

The Application of Civil RICO Laws to Rogue Internet Pharmacies

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I. INTRODUCTION

Anyone in the United States who has ever been ill knows that many medications require prescriptions.¹ Although the federal government requires that pharmacists register with the Drug Enforcement Agency (DEA), the states ultimately control the licensing and regulation of pharmacists.² As a result of state-specific licensing and regulation, a pharmacist licensed in one state may not be permitted to fill prescriptions in another state.³ The government's ultimate purpose in this multilevel regulation is the protection of the consumer.⁴

The issue of pharmacy regulation is important and becomes more complex when pharmacies fill prescriptions through the Internet and across state borders. The first Internet pharmacies began operating in 1999.⁵ Since then, the industry has grown phenomenally. In 1999, there was an estimated 300 to 400 online pharmacies thought to be dispensing drugs, of which, only 6 were thought to be operating

1. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397 (1999); Federal Controlled Substance Act § 13, 21 U.S.C. § 822(a)(2) (1999). State statutes also regulate the dispensing of prescription drugs and controlled substances. *See, e.g.*, Massachusetts Controlled Substances Act, MASS. GEN. LAWS ch. 94C §§ 1-48 (1997).

2. Amy J. Oliver, *Internet Pharmacies: Regulation of a Growing Industry*, 28 J.L. MED. & ETHICS 98, 99, (2000) (indicating states traditionally regulate dispensing of prescription drugs); 21 U.S.C. § 822. *See, e.g.*, MASS. GEN. LAWS ch. 112 § 24 (1996) (defining requirements to practice pharmacy in Massachusetts). 21 U.S.C. § 822.

3. *See e.g.*, MASS. GEN. LAWS ch. 94C §§ 6-7 and Massachusetts Registration of Pharmacists, MASS. GEN. LAWS ch. 112 §§ 24-24B.

4. *See e.g.*, MASS. GEN. LAWS ch. 94C §§ 6-7 and Massachusetts Registration of Pharmacists, MASS. GEN. LAWS ch. 112 §§ 24-24B.

5. Eric M. Peterson, *Doctoring Prescriptions: Federal Barriers to Combating Prescription Drug Fraud Against On-Line Pharmacies in Washington*, 75 WASH. L. REV., 1331, 1342 (2000).

legally.⁶ This proliferation continued and in 2000, sources estimated that sales for 2001 would reach \$1.4 billion and would exceed \$15 billion by 2004.⁷ The high potential for profit coupled with the anonymity of the Internet and legally ambiguous jurisdiction pose a consumer protection risk.

Online pharmacies fall into three basic categories: those that require a written prescription from a licensed physician, those that provide a prescription to the consumer, and those that dispense drugs without the requirement of a prescription. Pharmacies that require a written prescription from a licensed physician are the closest to the traditional neighborhood pharmacy.⁸ This type of pharmacy is the least susceptible to abuse, and may include cyber-versions of well known national chains.⁹ Pharmacies that refer the customer to an online prescription service or provide a consultation prior to prescribing and dispensing a prescription, and pharmacies that dispense drugs without a prescription are known as rogue pharmacies.¹⁰ In addition, about half of the online pharmacies that

6. *Access to Affordable Drugs in South Florida, before Comm. on House Energy and Commerce Subcomm. on Health, 108th Cong. (2003)*, (statement of John Taylor, Associate Commissioner, Regulatory Affairs, FDA) 2003 WL 11716104 [hereinafter *Access to Affordable Drugs*] (testifying to Congress on the number of Internet pharmacy sites), available at <http://www.fda.gov/ola/2003/southfl0310.html>; Steve Sternberg, *Clinton Wants FDA to Control Drug Sales Online*, USA TODAY, Dec. 29, 1999 at 6D (citing "government officials[']" estimate of 400 online pharmacies but not indicating only 6 were legal); Sara Fritz, *In U.S. No Easy Rx for Online Pharmacies*, ST. PETERSBURG TIMES, Apr. 2, 2000 at 1A (citing Kansas Attorney General Carla Stovall); Sara Fritz, *Clinton is Hardly Nemesis of Net Drug Bazaar After All*, ST. PETERSBURG TIMES, Apr. 17, 2000 at 2A (2000 WL 5608508) (correcting facts in part and confirming 400 illegal online pharmacies).

7. Oliver, *supra* note 2 (citing a "US Internet Pharmacy Sales 'At Least \$1.4 Billion by 2001'" Marketletter, January 3, 2000).

8. Kerry T. Rost, *Policing the "Wild West" World of Internet Pharmacies*, 55 FOOD & DRUG L.J., 619 (2000) (illustrating for the consumer, there may be little difference between this type of pharmacy and their neighborhood pharmacy); Carol Ukens, *Internet Pharmacies*, DRUG TOPICS, May 17, 1999, at 63.

9. See e.g., <http://www.cvs.com>; <http://www.wallgreens.com>. In the Fall of 2000, the online pharmacy owned by Merck & Co. sold more than 100,000 prescriptions in a single week. Sara E. Zeman, *Regulation of Online Pharmacies: a Case for Cooperative Federalism*, 10 ANNALS HEALTH L. 105, 106 (2001). In the summer of 1999, Rite Aid paid over \$7 million dollars for an interest in a pharmacy website and CVS paid \$30 million for its online pharmacy. *Id.* See also Julius A. Karash, *More Prescriptions Are Being Filled on the Net: There Are Hundreds of Online Pharmacies, But Not All Will Survive*, KAN. CITY STAR, Oct. 22, 2000, at G1. Susan Chandler, *Walgreen Opens Up on Plans for Web; E-commerce Venture to Debut in September*, CHI. TRIB., June 29, 1999, § 4, at 1.

10. John Henkel, *Buying Drugs Online: It's Convenient and Private, But Beware of 'Rogue Sites'*, FDA CONSUMER, Jan. 1, 2000 at 24, revised June 2000 and Mar. 2001, available at

sell drugs in the United States do so from inside its borders.¹¹ Therefore, this Note will discuss the application of civil RICO laws to rogue pharmacies based in the United States.

