

# THE RICO ACT: ITS SEVENTH INNING STRETCH

BY

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## I. INTRODUCTION

The sports card industry is about to be turned on its ear by, of all things, the Racketeer Influenced and Corrupt Organizations Act (RICO). This article will explore the history of the sports card industry and explore the timeline that led it to RICO's door. The article will also examine the RICO Act and merge that Act into the sports card industry to display how this unique cause of action looks. In conclusion, this article will examine the court's rationale in the only case on the matter and illustrate reasons why courts should balk at waving RICO around the bases of sport card collecting.

## II. HISTORY OF SPORTS CARDS

In order to understand the principles used by the Plaintiffs in the *Schwartz* case one must comprehend how the sports card industries reached the point of using "chase cards" to sell their product. The following history, as well as the analysis used later in the article, will focus on baseball cards as opposed to basketball, football, hockey, and non-sports cards. The reason for this is that baseball cards have dominated the market since the inception of sports cards and have always led the way in which the other collectable cards would follow.<sup>1</sup> In other words, any

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<sup>1</sup> There will be numerous times in this article when I will not cite a specific source for the information given in regards to the history of baseball cards and the hobby of sports cards collecting. This is not because I am lazy but because I know this information first hand. I would go as far as to say in a trial I could qualify as a sports card collecting expert. I began collecting baseball cards when I was seven years old. I spent most of my time trying to

change in the presentation or marketing of sports cards have always occurred first in baseball cards only to be followed by the other collectable cards. This is true even though the same companies manufacture all of the different types of collectable cards.

Baseball cards have been around since the beginning of the twentieth century. At that time they were packaged with tobacco. The baseball cards were simply a secondary product because most of the customers bought the product for the tobacco. However, this changed when the baseball cards started to be collected and sold on a secondary market. This coincided with the baseball explosion of the 1940's and the broadcasting of games on the radio. While baseball had been popular prior to these events, it was never able to reach so many households in such a short amount of time. America and its youth were engulfed by Major League Baseball and this was recognized by a company named Bowman.<sup>2</sup> Bowman decided that baseball cards, along with chewing gum, could be sold on their own.<sup>3</sup> In 1948 Bowman came out with packages of baseball cards and chewing gum. The packages sold for a couple of cents and contained roughly ten cards and a stick of gum. The baseball cards were numbered in order for purchasers to be able to make a set.<sup>4</sup> The set included forty eight cards, including cards of then rookies Bob Elliott, Ralph Kiner, Yogi Berra, Warren Spahn, and Stan "The Man" Musial.<sup>5</sup> The purchasers

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collect all of the cards of my favorite player, Fernando Valenzuela. As I grew older I began to expand my collecting to completing entire sets. By fourteen years old I was collecting all of the baseball card sets and buying extra packs in order to hunt for the valuable rookie cards. During high school I expanded my collecting to football and basketball. I stopped completing sets and began to concentrate on pulling my favorite players out of the packs and pulling chase cards out of the packs. I would use chase cards that I did not believe would go up in value to trade for additional packs. In essence it was a stock market for those young at heart. Once I was in college and had a decent paying job I began to swim with the big boys. I have bought packs as expensive as \$40 and pulled cards valued at \$600. I have sold cards only to watch them go drastically up or down. I have also bought cards I believed to be undervalued and received forty times what I paid for them (I bought 10 Brett Favre rookies for \$1 each and sold them for \$40 each). I am out of the hobby now simply because it is a drain on finances and the market for sets and certain chase cards collapses everyday. In other words, I know plenty of information without having to cite to authority. In fact, some of the information I share might not even be in print.

<sup>2</sup> Beckett Baseball Card Monthly, April 2000, at 23.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

would have to continue to buy packs of the baseball cards until they had all forty eight cards for their set. This marketing strategy of selling the cards in individual packs as opposed to selling the entire set together is still the industry standard to this day. Therefore, the gambling aspect of card collecting began in 1948.

Bowman was challenged the next year by a company named Leaf, but Leaf would disappear from baseball cards the next year and not resurface for forty years.<sup>6</sup> In 1952, Bowman was joined in the market by Topps, the company that would eventually buy Bowman.<sup>7</sup>

