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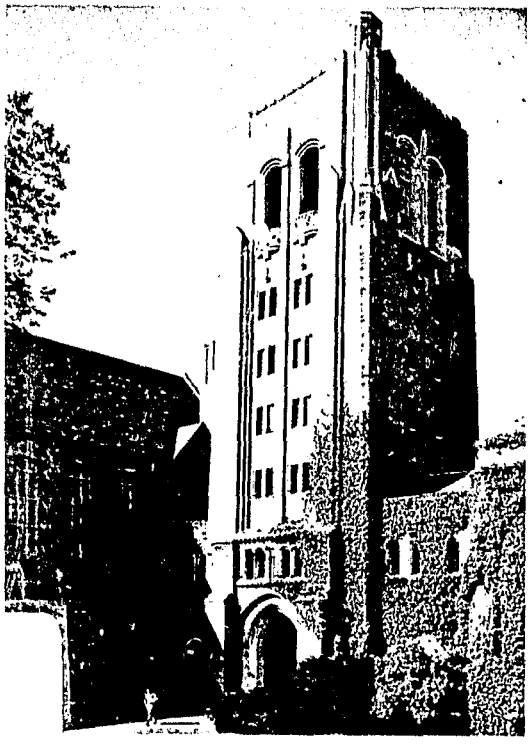


Techniques in the Investigation and Prosecution of Organized Crime

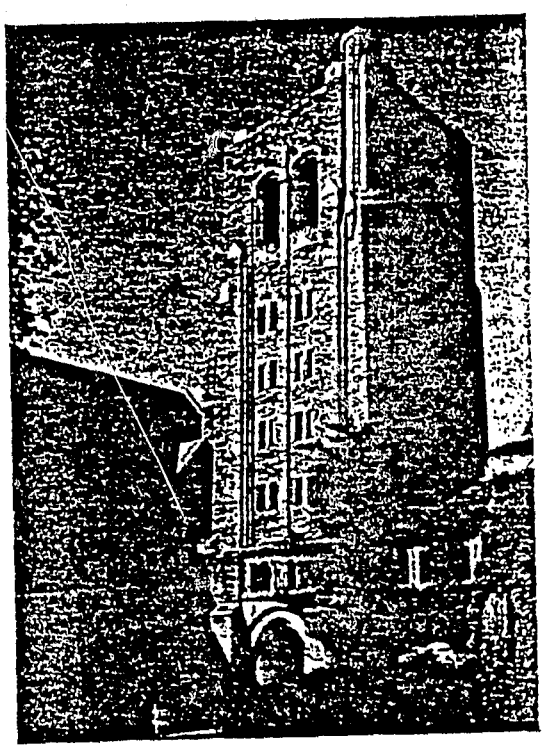
Materials on RICO

Criminal Overview
Civil Overview
Individual Essays

G. Robert Blakey (ed.)

Volume One

Cornell Institute on Organized Crime



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The research in these materials was supported by the Law Enforcement Administration, United States Department of Justice, Grant Number 79-PT-L01-8311. The views expressed in them, however, do not necessarily represent the official position or policy of the U.S. Department of Justice.

PREFACE

This project seeks to present a comprehensive and up-to-date analysis of most issues confronting a RICO litigant. These materials represent the combined efforts of Cornell Law School Students supervised by the staff of the Cornell Institute on Organized Crime. The following students participated in researching, writing, and editing these materials.

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Special thanks to Michael Smith, research director, who edited and oversaw the production of this project. The patience and peerless dexterity of typists Deborah Emnett, Patricia Black, Sharon Hulkower, Suzanne Spector, Kathy Tajeau, and Kathryn Dietz is hereby acknowledged and applauded.

All materials have been shepardized through May 1979 and updated through 25 Crim. L. Rep. 3085 (May 30, 1979). Although the citation form approaches that prescribed by the Uniform System of Citation (12th ed. 1976), inconsistencies are acknowledged.

G.R.B.

Cornell Law School
January, 1980

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MATERIALS ON RICO:
CRIMINAL OVERVIEW

by

G. Robert Blakey
Professor of Law and Director
Cornell Institute on Organized Crime

The following materials are based on a lecture delivered on Thursday August 9, 1979 to the Cornell Institute on Organized Crime Summer Program on Labor Racketeering.

I'm sure many of you have had the occasion to see a defense counsel cite in a brief in a conspiracy case Judge Learned Hand's comment that conspiracy was the "darling of the modern prosecutor's nursery."[1] Were Judge Hand alive today he might be moved to comment that the fickle fancy of the prosecutor has turned to RICO, the Racketeer Influnced and Corrupt Organizations,[2] Title [IX] of the Organized Crime Control Act of 1970.[3]

Types of RICO Prosecutions

Largely ignored at first, it is today widely employed by federal prosecutors: not just strike force attorneys, but U.S. attorneys; not in just Mafia type prosecutions, but in political corruption [cases]. The Mandel case is a good example. The governor of Maryland has been convicted, reversed, convicted, and reversed[4] . . . in what is basically one of the most sophisticated RICO prosecutions yet brought, and I might add (and I'm generally familiar with the record in that case), one of the correctly brought prosecutions. The rocky history of that case is not attributable to any

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[1] Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

[2] 18 U.S.C. §§ 1961-1968 (1976).

[3] Pub. L. No. 91-452, 84 Stat. 941.

[4] United States v. Mandel, (Mandel I), 415 F. Supp. 997 (D. Md. 1976), aff'd in part and vacated in part, (Mandel II), 591 F.2d 1347, aff'd, (Mandel III), 602 F.2d 653 (4th Cir. 1979).

failure on the part of the government, but [to] an unwillingness on the part of the political and judicial establishment to apply the law as written.

[RICO is applicable] not just [to] political corruption cases but [to] white collar crime. Some of you may be familiar with the prosecution now pending in Los Angeles [involving] a Japanese conglomerate, a bribe to people in Alaska, and a sale of telephone cable.[5] That conglomerate is now facing a tough RICO prosecution carrying with it a criminal forfeiture that may amount to several million dollars. It's a pleasure to see how they are squirming.

[RICO applies] not just [to] political corruption and white collar crime, but [to] violent offenses generally. I'm not so sure that I can support this prosecution unequivocally, but the Hell's Angels in California have been indicted federally under RICO. I can support the application of RICO to the multi-faceted criminal activities of Hell's Angels. I'm not terribly sure that I can associate myself with a thirty-one-defendant prosecution, where you expect to try thirty-one people in the same courtroom, on the same day, at the same time. That seems . . . designed to build . . . reversible error [into] the case. The point I'm making is that if the New York Times is to be taken literally, [only] three out of ten current RICO prosecutions on the federal

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[5] United States v. Marubeni America Corp., No. 79-1327 (9th Cir., filed March, 1979).

level are . . . Mafia type [The others] are political corruption, white collar crime, and violent offenders generally.[6]

You may ask yourself, why talk about RICO to a group of state and local prosecutors? There are only about ten of you out there who can use RICO in the federal context. I have three objectives in mind. . . . I want to make you aware of what RICO is and how it works. That's the broadest possible objective. I am doing that to do, as I said, three things.

State Legislative Reform

First, I want to raise with you the possibility of legislative reform on the state level and suggest to you that RICO may well be something that your local prosecutor or state attorney general can support as a means of legislative reform. Before I got involved in the assassinations committee, I worked with the state legislature[s] in Arizona and Florida, both of whom have adopted state RICO provisions. . . . I'm told . . . that recently Rhode Island adopted a state RICO statute. Instead of just wondering or talking about federal legislation that has proven itself extremely useful in bringing prosecutions against sophisticated group criminality, move to get reform at the state level. If you are interested in that, I am interested in helping you.

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[6]N.Y. Times, Dec. 8, 1978, § IV, at 1, col. 4.

There is a mechanism whereby that can be done. There is a program at American University. The head of the program . . . is Joseph Trotter, . . . director of the American University Law Institute. His address is 4900 Mass. Avenue, Washington, D.C. 20016, and his telephone number is (202) 686-3803. Through Joe it is possible to hire consultants for the purpose of law reform. I'm not passing out my card you understand, but I am interested in helping legislative reform at the state and local level. If it's not possible for me to do it, I'll find someone who can . . . be of assistance to you in framing legislation for possible introduction at the state and local level.

I raise this possibility with this . . . point in mind: Don't just take the federal statute. The federal statute was drafted by a relatively small group of people almost ten years ago. A lot of us have had second thoughts about what we put in it, not in the sense that they were mistakes, but they weren't as right as they could have been, and there's room for improvement in the statute. The Florida statute is a good example of an effort to improve on federal RICO.[7] You ought to make an effort to do something more imaginative than simply copying the federal statute.

Federal-State Cooperation

Second, there is the distinct possibility of federal and state cooperation, as strange as that may sound. Let

[7] 26 Fla. Stat. § 943.61 et seq (1977).

me give you an example. There was a recent case in New York involving a sophisticated group where the basic underlying bffense was murder, . . . a series of hits. Unfortunately, under New York law, the principal witness was uncorroborated. New York law requires corroboration of an accomplice's testimony. That is not true under federal law. The murder syndicate, if you will, that was involved is now being considered for prosecution in the federal courts as a RICO murder. State murder, if done in the context of an enterprise, can be federal murder. A case that could not be prosecuted in the state courts [can now be prosecuted] in federal courts.

So thinking RICO (that's the . . . message of this conversation) is a good idea because sometimes you can begin [asking:] Is this a better federal case or a better state case? You can choose to enhance your ability to handle a particular situation by . . . turning the material over to the feds. And I would think, for the feds, that you ought to think of the cases which you can also turn over to the states.

Assistance From Private Plaintiff's Bar

Third, . . . federal RICO promises to state and local prosecutors collateral private assistance dealing with the sophisticated crime problem. . . . All of you have limited resources. You cannot try all of the cases that come to

your attention. If there were some way in which you could hire additional lawyers to help you out and somebody else paid for it, all of you would have a tendency to do it. If you structure your state and local prosecutions correctly, it is possible that . . . the private plaintiff's bar can civilly follow up your criminal RICO prosecutions just like the antitrust bar follows up the Justice Department's antitrust prosecutions with collateral civil suits. The cumulative effect in the community is to bring . . . legal remedies [to bear] on the problem, . . . not . . . only . . . criminal remedies, but civil remedies as well. That effect ought to be one of a multiplier of your own resources and if you don't think in those terms, it seems to me you are in context myopic. [With those three principles in mind,] I'd like to talk, . . . about the legislative history of RICO, the structure of the statute, and its criminal penalties.

Legislative History of RICO

Let's take a look at the legislative history of RICO. It's useful to take a look at it, because there are myths about what RICO was designed to do and how . . . prosecutors [may now be] abusing it. The legislation that ultimately culminated in Title IX, of the organized Crime Control Act of 1970, was first introduced in 1968. S.2048[8] and S.

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[8]S. 2048, 90th Cong., 1st Sess. (1967).

2049[9] were introduced in the Senate by Senator Hruska; H.11266[10] and H.11268[11] were introduced in the House by Congressman Poff.

These bills were based on a long period of study by the American Bar Association and the President's Crime Commission, [that is,] the Katzenbach Commission of 1967. They grew out of a concern first developed [in] the Kefauver Committee [about] the problem presented in a free enterprise economy by black money. By black money, I mean the proceeds of illegal endeavors. But fear was expressed, first in the Kefauver Committee and subsequently by the Crime Commission in 1967 that the proceeds of illegal endeavors were being invested in legitimate businesses, and that the free enterprise economy required . . . that the law sterilize that black money and prevent its objectionable influence from being felt in the legitimate economy.

The legislation introduced in 1968 was an effort to face up to that problem. S.3048 applied . . . the Sherman Antitrust Act[12] to the investment of intentionally unrecorded income. The thought was that any income not reported on your income tax returns should be sterilized, and it should

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[9] S.2049, 90th Cong., 1st Sess. (1967).

[10] H.11266, 90th Cong., 1st Sess. (1967).

[11] H.11268, 90th Cong., 1st Sess. (1967).

[12] 15 U.S.C. §§ 1-7 (1976).

be made, in effect, an unlawful trade practice to then invest that money in legitimate business. S.2049 defined certain kinds of criminal activities and . . . directly prohibited the investment of the proceeds of those . . . activities in legitimate business enterprises.

I'm describing these two bills because it is the nature of these two bills that formed the core of what was done in Title IX. . . . I say "the core" very advisedly. It's not all of what was done in Title IX. . . . It is unfortunate that most people think of Title IX only in terms of the scope of these first two bills. . . . Title IX . . . went through the legislative process both in the Senate and the House, [and] it was changed . . . a number of times [in] a number of directions. In any event, both bills contemplated the use of civil and criminal penalties to deal with the problem of the investment of black money. It envisioned the use of injunctions [and] private civil damage remedies. Nothing was done in the 90th Congress to process this legislation, either in the House or in the Senate.

In 1969 in the 91st Congress, S.1623[13] was introduced by Senator Hruska. S.1623 combined the language and approaches of the old bills, S.2048 and S.2049, following the recommendation of the American Bar Association. [T]he American Bar Association studied the first two bills and

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[13]S.1623, 91st Cong., 1st Sess. (1969).

suggested that problems would be . . . presented by making the antitrust laws directly applicable to the activities of organized crime. . . . I don't think our friends in the ABA said it in so many [words], but . . . they were concerned [that] if the typical defendant in a RICO type prosecution was Mafia, and [if a] RICO type prosecution were. . .[brought] in the context of the Sherman Act, our white collar offenders who fell into the same provisions would be treated as if they were Mafia types. So what our friends in the antitrust section of the ABA wanted to do was [not to] apply the antitrust laws directly to the Mafia because that [would] result in Mafia type prosecutions being brought against antitrust-type defendants. In other words, let's not mix Mafia prosecutions with white collar prosecutions.

[C]ongress took them at their suggestion and developed, independent . . . of the antitrust laws, laws aimed at dealing with organized crime and related (the magic words are "and related") prosecutions, using antitrust-type remedies. [There is] a lot of irony in this when you find out what finally happens at the end. It was in an effort to get white collar offenders out of organized crime type prosecutions that the antitrust laws were not made directly applicable to organized crime type offenses.

The Senate Committee on the Judiciary looked at S.1623, held hearings on it, and did a number of . . . staff studies of its operation. Senator McClellan and Senator Hruska in

consultation with Congressman Poff, . . . (before Congressman Poff . . . had the parallel legislation in the House) introduced S.1861.[14] S.1861 is the precurser [of] Title IX in the Organized Crime Control Act. S.1861 was modified in light of the hearings, testimony was taken from the Department of Justice and a variety of other groups including the ABA, and the bill was both expanded and narrowed. . . . S.1861, which was a separate bill, was then incorporated into S.30,[15] the Organized Crime Control Act, as Title IX of the statute, and that's the form in which, . . . with few [subsequent changes], it was enacted in 1970.

"Organized Crime" - Three Meanings

Now, I've started to use the phrase "organized crime." I'm talking about the Organized Crime Control Act. It's appropriate for me to fall back for a moment and define, . . . the senses in which . . . I use the phrase and the sense [in] which the Senate at that time was using it, although the statute . . . and the legislative history [do] not define it. The words "organized crime" really mean whatever you want them to mean, [and] in that sense they are right out of Alice in Wonderland. When Humpty Dumpty said, "When I use a word it means whatever I mean it to mean, nothing more nothing

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[14] S.1861, 91st Cong., 1st Sess. (1969).

[15] S.30, 91st Cong., 1st Sess. (1969).

less," [he] was using the standard technique of all lawyers. We use our words to mean whatever we want them to mean. If you read the literature on organized crime, however, there really are three senses in which the phrase is used.

The first sense [in which "organized crime" is used is] the sense of syndicate. [T]he easiest example of what I mean by a syndicate is La Cosa Nostra: it is . . . international in scope, it is multicriminal in scope, [and] it is all over the United States. It happens to have an ethnic base, but the ethnic base is certainly not essential to the notion of syndicate. The function that [a] syndicate performs is a lot like [that of] government. It sets territories [and] settles disputes between individual families within it. It performs . . . essentially a governmental function. There is no reason for it to be ethnic in character. We see emerging in narcotics syndicates that are not Italian-American . . .-some of them are Black, some them are Puerto Rican, . . . some of them are Cuban, and some of them are mixed Cuban and Columbian. There is nothing ethnic, as such, about organized crime. . . . [T]hese syndicates [settle] outside of the law problems that cannot be settled in the law because the activity is illegal . . . . That's one sense in which the phrase "organized crime" is used.

The second sense in which the phrase "organized crime" is used is the sense of enterprise. A house of prostitution is a business activity. It brings together madams, procurers,

women, [and] it may have a strong arm person involved. That's a business enterprise. It's possible to talk of a house of prostitution as organized crime. The same thing can be said of a narcotics wholesaler. The same thing can be said of a numbers operation, gambling, prostitution, or narcotics. The individual firms, if you will, that are engaging in the production or manufacturing or . . . providing of services are enterprises. . . .

There is a third sense . . . in which the phrase "organized crime" can be used. When somebody like Sonny Franzese sets up a series of bank robberies, . . . hires the individual bank robbers, provides them [with] possible sites for the robberies, [and supplies] them with legal services thereafter, those individual bank roberies can be called an organized crime venture. It is organized crime, as opposed to street crime, simply because of the resources that a person like Sonny Franzese brings to bear on the problem. It's not two guys walking into a bank with a paper bag and walking out. The crime in either case is bank robbery. One is organized crime and the other is street crime because of the people involved, the background, the resources. Frankly, the threat [posed] to the community . . . by an organized crime venture is substantially different [from that posed by] a spontaneous hardly planned stick up.

This statute, RICO, applies to organized crime primarily in the sense of enterprise. It uses the concept [of] enter-

prise in the language of the statute itself. The sense in which . . . "enterprise" is used, however, is such that it can apply directly to a syndicate [or] to a venture. The . . . concept "enterprise" is used [broadly] enough in the statute that no differentiation is made between syndicate and venture. Moreover, the statute is not limited in its application to organized crime as such, either in the sense of syndicate, enterprise, or venture. The statute . . . applies to any kind of enterprise criminality whether it has a syndicate relationship or not. Any group activity, whether Mafia or nonMafia, whether straight white collar offender, where a pattern of criminal behavior is engaged in squarely falls within this statute. The myth that Title IX only applies to sterilized black money (the investment of funds by organized crime in legitimate business) is . . . a myth and ought to be rejected as such. It is rooted in the legislative history of the statute because that's where it started out, but it in no sense is where it ended up. Let me make a pause here, and I'll make some reflections on what happened to Title IX before we talk about the structure of the statute and some current case laws.

Problems With Implementation

Title IX was drafted in 1970, and I went over as a brighteyed young law reformer to explain to the Department of Justice what Title IX was all about. . . . I spoke to

people [whom] I considered my friends. I had a very friendly audience. It took me from 1970 [until] about 1975 or 1976 to get the Department of Justice to understand what was in RICO, and it is only now that RICO prosecutions are being brought. The history of the effort to get RICO implemented can be summed up [as] the [struggles] of a frustrated law reformer. It took a great deal of time for people to look at it, understand it, and apply it. There is nothing that complicated about RICO. It could have been implemented almost immediately. There are other provisions in the Organized Crime Control Act that still remain largely unimplemented. Title X, dealing with dangerous special offender sentencing, is an example . . . .

If you do get involved in state legislative reform, build something into the reform that sees to it that it is implemented. It is not just enough to pass a statute. Russ Coombs,[16] for example, worked with Pennsylvania to enact the Pennsylvania RICO statute. To my knowledge Pennsylvania has never implemented its RICO statute. It's not enough just to get the legislature to change its mind as to what the law is, there must be some institutional way to train in it and to bring it to bear.

Enhanced Sanctions and New Remedies

Let me talk you you a bit about the structure of the statute. What is RICO? Well, the findings in the front of

[16]Professor of law at Rutgers at Camden.

it say explicitly what it is. It's an effort (and now I'm talking about the whole statute, but more particularly RICO) to do something about organized crime in the United States by providing enhanced sanctions [and] enhanced or new remedies. [T]hat's the key word. RICO is a remedial statute. It should be thought of as adding remedies. It is not, repeat not, a method of getting evidence. One objection for example, levelled against Title IX is the difficulty of proving the tracing of black money. How do you ever trace black money from illegal endeavors to the investment? The statute is not designed to help you trace. [RICO provides a] remedy. [I]f you can trace [the money], [the statute] will do certain things for you. [It] was never designed to help you trace. [Tracing] is a matter of informants, grand jury, immunity, paper chase, wiretapping, evidence gathering tools. This statute won't gather evidence for you. That you've got to do yourself. But if you do gather the evidence, this statute will do two things for you.

Technique of Prosecution

First, . . . as Jay Hogan[17] told you the other day, this statute is a technique of prosecution. Traditionally, we thought of the criminal law in terms of a simple model: a murder, rape, or robbery, a commonlaw offense that normally occurs on a single day at a single place between two individuals. It's generally a violent confrontation in which

[17]James Jay Hogan, defense counsel and lecturer on electronic surveillance at the 1979 summer institute.

the state of mind fairly screams out from the facts. I'll give you an example. Some guy comes up, grabs a woman, pushes her to the ground, rips her blouse off. The facts fairly scream assault with intent to rape. He'll hardly be heard to say: I was just checking to see if her blouse was . . . wash-and-wear maybe?

The trouble [is that organized crime usually involves more than] a simple confrontation. It's not what happened on a particular day, but the relationship between what happened on that day and something that happened ten days ago. Organized crime, white collar crime, is really about relationship, and [RICO gives you] the opportunity to present to the jury the significance of what happened, and not simply what happened. RICO, [in the concept of pattern,] requires you . . . to show a relationship between a crime on one day and a crime on another day . . . . By requiring you to do that, it also permits you to do that.

The focus of the traditional criminal law was on a single event on a single day, and it didn't want you to get into collateral matters because it was thought to be confusing, if not prejudicial. In fact, in sophisticated crime, . . . the relationship between what happens in front of you and something else . . . is what <u>is</u> significant, and it is not collateral.

Now what's the impact of doing that? It's precisely the impact that Jay talked about the other day. It's not

that a particular crime went down on a certain day, it's that it was out of, as Jay said it, the Bonnano family or the Gambino mob that the offense occurred. This is the sense in which I'm using venture. The ability to show that Sonny Franzese, mobbed up, planned a series of bank robberies, makes those bank robberies in our society much more significant. Think of the benefit that you get in showing to the jury that relationship. They don't see it in isolation anymore, and it's not only to the jury that you get to show it, it's to the judge. It's true that you can put information in a pre-sentence report [or] make a statement to [the judge] at the time of sentencing [that] this guy is mobbed up. There's a difference between saying it and showing it, and if you show it in the case itself, [it] has an immediate and dramatic impact.

There was a case down in the Fifth Circuit[18] involving compulsory prostitution. A group of guys were literally impressing migrant workers, women, into compulsory prostitution. One of the ways they did it was to . . . kidnap their children and threaten them with physical violence unless the women travelled from camp to camp, submitting themselves to prostitution. Now I've given you the statement of the facts at the highest level of abstraction, and I can feel in the room already a kind of personal repugnance to that kind of

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[18] United States v. Clemones, 577 F.2d 1247, modified, 582 F.2d 1373 (5th Cir. 1978).

activity. Talking about kidnapping, assault, compulsory prostitution - when the case was presented by the federal authorities to a grand jury in Georgia, . . . the effect . . . was almost to produce a lynch mob. And it wasn't just the individual assault, it wasn't just the individual kidnapping, it wasn't just the fact of prostitution, it was when [the prosecutor] put it all together [that] it had a cumulative impact . . . on the grand jury [which] was prejudicial in the best sense. They understood what was happening, and were more than willing to return an indictment-[even] a conviction if they could.

. . . What [else] does RICO do for you? RICO gives you different remedies. . . . I'll talk to you later about the nature of the criminal remedies involved; Brian Gettings[19] will talk to you later about the nature of the civil remedies involved.

"Person"

Let me talk to you now about the key ideas in the statute. . . . What are the building blocks in RICO? First, the concept "person." Person is defined in 18 U.S.C. § 1961(3). Read that statute carefully. It was drafted carefully. What you have in the so called definition section are not definitions . . . . You see the phrase "person includes;" it doesn't say "person means." It says "includes," and when you see the word "includes," what you see following are not words

[19]Defense counsel and lecturer on RICO at the 1979 Summer Institute

of limitation, words of definition. . . . [They] are words of illustration, and . . . something [that] illustrates . . . does not exhaustively define. I don't know that you can get . . . any broader than the illustrations given to you: individual person, corporation, union, association, entity. In fact, . . . the concept "person" is literally open ended. It is not limited by the examples given. . . .

"Enterprise"

Second concept: "Enterprise," 18 U.S.C. § 1961(4). Again you see the word "includes." The examples given as . . . illustrations of . . . an enterprise . . . include an individual, a partnership, a corporation, a union, an association-in-fact, or any combination of [them]. You can have an enterprise . . . consist[ing] of . . . an individual, a corporation, [and] a partnership all taken together.

The average person who [reads RICO thinks] of the enterprise as being either a corporation or a union and the person as operating the corporation or . . . union. . . . That is a typical RICO situation. But [framing] the enterprise is a [matter] of how the prosecutor conceptualizes the activity of the people and entities involved. . . . [F]or example, [in] the case that I referred to earlier, the Alaska case, you had a Japanese conglomerate that involved a series of subsidiaries and a number of persons. . . . [T]he government chose to charge that [by pulling] together the corporations and individuals. They could just as easily have made

the person the Japanese parent corporation and made the enterprise the individual corporations. This has an impact later on when we talk about forfeiture. What you forfeit depends on how you define enterprise, and enterprise is a very elastic concept under the statute.

"Pattern of Racketeering Activity"

Next key concept: "pattern of racketeering activity," 18 U.S.C. § 1961(5). This phrase is not only not defined, it's not even illustrated. [It] is limited by three concepts. [First,] the pattern of racketeering activity must have one of its instances occurring after the effective date of the statute. On the federal level, the effective date of the statute is . . . 1970, and if you can't find something since 1970, you ought to quit and go home. On the state and local level this might present a different problem. The only reason it's there is [because] you have to have something after the effective date to make it criminal, otherwise it would be ex post facto.

[Second, the] pattern [must] have two acts . . . within ten years of one another. In effect, that sets up an absolute prohibition against relating two acts that aren't closer in time than ten years. If you can't find two acts that aren't closer in time than ten years, it probably isn't an appropriate case to bring under RICO anyway.

The last limitation is that you must have [a minimum of] two acts . . . to make up the pattern. That means two

acts meet the requirement of a pattern. You can't have a relationship with only one act. [The requirement of two acts] is minimal. You really ought to have more than two.

Now what do we mean by "pattern?" A "pattern of racketeering activity." It is a negative concept primarily. This is in the legislative history, not in the definitions. It means "not isolated." [The acts] must be related in some way, related as to person, related as to objectives. This is a lot like Mr. Justice Stewart says of obscenity: It's difficult to discuss, but you know what it is when you see it. Patterns fairly bespeak themselves in the context of individual factual situations.

"Racketeering Activity"

Next key concept. "Racketeering activity."[20] What does the statute mean by that? Here, for the first time, the [concept] is defined. It says "means," "racketeering activity means" - that's a definition. It means only what follows and nothing else. It is not illustrative, it is definitional, and it defines itself in terms of two independent crimes, predicate offenses, if you will. The first are state offenses. RICO incorporates by reference a substantial body of state law, which means RICO incorporates [Rhode Island law] in Rhode Island . . . . RICO incorporates by reference New York law in New York. The state offenses are framed in

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[20] 18 U.S.C. § 1961(1) (1976).

generic terms: murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotic drugs at the felony level. Note, there are no [federal] marijuana RICO prosecutions . . . . [The statute includes] narcotics and other dangerous drugs; it does not include marijuana. I don't know that everybody's noticed that, but the . . . language is such that you cannot infer that marijuana is a dangerous drug [under] RICO. There are no federal RICO marijuana prosecutions. There may be some state ones, but there's not going to be any federal ones, and that was a conscious policy choice by the Congressmen involved.

The second incorporation by reference is of other specific federal offenses. In this context I obviously should talk about labor union embezzlement, labor union bribery, labor union conflict of interest payments. The Taft-Hartley Act[21] . . . is incorporated by reference into RICO. One implication of [this is that although] the Taft-Hartley Act is a misdemeanor, when it [is] incorporated . . . into RICO, two Taft-Hartley Act violations held together by a pattern [satisfy] the minimum [requirements] for a RICO offense. [The offense changes] from a misdemeanor to a felony, and [the penalties move] from $5,000 and jail [to] $25,000 and twenty years. By reconceptualizing, if you will, the way in which the Taft Hartley Act violation goes down, and that's a payment from an employer to a representative,

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[21] 29 U.S.C. §§ 141-187 (1976).

you can [alter] it from a simple misdemeanor [under] the Taft Hartley Act to a very serious felony [under] RICO.

[Other incorporated federal offenses include] federal extortion, securities fraud, and [mail fraud,][22] the largest single statute in [terms of] the scope . . . of what it brings into the federal law . . . . State and local prosecutors don't know anything about federal mail fraud. Federal mail fraud, in contrast to your state fraud statutes or your state larceny by trick statutes, . . . only requires a mailing, one mailing, and a scheme to defraud. You don't require anybody to have been defrauded. [The scheme] need not aim at the attaining of property. It's just any, if you will, thinking deceitfully and mailing a letter. It doesn't require an attempt to obtain the property or other goods and services. All it [requires] is the scheme and a mailing.

There are few offenses involving white collar offenders, that is [crimes of] fraud and deceit, that are not in fact mail fraud. There are few mail frauds that aren't in fact, if it is a sophisticates scheme at all, also a RICO violation. The scope of . . . this statute . . . simply has not been noticed by state and local prosecutors, or federal prosecutors, or . . . by the private civil defense bar [and] the civil plaintiff's bar.

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[22]U.S.C. § 1341 (1976).

Prohibitions

We [have talked] about the legislative history [and] the structure of [RICO]. What is prohibited by the statute? First, 18 U.S.C. 1962(a) obviously prohibits, in the context of everything that I've talked about, the investment of . . . income from a pattern of racketeering activity in an enterprise. Unfortunately, most people [who] read the statute never read beyond clause (a), and they think that clause (a) is what the statute is all about. You can really forget clause (a) as a practical matter. In fact, when I was involved in drafting Florida RICO I dropped clause (a) down to the bottom of the list . . . in the hopes that people who read Florida RICO will read beyond the first clause [unlike] the people who've read the federal statute. You may wonder why it's not in the right place. It's because people never read the federal statute right, so when I got a chance to redraft it, in effect, I put [the clause] someplace where people wouldn't read it. [Unfortunately, the Florida legislature did not pass the statute as I drafted it.]

Clause (b) . . . prohibits . . . acquiring an interest in any enterprise by a pattern of criminal behavior.

Clause (c) [prohibits] conducting any enterprise or participating in the conduct of the affairs of any enterprise by a pattern of racketeering activity. The heart of this statute is not in (a), not in (b), it is in (c).

Liberal Construction

One of the most important elements of this statute . . . is . . . that [although] it is criminal in scope, [it] is remedial in purpose and, therefore, is to be liberally construed.[23] Let me repeat that. This is a criminal statute, but the Congress has told the courts [to construe it liberally], and with one significant exception, all of the courts have done what they should do. They followed the law as drafted. . . . The statute explicitly says . . . ,"liberal construction in light of remedial purposes." The Mandel case in the district court[24] is the only one that rejected that and did it wrongfully. The Fifth Circuit,[25] the D.C. Circuit,[26] the Second Circuit,[27] the Third Circuit[28] have all taken the statute to mean what it says. Liberal construction, not only in the civil context, but in the criminal context.

The point is that the underlying criminal offenses, the

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[23]Organized Crime Crontrol Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 941.

[24]United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976).

[25]United States v. Elliott, 571 F.2d 880, 899 (5th Cir.), cert. denied, 99 S. Ct. 349 (1978); United States v. Salinas, 564 F.2d 688, 691 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978).

[26]United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 2055 (1979).

[27]United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439, 439 n.12 (2d Cir. 1975), cert. denied, 419 U.S. 1105 (1975).

[28]United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977).

racketeering acts, are independent criminal statutes. Those are the statutes that are strictly construed. . . . RICO [builds] another remedy on a separate criminal offense. There is no reason to narrowly construe RICO. RICO doesn't deal with criminality, it deals with degree of criminality. RICO doesn't deal with criminality, it deals with the remedy to be attached to criminality. RICO is a remedial statute, not strictly speaking a criminal statute, since it doesn't touch any conduct until that conduct is criminally independent of RICO. Consequently, there's no reason to limit the construction of RICO by our traditional techniques of narrow construction. I don't know why judges don't understand that. It's clear on the face of the statute, it's clear [in] the way the statute is drafted. Maybe it's that prosecutors don't argue it right, although frankly, I don't believe that's the case.

Criminal Penalties

Now, what . . . criminal penalties [does] RICO authorize? RICO is a very serious criminal offense. It authorizes a $25,000 fine and . . . twenty years in jail.[29] As a practical matter, you don't need more than twenty years in jail, so you could have authorized life or twenty-five or thirty years. Take twenty years out of anybody's life, and for all practical purposes, and in this context for all practical

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[29] 18 U.S.C. § 1963(a) (1976).

criminal purposes, you've virtually eliminated him. RICO, consistently applied and sentenced appropriately, would take . . . most serious offenders [out of circulation]. And why do you need more than that from them? This is obviously an example of the decent and humane way in which the statute was drafted. [Life terms are cruel because they are unnecessary.]

Criminal Forfeiture

RICO authorizes criminal forfeiture.[30] Most of you in this room don't know what I mean when I say criminal forfeiture. The only kind of forfeiture you remember or know about is civil forfeiture, the kind of forfeiture that occurs when you catch a gambler with books and records, or a bootlegger with a car. You bring an in rem proceeding against the thing. It's the United States against coins and currency, United States against one Buick sedan, United States against one Plymouth sedan. That's civil forfeiture. That's not what the criminal provisions of RICO are all about.

At commonlaw it was possible as an incident of a criminal conviction to lose all of your [real and] personal property. . . . The original meaning of the word felon is faithless. . . . [W]hen you committed a commonlaw felony, you indicated a breach of faith with the king. All property was held of the king, and when you breached faith with him, the property reverted back to him. That's why at commonlaw

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[30] Id.

a consequence of a felony was forfeiture. . . . In the United States in 1790, [criminal forfeiture] was abolished [at] the federal level by specific provision of the federal criminal code. . . . . [M]ost states . . . similarly abolished [it]. In some states, [criminal forfeiture is] unconstitutional under a state constitution.

If you get ready to draft a state RICO statute, this is one of the [potential problems]. There's no constitutional reason it can't be done at the federal level. There may be a state constitutional reason it cannot be done at the state level. I believe I recall in the Florida constitutuion a provision that prohibits criminal forfeitures, and that's the reason, I believe, that there is not a criminal forfeiture in the Florida RICO. There is a civil forfeiture in Florida RICO, not a criminal one, because the state constitution won't authorize it. I don't know, for example, whether Rhode Island has a constitutional provision against criminal forfeiture. It may well be, if the people who drafted the RICO didn't read the state constitution, [that] they may have put in an unconstitutional criminal forfeiture. [S]ome of this stuff is innovative and very useful; it may also be grossly unconstitutional--not federally, but under state constitutions.

You [do not] forfeit [all your goods and property] under the statute. That would be a bit gross. What you do forfeit is the property you gained by your pattern of racketeering activity, the ill gotten gains. You forfeit the interest that you have in the enterprise [which] permits you

to control it. That's the scope of the forfeiture. For example, in the federal context, [an] automobile agency was used as an outlet for stolen cars. The agency was conceptualized as an enterprise. It was operated by its owner through a pattern of racketeering activity, to wit, dealing in stolen property. The federal government brought a criminal case against him, including a forfeiture provision for [his interest in] the automobile agency. The case was settled on the federal level with the payment of $100,000 in lieu of the forfeiture of the agency itself.

Think of the point. We've talked so much about one more criminal conviction, headhunting, take a guy in, take a guy out; what this provision lets you do is take out the business enterprise. That's what you're really worried about, isn't it? It's the business enterprise that continues while the guy's in jail. Forfeit the enterprise. Clean up the market place.

We had in our materials a coin-operated machine company that could have been conceptualized as as enterprise operated through a pattern of extortion against various employers. You could indict our friends (we can argue about which ones go in the indictment) for operating that enterprise, meaning Dynamite Vending, through a pattern of activity, racketeering activity, to wit, extortion, and have forfeited the ownership of the vending machine company to the government. In fact, there is one case where the government did exactly that

and took a payment of $246,000 in lieu of the forfeiture of four vending machine companies. It works. [In] another case, a restaurant was the center out of which a gambling establishment was operating. In addition to asking for a fine and imprisonment on the gambler, they forfeited his restaurant. So the government succeeds to ownership of the restaurant, and then sells it, and I'd hope it sells it to somebody who is not a gambler. So you clean up the base, the economic base, of the criminal operation.

In our context, labor racketeering, [there is] United States v. Rubin,[31] in the Fifth Circuit. [On] 103 counts of embezzlement, the jury returned a guilty verdict. [Rubin] forfeited the amount of the embezzled money to the government, and in this context . . . he forfeited his union office. [T]he conviction took him right out of the union, [and was] sustained by the Fifth Circuit [in] a good opinion. There's only one problem with the opinion. The court assumed that the forfeiture should be narrowly construed, for reasons that escape me, and apparently never saw the liberal construction clause. But despite the assumption that [the statute] should be narrowly construed, which was erroneous, [the court] still reached the right result, and Rubin forfeited his union office.

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[31]559 F.2d 975 (5th Cir. 1977).

A Word of Caution

There is a piece of folk wisdom in our society that tells the story about the goose that laid the golden egg, and everybody knows what people did in that context. Out of greed they killed the goose, and there [were] no more golden eggs. I'm not suggesting that . . .[RICO's] laid eggs, golden or otherwise. What I am suggesting to you is that what I have told you is a story that's too good to be true. This is a very powerful statute. This puts in your hands a variety of criminal remedies that you've never had before.

There has been little controversy over RICO until recently because there has been little use of RICO until recently. The defense bar is now reading RICO for the first time, and you heard Jay up here: "My God, how do I defend against that kind of a charge?" That's not the reaction one should have. The problem isn't defenses under this. Nobody should draft a statute that's easy to defend under. The purpose of a law is not to make life easy or hard for defense counsel. It's to do something about problems in the street. RICO does something about problems in the street.

In fact, RICO applies not only to LCN-type prosecutions. Jay is not going to get sympathy coming before you or other audiences and saying, "My God, how do I defend a murder prosecution when the nature of the murder charges my defendant as being a member of the Gambino mob." You people laughed and so would any lay audience . . . . But what's going to

happen when RICO is properly applied to nonLCN defendants engaging in a pattern of racketeering activity as a part of an enterprise? And they walk in, not in wide brimmed hats and not in black shirts and white ties, but [in] white shirts and black ties, . . . pillars of the community. They are governors of states, like in Maryland. If you do not apply the statute . . . with enormous discretion, I am afraid RICO will become a goose, and you people will in fact kill the goose that potentially can lay for you a golden egg. Thank you.

Cornell Institute on Organized Crime

Techniques in the Investigation and Prosecution of Organized Crime

MATERIALS ON RICO:

CIVIL OVERVIEW

By

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The following materials are based on a lecture delivered on Thursday, August 9, 1979 to the Cornell Institute on Organized Crime Summer Program on Labor Racketeering.

Professor Blakey:

Shortly after Dean Atcheson left the State Department, he wrote a book describing his experiences at the founding of the United Nations, and he called it Present at the Creation. I don't want to make it overly melodramatic, but our next speaker was indeed present at the creation of RICO. He was a counsel and director of the House Republican Conference Task Force on Crime, whose chairman or principal member was Richard Poff. You will recall my mentioning to you that it was out of Poff's work in the House and Hruska's work in the Senate and, ultimately, the joint conferences between Poff, Hruska, and . . . Senator McClellan, that Title IX came. Brian Gettings, our next speaker, contributed to that process. He is currently an attorney in the firm of Leonard, Cohen, Gettings, and Sher. He was previously the United States Attorney for Eastern District of Virginia. He was, from 1965 through 1967, chief of the Organized Crime Control Unit of the Department of Justice in Florida. Mr. Gettings.

Mr. Gettings:

Thanks, Bob. Very simply, at the present, I am a criminal defense lawyer. I understand you have warm feelings towards criminal defense lawyers as a group, and that I can expect . . . some relatively peppery questions, which I'll try my best to answer for you . . . .

When I was in the army, I learned that in the business of lecturing it's absolutely essential to establish rapport

(that's the way they they spell it) with the troops before you begin a lecture, and therefore, invariably you must start by telling a joke or a funny story. My problem is [that] most of the jokes . . . I know are either dirty, and therefore inappropriate for a gathering such as this, [or] ethnic, same thing, or just not very funny. However, I do have a Mafia story that I would like to tell you so that I can hopefully establish a little rapport with you.

This involves (I hope none of you have heard it; I'm sure some of you haven't) it involves the oldtimer, the old time prospector who after 60 years of beating the bushes for gold, finally struck it rich in Old Mexico. [H]is entire lifetime of working was rewarded because he got gold dust in excess of a million dollars, and he had his bag. His only problem was [that] he talked too much. [H]e was in a little cantina talking about how he finally made it after all these years of struggling, and the predictable happened. Pedro Bandito, who was the capo in the Gonzales family in this little town south of Juarez, overheard him, beat him up, took his gold away, and sent him out of town.

Well, the oldtimer was naturally crestfallen. He found his way to Chicago, and he's sitting in a bar with his last two dollars, and he's weeping in his beer, and who does he happen to be sitting next to but the local hood, the local button man for the Chicago outfit, Anselmo the Shiv. [The oldtimer] tells Anselmo a story, and Anselmo has a heart of

gold. Anselmo says, "I'm going to do something for you." So he goes down to Juarez, and he looks up Pedro Bandito, and he finds him in the cantina, and he starts to tell him, "You give the money back to the oldtimer. You give the gold back, or I blow out your brains." The trouble is Pedro Bandito does not understand English, [and] Anselmo the Shiv does not speak Spanish, so they get a translator.

They bring the translator over, and [Anselmo] puts the gun right to the head of Pedro Bandito, and he says, "You tell him he no giva the money back to the oldtimer, giva the gold back, I blow his brains out. Tell him to tell where is the gold." So in Spanish the translator repeats all this to him, Pedro Bandito . . . . So [Pedro gives] the translator the directions . . . : "You go out the door, you go down the road 3 miles to the fork in the road, you take the right fork, you go to the third creek, you cross over the creek, there's trail that cuts in three ways, you go up the middle fork, you go up the trail past the big cactus, you climb the hill, there are three rocks on the top of the hill, under the second rock, six feet down, is the gold." He tells all this to the translator. Anselmo the Shiv says, "What's he say? What's he say?" "Pedro Bandito, he say he not afraid to die."

You'd really be surprised to know how many lawyers, <u>lawyers</u> now, think that RICO used to be the shortstop for the Boston Red Socks. That's how much lawyers know about RICO. Now I listened to Bob's presentation this morning, and he

gave you the legislative history of the entire statute. He gave you the structure of the statute and its construction, as it presently stands as he thinks it may be in the future as courts will probably construe it. He gave you all this, though, as it related to the criminal side of RICO.

Civil RICO's Relation to Antitrust Law

It's my function . . . to talk to you about . . . the civil side of RICO. And I'll tell you quite frankly when you take the entire RICO statute, that is the entire statutory scheme which runs from section 1961 to 1968 of Title 18 United States Code, I think the civil features of the RICO statute are far more important and have [more] potential for effective organized crime control, not prosecution, but control, than do the criminal provisions. The civil provisions of RICO are innovative and imaginative and yet they're steeped somewhat in the history of antitrust law. They track it to a certain extent, not in all respects. I don't think it was a brand new idea that grew out of Professor Blakey's head and Congressman Poff and Senator Hruska. They looked to the antitrust laws and said, "Well if you can do it there, why can't you do it here?" I think any antitrust lawyer will tell you that the civil aspects of antitrust law in terms of deterrent and [preventing] the business community from violating antitrust laws, [are] far more significant, far more effective than are the criminal provisions. You've got to

to have the criminal provisions. I'm not suggesting to you that you abandon all thought of prosecuting people and just utilize the civil aspects of the RICO statute. You've got to prosecute. But in terms of the effect, the accomplishment, the long range mission that you have if you are involved in any anti-organized crime program, I think a little bit of experience with the civil features of the RICO statute will lead you to the same place that the antitrust bar is with respect to the antitrust laws. You've got to have the criminal provisions of the Sherman Act[1] and the Clayton Act.[2] You just can't tolerate criminal conduct, but on the same side of things, the civil aspects of it work better.

[According to] the program, . . . I'm supposed to talk to you about . . . the civil provisions of the RICO statutes as utilized by both federal and state agencies to control organized crime and labor racketeering. I'm not going to dwell on labor racketeering because everything I say is applicable across the board. It applies just as much to any other facet of organized crime as it does to labor racketeering, and it applies to labor racketeering just as much as it does to the other facets of it.

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[1]15 U.S.C. §§ 1-7 (1976).

[2]15 U.S.C. §§ 12-27 (1976).

Who Uses the Civil Features of RICO?

[T]here's a more logical breakdown [as] to who uses the civil features of RICO. One is government, meaning the U.S. Government. There's a specific civil enforcement procedure that is . . . the province of the Attorney General and the United States and his Department of Justice.[3] There's the federal end of it. But there's another one, and I think this is probably of greater interest and greater significance to most of you, because I think most of you are state and local prosecutors, as opposed to federal; there's the one that relates to private parties.[4] Now, private parties under the RICO statute includes injured state and local governments and injured private parties. I stress the word injured [to distinguish this] cause of action [from that] given to the federal government in the statute, where the federal government comes and sues on its own. As far as state and local governments are concerned, or private parties, you have to be injured. Now, that's a distinction that needs to be made but should not be troublesome when I start talking to you about just what the statute gives you, just what causes of action it creates.

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[3] 18 U.S.C. § 1964(b) (1976).

[4] Id. § 1964(c).

Jurisdiction in Federal Courts

Civil RICO, which is section 1964 of Title 18, comes in four subparts or subsections . . . : (a), (b), (c), and (d). Section (a) is jurisdictional in that it gives the district courts of the United States, that is the federal courts, jurisdiction to prevent and restrain violations of section 1962. Now, 1962 was what Professor Blakey talked to you about, the criminal provisions of RICO, and 1964 gives the district courts the power to restrain [violations]. [This] cuts against, incidentally, all your commonlaw notions, equity notions, that you may not enjoin the commission of a crime.

Court Orders

This is a specific statute that permits it and gives the court the power to do it by ordering any person to divest himself of any interest, direct or indirect, that he may have in any enterprise. Now, enterprise - bear in mind you've got to go back first to 1962 where you have the definition of the criminal offenses, and you go back to 1961 for your definition of enterprise. Now, this is just like a civil divesture. It's just like in the antitrust field when DuPont was forced to give up its stock in General Motors. There was nothing punitive about it. It was simply that the Supreme Court said, "Look we can't tolerate this situation. You've got to sell it. [T]hey gave them X number of years

to get rid of their stock. It's a divestiture, that is, a power that the district court has under civil RICO.

It also has the power to issue an order imposing reasonable restrictions on the future activities or investments of any person. [T]hat includes, [but is not limited] to, prohibiting any person from engaging in the same type of activity or endeavor as the enterprise--again, the word enterprise is repeated as the enterprise . . . was engaged in--again reference back to 1962 and 1961. The activities of [the enterprise] of course, . . . must affect interstate or foreign commerce. Now, again, an analogy, this is not a whole lot different from the Taft Hartley Act where upon conviction of certain crimes, a person is prohibited from holding union office. Or Jimmy Hoffa, where there were limitations upon his holding office that were attached as conditions to his parole.

The third thing that a court can do-- and right now we're still talking abour section (a) of 1964, and what is the power of the court--the court can also order the dissolution or reorganization of any enterprise, any business, anything that comes within the defintion of enterprise . . . in 1961, where that enterprise is found to be in violation of 1962. The court can order the dissolution or reorganization of that enterprise, making due provision for the rights of innocent parties. [I]t's a good thing that's in there because frequently when you get into businesses that have a semblance

of legitimacy, you will find that there are creditors, legitimate creditors, who [have] loaned them money, or [who are] secured with property owned by the business. Their rights are protected. It's one of the only fair things, I think, that found its way into this act. It's totally out of character with Professor Blakey, but anyway, the innocent are protected.

You all know what the violations of 1962 are. You all know about generic violations of state law: murder, bribery, extortion, gambling, and so forth. These are all the lynchpins, . . . the foundations for bringing this type of an action.

Attorney General May Sue

Now, section (b) of 1964 provides that the Attorney General of the United States may institute proceedings under this section. He specifically may bring an application in any district court for . . . a restraining order that may order any of the things that I have described to you. So quite apart from the Attorney General's arrows criminally to sling at organized crime, he is given further this injunctive power to accomplish more than merely "Don't do it any more," but to accomplish the issuance of a broad variety of orders.

Advantages of Proceeding Civilly

Now, you say, "Well, if he can prosecute, why does he need to do this?" I think the advantages to proceeding civilly under RICO far outweigh in many, many instances, . . . those of going criminally, whether under RICO or . . . under any special substantive violation. First of all, he goes by way of complaint, not indictment. Now, I don't think that's a big deal. It's easy to write a complaint, and it's easy to write an indictment, and it's just as easy to get an indictment from a grand jury as it is to get a civil complaint filed in the clerk's office, but what about your burden of proof? If there is a major advantage, it is precisely there.

In a criminal case, you are required, as you all know, to prove guilt beyond a reasonable doubt. In a civil case, and this is a civil case that is no different from any other civil case, the burden of proof is simply by a preponderance of the evidence. I have an associate who's a former Assistant U.S. Attorney. He's working on a RICO civil case that's in our firm right now. When he first read the statute, he chuckled, and he said, "All my life I've been looking for proving a mail fraud by a mere preponderance of the evidence as opposed to beyond a reasonable doubt." That's what's involved. That's all you have to do.

You have a right of appeal in the event you run into the wrong judge and he tosses it out, and it happens. It happens in federal courts and state courts. You all know

that. You've got a right of appeal in a civil case . . . ; you may have a right of appeal in certain criminal cases, but you may not. You also have a right of appeal after trial because there's no double jeopardy. And if the verdict goes the wrong way, you can appeal that on the evidence. In a criminal case, if the verdict goes against you, that's it. Jeopardy attaches, and you can't go back again.

You have very, very broad discovery rights, discovery rights that don't exist under the criminal law. You cannot depose a criminal defendant before trial. You bring a civil action against him [and] you can depose him. He can take the fifth amendment. You can give him use immunity. If you don't have a good solid criminal case against him anyway, what difference does it make if you give him use immunity and compel his testimony. If he perjures himself--fine, you've got a perjury case.

Enforcement of injunctions, if . . . the federal government . . . gets the injunction, is relatively easy. It's summary enforcement. You get, . . . in the federal system, . . . nationwide service of process in a civil case under the RICO statute. It's not limited by the Federal Rules of Civil Procedure which limit your process server. Finally, again a departure from the federal rules, you don't have to allege a jurisdictional amount.

United States v. Cappetto

Now this whole scheme, this entire business of the federal government coming in for injunctive action, has been approved by the only court that ever took a look at it, and that case is United States v. Cappetto,[5] where I'm told that the lawyer . . . , who's a criminal defense lawyer, came in and pled not guilty to the civil complaint. I'm not sure I wouldn't have done the same thing, at the time. At the time.

That is the only case on the books that discusses this section (a) and section (b) of 1964 civil injunctive relief sought by the United States government feature of civil RICO. [Y]ou might ask why, and the reason is that this is not used very widely. It's under-used. It's a mystery to me. I think if you go to the Justice Department, and you say RICO, they'll say, "Yeah, he used to play shortstop for the Boston Red socks." They don't know about it. It's only recently, as Bob pointed out, that people in the Justice Department have awakened to the existence of this statute that's been on the books for nine years. [I] understand [they are] using it, although I haven't seen any overwhelming evidence of this.

[I]n the Cappetto case it was a very simple thing that the government, the strike force in Chicago, sought to do. They had a gambling enterprise, and they filed a complaint seeking an injunction to prevent Cappetto and his associates,

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[5]502 F.2d 1251 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

seven, eight, or nine other guys, including Anselmo the Shiv, from engaging in gambling. [T]he district judge gave them the order, . . . a temporary restraining order was what they got first, and then they started into discovery. [I]ndeed, they attempted to take the deposition of three or four people that were in the gambling operation, and they all came in and took the fifth. [T]he court gave them use immunity upon the application of United States Attorney. [T]hey still refused to testify, and they went to jail. The upshot of it was [that] the restraining order was entered, and these people were prohibited from engaging in gambling. All you had to do then was catch them [doing] it once, and boom, they're in comtempt of the order.

Well, this was appealed to the Seventh Circuit. [The] Seventh Circuit had absolutely no problem with the entire thing, had no problem with . . . the use,. . . the fashion in which [the statute] was used, . . . had no problem with giving use immunity to the three or four people in the operation, [and] had no problem with sending them to jail when they refused to testify. If you read the opinion you'll see that all the problems . . . the defense lawyers had, after they got over the fact that they were in a civil case as opposed to a criminal case, were just brushed aside. [I]t was a clear green light by a very respected circuit in the United States: "Hey, do this." That was in 1974, and [RICO] still has not been used [by the U.S. government] to the fullest extent [as

far as] I can see.

Now . . ., that's strictly the federal end of it. Those of you who are with state and local law enforcement, if you're on good terms with your federal counterparts . . . and you've got a situation that you think is appropriate for some action along these lines, will go to them. You'll probably be way ahead of him. If you walk in and say, "Now I've got this 1964 sections (a) and (b), and I've got this operation here. Why don't we use this?" He's going to have to scramble for the books, and read the manual, and do this, that, and the other thing. [Y]ou can explain it all to him and say, "Let's do it." I think they'll do it. It's just a question of motivation and prompting.

Private Treble Damage Suit

1964 section (c), in my judgment though, is the dynamite of it all, and that should even be of more interest to you because that's what you can use directly without having to go to the U.S. Attorney's office, or to the strike force, or to the Justice Department. 1964(c) provides that any person injured in his business or property by reason of a violation of section 1962--again going back to the criminal provisions that Bob outlined for you earlier--any person so injured may sue in any appropriate U.S. district court and shall recover threefold the damages he sustained. In other words, [if] you prove your damages, it's not up to the dis-

cretion of the court or a jury to say, "Well, we won't give them three times. We'll give them one and a half times." If you prove your damages, you shall be entitled to recover three times your damages [and] the cost of your suit, which includes reasonable attorney's fees. Again, the definitions set forth in section 1961 apply here, [and] the criminal activity as set forth in 1962 applies here. If you've got any sort of an activity that falls within the definitions and the prohibition of 1962, you've got an automatic treble damage suit.

State or Local Government as Plaintiff

Now, what's a classic that might be of interest to a group of state . . . and local prosecutors? A bribery. If a public official in your jurisdiction is bribed, that comes smack within the wording of this statute. [Y]our government, whether it's state, county, city, [or] municipality, . . . has a cause of action that you can bring against either . . . the bribor [or] bribee, [or both,] for whatever damages your government has suffered as a result of the bribe.

Now, Bob mentioned the rigged bid case in Alaska.[6] I'm somewhat familiar with that case. I can say this, . . . the City of Anchorage may bring private action under the RICO statute to . . . recover the amount of the bribe

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[6]United States v. Marubeni America Corp., No. 79-1327 (9th Cir., filed March, 1979).

trebled . . . [A]n officer or an employee of the City of Anchorage . . . was bribed in excess of $200,000 to assist in the rigging of a city bid for . . . about eight or nine million dollars worth of cable that the City of Anchorage bought from this Japanese corporation. Ultimately, the Japanese corporation got the . . . sale because of the bribery. All right, the city has a cause of action for the amount of the bribe trebled, . . . $600,000. The damages are not readily ascertainable, . . . anywhere between $500,000 and $1,000,000, so [the city has] a cause of action for whatever that amount ultimately turns out to be trebled. [U]nder another theory of law that is not excluded . . . by the existence or the use of the RICO statute, [the city] may even have a cause of action to rescind the contract and to get back, in addition to all these other treble damages, . . . the full amount of the contract which was eight or nine million dollars. That much would not be trebled.

Now, the wholepoint . . . is that the city attorney for the City of Anchorage is certainly earning his pay on behalf of the City of Anchorage [and] the State of Alaska. He's using some imagination. He knew about the RICO statute, and he may go ahead with this. That situation in Anchorage must be duplicated a thousand times over in cities, counties, and states all across the nation. [I]t seems to me that state and local prosecutors . . . have a tremendous opportunity not only to recoup for your governments what you have been

jipped out of, but to make it tough on the people who are doing business illegally with your government.

That is the control feature of RICO. It wasn't intended just to make people whole. The Congress, I believe, had other things in mind when it enacted the civil provisions of RICO than merely creating causes of action for people and governments to make them whole. There are enough causes of action in the federal code that they really don't have to do this. It's a by-product however.

The main purpose was to use it as a control mechanism, [as] another way . . . of making the risks unacceptable for people who would do business with the government and cheat them. Life is always filled with risks; just about everything you do carries a little bit of risk with it. More often than not though, you do things because you determine that the risks are . . . acceptable. Well, if you make the price of doing things so high that you make the risks unacceptable, maybe then the people just won't take the risks any more. That is the thinking behind the Congress when it enacted the civil provisions of the RICO statute.

Private Individual as Plaintiff

Now, in addition to giving state and local governments a cause of action, [RICO] also gives private individuals a cause of action. Bob alluded to this earlier this morning when he was talking about resources. There is no organized

crime program that I have ever seen that wasn't understaffed. You never have enough . . . people to do the job because it's a big job. There is a way, however, that you can enlist the resources of the private bar. [S]imply encourag[e] the victims, where the victim is not the state, or the county, or the city, where the victim of some fraud, scam, whatever it may be, happens to be a private individual, tell them, "Hey, you've got a cause of action. [I]f he goes to a lawyer, any lawyer--and there's not a great deal of mystery to this [statute], once you read it a few times; it's based upon sound legal principles that are well established--you've got a lawyer from the private bar who's helping you out, if not directly, at least indirectly. [H]e's doing part of your job, if he is suing some racket guy to recover on behalf of someone who's been victimized.

There is a provision, as I mentioned before, for attorney's fees, and think of this. Let me use this hypothetical. Let's say that you have a racket guy who owns a pizzeria, and he goes around telling people, "You buy my pizza." The guy [doesn't] want to get beat up, so he buys a . . . pizza [for] $2. [He] goes to a lawyer, [and the] lawyer says, "Yeah, that was extortion, no question about it. You've got a cause of action, treble damages, $6." However, that can generate $8,000 in attorney's fees, which is also recoverable by the private party under the act. For that I thank Professor Blakey. . . .

Thinking RICO

I heard him say it, but I'm going to say it again. I think that if you come away from here, from the combination of Bob's lecture and my lecture, with just one thing, think RICO, think about the civil features of RICO, we'll have accomplished something. In other words, whenever you are drafting an indictment or [preparing] to proceed against somebody, keep it in mind.

Statute of Limitations Issue

. . . There may be a statute of limitations problem with RICO. It may be the nearest federal statute or you may have to look to state law [which] varies from state to state, and [the appropriate statute of limiations] depends upon . . . how the federal court would construe [RICO]. The federal courts may use the state statute of limitations. [T]he cause of action may be a tort which has a three year statute in some places, two years in others, and so forth, [or it] may be in contract, [or] it may be God knows what, but you may well have a short statute of limitations. So if . . . you're looking at [a situation], and you say, "Hey, you know, somewhere or another the civil features of RICO may be appropriate here," don't do the usual thing and say, "Well, we'll worry about the civil case later on," and go forward with whatever your criminal case is. Get thinking RICO at that time, and get thinking civil RICO at that time.

[T]ailor what you do criminally, and tailor your investigations towards the eventuality that maybe [you can't] make a criminal case, but [you may be able to] make a civil case. [I] think if you come out of here . . . just thinking that way and just saying [that] this is something that [you] didn't know about before or [had] heard about but . . . didn't really think about, and is sort of plugged into your program, maybe we've accomplished something.

Hit Organized Crime in the Pocket

[Y]ou've got to remember this. When everything else is said and done as far as organized crime is concerned, the name of the game is profit. The name of the game is money. They talk about power, but power is only a means to the end of getting as much money as you can, and you know the prosecution philosophy is really prosecution. Put them behind bars. That's the way you look at it, that's the way I looked at it, that's the way ninety-nine out of a hundred people look at it in the prosecutor's office. I'm not saying you shouldn't look at it that way, but . . . lots of times that's just not the answer. [L]ots of times you'll spend a year making a case and year putting it into court, and the judge slaps [the guy] on the wrist anyway. What do you have in the end? [N]othing. The other guy's laughing at you. Or you'll put him away for a short time, and business goes on as usual, or even if you put him away for a long, long time, the business keeps going. He isn't running it, his brother is.

But if you attack the activity where it hurts, on the money end, I guarantee you're going to accomplish something. [T]hat's what they're more scared about. I can tell you this, they're more scared of your going after their money, their resources, than they are if they have to take a fall for a couple of years. [I]n the end, I think you will accomplish a whole lot more if you start using civil RICO the way that Senator Hruska, Congressman Poff, and Bob Blakey, who really wrote it all, intended.

CORNELL INSTITUTE ON ORGANIZED CRIME

TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME

Individual Essays

prepared by

students

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Cornell Law School

LEGISLATIVE HISTORY OF R.I.C.O.

by
Toby D. Mann

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SUMMARY

¶ 1 As early as 1950 the problem of criminal infiltration of legitimate business was documented.[1] In the 1960's, antitrust laws were used to attack this criminal activity in business.[2] The problem motivated Congress to develop direct criminal legislation[3] to combat patterned infiltration of legitimate business[4] by "organized" and "non- organized" criminal activity.[5] R.I.C.O. is the result of the assimilation of several strong Senate bills modified by the House of Representatives.

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[1] S. Rep. No. 2370, 81st Cong., 2d Sess. 16 (1950), reprinted in R.I.C.O. Legislative History at 218 as compiled by the Cornell Institute on Organized Crime [herinafter cited as R.I.C.O. Leg. Hist.].

[2] Los Angeles Meat and Provision Drivers Union v. United States, 371 U.S. 94 (1962); United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806 (3d Cir.), cert. denied, 384 U.S. 961 (1966); United States v. Bitz, 282 F.2d 465 (2d Cir. 1960).