II. BENEFITS AND RISKS

Online pharmacies, although a possible source of fraud and abuse, may supply some benefit to the consumer, if run legally. Internet pharmacies offer the convenience of having one's prescriptions delivered directly to the door.¹² This may be of great importance to the elderly or other people who may be unable to leave their homes.¹³ Also, Internet pharmacies may benefit consumers who do not live near a pharmacy and who may prefer to receive their prescriptions in the mail.¹⁴ In addition, Internet pharmacies may have less overhead expenditures and more competition, thus resulting in lower drug costs.¹⁵

Although Internet pharmacies may be convenient because they ship prescriptions via the mail or they may not require a prescription, the risks involved with these pharmacies outweigh the benefits.¹⁶ One of the main purposes of the Federal Food, Drug, and Cosmetic Act (FDCA) is to protect the public from unsafe or adulterated drugs.¹⁷ When prescription drugs are improperly prescribed or distributed with no prescription at all, Congress's intent is bypassed and the public is put at risk.¹⁸

The dispensing of drugs by rogue pharmacies without a proper prescription endangers the public because it bypasses the patient-

http://www.fda.gov/fdac/features/2000/100_online.html (warning about practice of prescribing and distributing drugs based solely on questionnaire).

11. *Access to Affordable Drugs*, 108th Cong. (2003), 2003 WL 11716104.

12. *Online Pharmacies*, 106th Cong. (1999), 1999 WL 20010890 (statement of Dr. Janet Woodcock) (testifying before the House Subcommittee on Oversight & Investigations).

13. *Id.* For those unable to leave the home, mail order or Internet pharmacies may provide a service integral to their health. *Id.*

14. *Id.*

15. *Online Pharmacies*, 106th Cong. (1999), 1999 WL 20010890 (statement of Dr. Janet Woodcock).

16. Henkel, *supra*, note 10. In addition to illegally selling prescription drugs, some websites sell fake remedies and "miracle cures." *Id.* In 1996 and 1997, a California company, Lei-Home Access, sold a home AIDS tests where the consumer would mail in a drop of blood. *Id.* Not only was the test not approved by the FDA, but the company falsified its test results. *Id.* Eventually the FDA closed the sight and the owner was sentenced to more than five years in jail. *Id.*

17. *United States v. Sage Pharms. Inc.*, 210 F.3d 475, 480 (5th Cir. 2000) (supporting FDA's right to use its discretion in enforcing FDCA to protect the public).

18. Henkel, *supra*, note 10.

doctor and patient-pharmacist relationship.¹⁹ In one tragic case, a man, without a prescription, placed an order over the Internet for the drug Viagra (sildenafil citrate),²⁰ a medicine to treat erectile dysfunction and later suffered a heart attack.²¹ A proper check-up and medical history would likely have shown a family history of heart disease, which is a contraindication for the drug.²² A responsible physician would not have prescribed Viagra to a patient with a history of heart disease.²³

In addition to self-imposed risks, consumers who purchase drugs from rogue sites may fall prey to unethical vendors because there is no way to ever truly know what one may receive in the mail. The consumer is at risk for receiving contaminated, counterfeit, or expired drugs.²⁴ These counterfeit drugs may contain inactive ingredients, subpotent, or superpotent drugs that could cause unexpected side effects.²⁵ Even if one orders and receives the proper drug, it may be shipped or stored under unsafe conditions that may affect its potency or safety.²⁶ This too could result in side effects not anticipated by the consumer.²⁷

Some of the rogue sites issue online questionnaires that they claim are reviewed by doctors or they hyperlink their site to an online prescriber.²⁸ These services, however, provide minimal protection to the consumer.²⁹ On these sites, the consumer may simply fill out a brief questionnaire.³⁰ In theory, the operator of the site will then evaluate the answers and prescribe the requested drug.³¹ However, these rogue pharmacies often fail to even confirm the answers provided by the consumer, and simply ship the drugs to the

19. *Online Pharmacies*, 106th Cong. (1999), 1999 WL 20010890 (statement of Dr. Janet Woodcock).

20. See generally <http://www.viagra.com/index.asp> (informing consumers about function and safety of Viagra).

21. Naftali Bendavid, *Prescriptions Via Internet Pose Dangers Doctors Fear Patients Will Skip Supervision, Checkups*, CHI. TRIB., June 16, 1999, § 4, at 1.

22. *Id.*

23. *Id.*

24. Henkel, *supra*, note 10.

25. *Online Pharmacies*, 106th Cong. (1999), 1999 WL 20010890 (statement of Dr. Janet Woodcock) (stating some illegally purchased drugs may be real but may also represent a dangerous health risk).

26. *Id.*

27. *Id.*

28. Barbara J. Williams, *On-Line Prescriptions and Drug Sales: An Overview of Emerging Issues*, 1 HOUS. J. HEALTH L. & POL'Y 147, 151, 155 (2001) (describing how rogue sites function).

29. *Id.* at 151.

30. *Id.*

31. Williams, *supra*, note 28.

consumer's front door.³² To illustrate the lack of actual supervision by doctors working for these rogue sites, an investigative reporter ordered Viagra for his cat.³³ He used the cat's name, real height, and weight.³⁴ The online pharmacy filled the prescription without asking any questions.³⁵ In similar instances of illegal dispensary, reporters obtained Viagra for a 98 year old man and "a prescription diet drug" for a seven year old girl.³⁶

In March of 2002, an 18 month joint investigation involving the Food and Drug Administration (FDA), DEA, Internal Revenue Service (IRS), and the U.S. Attorney's Office resulted in the indictment of a Texas pharmacist, three doctors, and two corporations, for dispensing drugs through a rogue Internet pharmacy.³⁷ Charges included conspiracy to illegally dispense controlled substances and conspiracy to commit money laundering.³⁸ According to the indictment, during the eighteen month period, the defendants illegally made more than \$7.7 million from the Internet sale of only two drugs.³⁹ The doctors issued prescriptions to consumers without taking a history, performing an exam, or performing any type of testing.⁴⁰ The pharmacist and two corporations eventually pled guilty to illegally dispensing a controlled substance and forfeited \$1 million.⁴¹ It is obvious from the examples that illegal rogue pharmacies have the potential to injure consumers and therefore require regulation.