Topps' cards were the first baseball cards to emphasize the appearance of the baseball cards. Their pictures were crisp and done by nationally known sports photographers. Topps also emphasized the entire Major League Baseball, not just its stars.<sup>8</sup> Topps' first set in 1952 contained four hundred and seven cards, almost two hundred more than any previous baseball card set produced by Bowman.<sup>9</sup> The fact that Topps' set contained more cards yet the packs contained the same number of cards as Bowman meant two things. One, the purchaser would have to purchase more packs to complete the set. Two, the purchaser, depending on his luck, would probably have to buy more packs to obtain his favorite player or the star card of the set. In this case it was card number 311, Mickey Mantle. For example, in 1951 the Bowman set contained Mickey Mantle's rookie card and his first ever baseball card.<sup>10</sup> The set contained three hundred twenty four cards and is considered inferior in quality to the 1952 Topps set.<sup>11</sup> Therefore, it would take a collector (depending on luck) an additional nine packs to obtain a 1952 Topps Mantle when compared to a 1951 Bowman Mantle. This perception of scarcity, along with the belief that 1952 Topps is a better looking card than 1951 Bowman, has led to a

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

vast difference in value of the two cards. The 1951 Bowman Mantle is valued at \$8500 and the set at \$16,000 while the 1952 Topps Mantle is valued at \$18,000 and the set at \$65,000.<sup>12</sup> This perception of scarcity regarding the number of packs it takes to get a specific card is at the heart of the issue of this article and it has been around since the early 1950's.

In 1955 Bowman made its last appearance and Topps completely dominated the market.<sup>13</sup> At this time Topps was putting out one set per year.<sup>14</sup> Every year collectors would buy their packs, chew their bubble gum, and slowly over the course of the year complete their set and collect doubles of their favorite players and team (No one dared to have more than one favorite team when it comes to collecting). The size of the set ballooned into the seven hundreds.<sup>15</sup> This pattern continued until 1974. Twenty-two years after their first appearance Topps felt it was time for a change. At the end of the year Topps included cards titled "Topps Traded" into the same packs that contained the regular set.<sup>16</sup> These cards represented players that were traded to another team or players that did not have a card in the regular set. Therefore, if collectors wanted a true complete set of baseball for 1974 they would have to buy packs that contain cards they already have in order to obtain cards they needed for the "Topps Traded" set. If a collector had finished his set by May he was forced to buy more packs of the same cards in November in order to get the new cards to complete the set of 1974. This is the first incident of "insert cards" and is the backbone of the rationale used by companies today to sell their product. This will be discussed extensively later in the article.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Beckett Baseball Card Monthly, April 2000, at 24.

<sup>14</sup> *Id.*

<sup>15</sup> Beckett Baseball Card Monthly, April 2000, at 24-5.

<sup>16</sup> Beckett Baseball Card Monthly, April 2000, at 26.

In 1981 two other companies, Donruss and Fleer, joined Topps in the baseball card market.<sup>17</sup> Both companies produced one set each.<sup>18</sup> The sets were equal to Topps in quality and size and both used the same packaging process of using packs to complete the sets. Since baseball cards were relatively inexpensive at this time (roughly 50 cents per pack) most collectors accepted the two new companies and started to collect all three sets. There was little competition between the two companies because it was manageable to collect all three sets. Therefore, the three companies did not change the makeup of their base sets.

However, the companies did begin to add other sets to the lineup in order to grab more of the market. For instance, Donruss and Fleer both released equivalent sets to compete with Topps "Topps Traded" end of the year set.<sup>19</sup> Donruss, hoping to capitalize on the rookie craze, came out with an all rookie set in 1986.<sup>20</sup> This prompted Topps to come out with its own rookie set in 1987.<sup>21</sup> In 1989 Topps released an entire set under the name of Bowman which it had bought.<sup>22</sup> By 1989 the market of baseball cards had grown from one set in 1980 to a Topps set, Topps Traded set, Topps Rookie set, Bowman set, Donruss set, Donruss Rookie set, Fleer set, and a Fleer Update set.<sup>23</sup> However, the industry had not seen anything until Upper Deck and the 1990's.

Upper Deck first struck in the summer of 1989 after the main three had released their main baseball set.<sup>24</sup> There were three major differences between Upper Deck and the other three. First, the quality of the cards had never been seen. The stock of the paper was thick and the photographs had a glossy finish to them. Second, the price per pack was the first to go over

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Beckett Baseball Card Monthly, April 2000, at 27.

<sup>21</sup> *Id.*

<sup>22</sup> Beckett Baseball Card Monthly, April 2000, at 28.

<sup>23</sup> *Id.*

the one-dollar amount. Third, it was the first time a card company used the marketing strategy of how rare the cards are. Upper Deck marketed in such a way to make the collectors believe that this product must be bought now or it will not be around in the future. These three differences combined made 1989 Upper Deck the most successful baseball card set ever, along with a rookie card that was included in the set for a guy named Ken Griffey, Jr.<sup>25</sup> Upper Deck changed the face of card collecting and put the “I have to have it now” mentality into the hobby. This mentality is at the heart of sports card marketing today. It is also the mentality that pushes adults and children passed their financial limits in order to obtain “chase cards” which is the very issue in the *Swartz* case.