[3] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (codified at 18 U.S.C. §§ 1961 - 1968 (1976) [hereinafter referred to as R.I.C.O.: Racketeer Influenced and Corrupt Organizations].

[4]
> To aid in the pressing need to remove organized crime from legitimate organizations in our country, I have thus formulated this bill entitled the "Corrupt Organizations Act of 1969." This bill is designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees and the President's Crime Commission.

115 Cong. Rec. 9567 (1969), reprinted in R.I.C.O. Leg. Hist. at 30 (remarks by Senator McClellan upon introduction of S. 1861).

[5] See 116 Cong. Rec. 18913 - 18914 (1970), reprinted in R.I.C.O. Leg. Hist. at 226 - 27.

I. R.I.C.O.: CONTENT, PURPOSE, AND SCOPE

A. CONTENT

¶ 2 R.I.C.O. is an attack on criminal infiltration of legitimate business. R.I.C.O. proscribes:

> 1. the use of income or proceeds from a pattern of racketeering activity by a principal in the commission of that activity to acquire an interest or establish an enterprise engaged in interstate commerce;
>
> 2. the acquisition of any enterprise engaged in interstate commerce through a pattern of racketeering activity;
>
> 3. the operation of an enterprise engaged in interstate commerce through a pattern of racketeering activity; and
>
> 4. conspiracy to commit any of the above prohibitions.[6]

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[6] § 1962 Prohibited activities

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

¶ 3 Violations of these prohibitions may be restrained by district courts through the issuance of:

1. orders of divestment;

2. prohibitions on business activities; and

3. orders of dissolution or reorganization.[7]

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6 cont'd

> debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (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.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) or this section.

18 U.S.C. § 1962 (1976); see also R.I.C.O. Leg. Hist. at 180.

7

> § 1964. Civil remedies
>
> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964 (1976); see also R.I.C.O. Leg. Hist. at 183.

Unrestrained violations may be punished by fine, imprisonment, and criminal forfeiture of the convict's interest in the enterprise.[8] Civil treble damage actions are provided for victims of R.I.C.O. violations.[9]

¶ 4 R.I.C.O. makes provision for nationwide venue and service of process,[10] expedition of government civil ac-

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8 § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquiredor maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963 (1976); see also R.I.C.O. Leg. Hist. at 181.

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

18 U.S.C. § 1964(c) (1976); see also R.I.C.O. Leg. Hist. at 184.

10 § 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

tions,[11] and civil investigative demands.[12]

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10 cont'd

> (c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.
>
> (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. § 1965 (1976); see also R.I.C.O. Leg. Hist. at 184-85.

11

> § 1966. Expedition of actions
>
> In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

18 U.S.C. § 1966 (1976); see also R.I.C.O. Leg. Hist. at 185-86.

12

> § 1968. Civil investigative demand
>
> (a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeer-

12 cont'd

ing investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United

12 cont'd

States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

12 cont'd

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly —

(i) designate another racketeering investi-

gator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian

B. PURPOSE

¶ 5 These provisions were developed with the purpose of incorporating the machinery of antitrust law into a comprehensive attack on the criminal infiltration of legitimate business.[13] R.I.C.O. provides criminal law the prosecutorial and civil tools of antitrust without limiting case law.[14] Antitrust case law was developed with the intent of

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12 cont'd

> is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.
>
> (j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

18 U.S.C. § 1968 (1976); see also R.I.C.O. Leg. Hist. at 186-93.

[13] "I have today introduced a bill entitled 'The Criminal Activities Profits Act.' This bill is aimed specifically at racketeer infiltration of legitimate business and it is premised principally upon our existing antitrust laws." 115 Cong. Rec. 6993 (1969); reprinted in R.I.C.O. Leg. Hist. at 25 (remarks by Senator Hruska upon introduction of S. 1623).

[14] R.I.C.O. was originally introduced as an amendment to the Sherman Act. It was separated into an independent criminal statute, at the suggestion of the American Bar Association, in order to free it from the standing and proximate cause requirements developed for antitrust law. See Relating to the Control of Organized Crime in the United States: Hearings on S. 30 and Related Proposals Before the Subcomm. No. 5 of the Comm. on the Judiciary House of Representatives, 91st Cong., 2d Sess. 147-49 (1970) [hereinafter cited as House Hearings on S. 30] reprinted in R.I.C.O. Leg. Hist. at 128-29.

maintaining competition.[15] R.I.C.O.'s case law should develop liberally, purging the criminal element from legitimate business.

C. SCOPE

¶ 6 R.I.C.O. owes its existence to Congress' concern about organized crime, which provided the occasion and context, but not the limits. R.I.C.O. is a broad criminal law reform applicable to all those who fall within its prohibitions, not merely to members of "organized crime."[16]

II. THE ORIGINS OF THE APPLICATION OF ANTITRUST PRINCIPLES TO CRIMINAL INFILTRATION OF LEGITIMATE BUSINESS

A. PROBLEM

¶ 7 In 1951 the Kefauver committee[17] disclosed the problem of organized crime's infiltration into legitimate business.[18] The committee further noted that once business was infiltrated, criminal methods were employed to create monopolies

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[15] "The Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition . . ." Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930). "The end sought [through the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions . . . ." Apex Hosiery Co. v. Leader, 3190 U.S. 469, 493 (1940).

[16] See note 5 supra, and notes 70 & 71 infra.

[17] Special Committee of the United States Senate to Investigate Organized Crime in Interstate Commerce.

[18] "One of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises. S. Rep. No. 141, 82d Cong., 1st Sess. 33 (1951), reprinted in R.I.C.O. Leg. Hist. at 220.

and unfair competition.[19]

¶ 8 By 1960, the problem of criminal infiltration of labor unions was documented by the Senate Select Committee on Improper Activities in the Labor and Management Field.[20] Shortly thereafter the Senate Subcommittee on Government Operations exposed the massive family structure of Cosa Nostra.[21]

B. RECOMMENDATIONS AND PROPOSALS

1. RECOMMENDATIONS

¶ 9 The problem of criminal activity in legitimate business was well documented by 1967 when the President's Commission on Law Enforcement and Administration of Justice reported the methods used by organized crime to acquire control of business concerns.[22] It recommended the use of regulatory

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[19]"In most cases, these are enterprises in which gangster methods have been used to obtain monopolies so that their vicious practices taint otherwise legitimate business . . . .

They are able to compete unfairly with legitimate business men because of their accumulations of cash and their vicious methods." S. Rep. No. 2370, 81st Cong., 2d Sess. 16, (1950), reprinted in R.I.C.O. Leg. Hist. at 218.

[20]S. Rep. No. 1139, 86th Cong., 2d Sess. 487-513 (1960).

[21]Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Government Operations United States Senate, 88th Cong., 1st Sess. (1963).

[22]"Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interest in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various f ms of extortion." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 190 (1967), reprinted in R.I.C.O. Leg. Hist. at 222.

measures to control infiltration of business.[23] In support of its recommendation, it noted the easier civil standard of proof, the possibility of discovery, and the value of antitrust-type remedies.[24]

2. PROPOSALS

¶ 10 In the 90th Congress, two bills were proposed incorporating the Commission's recommendations. S. 2048[25] proposed an amendment to the Sherman Antitrust Act prohibiting the investment or business use of unreported income.[26] The

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[23] "Law Enforcement is not the only weapon that governments have to control organized crime. Regulatory activity can have a great effect . . . .

Government at various levels has not explored the regulatory devices available to thwart the activities of criminal groups, especially in the area of infiltration of legitimate business."

Id. at 208, reprinted in R.I.C.O. Leg. Hist. at 223.

[24] These techniques are especially valuable because they require a less rigid standard of proof of violation than the guilt-beyond-a reasonable-doubt requirement of criminal law. Regulatory agencies also have powers of inspection not afforded to law enforcement . . . . Civil proceedings could stop unfair trade practices and antitrust violations by organized crime businesses.

Id.

[25] S. 2048, 90th Cong., 1st Sess. (1967), reprinted in R.I.C.O. Leg. HIst. at 4 - 5.

[26] Sec. 8. Every person who (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise engaged in or affecting trade or commerce among the several states, with foreign nations, or within any place subject to the provisions of section 3, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than $50,000, or imprisoned for not more than one year or both.

Id. § 8, reprinted in R.I.C.O. Leg. HIst. at 4 - 5.

bill's sponsor, Senator Hruska, hoped to bring the full force of the Sherman Act to bear on organized crime.[27]

¶ 11 S. 2049[28] was independent legislation paralleling the Sherman Act. It prohibited:

1. the acquisition of an interest in a business affecting interstate commerce with income derived from listed criminal activities;[29] and

2. the agent of a corporation from authorizing the corporation to engage in any of the listed criminal activities.[30]

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[27] "The antitrust laws now provide a well-established vehicle for attacking anticompetitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinarily broad and flexible remedies ought to be used more extensively against the 'legitimate' business activities of organized crime." 113 Cong. Rec. 17999 (1967), reprinted in R.I.C.O. Leg. Hist. at 3 (remarks by Senator Hruska upon introduction of S. 2048.)

[28] S. 2049, 90th Cong. 1st Sess. (1967), reprinted in R.I.C.O. Leg. Hist. at 6 - 14.

[29] (1) The term "criminal activity" means (A) any act involving murder, kidnaping, extortion, bankruptcy fraud, or the manufacture, importation, receiving, concealment, buying, or otherwise dealing in narcotic drugs or marihuana which is punishable under any statute of the United States; (B) any act which is punishable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 1084 (relating to the transmission of gambling information), section 1503 (relating to obstruction of justice), section 1954 (relating to welfare fund bribery), and chapter 117 (relating to white slave traffic); and (C) any conspiracy to commit any of the foregoing offenses.

Id. at § 2(1), reprinted in R.I.C.O. Leg. Hist. at 6 - 7.

[30] Sec. 3.(a) Whoever, being a person who has received any income derived directly or indirectly from any criminal activity in which such person has participated as a principal within

The bill allowed the government and third parties to seek injunctions to restrain violations of S. 2049.[31] Actions

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> the meaning of section 2, title 18, United States Code, applies any part of such income or the proceeds of any such income to the acquisition by or on behalf of such person of legal title to or any beneficial interest in any of the assets, liabilities, or capital of any business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce shall be guilty of a felony and shall be fined not more than $10,000, or imprisoned not more than ten years, or both.
>
> (b) Whoever, being a director, officer, or agent of a corporation who has authorized, ordered, or performed any act which constitutes in whole or in part a violation of subsection (a) by such corporation, shall be guilty of a misdemeanor and shall be fined not more than $5,000, or imprisoned not more than one year, or both.

Id. at § 3, reprinted in R.I.C.O. Leg. Hist. at 8.

31

> (b) Under the direction of the Attorney General, it shall be the duty of United States attorneys, in their respective districts, to institute proceedings to prevent and restrain such violations. In any action by the United States under this section, the court shall proceed as soon as may be to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such temporary restraining order or prohibition as it shall deem proper.
>
> (c) Any person (other than the United States) may institute action under this section, in any district court of the United States having jurisdiction over the parties, to prevent and restrain threatened loss or damage to such person from a violation of section 3 In any such action, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any such action before a determination thereof upon its merits.

Id. § 4(b), § 4(c), reprinted in R.I.C.O. Leg. Hist. at 9 - 10.

for damages and cost were available to the government[32] and treble damage actions to the victims.[33]

¶ 12 S. 2049 also provided a full range of liberal procedural provisions. Liberal venue and service of process,[34]

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32 (b) Whenever the United States is injured in its business or property by reason of any violation of section 3, it may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual amount of the damages sustained, and the cost of the action.

Id. § 5(b), reprinted in R.I.C.O. Leg. Hist. at 10.

33 Sec. 5. (a) Any person who is injured in his business or property by reason of any violation of section 3 may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

Id. § 5(a), reprinted in R.I.C.O. Leg. Hist. at 10.

34 Sec. 7. (a) Except as otherwise specifically provided by this Act, any civil or criminal action or proceeding under this Act against any person may be instituted in the district court of the United States for any district in which such person resides, is found, or has an agent, and any such action or proceeding against a corporation also may be instituted in such court for any district in which such corporation transacts business.

(b) In any action under section 4(b) of this Act in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this Act in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance

a four-year statute of limitations,[35] expedition[36] of govern-

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> of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.
>
> (d) Except as otherwise specifically provided by the Act, all process in any action or proceeding under this Act against a corporation may be served in any judicial district in which such corporation is an inhabitant or is found.

Id. § 7, reprinted in R.I.C.O. Leg. Hist. at 11 - 13.

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> (c) Except as otherwise provided by section 6, any action under this section shall be barred unless it is commenced within four years after the cause of action accrued.

Id. § 5(c), reprinted in R.I.C.O. Leg. Hist. at 10.

> (b) Whenever any civil or criminal action other than an action under section 5(b) is instituted by the United States to prevent, restrain, or punish any violation of section 3, the running of the period of limitations prescribed by section 5(c) with respect to any private right of action arising under this Act which is based in whole or in part on any matter complained of in such action by the United States shall be suspended during the pendency of such action by the United States and for one year thereafter. Whenever the running of such period of limitations is so suspended with respect to any right of action arising under section 5(a), action thereon shall be barred unless it is commenced within such period of suspension or within four years after the accrual of the cause of action.

Id. § 6(b), reprinted in R.I.C.O. Leg. Hist. at 11.

36

> SEC. 8. In any civil action instituted by the United States in any district court of the United States under this Act, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge (or

ment civil actions,[37] direct appeal to the Supreme Court,[38] and broad transactional immunity[39] were included.

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> in his absence to the presiding circuit judge) of the circuit in which such action is pending. Upon receipt of such copy, such judge shall designate immediately three judges of that circuit (of whom at least one shall be a circuit judge) to hear and determine such action. The judges so designated shall assign such action for hearing at the earliest practicable date, participate in the hearing and determination thereof, and cause such action to be expedited in every way.

Id § 8, reprinted in R.I.C.O. Leg. Hist. at 13.

37

> SEC. 9. (a) In the taking of depositions for use in any civil action instituted by the United States under this Act, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court, and no order excluding the public from attendance at any such proceeding shall be made or enforced.

Id. § 9(a), reprinted in R.I.C.O. Leg. Hist. at 13.

38

> SEC. 10. In every civil action instituted by the United States in any district court of the United States under this Act, an appeal from the final judgment of the district court will lie only to the Supreme Court.

Id. § 10, reprinted in R.I.C.O. Leg. Hist. at 14.

39

> (b) No individual who gives testimony under oath, or produces documentary evidence under oath, in obedience to a subpena issued in any action or proceeding instituted by the United States under this Act may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies, or produces documentary or other evidence, in such action, except that no such individual shall be exempt from prosecution or punishment for perjury committed while so testifying.

Id. § 9(b), reprinted in R.I.C.O. Leg. Hist. at 14.

¶ 13 These two initial attempts to apply antitrust-type statutes to organized crime were referred to the Senate Committee on the Judiciary,[40] where no action was taken.

¶ 14 The Antitrust Section of the American Bar Association responded to S. 2048 and S. 2049 agreeing in theory, but not in form.[41] The Section recommended that the antitrust-type bills attacking criminal infiltration of business be independent criminal statutes.[42] Concern was expressed that a commingling of the two distinct statutory purposes might produce unharmonious results and methods.[43] Independent status would also free the new criminal proceedings of the restrictive case law developed in the regulatory antitrust setting.[44] The American Bar Association thought that this

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[40] 113 Cong. Rec. 18007 (1967).

[41]
> The Antitrust Section agrees that organized crime must be stopped. It further agrees that the antitrust machinery possesses certain advantages worthy of utilization in this fight. It therefore supports and endorses the principles and objectives of both S. 2048 and S. 2049, and similar legislation.
>
> However, it prefers the approach of S. 2079. By placing the antitrust-type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided.

House Hearings on S. 30, 91st Cong., 2d Sess. 149 (1970), reprinted in R.I.C.O. Leg. Hist. at 129.

[42] Id.

[43] Id.

[44]
> Moreover, the use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause."

was important in the areas of victim standing and proximate cause, where more liberal standards should be applied in R.I.C.O. actions.[45]

III. CONGRESSIONAL ACTION — ORGANIZED CRIME: OCCASION FOR CRIMINAL LAW REFORM

A. CRIMINAL LAW REFORM AS VIEWED BY ITS SPONSORS

¶ 15 In the 91st Congress, Senator McClellan, in reponse to the problem of organized crime, introduced S. 30[46] utilizing the recommendations of the President's Commission. Although S. 30 was entitled the Organized Crime Act of 1969, it was a broad-based criminal law reform covering such general areas as grand juries,[47] immunity,[48] gambling,[49] and recalcitrant witnesses.[50] When S. 30 was first introduced, it did not contain antitrust-type provisions for

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> Conversely, the placing of this legislation in the body of the antitrust laws could have an undesirable and inappropriate impact on the administration of the antitrust laws in their normal context. Thus, faced with litigation between private citizens and members of the organized criminal hierarchy, there may well be a natural inclination to weight the balance heavily in favor of the private citizen. Such an imbalance, while defensible in this context, is inappropriate in the normal antitrust litigation context.

Id.

45 Id.

46 S. 30, 91st Cong., 1st Sess. (1969), reprinted in part in R.I.C.O. Leg. Hist. at 22 - 23.

47 Id. tit. I.

48 Id. tit. II.

49 Id. tit. VIII.

50 Id. tit. III.

controlling infiltration of business.

¶ 16 Combining S. 2048 and S. 2049 of the 90th Congress into one independent criminal statute,[51] Senator Hruska introduced S. 1623.[52]

¶ 17 As a product of the Senate hearings on S. 30 and S. 1623, S. 1861[53] was drafted and introduced.[54] S. 1861 enlarged the range of listed "racketeering activities"[55]

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[51]"In the 90th Congress I sponsored two bills, S. 2048 and S. 2049, which were essentially similar to the bill I introduce today." 115 Cong. Rec. 6993 (1969), reprinted in R.I.C.O. Leg. Hist. at 25 (remarks of Senator Hruska upon introduction of S. 1623).

[52]S. 1623, 91st Cong. 1st Sess., 115 Cong. Rec. 6995 - 96 (1969), reprinted in R.I.C.O. Leg. Hist. at 27 - 28.

[53]S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568 - 9571 (1969); reprinted in R.I.C.O. Leg. Hist. at 31 - 34.

[54]"The bill which I am introducing today, the Corrupt Organizations Act of 1969, is in part a product of testimony developed in four days of hearings on S. 30." 115 Cong. Rec. 9567 (1969), reprinted in R.I.C.O. Leg. Hist. at 30 (remarks by Senator McClellan upon introduction of S. 1861) (Hearings on S. 30 were combined with hearings on S. 1623 and other bills).

[55] "(1) The term 'racketeering activity' means (A) any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 664 (relating to embezzlement from pension and welfare funds), section 659 (relating to theft from interstate shipment), sections 891 - 894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling transformation), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1954 (relating to welfare fund bribery), sections 2314 and 2315 (relating to interstate transportation of stolen property),

(referred to as "criminal activity" in previous bills) and required the conduct to be patterned.[56] Victim treble damage and injunction actions were dispensed with in what appears to have been an attempt to streamline the bill,

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> sections 2421 - 24 (relating to white slave traffic), section 501(c) of the Labor Management Reporting and Disclosure Act of 1959 (relating to embezzlement from union funds), and (C) any conspiracy to commit any of the foregoing offenses.

Unenacted § 1961(1) as proposed by S. 1861 , 91st Cong., 1st Sess. § 2(a), 115 Cong. Rec. 9569 (1969), reprinted in R.I.C.O. Leg. Hist. at 32.

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> "(6) The term 'pattern of racketeering activity' includes at least one act occurring after the effective date of this Chapter.

Unenacted § 1961(6) as proposed by id., reprinted in R.I.C.O. Leg. Hist. at 32.

> "§ 1962. Prohibited racketeering activities.
> "(a) It shall be unlawful for any person who has knowingly received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
> "(b) It shall be unlawful for any person to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, through a pattern of racketeering activity or through collection of unlawful debt.
> "(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.

Unenacted § 1962, as proposed by id., reprinted in R.I.C.O. Leg. Hist. at 32.

sidestepping the accompanying complex legal issues[57] and possible political problems. S. 1861 further strengthened S. 1623 by providing civil investigative demands,[58] use .

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[57]The jurisprudence of private treble damage actions requires much more than merely the power to instigate the action. Detailed rules of standing to sue and proximate cause of injury must be developed. The legislature must determine appropriate statutes of limitations and tolling rules. It must decide if injunctive relief will be available to private parties, and to what extent the government may intervene on behalf of private parties and itself.

[58] "§ 1968. Investigations

"(a) Civil investigative demand.

"(1) Issuance.

"Whenever the Attorney General, or the Assistant Attorney General designated by the Attorney General, has reason to believe that any person or enterprise under investigation may be in possession, custody, or control of any documentary material relevant to a civil racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

"(2) Contents.

"Each such demand still—

"(i) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

"(ii) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

"(iii) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(iv) identify the custodian to whom such material shall be made available.

"(3) Reasonableness; privilege.

"No such demand shall—

"(i) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aide of a grand jury investigation of such alleged racketeering violation; or

"(ii) require the production of any documentary evidence which would be privileged from

disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

"(4) Territorial limits of service.

"Any such demand may be served by any racketeering investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

"(5) Service upon legal entity.

"Service of any such demand or any petition filed under this section may be made upon a person by—

"(i) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

"(ii) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

"(iii) depositing such copy in the United States mails, by registered or cerified mail duly addressed to such person at its principal office or place of business.

"(6) Return.

"A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(7) Racketeering document custodian.

"(i) Designation; deputy custodians.

"The Attorney General, or any Assistant Attorney General designated by the Attorney General, shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

"(ii) Compliance with civil investigative demand; original documentary material.

"Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in

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writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

"(iii) Possession of documentary material; responsibility for use and return; copies for official use; examinations.

"The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice. Under such reasonable terms and and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

"(iv) Delivery of documentary material for use in presentation of case or proceeding; return to custodian of material not in control of court or grand jury.

"Whenever any attorney has been desiganted to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding, such attorney shall return to custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

"(v) Return to producer of documentary material not in control of court or grand jury.

"Upon the completion of (1) the racketeering investigation for which any documentary material was produced under this chapter, and (2) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section which has not passed into the control of

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any court or grand jury through the introduction thereof into the record of such case or proceeding.

"(vi) Demand by producer for return of documentary material upon failure to institute case or proceeding within reasonable time after completion of examination and analysis of evidence.

"When any documentary material has been produced by any person under this chapter for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, or the Assistant Attorney General designated by the Attorney General, to the return of all documentary material other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section so produced by such person.

"(vii) Successor custodian; notice to producer of documentary material; duties and responsibilities of successor.

"In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under any demand issued under this chapter, or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General, or any Assistant Attorney General designated by the Attorney General, shall promptly (1) designate another racketeering investigator to serve as custodian thereof, and (2) transmit notice in writing to the person who reproduced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this chapter upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

"(b) Judicial proceedings.

"(1) Petition for enforcement; venue.

"Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, or any Assistant Attorney General designated by the Attorney General, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for

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the enforcement of this chapter, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

"(2) Petition for order modifiying or setting aside demand; time for petition; suspension of time allowed for compliance with demand during pendency of petition; grounds for relief.

"Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person.

"(3) Petition for order requiring performance by custodian of duties; venue.

"At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this chapter.

"(4) Jurisdiction; appeal; contempts.

"Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28. Any disobedience of any final order entered under this section by any court may be punished as a contempt thereof.

"(5) Applicability of Federal Rules of Civil

immunity,[59] forfeiture of gains in violation of the bill,[60]

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Procedure.

"To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under this chapter."

Unenacted § 1968, as proposed by S. 1861, 91st Cong., 1st Sess. §2(a), 115 Cong. Rec. 9570 - 71 (1969), reprinted in R.I.C.O. Leg. Hist. at 33 - 34.

59 "(b) Whenever in the judgement of the Attorney General, or any Assistant Attorney General designated by the Attorney General, the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States, or in any civil proceedings under this chapter involving a violation of section 1962 of this chapter, is necessary to the public interest, the United States attorney, upon the approval of the Attorney General, or any Assistant Attorney General designated by the Attorney General, shall make application to such court that the witness shall be instructed to testify or produce evidence, subject to the provisions of this section. Upon order of the court no such witness shall, after having claimed his privilege against self-incrimination, be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may compel him to be a witness against himself in a criminal case. Such testimony or evidence so compelled shall not be used as evidence in any criminal case against such witness except a prosecution for giving false testimony or for a failure to comply with the order.

Unenacted § 1967(b) as proposed by id. at 9569 - 70, reprinted in R.I.C.O. Leg. Hist. at 32 - 33.

60 "§ 1963. Criminal penalties

"(a) Whoever violates any provision of section 1962 of this Chapter shall be fined not more than $10,000 or imprisoned not more than 20 years, or both, and shall forfeit to the United States all interest in the enterprise engaged in, or the activities of which affect, interstate or foreign commerce.

Unenacted § 1963 as proposed by id. at 9569, reprinted in R.I.C.O. Leg. Hist. at 32.

and a congressional mandate for liberal construction.[61]

¶ 18 These and other organized crime bills were referred to the Subcommittee on Criminal Law of the Senate Judiciary Committee.[62] A variety of sources offered recommendations. The American Bar Association preferred transaction over use immunity.[63] The Department of Justice suggested that the investor be required to have been a principal in the criminal activity[64] and be allowed minimal investment of illegal monies.[65] Clarification of the terms "pattern of

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61 SEC. 4. The provisions of this act shall be liberally construed so as to effectuate its remedial purposes.

Id. § 4 at 9571, reprinted in R.I.C.O. Leg. Hist. at 33.

62 115 Cong. Rec. 6925, 9512 (1969).

63 See Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1816, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 21 Cong., 1st Sess. 268, (1969) [hereinafter cited as Senate Hearings on S. 30], reprinted in R.I.C.O. Leg. Hist. at 37.

64 Since the prohibition is intended to be aimed primarily at the person who is an active participant in illegal enterprises, it is felt that this problem of vagueness can be remedied by amending subsection (a) to insert the following language after the phrase "from a pattern of racketeering activity":
in which such person has participated as a principal within the meaning of section 2, title 18 United States Code.

Id. at 406, reprinted in R.I.C.O. Leg. Hist. at 42.

65 While perhaps not rising to the level of a constitutional defect, it is felt that subsection (a)'s total ban on the acquisition of any interest in an enterprise, including the purchase of even a single share of stock, is unnecessary and beyond the scope of the evil at which the legislation is aimed. Accordingly, it is recommended that this total stricture be modified so as to allow the purchase of securities on the open market for ordinary investment purposes by amend-

racketeering activity"[66] and "racketeering activity"[67] was

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ing subsection (a) to insert the following provision at the end thereof:

> Provided, that a purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be a violation of this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their associates in any pattern of racketeering activity after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Id.

66 Section 1961(6) defines the term "pattern of racketeering activity" as follows:

> The term "pattern of racketeering activity" includes at least one act occurring after the effective date of this chapter.

The term "pattern" indicates that what is intended to be proscribed is not a single, isolated act of "racketeering activity," but at least two such acts. In order to clarify this purpose, it is suggested that the term be redefined as follows:

> (6) The term "pattern of racketeering activity" means at least two acts, one of which occurred after the effective date of this chapter.

Turning to the substantive provisions of the bill, Section 1962 contains three general types of prohibited racketeering activities. Under subsection (a) it shall be unlawful for any person who has knowingly received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of an interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id. at 405, reprinted in R.I.C.O. Leg. Hist. at 41.

67 It is felt that the definition of the term "racketeering activity" contained in Section 1961(1)(A), "any act involving the danger of violence to life, limb, or property, indictable

also suggested.

¶ 19 The American Civil Liberties Union expressed its disapproval of the legislation through a series of general attacks. It claimed that mandatory open proceedings in government civil actions and the use of civil investigative demands against natural persons violated the Fifth Amendment and the defendant's right of privacy.[68] Most impor-

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67 cont'd

under State or Federal law and punishable by imprisonment for more than one year", is too broad and would result in a large number of unintended applications, as well as tending toward a complete federalization of criminal justice. It is suggested, therefore, that Section 1961 (1)(A) be redefined as follows:

(I) The term "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury, or dealing in narcotic drugs, marihuana or other dangerous drugs, which is indictable under State law and punishable by imprisonment for more than one year.

It is felt that by thus narrowing the definition of the class of applicable state crimes in terms of their generic meaning, the definition of "racketeering activity" contained in Section 1961(1)(A) will be both broad enough to include most state statutes customarily invoked against organized crime, yet narrow enough to be constitutional. United States v. Nardello, 393 U.S. 286 (1969).

Id.

68 Also of concern is proposed new Section 1967 which provides that in the taking of depositions for use in civil actions under the bill "the proceedings shall be open to the public as freely as our trials in open court, and no order excluding the public from attendance at any such proceeding shall be made or enforced . . . ."

It seems clear that his provision with its prohibition on court orders excluding the public is intended to permit "exposure for exposure's sake." This is both a violation of the right of privacy and derogation of the Fifth Amendment privilege which although strictly speaking, not generally applicable in civil proceedings, we believe in principle protects individuals against

tantly, it expressed concern that this liberal legislation would extend beyond organized crime and infringe upon the civil rights of white-collar and political activist defendants.[69]

¶ 20 Senator McClellan responded to the continued attacks on the legislation's scope with four arguments.[70] Saying R.I.C.O. should only apply to organized crime:

> 1. confuses the occasion for re-examining an aspect of criminal justice with the proper scope of the legislation coming out of that study;
>
> 2. confuses the role of Congress with the role of the courts;

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68 cont'd

> compulsion to reveal embarrassing and private facts . . . Proposed Section 1968 dealing with investigations seems unwarranted and dangerous . . . Specific circumstances aside, the entire procedure is in our view, improper, whether or not the demanded material is authorized to be used solely in connection with civil proceedings. The section amounts to authorization of fishing expeditions by the government. There is nothing to prevent, for example, the Attorney General or the Assistant Attorney General appointed by him, from demanding business records in dragnet fashion from all persons in a given community suspect of underworld connections and the fine-combing these records in the hopes of "hitting pay dirt." Not only does this do violence to the constitutionally protected right of privacy, but it also makes the Fifth Amendment privilege virtually meaningless. As long ago as 1886, the Supreme Court said in Boyd v. United States.

Id. at 477, reprinted in R.I.C.O. Leg. Hist. at 48 - 49.

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> First and foremost we are concerned by the enormous and virtually unlimited breadth of the criminal provisions of the proposed legislation. . . . There is no guarantee nor reason to assume that in times of stress, or where the aim seems laudable, S. 1861 would not be used in areas far removed from what we know as organized crime.

Id. at 475, reprinted in R.I.C.O. Leg. Hist. at 47 - 48.

70 116 Cong. Rec. 18913 - 18914 (1970); reprinted in R.I.C.O. Leg. Hist. at 226 - 27.

3. is pragmatically infeasible requiring application of R.I.C.O. only to organized crime prior to the use of R.I.C.O.'s investigative tools; and

4. implies a double standard of civil liberties.[71]

¶ 21 Incorporating many of these recommendations the Senate Committee on the Judiciary assimilated these many bills into

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71 Mr. President, this line of analysis has a certain superficial plausibility, yet on closer examination we see that it is seriously defective in several regards. Initially, it confuses the occasion for re-examining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that re-examination . . . .

In addition, the objection confuses the role of the Congress with the role of a court . . . . But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem . . . .

The objection, moreover, has practical as well as theoretical defects . . . . Many of the provisions, . . . [such as the civil investigative demand], deal with the process of investigating and collecting evidence. When an investigation begins one cannot expect the police to be able to demonstrate a connection with organized crime, . . . It is only at the conclusion of the investigation that organized crime involvement can be shown and verified . . . .

Lastly, and most disturbingly, however, this objection seems to imply that a double standard of civil liberties is permissible. S. 30 is objectionable on civil liberties grounds, the union and city bar committee suggest, because its provisions have an incidental reach beyond organized crime . . . . Has the union forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white-collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases.

Id. (Senator McClellan gave these remarks on the Senate floor after S. 30 had passed the Senate and contained most of S. 1623 and S. 1861).

S. 30. Immunity was provided in Title II[72] of S. 30 and dropped from Title IX. The definition of "racketeering activity" was broadened and clarified to include more specific types of conduct.[73] Similarly, "pattern of racketeering activity" was clarified, requiring at least two acts, one

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[72] Organized Crime Control Act of 1970, Title II, 18 U.S.C. §§ 6001 - 6005 (1976).

[73] "(1) 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment), section 664 (relating to embezzlement from pension and welfare funds), sections 891 - 894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421 - 24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . .

House Hearings on S. 30, 91st Cong., 2d Sess. 50 - 51. See also R.I.C.O. Leg. Hist. at 91 - 93.

of which had occurred after the effective date of the law.[74] Principal status in the racketeering activity of the investor was required and minimal investment allowed.[75]

¶ 22 On its own initiative, the committee chose not to include private treble damage and injunction suits, but provided a continuation clause extending the period of violation for as long as benefit continued.[76] Over the

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74 "(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter . . .

House Hearings on S. 30, 91st Cong., 2d Sess. 52. See also R.I.C.O. Leg. Hist. at 93.

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

House Hearings on S. 30, 91st Cong., 2d Sess. 53 - 54. See also R.I.C.O. Leg. Hist. at 95 - 96.

76 "(e) A violation of this section shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation.

House Hearings on S. 30, 91st Cong., 2d Sess. 55. See also R.I.C.O. Leg. Hist. at 96.

dissent of Senators Hart and Kennedy[77] the committee retained the wide scope including non-organized crime violators. This revised version of S. 30 was passed by the Senate almost unanimously[78] and sent to the House.[79]

B. CRIMINAL LAW REFORM AS "REFINED" BY THE OTHER HOUSE

¶ 23 The House's attitude toward S. 30 can be seen by viewing the many parallel bills introduced. The theory and purpose of the legislation were agreed with, but not always the detail. H. 19215[80] and H. 19586[81] paralleled the R.I.C.O. section of the Senate version of S. 30 except in their inclusion of private civil actions. H. 19586 provided for private treble damage actions,[82] but not for any of the necessary legal subsidiary issues. H. 19215 was much more

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[77] Individual Views of Messrs. Hart and Kennedy, S. Rep. No. 617, 91st Cong., 1st Sess. 215 (1969), reprinted in R.I.C.O. Leg. Hist. at 87.

[78] The vote in the Senate was 73 for and 1 against. 116 Cong. Rec. 972 (1970).

[79] Upon receipt, the House sent S. 30 to the Committee on the Judiciary. 116 Cong. Rec. 1103 (1970).

[80] H. 19215, 91st Cong., 2d Sess. (1970).

[81] H. 19586, 91st Cong., 2d Sess. (1970).

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

Unenacted § 1964(c), as proposed by id., reprinted in R.I.C.O. Leg. Hist. at 123.

complete, granting private injunctive[83] and treble damage actions[84] and governmental actual damage actions.[85] Provision also existed for government intervention in private suits,[86] a five-year statute of limitations, and automatic

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83 "(c) Any person may institute proceedings under subsection (a) of this section. In any proceeding brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the executive of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any action before a determination thereof upon its merits.

Unenacted § 1964(c), as proposed by H. 19215, 91st Cong., 2d Sess. (1970), reprinted in R.I.C.O. Leg. Hist. at 121.

84 "(e) Any person who is injured in his business or property by reason of any violation of section 1962 of this chapter may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the actual damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

Unenacted § 1964(e), as proposed by id., reprinted in R.I.C.O. Leg. Hist. at 121.

85 "(d) Whenever the United States is injured in its business or property by reason of any violation of section 1962 of this chapter, the Attorney General may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual damages sustained by it, and the cost of the action.

Unenacted § 1964(d) as proposed by id., reprinted in R.I.C.O. Leg. Hist. at 121.

86 "(f) The Attorney General may upon timely application intervene in any civil action or proceeding brought under this chapter, if the Attorney General certifies that in his opinion the case is of general public importance. In such action or proceeding, the United States shall be entitled to the same relief as if it had instituted the action or proceeding.

Unenacted § 1964(f), as proposed by id., reprinted in R.I.C.O. Leg. Hist. at 122.

tolling during governmental actions.[87] Unfortunately, this more complete bill gave way to H. 19586.[88]

¶ 24 With great reluctance, the House Judiciary Committee considered S. 30.[89] Concerns were raised and changes resulted. Excluding the addition of the private treble damage action provision all of the House's changes limited S. 30.[90]

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87 "(h) Except as hereinafter provided, any civil action under this section shall be barred unless it is commenced within five years after the cause of action accrued. Whenever any civil or criminal action or proceeding, other than an action under subsection (d) of this section, is brought or intervened in by the United States to prevent, restrain, or punish any violation of section 1962 of this chapter the running of the period of limitations prescribed by this subsection with respect to any cause of action arising under subsections (c) and (e) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by he United States shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.

Unenacted § 1964(h), as proposed by id., reprinted in R.I.C.O. Leg. Hist. at 122.

88 The language of R.I.C.O. as enacted into law is identical to the language of H. 19586 and contains none of the subsidiary provisions of H. 19215. It would seem reasonable to suspect that this version was chosen for political reasons. Logical reflection on the inclusion of a private-treble-damages action would have convinced even a Congressional committee of the need for subsidiary provision at least on the issue of a statute of limitation for private civil actions.

89 Representative Celler, Chairman of the House Judiciary Committee, scheduled hearings on S. 30 only after petition to have the bill discharged from committee had begun circulating and was near the required number of signatures. Once hearings were begun, they were concluded within a week.

90 The addition of the private-treble-damage action may also have limited R.I.C.O. Because the House did not answer the many subsidiary issues involved with treble damage actions, the courts will have to look to other statutes and case law. Antitrust law most closely parallels R.I.C.O. and courts will look to its developed case law. Forcing the courts to apply antitrust case law to R.I.C.O. is precisely what the American Bar Association counselled against when responding to S. 2048 and S. 2049. See note 41 supra. The Senate's clear effort to keep antitrust case law out of R.I.C.O. cases may be hindered by the House's incomplete addition of private-treble-damage actions.

¶ 25 The statutory definitions of "unlawful debt"[91] and "pattern of racketeering activity"[92] were narrowed. Debts from legal gambling, even if unenforceable, were removed from R.I.C.O.'s prohibitions against collection of debts.[93] "Pattern of racketeering activity" was limited, requiring both acts to have occurred within ten years.[94]

¶ 26 Further limiting occurred in removal or destruction of whole clauses. The continuation clause added by the Senate Judiciary Committee to extend the statute of limitations was deleted by the House. Mandatory open proceedings in government civil suits were replaced with broad

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> (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate . . .

18 U.S.C. § 1961(6) (1976). See also R.I.C.O. Leg. Hist. at 178 - 79.

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> (5) "pattern of racketeering activity" requires a least two acts or racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5) (1976). See also R.I.C.O. Leg. Hist. at 178.

93 See note 91 supra.

94 See note 92 supra.

court discretion.[95]

¶ 27 The House Judiciary Committee Hearings raised concerns which were not incorporated into S. 30. The committee dissenters felt the forfeiture clause unwise and envisioned difficulty for the courts in interpreting racketeering activities in terms of potentially conflicting state substantive definitions.[96] The American Bar Association majority believed "pattern of racketeering activity" should require three acts.[97] Civil investigative demands directed against

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[95] In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

18 U.S.C. § 1967 (1976). See also R.I.C.O. Leg. Hist. at 186.

[96] H.R. Rep. No. 1549, 91st Cong., 2d Sess. 186 - 88 (1970), reprinted in R.I.C.O. Leg. Hist. at 170 - 72.

> This provision, by employing the words "a State," raises both very difficult jurisdictional problems, and substantive problems arising from the creation of a Federal law of gambling and of usury. For example, a transaction may have connections with two or more States; in one, it is legal, in another not. Innocent action in one State will be the premise for establishing the collection of an "unlawful debt" in another State under title IX. Which State's laws are to govern?

Id. at 186 - 87, reprinted in R.I.C.O. Leg. Hist. at 170 - 71.

[97] House Hearings on S. 30, 91st Cong., 2d Sess. 556, 558 - 60 (1970), reprinted in R.I.C.O. Leg. Hist. at 159 - 60.

> (1) The definition of pattern of racketeering activity contained in # 1961(5) be changed to require "at least tree acts of racketeering activity, two of which occurred after the effective date of this chapter and within five years of each other." The purpose of this recommendation is to insure that this Title will be applied in accordance with its stated goals and to prevent its use against persons involved in two isolated offenses.

Id. at 560, reprinted in R.I.C.O. Leg. Hist. at 160.

natural persons raised Fifth Amendment difficulties for the American Civil Liberties Union,[98] while the New York Lawyers Association worried about protecting innocent persons.[99] The Association of the Bar of the City of New York reiterated the continuing issue of S. 30's scope beyond

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98 Under proposed § 1968, the Attorney General may issue a "civil investigative demand" requiring the production of documentary material whenever he "has reason to believe" that any person or enterprise has possession or custody of material relevant to "a racketeering investigation." Although the section is adapted from similar provisions in the antitrust laws, its scope has been considerably extended in the process of adaptation. Thus, the proposed provisions apply to natural persons as well as corporations, and, more importantly, they are not limited to individuals or entities "under investigation" as are the comparable antitrust laws.

Id. at 500, reprinted in R.I.C.O. Leg. Hist. at 150.

99 In an effort to meet the more obvious objections, the bill provides in Section 1963(c) that "The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons." The hardship and confusion that could result may be illustrated as follows: The Chase Bank lends an officer of a large off-shore mutual fund a substantial sum of money and receives as collateral blocks of marketable securites. Thereafter, it is learned that the off-shore fund is guilty of two acts of fraud. In the sale of securities and as a controlling person, the officer is personally liable. The United States obtains forfeiture of the controlling person's assets insofar as they can be vaguely related to the securities fraud. At that point, the bank is at the government's mercy whether it gets paid or becomes an unsecured creditor of the 'racketeer'. "Making due provision for the rights of innocent persons" is probably unconstitutional for vagueness.

Id. at 402, reprinted in R.I.C.O. Leg. Hist. at 144.

organized crime.[100]

¶ 28 S. 30 was subjected to amendment attempts on the House floor. An amendment establishing penalties for malicious treble damage actions was defeated,[101] as was an amendment to proscribe the status of being a member of organized crime.[102] An amendment was also offered to

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100 There, I think, we have to take a look and see how broad this provision of "pattern of racketeering activity" is. I think if you will look at the underlying crimes which are involved, it would seem to apply to a theft from an interstate shipment, regardless of the value of the property stolen, and unlawful use of a stolen telephone credit card — the "Mom and Pop" variety of illegal gambling business, the local numbers place, a securities fraud case, practically any State or Federal felony or misdemeanor involving drugs, including marihuana.

We think that it is too broad, particularly when you consider you are dealing with a person's opportunity to engage in business as a result of having been involved in any of the acts which are defined as comprising part of "a pattern of racketeering activity."

Id. at 370, reprinted in R.I.C.O. Leg. Hist. at 141.

101 "At line 10, on page 130, of Section 901, add the following after the period: 'Provided, any such person who brings a frivolous suit, or a suit for the purpose of harassment, shall be subject to treble damages for injury to the defendant, or to his business or property'." 116 Cong. Rec. 35342 (1970, reprinted in R.I.C.O. Leg. Hist. at 205.

102 Amendment offered by Mr. Biaggi: Page 125, line 20, strike out the work "and," and on page 126, after line 7, insert the following:

"(11) 'Mafia and La Cosa Nostra Organizations' mean nationally organized criminal groups composed of persons of Italian ancestry forming an underworld government ruled by a form of board of directors, who direct or conduct a pattern of racketeering activity and control the national operation of a criminal enterprise in furtherance of a monopolistic trade restraining criminal conspiracy."

Page 127, after line 19, insert the following:

"(e) It shall be unlawful for any person to be a member of a Mafia or a La Cosa Nostra or-

clarify the private treble damage remedy incompletely added by the House committee.[103] The amendment was with-

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102 cont'd

ganization."
Page 127, line 22, after the words "of this chapter" insert ",other than subsection (e) thereof,".
Page 129, after line 8, insert the following:
"(d) whoever violates subsection (e) of section 1962 of this chapter shall be fined not more than $5,000 or imprisoned not more than 5 years, or both."
Page 130, after line 16, insert the following:
"(e) Whoever orally or through the use of radio, television, movies, newspapers, magazines, books, letters, circulars, petitions or other media in physical or mechanical form, which travel in interstate commerce, declare a person to be a member of, or an alleged member of, a Mafia or a La Cosa Nostra organization shall, if such declaration is untrue, be liable without proof of special damages, in a civil action commenced by such person in the United States District Courts of any district to which such declaration is transmitted or in which it appears. The making of such a declaration shall be considered defamatory on its face and shall be actionable as liable per se. The person making the declaration shall be liable for general and punitive damages, and if provable, for special damages. Notwithstanding any jurisdictional limitation with respect to the amount in controversy, the United States District Courts shall have legal jurisdiction of civil actions arising under this subsection."

116 Cong. Rec. 35343 (1970), reprinted in R.I.C.O. Leg. Hist. at 206.

103 Amendment offered by Mr. Steiger of Arizona:
On page 129, line 11, insert ",without regard to the amount in controversy," after "jurisdiction".
On page 130, lines 23 and 24, insert "subsection (a) of" after "under" each time it appears.
On page 130, line 23, strike "action" and insert in lieu thereof "proceeding".
On page 133, lines 6 to 16, strike subsections (c) and (d) and insert in lieu thereof:
"(c) Any person may institute proceedings under subsection (a) of this section. In any proceeding brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of

103 cont'd

immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any action before a determination thereof upon its merits.

"(d) Whenever the United States is injured in its business or property by reason of any violation of section 1962 of this chapter, the Attorney General may bring a civil action in a district court of the United States, without regard to the amount in controversy and shall recover the actual damages sustained by it, and the cost of the action.

"(e) Any person who is injured in his business or property by reason of any violation of section 1962 of this chapter may bring a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the actual damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

"(f) The Attorney General may upon timely application intervene in any civil action or proceeding brought under this chapter, if the Attorney General certifies that in his opinion the case is of general public importance. In such action or proceeding, the United States shall be entitled to the same relief as if it had instituted the action or proceeding.

"(g) A final judgment or decree rendered in favor of the United States in any criminal or civil action or proceeding under this chapter shall estop the defendant in any subsequent civil proceeding as to all matters respecting which said judgement or decree would be an estoppel as between the parties thereto.

"(h) Except as hereinafter provided, any civil action under this section shall be barred unless it is commenced within five years after the cause of action accrued. Whenever any civil or criminal action or proceeding, other than an action under subsection (d) of this section, is brought or intervened in by the United States to prevent, restrain, or punish any violation of section 1962 of this chapter the running of the period of limitations prescribed by this subsection with respect to any cause of action arising under subsections (c) and (e) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the United States, shall be suspended during the pendency of such action or proceeding by the United States and for two years thereafter.

116 Cong. Rec. 35346 (1970), reprinted in R.I.C.O. Leg. Hist. at 209.

drawn for future consideration.[104]

C. CRIMINAL LAW REFORM ACCEPTED AS LAW

¶ 29 On October 12th, the Senate received S. 30 as amended by the House. The basic structure and scope of the bill had been preserved. Because of the approaching end of the Congress and the upcoming elections, the Senate was forced to concur with the House version of S. 30[105] or, had it waited for a conference committee, face the possible death of a much-needed bill.[106]

¶ 30 President Nixon signed S. 30 into law as expected,[107]

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[104]"I would hope that the gentleman might agree to ask unanimous consent to withdraw his amendment from consideration with the understanding that it might properly be considered by the Judiciary Committee when the Congress reconvenes following the elections or some other appropriate time." Id. Future consideration of clarification of R.I.C.O. occurred in the Senate, but not in the House. In the 92d Congress, Senators McClellan and Hruska introduced S. 16. Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 3 - 4 (1972), reprinted in R.I.C.O. Leg. Hist. at 233-34. S. 16 provided for private injunctive actions, government damage actions, government intervention into private civil actions, and a civil statute of limitations. S. 16 was reported favorably from committee, S. Rep. No. 1070, 92d Cong., 2d Sess. (1972), and unanimously passed, 118 Cong. Rec. 29379 (1972). Even when S. 16 was incorporated into the amended Senate version of H.R. 8389, 118 Cong. Rec. 31054 - 56 (1972), the House took no action on it.

In the session of the 93rd Congress, the Senate considered and passed S. 13. 119 Cong. Rec. 10319 (1973). S. 13, S. 13, 93d Cong., 1st Sess. (1973), was identical in relevant portions to S. 16 of the 92d Congress. The House referred S. 13 to committee where it died. 119 Cong. Rec. 10592 (1973). No further action was taken to clarify these portions of R.I.C.O.

[105]116 Cong. Rec. 36296 (1970).

[106]The Senate received S. 30 from the House on October 12th, two days before the election recess and only 29 working days before the end of the session. See 116 Cong. Rec. 36280 - 44876 (1970).

[107]116 Cong. Rec. 37264 (1970).

since in 1969 he had supported the study and use of anti-trust-type provisions against organized crime.[108] As law R.I.C.O. provides such provisions.

[108] See President's Message to the Congress on a Program to Combat Organized Crime in America, 1969 Pub. Papers 315, 320 - 31 (April 23, 1969), reprinted in R.I.C.O. Leg. Hist. at 35.

RICO CONCEPTS

by

Erin Shaw

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I. INTRODUCTION

¶ 1 A principle purpose of the enactment of RICO[1] was to curtail the infiltration of organized crime into legitimate businesses.[2] Nevertheless, the statute extends to the perpetration of criminal activity through legal or illegal enterprises.[3] RICO's provisions, moreover, are to be liberally construed to effectuate these remedial purposes.[4]

¶ 2 RICO applies to any "person;" the concept is broadly defined as any entity capable of holding a legal interest in property.[5] To violate RICO, a person must acquire or maintain control of an enterprise or conduct its affairs[6] through a pattern of racketeering activity.[7] Similarly,

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[1]18 U.S.C. §§ 1961-1968 (1976).

[2]S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969).

[3]See 115 Cong. Rec. 6993 (1969) (remarks of Senator Hruska; introduction of S.1623).

[4]Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

[5]18 U.S.C. § 1961(3) (1976).

[6]18 U.S.C. § 1962(b)-(c) (1976). Section 1962(d) prohibits conspiring to violate § 1962(a)-(c). Section 1962(a) prohibits investment of funds derived from a pattern of racketeering activity. This section is not discussed in these materials due to its rare use and generally unmet burden of proof. See S. Rep. No. 617, 91st Cong., 1st Sess. 123-24 (1969).

[7]These materials do not deal with collection of an unlawful debt, but are confined to patterns of racketeering activity.

"Enterprise" is broadly defined as a legal entity[8] or any association in fact.[9] The enterprise must engage in, or its activities must affect, interstate commerce.[10] "Racketeering activity" includes generically defined state offenses and specified federal offenses.[11] A "pattern of racketeering activity" requires a relationship between the multiple offenses. Any person who performs the prohibited acts is subject to criminal penalties and civil remedies.[12]

¶ 3 The following materials will discuss the structure and elements of RICO and analyze the statute's application in a recent case.

II. CONCEPTS

A. Person

¶ 4 Section 1961(3) indicates that "person" includes "any individual or entity capable of holding a legal or beneficial interest in property."[13] Note that the defini-

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[8] 18 U.S.C. § 1961(4) (1976). Legal entities include individuals, partnerships, corporations, and associations.

[9] Id. The definition includes "any union or group of individuals associated in fact although not a legal entity." Id.

[10] 18 U.S.C. § 1962 (1976).

[11] 18 U.S.C. § 1961(1) (1976).

[12] 18 U.S.C. §§ 1963-1964 (1976).

[13] 18 U.S.C. § 1961(3) (1976).

tion is an illustration; it does not limit the concept.[14] "Person" has been held to extend to white collar criminals[15] as well as members of organized crime.[16]

B. Enterprise

¶ 5 To violate RICO, a person must acquire or maintain an interest in or control of an enterprise,[17] or conduct or participate in the conduct of an enterprise's affairs.[18] Section 1961(4) indicates that "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity."[19] Here, too, the

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[14] Section 1961 defines "person" and "enterprise" using the word "includes." "Includes" is a term of enlargement, not of limitation. Highway & City Freight Drivers v. Gordon Transps., Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 99 S. Ct. 612 (1978); American Fed'n of Television and Radio Artists v. NLRB, 462 F.2d 887, 889-90 (D.C. Cir. 1972); Argosy Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968); Fed. Power Comm'n v. Corporation Comm'n, 362 F. Supp. 522, 544 (W.D. Okla. 1973), aff'd, 415 U.S. 961 (1974).

[15] E.g., United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

[16] E.g., United States v. Gambino, 566 F.2d 414 (2d Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

[17] 18 U.S.C. § 1962(b) (1976).

[18] 18 U.S.C. § 1962(c) (1976). Under this subsection the person must be employed by or associated with the enterprise. Note also that under § 1962 the enterprise must be engaged in interstate commerce or its activities must affect interstate commerce.

[19] 18 U.S.C. § 1961(4) (1976).

definition works by illustration, not by limitation.

¶ 6 Private businesses and labor organizations are enterprises under RICO. Courts have considered a foreign hotel and gambling casino,[20] a bail bond agency,[21] a beauty college,[22] a restaurant,[23] a theater,[24] a labor union,[25] and an auto dealership[26] to be enterprises. Under section 1962(b) and (c), the business being infiltrated or conducted may be legitimate or illegitimate.[27]

¶ 7 Government agencies are enterprises. Law enforcement

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[20]United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

[21]United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977).

[22]United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978).

[23]United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978) (legitimate restaurant served as a front for narcotics trafficking).

[24]United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978).

[25]United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir.), cert. dismissed, 99 S. Ct. 43 (1978).

[26]United States v. Brown, 583 F.2d 659 (3d Cir. 1978), cert. denied, 99 S. Ct. 1217 (1979).

[27]United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978) ("enterprise" applies to illegitimate businesses); United States v. Field, supra note 25 (union official engaged in racketeering activity in the conduct of a legitimate union). But see Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975), where the court held that Congress did not intend to include legitimate businesses, such as AT&T, in the definition of enterprise.

departments,[28] a Bureau of Cigarette and Beverage Taxes,[29] and the Philadelphia Traffic Court[30] have been considered RICO enterprises.[31]

¶ 8 The definition of enterprise also encompasses associations in fact. These enterprises may not be legal entities, but groups of individuals informally organized for a common purpose. Associations in fact are often formed for the purpose of engaging in criminal activities,[32] but their purposes

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[28] E.g., United States v. Brown, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Ohlson, 552 F.2d 1347 (9th Cir. 1977).

[29] United States v. Frumento, 563 F.2d 1083, 1092 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978).

[30] United States v. Vignola, 464 F. Supp. 1091, 1095 (E.D. Pa. 1979).

[31] In United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), the court held that Congress did not intend a state government to be included in the definition of enterprise. The Third Circuit disagreed with this holding in United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978), where it stated that Congress intended to prevent the infiltration of organized crime into all areas of economic life, not only into private business. Id. at 1090-91.
In addition, the legislative history indicates that Congress was aware of the role of government, through corruption and bribery of officials, in facilitating other illegal activities. See S. Rep. No. 617, 91st Cong., 1st Sess. 16 (1969).

[32] E.g., United States v. Clemones, 577 F.2d 1247 (prostitution ring), modified, 582 F.2d 1373 (5th Cir. 1978); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (gambling), cert. denied, 429 U.S. 1039 (1977); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) (gambling), cert. denied, 420 U.S. 925 (1975). Such illegitimate associations in fact are usually connected with § 1962(c) violations.
See United States v. Elliott, 571 F.2d 880, 898 (5th Cir.), cert. denied, 99 S. Ct. 349 (1978), where the court held:

> There is no distinction, for "enterprise" purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network.

may be legitimate as well.[33] The group associated in fact may change its membership in the course of the criminal activity.[34]

C. Pattern of Racketeering Activity

¶ 9 The takeover or operation of an enterprise must be performed through a pattern of racketeering activity.

¶ 10 Under RICO, section 1961(1), racketeering activity is defined to mean state and federal offenses. Here the definition limits; it does not just illustrate. Many of the offenses might typically involve solvent defendants, an important consideration in the context of private treble damages suits. The state offenses are generically defined; arson, bribery, and extortion are among the incorporated state crimes.[35] Many federal statutes are incorporated under RICO as well. Mail fraud[36] and securities fraud[37] are perhaps the

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[33] See S. Rep. No. 617, 91st Cong., 1st Sess. 157 (1969). Legitimate associative groups are often the enterprises infiltrated in § 1964(b) violations.

[34] United States v. Clemones, 577 F.2d 1247, 1253, modified, 582 F.2d 1373 (5th Cir. 1978).

[35] 18 U.S.C. § 1961(1)(A) (1976). Other state crimes are murder, kidnapping, gambling, robbery, and dealing in narcotics. Id.

[36] 18 U.S.C. § 1341 (1976).

[37] 15 U.S.C. § 77q(a) (1976); 15 U.S.C. § 78j(b) (1976); 17 C.F.R. § 240.10b-5 (1978).

most inclusive of the federal statutes,[38] since they cover a broad range of criminal activity that may entail the existence of solvent defendants.

¶ 11 The racketeering activity must form a pattern. Section 1961(5) limits "pattern" by requiring that "at least two acts . . ., one of which occurred after the effective date of this chapter[39] and the last of which occurred within ten years . . . after the commission of a prior act."[40] Beyond this express limitation, legislative history and judicial interpretation indicate that the acts must be related. Sporadic activity does not constitute a pattern of racketeering activity.[41] "The racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts."[42]

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[38] 18 U.S.C. § 1961(1)(B) - (D) (1976) also includes federal bribery and wire fraud statutes, among others.

[39] The effective date is October 15, 1970. The requirement that one act occur after the effective date avoids the prohibition against ex post facto laws. See S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969).
The last act must also be within the statute of limitations.

[40] 18 U.S.C. § 1961(5) (1976).

[41] S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969); cf. United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) ("'pattern' should be construed as requiring more than accidental or unrelated instances of proscribed behavior").

[42] Id. at 614; see United States v. White, 386 F. Supp. 882, 883 (E.D. Wis. 1974) ("pattern" suggests a greater interrelationship among the acts than simply commission by the same person). But see United States v. Field, 432 F. Supp. 55, 60-61 (S.D.N.Y. 1977) (Congress may define pattern as the commission of two acts within a specified period, even though the acts would not constitute a pattern as the term is usually understood), aff'd, 578 F.2d 1371 (2d Cir.), cert. dismissed, 99 S. Ct. 43 (1978).

D. Liberal Construction

¶ 12 RICO is to be "liberally construed to effectuate its remedial purposes."[43] With one exception,[44] the courts have interpreted this provision as applying to RICO in both civil and criminal proceedings. In criminal actions, courts have liberally construed "enterprise,"[45] "racketeering activity,"[46] and the RICO statute as a whole.[47]

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[43]Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a) 84 Stat. 947.

[44]United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976). The court held:

> While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency.

In United States v. Davis, 576 F.2d 1065 (3d Cir.), cert. denied, 99 S. Ct. 119 (1978), the majority construed § 1961(1)(A) liberally. The concurring opinion, however, emphasized the criminal nature of the action and stated that the language must be strictly construed. Id. at 1069.

[45]United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978); United States v. Elliott, 571 F.2d 880, 899 (5th Cir.), cert. denied, 99 S. Ct. 349 (1978); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975); United States v. Vignola, 464 F. Supp. 1091, 1095 (E.D. Pa. 1979); United States v. Frumento, 405 F. Supp. 23, 29-30 (E.D. Pa. 1975).

[46]United States v. Salinas, 564 F.2d 688, 691 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978).

[47]United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439 n.12 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

III. UNITED STATES v. PARNESS

¶ 13 United States v. Parness,[48] one of the first RICO criminal prosecutions, may also be used to illustrate how a civil action could be brought. Milton Parness was found guilty of a violation of section 1962(b),[49] acquiring control of an enterprise through a pattern of racketeering activity.

¶ 14 Parness owned a corporation, Olympic Sports Club, Inc., through which he managed junkets to gambling casinos. Parness had been arranging junkets from the United States to Allan Goberman's foreign hotel-casino for some time, when the two met. Parness acquired the exclusive right to manage junkets to Goberman's casino. Junket participants were allowed to gamble on credit. The junket operator, Parness, took responsibility for collecting the debts and remitting the proceeds to the casino.

¶ 15 The hotel-casino experienced financial difficulties, so Goberman borrowed $150,000 from Leonard Holzer. Parness knew of the loan and the financial condition of the casino.

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[48] 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). The facts set out in the text are derived from this case.

[49] Parness was also found guilty of two counts of causing interstate transportation of stolen property and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, 18 U.S.C. § 2314 (1976).

Goberman repeatedly asked Parness for $400,000 in overdue gambling receivables. As Parness claimed he had been unable to collect the debts, Goberman could not repay his loan and Holzer began foreclosure proceedings.

¶ 16 At the last moment, Parness offered to loan Goberman $150,000 to repay the Holzer loan. Goberman pledged his entire interest in the hotel. Parness's wife and a friend signed the loan agreement with Goberman, although neither provided any of the money loaned. Parness's wife purchased cashier's checks with funds from the gambling debts, which were, in fact, secretly collected.[50] With these checks, Goberman repaid Holzer.

¶ 17 Goberman continued his efforts to collect the gambling receipts from Parness. Because he did not obtain the money, Goberman was unable to repay the second loan and was divested of his interest in the hotel-casino.

¶ 18 Parness, using his cousin as a front, obtained two foreign shell corporations through which he transferred the hotel stock and finally attempted to make a public offering of it. Throughout these transfers, Parness covered up the fact that he, his wife, and his friend were involved in the loan.

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[50]The funds were collected from junket participants and converted to Parness's own use. The checks were stolen property. Two checks crossed state lines, and Goberman travelled interstate to pick up one of the loan checks.

IV. ANALYSIS OF PARNESS

¶ 19 Milton Parness is a "person" as defined in section 1961(3). The definition includes any individual capable of holding an interest in property. A "person" need not be a member of organized crime; he may be, as Parness was, a successful businessman and owner of a corporation.

¶ 20 Parness acquired a controlling interest in the corporation that owned the foreign hotel-casino. Section 1961(4) includes corporations in its definitions of enterprise. As the enterprise was located outside the United States, it engaged in foreign commerce.