III. REGULATION

The regulation of drugs and pharmacies is multi-leveled and includes both the federal and state governments. On the federal level, the FDA is responsible for enforcing the FDCA.⁴² The FDCA prohibits the sale or "delivery for introduction into interstate commerce," of drugs that are adulterated, misbranded, or unapproved and grants the FDA the power to bring civil or criminal charges

32. *Id.*

33. *Congressional Panel Discusses Online Pharmacies*, 11 LOY. CONSUMER L. REV., 212, 213 (1999).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Access to Affordable Drugs*, 108th Cong. (2003), 2003 WL 11716104.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Access to Affordable Drugs*, 108th Cong. (2003), 2003 WL 11716104.

42. 21 U.S.C. §§ 301-397 (1999).

against those who sell, import, or distribute these drugs.⁴³ Although the FDA may exert its jurisdiction when an Internet pharmacy violates the FDCA, it may not revoke a state pharmacist's license.⁴⁴

The DEA is another federal agency and is charged with enforcing the Controlled Substances Act (CSA).⁴⁵ Under this act, the DEA controls the distribution of controlled substances.⁴⁶ Not all prescription drugs, however, are considered controlled substances.⁴⁷ In fact, many drugs ordered from Internet pharmacies, including the popular "life style" drugs, are not controlled substances.⁴⁸ The CSA requires that anyone who distributes drugs, referring primarily to pharmacists, must register with the DEA.⁴⁹ The DEA, however, does not license pharmacists.

The Federal Trade Commission's (FTC) jurisdiction overlaps with that of FDA when drugs are involved in interstate commerce and are sold to the public. The FTC has the authority to bring a civil or criminal action against an Internet pharmacy if the Internet pharmacy makes false or misleading statements on its website in violation of the Federal Trade Commission Act (FTCA).⁵⁰ The FTC's jurisdiction is not specifically related to drugs but to "unfair or deceptive acts or practices in or affecting commerce."⁵¹ When "unfair or deceptive acts or practices" involve food, drugs, or cosmetics, then the FDA and the FTC possess concurrent regulatory powers.⁵²

43. *Id.* at § 331. The federal government has nearly sole jurisdiction over the FDCA. 21 U.S.C. § 337 (granting states very limited jurisdiction to bring "proceedings for the civil enforcement, or to restrain violations" relating primarily to misbranding).

44. 21 U.S.C. §§ 301-397 (1999); 21 U.S.C. §§ 801-971 (1999). State statutes also regulate the dispensing of prescription drugs and controlled substances. *See, e.g.,* MASS. GEN. LAWS ch. 94C §§ 1-48 (1997).

45. The Controlled Substances Act, 21 U.S.C. §§ 801-971 (1999). The CSA does not cover all drugs. It is designed to apply only to drugs that have the potential to be abused. *Id.*

46. *Id.*

47. 21 U.S.C. § 802(6) (defining controlled substances as drugs included in schedules I, II, III, IV, and V of the CSA and excluding alcohol and tobacco).

48. Dispensing and Purchasing Controlled Substances Over the Internet, 66 Fed. Reg. 21,181 (April 27, 2001). Most prescription drugs are not controlled substances. *Id.* This reduces the effectiveness of using the CSA against Internet pharmacies. *Id.* However, even though a drug may not be a controlled substance, it remains illegal to purchase or possess these drugs without a prescription. *Id.* (indicating some people use the term "life style" drug when referring to Viagra, weight loss medications, and tranquilizers).

49. 21 U.S.C. §§ 301-397 (1999).

50. The Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1997).

51. 15 U.S.C. § 45(a)(1) (1997) (establishing subject matter, role, and powers of FTC).

52. *Id.*

Although the FDA and FTC may regulate drug production and commerce, they cannot suspend or revoke a pharmacist's license.⁵³ The regulation of pharmacists rests primarily on the states, which designate their power to licensure boards.⁵⁴ These boards are responsible for establishing criteria for obtaining a license and have the power to suspend or revoke pharmacist's licenses.⁵⁵

In an attempt to avoid an increase in regulation by the federal government and to maintain standards, the National Association of Boards of Pharmacy (NABP) along with boards in Canada and Australia developed a voluntary self regulation system.⁵⁶ This Verified Internet Pharmacy Practice Site (VIPPS) program ensures quality, privacy, and compliance with state and federal regulations.⁵⁷ Due to the strict rules, only a few Internet pharmacies qualify for VIPPS approval.⁵⁸

The VIPPS program requires participating Internet pharmacies to post certain disclosure information, including the address for the physical location and the licensing state.⁵⁹ Of the 3,500 sites reviewed only a few are certified.⁶⁰ Certification allows the site to post a logo indicating its participation.⁶¹ The NABP intended VIPPS to provide consumers with a method of identifying safe Internet

53. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397; The Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

54. 21 U.S.C. § 824(a). Although the Attorney General may revoke a pharmacist's registration if he "has committed such acts as would render his registration. . . inconsistent with the public interest," the state is primarily responsible for disciplining pharmacists. *Id.* at § 824(a)(4).

55. *See, e.g.*, MASS. GEN. LAWS ch. 112 §§ 24-36 (regulating pharmacists).

56. <http://www.nabp.net/vipps/intro.asp> (detailing the origin of VIPPS program). In 2001, the NABP Task Force on the Expanded Use of the Internet in Pharmacy Practice and Regulation reported that Internet pharmacies do not require a separate method of regulation because they do not differ that greatly from the traditional pharmacy. Vani Singhal *et al.*, *Recent Developments in Medicine and Law*, 37 TORTS & INS. L.J. 601, 608 (2002) (citing an NABP report no longer available on-line).

57. 15 U.S.C. § 45(a)(1).

58. <http://www.nabp.net/vipps/intro.asp> (listing 14 certified Internet as of November 7, 2003).