The 1990’s saw an explosion of new sets and marketing gimmicks. The main four (Topps, Donruss, Fleer and Upper Deck) continued to put out their base set. However, the companies now knew that there was room for marquee sets of high quality and, more importantly, high price. It would be a waste of time to illustrate every new set so the sets that are important in forming the practice of “insert cards” and “chase cards” will be explained later.

Suddenly after fifty years of little competition, the hobby had turned into a fountain of wealth with the major four companies trying to get the high-end collectors’ money.<sup>26</sup> Unlike in the 1980’s when almost everyone could afford to purchase all of the sets, it was impossible for most collectors to purchase all of the marquee sets. For instance, in 1989 when there were four major sets and update sets, the collector would have had to spend roughly about \$130, depending

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* Ken Griffey, Jr., card #1 of 1989 Upper Deck is currently valued at an average of \$150. Gem mint cards are known to auction off for as much as \$3000. I used to be able to buy these cards for \$3 a piece in 1989. I could also pull about 1 to 2 out of a box that sold for \$40. This card was the first card to jump in price overnight. In 1990 the card jumped from \$5 to \$65 in a matter of months. I still have one. I sold the rest to finance dating in high school.

<sup>26</sup> A point of reference regarding “high end collectors”. I worked at the biggest sports card shop in Tucson, AZ for two years during college. There was a group of collectors that fit this category. On a weekly basis they would spend in the amounts from \$200 to \$5000.

on his luck.<sup>27</sup> In 1999, a collector would have had to spend roughly \$2000 to acquire the top, not all, of the marquee sets, and that does not include any of the “insert” or “chase” cards.<sup>28</sup> Since the average collector can not purchase all of the sets he must choose which sets or individual cards to collect. Therefore, the companies needed to come up with reasons why their product should be the one purchased by the collector who is willing to spend a higher amount of money.

A collector who is willing to spend a higher amount of money is always interested in the worth of the cards in the future. Card companies control two aspects of how valuable a card will become. One, how the card looks, and two, how rare is the card. The second reason is the one of interest to this article. The first half of the 1990’s saw the companies treat this issue by advertising low print runs of the marquee sets and promising that they were rare.<sup>29</sup> This worked for a while until the concept of the “chase” card was born.

### III. THE CREATION OF CHASE CARDS

Chase cards and insert cards are often referred to as if they were the same, but there is a difference. It is like the equation A is always B, but B is not always A. A chase card is always an insert card, but an insert card is not always a chase card. An insert card is a card that is not part of the base set but is randomly inserted into the same packs. The first insert card appeared in the 1990 Upper Deck set.<sup>30</sup> In one of every four packs there was a Reggie Jackson Heroes of

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<sup>27</sup> Beckett Baseball Card Monthly, April 2000, at 28.

<sup>28</sup> Beckett Baseball Card Monthly, April 2000, at 58-71.

<sup>29</sup> Beckett Baseball Card Monthly, April 2000, at 29-30. The first set to advertise low print runs was 1990 Leaf, made by Donruss. In comparison to the sets that were out at the time there was less of Leaf. However, it does not compare to the low print runs of today. For instance, I can find packs of Leaf now for \$10 a pack when it cost \$4 a pack when it came out. Upper Deck Authentic Football 1999, which is the current title holder of rare, came out at \$8 to \$10 dollars a pack. I would be lucky to find a pack for less than \$25, if at all. The most expensive card in Leaf is \$80 while Upper Deck is \$600 to \$750.

<sup>30</sup> Beckett Baseball Card Monthly, April 2000, at 29.

Baseball card.<sup>31</sup> There were a total of ten different cards in the insert set.<sup>32</sup> There was also 2500 of these cards that were autographed by Reggie Jackson.<sup>33</sup> While these are insert cards, they are not known as chase cards in the industry. The reason why is that a collector did not buy 1990 Upper Deck packs for the sole or majority purpose of getting a Reggie Jackson card. First of all, they were relatively easy to get since there was one in every fourth pack (except for the autograph). Second, while Reggie Jackson is an all time great, he was not a highly collectable player at the time because he was of the past generation. It would have been different if the inserts were Ken Griffey, Jr. cards. Therefore, in order to be a chase card, the card must be highly sought after and be more of a gamble to obtain than one in every four packs.

The first real chase cards occurred in a Donruss set entitled 1991 Leaf.<sup>34</sup> This was the first set where the collectors bought the packs for the main reason of acquiring the inserts entitled "Gold Leaf Rookies".<sup>35</sup> While the regular set was nice, it did not compare to the inserts. First, the cards focused on a widely desirable card, the rookie card. Second, a collector could expect one for every ten packs they opened. Third, the insert set contained 13 different players per series.<sup>36</sup> Therefore, if a collector wanted one specific rookie it would take him anywhere from one pack to 130 packs to obtain that card if he does not get any inserts twice. Those numbers are the perfect example of a chase card. A rare and desirable card that is not easily obtainable lights a fire under the gambling instinct of the common collector.

