by calling for more class action arbitrations against “enterprises” normally associated with organized crime; regardless of the current legality. Class action arbitration would help build a healthy relationship between the legal system and victims of organized crime, and it would also give victims more confidence in suing the organizations. The current structure of RICO is both unfair and unrealistic as it expects victims to sue an entire criminal organization alone. If victims were to come together and take on these organizations in a setting where they feel comfortable, forgotten victims may finally receive just compensation for all that they have been through.

¹⁸⁶ Henning, *supra* note 58; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 506 (1985).