¶ 21 Parness acquired the enterprise through a pattern of racketeering activity. He committed three acts of racketeering activity: two acts of causing interstate transportation of stolen property and one act of causing a person to travel in interstate commerce in furtherance of a scheme to defraud.[51] These acts formed a pattern[52] because they were

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[51] These federal offenses are incorporated under § 1961(1)(B). See notes 49-50 supra.
Note that, with minor changes in the fact pattern, acts of mail fraud or wire fraud would constitute the pattern of racketeering activity.

[52] The requirements set out in section 1961(5) are satisfied. The three acts occurred in February, 1971. At least one act occurred after October 15, 1970, and the last act occurred within ten years after a prior act. The indictment was brought in 1973. The statute of limitations runs from the last act. As long as the last act is within the limitations period, the continuing pattern of racketeering as a whole is likewise within the period.

interrelated. The acts had a common purpose, defrauding Goberman of his casino. They were also essential to the loan arrangement that ultimately resulted in Parness's acquiring control of the enterprise.

¶ 22 United States v. Parness[53] was a criminal proceeding, but the fact pattern is also well-suited to a civil action. Goberman could have sued as a private individual to recover three times the damages he suffered from Parness's fraudulent takeover of the hotel-casino.[54] A private litigant would have a lesser burden of proof, liberal venue and service of process requirements, and other advantages inherent in civil actions.[55]

¶ 23 Thus, in Parness the concepts of RICO are clothed in the facts of a fraudulent scheme. The case illustrates the basic ideas of "person," "enterprise," and "pattern of racketeering activity," the understanding of which is essential to the effective use of RICO.

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[53] 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105(1975).

[54] The $400,000 in gambling debts which Parness collected and did not remit to Goberman is a possible measure of damages.

[55] E.g., discovery and recovery of costs.

MAIL AND WIRE FRAUD

by

Erin Shaw

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SUMMARY

¶ 1 The federal mail and wire fraud statutes are incorporated into R.I.C.O. The statutes are in pari materia, and therefore, courts interpret them similarly.

¶ 2 Mail fraud has two elements: intent to execute a scheme or artifice to defraud and use of the mails.

¶ 3 The state of mind element breaks down into three parts: intent as to result, recklessness as to the truth or falsity of representations, and negligence as to the use of the mails. The finder of fact infers state of mind from circumstantial evidence.

¶ 4 Each use of the mails is a separate offense. The defendant himself need not place the letter in the mail or take it from the mail, so long as he causes the mail to be used. The mailing must also be in furtherance of the scheme. The mailing must occur before the scheme's completion, with the exception of lulling letters, and it must be primarily related to the scheme.

¶ 5 Criminal liability for a multi-member mail fraud scheme is determined by the principles of conspiracy, whether or not conspiracy is charged.

¶ 6 Land sale fraud is a typical mail and wire fraud scheme. The R.I.C.O. statute imposes both criminal and civil liability upon such organized illegal activity.

I. INTRODUCTION

¶ 7 R.I.C.O. incorporates a number of federal criminal laws in its definition of racketeering activity, including 18 U.S.C. §§ 1341[1] and 1343,[2] the mail and wire fraud statutes.[3]

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[1]18 U.S.C. § 1341 (1976) provides:

> Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[2]18 U.S.C. § 1343 (1976) provides:

> Fraud by wire, radio, or television
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3]See generally Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Criminal Justice Codification Revision, and Reform Act of 1974, 685-91 (1975); Note, A Survey of the Mail Fraud Act, 8 Mem. St. U.L. Rev. 673 (1978); Comment, Survey of the Law of Mail Fraud, 1975 U. Ill. L.F. 237; Criminal Division, Executive Office for U.S. Attorneys, U.S. Dep't of Justice, U.S. Attorneys' Manual Title 9, chs. 43-44 (May 23, 1978).

Because of the broad scope of these incorporated statutes, R.I.C.O. itself becomes a powerful tool for prosecutors and individual plaintiffs.

¶ 8 A common mail fraud fact pattern, the land sale scheme, is representative of the offense.[4] The facts below are followed by a discussion of the elements of mail and wire fraud. Finally, the application of R.I.C.O. in the land fraud context will demonstrate the usefulness of the statute.

II. FACT PATTERN

¶ 9 AMREP Corporation, Rio Rancho Estates, Inc., ATC Realty Corporation, and their corporate officers created and carried out a scheme to sell land by means of deceptive representations. The land, in Sandoval County, New Mexico, was fifteen to twenty miles northwest of downtown Albuquerque. Rio Rancho Estates, Inc., a subsidiary of AMREP, acquired the 91,000-acre tract of rolling hills and sandy soil in several installments from 1961 to 1971. The total purchase price for the tract was $17,800,000. The defendants staked out the property into 86,000 lots. By 1976, ATC Realty Corporation, another AMREP subsidiary, had sold over 77,000 lots, mostly to persons not residing in New Mexico, for a total sale price of $170,000,000. Purchasers built residences on only 1700 of the lots sold. Most of the vacant lots were on unpaved roads and had no utility services.

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[4]The following fact pattern is drawn from United States v. AMREP Corp., 560 F.2d 539 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978), and supplemented by Husted v. AMREP Corp., 429 F. Supp. 298 (S.D.N.Y. 1977), a civil action concerning the same land-sale fraud.

¶ 10 Rio Rancho centered its selling efforts on tightly organized and carefully scripted promotional dinners. Other methods of sale included advertisements in newspapers and on radio and television, brochures and fliers, letters of solicitation, sales visits to homes, and sales through real estate brokers.

¶ 11 At the sales dinners, the promoters made deceptive representations to induce their guests to purchase land. First, they misrepresented the potential rate and direction of Albuquerque's growth. The promoters stated that Albuquerque was "bursting at the seams." They asserted that, because mountains and government land surrounded the city on three sides, it could grow only to the northwest, through Rio Rancho. These representations were false. In fact, Albuquerque had abundant undeveloped suburban land located closer than Rio Rancho. In addition, while the defendants were promoting Rio Rancho, the area of greatest growth was in northeast Albuquerque, where land for residential development was available.

¶ 12 The second misrepresentation was that the purchase of a Rio Rancho lot was a safe and profitable investment. The promoters told the purchasers that they could make up to 25% a year from this "land investment program." The promoters illustrated their point with examples of dissimilar property in Albuquerque, showing possible gains of 150% or more per year. Actually, the resale market for Rio Rancho lots was limited. A market survey done for the defendants in 1965 predicted only a small, selective market penetration by Rio Rancho from 1966 to 1985.

¶ 13 The defendants included a disclaimer in their offer and a refund or exchange option in their sales contract. The disclaimer stated that "resale for a profit might be difficult for a number of years." The purchaser had the option to cancel the contract and receive a full refund if, upon inspection of the property within six months of the sale, he was dissatisfied. The purchaser could exchange his unimproved lot without charge for an improved lot; however, only a limited amount of improved property was available for exchanges.

III. MAIL AND WIRE FRAUD STATUTES GENERALLY

A. Purpose

¶ 14 An overview of the purpose, constitutional bases, and construction of the mail and wire fraud statutes facilitates an understanding of their application to situations like the AMREP case. The purpose of § 1341 is to prevent the use of the Postal Service to effect fraudulent schemes.[5] The purpose of § 1343 is analogous:[6] prevention of misuse of interstate communication facilities.

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[5] Parr v. United States, 363 U.S. 370, 389 (1960); Durland v. United States, 161 U.S. 306, 314 (1896); United States v. Keane, 522 F.2d 534, 544 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976).

Although the stated purpose of § 1341 is prevention of misuse of the mails, the real target of the statute is fraud. The federal government cannot reach conduct controlled by the state fraud laws without a federal basis for jurisdiction. Thus, although the true purpose of the mail and wire fraud statutes is to prevent the perpetration of fraudulent schemes, the stated purposes focus upon the U.S. Postal Service and interstate commerce.

[6] See ¶ 17 infra.

B. Constitutional Bases

¶ 15 The federal jurisdictional basis for § 1341 is using or causing the use of the U.S. mails.[7] The jurisdictional basis for § 1343 is using or causing the use of any interstate or foreign communication facility, including wire, radio, or television.[8]

C. Construction and Interpretation

¶ 16 The United States Constitution and congressional action restrict the jurisdiction of the federal courts. Courts strictly construe §§ 1341 and 1343 to avoid extension beyond the limits sets by Congress.[9] On the other hand, the courts broadly interpret the concept of fraud to effectuate the purpose of the statutes.[10] The mail fraud statute ap-

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[7]Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Criminal Justice Codification, Revision, and Reform Act of 1974, 691 (1975).

A predecessor of § 1341, § 215 of the Criminal Code, withstood an attack on its constitutionality in Badders v. United States, 240 U.S. 391, 393 (1916), where the Court held:

> The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate . . . . Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.

[8]Criminal Justice Codification, Revision, and Reform Act of 1974, supra note 7.

[9]United States v. Staszcuk, 502 F.2d 875, 880 (7th Cir. 1974), modified, 517 F.2d 53, cert. denied, 423 U.S. 837 (1975); United States v. Edwards, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972); United States v. Kelem, 416 F.2d 346, 347 (9th Cir. 1969), cert. denied, 397 U.S. 952 (1970).

[10]Durland v. United States, 161 U.S. 306 (1896); United States v. States, 488 F.2d 761, 764 (8th Cir.), cert. denied, 417 U.S. 909 (1973); United States v. Buckner, 108 F.2d 921, 926 (2d Cir.), cert. denied, 309 U.S. 669 (1940).

plies to any fraudulent scheme in which the mails are used.[11] The wire fraud statute is likewise applicable to schemes in which interstate communication facilities are used.[12]

¶ 17 The mail and wire fraud statutes are in pari materia, and courts construe them similarly.[13] Cases construing § 1341 are applicable to § 1343.[14] Thus, the materials below that focus on mail fraud are relevant to wire fraud as well. The only significant difference between the two statutes is the act on which federal jurisdiction is based.[15]

IV. ELEMENTS OF MAIL FRAUD

¶ 18 The mail fraud statute provides in pertinent part:

> Whoever, having devised or intending to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office . . . any matter . . . to be sent

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[11] United States v. Cady, 567 F.2d 771, 775 (8th Cir. 1977), cert. denied, 435 U.S. 944 (1978); United States v. Mirabile, 503 F.2d 1065, 1066 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975).

Federal "intrusions" into peculiarly state affairs are within § 1341, so long as use of the mails is involved. The principles of federalism are not violated by the broad reach of the statutes. E.g., United States v. Mandel, 591 F.2d 1347, 1358-59 (4th Cir. 1979) (state political processes); United States v. Mirabile, supra, at 1066-67 (state tax returns); United States v. States, 488 F.2d 761, 767 (8th Cir.) (state elections), cert. denied, 417 U.S. 909 (1973).

[12] See ¶ 17 infra.

[13] United States v. Tarnopol, 561 F.2d 466, 475 (3d Cir. 1977); United States v. Donahue, 539 F.2d 1131, 1135 (8th Cir. 1976).

[14] 561 F.2d at 475.

[15] See ¶ 15 supra.

> or delivered by the Postal Service, or takes or receives therefrom, any such matter . . . or knowingly causes to be delivered by mail . . . any such matter . . . shall be fined . . . or imprisoned . . . or both.[16]

The elements of the offense are:

> 1) intent to execute a scheme to defraud, and
>
> 2) use of the mails.[17]

A. Intent to Execute a Scheme to Defraud

¶ 19 The concept of a scheme to defraud is broad and inclusive.[18] Any scheme involving trickery or deceit is within the statute.[19] In Isaacs v. United States,[20] the court discussed the nature of fraud:

> [W]e recognize that the forms of fraud are as multifarious as human ingenuity can devise; that courts consider it difficult, if not impossible, to formulate an exact, definite, and all-inclusive definition thereof; and that each case must be determined on its own facts. In general, and it its generic sense, fraud comprises all

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[16] 18 U.S.C. § 1341 (1976). See note 1 supra for full text of statute.

[17] Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Sparrow, 470 F.2d 885, 889 (10th Cir. 1972), cert. denied, 411 U.S. 936 (1973); Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967). Cf. United States v. Pearlstein, 576 F.2d 531, 534 (3d Cir. 1978) (third element is "culpable participation by the defendant").

[18] See ¶ 16 supra.

[19] Criminal Justice Codification, Revision, and Reform Act of 1974, supra note 7, at 686.

[20] 301 F.2d 706 (8th Cir.), cert. denied, 371 U.S. 818 (1962).

> acts, conduct, omissions, and concealment involving breach of legal or equitable duty and resulting in damage to another.[21]

The courts have held that a "scheme or artifice to defraud" includes a wide range of deceptive plans, land sale schemes,[22] advance fee rackets,[23] schemes to defraud investors,[24] schemes to defraud insurance companies,[25] schemes involving

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[21] Id. at 713; cf. Weiss v. United States, 122 F.2d 675, 681 (5th Cir.), cert. denied, 314 U.S. 687 (1941), where the court stated, "[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity."

See also Ballentine's Law Dictionary 1249 (3d ed. 1969) (definition of swindling); Black's Law Dictionary 788 (rev. 4th ed. 1968) (definition of fraud; actor intends to deprive another of something he rightfully holds or to do him an injury by means of perversion of the truth, false representations, employment of an artifice, or concealment of the truth).

[22] E.g., United States v. AMREP Corp., 560 F.2d 539 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

[23] E.g., United States v. Sampson, 371 U.S. 75 (1962); United States v. Kaplan, 554 F.2d 958 (9th Cir.), cert. denied, 434 U.S. 956 (1977); Gusow v. United States, 347 F.2d 755 (10th Cir.), cert. denied, 382 U.S. 906 (1965).

[24] E.g., Deaver v. United States, 155 F.2d 740 (D.C. Cir.) (burial lots), cert. denied, 329 U.S. 766 (1946); United States v. Culver, 224 F. Supp. 419 (D. Md. 1963) (savings and loan associations).

[25] E.g., United States v. Cady, 567 F.2d 771 (8th Cir. 1977), cert. denied, 435 U.S. 944 (1978); United States v. Unger, 295 F.2d 889 (7th Cir. 1961).

breach of official or fiduciary duties or breach of trust,[26] merchandising schemes,[27] securities frauds,[28] tax frauds,[29] planned bankruptcy schemes,[30] debt consolidation schemes,[31] credit card schemes,[32] chain referral schemes,[33] schemes involving false applications or statements to obtain credit or loans,[34] election frauds,[35] franchise schemes,[36] work-

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[26] E.g., United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978) (official corruption), cert. denied, 99 S. Ct. 1022 (1979); United States v. Hasenstab, 575 F.2d 1035 (2d Cir.) (breach of employee's duties to employer), cert. denied, 99 S. Ct. 100 (1978); United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974) (official corruption), modified, 517 F.2d 53, cert. denied, 423 U.S. 837 (1975); United States v. George, 477 F.2d 508 (7th Cir.) (breach of employee's duties to employer), cert. denied, 414 U.S. 827 (1973); Shushan v. United States, 117 F.2d 110 (5th Cir.) (official corruption), cert. denied, 313 U.S. 574 (1941); United States v. Proctor & Gamble Co., 47 F. Supp. 676 (D. Mass. 1942) (breach of employee's duties to employer).

[27] E.g., United States v. Press, 336 F.2d 1003 (2d Cir. 1964), cert. denied, 379 U.S. 965 (1965).

[28] E.g., United States v. Sparrow, 470 F.2d 885 (10th Cir. 1972), cert. denied, 411 U.S. 936 (1973).

[29] E.g., United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975).

[30] E.g., Jacobs v. United States, 395 F.2d 469 (8th Cir. 1968).

[31] E.g., United States v. Bertin, 254 F. Supp. 937 (D. Md. 1966).

[32] E.g., United States v. Maze, 414 U.S. 395 (1974); Parr v. United States, 363 U.S. 370 (1960); United States v. Kelem, 416 F.2d 346 (9th Cir. 1969), cert. denied, 397 U.S. 952 (1970); Adams v. United States, 312 F.2d 137 (5th Cir. 1963).

[33] E.g., Blachly v. United States, 380 F.2d 665 (5th Cir. 1967).

[34] E.g., United States v. Young, 232 U.S. 155 (1914); United States v. Blassingame, 427 F.2d 329 (2d Cir. 1970) (wire fraud), cert. denied, 402 U.S. 945 (1971); United States v. Hancock, 268 F.2d 205 (2d Cir.), cert. denied, 361 U.S. 837 (1959).

[35] E.g., United States v. States, 488 F.2d 761 (8th Cir.), cert. denied, 417 U.S. 909 (1973).

[36] E.g., United States v. Pearlstein, 576 F.2d 531 (3d Cir. 1978) (pen marketing distributorships); Irwin v. United States, 388 F.2d 770 (9th Cir. 1964) (mail order franchises), cert. denied, 381 U.S. 911 (1965).

at-home schemes,[37] correspondence school schemes,[38] check-biting,[39] marital schemes,[40] divorce mills,[41] and charitable frauds[42] all fall within the mail fraud statute.[43]

1. State of Mind

¶ 20 The state of mind required for mail fraud is an intent to execute a scheme to defraud.[44] This state of mind breaks down into three parts:

1) intent to deprive another of something, to harm another, or to gain a benefit for oneself;

2) recklessness as to the truth or falsity of representations made in the course of the scheme; and

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[37] E.g., United States v. Baren, 305 F.2d 527 (2d Cir. 1962).

[38] E.g., Babson v. United States, 330 F.2d 662 (9th Cir.), cert. denied, 377 U.S. 993 (1964).

[39] E.g. United States v. Foshee, 569 F.2d 401 (5th Cir. 1978); Williams v. United States, 278 F.2d 535 (9th Cir. 1960).

[40] E.g., Pereira v. United States, 347 U.S. 1 (1954).

[41] E.g., United States v. Edwards, 458 F.2d 875 (5th Cir.), cert. denied, 409 U.S. 891 (1972).

[42] E.g., Koolisk v. United States, 340 F.2d 513 (8th Cir.), cert. denied, 381 U.S. 951 (1965).

[43] Schemes for obtaining money by means of threats of murder or bodily harm are not schemes to defraud under the mail fraud statute. Fasulo v. United States, 272 U.S. 620, 628-29 (1926).

[44] See Durland v. United States, 161 U.S. 306, 313 (1896); United States v. Sparrow, 470 F.2d 885, 889 (10th Cir. 1972), cert. denied, 411 U.S. 936 (1973); Williams v. United States, 278 F.2d 535, 537 (9th Cir. 1960).

3) negligence as to the use of the mails, that is, use of the mails must be reasonably foreseeable.

¶ 21 First, the schemer must intend the result of his scheme. He must intend to deprive another of something of value, to do some injury to another, or to gain a benefit for himself by means of such harm or deprivation.[45] When the scheme involves depriving persons of money or property, the requisite intended result is evident. The question remains, however, whether a scheme contemplating harm to an intangible right is within the mail-fraud statute.[46]

¶ 22 Courts construe "any scheme or artifice to defraud" independently of "for obtaining money or property,"[47] allowing a finding that a "scheme or artifice to defraud" need not concern tangible possessions.[48] Thus, if the schemer intends to deprive an employer of the faithful services of an

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[45] See United States v. Mandel, 415 F. Supp. 997, 1005 (D. Md. 1976), rev'd on other grounds, 591 F.2d 1347 (4th Cir. 1979).

Intent as to result, according to several courts, is an intent "to deceive persons of ordinary prudence and comprehension." Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967); Gusow v. United States, 347 F.2d 755, 756 (10th Cir.), cert. denied, 382 U.S. 906 (1965); Silverman v. United States, 213 F.2d 405, 405 (5th Cir.), cert. denied, 348 U.S. 828 (1954).

Cf. United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970) (sales pitch not in violation of § 1341; insufficient evidence that the scheme contemplated any harm or injury).

[46] Comment, Survey of the Law of Mail Fraud, 1975 U. Ill. L.F. 237, 245-48.

[47] United States v. States, 488 F.2d 761, 764 (8th Cir.), cert. denied, 417 U.S. 909 (1973).

[48] Id.

employee,[49] to deprive citizens of the honest and faithful services of a public official,[50] or to deprive the public of its right to honest and representative government,[51] he has the state of mind as to result for mail fraud.

¶ 23 Good faith is a complete defense to a charge of mail fraud, because it negates the intent to defraud.[52]

¶ 24 Second, the schemer must be reckless as to the truth or falsity of representations made in the course of the

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[49] E.g., United States v. George, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973); United States v. Proctor & Gamble Co., 47 F. Supp. 676 (D. Mass. 1942).

In George, the cabinet buyer for Zenith took kickbacks from the cabinet maker in exchange for preferential treatment. The court held:

> Here the fraud consisted in [the defendant's] holding himself out to be a loyal employee, acting in Zenith's best interests, but actually not giving his honest and faithful services, to Zenith's real detriment.

477 F.2d at 513.

Similarly, the court held in Proctor & Gamble that by causing Lever Brothers' employees to reveal their employer's trade secrets, the defendants defrauded the employer of its "lawful right" to his employees' loyal and honest services. 47 F. Supp. at 678.

[50] E.g., United States v. Isaacs, 493 F.2d 1124 (7th Cir.) (bribery of governor), cert. denied, 417 U.S. 976 (1974); Shushan v. United States, 117 F.2d 110 (5th Cir.) (bribery of Levee Board member), cert. denied, 313 U.S. 574 (1941).

[51] E.g., United States v. States, 488 F.2d 761 (8th Cir.) (election fraud), cert. denied, 417 U.S. 909 (1973).

[52] Durland v. United States, 161 U.S. 306,314 (1896) (if evidence had shown that defendant acted in good faith, "no conviction could be sustained, no matter how visionary might seem the scheme"); United States v. Westbo, 576 F.2d 285, 288 (10th Cir. 1978); New England Enterprises, Inc. v. United States, 400 F.2d 58, 71 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969).

Note, however, that a belief that an enterprise will be successful in the future does not excuse false statements about its present condition. United States v. Diamond, 430 F.2d 688, 691 (5th Cir. 1970).

scheme.[53] Although the schemer who recklessly disregards or is indifferent to the fraudulent nature of the scheme does not know that his representations are false or misleading, his recklessness in failing to acquire that knowledge satisfies the second state-of-mind requirement.

¶ 25 Third, the schemer must be negligent as to the culpable act, use of the mails. The use of the mails must be reasonably foreseeable.[54]

¶ 26 The mail fraud statute requires that the defendant "cause" the use of the mails. Here, the courts have defined causation in terms of state of mind. In Pereira v. United States,[55] the Court held that "where [use of the mails] can reasonably be foreseen, even though not actually intended, then [the defendant] 'causes' the mails to be used."[56] The judicial interpretation of causation, then, provides the

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[53] United States v. Pearlstein, 576 F.2d 531, 537 (3d Cir. 1978); United States v. Henderson, 446 F.2d 960, 966 (8th Cir.), cert. denied, 404 U.S. 991 (1971); Irwin v. United States, 338 F.2d 770, 774 (9th Cir. 1964), cert. denied, 381 U.S. 911 (1965).

[54] Pereira v. United States, 347 U.S. 1, 8 (1954).

That the use of the mails must be reasonably foreseeable does not mean that the defendant must have actually foreseen it. See United States v. Blassingame, 427 F.2d 329, 331 (2d Cir. 1970) (wire fraud; no requirement that accused foresee that instrumentalities of interstate communication may be used), cert. denied, 402 U.S. 945 (1971).

[55] 437 U.S. 1 (1954).

[56] Id. at 8-9. The full definition of causation is as follows:

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

Id.

third state-of-mind requirement, negligence as to the use of the mails.

2. Circumstantial Evidence

¶ 27 State of mind is rarely amenable to direct proof; therefore, the prosecutor or plaintiff may use circumstantial evidence[57] to establish the defendant's state of mind.[58] The jury infers the defendant's state of mind from the facts and circumstances presented.

¶ 28 Intent as to the result of the scheme may be inferred from the nature of the actual result or from the means used to carry out the scheme.

¶ 29 Intent to deprive or harm another or to benefit oneself may be inferred from evidence of an actual deprivation, a harm inflicted, or a benefit gained.[59] The scheme's fraudulent outcome is circumstantial evidence of the defendant's

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[57] Aiken v. United States, 108 F.2d 182 (4th Cir. 1939). The court discussed the circumstances from which intent could be inferred:

> Fraudulent intent . . . is too often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances which have been rather aptly designated as badges of fraud. When these are sufficiently numerous they may in their totality properly justify an inference of a fraudulent intent . . .

Id. at 183.

[58] Comment, Survey of the Law of Mail Fraud, 1975 U. Ill. L.F. 237, 242.

[59] United States v. Meyer, 359 F.2d 837, 839-40 (7th Cir.), cert. denied, 385 U.S. 837 (1966).

The converse is also true. "[T]he failure to benefit from a scheme . . . may mirror the defendant's good faith." Id. at 840.

intent to bring about that result. In the land-fraud fact pattern, the jury may consider evidence showing that the purchasers suffered financial losses from their unprofitable investments and that the schemers enjoyed unreasonably large profits. From these facts, the jury may infer that the schemers intended the result.

¶ 30 Evidence of the defendant's conduct in the execution of the scheme often reveals his state of mind. The prosecutor or plaintiff may introduce evidence of deceptive conduct, such as false or misleading representations[60] or non-disclosure or concealment of material facts,[61] from which the jury may infer an intent to defraud. For example, the AMREP salesmen in the fact pattern above made false representations and promises to encourage land purchases. Claims that Albuquerque must grow through Rio Rancho were false, because other land was available for expansion. Promises as to the future profitability of the land investment program never came true; the land's value did not appreciably increase. Important facts were concealed from the purchasers. The report done for AMREP indicated the resale market for Rio Rancho lots

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[60]Misrepresentations as to intentions regarding future acts were not subject to prosecution at common law; however, this common law rule does not restrict the mail fraud statute. "[I]t includes everything designed to defraud by representations as to the past or present, or suggestions or promises as to the future." Durland v. United States, 161 U.S. 306, 313 (1896).

[61]Non-disclosure and concealment most commonly arise in political corruption cases. See, e.g., United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979); United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 99 S. Ct. 1022 (1979); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

would be poor for at least twenty years. Defendants concealed this information from the purchasers, even though it was relevant to the transaction.

¶ 31 A misrepresentation must relate to what is bargained for to be evidence of intent to defraud.[62] The schemer must deceive his victim as to the quality or nature of the deal. The land schemers must convince the purchasers that desert land is a profitable investment; the insurance company defrauders must convince the company that the personal injury claims are genuine;[63] the bribed official must convince the public that they are receiving his honest and loyal services.[64] Misrepresentations about unimportant or extraneous matters do not establish an intent to defraud.[65]

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[62] See United States v. Pearlstein, 576 F.2d 531, 544 (3d Cir. 1978); United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970).

[63] United States v. Unger, 295 F.2d 889, 890 (7th Cir. 1961).

[64] United States v. Staszcuk, 502 F.2d 875, 877 (7th Cir. 1974), modified, 517 F.2d 53, cert. denied, 423 U.S. 837 (1975).

[65] In Pearlstein, supra note 62, the appellants were salesmen for GMF/ElginPen. As part of their sales pitch to potential distributorship purchasers the salesmen exaggerated their roles in the company's operation and made false statements about their own business backgrounds. The court held that:

> such misrepresentations did not relate to the essential feature of their presentations . . . and hardly can be construed as fraudulent.

576 F.2d at 544.

In Regent, supra note 62, stationery salesmen gained the sympathetic ear of their customers by making false statements regarding being referred to the customer by a friend, being a professional person, or needing to dispose of stationery due to the death of a friend. The court held that evidence of such statements alone showed no attempt to deceive as to the bargain being offered and, therefore, no fraudulent scheme. The court further stated:

> Where the false representaions are directed to the quality, adequacy, or price of the goods themselves, the fraudulent intent is apparent because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain.

421 F.2d at 1182.

¶ 32 A seller's puffing or innocent exaggeration of the qualities his wares possess is not circumstantial evidence to establish intent to defraud.[66] If the seller goes beyond mere puffing, however, and makes false statements, then he is engaging in fraudulent acts, and his conduct allows the finder of fact to infer intent as to result.

¶ 33 Recklessness regarding the truthfulness of representations may be established by the facts and circumstances surrounding the transaction. If the schemer is put on notice of the possibility that his claims are false, and yet he continues to make the same representations, a jury may infer his reckless disregard of their validity.[67] A scheme in which the perpetrator induces the victim to invest money for future profits usually involves representations as to the amount of profit to be realized. Because the "business" is new, the perpetrator does not know whether his facts and figures are accurate: his failure to apprise himself of their accuracy may lead to an inference of the perpetrator's indifference to the truth.[68]

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[66] Comment, Survey of the Law of Mail Fraud, 1975 U. Ill. L.F. 237, 244.

On sellers' puffing, see generally Comment, Mail Fraud - Fraudulent Misrepresentations Must Be Distinguished from "Puffing" or "Sellers' Talk" in Offenses Under 18 U.S.C. § 1341, 22 S.C.L. Rev. 434 (1970).

[67] United States v. Press, 336 F.2d 1003, 1011 (2d Cir. 1964), cert. denied, 379 U.S. 965 (1965).

[68] United States v. Pearlstein, 576 F.2d 531, 537 (3d Cir. 1978) (reckless disregard for validity of revenue projections used in promoting sale of distributorships); Irwin v. United States, 338 F.2d 770, 774 (9th Cir. 1964) (reckless indifference as to truth of representations that mail order franchises would be profitable), cert. denied, 381 U.S. 911 (1965).

¶ 34 In the land fraud case, the promoters projected future profits from investment in Rio Rancho, using examples of dissimilar Albuquerque property. The properties were different, and the profits were likely to be different; these facts may lead to the inference that the promoters recklessly disregarded the veracity of their profit estimates.

¶ 35 Negligence as to the use of the mails requires only that the mailings be reasonably foreseeable. In Pereira,[69] the Court held that the defendant's act of endorsing a check to a bank for collection caused the use of the mails. It was reasonably foreseeable that the mails would be used as a result of the endorsement, because banks make such mailings in the ordinary course of business. Similarly, use of a credit card resulting in the mailing of invoices from the merchant to the credit company or from the company to the cardholder also constitutes causing the use of the mails.[70] The mailings are reasonably foreseeable because they are the normal result of using a credit card. The finder of fact may determine from the evidence that although the defendant did not foresee the use of the mails, a reasonable person would have foreseen it.

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[69] Pereira v. United States, 347 U.S. 1, 8-9 (1954).

[70] United States v. Maze, 414 U.S. 395 (1974); United States v. Kelem, 416 F.2d 346 (9th Cir. 1969), cert. denied, 397 U.S. 952 (1970).

3. Result

¶ 36 Section 1341 requires that the schemer intend to execute a scheme or artifice to defraud, but it does not require that the scheme be completed or successfully carried out.[71] There is no result requirement for mail fraud.[72] The statute is intended to prevent misuse of the Postal Service,[73] and the offense is complete when the mails are used. Because completion or success of the scheme is not a part of the offense, a showing of actual damage or harm to the victim is unnecessary,[74] although it may indicate the defendant's state of mind.[75]

B. Use of the Mails

¶ 37 The second element of mail fraud is use of the mails. Under the statute, each use of the mails is a separate offense.[76] The statute provides that anyone who "places in any post office or authorized depository . . ., or takes or receives therefrom . . ., or knowingly causes to be delivered by mail"[77] any matter for the purpose of executing a fraudulent scheme commits the offense of mail fraud.

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[71] Blachly v. United States, 380 F.2d 665, 673 (5th Cir. 1967).

[72] The offense consists of state of mind and conduct only.

[73] See ¶ 14 supra.

[74] Blachly v. United States, supra note 71; United States v. Andreadis, 366 F.2d 423, 431 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

[75] See ¶ 29 supra.

[76] See Badders v. United States, 240 U.S. 391, 394 (1916).

[77] 18 U.S.C. § 1341 (1976).

1. Use

¶ 38 If the defendant himself, or his agent,[78] places or takes the mail, he is chargeable under § 1341. Further, if he merely "causes" the use of the mails, his conduct falls within the statute.[79] There is no requirement that the defendant or the victim send or receive the mail.[80] For example, in Pereira the sender and receiver were two banks, neither of which was a perpetrator or a victim of the scheme.[81]

2. In Furtherance of the Scheme

¶ 39 Section 1341 requires that the use of the mails be in execution or in furtherance of the scheme to defraud.[82] The sequence of events and the closeness of the relationship between the mailing and the scheme determine whether the use of the mails is in execution of the scheme.

¶ 40 In general, if the mailing occurs before the conception[83] or after the completion of the scheme,[84] the use of the mails

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[77] 18 U.S.C. § 1341 (1976).

[78] United States v. Kenofskey, 243 U.S. 440, 443 (1917).

[79] See ¶¶ 26, 35 supra for a discussion of the causation requirement. As causation requires no act by the defendant, it is treated in these materials as a part of the state of mind for the offense.

[80] Pereira v. United States, 347 U.S. 1 (1954).

[81] Id. at 8-9.

[82] Id. at 8.

[83] United States v. Beall, 126 F. Supp. 363, 365 (N.D. Cal. 1954).

[84] The point at which the schemer obtains the fruits of his efforts is considered the completion of the scheme. United States v. Kenofskey, 243 U.S. 440, 443 (1917).

is not in furtherance of the scheme.[85] Use of the mails after the fruition of a scheme to defraud is not in furtherance of it if the mailing is immaterial to its success.[86]

¶ 41 In United States v. Maze,[87] the Court held that mailings of credit card invoices from the merchant to the credit company or from the company to the cardholder were not mailings in furtherance of the credit card swindle,[88] even though the defendant caused the mailings.[89] The defendant had stolen the card and used it to pay for motel accommodations and restaurants. The Court held that the scheme was completed when the defendant checked out of the motel, having irrevocably

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[85]Comment, Survey of the Law of Mail Fraud, 1975 U. Ill. L.F. 237, 249.

[86]United States v. Maze, 414 U.S. 395, 402 (1974); Parr v. United States, 363 U.S. 370, 393 (1960); Kann v. United States, 323 U.S. 88, 94 (1944); cf. United States v. Wolf, 561 F.2d 1376, 1380 (10th Cir. 1977) (mailings subsequent to defendant's sale of accounts receivable and receipt of payment were not in furtherance of scheme); United States v. West, 549 F.2d 545, 556 (8th Cir.) (phone calls subsequent to defendant's gaining physical possession of cattle through fraudulent means were not in furtherance of scheme), cert. denied, 430 U.S. 956 (1977).

[87]Supra note 86, at 402.

[88]Compare United States v. Adamo, 534 F.2d 31 (3d Cir.) (merchants participating in credit card swindle; fruition when bank or credit company made payment in response to merchant's mailing of invoices; mailings in furtherance of scheme), cert. denied, 429 U.S, 841 (1976) with United States v. Maze, 414 U.S. 395.

[89]The Court applied the Pereira test, see ¶ 26 supra. 414 U.S. at 399.

received the fraudulently obtained goods and services. The subsequent mailings were for the purpose of adjusting the accounts among the defrauded parties; the success of the scheme was in no way dependent on the mailings. Because the use of the mails occurred after the scheme's fruition and had no relation to its success, it was not in furtherance of the swindle.[90]

¶ 42 Mailings subsequent to the completion of a scheme, designed to lull the victim into a false sense of security and to delay detection, are closely connected with the scheme and are in furtherance of it.[91]

¶ 43 Lulling letters are designed to convince the fraud victim that all is well and there is no cause for worry. Their purpose is to preserve or create the apperance of a legitimate transaction, thereby postponing inquiries and complaints and avoiding detection.[92] In United States v. Sampson,[93] the defendants used lulling letters in the execution of an advance-fee racket. After obtaining a loan application form and a filing fee from each applicant, the

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[90] 414 U.S. at 402.

[91] United States v. Ashdown, 509 F.2d 793, 800 (5th Cir.), cert. denied, 423 U.S. 829 (1975).

[92] E.g., United States v. Sampson, 371 U.S. 75 (1962); United States v. McDonald, 576 F.2d 1350 (9th Cir.), cert. denied, 99 S. Ct. 105 (1978); United States v. Ashdown, supra note 91; cf. United States v. Staszcuk, 502 F.2d 875, 881 (7th Cir. 1974) (public hearing notices were not lulling letters because they were not used to conceal and continue a fraud), modified, 517 F.2d 53, cert. denied, 423 U.S. 837 (1975).

[93] 371 U.S. 75 (1962).

defendants failed to carry out their promises to aid the applicants in obtaining loans. The defendants mailed accepted applications and letters of assurance to the applicants to lull them into a false sense of security and to postpone complaints. The Court held that the deliberate use of the mails for lulling purposes, although subsequent to obtaining the advance fees, was in furtherance of the fraudulent scheme.[94]

¶ 44 Regardless of the sequence of events, the mailing must be "sufficiently closely related"[95] to the scheme to come within the scope of § 1341.[96] This requirement is fulfilled when the mailing is "incident to an essential part of the scheme."[97] In Pereira,[98] the mailing of the $35,000 check

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[94] Id. at 80-81. The Court also held that Parr v. United States, supra note 86, and Kann v. United States, supra note 86, did not set down an absolute rule that use of the mails after obtaining the fruits of the scheme can never be for the purpose of executing the scheme. 371 U.S. at 80.

This holding was reiterated in United States v. Ashdown, supra note 91, at 799, where the court stated, "there is no rule that the money must change hands after the mailing."

[95] United States v. Maze, 414 U.S. 395, 399 (1974).

[96] Many courts have elaborated on the nature of the relationship between the mailing and the scheme. E.g., United States v. Brown, 583 F.2d 659, 668 (3d Cir. 1978) ("if the mailing is a part of executing the fraud, or is closely related to the scheme, a mail fraud charge will lie"), cert. denied, 99 S. Ct. 1217 (1979); United States v. LaFerrieu, 546 F.2d 182, 187 (5th Cir. 1977) ("the dependence in some way of the completion of the scheme or the prevention of its detection on the mailings in question"); Adams v. United States, 312 F.2d 137, 140 (5th Cir. 1963) ("significantly related to those operative facts making the fraud possible or constituting the fraud").

[97] Pereira v. United States, 347 U.S. 1, 8 (1954).

[98] Id.

from one bank to another was incident to an essential part of the scheme, obtaining the money.[99] In general, the Pereira "incident to an essential element" test has been interpreted narrowly.[100] The mailing must still be "sufficiently closely related" to the scheme.

¶ 45 Another description of the required relationship is that the use of the mails must be in furtherance of the scheme, not merely incidental or collateral to it.[101] To further the scheme, the mailing must aid it in some way. If its purpose is at odds with the successful completion of the scheme, then the mailing is not in furtherance of the

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[99] See ¶ 35 supra.

The defendant had his wife sell some securities she possessed in Los Angeles. She received a $35,000 check from her L.A. broker and gave it to her husband, who endorsed it for collection to an El Paso bank. The check was mailed from Texas to California in the ordinary course of business. The check cleared, and a cashier's check for the amount was drawn in favor of the defendant, who absconded with the money.

[100] See United States v. LaFerrieu, 546 F.2d 182, 186 (5th Cir. 1977), where the court stated:

> The Court's language [in Pereira] does not mean . . . that a mailing somehow related to an aspect of the scheme brings the scheme within the scope of the mail fraud statute.

The court held that an attorney's letter on behalf of his client demanding verification that money deposited was still in escrow was not a necessary step in the scheme although it was somehow related to the post-fruition lulling element.

But see Ohrynowicz v. United States, 542 F.2d 715, 718 (7th Cir.) (opening of checking account was essential part of scheme; mailing pursuant to ordering of personalized checks is in furtherance of scheme even though the defendant used only unpersonalized checks in the scheme), cert. denied, 429 U.S. 1027 (1976).

[101] United States v. Edwards, 458 F.2d 875, 883 (5th Cir.), cert. denied, 409 U.S. 891 (1972); Adams v. United States, 312 F.2d 137, 139 (5th Cir. 1963).

scheme.[102] Use of the mails that only increases the likelihood of detection and apprehension is not within § 1341.[103]

¶ 46 Courts have held that legally compelled mailings or routine mailings to carry out convenient procedures of a legitimate business are not in furtherance of a scheme even though they may incidentally benefit it.[104] Innocent mailings are not rendered fraudulent merely because they occurred while a scheme was in progress.[105] Of course, if the routine mailing is a part of perpetrating the fraud, or is closely related to the scheme, it is within the mail fraud statute

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[102] United States v. Staszcuk, 502 F.2d 875, 880 (7th Cir. 1974), modified, 517 F.2d 53, cert. denied, 423 U.S. 837 (1975).

In Staszcuk, the scheme was to obtain approval of zoning amendments by means of bribery. The purpose of the mailing of public hearing notices was "to provide an opportunity for affected persons to state objections to the proposed zoning changes." Id. This purpose conflicted with the execution of the scheme.

[103] United States v. Maze, 414 U.S. 395, 403 (1974) (mailing of credit card invoices made detection more likely); United States v. LaFerrieu, 546 F.2d 182, 187 (5th Cir. 1977) (attorney's letter of complaint would "further detection of the fraud or . . . deter its continuation").

[104] Parr v. United States, 363 U.S. 370, 391 (1960), (legally compelled letters, tax statements, receipts, and checks are not within § 1341); United States v. Brown, 583 F.2d 659, 668 (3d Cir. 1978) (business mailings in connection with obtaining a loan under false pretenses unrelated to the fraud), cert. denied, 99 S. Ct. 1217 (1979).

In Brown, the court held that:

> [A] mailing . . . for the purpose of fulfilling a business or legal procedure unrelated to the fraud and . . . not closely connected with [it] . . . is too remote to convert a state law fraud into federal mail fraud, even though the mailing has the incidental effect of assisting the scheme.

[105] United States v. Tarnopol, 561 F.2d 466, 472 (3d Cir. 1977) (routine mailing of packing slips).

despite its secondary legitimate function.[106]

¶ 47 Other types of mailings held to be sufficiently closely related to the scheme include mailings that are products of the scheme,[107] mailings incidentally informing co-schemers of the plan's progress,[108] and mailings of certificates or securities to the victim following a purchase.[109]

¶ 48 Mailings causing a delay necessary to the completion or continuation of a scheme are also in furtherance of the scheme.[110] The success of check-biting schemes[111] and credit card swindles[112] often depend on the delay of the mails.

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[106] United States v. Brown, supra note 104, at 668 (request for wholesale financing as part of scheme to obtain new car inventory, sell cars for cash, and abscond with the cash under a guise of robbery).

[107] United States v. Hasenstab, 575 F.2d 1035, 1039 (2d Cir.) (mailing of requisitions closely connected with kickback scheme), cert. denied, 99 S. Ct. 100 (1978).

[108] United States v. Craig, 573 F.2d 455, 483 (7th Cir. 1977) (notices of meetings informed co-schemers of the status of a bill; goal of scheme was passage of the bill).

[109] United States v. Tallant, 547 F.2d 1291, 1298 (5th Cir.) (mailing securities was integral part of scheme), cert. denied, 434 U.S. 889 (1977); United States v. Edwards, 458 F.2d 875, 883 (5th Cir.) (mailing of divorce decrees i final step in scheme), cert. denied, 409 U.S. 891 (1972).

[110] Cf. United States v. Maze, 414 U.S. 395, 403 (1974), where the Court rejected the contention that the delay caused by the mails was essential to continuation of the scheme by postponing its detection; the delay was due to distance, not to the mail service.

[111] E.g., United States v. Foshee, 569 F.2d 401, 406 (5th Cir. 1978); Williams v. United States, 278 F.2d 535, 538 (9th Cir. 1960); cf. United States v. Braunig, 553 F.2d 777, 781 (2d Cir.) (bank policy of crediting international checks to the account before confirmation from drawee bank allowed defendant to withdraw funds before discovery of forgery), cert. denied, 431 U.S. 959 (1977).

[112] E.g., United States v. Kelem, 416 F.2d 346, 349-50 (9th Cir. 1969), cert. denied, 397 U.S. 952 (1970); Adams v. United States, 312 F.2d 137, 140 (5th Cir. 1963).

C. Liability

¶ 49 Conspiracy principles of liability apply to multi-member mail-fraud schemes without regard to whether a conspiracy is charged.[113] Each participant is criminally liable for the reasonably foreseeable actions of his co-schemers in furtherance of the fraud, regardless of whether he knew of or agreed to those actions.[114] Once an agreement to participate in the scheme is established,[115] every member is responsible for acts within the general scope of the scheme,[116] including reasonably foreseeable mailings.[117] An affirmative act of withdrawal by the defendant will relieve him of liability, however.[118]

V. APPLICATION OF R.I.C.O.

¶ 50 The foregoing material has examined the mail fraud statute, one of the federal criminal statutes incorporated under R.I.C.O. The land fraud fact pattern involves violations

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[113] United States v. Joyce, 499 F.2d 9, 17 (7th Cir.), cert. denied, 419 U.S. 1031 (1974).

[114] See United States v. Craig, 573 F.2d 455, 483 (7th Cir. 1977), cert. denied, 99 S. Ct. 82 (1978); United States v. Wilson, 506 F.2d 1252, 1257 (7th Cir. 1974).

[115] Cf. United States v. Allied Asphalt Paving Co., 451 F. Supp. 804, 812 (N.D. Ill. 1978) (defendant must be party to scheme and m t have specific intent to defraud).

[116] United States v. Cohen, 516 F.2d 1358, 1364 (8th Cir. 1975).

[117] United States v. McDonald, 576 F.2d 1350, 1360 (9th Cir.), cert. denied, 99 S. Ct. 105 (1978).

[118] United States v. Cohen, supra note 116.

of the mail and wire fraud statutes. Once the prosecutor or plaintiff proves these offenses, he will be able to show a R.I.C.O. violation.

A. Elements of the Offense

¶ 51 For both mail and wire fraud, the prosecutor or plaintiff must show the defendant's intent to execute a scheme to defraud.[119] The AMREP land sale fraud is designed to cheat purchasers by inducing them to buy land at a price for exceeding its value. The promoters convinced their victims that Rio Rancho lots were a good investment by making false representations that the rapid expansion of Albuquerque inevitably would result in an excellent resale market. The disclaimer and the refund-exchange option did not remove the taint of fraud from the scheme. The defendants' intended result was to deceive the purchasers and deprive them of their money.

¶ 52 Recklessness as to the truth or falsity of representations is the second part of the requisite state of mind. The defendants' awareness of the limited resale market for Rio Rancho property and of the land available for expansion within Albuquerque indicates that the schemers were at least reckless as to the validity of their claims.

¶ 53 The defendants also must be negligent as to the use of the mails or the channels of interstate communication. A letter of solicitation or an advertising brochure mailed by an employee or an agent of AMREP, an ad in a newspaper delivered

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[119] See ¶¶ 19-36 supra.

by mail, a phone call from a potential purchaser to inquire about Rio Rancho, or a television spot promoting the property are all examples of acts reasonably foresseable by the defendants.

¶ 54 These examples also satisfy the requirements that the use of the mails or of interstate communication facilities be in furtherance of the fraudulent scheme.[120] Such letters and advertisements are intended to attract new purchasers, and the potential purchaser's phone call is a further step in completion of a sales transaction. A lulling letter to a purchaser, assuring him that the defendants will soon find an interested buyer for his lot, furthers the fraud by postponing complaints about the lack of a resale market for Rio Rancho property.

B. R.I.C.O.

¶ 55 Once the offenses of mail fraud and wire fraud are proven, R.I.C.O. comes into play. The statute requires at least two acts of racketeering activity, one occurring after October 15, 1970, and the last act occurring within ten years after the prior act.[121] Proof of at least two offenses within the predescribed time period is required to establish a "pattern of racketeering activity" under R.I.C.O.

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[120] See ¶¶ 39-48 supra.

[121] 18 U.S.C. § 1969(5) (1976).

¶ 56 The substantive R.I.C.O. offense in this fact situation is 18 U.S.C. § 1962(c), illegal use of an enterprise.[122] The prosecutor or plaintiff must show that the defendant corporations and officers conducted the affairs of the land sale enterprise through a pattern of mail and wire fraud offenses. The statute also requires that the enterprise, AMREP and its subsidiaries, be engaged in interstate commerce or that its activities affect interstate commerce. The interstate transactions involved in nationwide land sales satisfies this jurisdictional element.

¶ 57 R.I.C.O. provides for civil remedies[123] as well as criminal penalties. In the land fraud case, a restraining order may be issued to halt the continuing fraud, or an individual purchaser injured by the fraud may recover treble damages.

¶ 58 The AMREP case was criminally prosecuted under the mail fraud and interstate land sale fraud[124] statutes. R.I.C.O. is valuable because it goes beyond criminal penal-

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[122] 18 U.S.C. § 1962(c) (1976) provides:

> 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.

[123] 18 U.S.C. § 1964 (1976).

[124] 15 U.S.C. § 1703(a) (1976).

ties by providing a civil sanction for the illegal scheme. R.I.C.O.'s injunctive relief and treble damages can financially immobilize the enterprise and repair injuries suffered by the victims of the fraud. The application of R.I.C.O. to a typical mail and wire fraud fact situation demonstrates the usefulness of the statute.

SECURITIES FRAUD AND R.I.C.O.

by

Neva Flaherty

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I. SUMMARY

¶ 1 In a case of securities fraud, the R.I.C.O. law provides greater penalties for the perpetrator and greater monetary recovery for the victim than do the securities laws. Recovery of triple damages under R.I.C.O. requires proof of two instances of securities fraud. Such fraud occurs when a purposeful, knowing, or reckless misrepresentation or omission of a material fact is made in connection with an actual sale or purchase of securities. After securities fraud is established, the plaintiff must also satisfy the R.I.C.O. law's requirements. The acts of fraud must emanate from an enterprise that affects interstate commerce, be connected by a common scheme, and fall within the time limits of the law.

II. ADVANTAGES OF R.I.C.O. IN SECURITIES FRAUD CASES

¶ 2 A case of securities fraud, prosecuted civilly or criminally under R.I.C.O. will yield greater monetary damages and heavier criminal penalties than if brought to court under the antifraud provisions of the securities laws.

Consider, for example, the King Resources Co.'s (KRC) securities litigation growing out of the financial demise of KRC and its related companies.[1]

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[1] American Employers' Ins. Co. v. King Resources Co., 545 F.2d 1265, 1267 (10th Cir. 1976).

A. ILLUSTRATIVE CASE

¶ 3 John M. King entered the oil business in 1955 and was very successful.[2] Soon he formed King Resources Co. (KRC), which went public in 1967 with issues of stock and convertible debentures. KRC enjoyed phenomenal success for the next three years.

¶ 4 King also organized two corporations to raise funds for oil and gas exploration by KRC through the sale of limited partnership interests to the public. One corporation, Imperial-American Resources Fund, Inc., was a general partner in limited partnerships in proven or semi-proven oil and gas wells. The other corporation, Royal Resources Exploration, Inc., was the general partner in wildcat properties. Two parallel management companies were formed, each holding title to properties on behalf of one of the funds. The stock in the management companies was held by King, his wife, and trusts for their children.

¶ 5 In November, 1968, the Kings and the trust exchanged their management fund stock for stock in Colorado Corp., a holding corporation also engaged in acquisition, sale, and development of oil, gas, and mineral properties.

¶ 6 Colorado Corp. also owned the stock of Denver Corp., the broker-dealer selling interests in the Royal and Imperial limited partnerships. These securities, registered

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[2]The following factual summary is drawn from King v. United States, 545 F.2d 700, 702-03 (10th Cir. 1976), unless otherwise noted.

with the SEC, were purchased by 17,000 investors for $130 million.[3]

¶ 7 Although each company had separate affairs and directors, "King was at all times active in their management affairs . . . . The operations of the complex were elaborate, aggressive, and broad-ranging throughout the world . . . The complex was, in large measure, reflective of the aggressive, outgoing, and fast-moving style and manner of King."[4]

¶ 8 While King was building his empire, Bernard Cornfield was developing Investors Overseas Services,Ltd. (IOS), which sold "offshore mutual funds." IOS became the largest purchaser of King's oil and gas investments.[5]

¶ 9 When IOS fell on hard times, Cornfield urged King to buy IOS. The plan never succeeded and the King empire collapsed into bankruptcy in 1971. The collapse spawned numerous suits, including:

¶ 10 1) An SEC enforcment action, filed in January 1971, seeking an injunction against KRC's further sale of securities violating the registration and antifraud provisions of the securities laws.[6] The SEC charged that KRC, in issuing stocks and debentures in 1970, had made false and mis-

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[3] In re King Resources Co. Sec. Litigation, 420 F. Supp. 610, 614 (D. Colo. 1976).

[4] King v. United States, 545 F.2d 700, 702 (10th Cir. 1976).

[5] In re King Resources Co. Sec. Litigation, 342 F. Supp. 1179, 1181 n. 6 (J.P.M.D.L. 1972 (SEC v. King Resources Co., No. C-2858 (D. Colo. filed Jan., 1971)).

[6] In re King Resources Co. Sec. Litigation, 342 F. Supp. 1179, 1181 (J.P.M.D.L. 1972).

leading statements about its general operations, its transactions with IOS, and its transactions with several trusts benefitting the families of KRC's officers. These transactions "were part of a three-phase effort to take over management and control of Investors Overseas Services, Ltd."[6a]

¶ 11 2) Four private civil damage suits[7] echoing the SEC allegations, filed by KRC stock and debenture holders. Three of the cases were class actions on behalf of all holders in certain categories.[8]

¶ 12 3) Another claim was that Ohio was defrauded in its purchas of $8,000,000[8a] in KRC promisory notes in April and May, 1972. Ohio said that financial statements by KRC's accountant, Arthur Andersen and Co., were false and misleading because they did not show the extent to which KRC was dependent on one customer, a mutual fund controlled by I.O.S.[9]

¶ 13 4) A suit[10] on behalf of the 17,000 investors in the limited partnerships, charging that the prospectuses and

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[6a] Id. at 1182-83. Private actions against KRC, ¶¶ 11, 13 infra, were also alleged to arise out of one or more phases of the take-over effort. Id. at 1180 n. 1, 1182-83.

[7] Id. at 1181 n. 7 (refers erroneously to cases in note 2, but actual cases are those in note 3: Diedrich Corp. v. King Resources Co., Civ. A. No. C-3424 (D. Colo. 1971); Leonard Gross v. Blyth and Co., Civ. A. No. 70-751 (D. Or. 1971); Joseph N. Morell v. John M. King, Civ. A. No. C-71-805 (N.D. Ohio 1971); Donald J. Licker v. King Resources Co., Civ. A. No. C-71-882RHS (N.D. Cal. 1971)).

[8] Id. at 1181.

[8a] In re King Resources Co. Sec. Litigation, 458 F. Supp. 220, 221 (J.P.M.D.L. 1978).

[9] Ohio v. Crofters, Inc., 75 F.R.D. 12, 15 (D. Colo. 1977), cert. denied, 99 S. Ct. 117 (1978).

[10] In re King Resources Co. Sec. Litigation, 420 F. Supp. 610 (D. Colo. 1976).

registration statements issued between September, 1966, and August, 1970, contained misleading statements and omissions. The plaintiffs, in a shareholder-derivative posture, raised the same claims on behalf of the partnerships.[11]

¶ 14 The limited-partnership suit was settled for $13,282,000[12] and the other suits were settled for an undisclosed amount.[13]

B. DIFFERENCES IN RESULT

¶ 15 Had the SEC turned the King Resources case over to the Department of Justice for criminal prosecution, the defendant could have received a maximum penalty, on conviction, of five years in prison or a $10,000 fine, or both, for each violation of the securities laws. The plaintiffs in the private suits could have obtained, at most, damages or recision.[15] They actually settled for less than their losses.[16] They might also have recovered attorney's fees.[17]

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[11] Id. at 614-15.

[12] Id. at 612, 639.

[13] American Employers' Ins. Co. v. King Resources Co., 556 F.2d 471, 472-74 (10th Cir. 1977). King was the only party not agreeing to the settlement, approved Dec. 19, 1975. Id. at 472.

The injunction sought by the SEC was granted. In re King Resources Sec. Litigation, 342 F. Supp. 1179, 1181 (J.P.M.D.L. 1972). One defendant in In re King Resources Co. Sec. Litigation, 420 F. Supp. 610 (D. Colo. 1976), was indicted with other principals of the King Resources financial complex. Id. at 618.

[14] 15 U.S.C. §§ 77x, 78ff(a) (1976).

[15] 3 L. Loss, Securities Regulation, 1792-97 (2d ed., 1961).

[16] See notes 12, 13, supra.

[17] The remedies available under the right of action implied from the antifraud provision of the Securities Exchange

¶ 16 If the civil and criminal cases had been brought, instead, under RICO, the defendants would have faced a maximum criminal penalty of twenty years in prison, not five, or a fine of $25,000, not $10,000, or both a fine and incarceration.[18] They would have also forfeited any interest obtained through securities fraud (the profits) or any interest or security in a business operated or controlled by securities fraud (the power base).[19] The civil plaintiffs could have recovered, at trial, an amount three times their actual losses.[20] Recovery of attorney's fees would be mandated,[21] not subject to a judge's discretion. A court could also order the defendants to divest themselves of their interests in the defendant corporations, or dissolve the corporations, or obey restrictions on future securities' activities.[22]

II. ELEMENTS OF A R.I.C.O. SECURITIES FRAUD CASE

¶ 17 To bring the King Resources cases under R.I.C.O., a

Act of 1934, 15 U.S.C. 78j(h) (1976), are similar to the remedies under statutory rights of action in the securities laws. See 15 U.S.C. §§ 77k, l, 78r(a) (1976). Because §§ 77k and 78r allow a judge discretion in awarding attorney's fees, the same discretion could be implied in a suit under § 78j(b). Judges in class actions have similar discretion on attorney's fees. 7A C. Wright and A. Miller, Federal Practice and Procedure, Civil § 1803 at 284, 288 (1972).

[18] 18 U.S.C. § 1963(a) (1976).

[18a] See note 17 supra.

[19] 18 U.S.C. § 1963(a) (1-2) (1976).

[20] 18 U.S.C. § 1964(c) (1976).

[21] Id.

[22] 18 U.S.C. § 1964(a) (1976).

civil plaintiff would have to show that:

1) an enterprise existed;

2) illegal activity was used to conduct the enterprise or to acquire or maintain control of the enterprise;

3) the illegal activity was a pattern of racketeering proscribed by the R.I.C.O. law;

4) the necessary interstate commerce connection existed.[23]

A. EXISTENCE OF ENTERPRISE

¶ 18 An enterprise is defined by Section 1961(4) to include "any individual, partnership, corporation, association, or other legal entity . . . ."[24] Because securities are issued by corporations, the "enterprise" element is easily established in a R.I.C.O. securities fraud case.

B. ILLEGAL USE OF ENTERPRISE

¶ 19 Under Section 1962(c), it is illegal to conduct an enterprise's affairs through a pattern of racketeering activity.[25] In the King Resources case, the enterprise's sale of securities was conducted by alleged misrepresentations that were illegal under the securities laws. Where the alleged misrepresentations

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[23] 15 U.S.C. § 1962(c),(d) (1976). See Criminal Division, U.S. Dep't of Justice, Racketeer Influenced and Corrupt Organizations Statute, 20-26, 46 (4th ed.) [hereinafter cited as R.I.C.O. Manual].

[24] 18 U.S.C. § 1961(4) (1976).

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

18 U.S.C. § 1962(c) (1976).

were part of King Resources' effort to acquire control of I.O.S., a Section 1962(b) charge of using racketeering activity to gain control of an enterprise could be lodged.[26]

C. PATTERN OF RACKETEERING

¶ 20 To establish the pattern of racketeering activity in the KRC cases, a plaintiff must show that:

1) the type of securities fraud that occurred was included under R.I.C.O.'s prohibition;[27]

2) at least two acts of racketeering activity occurred within the time limit of the law;[28]

3) the acts were connected by a common scheme.[29]

1. RACKTEERING ACTIVITY

¶ 21 To determine if KRC's securities fraud is racketeering activity under R.I.C.O. Section 1961(1)(D),[30] it is necessary to understand what securities fraud encompasses and whether Congress intended all such fraud to fall under R.I.C.O.[31]

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

18 U.S.C. § 1962(b) (1976).

[27] See 18 U.S.C. § 1961(1)(D) (1976).

[28] See 18 U.S.C. § 1961(5) (1976).

[29] See R.I.C.O. Manual, supra note 23.

[30] "As used in this chapter, (1)'racketeering activity' means . . . (D) any offense involving . . . fraud in the sale of securities . . . ." 18 U.S.C. § 1961(1)(D) (1976).

[31] See ¶¶ 38-77 infra.

2. TIME LIMITS

¶ 22 To satisfy the R.I.C.O. time limits, it is necessary to show that at least two acts of fraud were committed within ten years of each other, with one act occurring after October 15, 1970 (the effective date of the R.I.C.O. law)[32] and within the applicable statute of limitations.[33] If the 1972 Ohio note purchases were included in the R.I.C.O. case, there would clearly be an act committed after the effective date. (Otherwise, it is assumed for the purposes of this example that at least one of the stock or debenture sales took place after that date.)

¶ 23 Ascertaining whether the statute of limitations has run on the final act of a R.I.C.O. scheme is a complicated matter, which will affect the choice of state in which to file the civil suit. Because both R.I.C.O. and the Sections 17a and 10b of the securities laws provide federally created rights to civil damages without a statute of limitations, the plaintiff in a R.I.C.O. civil damage suit for securities fraud may have to look to the state law for a statute of limitations.[34]

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[32] "[P]attern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [Oct. 15, 1970] and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(5) (1976).

[33] See ¶¶ 23-30 infra.

[34] See, e.g., Ernst v. Hocjfelder, 425 U.S. 185, 210 n.29 (1976); U.A.W. v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966); Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906); 2 Moore's Federal Practice ¶ 3.07[2], at 3-54. In applying

¶ 24 R.I.C.O.'s liberal venue and process provisions[35] allow the plaintiff a wide choice of states. Under the securities laws, the cause of action for fraud can arise wherever the securities are sold. In the King Resources litigation, with thousands of plaintiffs, the cause of action could arise in any of the fifty states.

¶ 25 In choosing among states, a plaintiff should be aware that a triple damage suit may be regarded, in some jurisdictions, as a suit for a penalty. Such a suit is subject to a short statute of limitations. Federal circuits follow differing practices in choosing whether to apply a state's general statute of limitations or the shorter one covering a suit for a penalty. Some circuits follow a "federal" approach, in which they characterize a triple damage suit asremedial, not penal, based on federal law as laid down by the Supreme Court in Chattanooga Foundry and Pipe Works v. Atlanta.[36] Federal courts in some circuits follow a

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a state statute, the federal court will use state law to define "cause of action" and to determine where the cause of action arose. Federal law determines when the cause of action accrues. Id. at 3-54--3-62. For a full discussion of the statute of limitations issues arising under R.I.C.O., see The Statute of Limitations in a Civil RICO Suit for Treble Damages, from which this material is drawn. But see McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 227-30 (Brennan, J. concurring).