The chase card formula introduced in 1991 continued to be enhanced through the nineties. In 1993 Topps took it to another level by creating inserts that paralleled their base set

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

entitled Finest.<sup>37</sup> These cards were called refractors because they created a mirror finish and refracted a rainbow of light. The other level that Topps took these to is that they were extremely rare (one every 24 packs), the packs were expensive (\$4.99), and there were certain inserts that were printed less than others (short prints). This combination created a hobby frenzy to pull one of these inserts from the packs and skyrocketed the price to \$12,000 for the entire set.<sup>38</sup> Topps had created an insert that was obtainable by only the lucky and the wealthy. The present day chase card had been invented.

By the end of the decade every set had some sort of chase card, but Upper Deck became the master. They began to insert everything from game jerseys, certificates to redeem for game equipment and trips, and highly scarce chase cards of top performers that were actually numbered for their print run.<sup>39</sup> For example, a 1999 Upper Deck SP Signature Autograph of Ken Griffey Jr. is numbered 1/50, meaning there are only fifty in existence.<sup>40</sup> This card which is only eight months old is worth \$800.<sup>41</sup> Upper Deck also was the first to print the actual odds of obtaining such a card on their packs. Now every card company does it. Chase cards now drive the market because a company cannot sell a \$5 pack without there being the chance that the collector will pull a card worth 100 times that.

What does this all mean? All of the factors leading up to the invention of the chase card and all of the factors of the chase card push the collector's human instinct into believing that he can obtain a valuable card in the pack he is about to open. And if he does not find it in that pack it must be in the next pack because the odds just got better. I know because I have been there many times while growing up. My friends and I while growing up have all spent more money

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<sup>37</sup> Beckett Baseball Card Monthly, April 2000, at 31.

<sup>38</sup> *Id.*

<sup>39</sup> Beckett Baseball Card Monthly, April 2000, at 35-76.

<sup>40</sup> Beckett Baseball Card Monthly, April 2000, at 65.

than we have allotted for our weekly trip to the hobby shop. In the 1980's it was because we wanted to finish our sets faster than what we had budgeted for. But in the 1990's it became about money and about the chase card. It became about gambling. The equation of definite odds plus the value of the cards created by the companies making the cards rare plus the value placed on the cards by the desirability of the player equals a collectors sometimes unstoppable desire to find the next \$800 card. That is the exact equation that is at issue in the *Swartz* case regarding whether the card companies are using gambling and human instinct in order to sell the next expensive product.

#### IV. THE HISTORY OF RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO) was signed into law in 1970 by President Richard Nixon.<sup>42</sup> The Act was part of Title IX of the Organized Control Act.<sup>43</sup> The Act's purpose was to put a halt to the infiltration of organized crime into legitimate businesses and to create an easy process to punish such occurrences.<sup>44</sup> While RICO entails both criminal and civil penalties, the purpose of this article centers on the civil provisions. The civil provisions went virtually unused for the first decade of RICO's existence.<sup>45</sup> However, in the 1980's attorneys began to discover a useful part of RICO.<sup>46</sup> That part was the provision that allows for treble damages and attorney fees to be awarded.<sup>47</sup> This gave attorneys an easier avenue to pursue remedies in cases where treble damages without RICO would be out of the

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<sup>41</sup> *Id.*

<sup>42</sup> SKADDEN, ARPS, SLATE, MEAGHER & FLOM, GUIDE TO RICO 3 (1986).

<sup>43</sup> GREGORY P. JOSEPH, CIVIL RICO 2 (1992).

<sup>44</sup> SKADDEN, ARPS, SLATE, MEAGHER & FLOM, GUIDE TO RICO 3 (1986).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

question.<sup>48</sup> All of a sudden attorneys were attempting to fit cases into a RICO analysis that were in no way related to organized crime or the purpose of RICO that was on the minds of the legislature back in 1970.<sup>49</sup> In fact, the use of RICO to stop the influx of organized crime and similar activities into legitimate businesses in the United States is a rarity to this day.<sup>50</sup>

The treble damages provision was not included in the first versions of RICO when it was simply a Bill. In fact, the ability for a private citizen to have a cause of action under RICO was not available in the version of RICO that was passed by Senate.<sup>51</sup> The version that made it out of the Senate only contained a provision allowing for civil actions when the United States brought them.<sup>52</sup> The House of Representatives added the ability for a private party to use RICO for a civil action as well as the provision to recover treble damages.<sup>53</sup> The House felt that such provisions would create a system where the victims of organized crime activity could fight back and act as a private attorney general.<sup>54</sup> The Bill was sent back to the Senate and adopted without any further changes made.<sup>55</sup>

The 2<sup>nd</sup> Circuit tried to fix this wandering away from the organized crime theme to no avail. In 1984 the 2<sup>nd</sup> Circuit made it a requirement that a civil RICO defendant have a prior conviction.<sup>56</sup> The Court also restricted civil RICO actions to more traditional organized crime activities.<sup>57</sup> However, the Supreme Court on certiorari held both provisions invalid and against the liberal construction that is to be given to civil RICO actions.<sup>58</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> GREGORY P. JOSEPH, CIVIL RICO 3 (1992).