59. *Id.* VIPPS certification requires an Internet pharmacy to comply with the licensing and inspection requirements of their state and each state to which they dispense, comply with "VIPPS criteria including patient rights to privacy, authentication and security of prescription orders, adherence to a recognized quality assurance policy, and provision of meaningful consultation between patients and pharmacists." *Id.*

60. *See Zeman, supra*, note 9 (explaining VIPPS and citing personal notes); *See also* Sara Fritz, *No Easy Rx for Online Pharmacies*, SAINT PETERSBURG TIMES, Apr. 2, 200, at 1A (quoting Kansas Attorney General stating that only 6 of about 400 online pharmacies were operating within the law).

61. <http://www.nabp.net/vipps/intro.asp>.

pharmacies that meet the strict requirements of state regulation.⁶²

Although the large pharmaceutical companies may regulate the legal and illegal flow of prescription drugs into the United States from Canada, their goals are based too much on financial gain to rely on them for true regulation. The Pharmaceutical Market Access Act of 2003 (PMAA) submitted to Congress on July 15, 2003 described the economics of the American pharmaceutical market as “perverse” and would allow for the importation or reimportation of non-narcotic pharmaceuticals into the United States.⁶³ To decrease the importation of Canadian drugs to the United States, Pfizer Inc., the world’s largest pharmaceutical company and maker of popular drugs including Viagra, reacted by requiring Canadian pharmacies known to sell drugs to customers in the United States, to purchase their drugs direct from Pfizer rather than drug wholesalers.⁶⁴ This step was intended to prevent United States citizens from purchasing their drugs in Canada where the lower price and beneficial exchange rate would reduce Pfizer profits.⁶⁵ Other pharmaceutical companies such as GlaxoSmithKline, AstraZeneca, and Wyeth also took steps to reduce the distribution of Canadian drugs to the United States by limiting the supply of drugs to Canadian pharmacies known to export to the United States.⁶⁶ While the large pharmaceutical companies may exert power over the Internet pharmacies, it would be unwise to rely on the companies for regulation, as their motives are largely financial.⁶⁷

62. See David B. Brushwood, *Responsive Regulation of Internet Pharmacy Practice*, 10 ANNALS HEALTH L. 75, 100-2 (2001) (describing benefits and drawbacks of NAMP/VIPPS program). The NABP certifies an Internet pharmacy through VIPPS and permits it to hyperlink its seal on their website. *Id.* This link verifies that the site is certified. *Id.* This allows the consumer to differentiate between safe, regulated websites and “rogue” sites. *Id.* One main drawback is that the NABP/VIPPS program is not well known by consumers. *Id.* Another problem with the NABP/VIPPS program is that it does not regulate the websites, per se, it simply reports that the websites conform to the proper regulation and post contact information. *Id.* VIPPS is strictly voluntary. *Id.*

63. The Pharmaceutical Market Access Act of 2003, H.R. 2427, 108th Cong. (1st Sess. 2003).

64. Scott Hensley and Anna W. Mathews, *Pfizer Warning May Curb Drugs From Canada*, WALL ST. J., Aug. 7, 2003, at A2; Gardiner Harris, *Pfizer Moves to Stem Canadian Drug Imports*, N.Y. TIMES, Aug. 7, 2003, at C1.

65. Gardiner Harris, *Pfizer Moves to Stem Canadian Drug Imports*, N.Y. TIMES, Aug. 7, 2003, at C1 (citing “a Canadian health agency” stating that United States drug prices are 67 per cent higher than in Canada); See Hensley *supra*, note 64 (crediting price controls and exchange rates as why Americans may save one-third to one-half off name brand prescriptions in Canada).

66. See Hensley *supra*, note 64; see Harris *supra*, note 65.

67. America supplies the pharmaceutical industry with half of its revenues and most of its profits. See Harris *supra*, note 65. According to IMS Health, as quoted

IV. CIVIL RICO

The Organized Crime Control Act of 1970 included the federal Racketeer Influenced and Corrupt Organization (RICO) laws.⁶⁸ Congress enacted these statutes to fight organized crime but they have other benefits.⁶⁹ For example, in addition to fighting organized crime civil RICO evolved into an effective tool to fight consumer fraud.⁷⁰ Unlike the CSA, FDCA, and particularly the FTCA, civil RICO provides for individual and class actions, in addition to a governmental cause of action brought by the states' attorneys general.⁷¹

Another major benefit to the RICO statutes is that they provide for a federal cause of action.⁷² Where a state's effectiveness may be hindered by its limited jurisdiction, and because it may only obtain an injunction within its own borders, a federal cause of action is more effective in that it may be enforced throughout the country.⁷³ This is useful for enterprises such as Internet pharmacies with the potential to relocate and avoid state-level regulation.⁷⁴

by the New York Times, Americans purchase up to \$650 million in Canadian drugs each year. *Id.* One may conclude that if the drugs had been purchased at higher, United States prices, the profit would have been higher for the drug companies. *Id.* However, Pfizer claims that its purpose is to fight counterfeit drugs and maintain an adequate supply. Pharmaceutical Market Access Act of 2003, H.R. 2427, 108th Cong. (1st Sess. 2003); *See Hensley supra*, note 64. In addition, Americans pay up to 1,000 per cent more for their drugs than many other countries. Pharmaceutical Market Access Act of 2003, H.R. 2427, 108th Cong. (1st Sess. 2003).

68. 18 U.S.C. §§ 1961-8 (2000).

69. *Id.*

70. *See generally*, G. Robert Blakey, *The Rico Civil Fraud Action In Context: Reflections On Bennett V. Berg*, 58 NOTRE DAME L. REV. 237 (1982) (providing an exhaustive and detailed description of many aspects of civil RICO including legislative history).

71. *Baum v. Great Western Cities, Inc.*, 703 F.2d 1197, 1209 (10th Cir. 1983). Although it prevents unfair competition and unfair or deceptive acts in or involving interstate commerce, the FTCA does not provide for a private cause of action. *Id.* (stating "private citizens cannot invoke the jurisdiction of the district courts" under the FTCA). Only the FTC may begin a cause of action under 15 U.S.C. § 45. *Id.*

72. 18 U.S.C. § 1964 (2000) (stating "[t]he district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter. . ."). *See generally* *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003), and *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) (recognizing class action civil RICO).