[35]18 U.S.C. § 1965 (1976) allows a R.I.C.O. civil action to be filed in any U.S. district court district in which the defendant resides, is found, has an agent, or transacts his affairs. See Civil Procedure — R.I.C.O. for a full discussion of venue and process under R.I.C.O.

[36]203 U.S. 390 (1906). See The Statute of Limitations in a Civil RICO Suit for Treble Damages, infra, at ¶¶ 37-59.

"state approach" in which they characterize the action by looking to state decisions characterizing a triple damage suit as penal or remedial.[37]

¶ 26 Once the action is characterized, the federal court usually then applies the most appropriate state statute of limitations.

¶ 27 In choosing a state in which to bring a R.I.C.O. suit, a plaintiff should be aware of the "federal" and "state" approaches. If possible, he should file suit in a federal court that follows the "federal" approach. If that is not possible, he should look for states that construe a suit for a penalty narrowly to exclude triple damage suits.[38]

¶ 28 Among the states that would not apply the short, "penalty" statute of limitation to the R.I.C.O. suit, the plaintiff should look for those with the longest statutes of limitations for common-law fraud and securities fraud, the statutes usually applied in securities fraud cases.[39]

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[37] See The Statute of Limitations in a Civil RICO Suit for Treble Damages, infra, at ¶¶ 41-45.

[38] See id. at ¶ 44 for a list of states that classify triple damages as a penalty.

[39] See, e.g., Fox v. Kane-Miller, 542 F.2d 915 (4th Cir. 1976) (one-year securities fraud limitation chosen over three-year general fraud provision); In re Alodex Corp. Sec. Litigation, 533 F.2d 372 (8th Cir. 1976) (two-year "blue-sky" limitation applied rather than five-year, common-law fraud period); Cleg. v. Conk, 507 F.2d 1351 (10th Cir. 1974), cert. denied, 422 U.S. 1007 (1975) (three-year fraud statute chosen over two-year securities law limit); Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967) (six-year fraud statute applied instead of a two-year securities statute). many courts that adopted the shorter limitation in the state securities law did so because their circuits had determined that the federal securities laws, like the state laws, do not require scienter. Now that the Supreme Court has ruled that a civil suit under the Federal Securities Act of 1934 requires proof of more than a negligent state of mind, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), states may now apply the common-law fraud statute of limitations because common-law fraud requires proof of scienter.

¶ 29 If, after this narrowing process, the plaintiff still has a choice among states, he should look for one whose conflicts law does not allow the "borrowing" of a statute of limitations from another state in which the action could have been brought.

¶ 30 If a non-borrowing state cannot be found, then the plaintiff should be prepared to argue on policy grounds that the case should remain under the most generous statute of limitations available. Recent federal decisions hold that the remedial policies of the federal securities laws are better served by longer, rather than shorter, statutes of limitations.[40] The purposes of R.I.C.O. - to encourage civil recovery for organized-crime victims and to deter organized-and-white-collar crime - are also better served by a longer statute of limitations. A defrauded investor may realize he has a R.I.C.O. civil remedy only after a lengthy criminal investigation produces an indictment.[41] R.I.C.O.'s liberal construction clause supports the choice of a generous statute of limitations.[42]

3. COMMON SCHEME

¶ 31 The plaintiff must also show the acts were connected

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[40] I.O.S. Progressive Fund, Inc. v. First of Michigan Corp., 533 F.2d 340, 344 (6th Cir. 1976); United California Bank v. Salik, 481 F.2d 1012, 1015 (9th Cir. 1973), cert. denied, 414 U.S. 1004 (1973).

[41] Federal, not state, law governs on the accrual of the cause of action. 2 Moore's Federal Practice, supra note 25, ¶ 3.07[2], at 3-62.

[42] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (also found in notes following 18 U.S.C. § 1961 (1976)).

by a common scheme.[43] In denying a motion to consolidate the KRC bankruptcies and the civil suits by stock, debenture, and limited-partnership investors, the court observed, "The cases all arose, directly or indirectly, as a result of [John M.] King's elaborate, aggressive, and broad-ranging investment activities throughout the world and the subsequent demise of same. Their interrelationship is predicated upon King's involvement within each on a personal or corporate official basis."[44] Another court observed that the stock and debenture suits arose out of a three-stage effort to acquire control of I.O.S.[45] Thus, there seems to be sufficient evidence to establish a common scheme.

D. INTERSTATE COMMERCE

1. UNDER R.I.C.O.

¶ 32 R.I.C.O.'s requirement that the enterprise be engaged in or have an effect on interstate commerce[46] can be established by as little as interstate phone calls or supplies ordered out of state.[47] The racketeering itself need not

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[43] R.I.C.O. Manual, supra at note 23. The Department of Justice suggests that a useful definition for "common scheme is that from the proposed Federal Criminal Code:

> "[Acts] that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events . . . § 1806(e)." Id.

[44] American Employers' Ins. Co. v. King Resources Co., 545 F. 2d 1265, 1267 (10th Cir. 1976).

[45] In re King Resources Co. Sec. Litigation, 342 F. Supp. 1179, 1182-83 (J.P.M.D.L. 1972).

[46] 18 U.S.C. § 1962(b-c) (1976).

[47] R.I.C.O. Manual, supra note 23, 41-42.

affect interstate commerce.[48]

¶ 33 In addition, the interstate-commerce requirement of the substantive offense (in this case, secuirites fraud), must also be satisfied.[49] In a R.I.C.O. securities fraud case, the same evidence will often satisfy both requirements, as can be seen from the following discussion.

2. UNDER SECURITIES LAWS

¶ 34 The antifraud provisions of the securities laws require that some means of interstate transportaion or communication be used in the offer, sale, or purchase of the securities.[50] The means most commonly used are the mails, telephone calls, wire facilities,[51] or a national stock exchange.[52]

¶ 35 Even if the use of interstate means is incidental, not central, to the fraudulent securities scheme, the use will be sufficient to meet the jurisdictional requirement.[53]

¶ 36 Mailings relied on to satisfy the interstate commerce requirement include: a confirmation of sale or delivery of

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[48] Id. at 46.

[49] Id.

[50] 15 U.S.C. §§ 77q(a), 78j (1976).

[51] The use of mails or wire communication also raises the possibility of mail or wire fraud counts. See Mail and Wire Fraud on mail fraud.

[52] See United States v. Re, 336 F.2d 306, 315-16 (2d Cir.), cert. denied, 379 U.S. 904 (1964).

[53] United States v. Ashdown, 509 F.2d 793, 799 (5th Cir.), cert. denied, 423 U.S. 829 (1975); United States v. Porter, 441 F.2d 1204, 1211 (8th Cir.), cert. denied, 404 U.S. 911 (1971); Little v. United States, 331 F.2d 287, 293 (8th Cir.), cert. denied, 379 U.S. 834 (1964).

a stock certificate,[54] an offer or other sales literature,[55] the mailing of the purchaser's check to the seller and the use of the mails to deposit that check for collection.[56] The mailed material need not contain a fraudulent representation on its face.[57]

¶ 37 The use of the mails will be sufficient even if the defendant did not intend their use as part of the scheme[58] or did not use them himself.[59] As long as the defendant set in motion forces that he could foresee would result in the use of the mails, the interstate means requirement is satisfied.[60]

III. SECURITIES FRAUD AS RACKETEERING ACTIVITY

¶ 38 R.I.C.O. includes as racketeering activity "any offense involving . . fraud in the sale of securities."[61] It can be argued that by this phrase, Congress incorporated into R.I.C.O. existing and future law defining securities law.[62]

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[54] United States v. Ashdown, 509 F.2d 793, 799 (5th Cir.), cert. denied, 423 U.S. 829 (1975).

[55] United States v. Kane, 243 F. Supp. 746, 750 (S.D.N.Y. 1965).

[56] Little v. United States, 331 F.2d 287, 294 (8th Cir.), cert. denied, 379 U.S. 834 (1964); United States v. Robertson, 181 F. Supp. 158, 164 (S.D.N.Y. 1959), aff'd in part, 298 F.2d 739 (2d Cir. 1962).

[57] United States v. Schaefer, 299 F.2d 625, 629 (7th Cir.), cert. denied, 370 U.S. 917 (1962).

[58] Pereira v. United States, 347 U.S. 1, 9 (1954).

[59] McDaniel v. United States, 343 F.2d 785, 788 (5th Cir.), cert. denied, 382 U.S. 826 (1965).

[60] United States v. MacKay, 491 F.2d 616, 619 (10th Cir. 1973), cert. denied, 416 U.S. 972, 419 U.S. 1047 (1974).

[61] 18 U.S.C.A. § 1961(1)(D) (1976).

[62] See ¶¶ 75-77 supra.

¶ 39 To understand what constitutes racketeering in the securities field, it is necessary to examine the jurisprudence that has developed on securities fraud in the forty-five years since passage of the federal securities laws. First, the antifraud provisions of the laws will be described, then court decisions defining terms within the laws and setting requirements will be discussed.

A. ANTIFRAUD PROVISIONS OF THE SECURITIES LAWS

¶ 40 Under the major federal securities legislation, the Securities Act of 1933[63] and the Securities Exchange Act of 1934,[64] fraud includes price manipulation, as well as false statements of material facts and omissions of material facts necessary to prevent the statements made from misleading investors.[65]

¶ 41 Section 9a of the 1934 Act proscribes transactions that create false and misleading appearances of either active trading or a market in a security registered on a stock exchange.[66] Market manipulations in unregistered securities

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[63] 15 U.S.C. §§ 77a-77aa (1976).

[64] 15 U.S.C. §§ 78a to 78hh-1 (1976).

[65] 15 U.S.C. §§ 77q(a), 78i(a), 78j(h) (1976).

[66] (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, for any member of a national securities exchange —

can be reached by the antifraud provisions of the securities laws.[67]

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66 cont'd

> (1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.
>
> (2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.
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> * * * * * * * * * * * * *
>
> (6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78i(a)(1), (2), and (6) (1976).

[67] Securities Act of 1933, ch. 38, § 17a, 48 Stat. 84-85 (1933), codified as 15 U.S.C. § 77q(a) (1976); Securities Exchange Act of 1934, ch. 404, § 106, 48 Stat. 891 (1934),

¶ 42 The main antifraud provisions of the securities laws are Section 17a of the 1933 Act[68] and Section 10b of the 1934 Act, together with Rule 10b-5 enacted under Section 10b.[69] Both sections apply to all securities, registered and unregistered with a stock exchange, and those exempt from registration.[70] Both sections require the use of the mails or an instrumentality of interstate commerce, such as a telephone call, to establish federal jurisdiction over the alleged fraud.[71]

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codified as 15 U.S.C. § 78j(b) (1976); 17 C.F.R. § 240.10 b-5 (1978) (Rule 10b-5). These prohibitions of "manipulative" as well as deceptive devices can be used, as well as Section 9a, ch. 38, § 9(a), 48 Stat. 889 (1933), codified as 15 U.S.C. § 78i (1976), to attack price manipulation of registered securities. Failure to disclose that securities are being sold at manipulated prices would be a deception under the antifraud provisions. Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 795 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970).

[68] 15 U.S.C. § 77q(a) (1976).

[69] 15 U.S.C. § 78j(b) (1976); 17 C.F.R. § 240.10b-5 (1978).

[70] Securities Act of 1933, § 17(c), 15 U.S.C. § 77q(c) (1976) states that exemptions provided in 15 U.S.C. 77c (1976) do not apply to the provisions of Section 77q. Exempted securities include government and municipal obligations, short-term paper, securities of non-profit institutions, and building and loan associations, securities subject to ICC approval, annuities, securities sold to investors within a single state. 15 U.S.C. 77c (2-6), (8), (11) (1976). Securities Exchange Act of 1934, § 10b, 15 U.S.C. § 78j(b) (1976) applies to "any security registered on a national securities exchange or any security not so registered." It applies to securities exempted under 17 U.S.C.A. § 78c (a)(12) (West Supp., 1979). D. Ratner, Securities Regulation in a Nutshell 117 (1978).

[71] 15 U.S.C. 77q(a), 78j (1976).

¶ 43 Section 10b and Rule 10b-5 reach further than Section 17a. Section 17a prohibits fraud in the offer or sale of securities.[72] Section 10b prohibits fraud "in connection with" the purchase, as well as sale.[73] Fraud is defined in Section 10b as any manipulative or deceptive device which is outlawed by rules of the Securities and Exchange Commission

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72 (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. §§ 77q(a) (1976).

73 It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange — . . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. 78j(b) (1976).

(SEC). The rule relied on in most 10b antifraud actions is Rule 10b-5.[74]

¶ 44 Although Rule 10b-5 is patterned on Section 17a, certain differences in language give the rule wider scope:

1) Both proscribe untrue statements of material facts or half-truths (failure to state a material fact necessary to make the statement made not misleading), but, unlike 17a, the rule does not require that money or property actually be obtained by the misstatement.[75]

2) Section 17a limits the affected parties to purchasers. Rule 10b-5 includes as victims "any person" defrauded "in connection with" sale or purchase of securities.[76]

¶ 45 The breadth of language in Rule 10b makes it a more effective vehicle than Section 17a for private civil damage suits under the securities laws. Courts have upheld a pri-

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[74]Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5 (1978).

[75]Compare 15 U.S.C. § 77q(a)(2) (1976) with 17 C.F.R. 240.10b-5(a) (1978).

[76]Compare 15 U.S.C. § 77q(a)(3) (1976) with 17 C.F.R. § 240.10b-(c) (1978).

vate right of action under Section 10b,[77] while a similar right under Section 17a remains unclear.[78] For this reason, these materials will focus on Section 10b and Rule 10b-5 as the vehicle for civil damage suits under the securities laws and the R.I.C.O. statute.

¶ 46 The antifraud provisions of the securities laws are grounded in the common-law concept of fraud. To carry out the Congressional purpose of protecting the investor, courts have interpreted the laws liberally, not technically.[79] Some of the common-law fraud elements have been dropped[80] or modified. Privity is not required between buyer and seller.[81]

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[77] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

[78] In Blue Chip, id. at n. 6, pp. 733-34, the Court says it does not decide whether a private right of action exists under § 17 in light of provisions for express civil remedies for false registration statements, prospectuses, and oral communications under §§ 11 and 12 of the 1933 Act, 15 U.S.C.A. §§ k, l (1971). The court cites conflicting opinions, Greater Iowa Corp. v. McLendon, 378 F.2d 783, 790 (8th Cir. 1967) (no private right of action); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 (2d Cir. 1961) (right of action exists), and Judge Friendly's concurrence in SEC v. Texas Gulf Sulphur, 401 F.2d 833, 867 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969), once private right granted under § 10-b, there was "little practical point" in denying right under § 17a).

[79] Securities and Exch. Comm'n v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963).

[80] SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (2d Cir. 1972). Accord, SEC v. Capital Gains Research Bureau, 375 U.S. 180, 193-95 (1963).

[81] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860-61 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); Heit v. Weitzen, 402 F.2d 909, 913 (2d Cir. 1968), cert. denied, 395 U.S. 903 (1969). See also Mitchell v. Texas Gulf Sulphur, 446 F.2d 90 (10th Cir.), cert. denied, 404 U.S. 1004 (1971), 405 U.S. 918 (1972).

A plaintiff does not have to prove reliance or actual loss to establish fraud; the mere non-disclosure or misrepresentation of a fact that is material is sufficient to establish causation.[82] Half-truths[83] and puffing[84] are proscribed along with misrepresentations. Scienter includes knowing[85] and reckless conduct[86] as well as purposeful conduct.

B. DEFINITION OF TERMS

1. SECURITY

¶ 47 The term "security" is defined in Section 3 of the 1934 Act to include:

> [A]ny note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any

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[82] Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972).

[83] 3 L. Loss, Securities Regulation 1433 (2d Ed., 1961).

[84] 6 L. Loss, Securities Regulation 3542 (2d Ed., Supp. 1969).

[85] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

[86] See, e.g., Sanders v. John Noveen and Co., 554 F.2d 790, 792-93 (7th Cir. 1977).

renewal thereof the maturity of which is likewise limited.[87]

¶ 48 The essential elements that distinguish a security or an investment contract from other commercial dealings are 1) an investment of money, 2) in a common enterprise, and 3) an expectation of profits solely from the efforts of persons other than the investor.[88]

¶ 49 Under this test, the following types of transactions have been held to be securities: rare coin portfolios,[89] land purchase contracts,[90] interest in a pyramid sales scheme,[91] limited partnership in a real-estate venture,[92] shares in a cooperative housing corporation,[93] trading on a discretionary account managed and supervised by a stockbroker,[94]

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[87] 15 U.S.C. § 78c(a)(10) (1976). Despite slight differences in language, the definition of security is essentially the same under the 1933 Act. 15 U.S.C. 77(b)(1) (1976). Tcherepnin v. Knight, 389 U.S. 332, 335-36 (1967); Fargo Partners v. Dain Corp., 540 F.2d 912, 914 n. 3 (8th Cir. 1976).

[88] SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946). The "solely from the efforts of others" test is not applied strictly. The exertion of a minimal effort by an investor will not prevent a holding that a particular scheme is an investment contract. Hector v. Wiens, 533 F.2d 429, 433 (9th Cir. 1976); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 479-82 (5th Cir. 1974).

[89] SEC v. Brigadoon Scotch Distributors, Ltd., 388 F. Supp. 1288, 1293 (S.D.N.Y. 1975).

[90] SEC v. Lake Havasu Estates, 340 F. Supp. 1318, 1321 (D. Minn. 1972).

[91] SEC v. Glenn W. Turner Enterprises, 474 F.2d 476, 482-83 (9th Cir.), cert. denied, 414 U.S. 821 (1973).

[92] Kroungold v. Triester, 407 F. Supp. 414, 417 (E.D.Pa. 1975).

[93] 1050 Tenants Corp. v. Jakobson, 365 F. Supp. 1171, 1175 (S.D.N.Y. 1973), aff'd, 503 F.2d 1375 (2d Cir. 1974).

[94] Berman v. Orimex Trading, Inc., 291 F. Supp. 701, 702 (S.D.N.Y. 1968).

direct distributorships for sale of home care products.[95] A non-contributory, compulsory pension plan funded by an employer was held not to be a security.[96]

2. SALE

¶ 50 The term "sale" in both the 1933 and 1934 Acts includes both contracts of sale and any disposition of a security.[97]

¶ 51 An exchange of shares in a merger is a sale, if it is an investment decision in which stockholders give up one significant economic interest for another. In SEC v. National Securities, Inc.[98] the Supreme Court held that the shareholders of the merging company, by voting to accept shares in the surviving company made an investment decision because they gave up their right to seek cash payment based on the court-appraised value of their shares in the merging company.[99]

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95 In re Bestline Products Securities, 412 F. Supp. 732, 738 (S.D.Fla. 1976).

96 International Brotherhood of Teamsters v. Daniel, 99 S. Ct. 790 (1979). The pension contribution was too insignificant a part of Daniel's compensation to be an investment of money. His expectation of profit depended mostly on continuing employer contribution, not the labors of the fund's investment managers. Id. at 796-98.

97 "The term 'sale' or 'sell' shall include every contract of sale or disposition of a security, or interest in a security, for value." 15 U.S.C. 77b(3) (1976).
"The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of." 15 U.S.C. § 78(c)(14) (1976).

98 393 U.S. 453 (1969).

99 Id. at 467. See also Frigitemp Corp. v. Financial Dynamics Fund, Inc., 524 F.2d 275 (2d Cir. 1975), in which investment company required shareholders to contribute shares to capital of Frigitemp as a condition of the investment company's purchase of a $1 million debenture. The debenture purchase was held to be consideration for the contribution of shares.

¶ 52 A share exchange is not a sale when shareholder's interests are not significantly affected[100] or when the company in which the stockholders receive shares is not a new entity.[101]

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[100] In re Penn Central Sec. Litigation, 494 F.2d 528, 533-34 (3d Cir. 1974). Penn Central directors restructured the company into a holding company and a wholly-owned railroad subsidiary, hoping that the holding company could issue stock for diversification ventures without Interstate Commerce Commission approval. The court held the shareholders, by voting to exchange railroad for holding-company stock, had given up no substantial economic interest. Id. at 539.

The shareholders' loss of the right to seek court appraisal of their railroad stock for cash sale was not caused by the exchange vote, but resulted from an earlier vote to operate under Pennsylvania business law, which gave no appraisal rights. Id. at 536. Loss of some voice in bankruptcy proceedings by the exchange vote was not significant because, at the time, bankruptcy "was a highly remote and speculative contingency." Id. at 537. The diversification purpose did not make the vote "a choice affecting the essential nature of the stock interest held by the plaintiffs." Id. at 538. A change in corporate charter is usually sufficient to allow diversification. The share exchange was necessary here purely because of special regulations on railroads. Id. at 538-39. See McCloskey v. McCloskey, 450 F. Supp. 991 (E.D.Pa. 1978), in which common stock in a family-owned corporation was exchanged for certificates in a voting trust giving one person day-to-day authority. The court held that the exchange was an internal management decision, not a sale, because the stockholder's economic interests were not terminated or transformed. She lost only the right to vote. Id. at 995; Tcherepnin v. Franz, 461 F.2d 544, 551 (7th Cir.), cert. denied, 409 U.S. 1038 (1972), in which depositors' exchanged accounts with limited withdrawal privileges for accounts with no limits. The court held that the exchange was not a sale because depositors in the financially troubled bank did not worsen their position by the exchange.

[101] In re Penn Central Securities Litigation, 494 F.2d 528, 533-34 (3d Cir. 1974). Holding company was not a "substantially different company with substantially different assets and prospects." Both companies were staffed and owned by the raliroad. Id. at 533-34.

See also Schnurbach v. Fuqua, 70 F.R.D. 424 (S.D.Ga. 1975). Roundlot shareholders were required to exchange each lot of 100 10¢ shares for one $10 share in a recapitalization. Odd-lot owners were required to surrender shares for cash. The changes produced by recapitalization (an increase in equity, change in par value of stock, reduction in number of shares and shareholders) were held not sufficient to create a new corporate entity "analogous to a corporation surviving a merger." Id. at 439.

A sale does not occur unless the corporation gives up control of the shares.[102]

¶ 53 The issuing of stock by a corporation is a sale protected by Section 10b and Rule 10b-5.[103] A stockholder may bring a derivative action to challenge the corporation's issuance of stock for inadequate consideration if he can show the corporation, as an entity separate from its board, has been defrauded. This occurs when a minority of the corporation's

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[102] International Controls Corp. v. Vesco, 490 F.2d 1334 (2d Cir.), cert. denied, 417 U.S. 932 (1974). Held: Transfer by Interational of its stock in Fairfield Aviation Corp., a wholly-owned subsidiary, to Fairfield General Corp., a new wholly-owned subsidiary, in exchange for additional Fairfield General stock, was not a sale because International, as sole owner of Fairfield General, retained control over Fairfield Aviation. Id. at 1343. A "sale" and loss of control occurred later when International passed its Fairfield General stock to International shareholders as a dividend. Id. at 1345. The court said no consideration from the ICC shareholders was required, in light of the view in Superintendent of Ins. v. Bankers Life Ins. Co., 404 U.S. 6, 12 (1971) that § 10b must be read flexibly to give the protection intended by Congress. Id. at 1345. The court distinguished Shaw v. Dreyfus, 172 F.2d 140 (2d Cir.), cert. denied, 337 U.S. 907 (1949), a case under § 16b of the 1934 Act, 15 U.S.C.A. 78p(b) (1971), in which shareholders' receipt of stock rights, analogous to stock dividends, was not a purchase because stockholders gave no consideration in return. Vesco at 1344.

[103] Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961), in which a stock transfer agent, relying on phony corporate documents, issued 700,000 shares of Consolidated American Industries, Inc. stock. The stock was exchanged for two contracts held by Mountain States Securities Corp. for purchase of insurance company stock and oil development rights. Mid-Atlantic was a sham corporation and the contracts were nearly worthless. The court said the transaction was a sale because Consolidated exchanged shares, worth $700,000 if sold on the open market, for property rights that Mountain States purportedly valued.

directors are deceived,[104] or when stockholders are deceived, though all directors knew of the information withheld from stockholders.[105] When future investors and creditors are misled, the corporation is deceived because it incurs liabilities and risks it would not otherwise assume.[106]

¶ 54 A breach of fiduciary duty is not sufficient grounds for a shareholder derivative suit.[107] The shareholder must

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[104] Ruckle v. Roto-American Corp., 339 F.2d 24 (2d Cir. 1964) (one director alleged that in voting to issue stock sold to company president, he was misled when six other directors, who were also corporate officers, withheld latest financial statement and gave stock arbitrary value.)

[105] Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). Shareholder in Banff Oil Ltd. complained that Banff board's sale of 500,000 shares to controlling shareholder Acquittance Co. at $1.35/share was fraud. Sale financed joint exploration, which struck oil two months later. Shareholder alleged that Banff directors and Acquittance kept knowledge of the value of the land to be explored from Banff stockholders to keep the sale price low for Acquittance. If this allegation was proved, the court said, Acquittance and the Banff directors would be guilty of deceiving the minority stockholders. Id. at 219. See also Pappas v. Moss, 393 F.2d 865 (3d Cir. 1968) (board resolution authorizing issuance and sale of stock to directors and containing two factual misstatements held to deceive independent minority stockholders standing in place of corporate entity.)

See also Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1971) (see rehearing en banc at 736) (two controlling directors sold large block of shares to Martin Marietta, Inc., then called in convertible debentures for $6.6 million without disclosing Martin Marietta's plan to gain control by eradicating potential ownership of stock by debenture holders.)

[106] Bailes v. Colonial Press, Inc., 444 F.2d 1241, 1245 (5th Cir. 1971).

[107] Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 474 (1977).

allege deception or non-disclosure of material information.[108] An allegation that the price is unfair is insufficient.[109]

C. REQUIREMENTS

1. ACTUAL PURCHASER/SELLER RULE

¶ 55 The private right of action under Section 10b and Rule 10b-5 is limited to actual purchasers or sellers of securities.[110] Without such a limit, the actual damages recover-

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[108] Id. The court held that where state law does not require shareholders' consent for a merger, the directors do not violate § 10b and Rule 10b-5 by notifying shareholders after the merger, although directors breached fiduciary duty to shareholders. Because the stockholders, when notified pursuant to law, got all the information necessary for their decision on accepting the price offered for their shares, no omission or misstatement occurred. Id.

[109] Popkin v. Bishop, 464 F.2d 714 (2d Cir. 1972) (shareholder derivative action on ground that share exchange rates in merger were unfair to minority stockholders, but no complaint that proxy statements prior to merger vote were false or misleading).

Cf. Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977), cert. denied, 434 U.S. 1069 (1978) in which a stockholder of Universal Gas and Oil Co., Inc. (UGO) charged, in a derivative suit, that § 10b was violated by the unfairness and breach of fiduciary duty of a deal in which 4.2 million UGO shares were transferred to parent company in exchange for all the parent's assets and liabilities, including a $7 million debt to UGO and excluding the UGO stock. The court found deception as well as breach of fiduciary duty. The parent company had not fulfilled its duty to disclose the "looting of a subsidiary with securities outstanding in the hands of the public . . . ." Id. at 221.

[110] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). The Blue Chip trading stamp company was required by the terms of an antitrust consent decree to offer retailers, including Manor, an opportunity to buy Blue Chip stock. Manor spurned the offer because of a gloomy prospectus. When Blue Chip shares were sold publicly a year later at a higher price, none of the discouraging informa-

able in a private suit[111] would be speculative and difficult to prove, the Supreme Court said in Blue Chip Stamps v. Manor Drug Stores.[112] Purchaser status can be achieved without physical possession of the securities.[113] Holders of "puts," "calls," options, and other contractual rights are recognized

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tion appeared in the prospectus. Manor alleged the first prospectus was deliberately falsified to preserve shares for public sale at a better price. Id. at 725-27. The Court denied standing to Manor because it had neither bought nor sold stock. Id. at 754-55. The Court upheld the rule enunciated by the 2d Circuit 23 years previously in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952) and adopted by virtually all lower courts which subsequently faced the issue. Blue Chip at 731-32. Rejection of two attempts to expand 10b to attempts to purchase or sell and limitation of express civil remedies in the 1934 act to actual purchasers and sellers showed Congressional intent to confine private suits for damages to actual buyers and sellers. Id. at 732.

If fraud discouraging purchase does not give a private right of action under § 106, then, by analogy, no § 10b right of action accrues when fraud induces retention of securities. Ingenito v. Bermec Corp., 441 F. Supp. 525, 545 (S.D.N.Y. 1977); In re Homestake Production Co. Sec. Litigation, 76 F.R.D. 337, 374 (N.D. Okla. 1975). But see Bolger v. Laventhal, Krekstein, Horwath & Horwath, 381 F. Supp. 260, 266 (S.D.N.Y. 1974), in which a specific inducement to plaintiffs to retain shares is sufficient, citing Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973) (discussed under "forced seller" exception, infra, ¶ 56) and Stockwell v. Reynolds and Co., 252 F. Supp. 215 (S.D.N.Y. 1965).

[111] 15 U.S.C. 78bb(a) (1976).

[112] 421 U.S. 723, 734-35 (1975). The limit does not apply to sections of the securities laws that do not express limit remedies to purchasers or sellers. Id. at 733-34.

[113] Smallwood v. Pearl Brewing Co., 489 F.2d 579, 592 (5th Cir.), cert. denied, 419 U.S. 873 (1974) in which merging company exchanged shares held by its stockholders for shares of surviving company, which were then passed to merging company shareholders.

as purchasers or sellers.[114]

¶ 56 There are several ways to circumvent the actual seller/purchaser rule. Shareholders who are induced to retain stock, or those injured by insider trading in violation of Rule 10b-5 can bring a shareholder's derivative suit if the corporation itself bought or sold securities.[115] A non-purchaser may be able to sue under Section 17a, which prohibits fraud "in the offer or sale"[116] of securities.[117] In merger situations, the "forced seller" doctrine gives a minority shareholder standing without his selling stock if his only alternatives are to sell at a majority-dictated price or retain stock in a non-existent corporation.[118]

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[114] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 751 (1975). But court held that antitrust decree requiring trading stamp company to offer its shares to retailer customers did not give the retailer a contractual right to purchase. Id. at 752. Nor is a contractual right found in an agreement giving shareholders first refusal when other shareholders sell their stock. Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 192-93 (3d Cir. 1976). An oral contract is sufficient to give seller/purchaser status. Desser v. Ashton, 408 F. Supp. 1174, 1175 (S.D.N.Y. 1975), aff'd mem., 573 F.2d 1289 (1977). The statutory definition of "security" includes the "right to subscribe to or purchase . . . ." a security. 15 U.S.C. § 78c(a)(10) (1976).

[115] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38 (1975).

[116] 15 U.S.C. § 77q(a) (1976).

[117] Reid v. Madison, 438 F. Supp. 332, 335 (E.D. Va. 1977).

[118] Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir. 1967), cert. denied, 389 U.S. 970 (1962). Vine, a minority stockholder whose consent was not required for a short-form merger, alleged fraud in the sale of the majority stock to

2. "IN CONNECTION WITH"

¶ 57 The relationship between the fraud and the securities transaction can be more indirect under Section 10b and Rule

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the surviving company at $15 per share. Although Vine had not accepted the dictated price of $3.29 per share for minority shareholders, the court deemed him a seller because his only choice was to exchange shares for cash, either at the dictated or court-appraised price, or retain stock in a non-existent company. Id. at 634. In Vine, sale was legally compelled by the short-form merger statute. Id. at 633-34. In Travis v. Anthes Imperial Ltd., 473 F.2d 515, 522-23 (8th Cir. 1973), forced sale was found when compelled by practicality. Molson Industries Ltd. bought up Canadian-owned stock in Anthes. Travis, who owned 80% of American-held shares in Anthes, was told an offer would be made later to Americans. Molson, holding 90% of Anthes' shares, merged it into Molson, then said Travis had 24 hours to turn in his stock for either cash or a combination of Molson's stock and cash. The court held this offer to be a forced sale, bcause if Travis did not accept, he had no market for his stock.

Cf. Bryan v. Brock and Blevius Co., 343 F. Supp. 1062 (N.D. Ga. 1972), aff'd, 490 F.2d 563 (5th Cir. 1974) (forced sale found under threat of merger used to force minority shareholder to accept majority's cash offer for stock. If he accepted, no merger would occur; if he refused, company would be merged into sham company to force minority stockholder into dissenter's remedy of court appraisal.)

The furthest reach of the forced-seller doctrine appears in Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). Crane and American Standard, Inc., both manufacturers of plumbing fixtures, battled for control of Air Brake. Crane, loser in a stockholder vote on control, alleged price manipulation by American Standard to defeat Crane's tender offer. The court held Crane to be a forced seller because under anti-trust law, American Standard could now force Crane to divest itself of Air Brake stock. Id. at 794, 798. Crane qualified as a forced seller even though it could sell stock in an existing, rather than merged, corporation in the open market, rather than at a dictated price. Crane is not invalidated by the holding of Piper v. Chris Craft Industries, Inc., 430 U.S. 1, 42 (1977), that a defeated tender-offerer does not have standing to raise a fraud claim under § 14e of the Securities Exchange Act of 1934, as added by § 3 of the Williams Act of 1968, 82 Stat. 457, 15 U.S.C. § 78n(e) (1976) or under SEC Rule 10b, 17 C.F.R. § 240.10b-6 (1978). Carne Co. had standing as a forced seller, not as a defeated tender-offerer.

10b-5 than under Section 17a. Section 17a prohibits fraud "in" the offer or sale of securities,[119] while Section 10b prohibits fraud "in connection with"[120] sale or purchase.[121]

¶ 58 Fraud "touching [the] sale of securities" is sufficient to create the necessary "connection," the Supreme Court held in Superintendent of Insurance v. Bankers Life and Casualty Co.[122] Under this broad definition, the receiver of an insurance company was allowed to sue for securities fraud although the alleged deception was not an integral part of the actual sale of the securities.[123] Although the Banker's

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[119] 15 U.S.C. § 77q(a) (1976).

[120] 15 U.S.C. § 78j(b) (1976).

[121] As a result of the difference in language, "the plaintiff will have to demonstrate at trial a more direct involvement in the offer or sale of securities to make out a § 17(a) violation than is necessary to establish a violation of § 10(b) and Rule 10b-5. SEC v. Penn Central Co., 450 F. Supp. 908, 916 (E.D. Pa. 1978).

[122] 404 U.S. 6, 12-13 (1971).

[123] The Manhattan Casualty Co. voted to sell its treasury bonds on the assurance by company officers that the proceeds would be used to purchase a certificate of deposit. Instead, the proceeds were misappropriated to cover a $5 million check written earlier to purchase the company. Id. at 7-8. See also Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1971).

A Second Circuit panel held that the failure to disclose a major stockholder's plan to take control of the company was not a fraud in connection with the company's repurchase of convertible debentures, although the repurchase gave the major stockholder control by eliminating the debenture-holders' claims on 220,000 shares of unissued stock. The panel held the redemption was carried out in accordance with the terms of the debenture and was untouched by the non-disclosure. Id. at 732. The Second Circuit, en banc, reversed, holding that the non-disclosure touched the repurchase of the debentures. Id. at 737.

Life standard is broad, it does not include mere corporate mismanagement[124] or a breach of fiduciary duty.[125] For a private claim to be brought under Section 10b and Rule 10b-5 for such activities, deception of stockholders or investors must be shown.[126] Banker's Life does not erase the requirement that the plaintiff be an actual purchaser or seller[127] of securities.[128]

¶ 59 The "in connection with" requirement is a causation test, requiring some showing of a link between the fraud and the plaintiff. Privity between buyer and seller, or between

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[124] Superintendent of Ins. v. Bankers Life and Casualty Co., 404 U.S. 6, 12 (1971).

[125] Santa Fe Industries v. Green, 430 U.S. 462, 473-74 (1977). In Superintendent of Ins. v. Bankers Life and Casualty Co., 404 U.S. 6 (1971), the Court had, in dicta, said, "The Congress made clear that 'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investors' ignorance and the like." Id. at 11-12, quoting from H.R. Rep. No. 1383, 73rd Cong., 2d Sess., 6 (1934). The Court in Santa Fe, 430 U.S. 462, snipped the web at the point where no deception occurs, saying that to allow a private suit for breach of fiduciary duty was not necessary to carry out the purpose of the securities laws, which is to promote full disclosure. Id. at 477.

[126] Santa Fe Industries v. Green, 430 U.S. 462, 473-74 (1977).

[127] Lutgert v. Vanderbilt Bank, 508 F.2d 1035, 1037-38 (5th Cir. 1975) (plaintiff does not get standing by showing he was touched by the purchase or sale of securities. He must be an actual seller or purchaser of security touched by fraud.)

[128] Golding v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 385 F. Supp. 1182, 1184 (S.D.N.Y. 1974) (broker's promise to make good client's losses in commodities by giving her options to purchase stock at discount does not fall under § 10b because the fraud touched commodities).

plaintiff plaintiff and defendant, is not required to satisfy the "connection" requirement.[129] Courts have expressed the connection requirement in two different ways.

¶ 60 The Second Circuit tests connection by asking "whether the plaintiff would have been influenced to act differently than he did . . ." had the defendant not misrepresented or failed to disclose a fact.[130] Actual reliance by the plaintiff on the misrepresentation or absence of a non-disclosed fact is not required.[131]

¶ 61 Other courts prefer a proximate cause formulation of the "connection" test.[132] The "connection" is established when defendant's conduct is the proximate cause of the misrepresentation to the plaintiff and the defendant could reasonably foresee this result, even though the result oc-

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[129] Shapiro v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 495 F.2d 228, 239 (2d Cir. 1974). See also, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969), in which insiders were found to have perpetrated fraud on investors by a misleading press release, even though insiders did not sell to investors. The demise of the privity requirement was extended to private actions under § 10b and Rule 10b-5 in Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968), cert. denied, 395 U.S. 903 (1969).

[130] Shapiro v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 495 F.2d 228, 239 (2d Cir. 1974).

[131] Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972).

[132] SEC v. Penn Central Co., 450 F. Supp. 908, 913 (E.D. Pa. 1978)

curred indirectly.[133] Misrepresentations that influence a stockholder to retain his stock are not sufficient to meet the causation requirement unless they are the "but for" cause of his retention or were made specifically to induce him not to sell.[134] The causal connection is not satisfied when a number of steps intervene between the fraud and the sale.[135]

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[133] Id. at 912. In this case, two corporate employees admitted that they misrepresented profits of several corporations they managed because their employment agreements with two of the corporations pegged their compensation to reported profit. The profit information reached the public, although the defendants did not directly disseminate it. The court held that the plaintiff had sufficiently alleged that the defendants' misrepresentations to the corporations caused misrepresentations to investors in those corporations. Id. at 914.

The causal connection was not satisfied in Tully v. Mott Supermarkets, Inc., 540 F.2d 187 (3d Cir. 1976). Purchasers of Class A stock sued Class C directors, saying the Class C plan to sell other Class A stock to all shareholders violated an agreement giving Class A shareholders right of first refusal on such sales. The court found no causal connection between the plaintiff's original stock purchase and plaintiff's alleged injury, which stemmed from the Class C directors' refusal to sell stock to plaintiffs under the agreement. Id. at 194.

[134] In re Penn Central Securities Litigation, 62 F.R.D. 181, 186 (E.D. Pa. 1974); cf. Travis v. Anthes Imperial Ltd., 473 F.2d 515, 521-22 (8th Cir. 1973) (misrepresentation directed specifically at stockholder rather than at general public that induces stockholder to retain stock is a misrepresentation "in connection with" sale, even though sale does not immediately follow).

[135] Ketchum v. Green, 557 F.2d 1022, 1028 (3d Cir.), cert. denied, 434 U.S. 940 (1977). The former president and chairman of a corporation alleged they were fraudulently induced to vote for defendants as directors, enabling defendants to retain their majority on the board. The alleged

3. MATERIALITY - INSIDER TRADING

¶ 62 To establish securities fraud, the fact that is misstatedor omitted must be material.[136] Much of the law defining this requirement has originated in cases of "insider trading" — purchases or sales by persons with access to information that "is not available to those with whom they deal or to traders generally."[137]

¶ 63 Insider trading differs from other forms of securities fraud because it involves a complete non-disclosure, rather than a false statement or an omission that makes a statement misleading.[138] The prohibition against insider trading im-

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fraud was the defendants' failure to disclose their intention to fire the chairman and president. Once the two officers were ousted by defendants' bloc on the board, a stock retirement agreement required the ousted officers to sell their stock back to the corporation. Id. at 1023-24. The court held that deception "occurred, if at all, in connection with the struggle for control of the corporation," but did not cause the stock sale. Id. at 1028. The stock retirement agreement, activated by the ouster, was "an independent and intervening cause" of the securities sale. Id. at 1029.

See also Ingenito v. Bermec Corp., 376 F. Supp. 1154, 1177 (S.D.N.Y. 1974). The court held that "lulling" and fraudulent concealment of facts, which induced plaintiffs to retain their shares in a cattle-raising business, did not cause the bankruptcy that forced them to sell their shares. Bankruptcy resulted because the fraud failed to convince other shareholders to retain their holdings.

[136] 3 L. Loss, Securities Regulation, 1431 (2d ed. 1961); 6 L. Loss, Securities Regulation, 3543-3547 (2d ed. Supp. 1969).

[137] D. Ratner, Securities Regulation in a Nutshell, ¶ 19, at 120 (1978).

[138] In List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.) cert. denied, 382 U.S. 811 (1965). The Second Circuit held that "total non-disclosure," in which no information bear-

poses a duty on the insider to disclose his information or refrain from trading until the information becomes public.[139] The policy behind the rule is to equalize the positions of insider's and ordinary investor's access to knowledge and to prevent unfair advantage.[140] The information that must be disclosedincludes benefits that the insider receives from the stock transactions[141] as well as knowledge of facts af-

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ing on a stock's value was disclosed, could violate § 10b and Rule 10b-5. To exempt such cases from the rule would remove the protection of the securities' law from impersonal transactions and frustrate the Congressional purpose behind the laws. Id. at 461-62.

Non-disclosure presumably does not violate clause (2) of Rule 10b-5, 17 C.F.R. 240.10b-5 (1978), which requires a statement. In Cady, Roberts, and Co., 40 S.E.C. 907 (1961), the Securities and Exchange Commission said the brokers' sell orders based on inside information about a company's dividend violated clause (3)as a practice operating as a fraud or deceit upon purchasers. Subsequent decisions have not clarified whether insider trading is covered by clauses (1) and (2) of the rule. D. Ratner, Securities Regulation in a Nutshell, ¶ 19, at 122-23 (1978).

[139] The duty originated as the basis for an S.E.C. enforcement action in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969), and was held to be the basis of private actions under § 10b in Shapiro v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 495 F.2d 228, 236 (2d Cir. 1974).

The duty extends "not only to the purchasers of the actual shares sold by defendants . . . but to all persons who during the same period purchased Douglas stock in the open market without knowledge of the material inside information . . . ." Id. at 237.

[140] Shapiro v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 495 F.2d 228, 236 (2d Cir. 1974); List v. Fashio Park, Inc., 340 F.2d 457, 461 (2d Cir.), cert. denied, 382 U.S. 811 (1965).

[141] Affiliated Ute Citizens v. United States, 406 U.S. 128, 145-48 (1972) (bank that sold stock in corporation managing Indians' mineral and oil assets did not disclose to Indian sellers that bank received commission on sales or that it solicited standing offers for stock and thus benefitted from deposits made by potential purchasers).

fecting the value of the stock[142] and the company's future earnings and prospects.[143]

¶ 64 A person qualifies as an insider if he has enough information from which to infer that the stock is more or less valuable than the public thinks, even if he does not have direct, specific knowledge.[144] The prohibition on insider trading applies to brokers[145] as well as corporate officers and directors.[146] Non-trading insiders are barred from pass-

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[142] Speed v. Transamerica Corp., 99 F. Supp. 808, 828-29, (D. Del. 1951), aff'd, 235 F.2d 369 (3d Cir. 1956).

[143] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969).

[144] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 843-47 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). Test drilling uncovered evidence of remarkably copper-rich land in Canada. The information was kept confidential among a handful of corporate officers and employees while more land was purchased in the area over the next six months. Another employee, Huntington, did not know the details of the test drilling, but participated in the land acquisition by writing a letter making a substantial offer for lands nearby. That same day, he purchased a "call" on 100 shares of TGS stock, though he had never before purchased a call. A month earlier, he had purchased 50 shares. The court held, "These purchases . . . coupled with his readily inferable and probably reliable understanding of the highly favorable nature . . ." of the test drilling showed Huntington "possessed material inside information." Id. at 853.

[145] List v. Fashion Park, Inc., 340 F.2d 457, 461 (2d Cir.), cert. denied, 382 U.S. 811 (1965); Cady, Roberts and Co., 40 SEC 907, 912 (1961). In Cady, Roberts, a partner in a broker-dealer firm received a telephone tip from a firm associate, who was also a Curtiss-Wright Corp. director, that Curtiss had voted to cut its dividend. Acting on this information, which he knew was not public, he ordered the sale of Curtiss-Wright stock from discretionary accounts that he managed. Id. at 907-10.

[146] See Speed v. Transamerica Corp., 99 F. Supp. 808, 828-29 (D. Del. 1951); D. Ratner, Securities Regulation in a Nutshell, ¶ 19, at 120-21 (1978).

ing their information to others,[147] and the "tippees" who receive inside information are also barred from trading on it without disclosure.[148]

¶ 65 Once insiders disclose their information to the public, they must wait to buy or sell until the public can be reasonably expected to have received the information.[149]

¶ 66 To raise a claim of insider trading, a plaintiff must show that the undisclosed information was "material." He need not show that he relied on the information or the absence of it.[150]

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[147] Shapiro v. Merrill Lynch, Pierce, Fenner, & Smith, 495 F.2d 228, 237 (2d Cir. 1974); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 852-53 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969).

[148] Shapiro v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 495 F.2d 228, 237-38 (2d Cir. 1974).

[149] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). Texas Gulf Sulphur Co. issued a press release about its favorable test results at 10 a.m., April 16, 1964. One insider, Crawford, telephoned his broker at midnight on April 15 and at 8:30 a.m., April 16 with "buy" orders. Another insider, Coates, called his broker at 10:20 a.m. on April 16, just after the press release had been issued. The Second Circuit held that both acted in violation of Rule 10b-5. "[A]t the minimum Coates should have waited until the news could reasonably have been expected to appear over the media of widest circulation, the Dow Jones broad tape . . . ." Id. An abbreviated announcement earlier that day by Canada's mining minister and a report in a mining journal which reached New York City on April 16 through sporadic reports to investment firms were not the equivalent of a full public announcemnet freeing insiders to buy. Id. at 853.

[150] Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972). The withholding of a material fact in the face of an obligation to disclose is sufficient to establish causation in fact, without a showing of actual reliance. Id. at 154.

¶ 67 A non-disclosure is material if there is a substantial likelihood that an investor would attach importance to the fact in making his decision to buy or sell. The basic test of materiality, as stated in List v. Fashion Park, Inc.,[151] is "whether 'a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction . . . .'"[152] In TSC Industries, Inc. v. Northway, Inc.,[153] a case of alleged fraud by omission under Rule 14a-9[154] prohibiting false or misleading statements in proxy solicitations, the Supreme Court set out the following standard of materiality: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[155] The court rejected the Seventh Circuit's formulation of the standard ("all facts which a reasonable shareholder might consider important")[156] as too low and in conflict with the

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[151] 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965).

[152] Id. at 462.

[153] 426 U.S. 438 (1976).

[154] 17 C.F.R. § 240.14a-9 (1978).

[155] 426 U.S. at 449.

[156] 426 U.S. at 445.

List standard.[157] The "might" standard would require disclosure of so many facts that the stockholders would be confused. That result would be the opposite of the Congressional aim of producing full disclosure of information necessary for an informed decision by the stockholder.[158] Because the

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[157] 426 U.S. at 445. The Court noted that the Second and Fifth Circuits rejected the "might consider important" standard and "opted for the conventional tort test of materiality - whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action. [Citations omitted]." Id. This tort formulation was used in List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.), cert. denied, 382 U.S. 811 (1965).

The Court, in TSC Industries, 426 U.S. 438, distinguished language in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), that says: "All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in making the decision." Id. at 153-54 (emphasis added). The Court said the Ute language was not "a precise definition of materiality, but only . . . a 'sense' of the notion," used in ruling that reliance need not be proved. "The quoted language did not purport to do more." TSC Industries, 426 U.S. at 447, n. 9.

[158] 426 U.S. at 448-49.

In TSC Industries, National Industries purchased 34 per cent of TSC voting stock, placed five directors on the board, put its president in as TSC board chairman and its executive vice president in as chairman of TSC's executive committee.. With the National nominees abstaining, TSC's board voted to sell all TSC assets to National by an exchange of stock; they sought stockholder approval by proxy solicitation. The solicitation did not state the positions National's top officers held on TSC's board, nor did it disclose that reports to the SEC stated that National might be deemed to be TSC's "parent." The Supreme Court held these omissions were not material under the "substantial likelihood" test. The proxy statement contained other information showing National's role in TSC (the number of National nominees on TSC's board and the percentage of stock owned by National). "These disclosures clearly revealed the nature of National's relationship with TSC and alerted the reasonable shareholder to the fact that National exercised a degree of influence over TSC." Id. at 452. The omission of the "parent" statement was not material because National's "parent" status was an issue of fact and its influence was indicated by other information. Id. at 453. Had the proxy statement contained no other information on National's role, omission of the "parent statement" would have been material. Id. at 453, n. 15.

language and purpose of Rule 14a-9 and Rule 10b-5 are similar, the "substantial likelihood" test of materiality would apply in securities fraud cases as well.

¶ 68 A plaintiff can satisfy the "substantial likelihood" standard without proving he would have decided otherwise had he known the omitted fact.[159]

¶ 69 Facts considered important to an investor and, therefore, material "include not only information disclosing the earnings and distributions of a company, but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities."[160] Mere operating details are not material.[161] To be held material, plans for the company's future must be firm, not merely matters under discussion at the time of the complained of non-disclosure.[162]

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[159] 426 U.S. at 449.

[160] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969).

[161] Parsons v. Hornblower & Weeks-Hemphill, Noyes, 447 F. Supp. 482 (M.D.N.C. 1977), aff'd, 571 F.2d 203 (4th Cir. 1978) (need for cord between television and color video tape camera developed for home use is operating detail "not conducive to informed decision-making." Id. at 491).

[162] Harkavy v. Apparel Ind., Inc., 571 F.2d 737 (2d Cir. 1978). Harkavy sold Apparel shares back to the company in March, 1969, and January, 1970. Between the two sales, a trade paper published an article saying Apparel was considering a new line. Four months after Harkavy's second sale, Apparel hired two men to develop a new line, which was cut in the summer of 1970. Court held there had been no non-disclosure of material facts concerning the new line to Harkavy because the plans became firm several months after his final sale; he was informed by the trade paper, and the possibility that a new line would reverse Apparel's financial prospects was uncertain. Id. at 741-42. See also List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir. 1965), cert. denied, 382 U.S. 811 (1965), in which investor who sold his Fashion Park

4. SCIENTER OR STATE OF MIND

¶ 70 As the jurisprudence of the securities laws evolved, the state-of-mind requirement was relaxed to a negligence standard, less strict than the intent to defraud required under common-law fraud.[163] A tightening of the requirement occurred in 1976, when the Supreme Court, in Ernst & Ernst v. Hochfelder,[164] ruled that negligence was not sufficient to establish the required state of mind in a private action under Section 10b and Rule 10b-5.[165] Negligence is still sufficient, however, in SEC enforcment actions for injunc-

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shares a month prior to Fashion Park's merger with another firm sued for fraud through non-disclosure of the impending sale. Court held that at time investor sold his stock, prospect of sale was too remote to influence a reasonable investor. All Fashion Park knew at that time was the name of the firm interested in buying. Id. at 464.

[163] Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 102 (10th Cir.), cert. denied, 404 U.S. 1004 (1971), 405 U.S. 918 (1972). See also 3, L. Loss, Securities Regulation 1440, 6 Securities Regulation 3552-53 (1961).

[164] 425 U.S. 185 (1976).

[165] 425 U.S. at 193.

Ernst & Ernst was the accounting firm for a brokerage firm whose president induced investors to buy into escrow accounts by sending checks made out to and addressed to the president, not the firm. When he was away, no one else was allowed to open mail addressed to him. Hochfelder sued Ernst & Ernst under § 10b and Rule 10b-5 alleging negligence, not fraud. Had the accounting firm investigated properly, it would have discovered the mail rule, mentioned it in its annual report, and thus the SEC would have been alerted to the president's fraud, Hochfelder contended. Id. at 188-93.

tions under Section 10b and 17a.[166]

¶ 71 The state-of-mind requirement can, of course, be satisfied by evidence that the defendant knew of the misrepresentation or omission. Knowledge can be shown by attendance and participation at board meetings, or by preparation of financial reports containing misrepresentations.[167] Participation by a director in dissemination of false information will also establish knowledge.[168]

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[166] SEC v. Geotek, 426 F. Supp. 715, 726 (N.D. Cal. 1976), aff'd sub nom.; SEC v. Arthur Young and Co., 590 F.2d 785 (9th Cir. 1979); SEC v. Capital Gains Research Bureau, 375 U.S. 180, 192-93 (1963); SEC v. Coven, 581 F.2d 1020, 1026-27 (2d Cir. 1978), cert. denied, 99 S. Ct. 1432 (1979).

If a private right of action exists under § 17a as well as under § 10b, scienter would be required in such private actions. Malik v. Universal Resources Corp., 425 F. Supp. 350, 363 (S.D. Cal. 1976). Otherwise, the Hochfelder scienter requirement could be circumvented by bringing private suits under § 17a. Id.

[167] Malik v. Universal Resources Corp., 425 F. Supp. 350, 364-65 (S.D. Cal. 1976). Three plaintiffs gave money for stock purchases to Universal Resources before UR received state permission to issue stock. In its application to the state, the money was listed as loans in company financial reports and the names of the three investors were not included as eligible investors. These facts were held to establish the scienter of Block, UR's secretary-treasurer. He participated in board meetings, read and submitted the financial reports and, as secretary-treasurer, must have characterized the stock purchase money as a loan to the accountants who prepared the report. Id. at 364-65.

[168] SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 862 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). But a director's failing to insure that all adverse material is disclosed is not equivalent to participation in dissemination or concealment. Lonza v. Drexel Co., 479 F.2d 1277, 1301-1302 (2d Cir. 1973). See also McLean v. Alexander, 449 F. Supp. 1251 (D. Del. 1978). The court held that inactive stockholders have no duty to ascertain the true financial picture of the company and thus cannot be accused of knowingly or recklessly misleading a purchaser of the company. Id. p. 1257. However, majority stockholders were found to have knowingly misrepresented current sales and facts concerning the distribution contract for a laser pipe-laying device. Id. at 1256-1258.

¶ 72 Although the court in Ernst & Ernst explicitly did not decide whether reckless conduct would suffice to establish scienter in a civil suit,[169] a number of lower courts have so decided since the Ernst & Ernst decision.[170] Recklessness, narrowly defined to distinguish it from negligence, is:

> [A] highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.[171]

¶ 73 Recklessness has been found when:

1) a company director, at a merger negotiation meeting, ratifies a prediction of healthy earnings by his company for the next two years, even though he is aware of information

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[169] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

[170] Nelson v. Serwold, 576 F.2d 1332, 1337 (9th Cir.), cert. denied, 99 S. Ct. 464 (1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44-47 (2d Cir.), cert. denied, 99 S. Ct. 642 (1978); Sanders v. John Nuveen & Co., 554 F.2d 790, 792-793 (7th Cir. 1977) (en banc.).

[171] Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977) This definition was adopted as the court reconsidered a case in the light of the Hochfelder decision. The court found no recklessness in underwriter Nuveen's mistaken but honest belief that financial statements prepared by CPA's accurately pictured the financial condition of a company that defaulted soon after the Nuveen firm underwrote an issue of the company's commercial paper. Id. at 792-793.

that makes those predictions questionable;[172]

2) a representative of a brokerage frim reassures a long-time investor that his investment advisor's decisions were sound, although the broker made no effort to ascertain if his assurances were accurate;[173]

3) an owner of a rural telephone company does not disclose plans underway to modernize and sell the company and predicts no dividends when an attorney, clearing up an estate, inquires about the status of the estate's stock

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[172] Sunstrond Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir.), cert. denied, 434 U.S. 875 (1977). The court held that the danger of ratifying the predictions to Sunstrond, which wanted to absorb the director's company, were objectively obvious to the director. He knew of a report questioning the company's accounting techniques and that the board had discussed the problem at twenty-five meetings in six months. He had questioned increasing cost deferrals appearing in monthly financial reports for the eight preceeding months. He knew that a computer unit, which was expected to be a principal source of revenue to offset these costs, had not been approved by the government, and no government contracts could be won without that approval. Id. 1045-1047.

[173] Rolf v. Blyth Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir.), cert. denied, 99 S. Ct. 642 (1978). The registered representative of the brokerage firm knew the securities purchased by the investment advisor were of low quality. The representative had daily contact with the advisor, during which time he could have supervised the advisor, as he had promised the investor he would. Id. The representative recklessly failed to learn of or failed to disclose the advisor's fraud. Id. at 48. The value of the investor's portfolio dropped from $1.4 million to $446,000 in little more than a year. Id. at 42.

in the company.[174]

¶ 74 Recklessness has not been found when the reliance on an accountant's report is within the bounds of commercial prudence[175] or when the defendant was performing a ministerial[176] or routine, supporting role.[177]

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[174] Nelson v. Serwold, 576 F.2d 1332, 1337 (9th Cir.), cert. denied, 99 S. Ct. 464 (1978). The owner who answered the attorney's inquiries knew of the modernization plans, knew that the book value and earnings ahd steadily increased, knew that the attorney believed the market value of the stock was $5 a share. As a result of the owner's non-disclosures, the estate sold the stock to the company at $6.94/share at a time when its market value was $60 per share. Id. at 1334-1335.

[175] Coleco Indus. Inc. v. Bermon, 567 F.2d 569 (3rd Cir. 1977), cert. denied, 99 S. Ct. 106 (1978). In response to an acquisition offer, a swimming pool company based its statement of per/pool profits on an accountant's report. Later, the report was found to have understated inventories and costs. Id. at 571-573. The pool company's reliance on the accountant was cosemerically prudent, the court held. Id. at 574-575. Any information suggesting the report was erroneous was available both the pool firm and the acquiring company. Id.

[176] Lingenfelter v. Title Ins. Co. of Minn., 442 F. Supp. 981, 994 (D. Neb. 1977). Sunshine Land and Cattle Co. financed an Arizona land development through a subdivision trust. Title Insurance Co. was the trustee and administrator, collecting the payments from purchasers of lots and passing them on to the original owner of the former ranch (the first beneficiary of the trust) and to the developer (the second beneficiary). Sunshine also said "investment packages", consisting of mortgages Sunshine held on lots and debts Sunshine had incurred. When one mortgage was switched for another, the title company performed paperwork. Id. at 987-989. The court held that the title company was not reckless in failing to tell investors of fruadulent misrepresentations by Sunshine's salesman. Id. at 994. The company performed "essentially immaterial acts" for Sunshine and had no basis for knowing about the salesman's activities. The title company was not reckless when it did not warn investors that the SEC was investigating Sunshine and did not hold all incoming funds for investors once it learned of Sunshine's defaults. Id. 994-996.

[177] Felts v. Nat'l Account Sys. Ass'n., 446 S. Supp. 357 (N.D. Miss. 1977). Starco Corp., a fire warehousing business,

D. LEGISLATIVE HISTORY

¶ 75 From R.I.C.O.'s legislative history, it is possible to argue that Congress intended to incorporate the present and future jurisprudence of securities fraud into R.I.C.O., so that R.I.C.O. would reach all fraudulent schemes, in both purchase and sale, proscribed by the securities laws.

¶ 76 The phrase "any offense involving fraud . . . in the sale of securities"[178] does not appear in the original R.I.C.O. bills.[179] During hearings on the bills, the Justice Department urged the committee to define more specifically the state crimes that constituted racketeering activity under § 1961

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owned National Account Systems, which issued worthless promisory notes. An insurance agent who wrote "coverage letters" detailing insurance and bonding for the tire company's warehouses and on National Account Systems' employees did not make a misrepresentation about National Account Systemt in a manner so reckless as to come close to conscious deception. Id. at 360-361. Coverage letters are and the insurance agent did not know of the securities sales. Id. at 358-359. See also Fuls v. Shastina Properties, Inc., 448 F. Supp. 983 (N.D. Cal. 1978). A lender who periodically received financial reports from a developer and inspected the site did not know of or participate in fraudulent representations by the developer's salesman, because the lender had no knowledge or control of the sales techniques. Id. at 989-990.

[178] 15 U.S.C. § 1961(1)(D) (1976).

[179] See § 2048, § 2049, 90th Cong., 1st Sess. (1967); § 30, 91st Cong., 1st Sess. (1969); § 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-6996 (1969); § 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568-9571 (1969).

(1)(A).[180] The committee did so.[181] In adding securities fraud to the list of federal offenses constituting racketeering activity, the committee did not define the offense by reference to statutory sections, although other federal offenses were so defined in the revised version and in the original bills.[182] For the committee to omit any statutory definition of the crime of securities fraud at a time when the committee was under pressure to be more specific about state crimes suggests that the committee, and Congress, wanted all possible manfiestations of securities fraud, including purchases to come under the R.I.C.O. umbrella.[183]

¶ 77 A broad reading of the term is also supported by the statutory phrasing ("any offense involving . . . fraud in

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[180] See S. Rep. No. 617, 91st Cong., 1st Sess. 121-122. The original bill, § 1861, defined "racketeering activity" as "any act involving the danger of violence to life, liberty or property, indictable under State or Federal law and punishable by imprisonment for more than one year." § 1861, 91st Cong., 1st Sess. § 1961(1)(A), 115 Cong. Rec. 9569 (1969). "Racketeering activity" also included acts indictable under specified sections of title 18 of the United States Code. Id. § 1961(1)(B).

[181] Compare § 1861, 91st Cong., 1st Sess. § 1961(1)(A), 115 Cong. Rec. 9569 (1969) with S. 30, 91st Cong., 1st Sess. § 1961(1)(A), S. Rep. No. 617, 91st Cong., 1st Sess. 1-32 (1969).