<sup>51</sup> SKADDEN, ARPS, SLATE, MEAGHER & FLOM, GUIDE TO RICO 4 (1986).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See *Hearings on S. 30, and Related Proposals, Before Subcomm. No. 5 of the House Committee on the Judiciary, 91<sup>st</sup> Cong., 2d Sess. 520 (1970).*

<sup>55</sup> SKADDEN, ARPS, SLATE, MEAGHER & FLOM, GUIDE TO RICO 5 (1986).

<sup>56</sup> See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984).

<sup>57</sup> See *Id.*

<sup>58</sup> See *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985).

## V. RICO ELEMENTS

Section 904(a) of the Organized Crime Control Act, which contains RICO, states that the provisions contained in the Act are to be construed liberally.<sup>59</sup> The structure of RICO is as follows: §1961 defines the phrases used within RICO; §1962 specifies what acts constitute prohibited activity under RICO; §1963 defines the criminal penalties of RICO; and §1964 illustrates the civil aspect of RICO.<sup>60</sup> This section illustrates four types of causes of action that may be brought based on a RICO violation. §1964(a) gives jurisdiction to the district courts of the United States in regards to cases based on a violation of RICO.<sup>61</sup> §1964(b) gives the power to the Attorney General to institute proceedings under RICO.<sup>62</sup> §1964(d) states that a defendant who is found guilty of a criminal RICO act is estopped from “denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.”<sup>63</sup> While these provisions are important, they are not the focus of this article. The focus of this article revolves around §1964(c). That section states:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.<sup>64</sup>

In order to state a valid cause of action under §1964(c) the plaintiff must meet four requirements. “(1) the plaintiff must be a “person” who has (2) suffered “injury” to (3) his or her

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<sup>59</sup> 18 U.S.C. §904

<sup>60</sup> 18 U.S.C. §§1961-1964

<sup>61</sup> 18 U.S.C. §1964(a)

<sup>62</sup> 18 U.S.C. §1964(b)

<sup>63</sup> 18 U.S.C. §1964(d)

<sup>64</sup> 18 U.S.C. §1964(c)

“business or property” (4) “by reason of” the defendant’s violation of section 1962.”<sup>65</sup> The term “person” is defined in §1961 as “any individual or entity capable of holding a legal or beneficial interest in property.”<sup>66</sup> This is an easily met requirement.

A RICO action cannot come to fruition without an injury.<sup>67</sup> The Supreme Court has stated that the injury needed for a RICO action is one that has come about by acts that are sufficiently related in order to create a pattern.<sup>68</sup> The injury must be present or in the past. It cannot be based on an injury that will occur in the future.<sup>69</sup>

The injury must be to the person’s business or property; thus personal injuries such as physical, mental or emotional injuries are not recoverable under RICO.<sup>70</sup> For instance, injuries resulting from pain and suffering regarding a lost wager are not recoverable. Loss of earnings related to personal injuries, such as emotional distress, are also not recoverable even though it is property (money) that has been lost.<sup>71</sup>

The injury suffered must be proximately caused by a violation by the defendant of an act listed in §1962. The relevant part of §1962 regarding this article’s issue is §1962(c).

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.<sup>72</sup>

<sup>65</sup> GREGORY P. JOSEPH, CIVIL RICO 24 (1992).

<sup>66</sup> 18 U.S.C. §1961(3)

<sup>67</sup> See *Berg v First Interstate Ins. Co.*, 915 F.2d 460 (9<sup>th</sup> Cir. 1990).

<sup>68</sup> See *Sedima*, 473 U.S. at 497.

<sup>69</sup> GREGORY P. JOSEPH, CIVIL RICO 25 (1992).

<sup>70</sup> See *Rylewicz v Beaton Servs., Ltd.*, 888 F.2d 1175 (7<sup>th</sup> Cir. 1989).

<sup>71</sup> See *Grogan v Platt*, 835 F.2d 844 (11<sup>th</sup> Cir. 1988).

<sup>72</sup> 18 U.S.C. §1962(c).