73. *Henkel, supra*, note 10. The participation of federal agencies in the regulation of Internet pharmacies is beneficial because the states have "difficulty enforcing their laws across state boundaries. *Id.* If a state is successful in closing a "rogue" site, there is nothing to stop the site from opening in another state. *Id.* *Henkel* states that if the federal government shuts down a "rogue" website, that website will be out of business in all of the states. *Id.*

74. *Henkel, supra*, note 10. The location of the warehouse storing the drugs, the

Civil RICO litigation requires a preexisting enterprise to be infiltrated by a corrupt individual or entity that engages in or affects interstate or foreign commerce.⁷⁵ The plaintiff in a civil RICO claim must prove that the defendant performed at least one of several prohibited activities and that the activity or activities caused injury to the plaintiff, his or her business, or property.⁷⁶ To make a valid claim under the civil RICO statutes, the plaintiff must claim that the defendant is either employed by the enterprise, associated with the enterprise, conducted in the enterprise's affairs, or participated in a pattern of racketeering, such as the collection of an unlawful debt.⁷⁷ The most common predicate offenses for civil RICO claims

office housing the operations of the website, and the website server may each reside in a different state. *Id.* For a state to exert its jurisdictional power over an out of state entity such as an Internet pharmacy or an individual involved in its operation, the state must meet the usual personal jurisdiction requirements. *See e.g.*, MASS. GEN. LAWS ch. 223A §§ 1-8 (2000) (exemplifying state long arm statutes). *See also*, Int'l Shoe Co. v. State of Washington, Office of Unemployment, 326 U.S. 310 (1945) (establishing minimum contacts test). *Helicopteros Nacionales De Colombia v Hall*, 466 U.S. 408 (1984) (limiting states ability to assert jurisdiction when contacts are insufficient); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 120 (1987) (ruling defendant must purposefully direct its actions toward forum state); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1991) (describing active, passive, and interactive websites and applying minimum contacts to them). *See also* *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996), *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997).

75. *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2nd Cir. 1983) (citing 18 U.S.C. § 1962 (1976) and listing minimal elements that must be averred for civil RICO claim). To assert a claim for civil RICO, a plaintiff:

must allege the existence of seven constituent elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce.

Id.

76. 18 U.S.C. § 1961(1)(A) (2000). Predicate offenses may include state offenses such as:

any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year.

Id.

Predicate offenses may also include federal crimes including but not limited to mail fraud, wire fraud, and securities fraud. 18 U.S.C. § 1961(1)(B) (2000). Other predicate offenses include bribery of public officials or witnesses as per 18 U.S.C. § 201 (1994). For consumer cases, mail and wire fraud are the most significant predicate offenses. JONATHAN SHELDON & CAROLYN CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 9.2.2 (5th ed. 2001).

77. SHELDON, *supra*, note 76 at § 9.2.3.1.

involving consumer protection are mail and wire fraud.⁷⁸

In a successful civil RICO claim, the plaintiff must prove a pattern of racketeering activity.⁷⁹ A single act or predicate offense will not suffice for a RICO claim.⁸⁰ While the plaintiff must prove more than one racketeering activity, the Supreme Court has not yet defined “pattern.”⁸¹ Generally, two acts of racketeering may meet the pattern requirement but that is not guaranteed.⁸²

The enterprise in a civil RICO claim must be distinct from the actual person committing the predicate offense.⁸³ Therefore, when raising a civil RICO claim, one must first identify the enterprise infiltrated by the defendant and then distinguish it from the person.⁸⁴ The predicate offense perpetrated by the defendant is actually committed against the enterprise and not against the plaintiff.⁸⁵ There is often difficulty in separating the enterprise from the defendant, especially when dealing with closely held corporations or partnerships.⁸⁶ However difficult it may be, it is essential to separate

78. *Id.*

79. 18 U.S.C. § 1962 (2000) (outlawing racketeering and infiltration of legitimate businesses).

80. 18 U.S.C. § 1961(5) (2000) (defining “pattern of racketeering activity” as requiring at least two acts within ten years of each other).

81. *Sedima, S.P.R.L. v. Imex Co., Inc.*, 473 U.S. 479, 496-97 (1985). While under the RICO statutes, a pattern requires at least “two acts of racketeering activity,” only two acts may not be enough to establish a pattern. *Id.* at 497 n.14.

82. *Id.* “[W]hile two acts are necessary, they may not be sufficient.” *Id.* The target of RICO is the sustained threat and threat of continuing activity. *Sedima*, 473 U.S. at 497 (citing the Senate Report S. Rep. No. 91-617, p. 158 (1969)). See 18 U.S.C. § 1962 (a)-(c) (outlawing racketeering activity). See also *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 230, 240 (1989) (requiring at least two predicate offenses but not requiring predicate offenses to be part of same illegal schemes.)

83. 18 U.S.C. § 1961(3) (2000). According to the statute, “‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property.” *Id.* See also, *SHELDON*, *supra*, note 76.

84. 18 U.S.C. § 1961(4) (2000). “[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.” *Id.* But see *United States v. Hartley*, 678 F.2d 961, 988, 989 (11th Cir. 1983) (allowing a corporation to serve as both person and enterprise).

85. *Nat’l Org. of Women v. Sheidler*, 510 U.S. 249 (1994). To qualify as an organization, some Circuits require the plaintiff prove certain characteristics: “(1) an ongoing organization with a decision-making framework or mechanism for controlling the group; (2) with associates that function as a continuing unit; and (3) that is separate and apart from the pattern of racketeering activity.” *SHELDON*, *supra*, note 76 at § 9.2.3.2.3.

86. *United States v. Turkette*, 452 U.S. 576, 583 (1981). Where the enterprise is not an individual or a single entity, an associate may be defined as “a group of persons associated together for a common purpose of engaging in a course of conduct.” *Id.*

the enterprise from the defendant because the two cannot be the same entity.