[182] Compare S. 30, 91st Cong., 1st Sess. § 1961(1)(D), S. Rep. No. 617, 91st Cong., 1st Sess. 1-32 (1969) with Id. § 1961(1)(B)-(C) and S. 1861, 91st Cong. 1st Sess. § 1961(1)(B), 115 Cong. Rec. 9569 (1969).

[183] The legislative history contains several references, 113 Cong. Rec. 17947, 17949, 17998 (1967), to a scheme that came to light in 1967 in which an established brokerage firm lived a man with a criminal background. Soon he was filling orders for large blocks of stock in certain companies. Rumors of future profits, mergers, acquisitions and other favorable developments circulated, driving up the price of

the sale of securities"[134]) and by the statutory command of liberal construction.[135]

IV. APPLICATION OF SECURITIES FRAUD AND R.I.C.O. LAW TO ILLUSTRATIVE CASE

A. SECURITIES FRAUD LAW

¶ 78 The elements of securities fraud are easily seen in the King Resources litigation. The stocks and debentures that were sold to the public[186] and the eight million dollars worth of notes that were purchased by Ohio[187] fall within the statutory definition of securities.[188] Limited partner-

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183 cont.

the stocks. Massive sales followed, leaving the companies in the doldrums. 113 Cong. Rec. 17998 (1967). This example suggests that Congress intended the RICO law to reach fraud in both purchase and sale, because both were necessary to the scheme described.

One witness before the House Judiciary Committee read the RICO bill as including violations of Rule 10b-5, 17 C.F.R. 240 10b-5 (1978), which prohibits fraud in both sale and purchase. Although the witness was concerned only with sales, there cannot be a sale without a purchase. Relating to the Control of Organized Crime in the United States: Hearings on S. 30 and Related Proposals Before the Subcomm. on the Judiciary. 91st Cong., 2d Sess. 401 (1970) (statement of New York Lawyers' Assn.).

184 18 U.S.C. § 1961(1)(D) (1976) (emphasis added).

185 Organized Crime Control Act of 1970, Pub. L. No, 91-452, § 904(a), 84 Stat. 947 (1970).

186 See ¶ 3 supra.

187 See ¶ 12 supra.

188 See ¶ 47 supra; 15 U.S.C. §§ 77(b)(1), 78 c (a)(10) (1976).

ships are held to be securities.[139]

¶ 79 The complaining investors acquired these securities through straightforward sales,[190] involving none of the judicially developed concepts of "sale."[191] The plaintiffs would have no difficulty meeting the "actual seller" requirement.[192]

¶ 80 The connection between the sales and the false and misleading statements of which the investors complain can be established in either of two ways:[193]

1) the investors can show that they would not have bought the securities had they known the truth about KRC's general operations and its transactions with and dependence on I.O.S;[194]

2) they can show that King and the officers of his corporations could foresee that the alleged misrepresentations in the prospectuses of the securities would cause misrepresentations to the investors.[195]

¶ 81 To prove that the facts allegedly misrepresented are material, the plaintiffs would have to show that there was a substantial likelihood that a reasonable investor would

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[189] See ¶ 49 supra.

[190] See ¶¶ 3, 4, 6 supra.

[191] See ¶¶ 51-53 supra.

[192] See ¶ 55 supra.

[193] See ¶¶ 59-61 supra.

[194] See ¶ 60 supra.

[195] See ¶ 61 supra.

attach importance to those facts.[196] Heavy dependence on one customer[197] and information about the companies' general operations[198] are facts affecting the companies' future and thus would be important to an investor.[199]

¶ 82 The state-of-mind requirement can be satisfied by showing that King and the directors of King's companies attended board meeting where the actual facts became known, yet approved the prospectuses and reports containing the false and misleading statements.[200]

¶ 83 Because the King Resources case involves a common, straightforward type of alleged securities fraud, it falls easily within the securities fraud that Congress deemed to be racketeering activity in § 1961 of the R.I.C.O. law.[201] The legislative history of R.I.C.O. supports a broad reading of the term "any offense involving fraud . . . in the sale of securities."[202]

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[196] See ¶ 67 supra.

[197] See ¶¶ 8-9 supra.

[198] See ¶¶ 10, 11 supra.

[199] See ¶ 69 supra.

[200] See ¶¶ 70-74 supra.

[201] 18 U.S.C. § 1961(1)(D) (1976).

[202] Id.; See ¶¶ 79-81 supra. See ¶¶ 75-76 supra.

B. R.I.C.O. LAW

¶ 84 Having established that racketeering occurred in the King Resources securities sales, a plaintiff in a R.I.C.O. damage action would next have to establish the elements of a pattern of racketeering activity.[203] He would have to show that at least two sales took place within the law's time limitations.[204] With thousands of investors, this requirement would be easy to satisfy.

¶ 85 The plaintiff would also have to show that the sales were connected by a common scheme,[205] such as King's conglomerate investment activities or his efforts to purchase I.O.S.[206]

¶ 86 The plaintiff could satisfy the interstate commerce requirements of the R.I.C.O. and securities laws by showing that interstate mailings or phone calls were made in connection with the scheme or the sales.[207] Such communications should be easy to prove because King's operation was based in Colorado,[208] the two general partners in the limited partnerships were incorporated in Delaware,[209] and some in-

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[203] 18 U.S.C. § 1961(5) (1976).

[204] Id.; See ¶¶ 22-30.

[205] See ¶ 31 supra.

[206] See ¶¶ 3-9 supra.

[207] See ¶¶ 32-37 supra.

[208] In re King Resources Sec. Litigation, 342 F. Supp. 1179, 1183 (J.P.M.D.L. 1972).

[209] King v. United States, 545 F.2d 700, 702 (10th Cir. 1976).

vestors were from California,[210] and, no doubt, other states.

¶ 87 Once all elements of a pattern of racketeering were established, the plaintiff would have to show that the King Companies' affairs were conducted through the racketeering activity.[211] Because the corporations issued and sold the stock, the charge would be simple to prove. The plaintiff might also be able to show the racketeering was used to acquire control of another enterprise, namely I.O.S.,[212] and thus establish a R.I.C.O. violation under § 1962(b),[213] which prohibits the use of a pattern of racketeering to acquire or maintain control of an enterprise.

¶ 88 If the plaintiff establishes all elements of a R.I.C.O. offense, he could recover three times the amount of money lost on his stock purchases, as well as his attorney's fees.[214] He might also convince a court to order King to give up his interests in his corporations, dissolve them, or obey restrictions to prevent fraud in future securities sales.[215]

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[210] In re King Resources Co. Sec. Litigation, 352 F. Supp. 974, 974 (J.P.M.D.L. 1972).

[211] 18 U.S.C. § 1962(C) (1976).

[212] See ¶ 10 supra.

[213] 18 U.S.C. § 1962(b) (1976).

[214] See ¶ 16 supra.

[215] Id.

Arson and RICO

by

Matthew Gabel

OUTLINE

Summary

¶ 1 Arson-for-profit -- what is now known as the "easiest crime"[1] -- is also the Nation's fastest-growing crime.[2] It has an enormous economic impact: it causes insurance premiums to rise, it removes buildings from property tax roles, and it can wipe out entire local businesses and industries.

¶ 2 The phenomenal rise in recent years of arson-for-profit -- with increasing involvement of organized crime -- is especially disturbing, in view of the extremely low prosecution rate. For example, it is estimated that only one in 100 accused arsonists is ever convicted.[3] Arson-for-profit has become such a growing problem, that traditional law enforcement methods are clearly no longer effective deterrents. Rather, it is necessary to remove the profit incentives from arson. This is possible through several means: increased application of the civil (triple damages) provisions of RICO,[4] through appropriate state "immunity"

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[1]Senator John Glenn, Opening Statement, Arson-For-Hire: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate [Ninety-Fifth Congress, Second Session (August 23, 1978)], p. 7 [hereinafter "Arson-For-Hire Hearings"].

[2]Id. As of 1978, it was estimated that arson-for-profit caused losses of approximately $2 billion a year, and rising at the rate of 25 percent annually. Senator Sam Nunn, Opening Statement, id., p. 1.

[3]Id., p. 1.

[4]18 U.S.C. §§ 1961-1968 (1976).

legislation regarding the free exchange of information on policyholders, and through the cooperation of the insurance industry as a whole. This paper will examine the factual and statistical background of arson; its profit incentives; the problems normally associated with detection and prosecution in an arson context; the nature of present insurance industry practice (which compounds the problem); the involvement of organized crime in arson-for-profit; and suggested means of combating arson, especially through expanded use of RICO, and through collateral efforts.

I. Arson: The Problem

¶ 3 Roughly speaking, arson is the willful and malicious burning of another's property or one's own property for some improper purpose, such as to defraud an insurer.[5]

¶ 4 Recent statistics for arson are staggering. For example, between 1965 and 1975, the number of building arsons increased 325%.[6] In 1975, the estimated nationwide loss from arson was $1.4 billion[7] -- more than any other offense on the FBI Index of Serious Crime.[8] By 1978, the

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[5]John F. Boudreau, Quon Y. Kwan, William E. Faragher, and Genevieve C. Denault, Arson and Arson Investigation: Survey and Assessment, National Institute of Law Enforcement and Criminal Justice (October 1977) [hereinafter "Survey"], p. xiv.

[6]Id. p. 91.

[7]Id., p. xiv.

[8]The Index is a compilation of seven crimes: murder, rape, aggravated assault, robbery, burglary, larceny, and motor vehicle theft. Id., p. xiv.

figure had jumped to an estimated $2 billion per year, and rising 25 percent annually.[9] In terms of human cost, arson is responsible for about 10,000 injuries and 1,000 deaths (including about 45 firefighters) per year.[10] On a regional basis, authorities estimate that over the past ten years in the South Bronx alone, more than 30,000 buildings have been burned and abandoned, the majority of them the result of arson.[11] The insurance industry estimates that up to 25 percent of every person's home insurance bill goes to pay for arson.[12] Yet current figures indicate that only 9 persons are arrested, 2 convicted, and 0.7 incarcerated per 100 fires classified as incendiary or suspicious.[13]

¶ 5 Arson must be recognized as a special, if not unique, crime, because of its inherent problems: (1) In terms of

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[9] See note 2, supra.

[10] Id.

[11] Senator John Glenn, Opening Statement, Arson-For-Profit: Its Impact on States and Localities: Hearings Before the Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs, United States Senate [Ninety-Fifth Congress, First Session], December 14, 1977 [hereinafter "Arson-For-Profit Hearings"], p. 2.

[12] Arson-For-Hire Hearings, note 1, supra, p. 6.

[13] Survey, note 5, supra, p. 6. Fire reports classify the causes of fires into five basic categories: (1) Accidental (defective equipment or electrical wiring, careless smoking, children playing with matches, other unintentional causes); (2) Natural (lightning, etc.); (3) Incendiary (intentionally-set fires, including fraud fires); (4) Suspicious (suspected of being incendiary); (5) Unknown Cause (no cause established). Id., p. 3.

burden of proof, the cause of a fire must be assumed to be accidental or natural, unless proven otherwise.[14] Hence there must be a full investigation before it is even known whether a crime has occurred. (2) Such investigations, however, are not always possible, due to shortages of trained arson investigators[15] and governmental "gaps" in jurisdiction and coordination between local fire and law enforcement agencies.[16] (3) There are seldom, if any, witnesses to the crime of arson. Also, (4) evidence of arson is often destroyed or damaged by the fire, or by the fighting of the fire. Whatever evidence is available is often circumstantial, making proof beyond a reasonable doubt very difficult in a criminal arson prosecution. Hence the incidence of arson is actually much higher than is reflected by those fires classified as "incendiary." Moreover, some experts believe that at least 50 percent of all fires labeled "unknown cause" are actually intentionally set.[17]

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[14] Id., p. 3.

[15] Id.

[16] See, e.g., R. Revelle, "Combating Arson in Seattle," December 5, 1977, reprinted in Arson-For-Profit Hearings, note 11, supra, p. 38.

[17] See, e.g., R.E. May, "Arson: The Most Neglected Crime on Earth," Police Chief (July 1974), p. 32; J.F. Pedlar and R.E. Tighe, "The Forgotten Crime," 42 International Fire Chief (No. 4) 3-4 (1976).

¶ 6 It is worth noting that incendiary materials such as gasoline or kerosene can be purchased with ease. Matches are given away. The technical aspects of how to "torch," or burn a building are quite simple, and readily available as a matter of public record.[18] No small wonder, then, that a crime so inexpensive to commit, requiring such little skill, presenting such a small risk of detection or prosecution, and offering such great financial returns, would become a popular, fast-growing crime.[19]

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[18]For example, see Arson-For-Hire Hearings, note 1 supra, p. 39, wherein Angelo Monachino, an admitted "torch," describes in great detail the various methods of starting an arson fire.

[19]It is, of course, possible that the recent apparent rise in arson statistics is partially due to increased awareness of the problem among law enforcement officials, i.e. seeing what was heretofore overlooked. In any event, it is clear that arson-for-profit is developing sophisticated criminal "spinoffs": (1) "Mango hunting" whereby buildings are "torched," and fire-resistant fixtures (pipes, tubs, basins) are removed and sold to building contractors. Firemen, in ripping out the walls to get at the fire, actually make it easier for scavengers to strip the building of valuable plumbing. See Testimony of Mario Merola, District Attorney, Bronx, N.Y., Arson-For-Profit Hearings, note 11 supra, p. 172. (2) Insurance proceeds and Federal renovation funds are shared by property owners (who arrange for fires) with so-called repair and renovation companies. (3) Arson has also been used in inner cities to drive out competing supermarkets and retail stores, resulting in poor-quality, high-priced monopoly businesses -- or nothing at all. Senator John Glenn, Opening Statement, Arson-For-Hire Hearings, note 1 supra, p. 8.

¶ 7 There are six generally recognized motives[20] for arson:

1. Revenge/spite/jealousy (jilted lovers, feuding neighbors, disgruntled employees, etc.).

2. Profit/insurance fraud.

3. Vandalism/malicious mischief (especially among juveniles).

4. Crime concealment/diversionary tactics (destroying evidence of burglary, larceny, murder, etc., or as an aid to committing some).

5. Intimidation/extortion/sabotage (used by the mob, striking workers, employers, etc.).

6. Psychiatric afflictions/pyromania/alcoholism (includes those who set a fire in order to extinguish it, thereby becoming a "hero").

Unfortunately, there is very little data as to the relative frequencies of these motives. Several studies suggest, however, that revenge is the predominant motive of adult arsonists.[21] Estimates of fraud as a motive range from 5 to 20 percent.[22]

¶ 8 A significant obstacle in analyzing the problem of arson is the lack of a central source for compiling accurate

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[20] Survey, note 5 supra, pp. 19-21. Cf., Testimony of Mario Merola, Arson-For-Profit Hearings, note 11 supra, p. 172 twelve classifications of arson motives. Most, if not all of these twelve fall within the six basic categories listed in the text accompanying this footnote, except perhaps for social activist groups who burn out a neighborhood to focus governmental attention on ghetto conditions.

[21] Survey, note 5 supra, p. xiv.

[22] Id.

statistics. At present, the type of agencies responsible for arson detection and investigation vary from state to state, and even from city to city. The only source of national arson statistics is the National Fire Prevention Association (NFPA), a private, nonprofit group that relies for its data on an annual survey of 2000 fire departments -- out of a possible 24,000.[23] Under the FBI Index system, arson is currently classified as a "Part II" crime; this places it among the ranks of vagrancy, public intoxication, violating a curfew, and other petty crimes.[24] In order to remedy this discrepancy, there have been moves to add arson to the FBI Index of Serious Crimes.[25] The rationale is that increased awareness among law enforcement officials and the public will result in more effective campaigns against arson.

II. Arson: The Profit Incentives

¶ 9 The relative ease with which any building can be "torched," and the low prosecution rates for arson provide a convenient backdrop to another reason for the popularity of arson, especially among organized crime groups: the

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[23] Id., p. 91.

[24] Senator John Glenn, Opening Statement, Arson-For-Profit Hearings, note 11 supra, p. 3.

[25] See, e.g., Testimony of Dan J. Carpenter, Chairman, Arson Committee, International Association of Fire Chiefs, Arson-For-Profit Hearings, note 11 supra, pp. 272-76.

ability to turn a large profit from a very small investment, all within a relatively short period of time.[26] This is due to several reasons, each of which stem from the insurance industry's valuation and adjustment procedures.

¶ 10 First, the insurance companies often fail to inspect either the buildings they insure, or records of property value assessments or property tax payments.[27] Nor do they consult with the owner as to the building's actual market value.[28] Nor, often, do the companies inspect a building when the owner claims improvements; rather they merely increase the amount of the policy upon the owner's verbal representations.[29] It is thus a simple matter to overinsure a building through a series of sham transactions among several "straw" parties[30] over a short period of time, whereby

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[26]Although no central source of statistics exists regarding mob-run arson rackets, the problem can be illustrated by one such ring, which, operating between 1969 and 1975, pulled down an estimated $500 million. Clifford L. Karchmer, "Arson and the Mob," 2 Firehouse (no. 8) 22 (August 1977) [hereinafter "Karchmer"].

[27]Testimony of Michael Smith, former professional arsonist, Arson-For-Hire Hearings, note 1 supra, p. 35. See also, Testimony of Joseph J. Carter, insurance broker convicted of arson fraud, id., p. 91; Testimony of Ronald Ewert, Illinois Legislative Investigating Commission, id., p. 202.

[28]Michael Smith, note 27 supra, testified that the insurance companies "don't want to talk to you. They insure it for what they tell you, or don't insure it." Arson-For-Hire Hearings, note 1 supra, p. 35.

[29]Testimony of Joseph J. Carter, note 27 supra, p. 105. For example, this would enable an owner to make minor cosmetic repairs to a building; and inflate the policy value well above the real value of the alleged "improvements."

[30]See, e.g., Statement of James E. Jones, Jr. Alliance of American Insurers, reprinted in Arson-For-Profit Hearings, note 11 supra, p. 112.

the policy value is greatly inflated after each transaction.[31] To compound the problem, insurance companies generally insure buildings on the basis of replacement cost, as opposed to fair market value -- the latter of which is frequently quite low in decaying urban areas.[32]

¶ 11 Second, insurance companies, in a competitive market, are concerned with their "image." Even if they suspect arson, they will not ordinarily fight a claim in court, for fear of being labeled a "hard collector."[33] Similarly, rather than spend large sums on investigation and litigation of claims, the companies would always rather settle for an amount less than the face value of the policy.[34] There is,

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[31]Such a scheme enabled one defrauder to purchase a building in Tampa, Florida from the Salvation Army for $30,000, reinsure it for $290,000, and after "torching" it, collect a $200,000 settlement -- a quick profit of $170,000, or 567% of the original investment. Testimony of Joseph J. Carter, note 27 supra, p. 99.

[32]See, e.g., Testimony of Michael Smith, note 27 supra, p. 26; Testimony of Joseph J. Carter, id., p. 99.

[33]Testimony of Gordon Nesvig, Attorney (representing Michael Smith), Arson-For-Profit Hearings, note 11 supra, p. 27.

[34]Testimony of Joseph J. Carter, note 27 supra, p. 94. Mr. Carter, a former insurance adjuster, testified that he would routinely use the knowledge that a particular fire was "suspicious" as leverage in bargaining with the policyholder: by threatening to fight the claim in court (with ensuing delays in collecting any money), an insurance adjuster can settle for substantially below the face value of the policy, thereby saving costs of litigation as well. Id., pp. 108-9. Mr. Carter also testified that an insurance company must pay off a claim unless it can prove that the insured was "directly responsible" or "connected in some way" with the perpetration of the arson. Id., p. 95.

therefore, little or no incentive on the part of the insurance industry to deny fraudulent claims. Moreover, this willingness to pay off quickly, rather than contest a claim, keeps the insurance companies and the arsonists in business -- at the expense of the consumer, who must absorb the cost in the form of higher premiums.

¶ 12 A third factor is the 1974 Federal Privacy Act,[35] and various privacy acts enacted by individual states. In the aggregate, such statutes prohibit a free exchange of information among insurance companies, fire marshals, and law enforcement agencies.[36] Insurance companies are wary of releasing information in their files to law enforcement authorities, since this might subject them to damage suits for violation of the fiduciary relationship between policyholder and the companies, where the information was disclosed to the detriment of the policyholder.[37] Information presently barred to insurance company scrutiny -- such as financial records of transactions involving the insured property, financial ability of the insured, reports of prior claims, etc. -- might greatly help insurers in establishing the circumstantial evidence of arson-for-profit.

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[35] 5 U.S.C. 552(a) (1976).

[36] See Testimony of James McMullen, Director of Security Investigations, Farmers Group, Inc., Arson-For-Hire Hearings, note 1 supra, August 24, 1978, p. 133.

[37] Id., p. 132. See also, Testimony of George Clark, Vice President for Claims, Craven, Dargan & Compnay, Arson-For-Hire Hearings, note 1 supra, p. 135.

¶ 13 It is worth noting, of course, a related problem in this context: even if such information were available to insurance companies and law enforcement agencies on a central index system, there would still exist the problem of continual name-change and aliases among those who would burn a building in order to defraud an insurer.[38]

¶ 14 Finally, there has been a great deal of criticism of federal programs called FAIR plans,[39] which ostensibly serve to provide essential property insurance in urban "core" areas, where the insurance industry will not. In practice, however, FAIR plans have unwittingly provided incentives for arson-related insurance fraud[40]: requirements regarding valuation

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[38]Testimony of James McMullen, note 36 supra, p. 133. Mr. McMullen testified that there is such an index system. Called the Fire Marshal's Reporting Service, it is funded by contributions from insurers, and is based on the filing of an informational card for each fire, burglary, or other type of claim exceeding approximately $250. It is not known, however, to what extent this system is known or used by independent adjusters, as opposed to company adjusters. Id.

[39]Fair Access to Insurance Requirements plans are privately-owned organizations, set up in response to the Federal Urban Property Protection and Reinsurance Act. There are approximately 28 FAIR plans now in existence. Testimony of Gloria M. Jimenez, Federal Insurance Administrator, Arson-For-Hire Hearings, note 1 supra, p. 213.

[40]See generally, Arson-For-Profit: More Could Be Done To Reduce It, Report by the United States Comptroller General (May 31, 1978). For example, many of the FAIR plans contain a proviso that the insurer give a 30-day notice before it can cancel a policy. As a result, any would-be defrauder has an added "grace" period in which to burn his own building and collect on the policy, regardless of the insurance company's intention to terminate its liability.

of property are lax, resulting in overinsuring, and insurance is provided to almost anyone who requests it. Other federal programs, such as HUD's administration of funds under the Community Development Act, have given considerable profit incentives to unscrupulous groups in the area of real estate arson-for-profit.[41]

III. Involvement of Organized Crime

¶ 15 Such a state of affairs has given organized crime, with its limitless resources, a made-to-order business opportunity. Writes one commentator: "[T]he mob has entered the arson-for-hire market by offering something its unorganized competitors cannot, package deals, starting with the fire and ending with complete arrangements for the insurance settlement."[42]

¶ 16 One type of financing arrangement might be as follows. A businessman who wants his building or factory burned down (due to operating losses, etc.) approaches the mob on a free-lance contract basis. The mob typically demands 25 percent of the final insurance payment for the loss, with 25 percent

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[41]For an example of the enormous profits that can be had through on arson-related building scheme, see Memorandum from Robert H. Liebmann, Principal Accountant Investigator, to Nathan Dembin, Chief of Investigations Bureau, Bronx District Attorney's Office, reprinted in Arson-For-Profit Hearings, note 11 supra, pp. 179-83.

[42]Karchmer, note 26 supra, p. 23.

of that amount "up front."[43] After the fire, and when the insurance has been paid, the owner then pays the remaining balance between the cash advance and the amount needed to satisfy 25 percent of the insurance payment.[44]

¶ 17 Before the fire, of course, an insurance broker with mob connections has steered the owner of the building to one of several insurance companies known to give the highest coverage, and with the most liberal claims payment policies -- companies known to pay "in a hurry."[45] Then, after the mob "torch" has done his work, an accommodating insurance adjuster makes a quick and favorable settlement. Often, a high official in the fire department is cooperating with the mob: he can arrange to have the fire written off as something other than "incendiary" or "suspicious," and can ensure that the best arson investigators are assigned to fires other than the ones set by the mob operation.[46] In the words of one insurance broker, who recently pleaded guilty

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[43] In other words, the mob would take 6 and 1/4 percent of the insurance value of the property in cash, before anything was done. This payment was a way of testing the owner's "good faith." See Testimony of Angelo Monachino, note 18 supra, p. 39.

[44] In theory, 25 percent of the mob's share would go to the "torches," another 25 percent to whomever had brought in the assignment, with the remaining 50 percent going to the head of the mob and for "other expenses." As a practical matter, however, the torches had very little clout within the group, and were almost never paid. Id.

[45] Testimony of Joseph J. Carter, note 27 supra, p. 88.

[46] See, e.g., Testimony of Angelo Monachino, note 18 supra, pp. 40, 46.

to insurance fraud in an arson-for-profit scheme: "Our group had all the elements . . . . We had the insurance adjuster . . . accommodating insurance agents, the torches, and the fire department, all apparently working to defraud the insurance companies . . . . We had an arson empire."[47]

¶ 18 While such "arson empires" have reaped huge profits on a freelance contract arson basis, mob leaders have also used the occasion of an overdue loan shark debt or gambling debt to burn a debtor's business. It is estimated that mob-related arsons arising from gambling and loan-sharking now equal the number of business "contract" fires.[48]

IV. Non-RICO Approaches to Organized Crime

¶ 19 An example of an organized crime arson ring, and the results obtained through more traditional statutory methods (i.e., federal statutes other than RICO) can be found in a string of cases involving Merrill H. "Morrie" Klein.[49] Klein was a "fire broker"[50] who specialized in locating

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[47]Testimony of Joseph J. Carter, note 27 supra, p. 88.

[48]Karchmer, note 26 supra, pp. 24-5.

[49]See, e.g., United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Bubar, 567 F.2d 192 (2d Cir. 1977); United States v. Tiche, 424 F. Supp. 996 (W.D. Pa., 1977).

[50]Asked at one trial how he had earned his money, Klein replied: "I sold fire like other people sell anything else." Klein once boasted to a customer, "I can make concrete burn." Karchmer, note 26 supra, pp. 26-7.

failing businesses. First, he would arrange for their legitimate sale, and then, follow up with a contract arson plan for the new owner. As the head of an arson "co-op," Klein had available a crew of arsonists to burn the business, and a host of associates (insurance agents, etc.) to arrange for the inflated insurance claim. Thus, Klein would normally be paid three times for a single operation: first, by the old owner (for having arranged the "legitimate" sale of the business); second, by the new owner (for having arranged the arson); and third, by the cooperative insurance adjuster (for having steered him business).[51]

¶ 20 The Pittsburgh Organized Crime Strike Force soon learned that known mob figures in the Pittsburgh area were major clients of Klein's arson "co-op."[52] Eventually, the federal prosecutor compiled a record of thirty-three convictions and five acquittals, in nine prosecutions, relying mainly on criminal statutes other than RICO.[53] For example,

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[51] Id., p. 27. Klein's fee ranged from 10% to 20% of the insurance settlement; he also took a flat 5% from the insurance adjuster's share as a "finder's" fee. Id. Such a percentage can prove to be extremely lucrative: for example, Klein was implicated in the $6 million Artistic Wire Company fire, which occurred in Taftville, Connecticut in 1973, and for which he was indicted in 1975.

[52] Id., p. 27.

[53] The most frequent charges were mail fraud and conspiracy. Id.

the federal mail fraud statute[54] is triggered when the mails are used to collect on the insurance policy -- the normal way to file a claim with the company. The Strike Force also used the interstate travel in aid of racketeering statute,[55] which specifically includes arson as an unlawful activity.

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[54]18 U.S.C. 1341 states in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses...for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service...or knowingly causes to be delivered by mail according to the direction thereon...shall be fined not more than $1000 or imprisoned not more than five years, or both.

Also used occasionally are companion statutes, 18 U.S.C. 1342 and 18 U.S.C. 1343, which provide, respectively, for criminal liability stemming from fictitious name or address, and fraud by wire, radio, or television.

[55]18 U.S.C. 1952 (1976) states in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--
> (1) distribute the proceeds of any unlawful activity; or * * *
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1) ...and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
> (b) As used in this section, "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

This statute was used to prosecute two major arson cases in which the arson "co-op" had sold its traveling fire business outside Pennsylvania, in Connecticut and Kentucky.[56] Finally, the Strike Force also had at its disposal the federal explosives statutes,[57] which it used in conjunction with the statutes already mentioned.

¶ 21 Despite the relative success of the Pittsburgh operation and other similar operations, the growing arson statistics suggest that such criminal prosecutions have not, overall, impaired the effectiveness of organized crime's arson-for-profit operations. As long as large profits are to be had, new participants will surely be found to replace those serving prison terms. For this reason, a traditional criminal approach to the present arson-for-profit problem seems altogether inappropriate.

V. Criminal RICO and Forfeiture

¶ 22 In February, 1978, a Tampa jury returned guilty verdicts against sixteen defendants in the case of United States v. Joseph J. Carter, et. al., on federal charges of conspiracy, mail fraud, and racketeering.[58] Defendant Carter, an insur-

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[56] See Karchmer, note 26 supra, pp. 27,28.

[57] See, e.g., 18 U.S.C. §§ 842-845 [Interstate Transportation of Explosives or Incendiary Devices]; 18 U.S.C. 1716 [Non-mailable Injurious Articles (Explosives or Incendiary Devices)]; and 26 U.S.C. 5861 [Prohibited Acts (Re: Firearms and Destructive Devices as defined by 26 U.S.C. 5845)].

[58] See Statement of Eleanor Hill and Eades Hogue, Strike Force Attorneys, Justice Department, reprinted in Arson-For-Hire Hearings, note 1 supra, p. 110.

ance adjuster, and Willie Noriega, a "torch," were elements of an arson-for-hire "enterprise" within the meaning of RICO,[59] whereby low-cost, substandard property was overinsured and then burned, in order to collect inflated fire insurance proceeds.

¶ 23 This pattern had operated for approximately four years, and had resulted in fraudulent insurance payments totalling hundreds of thousands of dollars.[60] Inherent in the organization's operation was the involvement and cooperation of ostensibly legitimate insurance agents, businessmen, realtors,

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[59]Specifically, Section 1962(c) makes it unlawful for any person, through a "pattern of racketeering" activity, to knowingly and willfully participate in the conduct of the affairs of an "enterprise" engaged in, or the activities of which affect, interstate commerce. Section 1962(d) makes illegal the act of conspiring to commit the offense proscribed by Section 1962(c). The RICO statute was particularly suitable to the facts Noriega had described, in that (1) an enterprise under the statute was not limited to purely legal entities, but included "any union or group of individuals associated in fact" and (2) "racketeering activity" under RICO consisted not only of offenses considered criminal under federal law, but also acts traditionally classified as state offenses, specifically including "any act or threat involving * * *arson* * *which is chargeable under state law." 18 U.S.C. 1961(1). Noriega had described a thriving, ongoing arson-for-hire industry in the Tampa area, operated by an effectively knit group of individuals, functioning in a variety of capacities in order to meet the specific needs of the "business." This "enterprise" depended on and specialized in the successful perpetration of two separate types of crimes: the actual acts of arson, illegal under state law, and the defrauding of insurance companies, illegal as mail fraud under federal law. The RICO statute enabled prosecutors to prosecute effectively, with the full support of the federal law enforcement network, a large-scale, ongoing criminal enterprise which had, prior to the federal indictment, successfully evaded prosecution by state agencies. Arson-For-Hearings, note 1 supra, p. 111.

[60]Id., p. 110.

and fire officials. Hence, much of the enterprise's attraction lay in its potential for extravagant profit at little or no risk.[61]

¶ 24 Shortly after the Tampa jury had convicted the sixteen defendants, it also returned special verdicts of forfeiture against four of the defendants, covering insurance proceeds which they had collected by virtue of their arson activities.[62] The successful use of the RICO forfeiture provision was thus a significant aspect of the case, in that the provisions had, up to that point, been utilized effectively in only a handful of other cases.

¶ 25 In other words, the forfeiture provisions are still in their infancy: in theory, the statute offers prosecutors great latitude in attacking organized crime, by seizing a wide range of interest and property -- including not only the fruits, but the instrumentalities of the criminal venture as well. As a practical matter, however, the statute presented the prosecutors in the Carter case with a wide array of previously unanswered procedural questions regarding the

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[61] Id., pp. 112-13.

[62] The RICO statute, in attempting to establish an all-inclusive scheme for the eradication of organized crime, provides in 18 U.S.C. 1963(a) that anyone who has violated 18 U.S.C. 1962 shall forfeit to the United States * * * (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled conducted, or participated in the conduct of, in violation of Section 1962." Id., p. 114. In this case, the ill-gotten insurance proceeds totalled approximately $350,000. Id.

forfeiture verdicts.[63] Moreover, there has since been great doubt expressed whether the assets ostensibly forfeited in Carter would, in fact, still be available for seizure or collection.[64] Such a situation is troublesome, especially given the scope of relief (i.e., sequestration of assets, temporary injunction) available under the RICO forfeiture provisions.[65]

VI. Civil RICO and Triple Damages

¶ 26 Prosecutors have thus used the criminal RICO statute, and the more traditional methods (mail fraud, etc.) with moderate degrees of success. It is clear, however, from the statistics that a more effective weapon is needed against the thriving arson-for-profit operations of organized crime groups. Simply stated, there are too many groups and members

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[63] See id., p. 114. Congress, in enacting the forfeiture provisions, did not set forth a procedural system specifically adapted to the peculiar needs of the criminal RICO statute. Instead, it chose to include, by blanket incorporation, the forfeiture procedure previously followed in civil forfeiture under the Customs laws. That decision, though perhaps serving to accelerate the initial enactment of the forfeiture provisions, leaves unsettled many important aspects of the forfeiture procedure. The Carter case is thus viewed as one of many "working laboratories" for the courts, from which, it is hoped, a concrete set of forfeiture guidelines will emerge. Id.

[64] See Testimony of Eleanor Hill, note 58 supra, p. 127.

[65] See Testimony of Eades Hogue, id.

to prosecute successfully, and not enough resources or personnel among prosecutors. As noted, the problems of proof in a criminal arson prosecution can be insurmountable. At the same time, the profit incentives of arson are too large for any unscrupulous group to ignore.

¶ 27 The civil (triple damages) provisions of RICO[66] are ideally suited to the arson-for-profit problem. First, the statute is aimed at the heart of the problem -- the profit factor. Remove the enormous profit (indeed, any profit at all) and you have removed the threat of arson-for-profit.

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[66] 18 U.S.C. 1964 states in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise...or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. * * * Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions... as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of the 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 fees.
>
> (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding...under this chapter shall estop the defendant from denying the essential allegations of the cirminal offense in any subsequent civil proceeding brought by the United States.

Here, the damages collectible from a defrauder are threefold the actual damages, as well as the cost of suit and reasonable attorney's fees. The civil RICO provisions could thus eliminate the type of "arson empires" discussed earlier, by depriving them of all available assets, legitimate or otherwise.

¶ 28 Second, since the section authorizes a civil proceeding, the standard of proof is preponderance of the evidence, rather than the more stringent proof beyond a reasonable doubt. The plaintiff need only show a "pattern of racketeering activity," that the operation was a "joint enterprise," and that it affected interstate commerce (easily shown through use of the mails to transmit insurance policies or claims). Further, where two or more persons have been convicted under state law of arson and/or fraud -- and where conspiracy was a companion offense -- the "pattern of racketeering activity" and "joint enterprise" requirements may be easily met, for the purpose of imposing civil liability.[67]

¶ 29 Third, although the Attorney General may institute proceedings under the section,[68] so, too, may any person "injured in his business or property by reason of the violation of § 1962 . . . ."[69] This would include any insurance company which was the victim of a fraudulent claim, as well as

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[67] See also, 18 U.S.C. 1964(d), quoted at note 66 supra.

[68] See 18 U.S.C. 1964(b), quoted at note 66 supra.

[69] 18 U.S.C. 1964(c) (1976).

a municipality which suffered damage (i.e., costs of fighting the fire, injuries, equipment losses) as a result of the arson. In this respect, the section is more akin to the federal civil antitrust statutes, inasmuch as it creates a system of "private attorneys general" to enforce the federal statutory scheme.

¶ 30 The civil RICO provisions thus provide a double-edged sword: on the one hand, an insurance company that has paid out on a policy, and later discovers the cause to be arson, can bring suit for damages against the policyholder. On the other hand, if the insurer denies the claim[70] or successfully fights the claim in court, a municipality can still bring suit for damages under RICO, on the basis of costs incurred in fighting the fire. Such was the situation surrounding a suit brought two years ago by the City of Milwaukee[71] -- one of three civil RICO suits brought to date[72] -- which prayed for damages of over a half million dollars. It should be emphasized, in any event, that a previous conviction under § 1963 is not a condition to bringing

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[70]It has been suggested that insurance policies should contain a clause that would permit an insurer to deny a claim successfully, where a preponderance of evidence reveals that arson was committed per se (which caused the origination of the claim), and where such an opinion was supported by at least two experts. See, e.g., Testimony of Joseph J. Carter, note 27 supra, p. 102.

[71]City of Milwaukee v. Rolan C. Hansen and Steven R. Hansen (E.D. Wisconsin, 1977), Case No. 77-C-246, grew out of the defendants' criminal convictions under RICO. See United States v. Roland C. Hansen and Steven R. Hansen, 583 F.2d 325 (7th Cir. 1978). A search of the reporters and LEXIS has failed to turn up the outcome of this civil RICO action.

[72]See C.L. Karchmer, "The Fight Against Arson: What the Government is Doing," 2 Firehouse (no. 10) 72 (October 1977). The author provides no information regarding the other civil actions, and a search on LEXIS has failed to locate the actions referred to.

a civil action for triple damages. Rather, as noted, plaintiff must prove the elements of § 1964 by only a preponderance of the evidence.[73]

Conclusion

¶ 31 It has yet to be seen whether the civil provisions of RICO will, as proposed, "break the financial back of racketeering enterprises, whether Mafia or non-Mafia."[74] Clearly, the provisions have the potential to eliminate from arson any possibility of financial gain. In this respect, the statute represents a significant departure from any approach heretofore used. The civil provisions of RICO are a far more effective means of dealing with the problem of arson-for-profit as it exists today, than are the traditional criminal approaches. What is not clear, however, is why there have been, to date, so few civil actions brought under RICO.

¶ 32 With the civil provisions of RICO serving as a focal point, a comprehensive means of fighting arson-for-profit may be outlined. It involves cooperation on essentially four interrelated levels:

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[73] Farmers Bank of State of Delaware v. Bell Mortgage Co., 452 F. Supp. 1278 (D. Del. 1978).

[74] See Karchmer, note 72 supra, p. 72.

1. Expanded Use of Civil RICO. With improved cooperation between the insurance industry and law enforcement agencies,[75] federal attorneys should assist municipal officials and insurance companies in developing evidence to bring triple damages actions. The programs could be patterned after those involving federal narcotics and organized crime "strike forces." Local officials, presumably would welcome such assistance from the federal level, since any damages ultimately collected would go into the municipality's coffers. A similar monetary incentive would also exist for the insurance companies who brought civil actions under RICO.

2. Insurance Industry Reform. Whether voluntarily or by law, the insurance industry should reform its practice regarding valuation of property, and its willingness to settle suspicious claims, rather than investigate or resist them. As noted earlier, the companies must eliminate the ease with which a policyholder can overinsure a substandard building, through close supervision and inspection. Also, the companies should make a concerted effort to investigate fully only claims it may suspect are fraudulent. Even if a company has paid out on a policy, it can later recoup all expenses through the triple damages provisions of RICO.

3. State "Immunity" Legislation. As noted, many state privacy laws prohibit the free exchange of information between the insurance industry and law enforcement agencies. Anti-

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[75] See text preceding note 76, infra.

arson legislation, such as that recently enacted in Connecticut,[76] will result in improved information-gathering and recordkeeping regarding policyholders and the buildings they insure. This, in turn, will make it easier for companies to resist arson-related fraudulent claims, and for prosecutors to recognize unlawful patterns of behavior surrounding such claims.

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[76]Connecticut's Public Act No. 79-367, "An Act Requiring Insurance Companies To Furnish Fire Officials With Information Relating To Losses," states in pertinent part:

> (a) [The state fire marshal] ANY AUTHORIZED AGENCY may IN WRITING requrest any insurance company to release information relative to any investigation it has made concerning a loss OR POTENTIAL LOSS due to fire of suspicious or incendiary origin which shall include but not be limited to: (1) An insurance policy relative to such loss, (2) policy premium records, (3) history of previous claims, and (4) other relevant material relating to such loss OR POTENTIAL LOSS.
>
> (b) If any insurance company has reason to suspect that fire loss to its insured's real or personal property was caused by incendiary means, the company shall furnish [the fire marshal] ANY AUTHORIZED AGENCY with all relevant material acquired during its investigation of the fire loss, cooperate with and take such action as may be requested of it by the [state fire marshal] AUTHORIZED AGENCY and permit any person ordered by a court to inspect any of its records pertaining to the policy and the loss. Such insurance company may request [the state fire marshal] ANY AUTHORIZED AGENCY to release information relative to any investigation [he] IT has made concerning any such fire loss of suspicious or incendiary origin.

[76]cont'd.

> (c) In the absence of fraud, malice or criminal act, no insurance company, AUTHORIZED AGENCY or person who furnished information on [its] behalf OF SUCH COMPANY OR AGENCY, shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made that is necessary to supply information required pursuant to this section.
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> * * * *

See also, Alliance of American Insurers, "Model Legislation: Arson Reporting - Immunity Bill," reprinted in Arson-For-Profit Hearings, note 11 supra pp. 164-65.

Companion legislation in Connecticut, Public Act. No. 79-342, "An Act Concerning Liens On Proceeds of Fire Insurance For Outstanding Taxes and Demolition Expenses," states in pertinent part:

> Section 1. (NEW) The interest of each person in the proceeds of any policy issued by an insurance company providing fire insurance coverage for loss or damages caused by fire on an item of real estate, including any policy written pursuant to the provisions of section 38-201h of the general statutes, provided the amount of the proceeds for the loss payable under such policy is five thousand dollars or more, shall be subject to any tax lien on such item of real estate continued pursuant to the provisions of section 12-173 of the general statutes.
>
> * * * *
>
> Sec. 2. (NEW) (a) Any municipality which has incurred demolition expenses for the abatement of any public or private nuisance or has incurred expenses for the inspection, repair, demolition, removal or other disposition of any real estate damaged by fire shall have the right to recover such expenses from the owner of the real estate for which such expenses were incurred.
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> * * * *

4. Local Anti-Arson Efforts. Although so-called "pro-active" or preventive measures are, alone, insufficient to deal with large-scale arson-for-profit operations, there is growing evidence that local community involvement can often make a dent in the regional incidence of arson.[77] Increased local awareness of, and participation in, anti-arson techniques can effectively complement municipalities' efforts to bring triple damages actions under RICO -- to recoup the costs of fighting arson-related fires, and, thereby, to deprive arson-for-profit groups of any profit motive and indeed, of essential capital.

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[77] For example, community anti-arson programs in such cities as Seattle and Boston have shown commendable results. See R. Revelle, "Combating Arson in Seattle," reprinted in Arson-For-Profit Hearings, note 11 supra, pp. 34-47; Peter G. Miller, "Preventing Arson: Early Warning System Worked in Boston," Washington Post, November 5, 1977, reprinted in Arson-For-Profit Hearings, supra, p. 209. Such programs have included the use of highly visible fire-alert patrols; information "hotlines"; consolidation of police and fire department investigative units; increased community awareness and education through information bulletins and training programs; and, in one case, an "early warning system," using prevailing insurance policy values, whereby a neighborhood was able to predict where an arson would mostly likely occur next. See Testimony of David Scondras, Symphony Tenants Organization Project, Boston, Mass., Arson-For-Profit Hearings, supra, pp. 202-21.

Cigarette Bootlegging:
The Problem, Civil and Criminal Remedies

by

Thomas Svogun

OUTLINE

Summary

¶1 The states and the federal government tax cigarette sales and cigarette use at different rates. Typically, cigarette bootlegging consists in evasion of these taxes by smuggling cigarettes out of low tax states into high tax states without paying the higher taxes. Tax evasion activities cost high tax states and localities an estimated $391 million in revenue losses each year.

¶2 State law regarding punishment of cigarette bootlegging is generally found as part of the state taxation law and is enforced by tax authorities. Few states impose punishment that could be considered a real deterent to organized crime smugglers, the principal villains in the area. Moreover, judges have in the past been lenient in imposing fines and sentences.

¶3 The chief federal statutes relating to punishment of cigarette tax evasion - the Jenkins Act, the Mail Fraud Law, the Trafficking in Contraband Cigarettes Law, and RICO - all, excepting the Jenkins Act, fall within Title 18 of the Criminal Law and impose more severe punishment on cigarette smugglers. RICO in conjunction with the Trafficking in Contraband Cigarettes Law, a predicate offense, is the prosecutor's best weapon against today's sophisticated organized smuggling operations.

¶4 RICO may be used against cigarette manufacturers, the source of the supply of bootlegged cigarettes. A manufacturer violates RICO by entering into a conspiracy with bootleggers, who have engaged in a pattern of racketeering activity amounting to a 1962 prohibited activity.

¶5 Before imposing liability on the supplier of goods for crimes committed by the purchaser, the Supreme Court, in two leading cases: United States v. Falcone and Direct Sales Co. v. United States required (1) that the manufacturer had knowledge of the conspiracy and (2) some facts associating the supplier with the purchaser's scheme from which intent or agreement could be inferred. The Circuits have split on the requirement of intent for conspiracy liability. Prosecutors should, where possible, bring cases against manufacturers in jurisdictions, like the D.C. Circuit, where knowledge of the conspiracy alone is sufficient. For the purposes of a civil action, suits may be brought in any federal district court where the manufacturer resides, has an agent, or transacts his affairs.

¶6 One of the main advantages of the civil suit is the lower standard of proof. A conspiracy could be established by a preponderance of the evidence. Further, the civil remedies are formidable. District Courts would have the power to "prevent and restrain" manufacturers from selling to smugglers through appropriate orders, including injunctive relief. Any private persons injured by violation of RICO would be entitled to treble damages plus litigation expenses.

¶7 The threat of a RICO action could be sufficient to deter manufacturers from selling cigarettes to known smugglers.

Introduction

¶8 Cigarette smuggling became a problem following the development, beginning after 1965, of sharp disparities among the states in the rates at which cigarettes were being taxed. Individuals from the northeast travelling south to North Carolina, noticed the low taxes and sensed the advantage in taking cigarettes back north, where taxes were high. These small time operators, however, were soon to be muscled out by the big boys.[1] An individual identified in a New York Times article as "Joe", a former member of the Carlo Gambino crime family, indicated mob penetration into cigarette bootlegging as of 1971: "Any state that has a high cigarette tax, the biggest majority of them [bootlegged cigarettes] are controlled by the boys."[2] Sergeant James Cresick of the New York City Police Department's Intelligence Division told the New York State Commission of Investigation that leaders and underlings of the New York-based Luchese, Genovese, and Colombo crime families were known to be engaged in illegal

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[1]"Mr. X Tells How He Evaded $844,775 in Cigarette Taxes," New York Times, Jan. 21, 1972, p. 95. In tape-recorded testimony, the anonymous "Mr. X" testified that in 1966 he began smuggling. At that time, he said organized crime began moving into the smuggling market, forcing out small operations, including "casual tourists just trying to make extra bucks." "Mr. X" remains anonymous probably because of fear of mob reprisals. The level of organized crime intimidation present in the cigarette industry was eloquently demonstrated when five industry executives appeared for a press conference wearing hoods. See New York State Senate Research Service: Cigarette Bootlegging--Still a Problem: Issues in Focus, p. 4.

[2]"The Boys Behind the Illicit Cigarette Operations," New York Times, May 9, 1971, p. 42.

traffic in cigarettes.[3] He stated that similar racketeering in cigarettes was being conducted by Angelo Bruno of Philadelphia, Simone Rizzo De Cavalcante of New Jersey and their criminal organizations.[4] Hearings in Congress indicated that the Giancana family in Chicago and the Patriarca family in Providence are also involved.[5] What follows is a study of one big time operator.

I. Case Study of Anthony Granata: A Cigarette Smuggling Enterprise[6]

¶9 Anthony Granata was convicted of violating New York cigarette tax laws and was sentenced to four years in prison in the fall of 1976.[7] Granata's business at first consisted

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[3]Perlmutter, "Mafia Families Called Involved In Cigarette Smuggling Racket," New York Times, Jan. 20, 1972, p. 86.

[4]Id.

[5]Hearings Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 95th Cong., 2d Sess. on Cigarette Bootlegging, Feb. 28, March 8, April 17, 1978, p. 115.

[6]The information for this section is based on a case study actually done in: Fifteenth Annual Report of the Temporary Commission of Investigation of the State of New York, issued in April, 1973. The case study is summarized in: Cigarette Bootlegging: A State and Federal Responsibility, Advisory Commission on Intergovernmental Relations (May 1977) pp. 23-25.

[7]Granata, described as kingpin of a Mafia bootlegging ring that cheated New York City and New York State out of millions of dollars, had been arrested on March 29, 1974, allegedly as he directed unloading of 11,000 cartons of untaxed cigarettes within 200 feet of a Brooklyn, N.Y.C., police station. See, New York Times, March 30, 1974, p. 9.

of small-scale bootlegging, but by 1966 developed into a full-sized operation.[8] Fully blown, the business entailed thirty employees, ranging from clerical workers to drivers. Drivers were dispatched from New York to North Carolina six days each week.[9] Clerical employees handled the orders and arranged the deals. An expediter or traffic manager was stationed in North Carolina to supervise that end of the operation.

¶10 Legal costs--involving lawyers, bails, and fines--arising from arrests of drivers, were handled from Granata's headquarters in New York City (later transferred to New Jersey).

¶11 Fraudulent drivers' licenses and identification were supplied. Trucks were disguised to avoid detection. Dummy corporations were founded to conceal the smuggling business.[10]

¶12 Police surveillance uncovered that Mario and Vincent Gigante, leaders in the Genovese crime family, financed the operation. The Gigantes met with Granata and discussed profits and territorial rights.

¶13 Robert Lisante, an associate of Granata, was responsible for coordinating orders for cigarettes, including financing and delivery arrangements. In June, 1971, he had been arrested in New Jersey for possession of 4,560 cartons of cigarettes.

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[8]Estimates were that Granata's smuggling cost New York City and New York State $11 million each year in excise and sales taxes. Id.

[9]For each long haul to North Carolina, drivers were paid $100 plus $95 for expenses. Drivers received $60 for each short haul. On short hauls drivers would meet shipments coming from North Carolina, in Pennsylvania. The cigarettes would be transferred to their vehicles for transport to Granata's Brooklyn warehouse.

[10]Corrupt lawyers were probably used to do this.

Although convicted, he received a suspended jail sentence and a $250 fine. He was again arrested on September, 1971, at which time 15,000 cartons of cigarettes, a tractor, and a trailer truck were seized by the police. Questioned at a public hearing regarding the transactions involved, Lisante invoked the fifth amendment.

¶14 Joseph (Sam) Pontillo was a second Granata associate. When Granata moved to New Jersey (because of law enforcement pressure) Pontillo was his liaison in Brooklyn. Pontillo, apparently, headed his own group of bootleggers and shared loads of bootlegged cigarettes with Granata.[11] Pontillo was arrested in October, 1968, in New Jersey for possession of 2,200 cartons of untaxed cigarettes. Pontillo was again arrested in April, 1969, after leaving Granata's New York warehouse with 3,600 cartons of untaxed cigarettes. The second case, however, was dismissed on grounds of illegal search and seizure. At his appearance before the New York Commission's public hearings, Pontillo also invoked the fifth amendment.

¶15 Among the thirty individuals involved in Granata's smuggling enterprise, there were 189 separate arrests for criminal acts; 41 of these attributable to cigarette tax evasion. However, only a few convictions of lower echelon types were obtained. Higher-ups, who were rarely on the scene when smuggling took place, insulated themselves. Even if they were caught on the scene, cases tended to be dismissed on grounds of illegal search and seizure.

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[11] This was a risk spreading device. Thus, for a load of 10,000 cartons, Granata might underwrite 5,000, leaving 5,000 for Pontillo.

¶16 In the diagram on the following page, there is a detailed picture of Granata's sophisticated smuggling operation. Discussion now turns to the general features of cigarette bootlegging in the United States. Once the problem has been outlined, discussion will focus on the use of law--state and federal--to control cigarette smuggling.

II. Cigarette Smuggling: An Outline of the Problem

¶17 The States and Federal government impose a tax on cigarette sales and on cigarette use. Cigarette smuggling constitutes evasion of such taxes. Each of the states tax cigarettes sold in their borders separately. As of 1976 there were fifty-one jurisdictions engaged in the cigarette taxing business: 49 states, the District of Columbia, and the Federal government.[12]

¶18 Cigarette taxes are collected from consignees who first receive cigarettes from the manufacturers: typically wholesale and large retail outlets.[13] Manufacturers have records of cigarettes distributed to dealers, although they do keep records of subsequent distribution.[14] In forty-seven states (excluding Alabama, Hawaii, and Michigan) payment of the tax is evidenced by affixation of a stamp or meter impression on each pack at the place of the dealer liable for the tax.[15]

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[12] See, "Cigarette Bootlegging: A State and Federal Responsibility," Advisory Commission on Intergovernmental Relations (May, 1977), pp. 34-35 [hereinafter cited as ACIR].

[13] ACIR, note 12 at 51.

[14] Id.

[15] Id.

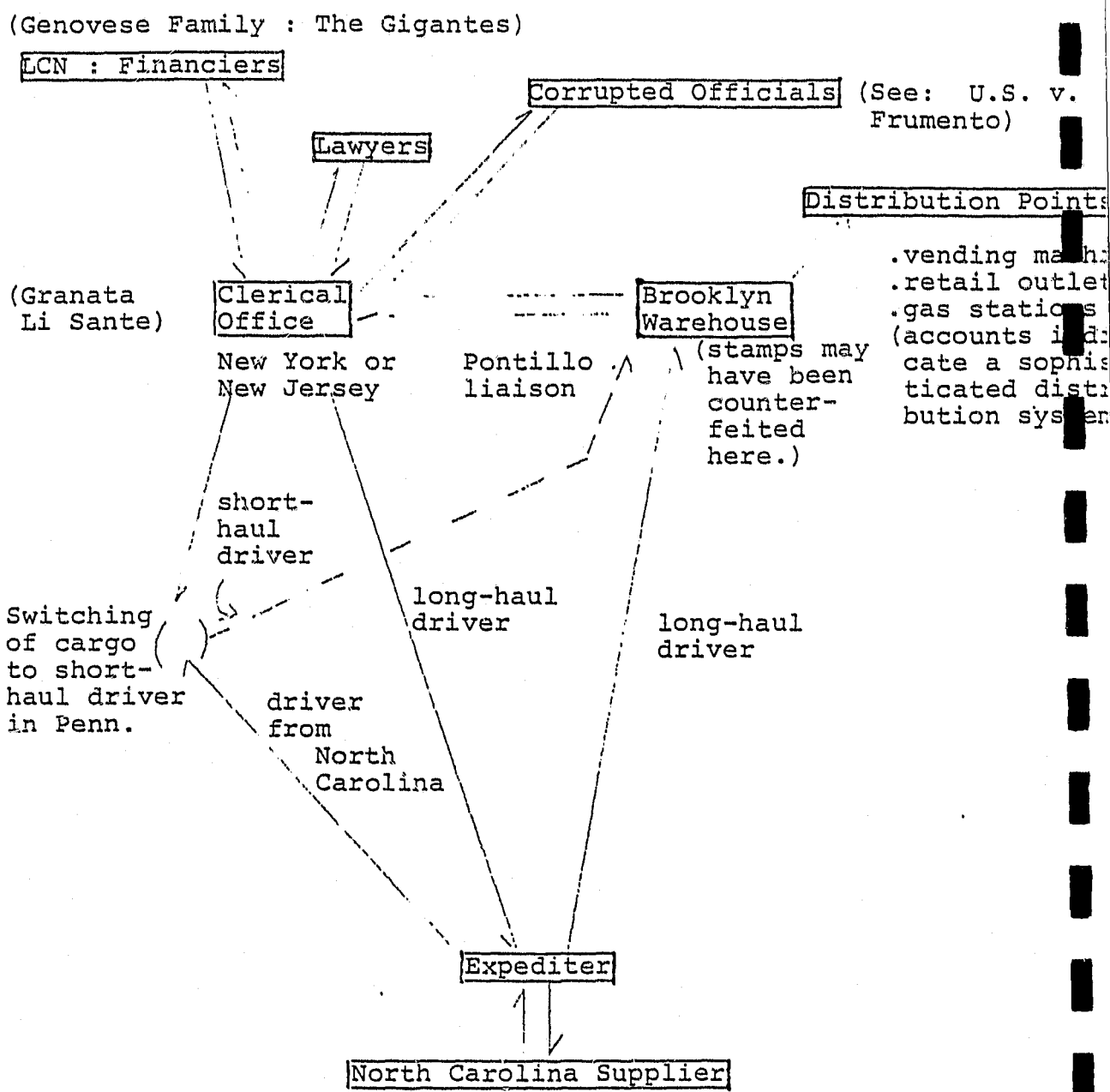

Diagram based on Granata's Cigarette Bootlegging Enterprise*

*with the following additions:

corrupt officials
inference that corrupt lawyers were involved
suggestion that stamps may have been counterfeited at the warehouse

¶19 After 1965 state governments began taxing cigarettes at increasingly different rates. Certain states imposed high taxes, in search for funds to meet increasing budget demands. Smuggling began when individuals purchased cigarettes in low tax states and transported them to high tax states, where they were consumed or sold for profit.

¶20 Four distinct types of cigarette smuggling developed.[16] The first, historically, was casual smuggling which involved crossing state lines to buy cigarettes for personal use or for friends. A second type is organized cigarette smuggling for profit ranging from small, part-time operations to large-scale businesses run by crime families, like Granata's. A third is mail order purchase of cigarettes. This form of smuggling is on the wane because of increased enforcement of the Jenkins Act[17] in conjunction with the U.S. Mail Fraud Law (18 U.S.C. 1341). The fourth type is the purchase of cigarettes through tax-free outlets. Of these there are three kinds: (1) international points of entry--for example, smuggling from Mexico into the United States;[18] (2) military post exchanges; and

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[16] Id. at 9-12.

[17] Id. at 27. Federal authorities stated that the loss of state tax revenues from mail order sales of cigarettes dropped 99 percent from an estimated total of $300,000 a day in May, 1971, to less than $2,000 a day beginning on Nov. 2, 1972. United States Attorney William Seymour, Jr., attributed this decline to the use of civil injunctions against mail-order concerns in North Carolina. See, New York Times, Dec. 7, 1972, p. 58.

[18] The United States Bureau of Alcohol, Tobacco, and Firearms estimated in 1977 that federal and state governments lose $22 million yearly in tax revenues because of cigarette smuggling along the Mexican border. See, New York Times, Sept. 27, 1977, p. 30.

(3) Indian reservations, a problem particularly in the state of Washington.

¶21 There are a number of key factors affecting cigarette smuggling. Foremost among these and root cause of the problem are the tax differentials.[19]

¶22 A disparity in tax rates affects both the amount of smuggling and the type of smuggling. Where differences between high tax and low tax states exceed ten cents per pack, there is sufficient incentive for crime to become organized.[20] Second, cigarette smuggling is affected by the accessibility of retail outlets in low tax states to significant population centers in high tax states. Length of borders, accessibility of highways, size and distance of population influence the level of smuggling. A third factor is the risk of arrest and seizure of smuggled cigarettes. The presence of favorable conditions particularly in the Northeast and Midwest has meant that organized smuggling has been heaviest in these regions.

¶23 It is estimated that tax evasion activities cost high tax states and localities $391 million in revenue losses each year.[21]

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[19] ACIR, supra note 12 at 12-19. There have been numerous proposals involving minimization or elimination of tax differentials. The proposed Drinan-Pattison bill, a good example, would increase the 8 cent federal tax on cigarettes to 31 cents per pack, 23 cents of which would be returned to states not imposing taxes of their own. See, Hearings Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 95th Cong., 2d Sess. on Cigarette Bootlegging, pp. 178-85; for text of bill, p. 10 ff. See also recommendations by: ACIR, at 5-8. Major reductions of tax differentials, however, have proved to be politically impossible.

[20] ACIR, supra note 12 at 9.

[21] Id. at 3.

The problem is most serious in fourteen states[22] while moderate in another eight states.[23] The Council Against Cigarette Bootlegging estimates that the illegal profits from organized smuggling of cigarettes in eight Eastern states were about $97.9 million in fiscal year 1975-76.[24] Such states lost an estimated $170.7 million in tax revenues.[25] In New York City one out of every two packs sold is bootlegged, while in New York State the ratio is one to four.

¶24 The States aren't the only losers in cigarette smuggling. Taxpayers pay higher taxes for fewer services. Organized crime has driven legitimate wholesalers, retailers, and vending machine operators out of business. The facts are startling. In the past ten years: (1) 35 percent of cigarette wholesalers have gone out of business; (2) 50 percent of the employees of wholesalers and vendors have been thrown out of work; (3) retail candy stores and stands in office buildings are closing up. In gross terms, the cigarette industry has lost $2.5 billion in sales.[26] Trucks have been hijacked, and warehouses raided.[27]

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[22]Arkansas, Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin. Id. at 8.

[23]Id. at 3.

[24]Statement by Morris Weintraub, Council Against Cigarette Bootlegging. Id. at 22.

[25]Id.

[26]Id. at 112-113.

[27]The New York Times reported in 1977 that during a New York City power blackout, four tobacco warehouses were emptied of their entire inventories including the machines used to imprint New York City and State tax stamps. New York Times, July 31, 1977, p. 16.

Insurance costs have gone from $200,000 to $700,000 for the industry. Today many firms are unable to get insurance.

¶25 Political and law enforcement officials are corrupted.[28] Moreover, people are being murdered. Senator Edward Kennedy, in Hearings Before the Subcommittee on Criminal Laws and Procedures of Committees on The Judiciary, in the U.S. Senate, 1977, made the following comment:[29]

> With the infiltration of organized crime into this area, there has been evidence of increasing violent crime: extortion and bribery, truck hijackings, armed robberies, serious assaults, and even murder.