Enterprise is defined as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>73</sup> An important element to §1962(c) is that there is a pattern of racketeering activity. Racketeering activity is a vast definition including topics from arson to kidnapping.<sup>74</sup> For purposes of this article it includes “gambling . . . which is chargeable under State law and punishable by imprisonment for more than one year”.<sup>75</sup> In other words, a federal RICO action is dependent on what the State law is regarding gambling. Therefore, a successful RICO action in New York would not be successful in Nevada due to the drastic differences of gambling laws.

## VI. MERGING OF SPORTS CARDS AND RICO

Now that an overview of a RICO action has been illustrated it is important to focus in on the exact type of action that is paramount to this article. Several Plaintiffs have sued The Upper Deck Company in Federal Court alleging that Upper Deck has violated the RICO Act and is liable to them for damages suffered due to the violation.<sup>76</sup> The complaint alleges that the practice of Upper Deck of randomly packaging their cards and listing odds on the package of obtaining certain chase cards violates the RICO Act.<sup>77</sup> Therefore, an analysis of RICO and Upper Deck’s action using RICO’s elements is required.

The first requirement of RICO is met because the Plaintiffs are definitely persons. The second and third requirements are debatable. The Court that ruled on Upper Deck’s motion to dismiss felt that the Plaintiffs, who had spent thousands of dollars on packs, had suffered an

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<sup>73</sup> 18 U.S.C. §1961(4).

<sup>74</sup> 18 U.S.C. §1961(1)(A).

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

<sup>76</sup> *Swartz*, 967 F. Supp. at 405.

injury to their property.<sup>78</sup> This was because a portion of the purchase price of the pack of cards was in consideration to have a chance to receive a chase card.<sup>79</sup> While the Court states accurately that damages done through disappointment and other feelings associated with not obtaining a chase card are not recoverable, it fails to address the issue on whether the price paid for the pack is a fair market value for the product obtained.<sup>80</sup> For instance, if a pack is bought for \$5 and it contains cards that are worth \$5 but no chase card, can a portion of that \$5 still be allocated to damages for the chance of receiving a chase card. This issue is addressed later when analyzing whether this action should meet the requirements of RICO.

The Court used New York and New Jersey law since that is where the Plaintiffs purchased the packs of cards when analyzing the fourth requirement.<sup>81</sup> In order to meet the fourth requirement it must be shown that the Defendant was engaged in racketeering activity, such as gambling, which is chargeable under State law with a punishment of at least one year. The Court held that both the New York statute<sup>82</sup> and the New Jersey statute<sup>83</sup> pertaining to illegal lotteries contained the three elements of chance, consideration and prize.<sup>84</sup> Accepting the Plaintiffs'

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 414.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 411-12.

<sup>82</sup> The New York Penal Code defines an illegal lottery as:

an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value. New York Penal Code. §225 (10)

<sup>83</sup> New Jersey defines an illegal lottery as:

An unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value. N.J. Stat. Ann. Title 2C Chapter 37 §1.

<sup>84</sup> *Swartz*, 967 F. Supp. at 413.

allegations as true, the Court held that Plaintiffs had stated a valid claim under RICO.<sup>85</sup> The Court held that the chance element was demonstrated by the fact that a person does not know whether they will receive a chase card in a pack.<sup>86</sup> This was compared to a scratch lottery ticket.<sup>87</sup> The Court stated that there is dual consideration when a pack of cards is bought.<sup>88</sup> There is consideration paid for the regular cards obtained and there is consideration paid for the chance of obtaining a chase card.<sup>89</sup> The consideration relevant is the portion of the purchase price for the chance of receiving the chase card. The prize is the chase card itself.<sup>90</sup> The Court describes a chase card as having an immediately ascertainable value in the secondary market.<sup>91</sup> In other words, the Court considers the chase card as good as winning money. Therefore, the Court held that Upper Deck's action violated the State statutes and satisfied the fourth element of a RICO action. The 12(b) motion to dismiss was denied by the Court.

## VII. PROBLEMS AND REPERCUSSIONS OF THE *SCHWARTZ* ANALYSIS

It is the main opinion of this article that RICO has been stretched to include law suits that were not at all considered by the lawmakers when RICO was enacted. RICO was enacted as a way to better combat organized crime. It was not enacted in order to give every private citizen that has purchased products of collectibles a way to recover money that was willingly spent on merchandise. The money spent was not on lottery tickets or gambling tables where the value disappears in an instant. Therefore, in order to use RICO for the intended purpose and to keep

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 412.

<sup>89</sup> *Id.*

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

<sup>91</sup> *Id.*

overreaching lawsuits from using RICO, judges should strictly construe RICO requirements. It is clear that the Court in *Schwartz* did not do this and in the process could open up a sea of lawsuits that were never intended by the creators of RICO. The following analysis will show the holes in the *Schwartz* Court's analysis and will illustrate the landfalls that will be waiting if RICO is continually interpreted liberally.