Civil RICO laws grant standing to any victim that sustained real injuries to his or her business or property.⁸⁷ The language used by the legislature in drafting the RICO laws strictly prohibits recovery for personal injuries, even when caused by a pattern of racketeering.⁸⁸ Emotional distress is included in the prohibition of personal injury, even if derived from a pecuniary loss as a result of an otherwise valid RICO claim.⁸⁹ Likewise, RICO statutes also prohibit monetary losses caused by personal injury.⁹⁰

In addition to federal jurisdiction and federal injunctive relief, another benefit of bringing consumer protection litigation under federal civil RICO is that the prevailing plaintiff is entitled to mandatory treble damages and attorney and court fees.⁹¹ Attorney's fees in civil RICO claims may be substantial and may even surpass the value of the recovery.⁹² The court may also award attorney fees for nominal recovery under civil RICO statutes.⁹³ In awarding mandatory treble damages, the first third of the award is considered compensatory and the second two thirds are considered punitive damages.⁹⁴ Finally, awarding of attorney's fees can help redress a

87. 18 U.S.C. § 1964(c) (2000).

88. *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988) (prohibiting recovery where racketeering present, but predicate offense was murder and the suit was for economic aspects of personal injury); *Bast v. A.H. Robbins Co., Inc.* 616 F. Supp. 333, 335 (D.C. Wisc. 1985) (quoting *Bankers Trust Co. v. Rhoades* 741 F.2d 511, 515 (C.A.N.Y. 1984), *vacated on other grounds*, 859 F.2d 1096 (2d Cir., 1988), *cert. denied* 490 U.S. 1007 (1989), in discussing personal injury with respect to 18 U.S.C. § 1964(c), "a person physically injured . . . is not given a right to recover for his personal injuries").

89. *Berg v. First State Ins. Co.*, 915 F.2d 460 (9th Cir. 1990) (following the 11th and 2nd circuit courts' holdings as a matter of law personal injury is not compensable under RICO). "Even if the directors had incurred pecuniary losses from emotional distress, they would not be compensable under RICO." *Bankers Trust Co.*, 741 F.2d at 515.

90. *Grogan*, 835 F.2d at 844. RICO laws will not allow recovery for pain and suffering, emotional distress, or pecuniary losses as a result of pain and suffering or emotional distress. *Id.*

91. 18 U.S.C. § 1964 (c) (2000). SHELDON, *supra*, note 76 at § 9.2.5.3.5, n. 377-79 (discussing limitations to injunctive relief among the circuits).

92. SHELDON, *supra*, note 76 at § 9.2.5.3.2 (citing *Rosario v. Livaditis*, 963 F.2d 1013 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993); *FMC Corp. v. Varonos*, 892 F.2d 1308 (7th Cir. 1990); *N.E. Women's Ctr. v. McMonagle*, 889 F.2d 466 (3d Cir. 1989), *cert. denied*, 494 U.S. 1068 (1990); *Nu-Life Constr. Corp. v. Bd. of Edu.*, 795 F. Supp. 602 (E.D.N.Y. 1992)).

93. Sheldon, *supra*, note 76 at § 9.2.5.3.2.

94. *Nu-Life Constr. Corp.*, 795 F. Supp. at 604-609 (discussing attorney's fees under RICO statutes.)

large number of low value claims in a single class action suit.⁹⁵

The district courts have jurisdiction to grant injunctive relief in RICO cases.⁹⁶ Included in their injunctive relief is the power to compel divestiture of interest in an enterprise, restrict future activities and investments, and to dissolve or reorganize an enterprise.⁹⁷ Although the United States Attorney General may seek injunctive relief from the courts, whether an individual plaintiff in a private action may gain injunctive relief is divided among the Circuits.⁹⁸

V. MAIL AND WIRE FRAUD

Mail fraud is one of the most common predicate offenses cited when pleading a civil RICO claim.⁹⁹ The elements for mail fraud are the existence of a “scheme to defraud” and the mailing must be “made in furtherance” of the scheme.¹⁰⁰ Mail fraud requires a specific intent and may include deception or false statements, half-truths, or omissions.¹⁰¹ Mail fraud is particularly useful for invoking civil RICO laws because the courts interpret it broadly.¹⁰²

In addition to mail fraud, wire fraud is another commonly averred predicate offense for civil RICO claims.¹⁰³ The main difference between mail and wire fraud is that under wire fraud, one must prove an interstate communication.¹⁰⁴ Typically, a successful plaintiff must only prove that the defendant made a telephone call in the furtherance of the scheme.¹⁰⁵ For example, an in-state telephone call, which

95. *Id.*; FED. R. CIV. P. 23.

96. 18 U.S.C. § 1964(a).

97. *Id.*

98. *See, e.g.,* SHELDON, *supra*, note 76 at § 9.2.5.3.5, n.377-79 (differentiating between circuits allowing personal injunctive relief and those that do not).

99. 18 U.S.C. § 1341 (2000) (prohibiting use of the United States Postal Service or private interstate carrier in committing fraud).

100. *Schmuck v. United States*, 489 U.S. 705, 709 (1988) (detailing elements required for mail fraud); *see also* 18 U.S.C. § 1341.

101. *Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1346-7 (7th Cir. 1995) (discussing intent required for mail fraud.)

102. *Schmuck*, 489 U.S. at 707 (mailing title-applications by used car dealers satisfied mailing requirement); *Pereira v. U.S.* 347 U.S. 1, 8 (1954) (stating mailing need not be an essential element of the scheme to defraud); *but see* *Cleveland v. U.S.*, 531 U.S. 12, 15, 27 (2000) (requiring the object of fraud to be property “in the victim’s hands” thereby refusing to recognize state gaming licenses as property and excluding them from the mail fraud statute).

103. 18 U.S.C. § 1343 (2000) (prohibiting the use of wire, radio or television in interstate fraud). *See also* SHELDON, *supra*, note 76 at § 9.2.4.4.