¶26 The problem of cigarette bootlegging involves much more than tax evasion. It involves infiltration of organized crime into an industry whose legitimate elements are threatened with destruction. Appropriate measures have to be taken to deal with the menace of organized crime.[30]

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[28] See, U.S. v. Frumento, 563 F.2d 1083 (3rd Cir. 1977). The New York Times, Oct. 1, p. 30, Oct. 10, p. 42, 1973, covered the conspiracy trial and conviction of three New York detectives who plotted to set up Mr. and Mrs. Enrico Esposito, dealers in untaxed cigarettes, for a bribery deal. The detectives had seized the untaxed cigarettes at the home of the Brooklyn couple and offered lenient treatment in exchange for a bribe of $3,000.

When Anthony Granata was arrested, he apparently offered a bribe of $7,000 to one of the arresting officers.

[29] Transcript, pp. 1-2.

[30] See N.Y. State Senate, Special Task Force Report on Cigarette Bootlegging and the Cigarette Tax, p. 2:

> Industry executives, law enforcement officials and tax administrators generally concede that - if appropriate action is not taken - organized crime will continue destroying legitimate businesses and causing unemployment in the cigarette industry.

III. The Use of Law to Control Cigarette Smuggling: The State and Federal Statutory Matrix

¶27 State law regarding punishment of cigarette bootlegging is typically found as part of state taxation law and is enforced by tax authorities. The interstate travel of bootleggers has made enforcement by such authorities difficult. The chief federal statutes relating to punishment of cigarette tax evasion--the Jenkins Act,[31] the United States Mail Fraud Law,[32] the Trafficking in Contraband Cigarettes Law,[33] and the Racketeer Influenced and Corrupt Organizations Act[34]--all, excepting the Jenkins Act, fall within Title 18 of the Criminal Law.[35]

A. State Law

¶28 Most states classify cigarette smuggling as a misdemeanor. Punishment is generally light and includes fines and/or imprisonment. Stamp counterfeiting, however, is typically a felony and is punished more severely. Statutes usually provide for the forfeiture of unstamped cigarettes and, in most instances, of the vehicles used for transporting them. Cigarette smuggling may lead to revocation of a distributor's license, but there

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[31] 15 U.S.C. §§ 375-78 (1976).

[32] 18 U.S.C. § 1341 (1976).

[33] 18 U.S.C. §§ 2341-46 (1976).

[34] 18 U.S.C. §§ 1961-68 (1976).

[35] The elevation of cigarette smuggling to a federal offense and incorporation into the general code of what is tax evasion suggests recognition by the federal government that evasion of state cigarette taxes is a serious national problem.

appears to be no per se rule regarding suspension or revocation of such licenses; and the matter is left in the discretion of the state's tax commissioner.

¶29 Cigarette exporting states such as North Carolina, Virginia, and Kentucky have lax laws which impose relatively light punishments.[36] Statutory restriction on the issuance of distributor's licenses appears to be fairly loose.[37]

¶30 States sustaining large revenue losses due to smuggling have evolved more stringent penalties, geared to repeated

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[36]Va. Code § 58-747.17 classifies cigarette tax evasion as a misdemeanor punishable by a minimum fine of $25, to which may be added a jail sentence of 30 to 60 days. Kentucky Revised Statutes § 138.165 provides for the seizure and forfeiture of cigarettes, vending machines, and vehicles used. General Statutes of North Carolina impose both types of penalties. § 105-113.27 punishes sales or possession of unstamped cigarettes as a misdemeanor. A fine may be imposed in the discretion of the court or there may be imprisonment for up to two years, or both a fine and imprisonment. §§ 105-113.31 and 105-113.32 provide for the confiscation of smuggled cigarettes and vehicles.

[37]For example, N.C. Gen. Stat. § 105-113.13 provides that licenses are issued for a fee. The tax commissioner has discretion whether or not to investigate the applicant, he is not bound to do so. Moreover, under § 105-113.16 distributors who violate any section of the cigarette tax law may have their licenses suspended or revoked. The statute does not provide a standard for revocation. Compare N.Y. [Gen. Bus.] § 480 (McKinney) allowing revocation or suspension of licenses "for cause," when a violation of article 20--the cigarette tax law--constitutes cause. The statutory limitations on issuance of licenses, however, in New York do not appear to be significantly tighter than those of North Carolina.

offenses, willful intent to evade cigarette taxes, and the quantity of cigarettes smuggled.[38]

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[38]Fla. Stat. Ann. § 210.18 classifies possession or transportation of cigarettes for purposes of tax evasion, a misdemeanor in the first degree, carrying a maximum fine of $1,000 and imprisonment of up to one year. The second offense, however, is a third degree felony punishable by a fine of $5,000 and a prison term of five years. Purdon's Pennsylvania Statutes Annotated § 3169.902 punishes sales of unstamped cigarettes by a fine of $100 to $1,000 and/or imprisonment of sixty days. But, where such sale includes willful intent to evade the tax the crime becomes a felony punishable by a maximum fine of $15,000 plus the costs of prosecution and/or a maximum prison term of five years. Similar gradations are defined for the crime of possession of unstamped cigarettes, and possession with willful intent to evade the tax. See § 3169-903. Possession of greater than 200 but less than 1,000 cigarettes is punished by a fine of $300 plus the costs of prosecution and/or imprisonment for ninety days. Possession of 1,000 or more cigarettes is a misdemeanor punishable by a fine of $1,000 to $15,000 with costs of prosecution and/or imprisonment of three years. N.J. Rev. Stat. Ann. § 54:40A-28 classifies improper sale of unstamped cigarettes a misdemeanor carrying a maximum fine of $1,000 and/or a maximum prison term of one year. Anyone possessing 2,000 or more but less than 20,000 unstamped cigarettes is a "disorderly person" subject to punishment of up to $500 and/or six months imprisonment. Possession of 20,000 or more unstamped cigarettes is a misdemeanor punishable by a fine of $1,000 and/or one year imprisonment. § 54:40A-29(a) classifies stamp counterfeiting, a misdemeanor, carrying a maximum fine of $2,000 and/or imprisonment of seven years. New Jersey, also, punishes possession of counterfeit stamps. Possession of 2,000 or more cigarettes with counterfeit stamps is a misdemeanor punishable by $1,000 fine and/or one year imprisonment. Possession of less than 2,000 counterfeited cigarettes makes the individual a disorderly person subject to a maximum fine of $500 and/or six months in jail. Ill. Ann. Stat. § 453.18 punishes possession of unstamped cigarettes at the rate of $10 per package. New York State has developed an interesting approach. N.Y. [Gen. Bus.] Law § 48(a) penalizes a failure by any agent (an agent is defined in § 470.9 as "Any person authorized by the tax commissioner to purchase and affix adhesive or meter stamps on packages of cigarettes under this article . . . .") at a rate of 5 percent of the amount of tax due and, in addition, 1 percent of the tax due for each month of delay, after expiration of the first month after the tax became due. While possession or transportation of unstamped cigarettes is a misdemeanor--persons with two or more convictions or who willfully attempt to evade cigarette taxes or who possess 20,000 or more unstamped cigarettes for sale, commit a class E felony.

¶31 Only nine states classify any violation as a felony.[39] Few states impose punishment that could be considered a real deterrent to organized crime smugglers. Moreover, judges have in the past been lenient in imposing fines and sentences. Classification of penalty provisions under the tax law rather than the penal law may have had a negative effect on cigarette tax compliance and judicial enforcement of the tax laws.[40] The failure of state laws to control smuggling focused attention on the utilization of federal law which could be applied and enforced uniformly throughout the states.

B. Federal Law

¶32 Use of the Jenkins Act[41] and the federal mail fraud law[42] against mail order cigarette smuggling has been largely successful.[43] Other types of cigarette smuggling, however, especially

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[39] ACIR, supra note 12 at 33.

[40] The New York State Special Task Force on Cigarette Bootlegging has recommended that tax penalty provisions be transferred to the penal law. See id. at 36.

[41] 15 U.S.C. §§ 375-78 (1976). The Jenkins Act requires persons who ship cigarettes into other states to notify the tobacco tax administrators of names and addresses of recipients of cigarettes, as well as the quantities shipped, the brands, and the dates of mailing. The Act further requires a business to provide tobacco tax administrators with its name, principal place of business, and the names of officers. Violation of the Act carries a maximum fine of $1,000 and/or imprisonment for a maximum of six months.

[42] 18 U.S.C. § 1341 (1976). The mail fraud law prohibits the use of the mails for fraudulent purposes. A violation carries a maximum fine of $1,000 and/or a maximum prison term of five years. Mail fraud constitutes a predicate offense under RICO, 18 U.S.C. § 1961(1) and may expose the offender to that statute's stringent criminal and civil remedies.

[43] ACIR, supra 12 at 27. See also, note 17, supra.

organized smuggling, still flourish. RICO in conjunction with the Trafficking in Contraband Cigarettes Law is the prosecutor's best weapon against organized smugglers of that variety.[44]

¶33 The Contraband Cigarette Law is concerned with big time smuggling. "Contraband cigarettes" are defined in § 2341(2) as:

> a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable state cigarette taxes in the state where such cigarettes are found ....

Cigarettes in possession of the following persons are not considered contraband: a manufacturer or export warehouse operator, a common carrier with a proper bill of lading, a person licensed to account for and pay cigarette taxes, or officers of the United States performing official duties.

¶34 The statute defines two types of unlawful activity: (1) possession or sale of contraband cigarettes[45] and (2) fraudulent record-keeping.[46] The Secretary of the Treasury has authority to develop regulations regarding transactions in more than 60,000 cigarettes and may with permission or through a warrant

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[44]We are talking specifically about Granata-type organizations.

[45]§ 2342(a) states that: "It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes."

[46]§ 2342 stipulates that: "It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction."

inspect any records required thereunder.[47] Possession or sale of contraband cigarettes carries a maximum fine of $100,000 and/or a maximum prison term of five years.[48] Violation of the record-keeping requirements exposes an individual to a maximum fine of $5,000 and/or a maximum prison term of three years.[49] The statute, also, provides for seizure and forfeiture of contraband cigarettes.[50]

¶35 RICO incorporates the Trafficking in Contraband Cigarettes Law as a predicate offense.[51] RICO prohibits "racketeering activity"[52] which includes the commission of two or more such

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[47] § 2343 is the recording keeping and inspection section. Shippers may be required by the Secretary of the Treasury to keep a detailed record of the person receiving such cigarettes, the name of the purchaser, and a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another); and provide the name and addresses of the recipient's principal in all cases when the recipient is acting as an agent. Such records may help trace the course of cigarettes into the hands of smugglers.

[48] § 2344(a).

[49] § 2344(b).

[50] § 2344(c).

[51] 18 U.S.C. § 1961(1) (1976).

[52] "Racketeering activity" includes the commission of two or more of the following crimes:

> [A]ny act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year . . .

(organized smugglers do commit predicate offenses chargeable under state law. See, U.S. v. Frumento, 563 F.2d 1083 (1977)) and acts indictable under the federal trafficking in contraband cigarettes law. (Smuggling enterprises may also be involved in other predicate offenses violating federal laws including: bribery 18 U.S.C. § 201; theft from interstate shipment 18 U.S.C. § 659; interference with commerce, robbery, or extortion 18 U.S.C. § 1951; and racketeering 18 U.S.C. § 1952 (1976).

offenses. The elements of the RICO[53] offense are:

(1) That a person[54]
(2) through a pattern[55]
(3) of racketeering activity[56] or collection of unlawful debt[57]

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[53]See, Atkinson, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes, The Journal of Criminal Law and Criminology, vol. 69, no. 1, p. 2.

[54]The term "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C § 1961(3).

[55]The pattern "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . ." 18 U.S.C. § 1961(5). Legislative history and case law indicate that the two acts be related in some way. The Senate Report on RICO explained, S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969),

> The target of Title IX is thus not sporadic activity. The infiltration of legitimate businesses normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity, plus relationship, which combine to produce a pattern.

In United States v. Stafsky, 409 F. Supp. 609 (S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976), the court construed "pattern" as including:

> a requirement that the racketeering acts must have been connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not simply a series of disconnected acts. Id. at 614.

See also, United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977); United States v. Morris, 532 F.2d 436, 442 (5th Cir 1976); United States v. Moeller, 409 F. Supp. 49, 58 (D. Conn. 1975); United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977).

[56]See definition of racketeering activity in text above.

[57]"Collection of unlawful debt" concerns gambling activity.

(4) directly or indirectly
    (a) invests in,[58] or
    (b) maintains an interest in,[59] or
    (c) participates in[60]
(5) an enterprise[61]
(6) the activities of which affect interstate commerce.[62]

Conspiring to do the above is also a violation of RICO.[63]

¶36 In selecting the offenses comprising the statutory definition of "racketeering activity," the drafters tried to include all crimes commonly engaged in by members of organized crime.[64] The predicate offenses must be combined to form the § 1962 prohibited activities for RICO to crank into action.

¶37 RICO develops a new concept of conspiracy called enterprise conspiracy. It allows the joint trial of many persons accused of diversified crimes, freeing the government from the stringency

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[58]18 U.S.C. § 1962(a) (1976).

[59]§ 1962(b).

[60]§ 1962(c).

[61]"Enterprise" means "any individual, partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." § 1961(4). The term refers not only to infiltrated organizations (legitimate businesses and even government bureaus, as in U.S. v. Frumento) but encompasses the infiltrating enterprise, organized crime itself. For the view that "enterprise" includes illegal activities, see, e.g., United States v. McLaurin, 557 F.2d 1064, 1073 (5th Cir. 1977). See also, United States v. Brown, 555 F.2d 407, 416 (5th Cir. 1977).

[62]Cigarette bootlegging, by its nature interstate smuggling, should satisfy the interstate commerce requirement.

[63]18 U.S.C. § 1962(d) (1976).

[64]See, Atkinson, RICO: Broadest of the Federal Criminal Statutes, supra note 53 at 3, note 17 (citing G. Robert Blakey as authority).

of the multiple conspiracy doctrine. A single agreement or common object required by the traditional conspiracy doctrines often could not be inferred from the commission of highly diverse crimes by apparently unrelated individuals. What gives the RICO enterprise cohesiveness is that the various crimes constituting the predicate offenses track those typically engaged in by organized crime. The § 1962 prohibited activities set forth the possible objectives of the conspiracy. For conspiracy liability to lie knowledge of all the details of the enterprise and all its participants is not essential. What is required, however, is knowledge of the enterprise's essential nature.

IV. Liability Under RICO of Cigarette Manufacturers: The Suppliers of Bootlegged Cigarettes

A. Predicate Offenses and Prohibited Activities

¶38 Violation of the Trafficking in Contraband Cigarettes Law[65] occurs at the dealer's level when the tax is not paid. Cigarettes in possession of the manufacturer are not contraband, so that the manufacturer cannot directly violate the Act. Although the manufacturer may have engaged in other state or federal predicate offenses, for the purposes of this paper it is assumed that the manufacturer has not. Discussion for this reason focuses principally on the conspiracy theory of liability.[66]

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[65] 18 U.S.C. § 2341(2) (1976).

[66] Manufacturers could also be exposed to accessoryship liability for aiding and abetting violators of the cigarette contraband law. Courts, it has been noted, have not clearly distinguished between the concepts of conspiracy and accessoryship liability for aiding and abetting. The standards of proof tend to be the same. See, note, 53 Columbia L. Review 228, 229 (1953). The Supreme Court has indicated that all conspirators are accessories to the substantive crimes committed by co-conspirators "in furtherance of" the conspiracy and has held that conspirators are principals to all such crimes. Pinkerton v. United States, 328 U.S. 640 (1946).

The case to be developed against the manufacturer is: that he has violated RICO[67] by entering into a conspiracy with cigarette bootleggers who have engaged in § 1962 prohibited activities. The manufacturer may be tried in the same action with the cigarette bootleggers because of the sweep of the conspiracy concept.

¶39 Two Supreme Court cases constitute the principal sources of law for the liability of a supplier of goods for crimes committed by the purchaser of goods: United States v. Falcone[68] and Direct Sales Co. v. United States.[69]

¶40 In Falcone, the defendants provided operators of an illegal still with sugar, yeast, and cans. The total purchases and sales of sugar by two of the defendants were significantly increased while the stills were in operation. Of the two defendants who provided yeast for the stills, one had registered in the county clerk's office under an assumed name and the other failed to disclose yeast sales to the distillers on information forms required by the government. Defendants were prosecuted on the theory that by these sales they became part of a conspiracy to operate illegal stills. The circuit court had found against liability on the principle that conspiracy

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[67] § 1962(d).

[68] 311 U.S. 205 (1940).

[69] 319 U.S. 703 (1943).

required that a person "have a stake in the outcome."[70] The Supreme Court, however, affirmed the circuit court on grounds that accessory ship to conspiracy requires knowledge of the existence of the conspiracy, and that while defendants knew the goods sold were to be used for illegal purposes, they could not be held liable for conspiracy because they did not know of the existence of a conspiracy to so use them. The Court did not reach the question of requiring a "stake in the outcome" to prove conspiracy.

¶41 In Direct Sales, defendant drug manufacturer and wholesaler was found guilty of conspiring to violate provisions of the Harrison Narcotic Act.[71] The company sold, at frequent intervals over a seven year period, large quantities of morphine sulphate to a physician[72] and stimulated purchases by advertising discounts and quantity sales.[73] The Supreme Court

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[70] United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940) (Hand, J.) used the following language:

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make on unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.

[71] 26 U.S.C. §§ 2553-2554 (1946).

[72] There was expert testimony that quantities sold were in amounts approximately 200 times the annual needs of the average physician. 319 U.S. 703, 706-07.

[73] Id. at 707.

distinguished Falcone in that "the commodities sold there were articles of free commerce" while the drugs in Direct Sales were "restricted commodities, incapable of further legal use except by compliance with rigid regulations."[74] The character of the goods went to showing: the illegal use to which they were being put and that defendant seller had taken "the step from knowledge to intent and agreement."[75] Intent also could be inferred from the company's active stimulation of repeated sales from which profits were gained. A stake in the venture, though present, was not considered essential.[76]

¶42 The Supreme Court in Falcone and Direct Sales required knowledge of the conspiracy and a showing of intent based on factors of association, before imposing liability on the supplier of goods. The circuits have split on the requirement of intent for conspiracy liability: some circuits, like the

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[74] Id. at 710.

[75] Id. at 713.

[76] The Supreme Court in Direct Sales Co. v. United States, 319 U.S. 703, 713 (1943), stated:

> There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, it is not irrelevant to the question of conspiracy.

fifth and second requiring intent,[77] other, like the D.C. Circuit,[78] maintaining that knowledge alone is sufficient. In the lower courts, conspiracy liability has been found on factors of association such as: the quantity of the sales,[79] the continuity of the relationship between seller and buyer,[80] the seller's initiative or encouragement,[81] and the nature of the goods.[82] Failure to submit sales reports required by law[83]

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[77]For the Fifth Circuit, see the language in United States v. Prince, 515 F.2d 564, 567 (5th Cir. 1975):

> The proof, however, must be individual and personal and the government must prove . . . that each member of the conspiracy had the deliberate, knowing, and specific intent to join the conspiracy. Mere association with conspirators or knowledge of the illegal activity is not sufficient.

See also, United States v. Elliott, 571 F.2d 880, 906 (5th Cir. 1978). In the Second Circuit: United States v. Peori, 100 F.2d 401, 402 (2d Cir. 1938); United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940), aff'd, 311 U.S. 205 (1940).

[78]See United States v. James, 494 F.2d 1007, 1023-24 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975). Knowledge appears to be sufficient in the 9th and 7th Circuits. See Patti v. United States, 17 F.2d 562 (9th Cir. 1927); Vukich v. United States, 28 F.2d 666, 669 (9th Cir. 1928); Borsia v. United States, 78 F.2d 550, 555 (9th Cir 1935); Anstess v. United States, 22 F.2d 594 (7th Cir. 1927); Hubinger v. United States, 64 F.2d 772 (7th Cir. 1933). All of these cases involved conspiracies to bootleg liquor.

[79]Eley v. United States, 117 F.2d 526 (6th Cir. 1941).

[80]Van Huss v. United States, 197 F.2d 120 (10th Cir. 1952). See also, Janow v. United States, 141 F.2d 1017 (5th Cir. 1944); Bacon v. United States, 127 F.2d 985, 987 (10th Cir. 1942).

[81]Bartoli v. United States, 192 F.2d 130 (4th Cir. 1951); United States v. Cusimano, 123 F.2d 611 (7th Cir. 1941).

[82]United States v. Tramaglino, 197 F.2d 928 (2d Cir. 1952); United States v. Kertess, 139 F.2d 923 (2d Cir. 1944).

[83]United States v. Tramaglino, 197 F.2d 928 (2d Cir. 1952); United States v. Leow, 145 F.2d 332 (2d Cir. 1944).

or to keep the usual business records or the use of secretive techniques[84] have been considered relevant to the issue of intent. Intent has been inferred where the seller inflated his charges,[85] or has sold goods having no legitimate use,[86] or when illicit sales dominate the seller's business.[87] In cases where no conspiracy was found, there existed merely unencouraged sale or purchase.[88] It is not clear, however, which combination of factors in a given case produces conspiracy liability.

¶43 Given the split among circuits, prosecutors should, where possible, bring cases in jurisdictions where knowledge of the conspiracy alone is required or in jurisdictions which find intent short of the "stake in the venture" requirement. (The D.C. Circuit is to be preferred to the Fifth and Second Circuits. For the purposes of a civil action, suits may be brought in any federal district court where "such person (against whom the suit is larged) resides is found, has an agent, or transacts his affairs."[89] Since manufacturers are large concerns doing business in many states, there are fairly good chances of selecting a favorable jurisdiction.

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[84] United States v. Loew, 145 F.2d 332 (2d Cir. 1944); Bacon v. United States, 127 F.2d 985 (10th Cir. 1942).

[85] People v. Lauria, 251 Cal. App. 2d 471 (1967).

[86] People v. McLaughlin, 111 Cal. App. 2d 781 (1952).

[87] People v. Lauria, 251 Cal. App. 2d 471 (1967) (dictum).

[88] Johns v. United States, 195 F.2d 77 (5th Cir. 1952); Goodman v. United States, 128 F.2d 854 (9th Cir. 1942); Morei v. United States, 127 F.2d 827 (6th Cir. 1942). But cf., Malatkofski v. United States, 179 F.2d 905, 916-17 (1st Cir. 1950).

[89] 18 U.S.C. § 1965 (1976).

V. Cigarette Bootlegging and RICO

¶44 A RICO case may take the form of either a criminal or civil action. The civil suit may be brought by a private person in federal district court.[90] The standard of proof in a criminal case is that the RICO violation be proved beyond a reasonable doubt.[91] Legislative history, however, indicates a lighter burden--"preponderance of the evidence"--is the appropriate standard of proof for civil actions.[92] The civil suit has additional advantages. The right against self-incrimination disappears in a civil case when brought by the government, where use immunity is granted under 18 U.S.C. § 6002-6003.[93] It is not necessary to show probable cause in the complaint; good faith is sufficient. The government or private individual is entitled to discovery, backed up by the court's contempt

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[90]18 U.S.C. § 1964 (1976).

[91]The Fifth Circuit in United States v. Elliott, 571 F.2d 880 (5th Cir. 1978) interpreted the standard to require disproving all other reasonable hypotheses. The Supreme Court in Holland v. United States rejected this requirement.

[92]Hearing on Measures Related to Organized Crime Before the Sub-Comm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 388 (1970). (Testimony of Assistant Attorney General Wilson.) The Seventh Circuit in United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) stated, without specifying the standard of proof, that "[T]he standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering."

[93]See United States v. Cappetto, id. at 1356. The Seventh Circuit in Cappetto cited Kastigar v. United States, 406 U.S. 441, 446 (1972) for the proposition that immunity is coextensive with privilege against self-incrimination and may be invoked only against criminal proceedings.

powers.[94] Because the action may be initiated by the filing of a bill, there is no necessity for an arrest or other intervention by law enforcement officials. The doctrine of illegal searches and seizures has no application to a civil case, when the action is initiated by a private citizen.[95] Relief may be obtained almost immediately by issuance of a temporary injunction,[96] which may be issued solely upon the allegations in the bill.[97] If the defendant fails to answer such allegations this may be sufficient for issuance of a permanent injunction.[98] Moreover, the plaintiffs burden may be facilitated in that (1) a court of equity may consider the general reputation of the premises in question[99] and (2) the court may consider in

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[94]RICO § 1968 provides for a "Civil Investigative Demand" whereby the Attorney General may prior to institution of criminal or civil proceedings, require a person or enterprise to produce "any documentary materials relevant to a racketeering investigation."

[95]Walker v. Pemner, 190 Oregon 542 (1951).

[96]In a civil case four factors are considered in the granting of a preliminary injunction: (1) whether the petitioner is likely to succeed on the merits; (2) whether irreparable harm has been shown; (3) whether issuance of a preliminary injunction would substantially harm other interested parties; and (4) whether public interest is served by the injunction. See Conservation Council of North Carolina v. Costanzo, 505 F.2d 498, 502 (4th Cir. 1974); First Citizens Bank and Trust Company v. Camp, 432 F.2d 481 (4th Cir. 1970). But see United States v. Cappetto, 502 F.2d 1351, 1355 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) not requiring a showing of irreparable injury for a civil action under RICO. The four factors have been considered usable in a criminal case as guidance for issuance of a preconviction order. United States v. Mandel, 408 F. Supp. 679 (D. Maryland, 1976).

[97]State v. Ellis, 201 Ala. 295 (1918).

[98]People v. Clark, 368 Ill. 156 (1915).

[99]Balch v. State, 65 Okla. 146 (1917).

weighing the evidence the defendant's refusal to submit to cross-examination.[100]

¶45 The RICO statute provides criminal and civil remedies.[101] In a criminal action violation of § 1962 carries a maximum fine of $25,000 and/or a maximum prison term of twenty years.[102] The statute, in addition, requires forfeiture of any interest constituting a violation of § 1962.[103]

¶46 In a civil action, district courts have jurisdiction to "prevent and restrain" violations of RICO by issuing appropriate orders, including divestiture and injuctive relief.[104] Private persons injured by violation of RICO may recover treble damages plus litigation expenses.[105]

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[100] Davis v. Auld, 96 Me. 559 (1902).

[101] § 1963 imposes criminal penalties; § 1964 imposes civil remedies.

[102] § 1963(a).

[103] The pertinent language in § 1963(a) reads as follows: Forfeiture of "any interest acquired or maintained in violation of § 1962 . . ." and "any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of § 1962."

[104] See § 1974(a). Appropriate orders include: (1) "ordering any person to divest himself of any interest" in any enterprise; (2) imposing "reasonable restrictions" on future activities of any persons including: "prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise . . ."

[105] § 1964(c).

RICO Civil Remedies and Public Corruption

by

Caroline Sullivan

Outline

Summary

¶ 1 The corruption of public officials poses a serious threat to the effective prosecution and control of organized crime. The high degree of insulation from the criminal process that "respected members of the community" receive has caused the criminal prosecution of corrupt public officials to be quite difficult. Civil remedies promise to greatly improve this poor showing. Specifically, the civil provisions of the RICO statute are tailored to combat corruption by squeezing public officials where it hurts the most. These materials argue that prudent use of the forfeiture and treble damages provisions of the RICO statute can serve as an extremely effective supplement to traditional prosecutorial techniques in the control of official corruption and organized crime.

I. Introduction

¶ 2 Title IX of the Organized Crime Control Act of 1970, entitled Racketeer Influenced and Corrupt Organizations (RICO), is a direct attack on the increasing pervasiveness of organized crime in the business world.[1] Its primary aim is to retard

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[1] S. 1861, 91st Cong., 1st Sess. (1969), reprinted in 115 Cong. Rec. 9568 (1969). "It is, therefore, the declared policy of the Congress to eradicate the baneful influence of organized crime in the United States by the enactment of remedial legislation which will, through fine, imprisonment, criminal forfeiture, and civil divestiture, dissolution, injunction and other relief, enlarge, strengthen and vitalize the tools available to arrest and reverse the growth of organized crime in the United States, its infiltration of legitimate organizations, and its interference with interstate and foreign commerce."

the infiltration into legitimate business enterprises by members of the criminal underworld; it has potential to reach all facets of large criminal operations. Along with its criminal provisions, RICO offers a new method of attack: the use of civil remedies to deprive organized crime members of their powerful positions and their seemingly unlimited fortunes. These materials focus on civil remedies and their potential use against political corruption.

II. The Problem of Corruption

¶ 3 Political corruption is the most incidious aspect of organized crime, since not only does it perpetrate crime on its own account but also makes it almost impossible to combat other organized crime operations. Organized crime connections with legislators make it difficult to pass effective laws aimed at organized crime; connections with prosecutors and judges make it difficult to convict organization members. The result is a vicious circle of ever-increasing crime and "official" protection.[2]

¶ 4 Organized crime has two purposes which it serves through corruption. The first is to establish itself and survive. Corruption is essential to the existence of organized crime. In order to survive it must impede and, where possible, prevent law enforcement against it:

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[2] See, e.g., Crime and the American Response (New York 1973) pp. 79ff.

> Under our Anglo-American system of jurisprudence, effective law enforcement depends upon the coordinated actions and decisions of a number of closely interrelated individuals, each occupying separate and independent positions in the law enforcement process. . . . Successfully corrupt any key individual in the process, and the ultimate effect is the nullification of the entire process. Indeed, the situation is virtually the same as if the criminal sanctions did not exist.[3]

Corruption of the law enforcement process leads to the nullification of legal government. "When organized crime places an official in public office, it nullifies the political process. When it bribes a police official, it nullifies law enforcement."[4]

¶ 5 The second purpose served is increase of opportunities, influence, and, chiefly, profits. "[A]s the scope of organized crime's activities has expanded, its need and desire to corrupt public officials at every level of government has grown."[5] The many benefits which can accrue to organized crime from corruption are demonstrated by the story of the thoroughly corrupt city that has been called "Wincanton."[6] A gambling racketeer, having set up a protection racket in city government, maintained it at low cost to himself by providing opportunities

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[3]G. Robert Blakey and Ronald Goldstock, The Investigation of Organized Crime and Corrupt Activities; Official Corruption: Background Materials (1977), p. 31. Hereinafter referred to as Background Materials.

[4]The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, p. 2.

[5]Background Materials, p. 30.

[6]John A. Gardiner, Wincanton: The Politics of Corruption, in Task Force Report, supra n. 4, pp. 61ff.

for further corruption: "bringing politicians into contact with salesmen, merchants, and lawyers willing to offer bribes to get city business; setting up middlemen who could handle the money . . . ; and providing enforcers."[7]

¶ 6 Corruption occurs in all levels of hierarchical structure, on the federal, state, and local levels, in all three branches of government. The specific crimes involved are primarily bribery, extortion, and graft--their results are usually comparable.[8]

¶ 7 It has been said of the legislature that its corruption "is limited only by the imagination of its membership."[9] Legislators are involved in buying votes, misappropriating government funds, receiving kickbacks, accepting bribes for sponsoring private bills and influencing judicial decisions. A New York Senator, for example, was convicted of attempting to fix narcotics cases.[10]

¶ 8 In the judicial system corruption occurs at all stages of the criminal process--from before arrest to parole. Police corruption involves a myriad of types of crimes and levels of culpability; police are paid for everything from not investigating obvious criminal operations to testifying in ways that

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[7] Id. at 66.

[8] Background Materials, pp. 44-70, 217-18.

[9] Id. at 4.

[10] New York Times, Jan. 14, 1967, p. 1 col. 2.

are beneficial to defendants.[11] Corrupt district attorneys can refuse to prosecute and can sabotage the success of a case in the grand jury or at trial. Jurors are bribed to vote favorably, judges to decide leniently in convicting and sentencing and to use their influence on other judges.[12]

¶ 9 Opportunities abound for illegal gains by government executives and agency heads. City officials are paid to ignore criminal activity, to grant construction contracts to particular bidders, to decide zoning issues favorably.[13] "[T]he patterns of official corruption vary and are limited only by the imagination of the greedy."[14]

¶ 10 Corruption greatly increases the power of organized crime in all its forms.

> The millions of dollars it can spend on corrupting public officials may give it power to maim or murder people inside or outside the organization with impunity; to extort money from businessmen; to conduct businesses in such fields as liquor, meat, or drugs without regard to administrative regulations; to avoid payment of income taxes; or to secure public works contracts without competitive bidding.[15]

It is against the background of this "far more heinous threat"[16]

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[11] Background Materials, pp. 13-27.

[12] Id. at 11.

[13] New York Times, Apr. 8, 1971, p. 45, col. 3.

[14] Background Materials, pp. 8-9.

[15] Task Force Report, p. 2.

[16] S. Rep. No. 61791, 91st Cong., 1st Sess. 1-2.

that Title IX was enacted with the goal of improving the quality and strength of law enforcement. Its civil remedies offer an alternative to corruption-studded judicial and enforcement systems as well as an alternative method of fighting the level of the corruption.

III. Civil Remedies

¶ 11 Criminal prosecution of organized criminal activities is difficult because of the widespread protection corruption supplies; that difficulty is compounded when prosecution is aimed at that corruption itself. Traditional evidence-gathering techniques are insufficient; witnesses are easily impeached as accomplices or somehow rendered incompetent to testify;[17] the defendants are well-respected community figures.[18] Legislators as well as judges and prosecutors are well insulated. "The investigation of legislative officers . . . is sharply circumscribed by the Speech and Debate clause of the United States Constitution and similar state provisions,"[19] which protect legislators from interference with their legislative acts.

¶ 12 Although convictions of officials are obtainable, through perjury prosecutions if not on substantive counts,[20] it is still impossible to bring corruption under control

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[17] Background Materials, pp. 33-34.

[18] Id. at 12.

[19] Id. at 70.

[20] Id. at 204-205.

with these methods alone. "Organized crime has proved to be durable, in part because of its high resistance to traditional methods of crime control."[21] Resistance to civil remedies is not as highly developed; their application to organized crime is not traditional.

¶ 13 Civil remedies use an indirect method of attack. Instead of focusing on the punishment of criminals with imprisonment, they attempt to decrease the effectiveness of criminal activities by recovering illegally acquired money and preventing guilty parties from continuing their wrongdoing.

> While 'direct' laws fall short of posing serious difficulties to the continued existence of organized crime, 'indirect' laws may be effective. 'Indirect' laws, instead of aiming at the individual, seek to reach the equipment with which illegal activity is carried on or the fruits of illegal activity, the object being to deprive organized crime of its means of existence or to make illegal activity unprofitable.[22]

The types of relief which civil suits offer and the significantly less strenuous procedural rules offer opportunities for control which stymied criminal enforcement cannot equal.

¶ 14 Advantages are offered by civil procedure, even apart from the special provisions of Title IX. There is no necessity for arrest, which renders ineffective the corruption of police and district attorneys. Temporary injunctions may be available,

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[21] Note, A Civil Solution to the Problem of Organized Crime--The Florida Approach, 11 Boston Ind. and Comm. Law Rev. 990.

[22] Id. at 978.

affording immediate relief. Where juries are not necessary, there is less delay and one less opportunity to fix the outcome of the case through bribery. Appellate review is available to the plaintiff, as are valuable discovery rights. Such things as the defendant's failure to submit to cross-examination might be considered in weighing the evidence. Private citizens may initiate actions, and if they do, they might be able to use illegally obtained evidence. Immunized grand jury evidence might be admissible. Probably the single most important advantage is that the standard of proof in a civil action is only preponderance of the evidence instead of proof beyond a reasonable doubt.[23] These procedural aspects make civil relief much easier to obtain than criminal convictions.

A. Civil Remedies Before RICO

¶ 15 Some forms of civil relief were used against political corruption even before the enactment of Title IX. The available remedies included the recision and cancellation of contracts obtained illegally, the recovery of illegal gains and money damages.

¶ 16 Contracts obtained fraudulently are unenforceable, even where there is no showing of financial loss to the government

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[23]Oliff, Equitable Devices for Controlling Organized Vice, 48 Journal of Crim. Law Criminology and Pol. Science 627-29; Background Materials, p. 129; Annual Prosecutors Workshop (1976), pp. 33-35, 40-44.

or of actual bribery or extortion on the part of the official involved. In Pan American Co. v. United States,[24] the Court stated: "It is enough that these companies sought and corruptly obtained Fall's dominating influences in furtherance of the venture."[25] New York law provides for the cancellation of contracts made when there is a conflict of interest involved.[26]

¶ 17 Profits obtained by officials acting in conflict of interest may be recovered. In Williams v. State,[27] the state of Arizona recovered land illegally obtained by its land commissioner on the basis of the fiduciary duty owed by the official to the state. The constructive trust theory has also been used on the theory that money or property obtained illegally by an official is held in trust for the government or the citizens.[28]

¶ 18 Money damages may be recovered in tort actions. In City of Boston v. Simmons,[29] the city recovered the difference between what it did pay for land and what it would have had to pay had there been no breach of official duty.

Various aspects of the civil relief available for use against organized crime in general and official corruption

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[24] 273 U.S. 456 (1927).

[25] Id. at 500.

[26] N.Y. [Gen. Mun.] Law §§ 800-809 (McKinney 1974).

[27] 83 Ariz. 34, 315 P2d 981 (1957).

[28] See U.S. v. Carter, 217 U.S. 286 (1910), and Fuchs v. Bidwell, 31 Ill. App. 3d 567, 334 NE 2d 117 (1975).

[29] 150 Mass. 461, 23 NE 2d 210 (1890).

in particular prevented its effectiveness. The remedies were not always readily available, and there was reluctance on the part of courts to use them. The prohibited conduct was not always well-defined.[30] RICO introduces civil remedies which accompany legislation specially designed for use against organized crime.[31]

B. RICO

¶ 19 RICO provides more civil remedies and has special procedural provisions. The criminal provisions of the act[32] prohibit the use of illegally acquired funds in the establishment or operation of any enterprise which affects interstate commerce.[33] Section 1964 sets forth many types of civil remedies. It does not limit the orders which a court may issue to prevent and restrain violations of Section 1962.[34] It provides for divestment, dissolution, reorganization, restrictions on future activities and investments. Section 1964(c) provides for private treble damage actions. Some procedures are specified. The Attorney General may institute proceedings; the courts are given wide discretion in

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[30] See Yuma County v. Wisener, 45 Ariz. 475, 46 P 2d 115 (1953).

[31] See note 1, supra.

[32] 18 U.S.C. §§ 1962-1963.

[33] 18 U.S.C. § 1962.

[34] 18 U.S.C. § 1964(a).

issuing interim orders; the defendant is estopped from denying liability for actions for which he has already been convicted under RICO.[35] Later sections of the act provide for venue and service of process,[36] a civil investigative demand,[37] and expedition of civil actions.[38]

¶ 20 The RICO civil remedies were patterned after those developed in the field of antitrust law, although, evidently, without any intention of importing the great complexity of of that field.[39] The theory that gave rise to the use of these remedies against monopolies also justified their use against organized crime.

> It is premised on the notion that use of illegally acquired income and illegal methods to acquire and maintain an ongoing business enterprise gives that enterprise an unfair competitive advantage so that as a matter of sound economic and social policy divestiture or dissolution is justified in order to preserve the freedom of the marketplace.[40]

The difficulties associated with criminal prosecution of organized crime and the aptness of civil remedies as a tool against

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[35] 18 U.S.C. § 1964(d).

[36] 18 U.S.C. § 1965.

[37] 18 U.S.C. § 1968.

[38] 18 U.S.C. § 1966.

[39] See notes 61-74 infra and accompanying text.

[40] Hearings on S. 30, S. 975 Before the Sub-Committee on Criminal Law, Testimony of Lawrence Speiser.

economically powerful organizations played an important part in RICO's legislative history.[41] The civil remedies have much to offer that the criminal process lacks:

> These time tested remedies . . . should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure under which Section 1964 actions are governed, with its lesser standard of proof, non-jury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity.[42]

¶ 21 RICO makes available various types of civil remedies. Divestment is an important antitrust remedy;[43] a court can require persons or entities to strip themselves of their interests in property or organizations. The Supreme Court gave support to this remedy in United States v. Dupont and Company,[44] saying: "Courts are authorized, indeed required

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[41] S. Rep. No. 61791, 91st Cong., 1st Sess., 80. "There is no doubt that the common law criminal trial, hedged in as it is by necessary restrictions on arbitrary governmental power to protect individual rights, is a relatively ineffectual tool to implement economic policy. It must be frankly recognized, moreover, that the infiltration of legitimate organizations by organized crime presents more than a problem in the administration of criminal justice."

[42] Hearings on S. 30, S. 975 Before the Sub-Committee on Criminal Law, Testimony of Richard Kleindienst.

[43] See Standard Oil Co. v. U.S., 221 U.S. 1 (1910); U.S. v. Grinnel, 384 U.S. 563, 580 (1966).

[44] 366 U.S. 316 (1961).

to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests."[45] Dupont had acquired 23 percent of General Motors common stock, greatly diminishing free competition and tending to create a monopoly in a line of commerce. The Court held that partial divestiture would not be an adequate remedy, and Dupont was required to divest itself completely of the stock. This form of relief has so far not been successfully sought under RICO.[46]

¶ 22 RICO allows for dissolution of hopelessly corrupted organizations and protection of the rights of innocent parties in such cases. Precedent for this remedy is found in International Boxing Club of New York v. United States,[47] where the Court found that the defendants had combined and conspired in unreasonable restraint of trade and commerce to promote and broadcast and monopolize world championship boxing contests in violation of the Sherman Act.

¶ 23 Courts may also provide relief in the form of restrictions on the future activities and investments of persons found guilty of violating RICO. Relief of this sort was upheld in DeVeau v. Braisted,[48] which found that a New York

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[45] Id. at 326.

[46] See U.S. v. Ladmer, 429 F. Supp. 1231 (E.D. N.Y. 1977).

[47] 358 U.S. 242 (1959).

[48] 363 U.S. 144. See also U.S. v. Swift & Co., 286 U.S. 106 (1932).

law disqualifying felons from holding office in waterfront labor organizations was not unconstitutional. In United States v. Winestead,[49] the government brought a RICO action against alleged operators of a gambling ring and sought a temporary restraining order. The court found the relief inappropriate because the evidence did not show a likelihood that the defendants would continue their behavior in the future.[50]

¶ 24 These types of equitable relief and the procedures that accompany them have been found to be constitutional.[51] A jury trial is not available: "The relief authorized is remedial and not punitive and is of a type traditionally granted by courts of equity."[52] Collateral estoppel applies in a suit brought by the government if a prior criminal conviction has been obtained;[53] an acquittal is no bar to a civil suit.[54]

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[49]421 F. Supp. 295 (N.D. Ill. 1976).

[50]Id. at 296-97.

[51]See U.S. v. Cappetto, 502 F.2d 1231 (7th Cir. 1974).

[52]Annual Prosecutors Workshop, supra note 27 at 325.

[53]18 U.S.C. § 1964(d) (1976).

[54]See Farmers Bank v. Bell Mortgage Corporation, 452 F. Supp. 1278, 1280 (N.D. Cal. 1978).

¶ 25 Actions for these remedies may be brought by private individuals as well as by the government. Although this is not specifically stated by the statute, ample precedent exists for it in antitrust law[55] and in the legislative history:

> . . . the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman . . . . Patterned closely after the Sherman Act, it provides for private treble damage suits, prospective injunctive relief, unlimited discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime.[56]

Although the bill to which this language applies had somewhat different provisions than the RICO statute that was enacted, there is nothing to prevent private parties from seeking appropriate relief.

IV. Private Treble Damage Actions

¶ 26 Section 1964(c) allows private parties to bring treble damage actions if they have been injured by a violation of Section 1962.[57] The provision is modeled after Section 4

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[55]L. Sullivan, Antitrust, (West 1977), p. 769.

[56]S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6993.

[57]18 U.S.C. § 1964(c). "Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefore 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."

of the Clayton Act.[58] Since a damage award is not an equitable remedy, a case brought under this subsection would be eligible for a jury trial.[59] An unsettled issue is whether the collateral estoppel of Subsection (c) applies to private actions.

A. The Extent of Antitrust Influence

¶ 27 Some have assumed that collateral estoppel applies to private civil actions: "Subsection (d) provides for collateral estoppel in any civil action as to issues decided in a previous criminal prosecution."[60] However, bills proposed before the statute that was finally adopted did allow for collateral estoppel in all civil suits.[61] The change in language to the final reading could be a deliberate limitation.

¶ 28 The legislative history cites antitrust cases extensively as precedents for the use of RICO civil remedies.[62] However, it is hard to tell just how decisive the antitrust law is meant to be in RICO cases. The earliest versions

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[58] 15 U.S.C. § 15 (1976).

[59] Annual Prosecutors Workshop, supra note 24 at 325-26.

[60] Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity," 121 U. Pa. Law Rev., 195.

[61] See H. 19586, 91st Cong., 2d Sess. (1970) and S. 2049, 90th Cong., 1st Sess. (1967).

[62] Hearings on S. 30, S. 975 Before the Sub-Committee on Criminal Law, Testimony of Richard Kleindienst.

of statutes proposing civil remedies applied antitrust law itself to organized crime. In fact, some such cases had already been successful.[63] These versions were rejected as not always suitable in organized crime cases.[64] Subsequent versions were more carefully tailored to the intentions of organized crime cases.[65] The applicable antitrust law was narrowed.[66] Therefore, although much antitrust law is valid precedent for RICO cases,[67] some antitrust law is not meant to extend that far.

¶ 29 One such area concerns the standing requirements imposed by the courts in private treble damage actions brought under Section 4 of the Clayton Act. The injury must be direct;[68] the antitrust violation must be the proximate cause of the injury;[69] the remedy is not allowed for derivative injury.[70] The rationales offered for these limitations do not justify their application to organized crime cases.

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[63] See, e.g., U.S. v. Bitz, 282 F.2d 465 (2d Cir. 1960).

[64] S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995.

[65] Id.

[66] Id.

[67] See King v. Vesco, 342 F. Supp. 120, 122 (N.D. Cal. 1972).

[68] Sullivan, Antitrust, supra note 56, pp. 770-774.

[69] Id.

[70] Id.

"Various reasons have been suggested for these nonstatutory standing formulas, among them fear of double recoveries and of debilitating defendants by large aggregate awards, perhaps associated, in some instances, with relatively minor wrongs."[71] The nature of the wrongs prohibited by Section 1962 of RICO, which violations are required for Section 1964(c) recovery, insures that 'relatively minor wrongs' will not result in large recoveries, and certainly the debilitation of defendants is one of RICO's chief purposes. It is clear that these requirements were not intended to apply.[72]

¶ 30 In forming the final provision for collateral estoppel, the drafters may have intended to leave the question open for for the courts to apply. It is also possible that they made specific provision for cases brought by the United States in order to make civil actions more readily accessible as follow-ups in criminal prosecutions. They may also, however, have intended private suits to follow government actions.[73]

B. Application to Corruption

¶ 31 RICO civil actions can be used effectively against many aspects of organized crime, although so far they have not been widely used. Two private treble damage actions,

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[71] Id. at 773.

[72] S. 2049, 90th Cong., 1st Sess. (1967). Written statement by A.B.A. section on Antitrust Law, p. 129.

[73] See Sullivan, Antitrust, supra note 56, at 770 note 5.

King v. Vesco,[74] in which defendants were accused of using illegally acquired funds to gain control of the plaintiffs' business, and Farmers Bank of the State of Delaware v. Bell Mortgage Corporation,[75] involving an alleged securities fraud, were both dismissed for lack of venue. In People of the City of Chicago v. Bilandic,[76] the plaintiff alleged two counts of "generalized political corruption and incompetence," claiming injury from a decrease in property values due to a judge's judicial actions. The claim was dismissed for failure to state a claim upon which relief can be granted; it failed to claim injury from a Section 1962 violation.

¶ 32 RICO civil remedies could be used to combat political corruption. Several RICO criminal prosecutions have already been successfully brought against corrupt officials. Civil actions could be brought against these same officials; nothing need be proved for a civil action that is not proved in a criminal action, except that the relief be appropriate.[77] No injury need be shown other than the injury to the general public.[78] It need not be shown that there is inadequate remedy at law.[79]

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[74] 342 F. Supp. 120 (N.D. Cal. 1972).

[75] 452 F. Supp. 1278 (D. Del. 1978).

[76] No. 77 C 4471 (N.D. Ill.) Apr. 17, 1978.

[77] See Farmers Bank, supra note 55, and U.S. v. Cappetto, supra note 52.

[78] Id.

[79] Id.

¶ 33 The theory of a civil case would be the same as that of a criminal case. It has been held that government agencies are enterprises for RICO purposes,[80] and that they affect interstate commerce.[81] Bribery and extortion are among those crimes that may be considered in finding RICO violations.[82] So far many successful criminal violations have been brought against public officials.

¶ 34 United States v. Frumento[83] held that the Bureau of Cigarette and Beverage Taxes in the Pennsylvania Department of Revenue was an enterprise within the scope of Section 1962.[84] United States v. Salvitti[85] held that a kickback scheme run by a city official was a 'pattern of racketeering activity' in violation of Section 1962. RICO charges were brought against a former warden of a county prison for accepting bribes.[86] United States v. Vignola[87] held that a Philadelphia traffic court was a 'legal entity' and therefore an enterprise for

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[80] See U.S. v. Frumento, 563 F.2d 1083 (3d Cir. 1977).

[81] Id.

[82] Id.

[83] Id.

[84] Id.

[85] 451 F. Supp. 195 (E.D. Pa. 1978).

[86] U.S. v. Davis, 576 F.2d 1076 (3d Dir. 1978).

[87] 464 F. Supp. 1091 (E.D. Pa. 1979).

RICO purposes.[88] Charges were brought against a state legislator for accepting bribes to use his influence on school admission boards in United States v. Fineman.[89]

¶ 35 RICO civil actions could be brought against all of these officials where the relief sought is appropriate or where there is injury for which a private treble damage action could be brought. The state legislator, for example, might be sued by those who had been kept out of school by reason of his illegal use of influence. A contractor who is passed over for a contracting award by an official who received a bribe or kickback for his action might be awarded treble damages. A prior criminal conviction is not a prerequisite for a civil case; since there is a lower standard of proof, a civil action might be successful where a criminal prosecution failed for lack of evidence. Since private individuals may bring actions, more cases can be brought against more organized crime members; busy public prosecutors do not have to be depended on for every case; those who are injured may themselves seek relief without having to wait for someone else to take action.

Conclusion

¶ 36 The inclusion of civil remedies in RICO has been much criticized. It is feared that it will deprive defendants of

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[88] Id. at 1095.

[89] 434 F. Supp. 189 (E.D. Pa. 1977).

their constitutional rights: "We believe that adequate consideration has not been given to constitutional safeguards."[90] It is feared that they are much too open to abuse: "Section 1964(c) provides invitation for disgruntled and malicious competitors to harass innocent businessmen."[91] It is feared for its breadth: "The RICO law frightens many lawyers and judges. They worry about language so loosely drawn that it lets the government sweep even small-time white-collar defendants and public officials into the same pot as underworld hit men."[92] But used where they are needed, they could provide a measure of relief that criminal sanctions do not reach.

> Title IX's civil provisions promise to be far more effective than any existing authority as a means of protecting legitimate businessmen from the ruthless and oppressive methods used by organized crime in its business dealings, and as a means of guarding the American principle of free competition in the marketplace.[93]

Used against political corruption, they can do much to deprive organized crime of one of its most powerful weapons.

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[90] Hearings on S. 30, S. 975 Before the Sub-Committee on Criminal Law, Testimony of Lawrence Speiser.

[91] H.R. Rep. No. 1545, 91st Cong., 2d Sess. (1970).

[92] Newsweek, Aug. 20, 1979, p. 82.

[93] Hearings on S. 30 and Related Proposals, 91st Cong., 2d Sess. (1970).

RICO FORFEITURES: A GENERAL VIEW

by

Peter Storey

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SUMMARY

Section 1963 of the Racketeer-Influenced and Corrupt Organizations title provides for the forfeiture of certain property rights in criminal enterprises. The statute orders the Attorney General to dispose of these forfeited interests "making due provision for the rights of innocent persons."

These materials attempt to define various possible meanings of this phrase. The historical roots of the concept of forfeiture are explored, as are the coneptual bases for most of American forfeiture law. Section 1963 and its legislative history are then examined in closer detail to identify what the intended purposes of the statute are.

In part II, the materials attempt to define what rights are vested in other parties interested in the forfeited property. Because no reported decision has yet dealt with this issue, the materials can do little more than isolate and offer possible solutions to certain issues which the courts will face.

I. INTRODUCTION

¶ 1 Section 1963 of title 18 of the U.S. Code provides the penalties for violations of the Racketeer-Influenced

and Corrupt Organizations Title (RICO).[1] Subsection 1963(a) provides for the prison terms and fines as well as forfeiture by the offender of:

> (1) any interest he has acquired or maintained in violation of section 1962 and
> (2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.[2]

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[1] 18 U.S.C. §§ 1961 - 68 (1976) (Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. 9, 84 Stat. 922 (1970)).

[2] § 1962 provides:

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

Subsection 1963(b)[3] authorizes restraining orders to be entered prior to conviction to prevent dispersion of the property threatened with forfeiture. Section 1963(c) prescribes the mode of seizure and disposition of the property forfeited under section 1963(a). Section 1963(c) provides:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (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.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. Added Publ.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

18 U.S.C. § 1962 (1976).

[3] § 1963(b) provides:

> In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

18 U.S.C. § 1963(b) (1976).

[4] 18 U.S.C. § 1963(c) (1976).

> (c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

¶ 2 To date, no judicial or legislative materials offer guidance as to the meaning of the phrase, "making due provision for the rights of innocent persons." The ambiguities are quickly apparent: what are those rights; who is an innocent person; how much provision is "due;" who decides; is there an appeal to a higher authority? In addition, the constitutionality of the statute may depend on the meaning of the phrase.[5]

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[5] See discussion, infra at ¶ 55 n. 129 et seq.; Doyle, Criminal Forfeiture, 46 - 48, 53-54 (Library of Congress, Congressional Research Service 1971) [hereinafter cited as Doyle].

¶ 3 Interpretation of the phrase is further complicated by the almost unique nature of the forfeiture penalty prescribed in Section 1963(a). Upon conviction of a violation of Section 1962,[6] the offender automatically forfeits certain property. Conceptually the forfeiture is nothing more than an additional penalty. This type of criminal forfeiture is based on personal guilt; the rights of the government in the property derive from an in personam judgement against the offender.

¶ 4 With some other exceptions, all other forfeiture provisions under federal law are generically described as civil forfeitures.[7] Under these cases, which usually arise from violations of customs, revenue, and certain nar-

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[6] See note 2 supra.

[7] Congress and the Justice Department clearly thought that § 1963 reintroduced criminal forfeiture into American jurisprudence. See, e.g., S. Rep. No. 617, 91st Cong., 1st Sess. 79 - 80 (1969) [hereinafter cited as Senate Report]; H.R. Rep. No. 1549, 91st Cong. 2d Sess. 188 (1970) (dissenting views of Reps. Conyers, Mikva, Ryan); Accord, 18 U.S.C. § 3563 (1976). Section 3563 is presumably still good law except as it applies to forfeitures. See Senate Report, supra at 160.

Nonetheless, certain federal statutes use forfeiture as a criminal penalty. See United States v. Hall, 521 F.2d 406 (9th Cir. 1975) (18 U.S.C. § 545 (1976) (smuggling) imposes a criminal forfeiture for purposes of Fed. R. Crim. P. 7(c)(2)). A full analysis of the civil/criminal distinction as applied to traditionally "civil" actions is beyond the scope of these materials. See generally, Bane of American Forfeiture Law - Banished At Last?, 62 Cornell L. Rev. 768 (1977) [hereinafter cited as 62 Cornell L. Rev.].

cotics laws, the property is deemed "tainted" and the proceeding is theoretically against the property itself. The forfeiture stems from the "guilt" of the property, and the rights of the government derive from an in rem judgement against the offending articles.[8]

¶ 5 The notion of "guilty" property is clearly a fiction, but it is an enduring one.[9] Furthermore, the concept of civilly determining the rights of specific property as against all the world provides a doctrinal framework which is procedurally more hospitable to the claims of third parties than the in personam criminal scheme. The same cannot, however, be said for the substantive rights of the third party. It has consistently been held that if the "taint" in the property is valid, the rights of all others in the property are thereby extinguished.[10]

¶ 6 This then is the crux of the interpretation problem. Section 1963(c) mandates criminal forfeiture, but criminal

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[8] See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), citing The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); Helvering v. Mitchell, 303 U.S 391 (1937); United States v. Brig Malek Adhel, 43 U.S. 91, 2 How. 210 (1844).

[9] J.W. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505 (1920); Doherty v. United States, 500 F.2d 540, 545 (2d Cir. 1974); Beaudry v. United States, 79 F.2d 650 (5th Cir. 1935).

[10] See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) and cases collected therein.

forfeiture is an unknown quantity in American jurisprudence. Section 1963(c) prescribes customs procedure as a guide, but customs forfeitures are in rem in nature.[11] Section 1963(a) forfeitures are not.[12] Section 1963(c) orders the government to make "due provision for the rights of innocent persons," but the customs laws recognize almost no substantive rights in third parties.[13]

II. HISTORICAL ROOTS OF AMERICAN FORFEITURE LAW

¶ 7 The modern law of forfeitures grew out of three distinct institutions in British law:[14]

(1) forfeiture of realty and personalty upon conviction of a felony, often referred to as "common law" or "criminal" forfeiture;

(2) British statutory schemes designed to aid in the enforcement of revenue laws; and

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[11] See, e.g., United States v. Brig Malek Adhel, 43 U.S. 91, 2 How. 210 (1844); The Palmyra 25 U.S. (12 Wheat.) 1 (1827); United States v. Wing Leong, 287 F.2d 849 (7th Cir. 1961).

[12] See note 7, supra.

[13] See ¶ 25 and notes, infra.

[14] See, e.g., Doyle, supra note 5; 62 Cornell L. Rev., supra note 7.

(3) the institution of deodands which, although developed in medieval times by ecclesiastical courts, nonetheless survived in English law until 1846.[15]

¶ 8 It is wise to develop some understanding of the nature of each of these as well as the contributions each has made to the American law of forfeitures, both before and after RICO.

A. Criminal or Common-Law Forfeiture

¶ 9 At common law, conviction and attainder of a felony led to a forfeiture of property to the Crown.[16] Perhaps the most frequently cited rationale for forfeiture under these circumstances is that offered by Blackstone:

> [H]e who has thus violated the fundamental principles of government, and broke his part of the original contract between King and people, has abandoned his connexion with society; and has no longer any right to those advantages, which before belonged to him purely as a member of the community; among which social advantages, the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections.[17]

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[15] Act to Abolish Deodands, 1846, 9 & 10 Vict. C. 62 (1846); See generally, Finckelstein, The Goring Ox, 46 Temple L.Q. 169 (1973).

[16] 4 Blackstone, Commentaries *380 - 81 [hereinafter cited as Blackstone].

[17] Id. at *382.

¶10 If the offender was convicted and attainted, the forfeiture followed swiftly and automatically.[18] Conversely, a conviction and (under certain circumstances)[19] an attainder were required before a forfeiture occurred.[20] This kind of common-law, criminal forfeiture was merely an added penalty imposed in personam against a criminal defendant. The nature of the property subject to the forfeiture was immaterial. The sanction did not require that the property itself have been used in the crime or

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[18]Attainder was an "immediate, inseparable consequence of a sentence of death." Id. at *380. Death was the customary sentence upon conviction of a felony. Forfeiture, also, was swift and sure where an offender was declared an outlaw:

> [T]hat yf an exigent in case of felonye be awardyd against a man, he hath thereby forthwith forfetyd his goodes to the King.

St. German, Doctor and Student 61 (Selden Soc'y ed. 1974).

[19]See ¶ 11 infra.

[20]See, e.g., The Palmyra, 25 U.S. (12 Wheat.) 7 (1827) (Story, J.). It appears that the requirement of conviction did not apply where a man was outlawed for failure to answer a complaint. In this case forfeiture served as the ultimate contempt sanction. See n. 7 supra. The offender did, however, enjoy substantial procedural protections. The preferred sanction was to attach whatever property of the offender might be found. If attachment could not be had, a capias would issue against him. Upon ignoring a total of three capias as well as an exigent which was to be circulated throughout five counties, the defendant being solemnly called in each, the defendant's property would be forfeit. St. German, Doctor and Student 181 - 82 (Selden Soc'y ed. 1974).,

be otherwise "tainted;" rather the taint was in the owner himself.[21]

¶ 11 Although the imposition of forfeiture was automatic upon a finding of guilt, the extent of the sanction depended on the crime. The most severe loss, forfeiture of realty and personalty and corruption of blood, occurred when the offender was convicted and attainted for High Treason or Outlawry.[22] If he was attainted for a lesser crime than treason only his interest in realty, not those of heirs in fee tail, were forfeit.[23] The King was thereupon entitled to the land for a year and a day and had the right to commit waste upon it.[24] The remainder of the life estate passed to the offender's feudal lord.[25]

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[21]"Another consequence, 'which formerly resulted from' attainder, was the corruption of blood, both upwards and downwards; so that an attainted person could neither inherit lands or other hereditaments from his ancestors, nor retain those he was already in possession of, nor transmit them by descent to any heir; but the same escheated to the lord of the fee, subject to the sovereign's superior right of forfeiture: and the person attainted also obstructed

> all descents to his posterity, wherever they were obliged to derive a title through him to a remoter ancestor." 4 Blackstone, supra note 16.

[22]Id. at *381.

[23]Id. at *385; Hale, Pleas of the Crown *356 (1st American ed. 1847).

[24]4 Blackstone, supra note 16 at *385.

[25]Id.

¶ 12 Personalty was forfeit upon conviction of high treason, misprision of high treason, petit treason, felony, suicide, and certain other crimes.[26] There was no requirement that the offender be attainted.[27] Conviction alone was sufficient.

¶ 13 In contrast to the English tradition, forfeiture never enjoyed widespread use in the American colonies.[28] Several reasons have been advanced for this. Forfeited goods escheated to the Crown and not to the colonial governments. In addition most felons were too poor to forfeit anything of value in any case.[29]

¶ 14 Forfeitures became widespread throughout the American states only with the outbreak of the revolutionary war. During the revolution most states enacted provisions forfeiting the land and personalty of loyalists.[30] It was not

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[26] See e.g., Hale, Pleas of the Crown, 361 (1st American ed. 1847); 4 Blackstone, supra at *386 - 87.

[27] 4 Blackstone, supra at *387.

[28] Doyle, supra note 5 at 10 - 11; 62 Cornell L. Rev., supra note 7 at 777.