The Court in *Schwartz* used definite affirmative language when analyzing the Plaintiffs' complaint by stating that if all of the allegations by the Plaintiffs were true, Upper Deck's action violates the gambling laws of New York and New Jersey and violates the RICO act. The Court does not state that the Plaintiffs have met a lesser burden to avoid dismissal. The Court sends a message that it believes Upper Deck is in the wrong. Therefore, the Court's analysis shall be treated as a final judgment in the following analysis.

The area of the Court's reasoning that should be attacked is its decision that Upper Deck's action meets the prize requirement under the illegal lottery analysis. In that analysis the Court concludes that chase cards are the same as money and they should be considered a prize.<sup>92</sup> The prize requirement is in regards to the statute's requirement of receiving something of value. Obviously everything has value and this must be limited. As evidenced by the cases cited by the Court, it has been limited to cash prizes.<sup>93</sup> This is also evident by the Court's constant rationale that chase cards are as good as cash. Therefore, the prize requirement should be shown to be cash or something that has an "immediately ascertainable value."

The Court states that collectors can pull chase cards out of packs and immediately sell them back to the store owner for the price listed in the price guide. "It takes no more effort to

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

<sup>93</sup> All of the cases cited by the Court are incidents of illegal gambling and lotteries where actual cash was the prize. *People v Miller*, 2 N.E.2d 38 (1936); *People v Lavin*, 71 N.E. 753 (1904); *Valentin v El Diario La Prensa*, 427 N.Y.S.2d 185 (1980).

sell them back at a hobby shop than it does to turn in a winning scratch-off lottery ticket.”<sup>94</sup> It is obvious to an experienced card collector that the Court has been misinformed and this has led to its erroneous decision that chase cards are as good as cash. A collector can never get more than forty percent of the value of a chase card in cash from a store owner. A collector is usually lucky to get cash. Most of the time the store owner will only offer trade for other merchandise in the store. All of this depends on if the store owner even wants the card. There are many chase cards in existence that a store owner will not buy because they are too expensive, not in demand, or both. In summation, a store owner is not a 7/11 clerk giving you money on the spot for your Ken Griffey, Jr. lottery ticket. In my experience, on average, I received 35% cash for chase cards and was rebuffed nine out of ten times.

The Court failed to address selling chase cards on the Internet or at card shows. Both of these avenues are more prosperous than hobby shops, but both of them have drawbacks that do not fit the Court’s rationale. First, a collector will still only receive 50% to 60% value for his cards. Second, the collector must wait for a show to occur or wait to receive his money in the mail. Obviously, these avenues are not as immediately ascertainable as cashing a lottery ticket.

It is unimaginable for a court to hold that an item is a prize as good as cash of a lottery when the winner must work in order to receive any value, not full value. If the court in *Schwartz* knew what an ordeal it is to actually obtain any percentage of cash value for chase cards, it would probably have had another analysis and maybe a different result. A court in the future that takes into consideration what the intention behind RICO is should use such information to strictly scrutinize such a lawsuit and find that chase cards are not the same as cash. Thus, chase cards cannot be a prize under an illegal lottery scheme.

<sup>94</sup> *Schwartz*, 967 F.Supp at 413.

In addition to the difficulty of obtaining value for chase cards, courts should also analyze how a value is placed on a chase card. The courts should use this analysis to dismiss out of bounds lawsuits under RICO. The card companies do control the secondary market price of their product by short printing certain cards. However, this is true in various businesses. The issues that the courts should look at is how much control do card companies have in the value and do they profit when cards that have been released rise in value on the secondary market.

The first issue is how much control card companies have in the value of the cards. The answer is that they determine what the supply will be. Any economist will tell you that supply is only half the equation to determine value. There are many chase cards that are of a limited print run that are not worth the price of the pack. It is the collector and the secondary market that determines which chase cards are worth the trouble of buying packs. For example, in 1996 Upper Deck introduced a new all hologram card entitled SPx. They marketed it as the rarest of all the sets that would be printed that year. In the set there were several chase cards, including a Ken Griffey, Jr. card that was inserted in every pack. The trouble was that collectors quickly became frustrated by the price of a pack and the fact that there was only one card per pack. Because of the lack of demand one of the rarest chase cards of 1996 of the most popular player is valued at \$15. Upper Deck did everything in its power to make this card valuable, but without the help of the collector and secondary market it will not work.