104. *Id.*

105. *ePlus Technology, Inc. v. Aboud*, 313 F.3d 166 (4th Cir. 2002) (holding fraudulent use of facsimile transmissions and telephone calls satisfy the elements of wire fraud.) *See also, Carpenter v. United States*, 484 U.S. 19, 24 (1987) (affirming conviction of securities reporter for misappropriating information and

routes out of state, is sufficient to prove wire fraud.¹⁰⁶ Otherwise, the elements for mail and wire fraud are essentially the same.

VI. APPLICATION OF CIVIL RICO STATUTES TO INTERNET PHARMACIES

Due to the absence of a personal, class, or state level cause of action under federal regulation of Internet pharmacies, civil RICO is an effective means to redress consumer fraud or to effectuate successful regulation by the state in federal court without the necessity of a federal agency.¹⁰⁷ Although one may be made whole using the individual states' court systems, the federal court system offers more advantages such as nationwide jurisdiction, federal injunction, treble damages, and attorneys fees.¹⁰⁸ Characteristics of the different types of Internet pharmacies, however, may limit the ability to successfully plead a civil RICO claim; i.e. it may be difficult to differentiate between the enterprise and the individual.¹⁰⁹

In the case of rogue sites that simply dispense drugs without a prescription, the defendant may not be easy to separate from the enterprise, and may be particularly difficult to find if he or she does not hold a pharmacist's license.¹¹⁰ Under civil RICO statutes, one must prove a preexisting enterprise, independent from the defendant.¹¹¹ In other words, the claim cannot be alleged against the enterprise itself, instead it must be alleged against a specific individual, separate from the enterprise.¹¹² It may appear in such cases that there lacks a true enterprise and instead, there is merely an individual breaking the law, a situation, which falls out of the purview of civil RICO laws.¹¹³ In addition, dispensing drugs without a pharmacist's license and across state lines, while also in violation of state statutes, falls under the federal jurisdiction of the DEA and FDCA and therefore the federal government may be more likely to investigate and prosecute the rogue site.¹¹⁴ This activity by the

transferring via wire service).

106. *United States v. Davila*, 592 F.2d 1261, 1263-64 (5th Cir. 1979) (finding interstate wire fraud where wire transmitted out of the state and back into the state and where both parties were present in the state where transmission originated and terminated).

107. *Baum*, 703 F.2d 1197, 1209 (discussing the limits to the FTC's power).

108. *Henckle*, *supra*, note 10; 18 U.S.C. § 1964.

109. 18 U.S.C. § 196 (4).

110. 18 U.S.C. § 1961 (3)-(4).

111. *Id.*

112. *Id.*

113. *See supra*, note 75.

114. 21 U.S.C. §§ 301-397 (1999); 21 U.S.C. §§ 801-971 (1999). *See, e.g.*, MASS. GEN. LAWS ch. 94C §§ 1-48 (1997).

federal government would help reduce the need for state attempts to regulate the rogue pharmacies and reduce state use of civil RICO laws.

Perhaps the best use of civil RICO is against rogue Internet pharmacies that provide either an online questionnaire or doctor's consultation via the Internet, before dispensing drugs. In the case of these pharmacies, it may be easier to separate the individual from the enterprise.¹¹⁵ One may view the enterprise, not as the individuals participating in the illegal activity, but as the partnership or website itself.¹¹⁶ In such a case it is easier to distinguish between the enterprise and those individuals acting through it.¹¹⁷ Unlike the rogue sites that distribute drugs without any prescription, these sites are more likely found within the borders of the United States, making prosecution easier.¹¹⁸

Proving a pattern of racketeering is not difficult in civil RICO claims against Internet pharmacies. The Supreme Court ruled that as few as two predicate offenses may constitute a pattern.¹¹⁹ In addition, Congress mandated that RICO laws, "shall be liberally construed to effectuate its remedial purpose."¹²⁰ In a multi-billion dollar business, it should not be difficult to prove thousands of individual predicate offenses.¹²¹

As mentioned previously, mail and wire fraud are common predicate offenses pled in a civil RICO claim.¹²² Therefore, each instance where the pharmacy purposely delivers or accepts an order for a fraudulent prescription, one that is counterfeit, tainted,

115. 18 U.S.C. § 1961 (3)-(4).

116. 18 U.S.C. § 1961(4). Although an association of individuals operating a website for illegal purposes is not listed in the statute, it falls under the inclusive language, "any union or group of individuals associated in fact although not a legal entity." *Id.*

117. *Id.*

118. *Access to Affordable Drugs*, 108th Cong. (2003), 2003 WL 11716104; Sara Fritz, *Clinton is Hardly Nemesis of Net Drug Bazaar After All*, ST. PETERSBURG TIMES, Apr. 17, 2000 at 2A (2000 WL 5608508) (confirming 400 illegal online pharmacies); *Online Pharmacies*, 106th Cong. (1999), 1999 WL 20010890 (statement of Dr. Janet Woodcock) (distinguishing the different types of online pharmacies). Rogue websites providing a prescription through an online questionnaire are more likely found in the United States because those websites based outside the U.S. are less likely to require a prescription before distributing a drug. *Id.*

119. *Sedima*, 473 U.S. at 527.

120. Organized Crime Control Act, Pub.L. No. 91-452 § 904, Cal. 84 Stat. 942, 947 (1970)). *Prudential Ins. Co. of America v. U.S. Gypsum*, 711 F. Supp. 1244, 1259 (D.N.J. 1989) (reviewing and applying the legislative intent).

121. *See Zeman, supra*, note 9 (describing offenses); *See also Karash, supra*, note 9.

122. *See supra*, notes 99, 103.

superpotent, subpotent, or that is completely inactive, may constitute a separate predicate offense.¹²³ The Internet itself is an interstate, international web. It is almost impossible to use the Internet to commit a fraud without it falling under the federal wire fraud statute.