[29] Doyle, supra at 11; these generalizations should not, however, obscure the diversity in colonial practice. Although some colonies such as New York made little use of the forfeiture sanction which was theoretically available to them, others, such as Virginia and Pennsylvania made full use of the sanction. J. Goebel, Law Enforcement in Colonial New York 712 - 13, 716 (1944); A. Scott, Criminal Law in Colonial Virginia 109 (1930); 62 Cornell L. Rev. supra note 7 at 776 - 77.

[30] Doyle, supra note 5 at 13 - 14.

unusual for these to be legislative bills of attainder passed in regard to a specific offender and declaring his property forfeited.[31] Most were upheld.[32]

¶ 15 After independence had been achieved, this trend abated. It has been suggested that concerns that bills of attainder deprived innocent heirs of their inheritances and withheld the protection of judicial process finally outweighed the strong political feelings involved.[33]

¶ 16 Whatever the motivation, the Constitution specifically prohibits Congress from passing bills of attainder[34] and states that while Congress has the power to declare the punishment of treason, "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."[35] The latter provision

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[31] Id.

[32] An extensive list of these decisions is found in id. at 14 n. 51.

[33] "During the American Revolution this power was used with a most unsparing hand, and it has been a matter of regret in succeeding times, however much it may have been applauded 'flagrante bello.'" III Story, Commentaries on the Constitution of the United States, 211 n. 3 (Da Capo ed. 1970); 62 Cornell L. Rev. supra note 7 at 779.

[34] U.S. Const. art. I § 9.

[35] U.S. Const. art. III § 3; see also III Story, Commentaries on the Constitution of the United States 171 - 73 (Da Capo ed. 197[illegible])

provoked little debate, despite the long history of forfeiture in English law.[36]

¶ 17 American antipathy to criminal forfeiture went one step further when the first Congress enacted a statute declaring that:

> No conviction or judgement for any of the offenses aforesaid shall work corruption of blood or any forfeiture of estate.[37]

This provision has never been expressly repealed,[38] although certain acts of Congress have been inconsistent with its clear intent.

¶ 18 The Confiscation Act of 1862[39] authorized the President to seize the property of Confederate sympathizers. The

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[36] See generally, Doyle, supra at 14 n. 52.

[37] 18 U.S.C. § 3563 (1976) (Act of April 30, 1790, ch. 9 § 24, 1 Stat. 117 (1970)).

[38] However, the legislative history of RICO indicates that § 3563 no longer applies to forfeitures, at least of the RICO type. See Senate Report supra, note 7 at 160.

[39] Act of July 17, 1862, ch. 195 § 5, 12 Stat. 589 (1862). The others are the Racketeer Influenced and Corrupt Organizations title of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961 - 68 (1976) and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848 (1976). In United States v. Hall, 521 F.2d 406 (9th Cir. 1975) it was held that 18 U.S.C. § 545 (smuggling) provides for criminal forfeiture. See also, 62 Cornell L. Rev., supra note 7 at 779 - 80.

scope of the sanction was limited by an explanatory joint resolution of Congress which stated that no more than a life estate could be confiscated.[40] Various Supreme Court decisions recognized these reversions in the heirs.[41]

¶ 19 With the exception of the Confiscation Act, criminal forfeiture was unknown in the United States for almost two centures.[42] It is because there is so little American law on the subject that RICO presents the problem it does.

B. Civil Forfeiture

¶ 20 In addition to their use as criminal penalties, forfeitures were also used in England as a means of enforcing the customs and revenue laws.[43] Unlike the criminal variant, these statutory civil forfeitures[44] had a great influence on American law.

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[40] J. Res. 63, 37th Cong., 2d Sess. 12 Stat. 627 (1862).

[41] Bigelow v. Forrest, 76 U.S. (9 Wall.) 339, 350 (1869). The constitutionality of the confiscation act was upheld in Wallach v. Van Riswick, 92 U.S. 202 (1876); Miller v. United States, 78 U.S. (11 Wall.) 268 (1870).

[42] This, at least, was the position of the Justice Department when RICO was enacted. See note 7 supra.

[43] See, e.g., Doyle, supra note 5 at 5 - 10; Cornell L. Rev., supra note 7 at 775 - 76.

[44] These proceedings were also frequently known as exchequer proceedings or as vice-admiralty proceedings after the courts which had jurisdiction over them in England and America respectively.

¶ 21 An action for violation of the customs or revenue laws could be brought either in personam against the offender or in rem against the "offending" goods depending on the statute involved.[45] Generally, the government preferred the in rem action because in that proceeding the owner of the goods bore the burden of showing why they should not be forfeited.[46] If the owner did not anwer, summary forfeiture ensued.[47]

¶ 22 With the passage of the various Navigation Acts and various other acts of trade[48] during the seventeeth and eighteenth centuries these civil forfeiture proceedings became extremely harsh in their effect on the unwitting offender. A violation of the navigation acts resulted in forfeiture both of the "offending" goods and of the vessel or vehicle which carried them[49] Furthermore, it was no defense that the owner was unaware that he was transport-

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[45]Doyle, supra note 5 at 9; Cornell L. Rev., supra note 7 at 775.

[46]Id.

[47]Doyle, supra note 5 at 9 - 10.

[48]A brief summary of the various acts is found in Harper, The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering 387 - 414 (Octagon 1964).

[49]Cornell L. Rev., supra note 7 at 774.

ing illegal goods or even that he had taken reasonable precautions to ensure that he was not. Thus the act of a single sailor done without the knowledge or even against the express wishes of a master or owner could forfeit the entire ship.[50]

¶ 23 It appears, however, that in practice, this sort of harshness did not prevail in the Colonies. The British government did establish vice-admiralty courts to hear customs and revenue cases, and these courts were definitely unpopular with the colonists.[51] But it seems also that

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[50] Mitchell qui tam v. Torup, Parker 227, 145 Eng. Rep. 764 (Ex. 1766). Idle qui tam v. Vanheck, Bunbury 230, 145 Eng. Rep. 657 (Ex. 1727). The courts mitigated some of the severity of this doctrine by stating that:

> . . . a jury would be justified in finding no forfeiture, if the quantity of contraband was so small that the master could not have discovered it after a reasonable search. Thus, under the Navigation Acts, forfeiture of a ship carrying contraband was required only if the owner or his carefully chosen master was implicated or negligent.

Cornell L. Rev., supra note 7 at 775, commenting on, Mitchell qui tam v. Torup, Parker 227, 237 - 38, 145 Eng. Rep. 764, 767 (Ex. 1766).

[51] Several reasons have been suggested for this. First, the colonists had become accustomed to somewhat lax enforcement of revenue laws; secondly, neither the customs officials nor the officers of the courts were colonists and thus were presumably even more outside the sway of public opinion; thirdly, venue could be laid in any of the following three places: the local vice-admiralty court, the vice-admiralty court in Halifax, or the court of the exchequer in England. Lastly, trial was before the court, not by jury. Doyle, supra note 5 at 13.

the courts were extremely reluctant to declare a forfeiture without some proof of personal culpability,[52] thereby departing from British notions of both strict and vicarious liability.

¶ 24 After the revolution, civil forfeitures, unlike criminal ones remained well established in American law. The courts recognized the right of the federal government to impose forfeiture on violators of the embargo acts as well as pirates in in rem proceedings.[53] The British concepts of strict and vicarious liability in the in rem situation remained in American law. In United States v. Brig Malek Adhel[54] a ship was seized for piracy offenses. The owner contested the forfeiture on the grounds that he had had no knowledge of what the ship's captain was doing. The Court per Mr. Justice Story upheld the forfeiture of the ship saying:

> In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he implicitly submits to whatever

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[52] Cornell L. Rev., supra note 7 at 778.

[53] United States v. Brig Malek Adhel, 43 U.S. 91, 2 How. 210 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); United States v. Little Charles, 26 F. Cas. 979 (C.C.D. Va. 1818) (No. 15, 612).

[54] 43 U.S. 91, 2 How. 210 (1844).

> the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.[55]

¶ 25 These principles hold true today. The various civil forfeiture statutes make little provision for the rights of third persons. The action is directed against the res, and when the res is forfeited to the government their rights are extinguished.[56] Although responsible officials may decide to remit or mitigate the forfeiture, this is almost entirely at their discretion.[57] With few exceptions, the courts have refused to order a remission. The only discernible pattern among the exceptions is for courts to order remission where the forfeited property was stolen or otherwise used against the wishes of the owner.[58] Acquiescence in the use, even where the user has been specifically

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[55] Id. at 233, 2 How. at 234; accord, United States v. Hall, 26 F. Cas. 75 (C.C.E.D. Pa. 1844) (No. 15, 281); United States v. Little Charles, 26 F. Cas. 979 (C.C.D. Va. 1818) (No. 15, 612); see also, The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) (no personal conviction required for forfeiture to stand).

[56] United States v. One Ford Coupe Automobile, 272 U.S. 321, 325 (1926) (Brandeis, J.).

[57] The authority of the customs collector to remit or mitigate a forfeiture is given by 19 U.S.C. §§ 1613, 1618 (1976).

[58] See, e.g., Peisch v. Ware, 8 U.S. 132, 136, 4 Cranch 347, 364 (1808), cited in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974); United States v. Almeida, 9 F.2d 15, 16 (1st Cir. 1925); United States v. One Saxon Automobile, 257 F. 251, 252 (4th Cir. 1919); United States v. One Reo Speed Wagon, 5 F.2d 373, 373 (D. Mass. 1925). But see, United States v. One Chevrolet Sedan, 12 F. Supp. 793 (W.D.N.Y. 1935).

forbidden to use the property in an illegal manner, will usually deter the court from ordering a remission.[59]

¶ 26 The constitutionality of civil forfeitures is not in doubt. Constitutional claims have forced changes in certain collateral procedures,[60] but the power of the government to deprive an innocent owner of his property is unquestioned.[61]

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[59] See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 690 (1974); Van Oster v. Kansas, 272 U.S. 465, 468 (1926); United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926); J.W. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505, 508 - 12 (1920); United States v. One 1975 Ford Pickup Truck, etc., 558 F.2d 755, 757 (5th Cir. 1977); United States v. One Chevrolet Truck, 79 F.2d 651, 652 (5th Cir. 1935).

[60] United States v. United States Coin and Currency, 401 U.S. 715, 718 (1971) (right to remain silent may be invoked in a civil proceeding for forfeiture of gambling proceeds); One 1958 Plymouth Sedan v. Pa., 380 U.S. 693, 696 (1965) (civil nature of proceeding does not deprive claimant of her protection against unreasonable search and seizure); Boyd v. United States, 116 U.S. 616, 634 (1886) ("proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." This case too involved a risk of self-incrimination); Lee v. Thornton, 538 F.2d 27 (2d Cir. 1976) (requirement of $250 bond to obtain a hearing under 19 U.S.C. §§ 1607, 1608 (summary forfeiture) and failure to hold such a hearing within seventy-two hours of seizure constitute denial of due process).

[61] See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (forfeiture despite innocence of owner is not a taking without just compensation or a denial of due process); J.W. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505 (1921) (same); see also, Doyle, supra note 5 at 34 - 35.

C. Deodands

¶ 27 The third, and perhaps strangest source of forfeitures in Anglo-American law is the now defunct institution of deodands. When a man died, the object which was the immediate cause of his death was forfeited.[62] Originally the Church was the beneficiary and used the proceeds to buy masses for the soul of the decedent.[63]

¶ 28 With time, however, administration of deodands passed to the King, thereby becoming merely another source of revenue for the Court.[64] Despite this eventual loss of their original purpose, deodands remained an active feature of English law[65] until they were abolished by statute in

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[62]Deodands were only taken after deaths occurring in certain ways. A fuller discussion follows infra.

[63]It is not clear whether the church received the specific object, to be sold subsequently, or its value. Compare, Hale, Pleas of the Crown, *424 (notes) (1st American ed. 1847) with Finckelstein, The Goring Ox, 46 Temple L.Q. 169, 185 (1973) [hereinafter cited as Finckelstein].

[64]Hale, Pleas of the Crown, *424 (notes) (1st American ed. 1847); Finckelstein, supra note 63 at 183; Cornell L. Rev., supra note 7 at 771.

[65]"The wonder was that a law so extremely absurd and inconvenient should have remained in force down to the middle of the nineteenth century; especially as that did not arise from the law having become obsolete or having slipped their recollection from never having been put in force; for the law of deodands was called into action almost weekly as the newspapers constantly informed them." 88 Hansard, Parliamentary Debates 84 (1846), cited in Finckelstein, supra note 63 at 171.

1846.[66]

¶ 29 While it has been argued that deodands are the source of all English forfeiture law, this is probably not the case.[67] Rather, it seems that deodands were just one form of forfeiture, and were sui generis. Deodands combined certain attributes of civil forfeiture such as vicarious liability of the owner and the fact that the user did not need to be convicted, with a punitive element. Where customs forfeitures may be seen as compensating the government for lost revenues, the profit of the deodand did not compensate the family of the decedent, but went to the Crown.

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[66]Act to Abolish Deodands, 1846 9 & 10 Vict. C. 62 (1846).
Why deodands survived so long is not entirely clear. It appears that in its later years, the deodand served as a deterrent to negligence. Since the common law allowed no remedy for wrongful death to the family of the decedent, the threat of forfeiture was expected to hold people to a higher level of care.
It is significant that the bill which abolished deodands was introduced at the same time as the bill creating a private right of action for wrongful death. See Finckelstein, supra note 63 at 170 - 71.
Further, it is not surprising that the value of the deodand flowed to the Crown instead of to the decedent's family. Wrongful death was traditionally a Crown plea. Id. at 178; Hale, Pleas of the Crown, *477 (1st American ed. 1847).
Supporting the thesis that deodands served primarily as a deterrent to negligence, at least one source claims that, properly speaking, deodands were levied only where the death had been negligently caused. Hale, Pleas of the Crown, *424 (notes) (1st American ed. 1847); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974).

[67]See generally, Doyle, supra note 5 at 5 - 6; Cornell L. Rev., supra note 7 at 772.

¶ 30 Although deodands as such never took hold in American common law,[68] there is some authority for the proposition that civil forfeiture as known in the United States derives from the English deodands. Professor Finckelstein makes the following claim:

> [T]he federal courts, including the United States Supreme Court, have upheld the government's right to enforce the forfeiture, thereby sacrificing the interests of parties who by no stretch of any definition could be said to have contributed to the offence for which the forfeiture was being exacted. This is candidly acknowledged by the courts, who for this purpose alone resorted to the rationale that in such forfeiture actions, it is the thing itself which is the offender, not its owner. The current interpretation of such an action is that it is a proceeding undertaken by the government in a civil action in rem [citation omitted]. But this is hardly more than an attempt to put an ostensibly respectable disguise on an action which is at bottom nothing else than the deodand "updated."[69]

III. PURPOSES OF THE RICO FORFEITURE REMEDY

¶ 31 As noted earlier, civil forfeiture is the only one of these three forms which has had wide acceptance in the

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[68]"Deodands did not become part of the common law tradition of this country," Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974); Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54 (1916).

[69]Finckelstein, supra note 63 at 215.

United States.[70] In 1970, however, Congress enacted RICO,[71] which was thought to reintroduce criminal forfeiture into American law.

¶ 32 RICO was intended to create new remedies which could address the infiltration of organized crime into legitimate business enterprises.[72] Organized crime figures had assumed control, by a variety of means, of a wide variety of businesses[73] and had also acquired a strong influence in the affairs of labor unions.[74] In formulating remedies, Congress intended not only to punish defendants by depriving them of their liberty, but also sought to break the back of the

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[70] See note 7 supra and accompanying text.

[71] Id.

[72]
> It [RICO] has as its purpose, the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.

Senate Report, supra note 7 at 76 (1969); Statement of Findings and Purpose, 84 Stat. 922 (1970). See generally Senate Report supra note 7.

[73] Id. at 76 - 78.

[74] "Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others . . . . As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here." Senate Report supra note 7 at 78 (citations omitted).

economic power of organized crime.[75] Furthermore, Congress intended that the effects of RICO be lasting.[76]

¶ 33 The forfeiture provision was expected to further these policies, criminal forfeiture serving as an economic weapon:

> Through this new approach, it should be possible to remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence.[77]

¶ 34 Of course, the forfeiture provision has a punitive purpose also.[78] If economic regulation were the sole purpose of Congress, the provision would most likely be unnecessary, given the broad sweep of the government's civil remedies.[79] One court has made reference to the deterrent

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[75] "What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which these individuals constitute such a serious threat to the well-being of the nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." Id. at 79.

[76] "While the prosecutions of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted." Testimony of Attorney General Mitchell, quoted with approval in Senate Report, supra note 7 at 78.

[77] Senate Report, supra note 7 at 80.

[78] See generally Senate Report, supra note 7 at 79 - 80.

[79] 18 U.S.C. § 1964 (1976).

effects of the penalty.[80]

IV. ANALYSIS OF THE RICO FORFEITURE PROVISIONS

A. Generally

¶ 35 Section 1963(a) provides for the forfeiture of two types of property interest as a penalty for violation of section 1962. The offender:

> . . . shall forfeit to the United States
> (1) any interest he has acquired or maintained in violation of Section 1962, and
> (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.[81]

¶ 36 Construction of these provisions is difficult because there have been relatively few reported cases of forfeiture. The following property interests have, however, been forfeited to the government: illegally obtained funds,[82]

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[80] United States v. Rubin, 559 F.2d 975, 993 (5th Cir. 1977), vacated and remanded, 99 S. Ct. 67 (1978), reinstated in relevant part, 591 F.2d 278 (5th Cir. 1979).

[81] 18 U.S.C § 1963(a) (1976).

[82] United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), vacated and remanded, 99 S. Ct. 67 (1978), reinstated in relevant part, 591 F.2d 278 (5th Cir. 1979).

businesses,[83] shares in businesses,[84] union executive positions.[85] On at least two occasions, compromise cash payments in lieu of actual forfeiture have been accepted by the Justice Department.[86]

¶ 37 New problems in construction were raised by the recent case of United States v. Marubeni America Corp.[87] The defendants, two Japanese corporations and several of

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[83] United States v. Smaledone, 583 F.2d 1129, 1133 (10th Cir. 1978), cert. den., 99 S. Ct. 846 in 99 S. Ct. 1029 (1979) (restaurant forfeited).

[84] United States v. Mandel, 591 F.2d 1347, 1353 (4th Cir. 1979) (reversing the conviction) reinstated, New York Times, July 21, 1979 at 16.

[85] United States v. Rubin, 559 F.2d 975, 990 - 93 (5th Cir. 1977), vacated and remanded 99 S. Ct. 66 (1978), reinstated in relevant part, 591 F.2d 278 (5th Cir. 1979) (defendant ordered to forfeit all his union and trust positions. Held, the forfeiture does not extend to his right to seek such offices in the future).

[86] U.S. Dept. of Justice, Crim. Div., Racketeer Influenced and Corrupt Organization Statute 55 (4th ed.). The two cases were United States v. Hawes, 529 F.2d 472 (5th Cir. 1976) (cash compromise forfeiture of $246,000 in lieu of four vending machine companies) and United States v. White, 386 F. Supp. 882 (E.D. Wis. 1974) (cash compromise forfeiture of $100,000 in lieu of automobile agency). Neither opinion discusses the forfeiture aspect.

[87] No. _____ (C.D. Calif. 1978), appeal docketed, no. 79-1327 (9th Cir., April 29, 1979).

their officers, as well as an employee of the municipality of Anchorage, Alaska, were charged with violations of 1962(c). The government sought a forfeiture of $8 million in profits derived from contracts obtained through bribery. The defendants successfully argued that the phrase "any interest" as used in Section 1963(a)(1) means any ownership interest in the enterprise itself. The $8 million constituted value received, but was not an interest in the enterprise. Defendants further argued that this interpretation was supported by the legislative history and by the fact that Section 1963(a)(1) appears to be aimed at violations of Section 1962(a) and (b), while Section 1963(a)(2) appears to be the remedy for violations of 1962(c).[88] It was then argued that both parts of 1963(a) were intended to have the same effect, divestiture of influence, but that different provisions were needed to apply to the different offenses defined by section 1962.[89]

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[88]The argument is that since § 1962 (a) prohibits acquisition of certain interests and § 1962(b) prohibits acquisition or maintenance of certain interests, § 1963(a)(1) should be read as forfeiting precisely those interests.

Similarly, § 1962(c) prohibits certain conduct and § 1963 (a)(2) forfeits the sources of power which permit the defendant to engage in that conduct.

Thus, argue defendants, since they were indicted under § 1962(c), the government's sole remedy is § 1963(a)(2). Brief for Appellee, United States v. Marubeni America Corp., appeal docketed, no. 79-1327 (9th Cir., April 29, 1979).

[89]Id.

¶ 38 This reasoning prevailed at the trial level. The government has appealed and argues that, while it is true that its bill originally did say "any interest in the enterprise," the fact that it no longer does so is proof of legislative intent that it should not.[90] The government also argues that the defendants' theory would require the two parts of Section 1963(a) to be phrased in the alternative. Instead they are joined by an "and." If the defendants' interpretation were adopted, the presence of part 2 would rob part one of all independent significance. To avoid this, it is necessary to interpret part one as embracing different property.[91]

B. Federal Rules Amendments

¶ 39 To implement the criminal forfeiture provisions of RICO, the Federal Rules of Criminal Procedure were amended in several places.[92] Of these the most important was the

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[90] Brief for Appellant, United States v. Marubeni America Corp., appeal docketed, no. 79-1327 (9th Cir., April 29, 1979).

[91] Id.

[92] Rule 7(c)(2) is described infra. Also added were Rule 31(e) (special verdict as to extent of forfeiture) and Rule 32(b)(2) (judgement of forfeiture authorizes seizure of property on terms decreed by the court - the substantive effect of this is discussed at paragraphs 45 - 47). Rule 54(b)(5) was amended. This section had excepted "forfeiture of property" from the application of the Fed. R. Crim. P. The section now excepts "civil forfeiture of property."

addition of rule 7(c)(2) which provides:

> When an offense charged may result in a criminal forfeiture, the indictment shall allege the extent of the interest or property subject to forfeiture.[93]

¶ 40 In United States v. Hall,[94] the defendant was prosecuted under 18 U.S.C § 545 (1976) (smuggling). The Court held that failure to meet the requirements of Rule 7(c)(2) was fatal to an indictment.[95] The effect of the decision was somewhat diluted, however, by the court's allowing the government to bring a second indictment and retry Hall.[96]

¶ 41 It appears that to comply with Rule 7(c)(2) an indictment need not state the dollar value of the forfeiture, nor describe in great detail which assets it intends to seize. In United States v. Smaldone,[97] it was held that stating the name and address of the restaurant which the government sought to seize was sufficient.[98] In United States v. Bergdoll,[99] the court upheld an indictment

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[93] Fed. R. Crim. P. 7(c)(2).

[94] 521 F.2d 406 (9th Cir. 1975).

[95] Id. at 408.

[96] 559 F.2d 1160 (9th Cir. 1977), cert. denied, 435 U.S. 942 (1978).

[97] 583 F.2d 1129 (10th Cir. 1978).

[98] Id. at 1133.

[99] 412 F. Supp. 1308 (D. Del. 1976).

seeking the forfeiture of "all profits, interest in, claims against or property or contract and rights" obtained from the defendants' participation in a continuing criminal enterprise under 21 U.S.C. § 848.[100]

C. Following Property

¶ 41a Even with Rule 7(c)(2) there remains the problem of identifying the property to be forfeited. Section 1963 does not impose a criminal fine; rather it specifies several kinds of interests which are to be forfeited. Since it is unlikely that the property interests so specified will remain in their original form throughout the course of criminal proceedings and appeals,[101] the courts will have to

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[100] Id. at 1318 n. 17. 21 U.S.C. § 848 is the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265 (1970), which was enacted at the same time as RICO. Like RICO, the act provides for criminal forfeiture. To be sure, the forfeiture clause incorporated by reference other clauses of the indictment, and the conspiracy count specified the money at issue, but the court's opinion turned on the adequacy of the notice generally.

[101] § 1963(b) allows the court to enter restraining orders or accept performance bonds to prevent the dissipation of assets subject to forfeiture. In United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975) appeal dismissed/mandamus granted, 556 F.2d 569 (3d Cir. 1977), it was held that such an order did not deprive the defendant of the presumption of innocence. Id. at 1015. This is the only reported case where such an order has been entered.

In United States v. Mandel, 408 F. Supp. 679 (D. Md. 1976), the court outlined the factors to be considered in weighing a motion for such an order. They are:

employ some method of tracing property into new forms. ¶ 41b The courts can accomplish this by allowing the government to recover forfeitures by means of constructive trusts and equitable liens. Both remedies allow the government to "follow" the property. The equitable lien allows the government to recover the value of the forfeiture from the proceeds of the property. The contructive trust goes further towards preventing unjust enrichment by allowing the government to recover all of the proceeds from the transfer of the property, thereby denying

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> (1) has the petitioner (the government) made a strong showing that he is likely to prevail on the merits at trial;
> (2) has irreparable harm in the absence of relief been shown;
> (3) would the issuance of the injunction substantially harm other parties interested in the proceedings;
> (4) where does the public interest lie?

The court did not strike the statute down on presumption-of-innocence grounds, but it did leave very little room for its application:

> The court is of the opinion that on the facts of this case, the order the government seeks would be incompatible with the presumption of innocence defendants enjoy until such time, if ever, as a jury finds them guilty beyond a reasonable doubt. A finding that the government would be likely to prevail on the merits at trial . . . [is a] determination that defendants are likely to lose at trial.

Id. at 682 - 83.

the defendant the benefit of a good investment.[102] Use of this remedy may, however, raise questions of excessive variance from the indictment, especially given the specific mandate of Rule 7(c)(2).

¶ 41c To trace property successfully, the government must prove that the property it seeks to seize constitutes the proceeds of the forfeited property. It would not be enough to show that the total assets of the defendant were "swollen" by the amount the government seeks to recover; rather the exchange must be proved.[103]

¶ 41d Tracing money is a particularly difficult task as it is always fungible and frequently intangible. In response to this the courts have developed arbitrary[104] rules to determine the ownership of money in mixed accounts and in other situations where the identity of the money has been lost.

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[102] See generally Dobbs, Remedies 240-50 (West 1973) [hereinafter cited as Dobbs].

[103] Id. at 426 - 27; Restatement of Restitution § 215 (1937).

[104] In re Walter J. Schmidt & Co., 298 F. 314, 316 (S.D.N.Y. 1923) (L. Hand, J.); Bogert, Trusts & Trustees §§ 926, 928 (2d ed. 1962); Dobbs, supra note 102 at 429.

¶ 41e Where the victim's money has been mixed with that of the defendant in a single fund, it is generally agreed that the victim (or in this case the government) is entitled to an equitable lien upon the fund for the amount of his losses.[105] Where withdrawals have been made and dissipated, the victim has an equitable lien for as much of his losses as he can recover, but he cannot claim funds subsequently added to the fund by the defendant.[106] Where the withdrawals can be traced to specific property, the courts disagree as to the claimant's remedy. Some courts presume that the defendant spends his own money first, and only after he has spent all of it does he disturb the claimant's money. In these jurisdictions the claimant is entitled to an equitable lien on the fund (as before), but if this is not sufficient to compensate him, the equitable

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[105] Dobbs, supra note 102 at 427; Restatement of Restitution § 209 (1937).

[106] Restatement of Restitution § 212 (1937); Dobbs, supra at 425 - 26. This is the so-called "lowest intermediate balance rule." The victim does receive a judgement for the deficiency, but this does not give him the security interest of an equitable lien. Some courts make an exception to this rule where the defendant deposits additional money into the fund with the intent to restore the victim's funds. Id. In the RICO situation, this is most unlikely.

lien is extended to the acquired property to make up the difference. In other jurisdictions the presumption is that each withdrawal contains the same proportion of the victim's money as the victim's money bore to the whole fund. The same is true of the balance of the fund. The victim is entitled to a constructive trust on that proportion of the total of the property purchased and of the balance.[107] He is not entitled to any one part of it.[108]

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[107]The United States Supreme Court has not ruled definitively on this issue since 1881, Central National Bank v. Conn. Mutual Life Ins. Co., 104 U.S. 54, 68 (1881), when it adopted the "wrongdoer's first" approach. The circuit courts have divided on the question. Bird v. Stein, 258 F.2d 168, 178 (5th Cir. 1958) (proportional approach); Marcus v. Otis, 169 F.2d 148, 149 - 50 (2d Cir. 1948) (same); McCallum v. Anderson, 147 F.2d 811, 814 (10th Cir. 1945) ("wrongdoer's first" approach); Macbryde v. Burnett, 132 F.2d 898, 900 (4th Cir. 1942) (proportional approach). The Restatement of Restitution advocates the proportional withdrawal rule. Restatement of Restitution § 211 and comments (1937). Further, where the occasion seems to demand it, courts have developed variations of these rules to achieve more equitable results. See generally, Dobbs, supra note 102 at 427 - 30.

[108]Thus the claimant cannot claim that the better investments were made with his money and the bad ones with that of the defendant. In the language of the Restatement, he is entitled to "part of the whole," but not to the "whole of a part." Restatement of Restitution § 211 comment d. (1937).

D. Customs Laws

¶ 42 Section 1963(c) prescribes the disposition of property forfeited under 1963(a):

> (c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the courts shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dipose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.[109]

The customs laws regarding forfeiture are incorporated by reference with the power of customs officers vested in the

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[109] 18 U.S.C. § 1963(c) (1976).

attorney general. By themselves, this adoption of procedures and delegation of authority seems quite straightforward. Problems arise, however, when these provisions must be balanced against the command to make "due provision for the rights of innocent persons."

¶ 43 The customs laws do not require "due provision" for the rights of innocents. Section 1613 and 1618 of title 19 of the U.S. Code allow the secretary of the treasury to remit or mitigate a forfeiture upon proof that the forfeiture was incurred without any willfull negligence or intent to defraud on the part of the claimant.[110] The

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[110] 19 U.S.C. § 1613 (1976) states in relevant part:

> Upon the production of satisfactory proof . . . that such forfeiture was incurred without any willful negligence or intent to defraud on the part of the applicant, the Secretary of the Treasury may order the proceeds of the sale, or any part thereof, restored to the applicant . . .

19 U.S.C. § 1618 (1976) states in relevant part:

> . . . [T]he Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

decision to remit or mitigate is discretionary, however, and except where the forfeited property had been stolen from the owner or where the very possession of the property was against the wishes of the owner, the courts have generally refused relief.[111] Acquiescence in the offender's possession of the property, even when accompanied by strict prohibitions against illegal use, will usually deter judicial reversal.[112]

¶ 44 Thus it is necessary to draw on other areas of the law besides the customs statutes to develop a construction of the phrase "due provision for the rights of innocent persons" to provide real protections.

E. Powers of Various Officers

¶ 45 The statute is also ambiguous in its definition of the role of the judge and other officers in these proceedings.

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[111] See, e.g., Peisch v. Ware, 8 U.S. 132, 136, 4 Cranch 347, 364 (1808), cited in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974); United States v. Almeida, 9 F.2d 15, 16 (1st Cir. 1925); United States v. One Saxon Automobile, 257 F. 251, 252 (4th Cir. 1919); United States v. One Reo Speed Wagon, 5 F.2d 372, 373 (D. Mass. 1925). But see, United States v. One Chevrolet Sedan, 12 F. Supp. 793 (W.D.N.Y. 1935).

[112] See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 690 (1974); Van Oster v. Kansas, 272 U.S. 465, 468 (1926); United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926); J.W. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505, 508 - 12 (1920); United States v. One 1975 Ford Pickup Truck, etc., 558 F.2d 755, 757 (5th Cir. 1977); United States v. One Chevrolet Truck, 79 F.2d 651, 652 (5th Cir. 1935).

The indictment must allege "the extent of the interest or property subject to forfeiture."[113] The jury must return a special verdict as to "the extent of the interest or property subject to forfeiture."[114] Before the Attorney General disposes of "all such property as soon as commercially feasible, making due provision for the rights of innocent persons,"[115] the court is supposed to "authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper."[116]

¶ 46 Given this assignment of roles, this particular provision means that the court's powers go only to the manner of seizure; the court does not seem to have the power to exempt property from the scope of the forfeiture or to delay its seizure significantly.

¶ 47 Although the provision might be read more broadly if it stood alone, the presence of the other provisions requires

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[113] Fed. R. Crim. P. 7(c)(2).

[114] Fed. R. Crim. P. 31(e).

[115] 18 U.S.C. § 1963(c) (1976).

[116] 18 U.S.C. § 1963(a) (1976).

the strict interpretation. Rule 31 vests the power to define the forfeiture in the jury.[117] Section 1963(c) says that the court shall authorize the seizure of "all property."[118] The Attorney General is to dispose of "all such property."[119]

¶ 48 Although the court might stay the seizure until after civil proceedings are held to determine the rights of owners, it is not clear whether the court's findings in those proceedings would be binding on the government. It is at least arguable that all of the forfeited property must pass into the Attorney General's hands[120] and that he alone has the power to make due provision for the rights of innocent parties.[121]

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[117] Fed. R. Crim. P. 31(e).

[118] 18 U.S.C. § 1963(c) (1976).

[119] Id.

[120] No other arrangement accommodates all the prescribed powers of the participants. It appears that the Attorney General has the sole power to remit a forfeiture imposed by a jury's special verdict. It would seem that for a judge to remit a forfeiture would be to intrude on the discretion of the Attorney General, even though the judge might well have the power to stay a seizure for an extended period of time.

[121] Similar power is held by the collector of customs. See paragraph 43 supra. Section 1963(c) specifically provides that the powers of the Collector of Customs are vested in the Attorney General for purposes of this section.

V. THE RIGHTS OF "INNOCENT PERSONS"

¶ 49 It is arguable that the phrase "making due provision for the rights of innocent persons" serves no purpose. Under Section 1963(a), only the property and property rights of the defendant may be forfeited. Since only the defendant's rights in the property and not the property itself are forfeited, the government, theoretically, gets only what the defendant is able to lose. Thus, the forfeiture has no direct effect on any third party. The indirect effects, however, could be devastating. The sudden excision of the illegally obtained assets may throw an enterprise into insolvency, depriving innocent creditors. A sale of confiscated stock may depress the value of other shares. An innocent party may find that his new co-tenant, the U.S. government, does not share his long-term plans for the property.

1. What are the "rights" of an innocent person?

¶ 50 The threshold challenge is to determine the strength of the legislative command. Leaving aside the issue of what those rights are, the courts will have to decide whether making due provision for the rights of innocents is equal to or subordinate to the command to sell as soon as commercially feasible.[122] Arguments can be raised in favor of both.

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122 The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

18 U.S.C. § 1963(c) (1976).

¶ 51 Arguably the due provision clause should not be given great weight because innocent person's rights are traditionally not observed in American forfeiture practice. The statute intends that some consideration be shown, but viewed against the civil background, the phrase should not be generously contrued.

¶ 52 This argument is weak because it presupposes a legislative intent which is not evidenced in the legislative history.[123] There is no authority for inferring that the clause was to be read in the context of the past (nor is there any authority refuting that proposition).

¶ 53 It can also be argued that the two commands should be given equal weight. The government:

> shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.[124]

As such, the statute imposes two duties on the United States: to sell as soon as commercially feasible, and to make due provision for the rights of innocent persons. The structure of the statute suggests that the statutory duties are

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[123]The legislative history offers no direct guidance as to the meaning of the phrase. Nonetheless, Congress's apparent intention to do something different (see note 7 supra) suggests that this provision should not be read in the light of civil forfeiture statutes.

[124]18 U.S.C. § 1963(c) (1976).

equal; the government cannot satisfy the first command at the expense of the second. The weakness in the argument is the same one that pervades most speculation about RICO, lack of any primary authority construing it.

¶ 54 Besides determining the substantive weight of the command to make "due provision," the courts will also have to develop procedures for identifying the innocently held interest which would be affected by the forfeiture.

¶ 55 In a civil forfeiture, the proceedings determine the ownership of the property against all the world. Any claimant has standing to be heard,[125] even though he usually has no legal right to a remission.[126] Under RICO, however, there is no opportunity for these parties to be heard since in theory they are not involved. The criminal trial determines the guilt or innocence of the defendant, and, by implication, his rights in the property. Once a violation is shown, the defendant "shall forfeit" the property.[127] This language is mandatory. The innocent person would seem never to have his day in court.[128] This might constitute

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[125] Fed. R. Civ. P. 24(a).

[126] See paragraphs 20 - 26, and 43 supra.

[127] 18 U.S.C. § 1963(a) (1976).

[128] Whether this poses a problem or not depends on what substantive rights in innocent parties the courts choose to recognize. The question of substantive rights is treated at ¶ 57 et seq.

a denial of due process.[129] Civil hearings to determine claims to the property would be more just, at the very least, and might save the constitutionality of the statute.

¶ 56 Section 1963(c) provides:

> Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.[130]

As we pointed out earlier, this section should probably

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[129]The right to a hearing is recognized and protected even in civil forfeiture cases. See Lee v. Thornton, 538 F.2d 27, 31 (2d Cir. 1976) (requiring a $250 bond to obtain a hearing under 19 U.S.C. §§ 1607 - 08 and failure to hold such a hearing within 72 hours of seizure, constitute denial of due process). In Mathews v. Eldridge, 424 U.S. 319, 335 (1975) the Court said that:

> . . . identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. Applying this test to the situation described in the text, the private interest might be substantial; the failure to provide a forum in which claims could be heard poses an extreme risk of error. Presumably these two factors, taken together, would offset the added time and expense required to hear claims.

[130]18 U.S.C. § 1963(c) (1976).

be read restrictively.[131] Even a restrictive reading would allow the court to hold supplementary proceedings in which to hear the claims of innocent persons. Further authorization for such proceedings is given by the Federal Rules of Criminal Procedure.[132] The Federal Rules of Civil Procedure give the court discretion to structure such a proceeding to meet any special difficulties which arise from the court's unfamiliarity with the concept of criminal forfeiture.[133] Supplementary proceedings would not significantly delay the disposition of the forfeited property since the government would presumably have to take similar steps on its own to determine the identities of innocent persons.

¶ 57 The court will then have to define the rights themselves. Perhaps the most fundamental issue the courts

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[131] See paragraphs 46 - 47 supra.

[132] If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Fed. R. Crim. P. 57(b).

[133] In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Fed. R. Civ. P. 83. Presumably these supplementary proceedings would be civil in nature. Fed. R. Crim. P. 54(b)(5) says that the criminal rules do not apply to the collection of fines and penalties.

will have to face is whether the government is merely restrained from acting beyond the legal bounds of the interest it has acquired, thereby guaranteeing only the legal rights of the innocent parties, or whether the government is held to a higher duty of care to guarantee the economic and financial (in addition to the legal) position of those parties. At lest three arguments can be advanced in favor of the first option.

¶ 58 First, the exercise of the police power frequently causes incidental damage, which is usually not compensable. Nor is this diminished value of this sort usually recoverable on a theory of "taking without just compensation."

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[134]Generally, diminution of value does not constitute a taking under the Fifth Amendment. Ortega Cabrera v. Bayamon, 562 F.2d 91, 100 - 01 (1st Cir. 1977); Johnson v. United States, 479 F.2d 1383, 1390 (Ct. Cl. 1973), unless the diminution amounts to total destruction of the property. United States v. Virginia Electric and Power Co., 365 U.S. 624 (1961); Armstrong v. United States, 364 U.S. 40 (1960); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Holmes, J.)

The nature of the deprivation is a more significant factor. The deprivation of property to prevent a public harm which would result from continued ownership is an exercise of the police power and is not compensable. The taking of property for a public benefit is an exercise of the eminent domain power and does require compensation. See, e.g., Johnson v. United States, 479 F.2d 1383 (Ct. Cl. 1973); Franco-Italian Packing Co. v. United States, 128 F. Supp. 408 (Ct. Cl. 1955). The process of determining what is, and what is not, a taking of property is quite unstructured, however. See, Nowak, Rotunda & Young, Handbook on Constitutional Law, 437 ff. (West, 1978).

¶ 59 Although this argument is supported by tradition and by practical policy considerations, and has merit as a general principle of criminal law, the novel nature of RICO forfeitures and Congress's explicit concern with the rights of innocent persons are reasons to depart from that principle.

¶ 60 Second, it might be argued that the risks outlined above are the normal risks of owning property. The shareholder, co-tenant, or creditor is not entitled to greater protection simply because the government is involved.

This argument, however, is merely question-begging. Whether a higher standard of care is required is precisely the point at issue.

¶ 61 The third argument is perhaps the strongest. If the government's obligations are limited to those of any private co-tenant, creditor, shareholder, etc., the courts will not have to create a new body of law defining those obligations. The rights of innocent persons would be determined by the law applicable to that person's relation to the offender or to the property subject to forfeiture, e.g., partnership, secured creditor, tenants by the entirety. These relationships are well-defined in the law..

¶ 62 Simplicity notwithstanding, there are equally sound reasons for holding the government to a higher standard of care.

¶ 63 First, the primary purpose of Section 1963 is punitive.[135] The government has always had a substantial proprietary stake in the enforcement of customs and revenue laws.[136] In contrast, the government's financial interest in criminal forfeitures is not nearly so great. RICO's purpose is served by any process that removes the criminal from the source of his power.[137] As long as that purpose is served, the profitable disposition of the forfeited goods, while desirable, should not be allowed to deprive innocent persons.

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[135]As the statutory headings make clear, § 1963 provides the criminal penalties for violations of § 1962. § 1964 provides the civil remedy.

[136]Two of the most frequently cited cases in American forfeiture law are United States v. Brig Malek Adhel, 43 U.S. 91, 2 How. 210 (1844) and The Palmyra, 25 U.S. (12 Wheat.) 1 (1827). Both opinions were written by Justice Story and both affirmed the principle of "guilty property," the theoretical basis of strict liability in civil forfeiture.

It is estimated that during Justice Story's lifetime, customs revenues alone provided between 80% and 90% of the total revenue of the federal government. See 62 Cornell L. Rev. 768, 782 n. 86, citing Bureau of the Census, Dep't of Commerce, Historical Statistics of the United States, H.R. Doc. No. 33, 86th Cong., 1st Sess. 712 (1960).

Although the dependence of the federal government on customs duties has declined over the years, the revenue from forfeitures has reached enormous proportions. Between 1920 and 1930 the government seized some 52,000 automobiles, 1,400 boats, and $100,000,000 worth of other properties for violation of prohibition laws. See Williams, "Forfeiture Laws," 16 A.B.A.J. 572 (1930). In England, the proprietary interest of the government in civil forfeiture is indicated by the fact that these cases were tried in the Court of the Exchequer, a revenue court, and not in the criminal courts. See 62 Cornell L. Rev. at 783; Doyle, supra at 6 - 10.

[137]See notes 72, 74, 75, supra.

An analogy might be drawn to Section 726 of the new Revised Bankruptcy Act[138] which gives federal tax liens and other revenue obligations priority over the claims of general creditors, but gives little force to fines and forfeitures which take precedence only over interest claims and the residuum left to the bankrupt.

¶ 64 The loss which would be suffered by an innocent party stems from no fault of his own or of the property. Although supplementary civil proceedings might cure the due-process defect,[139] the innocent person should arguably have some substantive rights also. As mentioned earlier, he probably cannot claim that his property is being taken without compensation.[140] To refuse to recognize his damage claim leaves him without a remedy, even though his losses may be extensive.

VI. WHO IS AN "INNOCENT PERSON?"

¶ 65 The definition of "innocent persons" is equally unclear. This term also is undefined by the statute, the legislative hisory, or by any judicial decision.

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[138] 11 U.S.C.A. § 726 (1979 Pamphlet) (Pub. L. No. 95-598 § 726, 92 Stat. 2549 (1978)). This act becomes effective in October, 1979.

[139] See paragraph 55, supra.

[140] See note 134, supra and accompanying text.

¶ 66 "Innocent persons" would almost certainly include the victims of the defendant's racketeering activities, to the extent that they can be identified and their property traced. Although the exact nature of the government's interest in the forfeited property is unclear, and will have to be defined by judicial decision, it would be unfair to give the government's claim priority over a victim's claim. It is at least arguable that any proceeds derived from the forfeiture should be held in trust for such victims as can be identified.

¶ 67 Other parties should also be considered "innocent persons" within the meaning of the statute. Two definitions of the phrase suggest themselves. The first is to identify several gradations of innocence and use this scale to evaluate the strength of claims. The second is to define the word technically: a person is an "innocent person" if he is not found guilty of the crime.

¶ 68 The second approach is clearly the easier to apply. The first offers a more morally exact approach, but complicates the process of determining claims considerably.

¶ 69 To construct the moral hierarchy of interests which the first approach envisions, a court might well rely on the principles of unjust enrichment and following proper-

ty.[141] These principles are premised on the protection of the victim's interest, which yields only to the interest of a bona fide purchaser without notice and for value. In this context, a transferee is not a bona fide purchaser for value unless he meets two requirements. He must have paid valuable consideration, and he must not have had actual or constructive notice.[142]

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[141]These principles are also frequently referred to as the law of constructive trusts. The label is inaccurate, for constructive trust describes an equitable remedy created to effectuate the principles and not the principles themselves. Two other remedies, equitable lien and subrogation, are also available where imposition of a constructive trust would be too severe.

[142]The Supreme Court has not defined the limits of constructive notice since 1906. In United States v. Detroit Lumber Co., 200 U.S. 321, 333 (1906), the Court said:

> When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence. [Wilson v. Wall, 73 U.S. (6 Wall.) 83, 91 (1867)].

This case narrowed the operation of the doctrine. The

¶ 70 If a transferee is a bona fide purchaser without notice and for value, his interest will defeat the victim's interest.[143] If he has notice, or is a donee, i.e. did not pay valuable consideration, his interest in the original property is defeated, but he may be allowed to retain any enhancement in the value of the property.[144] If he is a conscious wrongdoer, he will not be allowed to retain either, even though the net result of this may be

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Court's earlier position had been:

> . . . in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must have knowledge of the conveyance, or at least of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge.

Stanley v. Schwalby, 162 U.S. 255, 276 (1896).

The commentators seem to prefer the ordinary negligence standard over the gross negligence one. See 2 Pomeroy, Equity Jurisprudence § 606 (3d ed. 1906); Restatement of Restitution § 174 and comments (1938).

Reference should also be made here to the doctrine of Lis Pendens. If a vendee acquires title to property under litigation, he will take subject to the outcome of the litigation. Although there is some disagreement as to whether is based on constructive notice or simple judicial convenience, the effect is much the same as constructive notice. Different jurisdictions have interpreted the doctrine in different ways. Statutory supplementation has compounded the problem further, and the federal approach is unclear. See generally, Osborne, Mortgages, 436 - 39 (West, 2d ed. 1970).

[143] Restatement of Restitution § 172 (1937).

[144] Id. §§ 203, 204.

that the victim recovers more than his loss.[145] This result is justified by the equitable maxim that no man shall profit by his own wrong.[146] Further distinctions and combinations of them are easy to envision.

¶ 71 Although the above discussion deals only with interests purchased from the defendant, the scheme is easily expanded. Bona fide purchasers from third parties are protected either by their own status as bona fide purchasers, or by that of their vendors. If the property had never belonged to the defendant, it would not be subject to forfeiture in any case.

VII. REMEDIES FOR "INNOCENT PERSONS"

¶ 72 Given the wide variety of interests which are subject to forfeiture under RICO, and the equally wide variety of ways in which these forfeitures could compromise the rights of innocent persons, it would be difficult if not impossible to formulate any one rule which would reliably settle all claims justly. At least in the early stages of this body of law, courts would be better advised to approach each case

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[145] Id. § 202.

[146] Id. comment c.

on its own merits and formulate remedies on the basis of the equities involved.

¶ 73 Certain factors can be identified, however, which should be taken into consideration. Among them are:

(1) the value of the forfeited interest;

(2) the value of the innocents' interests;

(3) the relative value of (1) to (2);

(4) the loss which would be suffered by innocent persons if the property were sold "as soon as commercially feasible," but without making any provision for the rights of innocent persons;

(5) the identity of the "innocent persons;" and, if the courts decide to use this standard,

(6) the relative innocence of the "innocent persons."

Depending on the circumstances, a wide variety of equitable remedies could be employed.

¶ 74 If, for example, the defendant had "muscled" in on the interest of the owners of an enterprise, the remedy would be simply to restore that interest to the owners. In this case, factor (5) controls. Under the principles of constructive trust, the victim is entitled to any enhanced value of the interest.[147]

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[147] Restatement of Restitution §§ 160, 166 (1937). There would be valid reasons for restricting recovery to the value of the loss, however. The primary purpose of giving the added value to the victim is to prevent unjust enrichment of the wrongdoer. Restatement of Restitution § 202, com-

¶ 75 It may often prove impossible to identify the original victims, yet a sale of the interest in a depressed market may reduce the value of the other shares. In such a case, the government might be ordered to hold the interest in trust for any victims that might later be identified. Or, indeed, the other shareholders might hold the interest in trust for the government, or for these hypothetical victims. The latter is the better course because the enterprise can be expected to run its affairs in its own best interest. Trust remedies are especially appropriate where the value of the innocently held interest exceeds the value of the forfeited interest.

¶ 76 In other cases the sale value of the forfeited interest will be great enough to cover any damage sustained by innocent persons. Here, of course, the damage remedy is appropriate.

¶ 77 As a general proposition, the recovery of a forfeiture by the government should not be allowed to throw the enterprise into bankruptcy. As noted earlier, when

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ment c. In this situation, however, the government stands as a ready taker. Second, there may well be victims whose losses can be documented, but not traced. The court may choose to distribute the aggregate enhanced value among them. Finally, the court should consider whether private litigants should be allowed to recover through the Attorney General instead of through their own treble damages actions. Empirical data will probably play a role. Is the prospect of treble damages a sufficient incentive to sue? Do defendants generally have sufficient assets to pay treble damages?

an entity is going through bankruptcy proceedings, fines and penalties have very low priority.[148] Occasionally an enterprise might prove so rotten to the core that the market would be better served by its elimination. If the government is unable to work a forfeiture of the entire enterprise it should be required to sue civilly for a dissolution order. To allow the government to use a partial forfeiture to throw the enterprise into bankruptcy would be to allow it to do indirectly what it was not able to do directly.

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[148] 11 U.S.C.A. § 726 (1979 Pamphlet) (Revised Bankruptcy Act of 1978, Pub. L. No. 95-598 § 726, 92 Stat. 2549 (1978)).

RICO Forfeiture: Tracing and Procedure

by

John Trojanowski

Outline

SUMMARY

¶ 1 Section 1963(a) of RICO is designed to eradicate the "economic base of organized crime. Section 1963(a)(1) provides for the forfeiture of "any interest acquired or maintained in violation of Section 1962," the substantive RICO statute. Section 1963(a)(1) has as its target organized crime's "ill gotten gains," its capital.

¶ 2 Section 1963(a)(2) provides for the forfeiture of "any interest in . . . a source of influence over, any enterprise which [organized crime] has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962" of RICO. Section 1963(a)(2) attacks organized crime's "source[s] of influence," its power.

¶ 3 A persistent problem at every step of a RICO prosecution is the identification of the property subject to the forfeiture penalty. A nexus between the Section 1962 violation and some specific property or other interest of the defendant must be present in the indictment, in any request for a restraining order to freeze the defendant's assets, in the prosecution's proof at trial, and in the special verdict which establishes the extent of the forfeiture.

¶ 4 If the forfeitable property is held by the defendant in its original form, separate and distinct from other property, there is no conceptual difficulty in enforcing a restraining order or forfeiture penalty. However, identification problems arise where the property subject to forfeiture has changed hands, or form, or both.

¶ 5 The imposition of a Section 1963(a) forfeiture places the government in a position analogous to that of a claimant attempting to identify property to a constructive trust or an equitable lien. It is suggested that the tracing rules used to give effect to constructive trusts and equitable liens be employed to solve forfeiture identification problems.

¶ 6 The constructive trust and the equitable lien may be thought of both as types of remedies available to the victim of unjust enrichment, and as methods of identifying property to the particular remedy. A constructive trust reaches that property in the hands of one person in which another has rights. An equitable lien uses property in the hands of one person as security for the liquidated claim of another. Both remedies will follow property through any number of successive transfers and comminglings as long as it can be proven that some specific property was the product of each transaction.

I. 18 U.S.C. § 1963(a): Criminal Forfeiture

¶ 7 In the "[s]tatement of [f]indings and [p]urpose" which prefaces the Organized Crime Control Act of 1970[1] Congress stated that

> (1) organized crime . . . annually drains billions of dollars from America's economy; (2) organized crime derives a major portion of its power through money obtained from . . . illegal endeavors;

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[1]Pub. L. No. 91-452, 84 Stat. 922 (1970).

> (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities . . . weaken the stability of the Nation's economic system . . . and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow . . . because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.[2]

¶ 8 Congress enacted Title IX of the Organized Crime Control Control Act of 1970, Racketeer Influenced and Corrupt Organizations (RICO),[3] to provide a method of reaching and destroying the "economic base"[4] which enables organized crime to pose "such a serious threat to the economic well-being of the Nation."[5] Senator McClellan, the author of the Act, stated that "[t]itle IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, . . . and, where possible, forfeiture of their ill-gotten gains."[6] The criminal forfeiture provisions

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[2]Pub. L. No. 91-452, 84 Stat. 922 (1970).

[3]18 U.S.C. § 1961-68 (1970).

[4]S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

[5]Id.

[6]116 Cong. Rec. 591, 18939 (1970) (remarks of Sen. McClellan); J. McClellan, The Organized Crime Act (S.30) Or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 141 (1970).

of Section 1963 of RICO are central to reaching these statutory goals.

¶ 9 Section 1963 of RICO provides in relevant part that:

> (a) Whoever violates any provision of Section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.
>
> (b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with the property or other interest subject to forfeiture under this section, as it shall deem proper.
>
> (c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.[7]

¶ 10 Section 1963(a)(1) is designed to reach organized crime's "ill-gotten gains" "acquired or maintained in violation of section 1962." Section 1963(a)(2) provides for the "removal of organized crime" from any "source of influence over, any enterprise which [it] has established, operated, controlled, or participated in the conduct of, in violation of section 1962." Thus, section 1963(a) launches a two-pronged attack upon the "economic base" of organized crime by mandating the seizure of its capital and power upon conviction for a section 1962 violation.

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[7] 18 U.S.C. § 1963 (1970).

¶ 11 More specifically, the plain language of section 1963(a)(1) mandates the forfeiture of "any interest . . . acquired or maintained in violation of section 1962."[8] The word "any"

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[8]Section 1962 provides that:

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

18 U.S.C. § 1962 (1970)

is broad in its scope and should be read to mean just what it says. The word "interest" is not defined by RICO. As a word in common use "interest" has been defined as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something."[9] The phrase "any interest" is in itself unbounded in scope and so can reach the "ill-gotten gains" from a RICO enterprise regardless of their form.[10]

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[9]Black's Law Dictionary 729 (5th ed. 1979).

[10]In this connection, it should be noted that the use of the word "profits" in 21 U.S.C. § 848(a)(3)(A) (1970), a narcotics forfeiture statute, has led at least one court to conclude that the phrase "any interest" in 18 U.S.C. § 1963(a)(1) (1970) does not include "profits." United States v. Meyers, 432 F. Supp. 456, 461 n. 18 (W.D. Pa. 1977).

Section 848(a)(2)(A) & (B) provide that:

> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States---
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Section 848(a)(2)(A) was not enacted as part of the Organized Crime Control Act of 1970. The word "profits" is appropriate in the context of illicit narcotics sales since "profits" "[m]ost commonly . . . [means] the gross proceeds of a business transaction less the cost of the transaction, i.e., net proceeds." Black's Law Dictionary 1090 (5th ed. 1979). However, the much more inclusive phrase "any interest" is appropriate to a field as multifarious as organized crime. For example, if a linen supply contract is obtained by extortion, the contract is covered by the phrase "any interest," but arguably not by the word "profits."

¶ 12 The scope of the phrase "any interest" is limited by the requirement that the government establish a nexus between the property it wishes to seize and a violation of section 1962. For example, the government might be required to prove that the contents of a bank account were traceable to the income from a defendant's participation "in the conduct of [an] enterprise's affairs through a pattern of racketeering activity"[11] before the contents of the account would be forfeitable under section 1963(a)(1).

¶ 13 Section 1963(a)(2) mandates the forfeiture of "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which [a defendant] has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962." The target of section 1963(a)(2) is organized crime's "source of influence over, any enterprise," that is, organized crime's power base. Its subject-matter reach is, therefore, narrower than that of section 1963(a)(1). The government must establish a nexus between the "interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise" and a violaton of section 1962 before a conviction will result in a forfeiture under section 1962(a)(2). The violation of any part of section 1962 triggers the forfeiture provisions of both section 1963(a)(1) and (2).

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[11] 18 U.S.C. § 1962(c) (1970).

¶ 14 Inexplicably, the District Court for the Northern District of Georgia in United States v. Thevis[12] found that

> the term "interest" is not defined in RICO, but as employed in 18 U.S.C. §1963 (a), it derives its meaning from the activities barred by §1962 . . . §1962(a) and (b) proscribe the acquisition or maintenance of an interest in an enterprise . . . through a pattern of racketeering activity, and it is this interest alone [", and not the fruits or profits generated by a violation of §1962",][13] which is subject to forfeiture under §1963(a)(1). United States v. Marubeni American Corp., (Cr. No. 78-1060-HP), (D.C. Cal. 3/30/79).[14]

¶ 15 Under the district court's reading, section 1963(a)(2) reaches "any interest in . . . a source of influence over, any enterprise," and section 1963(a)(1) minimally expands the statute's scope to reach a minority interest" in the enterprise which provides no "source of influence" over it.[15]

¶ 16 The district court's interpretation of section 1963(a) does violence to the plain meaning of the statute as well as to the clear intent of Congress.[16] "Any interest," not merely "any interest in an enterprise," is potentially subject to forfeiture under section 1963(a)(1).[17] By unjustifiably importing the restricting word "enterprise" from section 1962, the court ignores the unambiguous Congressional

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[12] 474 F. Supp. 134 (N.D. Ga. 1979).

[13] Id. at 144.

[14] Id. at 142.

[15] Id. at 143, n. 14 (N.D. Ga. 1979); accord, United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

[16] See text accompanying notes 1-10 supra, and note 18 infra.

[17] See text accompanying notes 9-10 supra.

directive that RICO "shall be liberally construed to effectuate its remedial purposes."[18]

¶ 17 If Congress had intended to limit the reach of section 1963(a)(1) to interests in enterprises, it would have included the word "enterprise" in the section, as it did in section 1962(a), (b), and (c), and section 1963(a)(2). Instead, Congress rejected a proposed version of section 1963(a) which mandated the forfeiture of "all interest in the enterprise."[19] The district court's interpretation of section 1963(a) in Thevis is hardly in harmony with the Congressional understanding that "violations [of section 1962] shall be punished by forfeiture . . . of all property and interest, as broadly described, which are related to the violations."[20]

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[18]Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

[19]S. 1861, 91st Cong., 1st Sess. § 1963(a) (1969), reprinted in Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary United States Senate, 91st Cong., 1st Sess. 67 (1969).

[20]H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57 (1970). See text accompanying notes 1-10 supra.

The true scope of Section 1963(a)(1) is reflected by the language used in Section 1963(b) and (c) to describe the property subject to forfeiture under Section 1963(a): "any property or other interest," and "all property or other interest." 18 U.S.C. § 1963(b) and (c) (1970). This expansive language is obviously not required to encompass the property forfeitable under Section 1963(a)(2).

II. Tracing Property Subject to Forfeiture

¶ 18 Once an information or indictment charges a defendant with the violation of section 1962, the imposition of a forfeiture penalty under section 1962(a)(1) or (2) is possible. At that point, it becomes necessary to identify specific property of the defendant as the "ill-gotten gains" or the "source of influence" subject to forfeiture.[21]

¶ 19 If the forfeitable property is held by the wrongdoer in its original form, separate and distinct from other property, there is no conceptual difficulty in enforcing a restraining order or forfeiture penalty. However, idenfification problems may arise where the property subject to forfeiture has changed hands, or form, or both. It is suggested that the tracing rules used to give effect to constructive trusts and equitable liens be employed to solve such identification problems.

¶ 20 The constructive trust and the equitable lien may be thought of as types of remedies available to a claimant, and as methods of identifying property to the particular remedy. Tracing is the key to the successful identification of property to a claim.[22]

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[21] See J. Atkinson, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes, 69 J. Crim. L.&C. 1, 5 (1978).

[22] Restatement of Restitution § 215 (1937) [hereinafter cited as Restatement]; 5 A. Scott, Trusts § 521 (3d ed. 1967) [hereinafter cited as Scott].

¶ 21 The public policy rationale for restitution is the prevention of unjust enrichment.[23] Similarly, RICO is aimed at the "removal of organized crime" from "sources of influence" and the seizure of its "ill-gotten gains."[24] The imposition of a section 1963(a) forfeiture places the government in a position analogous to that of a claimant attempting to identify property to a constructive trust or an equitable lien.

¶ 22 Since a section 1963(a) forfeiture will only be imposed on a person convicted of a section 1963 violation, the relevant rules to be examined are those applicable where a claim is asserted against a conscious wrongdoer.

¶ 23 Where "a conscious wrongdoer uses the property of another in acquiring other property [,] the person whose property is so used is entitled at his option either to enforce a constructive trust or to enforce equitable lien upon the property so acquired."[25]

¶ 24 A constructive trust is created "where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it."[26] A constructive trust reaches the property itself rather than its value.

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[23] Restatement, supra note 22, § 1.

[24] See text accompanying notes 1-6, supra.

[25] Scott, supra note 22, § 508; accord, In re Hallett's Estate, 13 Ch.D. 696, 709 (1879); Restatement, supra note 22, § 202.

[26] Restatement, supra note 22, § 160; accord, Scott, supra note 22, § 462.

¶ 25 An equitable lien is created "where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched."[27] An equitable lien reaches the property of one person as security for another's monetary claim against that person. It does not reach property qua property. However, default on the claim may lead to the seizure and sale of the property subject to the lien.

¶ 26 If R is a bookmaker who invests the income from his enterprise in real estate, the real estate may be reached for purposes of forfeiture under either a constructive trust theory, or an equitable lien theory. If the land is worth more than its purchase price, the application of the constructive theory allows the claimant to reach the profit, as well as the purchase price, since the land itself will be seized. If the real estate is worth less than the purchase price, the claimant can apply the equitable trust theory and reach the land as security for his claim. The claimant may also hold R personally liable for the excess of the value of his claim over the value of the real estate.[28]

¶ 27 Property can be followed through any number of successive transactions as long as it can be proven at each step that some specific property was the product of each particular transaction.[29]

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[27] Restatement, supra note 22, § 161; accord, Scott, supra note 22, § 463.