The second issue stated above is whether card companies profit when their cards rise in the secondary market. In order to answer one must have a working knowledge of card companies' sales policy. When it comes to card companies' rare premier sets, hobby shops are only offered the opportunity to purchase the product once. The hobby shop buys it from the company and starts to sell the packs at the suggested retail price. As the supply at the shop

dwindles, the price rises until they are sold out. At no time are they able to repurchase product from the card company. Therefore, the card companies only make profit on their product once and that is at the first price offered. Thus, unlike what the *Schwartz* court believed<sup>95</sup>, a card company never is able to charge more for its packs of cards. Courts should use these two issues to form a definition of what a prize is and not fault a company that has no controls over if their product is a prize or will later become a prize.

Another argument regarding what is a prize is “when is this definition measured?” For instance, is a value assigned to the chase card when the packs are released or does the value change with time. If a chase card is worthless when the card company sells them but later becomes valuable, will that chase card be deemed a prize? For example, in the 1995 Bowman set there was a chase card for Vladimir Guerrero but it was valueless because everyone wanted Hideo Nomo. Now the Guerrero card is worth \$250 and the Nomo is worth \$10. If a person in 1995 was buying the packs for the Guerrero this would not qualify as a prize because it had no cash value. But if the same person buys packs today he would have a cause of action because it could be considered a prize. Just another slippery slope the courts should avoid at all costs.

Another problem that could develop for the courts is the difference between regular cards and chase cards. In the *Schwartz* court’s analysis they only make a case for chase cards. They state that the damage is the consideration paid for the chance of obtaining a chase card. The problem is that there are numerous sets where a card in the regular set is worth more than any of the chase cards and it is the reason that collectors buy the packs. For instance, if a collector buys a pack of 1989 Upper Deck for \$15 the entire \$15 is in consideration of obtaining Ken Griffey, Jr. card. A court could argue this is different because the odds are not stated on the box or pack, but I refute that it is stated. Each pack states the number of cards within it and how many cards

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are in the set. Regular cards are randomly assorted the same way chase cards are. Therefore, even though it is not printed, I know that I can obtain a Griffey card 1 in every 46 packs. In other words, a collector can rationalize a way to sue under the RICO Act for every pack he has bought as long as there was something of secondary market value available. This is a dangerous premise to use RICO for.

The future of card collecting is individually numbered cards. Instead of the card companies advertising how low the print run of a card is they will simply show the collector by individually numbering each card x out of xxxx. For example, a Peyton Manning rookie card is not advertised as being rare but is shown to be rare by an individual number on the back. The one I possess is numbered 1765/1998. If RICO is held to apply to packs with odds and stated print runs, it will also apply to cards that have printed proof that they are rare and valuable.

If RICO continues to be expanded in the way illustrated in this article there is no limit as to the areas it can be expanded to include. One example is the soft drink business. Last year Pepsi Cola marketed cans that had the characters from the new Star Wars movie. A new character was released each week for Pepsi, Diet Pepsi, Pepsi One, and Mountain Dew. They were only on cans in 24 packs and the buyer could not see what character was on his product. The problem is that Pepsi randomly inserted a gold Yoda can in 1 of every 100 cases. This Yoda can could be sent to Pepsi for a prize of \$50 or, better yet, it was being sold on e-bay for up to \$150. If opening a pack of cards to pull something of value is actionable under RICO so is the purchasing of packs of soda to pull something valuable. If it seems far fetched that a person would purchase a 24 pack of soda only to search for a gold Yoda, log on to e-bay or a Star Wars fan site and be amazed. Therefore, the consideration paid in order for a chance to obtain a gold Yoda would be recoverable (plus double) under RICO.

Another example would be the action figure business. This is a business that thrives in the secondary market, similar to collectable cards. The courts would argue that action figures are different because you know what you are getting in the package. However, this is not true. It is common practice for the action figure business to create flaws and differences on certain figures in order to make a rare figure. The differences or flaws are not discovered for weeks, sometimes months. Collectors buy the figures and then patiently wait to learn of the flaws or differences in order to see if they purchased a valuable one or a regular one. For example, a Darth Maul action figure that sold for \$5.99 is now worth \$15. But the same Darth Maul that sold on the exact same shelves and the exact same price that has a black vest instead of a gray vest is worth \$500. The collector that has the black vested Darth Maul bought it with the inclination that some of his purchase price was going towards the chance to obtain something of immediate ascertainable value. As one can see, the slippery slope can continue into all sorts of products.

## VIII. CONCLUSION

The *Schwartz* court has shown a framework that such a RICO action is to be analyzed under. They just did not analyze correctly because they did not understand the card market and did not understand that a chase card or any collectable card is not readily made into cash. This is where the RICO line needs to be drawn. If an item is not as easy to turn into its value as easy as a lottery card or a betting slip it should not violate an illegal gambling statute and should not be a violation of RICO. RICO has been stretched far enough. It does not need to be stretched into collectibles.