In addition to mail and wire fraud, the RICO statutes specifically list the felony “dealing in a controlled substance or listed chemical” from section 102 of the CSA as a predicate offense for “racketeering activity.”¹²⁴ While many of the popular drugs sold on Internet pharmacies are not controlled substances, some are.¹²⁵ Therefore, in some cases, where the drug in question is a controlled substance, the plaintiff may argue three different predicate offenses, for each instance of fraud.¹²⁶

For most potential plaintiffs bringing a claim against an Internet pharmacy is impractical. First, the amount of money lost in a fraudulent transaction may equal less than several hundred, if not less than one hundred dollars and therefore it may not be cost effective to bring a suit in federal court.¹²⁷ In addition, many credit cards provide a means of relief for customers who are defrauded by allowing a customer to put a hold on the charge.¹²⁸ However, in both scenarios, the potential plaintiff may not wish to come forward if he or she believes they participated in an illegal activity. However, that does not completely preclude consumers from bringing suit.

Due to the small nature and commonality of the individual claims, a class action may be the most practical option.¹²⁹ Where a consumer’s illegal activity may be de minimus and a greater good may be served by allowing a RICO suit to go forward, the court may still allow the consumer to bring suit. Just as in an action by a single

123. 18 U.S.C. § 1341; 18 U.S.C. § 1343; *U.S. v. Lee*, 296 F.3d 792 (9th Cir. 2002) (including internet fraud in wire fraud); *U.S. v. Pirell*, 255 F.3d 728, 729 (9th Cir. 2001) (reviewing sentence for defendant who pleaded guilty to wire fraud involving the internet); *U.S. v. Martin*, 288 F.3d 1, 6, 8, 15 (1st Cir. 2000) (finding wire fraud based on email); *Online Pharmacies*, 106th Cong. (1999), 1999 WL 20010890 (statement of Dr. Janet Woodcock).

124. 18 U.S.C. § 1961(1)(A); 21 U.S.C. § 802 (2003).

125. 21 U.S.C. §§ 801-971.

126. 18 U.S.C. §§ 1341. For example, if an individual purchases a drug from an Internet site and receives an adulterated product in the mail, the website drug dispenser will have committed mail fraud when he sent the drug through the mail; wire fraud when he posted his website, accepted an order, and sent an email confirmation, as well as when he transmitted the consumer’s credit card information to the bank; and may have committed the predicate offense of felony dealing in a controlled substance. *Id.*; 18 U.S.C. 1843; 18 U.S.C. § 1961(1)(A).

127. *See supra*, note 12.

128. *See e.g.* http://www.providian.com/cmc/protect_acct.htm (last visited August 14, 2003).

129. FED. R. CIV. P. 23.

plaintiff, under the class action, the successful plaintiffs may collect treble damages and attorney's fees.¹³⁰ However, whether one may obtain a federal injunction is dependent on the circuit.¹³¹ One may conclude that even in jurisdictions, which do not allow for a private action for injunctive relief, a large settlement including court and attorney's fees may be enough incentive to prevent future fraud. Further, individual or class actions may trigger the Justice Department or States' attorneys general to investigate the pharmacy.

As a regulatory measure, the Assistant Attorneys General or States Attorneys General as representatives for their states' citizens, may protect consumers against rogue Internet websites through the use of civil RICO statutes.¹³² While the RICO statutes grant power to bring RICO claims to the United States Attorney General, the separate States' Attorneys General may find standing from the powers granted in their individual states' statutory law.¹³³ Their status, however, may be deemed equal to that of an individual claimant and may preclude injunctive relief in some jurisdictions.¹³⁴ When used by a state attorney general, the use of civil RICO can give extra length to the states' long arm capabilities and allow them to reach into federal court.¹³⁵ In addition, the federal district court may also hear state-based claims of fraud or other statutory state claims through federal supplemental jurisdiction thus providing an efficient and more powerful means to prevent illegal pharmacy practices affecting interstate commerce.¹³⁶

VII. CONCLUSION

Consumer use of rogue Internet pharmacies circumvents government regulation and poses a serious public safety threat. Many who use these sites put themselves in danger of tainted, old, or subpotent or superpotent drugs. Many may not understand the consequences of ordering drugs from the Internet while others simply

130. 18 U.S.C. § 1964(c); 18 U.S.C. § 1961(1)(A). *Scheidler v. Nat'l. Org. for Women, Inc.*, 537 U.S. 393 (2003) and *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229 (1989) (recognizing class action civil RICO); FED. R. CIV. P. 23.

131. 18 U.S.C. § 1964 (c). *SHELDON*, *supra*, note 76 at § 9.2.5.3.5, n. 377-79 (discussing limitations to injunctive relief among the circuits).

132. 18 U.S.C. § 1964(c). *See e.g.*, MASS. GEN. LAWS ch. 12 § 3 (2002) (granting the Massachusetts Attorney General power to bring suit in civil proceedings where the Commonwealth is a party or interested).

133. *See e.g.*, MASS. GEN. LAWS ch. 12 § 3.

134. *See supra*, note 91.

135. *See supra*, note 74; 18 U.S.C. § 1964(a).

136. 28 U.S.C. §1367 (1993) (allowing state claims to be heard in federal court where the state claim is closely related to the federal question.)

wish to obtain drugs they may otherwise not be able to obtain legitimately. These consumers avoid the measures designed to protect them.

While the federal government enjoys power to fight these rogue pharmacies through the FDCA, DEA, and FTC, the states' ability is much more limited. Protection of the public requires both federal and state cooperation, however, jurisdictional problems may reduce state-level effectiveness against an easily mobile threat. States may increase their effectiveness by utilizing civil RICO laws along with their long-arm statutes to acquire federal jurisdiction and possible federal injunctive relief. While this may not prove completely effective in all circuits, it may provide a powerful tool in others.

To utilize the civil RICO laws, the states must find jurisdiction. This requires using the language of a state's long-arm statutes to put them in the position of an "interested party." Certainly a state attorney general has a strong interest in protecting the citizens of his or her state. Once these requirements are met, the state may sue in a representative capacity and attain treble damages, attorney's fees, and possibly, injunctive relief in federal court.

The use of civil RICO statutes to acquire federal jurisdiction allows the state attorneys general to effectuate better regulation within the borders of their respective states.