[28] See Restatement, supra note 22, § 202, Comments c, d; Scott, supra note 22, § 508.

[29] Restatement, supra note 22, § 202, Comment i.

¶ 28 Assume R sells 100 counterfeit bonds for $10,000, and uses the proceeds to purchase a painting. If R subsequently sells the painting for $12,000 and uses the proceeds to purchase a $15,000 car, the car can be reached for purposes of forfeiture by applying the identification rules of the constructive trust.

¶ 29 Where a person uses wrongfully acquired money to make improvements on property he already owns, his property may be subjected to an equitable lien, but not to a constructive trust.[30] A constructive trust will not be imposed on the wrongdoer's property since it was improved, but not purchased, with the wrongfully acquired funds.[31] If the wrongdoer sells the improved property, the proceeds of that sale may be subjected to the equitable lien.[32]

¶ 30 Where a person wrongfully uses the money of another to discharge a debt, the claimant cannot enforce a constructive trust or an equitable lien since the wrongdoer holds no property which can be subjected to the lien or trust. However, the claimant can be subrogated to the rights the creditor had prior to his discharge.[33] If R uses the income from a

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[30] Restatement, supra note 22, § 206; Scott, supra note 22, § 512.

[31] Restatement, supra note 22, § 206, Comment b; Scott, supra note 22, § 512.

[32] Restatement, supra note 30.

[33] Restatement, supra note 22, §§ 162, 207; Scott, supra note 22, § 513.

bookmaking operation to discharge the mortgage on his home, R's home stands as security for any forfeiture to the extent of the illicit income used in discharging the mortgage. The government has the rights of the discharged mortgagee.

¶ 31 If the creditor was a secured creditor, the claimant has the rights of a secured creditor. If the discharged creditor had priority over the wrongdoer's general creditors, the claimant has that same priority. If the discharged creditor was only a general creditor of the wrongdoer, the claimant has that status.[34] In this connection, it should be noted that if the wrongdoer is insolvent and not in bankruptcy, any claim of the United States has priority over those of other creditors[35] whose liens are unperfected or insufficiently specific.[36] However, if the wrongdoer is in bankruptcy, the government's forfeiture claim ranks low in priority among allowed unsecured claims against the bankrupt's estate.[37]

¶ 32 "Where the wrongdoer uses money of the claimant in the purchase of property in the name of a third person as a

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[34] Restatement, supra note 22, § 207; Scott, supra note 22, § 513.

[35] 31 U.S.C.A. § 191 (1978).

[36] United States v. Gilbert Assocs., 345 U.S. 361, 365-66 (1953); Illinois ex. rel Gordon v. Campbell, 329 U.S. 362, 370-75 (1946).

[37] 11 U.S.C.A. § 726 (1978).

gift to a third person, the claimant is entitled to follow his money into the property and enforce a constructive trust or equitable lien upon the property."[38] The third party has not paid value for the property and so has no claim to it as a bona fide purchaser.[39]

¶ 33 Assume R corporation is engaged in cigarette smuggling and gives a business associate a swimming pool. The tracing rules associated with the equitable lien will identify the pool as security for a forfeiture of the corporation's income.

¶ 34 Similarly, where the wrongdoer uses the claimant's money to improve the property of the third party, or to discharge an obligation of the third party, and where the third party is not a bona fide purchaser, the claimant can enforce an equitable lien against the property purchased for the third party, or can be subrogated to the rights of the third party's discharged creditor.[40]

¶ 35 The most complex tracing problems occur where the wrongdoer has mingled the claimant's property with his own property in "one indistinguishable mass."[41] For example, if R deposits the proceeds of a RICO enterprise in his personal bank account along with funds from legitimate sources,

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[38] Scott, supra note 22, § 514.1; accord, Restatement, supra note 22, § 208(1).

[39] See U.C.C. § 2-403; Restatement, supra note 22, §§ 172-75.

[40] Restatement, supra note 22, § 208(2), (3); Scott, supra note 22, §§ 514.2, 514.3.

[41] Scott, supra note 22, § 515.

to what extent is the bank account subject to a forfeiture penalty imposed on the enterprise proceeds?

¶ 36 "Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund."[42] The wronged party can enforce an equitable lien on the mingled fund so that the entire fund serves as security for his claim; or he can enforce a constructive trust on a proportionate share of the fund itself. The remedy chosen is immaterial as long as the fund remains whole.[43] "The character of his claim . . . becomes important only if other property is acquired with the mingled fund, or withdrawals are made from the fund, or the fund diminishes in value."[44]

¶ 37 Therefore, where it is proven that R deposited the proceeds of a RICO enterprise in his personal bank account and thereby mingled the proceeds with money from legitimate sources, the government stands in the position of a claimant through the operation of section 1963(a) and can identify the mingled fund to the forfeiture penalty. The fund either will operate as security for the payment of the forfeiture or will itself be proportionally forfeited, the outcome depends on the theory chosen by the government.

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[42] Restatement, supra note 22, § 209; accord, National Bank v. Insurance Co., 104 U.S. 54, 68-70 (1881); In re Hallett's Estate, 13 Ch.D. 696, 717-20 (1879), 13 Ch.D. 726, 727-28 (1880); Scott, supra note 22, § 515.

[43] Restatement, supra note 22, § 209, Comment a; Scott, supra note 22, § 515.

[44] Scott, supra note 22, § 515.

¶ 38 "Where money of the claimant is mingled with money of the [conscious] wrongdoer and the mingled fund is used in acquiring other property, the claimaint is entitled to follow his money into the property thus acquired."[45] The claimant at his option may enforce an equitable lien "upon the property [acquired] as security for his claim against the wrongdoer,"[46] or he may enforce a constructive trust on the property "in such proportion as his money bore to the whole amount of the fund."[47] For example, if a claimant's money makes up one-third of the mingled fund, he can claim a one-third share in the property the fund is used to acquire.

¶ 39 If the property acquired is, or becomes, more valuable than the fund used in purchasing it, the constructive trust theory should be applied. Under that theory the profits attributable to the claimant's share of the fund may be reached in addition to the amount of the claim itself.[48]

¶ 40 On the other hand, if the property acquired is, or becomes, less valuable than the fund used in purchasing it, the equitable lien theory should be applied. Under that

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[45] Scott, supra note 22, § 516; accord, Restatement, supra note 22, § 210.

[46] Restatement, supra note 22, § 210(1), Comment d.

[47] Restatement, supra note 22, § 210(2), Comment d; accord, Primeau v. Granfield, 184 F. 480, 484-85 (C.C.S.D.N.Y.), rev'd on other grounds, 193 F. 911 (2d Cir. 1911), cert. denied, 225 U.S. 708 (1912); Scott, supra note 22, § 516.

[48] Restatement, supra note 22, § 210, Comment d; Scott, supra note 22, § 516.

approach, all of the property acquired with the mingled fund stands as security for the claim asserted by the injured party. If the claim is greater in value than the property acquired, the injured party may hold the wrongdoer personally liable for the difference.[49]

¶ 41 Where a conscious wrongdoer withdraws part of the money from a mingled fund, the claimant may enforce either an equitable lien or a pro rata constructive trust upon the balance of the mingled fund, or upon the part withdrawn, or upon the product of either.[50] His claim under either theory can be enforced against both the part of the fund withdrawn, or its product, and the balance of the fund, or its product.[51] The order of the deposits and withdrawals is immaterial.[52] The claimant "will not suffer a loss as long as the part withdrawn and part which remains or the products of these two parts are not less in value than the amount of his claim"[53] because his claim can reach all parts of the mingled fund.[54]

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[49] Id.

[50] Restatement, supra note 22, § 211; Scott, supra note 22, §§ 517, 517.1, 517.2.

[51] Id.

[52] Restatement, supra note 22, § 211, Comments a, b, c, c; Scott, supra note 22, §§ 517, 517.1, 517.2.

[53] Scott, supra note 22, § 517.2.

[54] Restatement, supra note 22, § 211; Scott, supra note 22, §§ 517, 517.1, 517.2.

It may be desirable to proceed under the constructive trust theory if any of the property upon which the claim is exerted has increased in value.[55]

¶ 42 Assume R deposits $10,000 of profits from an auto theft enterprise in his personal bank account, and brings the account balance to $15,000. If R then withdraws $5,000 from the mingled fund and dissipates it so that it cannot be traced, the balance of the account can be reached to satisfy a forfeiture of the proceeds of the enterprise.

¶ 43 Where the wrongdoer makes withdrawals from a mingled fund and adds to the fund from legitimate sources, the claimant can enforce an equitable lien on the fund only to the extent of its lowest intermediate balance.[56] A claim against a bank account containing mingled funds is limited to its lowest daily closing balance.[57]

¶ 44 If at any point the fund balance reaches zero, no claim may be enforced against it, regardless of the amount of any subsequent deposits from legitimate sources[58] (unless the wrongdoer evidences an intent to make restitution).[59]

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[55] Restatement, supra note 22, § 211, Comment d; Scott, supra note 22, § 517.2.

[56] Restatement, supra note 22, § 212; Scott, supra note 22, § 518.

[57] See Republic Supply Co. v. Richfield Oil Co., 79 F.2d 375, 380 (9th Cir. 1935); Scott, supra note 22, § 518.

[58] Restatement, supra note 22, § 212, Comment a; Scott, supra note 22, § 518.

[59] Restatement, supra note 22, § 212, Comment c; Scott, supra note 22, § 518.1.

Of course, the claim can be enforced upon the withdrawals from the fund if they can be traced.[60]

¶ 45 Assume R, a state official, deposits a $10,000 bribe in his personal bank account. Subsequent withdrawals for vacation expenses reduce the balance of the account to $5,000. Later deposits of legitimate funds raise the balance of the account to $20,000. Upon the forfeiture of the bribe as part of a RICO conviction, the mingled account can only be used to satisfy $5,000 of the penalty.

¶ 46 The rules which apply to mingled funds apply equally whether the fund is composed of money or other types of property.[61]

¶ 47 All of these tracing principles would obviously prove helpful in the context of RICO forfeiture and there is no reason why they should not be so employed.

III. Forfeiture Procedure

¶ 48 "When an offense charged may result in a criminal forfeiture, the indictment or information shall allege the extent of the property or interest subject to forfeiture."[62] Thus, rule 7(c)(2) requires that the defendant be notified

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[60] See Restatement, supra note 22, § 212, Comment c; Scott, supra note 22, § 518.

[61] Restatement, supra note 22, § 214; Scott, supra note 22, § 520.

[62] Fed. R. Crim. Proc. 7(c)(2).

if any of his property may be forfeited if he is convicted of a section 1962 violation.[63] If the prosecution fails to follow this procedure, the indictment or information may be dismissed.[64] The amount of information that must be included in the indictment or information will depend on the facts of the particular case.

¶ 49 At this stage in the proceedings, the tracing principles discussed in this paper could be used to connect specific pieces of property to the section 1962 violation alleged in the indictment or information.

¶ 50 Once a RICO prosecution has commenced, section 1963 (b) states that

> In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.[65]

¶ 51 The statute thus empowers the district courts to freeze the defendant's financial status quo to prevent the dissipation of assets. Restitutory tracing could enable the courts

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[63] See United States v. Smaldone, 583 F.2d 1129, 1133, (10th Cir. 1978); cert. denied, 439 U.S. 1073 (1979); United States v. Thevis, 474 F. Supp. 134, 145 (N.D. Ga. 1979); United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

[64] See United States v. Hall, 521 F.2d 406, 407-08 (9th Cir. 1975).

[65] 18 U.S.C. § 1963(b) (1970).

to determine precisely what property should be covered by a restraining order or other freezing mechanism.

¶ 52 One district court has stated that the issuance of a restraining order under section 1963(b) "constitutes a pre-trial determination that the defendant . . . [is] probably guilty, a determination which defendant . . . reasonably might conclude would render a fair trial less likely."[66] Other courts have reponded that the "[d]efendant is no more stripped of the presumption of innocence by . . . [the issuance of] a restraining order than would be the case were he required to post bond."[67]

¶ 53 Rule 31(e) provides that "[i]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."[68] "The assumption . . . is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be proved."[69]

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[66] United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976).

[67] United States v. Scalzitti, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975); accord, United States v. Bello, 470 F. Supp. 723, 724-25 (S.D. Cal. 1979).

[68] Fed. R. Crim. Proc. 31(e).

[69] Advisory Committee Note to Fed. R. Crim. Proc. 31(e) (1972 Amendment); accord, Criminal Division, United States Department of Justice, An Explanation of the Racketeer Influenced and Corrupt Organizations Statute 57 (4th ed. n.d.).

¶ 54 At trial the government must establish a nexus between the section 1962 violation and the forfeitable property. It must also establish the extent of the defendant's interest in that property. Again, the principles of tracing could prove useful.

¶ 55 The "special verdict should be submitted to the jury after they have returned their general verdict."[70] The detail required in the special verdict to determine "the extent of the interest of property subject to forfeiture" will depend on the facts of the particular case.[71]

¶ 56 The return of the special jury verdict creates the actual forfeiture. Upon conviction, the court must "authorize the Attorney General to seize all property or other interest declared forfeited" by the special jury verdict.[72]

¶ 57 A post-sentencing proceeding may be necessary for tracing purposes in a given case, as for example, where the defendant's assets were not effectively frozen during the trial. Rule 57(b) provides that "if no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or any applicable statute."[73] Thus rule 57(b) empowers the court to pursue any

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[70] Criminal Division, supra note 65.

[71] See United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979).

[72] 18 U.S.C. § 1963(c) (1970); accord, Fed. R. Crim. Proc. 32(b)(2).

[73] Fed. R. Crim. Proc. 57(b).

necessary tracing procedures after the jury has delivered its special verdict. Such a proceeding would be analogous to a traditional sentencing hearing in which the judge has great discretion with regard to the type of evidence he will admit.[74] The use of a post-sentencing proceeding to continue the tracing process would make evasion of the reach of section 1963(a) more difficult.

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[74] See Williams v. New York, 337 U.S. 241, 246-52 (1949).

APPENDIX

UNITED STATES v. MARUBENI AMERICA CORP.

AND THE

SCOPE OF RICO FORFEITURE

United States v. Marubeni America Corp.

¶ 1 On January 10, 1980, the United States Court of Appeals for the Ninth Circuit handed down United States v. Marubeni America Corp.[1] Marubeni and others were charged with wire fraud, mail fraud, interstate travel to commit bribery, conspiracy, and racketeering in a scheme to rig the competitive bidding for several million dollars worth of telephone cable.[2] On appeal, the government contended that the criminal forfeiture of "any interest" under 18 U.S.C. § 1963(a)(1) of RICO extended to the contract price received by Marubeni and Hitachi, another defendant.[3] Marubeni, on the other hand, contended that the criminal forfeiture was limited to an "interest in the RICO enterprise"[4] under several principles of statutory construction[5] and under RICO's legislative history.[6] The District Court for the Northern District of California adopted Marubeni's position.[7]

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[1] United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980).

[2] Id. at 763-64.

[3] Id. at 766.

[4] Brief for Appellees at 4, United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980).

[5] Id. at 15-29.

[6] Id. at 5-14.

[7] United States v. Marubeni America Corp., 611 F.2d 763, 764, 766 (9th Cir. 1980).

¶ 2 The ninth circuit affirmed the district court's interpretation.[8] That court read the phrase "in any enterprise" into section 1963(a)(1), and thus narrowed the reach of the phrase "any interest."[9] The court justified its decision by reading statements in RICO's legislative history on the scope of criminal forfeiture that used the phrase "interest in an enterprise" as exhaustive of the meaning of the statute rather than illustrative of one aspect of its application.[10] A majority of the federal courts have rejected similar narrow readings of RICO on the issues of whether an "enterprise" under RICO can be illicit as well as licit,[11] and whether RICO is applicable to

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[8] Id. at 766.

[9] Id. at 769.

[10] Id. at 768.

[11] See United States v. Rone, 598 F.2d 564, 568-69 (9th Cir. 1979); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), cert. denied, 99 S.Ct. 2055, 2056 (1979); United States v. Malatesta, 583 F.2d 748, 754 n.3 (5th Cir. 1978), modified on other grounds en banc, 590 F.2d 1379 (5th Cir.), cert. denied sub nom. Bertolotti v. United States, 440 U.S. 962, 100 S.Ct. 91 (1979); United States v. Elliott, 571 F.2d 880, 897 (5th Cir.), cert. denied sub nom. Delph v. United States, 439 U.S. 953 (1978); United States v. McLaurin, 557 F.2d 1064, 1072-73 (5th Cir. 1976), cert. denied, 434 U.S. 1020 (1977); United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Altese, 542 F.2d 104, 106-07 (2d Cir. 1976), cert. denied sub nom. Napoli v. United States, 429 U.S. 1039 (1977); United States v. Morris, 532 F.2d 436, 441-42 (5th Cir. 1976); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976); United States v. Capetto, 502 F.2d 1351, 1358 (7th Cir. 1974); cert. denied, 420 U.S. 925 (1975). Contra, United States v. Sutton, 605 F.2d 260, 263, 264-70 (6th Cir. 1979).

criminal activity by individuals who are not members of organized crime.[12]

¶ 3 In so reading RICO, the Marubeni court ignored the statute's liberal construction clause,[13] and its Statement of Findings and Purpose.[14] The court also drastically reduced the effectiveness of criminal forfeiture under section 1963(a)(1) as a remedy "to deal with the unlawful activities of those engaged in organized crime."[15] The ninth circuit's interpretation of RICO is erroneous and should not be followed by other courts.

Section 1963: General Purpose

¶ 4 Section 1963(a)(1) mandates the forfeiture of "any interest . . . acquired or maintained in violation of section 1962."[16] The limiting phrase "in any enterprise" does not appear on the face of the provision. Assuming, arguendo, that it is appropriate to look beyond the words of section 1963(a) itself to determine the scope of the forfeiture, the initial reference should be to the Statement of Findings and Purpose[17]

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[12] See United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied sub nom. Grancich v. United States, 423 U.S. 1050 (1976); United States v. Chovanic, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979); United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1977); United States v. Amato, 367 F. Supp. 547, 548 (S.D.N.Y. 1973). Contra, Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975).

[13] Pub. L. No. 91-452, 84 Stat. 947, Title IX, § 904(a) (1970).

[14] Pub. L. No. 91-452, 84 Stat. 922 (1970).

[15] Pub. L. No. 91-452, 84 Stat. 923 (1970).

[16] 18 U.S.C. § 1963(a)(1) (1970).

[17] Pub. L. No. 91-452, 84 Stat. 922 (1970).

which introduces the Organized Crime Control Act of 1970.[18] As the preamble to the Act, the Statement, unlike the legislative history, was voted on by the entire Congress and was signed by the President.[19] It is, therefore, the authoritative statement of both the Congressional purpose, and the evils that the Act was primarily designed to remedy.

¶ 5 The Statement is relevant to the Act as a whole and to RICO in particular. Statements similar to the enacted preamble prefaced both the original, RICO-less, version of S.30,[20] and S.1861, the immediate antecedent of RICO.[21] A close reading

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[18] Id.

[19] In this connection, Mr. Justice Jackson once stated that

> Resort to the legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond committee reports, which presumably are well considered and carefully prepared.
> . . . It is the business of Congress to sum up its own debates in legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill the President endorses the whole Congressional Record.
> . . . .
> By and large, I think our function was well stated by Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, Collected Legal Papers, 207.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-97 (1951) (Jackson, J.; concurring opinion).

[20] S.30, 91st Cong., 1st Sess. (1969), reprinted in Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary United States Senate, 91st Cong., 1st Sess. 4 (1969) [hereinafter cited as Senate Hearings].

[21] S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 61.

of the three prefaces shows that the enacted Statement evolved from the other two. Moreover, the similarities among the three show that S.30, including RICO, developed into its enacted form in response to a common conception of the problem of organized crime.

¶ 6 The occasion for Congress' enactment of the Act -- and of RICO -- was its study of organized crime.[22] The primary purpose of the enactment of the statute, therefore, was Congress' desire "to seek the eradication of organized crime."[23] Its purpose was not merely to force the withdrawal of organized crime from legitimate business or other organizations. The infiltration and corruption of legitimate business was only one of the several aspects of organized crime studied by Congress and enumerated in the Statement of Findings and Purpose.[24] Congress was fully aware of the symbiotic relationships that exist between various organized crime activities, and it enacted S.30, including RICO, in an effort to eradicate all of the

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[22]A careful distinction must always be made between the occasion for the enactment of legislation and the scope of that legislation. Organized crime served as the model for Congress' study. However, the legislation enacted was comprehensive, not only as it applied to organized crime, but also as it applied to situations where organized crime was not involved. See, e.g., 18 U.S.C. §§ 6001-05 (1970) (reformation of the law of immunity in administrative and Congressional hearings as well as grand jury proceedings).

[23]Pub. L. No. 91-452, 84 Stat. 923 (1970). Cf., S.30, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 5 ("the eradication of organized crime"); S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 62 ("to eradicate the baneful influence of organized crime").

[24]Pub. L. No. 91-452, 84 Stat. 922 (1970).

activities of organized crime. It would have been foolish for Congress to have aimed a comprehensive statute at only one aspect of organized crime, its infiltration of legitimate business, for organized crime would only arise again after each successful prosecution.[25]

¶ 7 Congress found that organized crime "weaken[s] the stability of the Nation's economic system,"[26] and "annually drains

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[25]The broad sweep of the Statement of Findings and Purpose reflects Congress' awareness that

> "[A]s long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted."
>
> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation . . . . [A]n attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

S. Rep. No. 91-617, 91st Cong., 1st Sess. 78-79 (1969).

In discussing one application of RICO, Senator McClellan, the principal sponsor of S.30, stated that "[e]xperience has shown that it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains." 116 Cong. Rec. 591, 18939 (1970) (remarks of Sen. McClellan); J. McClellan, The Organized Crime Act (S.30) Or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 141 (1970).

[26]Pub. L. No. 91-452, 84 Stat. 923 (1970). Cf., S.30, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 5 ("threatens . . . the general welfare of the Nation and its citizens"); S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 62 ("threatens the . . . stability of . . . [the nation's] economic system").

billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."[27] Congress also found that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loansharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation,"[28] and that "this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert our democratic process."[29]

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[27] Pub. L. No. 91-452, 84 Stat. 922 (1970). Cf., S.30, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 4 ("annually drains billions of dollars from America's economy and operates by an insidious reign of terror"); S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 61-62 ("annual drains billions of dollars from the Nation's economy while operating by corruption and the illegal use of violence").

[28] Pub. L. No. 91-452, 84 Stat. 922-23 (1970). Cf., S.30, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 4-5 ("derives its power through money obtained from such illegal activities as gambling, loansharking, narcotics, and other forms of vice"); S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 62 ("derives a major portion of its power through money and property obtained from such illegal activities as syndicated gambling, loansharking, the theft and fencing of stolen property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation").

[29] Pub. L. No. 91-452, 84 Stat. 923 (1970). Cf., S.30, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 5 ("this money and power, in turn, is being increasingly used to infiltrate legitimate business and labor unions"); S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 62 ("this money and power are being increasingly used to infiltrate legitimate businesses, trade organizations, labor unions, and other associations").

Section 1962(a): Take Over By Investment

¶ 8 Section 1962(a) of RICO[30] was addressed to the "money" aspect of the finding that organized crime's "money and power are increasingly used to infiltrate and corrupt legitimate business."[31] It proscribed organized crime's infiltration of legitimate businesses, as well as other organizations, through the investment of income "derived . . . from a pattern of racketeering activity."

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[30]Section 1962(a) states that

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

18 U.S.C. § 1962(a) (1970).

[31]Pub. L. No. 91-452, 84 Stat. 923 (1970).

Section 1962(b): Take Over By Racketeering

¶ 9 Section 1962(b) was addressed to the "power" portion of the Congressional finding.[32] The statute proscribed the acquisition of "any interest in or control of any enterprise" directly "through a pattern of racketeering activity." It attacked the infiltration of such organizations through the use of the power attendant to "normal" racketeering activity.

Section 1962(c): Operation of Racketeer Influenced (Licit) Or Corrupt (Illicit) Organizations -- The Generation of Money and Power

¶ 10 Section 1963(c)[33] was addressed directly to the "normal" racketeering activity reflected in the Congressional findings that "organized crime . . . annually drains billions of dollars

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[32]Section 1962(b) states that

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

18 U.S.C. § 1962(b) (1970).

[33]Section 1962(c) states that

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

18 U.S.C. § 1962(c) (1970).

from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption,"[34] and that it "derives a major portion of its power through money obtained from . . . illegal endeavors."[35]

Section 1962

¶ 11 Taken together, section 1962(a), (b), (c) focus on three key aspects of organized crime: expansion through investment, expansion through racketeering, and racketeering qua racketeering in the operation of either licit or illicit organizations. Typically, racketeering has begun as an exercise of illicit power in the context of an illicit organization. Its activities have generated money which, in turn, has generated further power. Money and power, individually or together, have been used to infiltrate legitimate organizations as well as to annex, or establish and operate new illicit organizations. Both the licit organizations taken over and the new illicit organizations generate more money and power; they thus intensify the expansion of organized crime. Consequently, the failure to attack any one aspect of organized crime would make eradication of the whole more difficult. Each is capable of regenerating the entire organized crime structure. As drafted, therefore, RICO was designed to attack each major aspect of organized crime.

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[34]Pub. L. No. 91-452, 84 Stat. 922 (1970).

[35]Pub. L. No. 91-452, 84 Stat. 922-23 (1970).

Section 1963(a)(1): Specific Purpose

¶ 12 The Statement of Findings and Purpose evidenced Congressional awareness of the malign effect of the illicit income of organized crime on America's economy and general welfare:

> [O]rganized crime . . . annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption . . . . [O]rganized crime derives a major portion of its power through money obtained from . . . illegal endeavors . . . . [T]his money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes . . . . [O]rganized crime activities . . . weaken the stability of the Nation's economic system, . . . threaten the domestic security, and undermine the general welfare of the Nation and its citizens. . . .[36]

It also stated the Congressional purpose "to seek the eradication of organized crime"[37] "by providing enhanced sanctions and new remedies."[38] Section 1963(a)(1) forfeiture was specifically designed as a remedy to reach organized crime's illicit income.

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[36] Id.

[37] Pub. L. No. 91-452, 84 Stat. 923 (1970).

[38] Id.

¶ 13 Section 1963(a) plainly states that any violation of section 1962 triggers both of its criminal forfeiture provisions, section 1963(a)(1) and (2).[39] Section 1963(a)(1) mandates the forfeiture of "any interest . . . acquired or maintained in violation of section 1962." The phrase "any interest" in itself is unlimited in scope. The requirement that there be a nexus between a section 1962 violation and the forfeitable "property or other interest"[40] limits the reach of section 1963(a)(1). Unlike common law forfeiture,[41] section 1963(a)(1) forfeiture does not reach all of the defendant's personal and real property upon his conviction. Section 1963(a)(1) is carefully designed to reach only interests such as ill-gotten gains.

¶ 14 Section 1963(a)(2), on the other hand, provides a means of removing organized crime from positions of economic power that it has acquired. It mandates the forfeiture of "any interest in . . . a source of influence over, any enterprise . . .

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[39] Section 1963(a) states that

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1970).

[40] 18 U.S.C § 1963(b) and (c) (1970).

[41] See 1 W. Blackstone, Commentaries 299-300 (8th ed. 1788); 4 W. Blackstone, Commentaries 380-89 (8th ed. 1788).

established, operated, controlled, [or] conducted . . . in violation of section 1962.[42] Here, too, there must be a nexus between a section 1962 violation and the forfeitable "property or other interest."[43] Like section 1963(a)(1), section 1963(a)(2) does not reach all of the defendant's personal and real property. No more is forfeited than is necessary to achieve the provision's economic objective.

Legislative History

¶ 15 Since the meaning of section 1963(a)(1) is clear on its face, there is no justification for looking to the legislative history for the meaning of the statute.[44] Moreover, the Congressional mandate that "[t]he provisions of . . . title [IX]

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[42] 18 U.S.C. § 1963(a)(2) (1970).

[43] 18 U.S.C. § 1963(b) and (c) (1970).

[44] See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J.; concurring opinion) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous."); United States v. Rone, 598 F.2d 564, 569 (9th Cir. 1979) ("When no ambiguity is apparent on the face of a statute, an examination of legislative history is inappropriate. The proper function of legislative history is to solve, and not create, an ambiguity.").

shall be liberally construed to effectuate its remedial purposes"[45] ought to be used to resolve any "ambiguity" in favor of enhancing, not limiting, the remedial impact of RICO. Nevertheless, an examination of the legislative history confirms that section 1963(a)(1) mandates the forfeiture of "any interest . . . acquired or maintained in violation of section 1962"[46] without limitation.

¶ 16 RICO's legislative history is illustrative, not exhaustive. Nowhere in that history is it asserted that only interests in enterprises are subject to RICO forfeiture. Those statements found in the legislative history on the forfeiture of interests in enterprises[47] are accurate, but they describe only one type of forfeiture. They are not inconsistent with the existence

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[45]Pub. L. No. 91-452, 84 Stat. 947, Title IX, § 904(a) (1970).

The overwhelming majority of the courts have adhered to RICO's liberal construction clause. See United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978); United States v. Elliott, 571 F.2d 880, 899 (5th Cir.), cert. denied, 99 S. Ct. 349 (1978); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); United States v. Salinas, 564 F.2d 688, 691 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978); United States v. Kaye, 556 F.2d 855, 860 n.7 (7th Cir.), cert. denied, 434 U.S. 921 (1977); United States v. Brown, 555 F.2d 407, 416 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied sub nom. Napoli v. United States, 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975); United States v. Vignola, 464 F. Supp. 23, 29-30 (E.D. Pa. 1975). Contra, United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

[46]18 U.S.C. 1963(a)(1) (1970).

[47]E.g., H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 35 (1970) ("[P]rovision is made for the criminal forfeiture of the convicted person's interest in the enterprise engaged in interstate commerce.").

of another type of forfeiture that reaches racketeering income.[48] Since the two types of forfeiture are not mutually exclusive, legislative history discussing one type of forfeiture ought not to be interpreted as excluding the other. Taken together, the statements in RICO's legislative history on the scope of criminal forfeiture reflect the plain meaning of the statute: section 1963(a)(1) reaches any type of interest, including racketeering proceeds, while section 1963(a)(2) reaches all interests in sources of influence over enterprises. On the other hand, reading section 1963(a)(1) as reaching only enterprises is inconsistent with statements in the legislative history, with RICO's liberal construction clause, with the Statement of Findings and Purpose, and with the plain meaning of the statute.

Analysis of United States v. Marubeni America Corp.

¶ 17 The circuit court in Marubeni found that the Congressional "purpose [in enacting RICO] was to rid legitimate organizations of the influence of organized crime,[49] "and not to attack racketeering broadsides."[50] The court based its opinion on statements in the legislative history that discuss the innovative approach of RICO to the problem of infiltration

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[48] E.g., id. at 57 ("[V]iolations shall be punished by forfeiture to the United States of all property and interests, as broadly described, which are related to the violations."); 116 Cong. Rec. 591, 18939 (1970) (remarks of Sen. McClellan); J. McClellan, The Organized Crime Act (S.30) Or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 141 (1970) ("Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains.").

[49] United States v. Marubeni America Corp., 611 F.2d 763, 769 n.11 (9th Cir. 1980).

[50] Id. at 769.

and corruption of legitimate business by organized crime.[51] However, those statements were never intended to limit RICO to only that application.

¶ 18 The preamble to the Organized Crime Control Act of 1970 was ignored by the ninth circuit. That preamble explicitly states that the Act's purpose is "to seek the eradication of organized crime."[52] Therefore, the application of RICO should not be limited to the removal of organized crime from legitimate business, just as it has not been limited to licit organizations[53] or to the activities of demonstrable members of organized crime.[54] The statute was drafted to be general in scope, and it should be so construed by the courts. The court's misunderstanding of one purpose of RICO may well have contributed to its misconstruction of the scope of RICO forfeiture. Had the court not narrowed its focus to the one purpose, it might have seen the inconsistency between its holding and the other purposes of the statute.

¶ 19 The Marubeni court agreed with the district court that it was "natural"[55] to look to section 1962 "to discover what

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[51] Id. at 768-69 n.11.

[52] Pub. L. No. 91-452, 84 Stat. 923 (1970).

[53] See cases cited in note 11 supra.

[54] See cases cited in note 12 supra.

[55] United States v. Marubeni America Corp., 611 F.2d 763, 766 (9th Cir. 1980).

sorts of interests were forfeitable"[56] because section 1963(a)(1) forfeiture is triggered by a violation of section 1962.[57]

¶ 20 The district court stressed similarities in vocabulary between section 1963(a)(1) and section 1962(a) and (b). Section 1962(a) proscribes the investment of illicit income "in acquisition of any interest in . . . any enterprise." Section 1962(b) proscribes acquisition or maintenance of "any interest in . . . any enterprise" "through a pattern of racketeering activity."

¶ 21 The district court found that "'[i]t follows . . . that when . . . § 1963(a)(1) speaks of 'any interest . . . acquired or maintained in violation of section 1962 . . . ,' the provision refers to interests in any enterprise.'"[58] The circuit court quoted this analysis with approval.[59]

¶ 22 However, this suggested linguistic relationship between section 1963(a)(1) and section 1962 provides no basis for the courts' addition of the restricting phrase "in any enterprise" to the phrase "any interest" in section 1963(a)(1).

¶ 23 The section 1963(a)(1) nexus requirement links the forfeiture remedy to the particular racketeering offense committed. Only an interest "acquired or maintained in violation of section 1962" is subject to section 1963(a)(1) forfeiture. Under section 1963(a)(1), the presence or absence of a nexus between

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[56] Id.

[57] Id.

[58] Id.

[59] Id.

a section 1962 violation and some particular interest, regardless of the form of that interest, determines whether the interest is forfeitable. Section 1963(a)(1) does not look to section 1962 for a definition of the form a section 1963(a)(1) interest can take. Nothing in the plain words of the statute mandates such a reading of the statute. Moreover, section 1963(a)(1)'s plain words and express purpose militate against that interpretation.

¶ 24 If Congress had intended to limit section 1963(a)(1) to the forfeiture of interests in enterprises, it would have included the word "enterprise" in the section, as it did in section 1962(a), (b), and (c), and section 1963(a)(2).[60]

¶ 25 The district court found support for reading the phrase "in any enterprise" into section 1963(a)(1) in "a distinction, implicit in the language of RICO, between 'income' and 'interest'."[61] The "distinction" seized upon by the district court and described by the circuit court is akin to the "distinction" between "racketeering" and "crime."

¶ 26 Section 1962(a) proscribes the investment of income "from a pattern of racketeering activity" "in acquisition of any interest in . . . any enterprise." The district court focused on the fact that the word "income" appears in section 1962(a) and noted that "[w]hen Congress meant 'income' . . . it used that term."[62] According to the circuit court, "[t]he

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[60] Cf., United States v. Rone, 598 F.2d 564, 568 (9th Cir. 1979) ("It is notable that Congress could have restricted the meaning of the Act by inserting a single word ["illicit"], but did not do so.").

[61] United States v. Marubeni America Corp., 611 F.2d 763, 766 (9th Cir. 1980).

[62] Id.

implication was compelling that 'the term "interest," as it is used in § 1963(a)(1) . . . , means something other than income derived from a pattern of racketeering activity'."[63]

¶ 27 However, neither the word "interest," nor the word "income," is defined by RICO. As a word in common usage, "interest" may be defined as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something."[64] "Income" may be defined as "[t]he return in money from one's business, labor, or capital invested."[65] The word "interest" is unlimited in scope and encompasses "income."

¶ 28 The narrow term "income" is appropriate in the context of section 1962(a) investment. Unless it is already in the form of income, that is, money, an interest must be converted into income before it can be invested. On the other hand, the broad term "interest" is appropriate where forfeiture is designed to reach ill-gotten gains, since the "interest" realized from a pattern of racketeering need not be limited to "income" or money, but can extend to a virtually unlimited class of valuable things, including "income" or money.

¶ 29 The circuit court also supported the "income" argument of the district court by noting that "Congress provided specifically for the forfeiture of 'profits' obtained from a criminal enterprise in the Comprehensive Drug Abuse Prevention and

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[63] Id.

[64] Black's Law Dictionary 729 (5th ed. 1979).

[65] Id. at 687.

Control Act of 1970.[66] 21 U.S.C. § 848(a)(2)(A)[67]."[68] Because that statute contains the word "profits" instead of the word "interest," the circuit court concluded that "[h]ad Congress intended forfeiture of racketeering income [in section 1963(a)(1)], we believe it would have expressly so provided."[69]

¶ 30 Again, the word "income" is "[t]he most general term that can be employed to denote a right, claim, title or legal share in something,"[70] while the word "profit" may be defined as, "most commonly, the gross proceeds of a business transaction less the costs of the transaction; i.e., net proceeds."[71]

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[66]Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[67]Section 848(a)(2)(A) and (B) provide that

> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States ---
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

21 U.S.C. § 848(a)(2)(A) and (B) (1970).

The Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce of the House of Representatives originated the statute in response to legislation proposed by the President. H.R. Rep. No. 91-1444 (Pt. 1), 91st Cong., 2d Sess. 1-2 (1970). The statute was not a product of the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate.

[68]United States v. Marubeni America Corp., 611 F.2d 763, 766 n.7 (9th Cir. 1980).

[69]Id.

[70]Black's Law Dictionary 729 (5th ed. 1979).

[71]Id. at 1090.

¶ 31 The narrow term "profits is appropriate in the context of illicit narcotics sales since such sales mirror in form the cash transactions of legitimate business. However, the broad term "interest" is necessary in section 1963(a)(1) because of the heterogeneous nature of the activities of organized crime which are designed to acquire or maintain benefits that need not be limited to "profits." For example, if a person uses violence to acquire the right to install cigarette vending machines in a restaurant chain, that right is encompassed by the word "interest" but not by the word "profits."

¶ 32 The Marubeni court also misunderstood the relationship among section 1962(a), (b), (c), as well as the relationship between section 1963(a)(1) and section 1962. Section 1962(c) is applicable where there is a single enterprise whose affairs are conducted "through a pattern of racketeering activity" by a person "employed by or associated with" that enterprise. On the other hand, the conduct proscribed by section 1962(a) and (b) may, in fact, involve the operation of two enterprises.

¶ 33 Section 1962(a) is addressed to the "acquisition of any interest in . . . any enterprise" through the investment of income "derived . . . from a pattern of racketeering activity." The enterprise invested in is the enterprise essential to the application of section 1962(a). However, the "pattern of racketeering activity" from which the income is derived may be a manifestation of the existence of another enterprise whose affairs are conducted "through a pattern of racketeering activity" in violation of section 1962(c).

¶ 34 For example, assume Bookmaker-Investor uses the income from a bookmaking operation to acquire an interest in a wholesale liquor business. The liquor business may be an enterprise

invested in under section 1962(a). The bookmaking operation may form a "pattern of racketeering activity" under section 1962(a). This same bookmaking operation may also manifest a violation of section 1962(c); it may be an enterprise whose affairs are conducted "through a pattern of racketeering activity."

¶ 35 Similarly, section 1962(b) proscribes the acquisition or maintenance of "any interest in or control of any enterprise" "through a pattern of racketeering activity." The enterprise in which an interest is acquired or maintained is the enterprise required for the application of section 1962(b). However, the "pattern of racketeering activity" through which the acquisition or maintenance takes place may also indicate the existence of another enterprise whose affairs are conducted "through a pattern of racketeering activity" in violation of section 1962(c).

¶ 36 For example, assume Extortionist acquires an interest in a restaurant by offering "protection." The restaurant may be the enterprise in which an interest is acquired under section 1962(b). The promise of "protection" may form part of a "pattern of racketeering activity" under section 1962(b). This same pattern of extortion may also indicate an enterprise whose affairs are conducted "through a pattern of racketeering activity" in violation of section 1962(c).

¶ 37 The circuit court's analysis of RICO proceeds from a limited conception of the relationship between the various parts of the statute. The first sentence of section 1962(a)

proscribes the investment of racketeering income in an interest in an enterprise.[72] The second sentence creates an exception for a de minimis "purchase of securities on the open market for purposes of investment."[73] The circuit court argued that "Congress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used."[74]

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[72]The first sentence of § 1962(a) provides that

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a) (1970).

[73]The second sentence of § 1962(a) provides that

> A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a) (1970).

[74]United States v. Marubeni America Corp., 611 F.2d 763, 767 (9th Cir. 1980).

¶ 38 The Marubeni court recognized that the "pattern of racketeering activity" which produces the section 1962(a) investment income may itself indicate the existence of an enterprise whose affairs are conducted "through a pattern of racketeering activity" in violation of section 1962(c). If the section 1962(a) investment of racketeering income is within the de minimis exception, there is no section 1962(a) violation to trigger a section 1963(a)(1) forfeiture of the interest acquired with the racketeering income. Nevertheless, there is no reason to suppose, as the Marubeni court did, that a section 1962(c) violation would not trigger the section 1963(a)(1) forfeiture of that same interest. The circuit court concluded that reading section 1963(a)(1) to mandate the forfeiture of racketeering income and its products "defeats the 1 percent investment exception [of section 1962(a)] and makes the rest of § 1962(a) surplusage."[75] The court, however, misinterprets the relationship between section 1962(a) and (c), and the section 1962(a) de minimis exception.

¶ 39 Congress has the power to subdivide a course of conduct into separate offenses and to impose a discrete penalty for the violation of each offense.[76] In section 1962, Congress proscribed three key aspects of organized crime activity, and in section 1963(a) provided a separate penalty for each section 1962 violation. Congress also decided not to criminalize, and, therefore, not to punish certain minimal section 1963(a)-type

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[75] Id.

[76] Gore v. United States, 357 U.S. 386, 387-93 (1951).

activity. But because Congress decided not to punish one aspect of a course of conduct, it does not follow that Congress decided not to punish the other aspects of that same course of conduct. A decision to limit punishment is not a decision to impose no punishment.

¶ 40 In addition to mandating both section 1963(a)(1) and (2) forfeiture, section 1963(a) provides that "[w]hoever violates any provision of section 1962 . . . shall be fined not more than $25,000 or imprisoned not more than twenty years, or both."[77] Cumulative penalties may be imposed for multiple offenses.

¶ 41 Section 1962(a)'s one percent investment exception merely indicates a Congressional decision not to punish minimal investments of illicit income. Congress obviously regarded such investments as too minor to warrant the imposition of sanctions under section 1963(a).

¶ 42 The section 1962(a) exception has the effect of exempting a person otherwise in violation of section 1962(a) from the fine and imprisonment penalties of section 1963(a). However, there is no reason to suppose that the exception makes that person's production of investment income immune from forfeiture if his method of income production violates another section of RICO. Such immunity would conflict with the Congressional decision "to seek the eradication of organized crime."[78] The investment income may be forfeited if a nexus between that interest and a violation of section 1962(c) can be proven.

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[77] 18 U.S.C. § 1963(a) (1970).

[78] Pub. L. No. 91-452, 84 Stat. 923 (1970).

¶ 43 Therefore, reading section 1963(a)(1) to encompass the forfeiture of illicit income does not "defeat . . . the 1 percent investment exception"[79] where a section 1962(c) violation triggers the forfeiture of an investment that falls within the section 1962(a) exception. The exception does not create a class of investments of illicit income exempt from forfeiture. Congress' lenity in defining criminal conduct did not affect the availability of penalties for the other conduct it did proscribe.

¶ 44 In addition, recognizing section 1963(a)(1) forfeiture of illicit income does not make section 1962(a) "surplusage."[80] Even though a section 1962(c) violation may trigger the forfeiture of an interest also forfeitable because of a section 1962(a) violation, the two offenses are not redundant since each offense proscribes different conduct. Moreover, the other penalties imposed for each violation may be made cumulative by the sentencing court.

¶ 45 The Marubeni court also found that reading section 1963(a)(1) to reach racketeering income would make section 1962(b) "redundant"[81] because a section 1962(c) violation might trigger the forfeiture of the same interest as a section 1962(b) violation. The court realized that the "pattern of racketeering activity" "through which an interest in or control of any enterprise" is acquired or maintained in violation of section 1962(b) may evidence an enterprise whose affairs are conducted "through a pattern of racketeering activity" in violation of section 1962(c).

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[79] United States v. Marubeni America Corp., 611 F.2d 763, 767 (9th Cir. 1980).

[80] Id.

[81] Id.

¶ 46 There was no need, however, for the court to read the limiting phrase "in any enterprise" into section 1963(a)(1). Since section 1962(b) and (c) proscribe discrete conduct, they are not "redundant"[82] even though they may trigger penalties that impact on the same interest. Moreover, the other penalties authorized by the statute may be imposed cumulatively.

¶ 47 The Marubeni court persisted in looking beyond the plain language of the statute to determine the scope of section 1963(a)(1) forfeiture,[83] and chose to examine RICO's legislative history.[84] But it did not correctly read the portions of the legislative history it examined. The initial version of S.30[85] was introduced by Senator McClellan on January 15, 1969.[86] RICO did not become part of S.30 until S.30 was reported by the Senate Judiciary Committee on December 18, 1969, with an amendment in the nature of a substitute.[87] RICO was

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[82] Id.

[83] Cf., Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring opinion) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous."); United States v. Rone, 598 F.2d 564, 569 (9th Cir. 1979) ("When no ambiguity is apparent on the face of a statute, an examination of legislative history is inappropriate. The proper function of legislative history is to solve, and not create, an ambiguity.").

[84] United States v. Marubeni America Corp., 611 F.2d 763, 767-68 (9th Cir. 1980).

[85] S.30, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 4.

[86] H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 37 (1970); S. Rep. No. 91-617, 91st Cong., 1st Sess. 46 (1969).

[87] See H.R. Rep. 91-1549, 91st Cong., 2d Sess. 37 (1970); S. Rep. No. 91-617, 91st Cong., 1st Sess. 1 (1969).

based on S.1861,[88] a bill introduced by Senator McClellan on April 18, 1969.[89] S.1861 evolved from S.1623[90] which was introduced by Senator Hruska on March 20, 1969.[91] S.1623 was itself a redrafting of two Hruska bills introduced in the previous Congress.[92]

¶ 48 The circuit court began its inquiry by misstating the sequence of bills that led to the enactment of RICO.[93] The court stated that, after its introduction on January 15, 1969, S.30 "was immediately amended to add the RICO title."[94] The Marubeni court apparently confused the final text of S.30 with its initial text.[95] In response to the government's assertion

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[88] S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 61.

[89] S. Rep. No. 91-617, 91st Cong., 1st Sess. 47, 83 (1969); J. McClellan, The Organized Crime Act (S.30) Or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 145 n.398 (1970).

[90] S.1623, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 37.

[91] S. Rep. No. 91-617, 91st Cong., 1st Sess. 83 & n.14 (1969); J. McClellan, The Organized Crime Act (S.30) Or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 145 n.398 (1970).

[92] Id.

[93] United States v. Marubeni America Corp., 611 F.2d 763, 767-68 n.9 (9th Cir. 1980).

[94] Id. at 767-68.

[95] The Circuit Court stated that "[t]he fact that S.1861 is dated after the S.30 version of RICO was introduced to Congress indicates [that S.1861 was not an antecedent of RICO]." Id. at 768 n.9.
The court was incorrect. A RICO-less version of S.30 was introduced on January 15, 1969. S.1861 was introduced on April 18, 1969. The amended S.30 reported by the Senate Judiciary Committee on December 18, 1969, was the first version of the bill to contain RICO as title IX. See text accompanying notes 85-92 supra.

of the actual bill sequence, the ninth circuit disingenously stated that the sequence of the legislation did not "alter . . . the impact of the legislative history.[96] The court could have made few more far-reaching mistakes in reading the legislative history.

¶ 49 S.1623 proscribed the investment of illicit income in legitimate business.[97] S.1861, its successor, proscribed three key aspects of organized crime: expansion through the investment of illicit income, expansion through racketeering, and racketeering per se.[98] S.1861's version of section 1963(a) mandated the forfeiture of "all interest in the enterprise engaged in."[99] While Title IX of S.30 proscribed essentially the same conduct as S.1861,[100] its version of section 1963(a) added the forfeiture of "any interest . . . acquired or maintained in violation of section 1962."[101] Therefore, the bill sequence proposed by the Marubeni court obscures the natural expansion of the statute.

¶ 50 The Marubeni court found support for reading the limitation "in any enterprise" into section 1963(a)(1) in a letter

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[96] United States v. Marubeni America Corp., 611 F.2d 763, 768 n.9. (9th Cir. 1980).

[97] S.1623, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 39-40.

[98] S.1861, 91st Cong., 1st Sess. (1969), reprinted in Senate Hearings, supra note 20, at 66-67.

[99] Id. at 67.

[100] S.30, 91st Cong., 1st Sess. (1969), reprinted in S. Rep. No. 91-617, 91st Cong., 1st Sess. 22-23 (1969).

[101] Id. at 23.

written by Deputy Attorney General Kliendienst.[102] The letter, written on August 11, 1969,[103] contains the Department of Justice comments on the original draft of S.1861.[104] As noted by the court,[105] the letter in part states that

> this revival of the concept of forfeiture as a criminal penalty, limited as it is in section 1963(a) [of S.1861] to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than of constitutional power.[106]

¶ 51 However, the discussion of section 1963(a) in the Kliendienst letter is addressed to a constitutional question concerning the scope of criminal forfeiture. It is not a technical commentary on the scope of the bill as expanded and reported. The point of the letter is simply that a limited forfeiture penalty is constitutional. This view of the letter's meaning is confirmed by the Department of Justice comments in the subsequent House hearings on S.30 as it passed the Senate:

> [Title IX] contains a provision for the forfeiture of any interest which has been attained in violation of the criminal provisions of the statute. The Department of Justice commented at length upon the constitutionality of this sanction in a report

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[102] United States v. Marubeni America Corp., 611 F.2d 763, 768 (9th Cir. 1980).

[103] S. Rep. No. 91-617, 91st Cong., 1st Sess. 121 (1969); Senate Hearings, supra note 20, at 404.

[104] Id.

[105] United States v. Marubeni America Corp., 611 F.2d 763, 768 (9th Cir. 1980).

[106] S. Rep. No. 91-617, 91st Cong., 1st Sess. 80, 125 (1969); Senate Hearings, supra note 20, at 407.

> on S.1861, from which Title IX has been derived, in [the Kliendienst letter] . . . . In essence, we said that . . . [criminal forfeiture] finds precedent in early colonial and English usage. We think that the revival of the concept of forfeiture as a criminal penalty, limited as it is herein to an offender's interest which is the subject of the criminal offense, is a matter subject only to Congressional discretion, not constitutional limitation.[107]

The Department of Justice comments on S.30, unlike its comments on S.1861, pointedly do not describe section 1963(a) forfeiture in terms of interests in enterprises since the bill as passed by the Senate was not so limited.

¶ 52 At one point, the Senate report on S.30 introduces a segment of the Kliendienst letter on section 1963 by stating that "[t]he use of the ancient doctrine of criminal forfeiture embodied in Title IX may be aptly explained by reference to the Department of Justice comments on [S.1861]."[108] The Kliendienst Letter is used at that point to explain that Title IX's innovative criminal forfeiture provision is of certain constitutionality because it provides for a limited forfeiture. Both the S.1861 and the Title IX versions of section 1963(a) provide for a similarly limited forfeiture by requiring a nexus between a section 1962 violation and the interest to be forfeited. The Department of Justice comments are thus relevant to the constitutionality of Title IX forfeiture as well as to the constitutionality of S.1861 forfeiture. The letter was quoted as a comment on the issue of constitutionality, not as a technical comment on the scope of the criminal forfeiture authorized by the statute.

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[107] Hearings on S.30 Before Subcomm. No. 5 of the Comm. on the Judiciary of the House of Representatives, 91st Cong., 2d Sess. 171 (1970) [hereinafter cited as House Hearings].

[108] S. Rep. No. 91-617, 91st Cong., 1st Sess. 79 (1969).

¶ 53 The remainder of the circuit court's examination of RICO's legislative history consists of the marshalling of quotations and citations to support the court's proposition that RICO forfeiture is limited to interests in enterprises. However, the court failed to realize that the statements it quoted to support its theory were illustrative rather than exclusive descriptions of the application of RICO forfeiture. They are, therefore, accurate, but incomplete. In addition, the court misread several of the passages it singled out for consideration.

¶ 54 The Marubeni court offered five comments from the legislative history in support of its interpretation of the statute.[109]

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[109] United States v. Marubeni America Corp., 611 F.2d 763, 768 & n.10 (9th Cir. 1980).

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 35 (1970) ("[P]rovision is made for the criminal forfeiture of the convicted person's interest in the enterprise engaged in interstate commerce."); Id. at 57 ("[V]iolations shall be punished by forfeiture to the United States of all property and interests, as broadly described, which are related to the violations."); House Hearings, supra note 108, at 171.

> ([Title IX] contains a provision for the forfeiture of any interest which has been attained in violation of the criminal provisions of the statute. The Department of Justice commented at length upon the constitutionality of this sanction in a report on S.1861 . . . [in the Kliendienst] letter . . . . In essence, we said that [criminal forfeiture] . . . finds precedent in early colonial and English usage. We think that the revival of the concept of forfeiture as a criminal penalty, limited as it is herein to an offender's interest which is the subject of the criminal offense, is a matter subject only to Congressional discretion, not contitutional limitation.);

S. Rep. No. 91-617, 91st Cong., 1st Sess. 34 (1969) ("[P]rovision is made for the criminal forfeiture of the convicted person's interest in the enterprise engaged in interstate commerce."); Id. at 160 ("The language [of section 1963] is designed to accomplish a forfeiture of any 'interest' of any type in the enterprise acquired by the defendant or in which the defendant has participated in violation of section 1962.").

The court's reliance on two of them is completely misplaced.[110] The court itself admitted that its use of one of these two passages was questionable when it stated that the passage "permit[ted] but . . . [did] not prove the government's case."[111]

¶ 55 The ninth Circuit also admitted that "[a] few . . . statements in the legislative history . . . seem to support the government's position that Congrees intended forfeiture of all 'illgotten [sic] gains'."[112] The court cited three passages in the legislative history which support the position that RICO forfeiture can reach illicit income, or any other form of interest "acquired or maintained in violation of section 1962."[113]

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[110] See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 57 (1970); House Hearings, supra note 108, at 171.

[111] United States v. Marubeni America Corp., 611 F.2d 763, 768 n.10 (9th Cir. 1980).

[112] Id.

[113] Id.

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 57 (1970) ("[V]iolations shall be punished by forfeiture to the United States of all property and interest, as broadly described, which are related to the violations."); S. Rep. No. 91-617, 91st Cong., 1st Sess. 79 (1969) ("What is needed here, the committee believes are new approaches that will deal not only with individuals, but also with the economic base through which those individuals, constitute such a serious threat to the economic well-being of the Nation. In short, an attack, must be made on their source of economic power, and the attack must take place on all available fronts."); 116 Cong. Rec. 591-92 (1970) (remarks of Senator McClellan)

> ([T]itle IX is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains.
> . . . .
> . . . Title IX . . . would forfeit the ill-gotten gains of criminals where they enter or operate an organization through a pattern of racketeering activity.).

¶ 56 The court concluded by stating that "these isolated references [which support the government's position] are simply rhetorical approximation and must be put in perspective."[114] The Marubeni court apparently thought it provided that "perspective" with a quotation from Senator McClellan, the principal sponsor of S.30: "'Title IX . . . would forfeit the illgotten [sic] gains of criminals where they enter or operate an organization through a pattern of racketeering activity'."[115] The quoted passage simply restates the nexus requirement necessary for any RICO forfeiture. It is fully consistent with the position that section 1963(a)(1) forfeiture reaches any interest, including illicit income, "acquired or maintained in violation of section 1962."

¶ 57 Nowhere in the legislative history is it stated that RICO forfeiture only reaches interests in enterprises. The comments in the legislative history which discuss the forfeiture of interests in enterprises, therefore, are consistent with reading section 1963(a) literally to reach racketeering income as well

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[114] United States v. Marubeni America Corp., 611 F.2d 763, 768 n.10 (9th Cir. 1980).

[115] Id. (emphasis added by circuit court).

as "any interest in . . . a source of influence over, any enterprise . . . operated . . . in violation of section 1962."[116]

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[116]There is another anomalous aspect to the court's reading of section 1963(a)(1). Under section 1961(4), an enterprise may be a legal entity such as a corporation. Legal title to such an entity's assets will be in the entity. Persons associated with the entity may own it, but they will not own its assets. Under the court's decision, a forfeiture under section 1963(a)(1) would reach such person's stock ownership in the corporation. The forfeiture would not extend to the proceeds of any "pattern of racketeering activity" engaged in on behalf of the corporation since title to the proceeds qua assets would be in the legal entity.

On the other hand, under section 1961(4) an enterprise may also be an association in fact which would not be a legal entity. The "assets" of the association would be the joint property of its members. Under the court's decision, forfeiture of an interest in the enterprise under section 1963(a)(1) would reach the "assets" of the association in fact, including racketeering income. In this situation, forfeiture under section 1963(a)(1) or (2) would impact on the same interest. The racketeering proceeds would not be forfeited as encompassed by the phrase "any interest" under the government's reading of section 1963(a)(1), but rather as encompassed by the phrase "any interest in any enterprise" or the phrase "any interest in . . . a source of influence over, any enterprise" under the court's reading of section 1963(a)(1) and (2).

In light of its decision "to seek the eradication of organized crime," it is difficult to believe that Congress intended to place such a premium on engaging in a "pattern of racketeering activity" through a legal entity. However, that is one result of the circuit court's decision in Marubeni.

Criminal Forfeiture: Disposition of Property and Remission of Forfeitures Under RICO

by

Janet Bostwick

OUTLINE

SUMMARY

¶1 RICO forfeitures are to be governed by the laws dealing with the disposition of property, including the customs laws as far as applicable. Statutory differences affect the application of these laws. First, RICO aims at removing the defendant from the enterprise, not at claiming government revenues. Second, the rights of innocent parties must be considered under the statute. Although not defined by statute, "innocent persons" should include those who do not have knowledge of the illegal activity, or who do not voluntarily consent to their relationship with the crime, e.g. victimized partners. The classification of innocent/not innocent operates not to determine whose property the government may take, but only whose rights the government must give added consideration to in disposing of the forfeited property.

¶2 Property may be disposed of by sale retention for public use, destruction, or donation. The type of property interest involved and the requirement that disposition take place as soon as "commercially feasible" will affect the choice of method. Where property will be sold, advertisement and notice of sale are required. Under current laws, the government receives bids and sells the property to the highest bidder on a cash basis, with no guarantees. Under RICO,

the type of property or the interest of other parties might require negotiated sales. Further, innocent parties play a role in the sale—either in choosing the class of bidders, or in slecting the final bid, or at some other point. Finally, credit terms and assurances or guarantees may be necessary to make the property marketable.

¶3 Instead of sale, property may be retained for public use by the government. Where property is illegal or the costs of sale will exceed the proceeds, the Attorney General may order its destruction. In addition, property may be donated to public organizations or agencies. These options require consideration of the rights of innocent parties before they can be used.

¶4 Along with the laws on disposition, the statute requires that remission or mitigation procedures under the customs law be applied. Under RICO, these provisions enable the Attorney General, in his discretion, to lessen an otherwise mandatory forfeiture. "Mitigating circumstances" include consideration of: the relation of the amount of the forfeiture to the severity of the crime, the defendant's role in the crimes, the experience and prior record of the defendant, any restitution made by the defendant to his victims, the hardship imposed upon his dependents by forfeiture, and finally, his involvement in organized crime. These factors will determine whether remission or mitigation will take place and the form of the mitigation.

I. INTRODUCTION

¶5 Aware of organized crime's increasing economic power and infiltration of legitimate business, Congress determined new penal sanctions were necessary to break this power.[1] As a consequence, the Organized Crime Control Act of 1970 included a provision for criminal forfeiture, "a powerful weapon, which will ... effectively remove the organized crime element from a particular field of activity, as well as remove the illegal profit potential ... ."[2]

¶6 Criminal forfeiture operates automatically upon conviction under § 1963.[3] The court then authorizes seizure of all forfeited property by the Attorney General.[4] The forfeited property is to be disposed of "as soon as commercially feasible, making due provision for the rights of innocent persons."[5] However, the exact procedure for disposition is not delineated. Rather, Congress incorporated by reference all laws dealing with the disposition of property and those dealing with forfeitures under the customs law "insofar as applicable and not inconsistent with the provisions hereof."[6]

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[1] Organized Crime Control Act of 1970, Pub. L. 91-452, § 1, 84 Stat. 941 (1970).

[2] 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan).

[3] 18 U.S.C. § 1963(a) (1976). Hereinafter, Title IX of the Organized Crime Control Act of 1970 will be referred to as "RICO", or by reference to the appropriate section of Title 18 of the United States Code.

[4] Id. § 1963(c).

[5] Id.

[6] Id.

¶7 These materials will present analysis of the disposition of property forfeited and the remission or mitigation of forfeitures under RICO. The discussion focuses first on current procedure on the disposition of property, primarily drawn from the customs laws and supplemented by other laws as necessary. These procedures will then be adopted to RICO forfeitures so that they are consistent with its provisions and purposes. Remission and mitigation procedures will be discussed after a general overview of the disposition.

II. DISPOSITION OF FORFEITED PROPERTY

A. The Current System

¶8 Under the customs laws, the customs official sends written notice after forfeiture liability to those parties which have an interest in the seized property.[7] This notice contains the alleged violations, their factual basis, and information concerning remission or mitigation remedies.[8] An officer takes custody of the property, storing it appropriately. The property is then appraised at a price at which each property is "freely offered for sale at the time and place of appraisement."[10]

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[7] 19 C.F.R. § 162.31 (1979).

[8] Id.

[9] 19 U.S.C. § 1605 (1976).

[10] 19 C.F.R. § 162.43 (1979).

¶9 The customs laws then separate those goods valued under $10,000, which are administratively forfeited,[11] from those valued greater than $10,000, which are judicially forfeited.[12] However, once forfeiture is determined, the procedure for the disposition of the goods is the same.[13]

¶10 Prior to the disposition of the property, one who has an interest in the property may petition for remission or mitigation of the forfeiture.[14] If the petition is denied or no petition is filed, the property is then disposed of by sale, retention for official use, or destruction.[15]

¶11 Prior to advertisement or sale, any property required to be inspected by a government agency must be so inspected.[16] Property which does not meet the standard is then destroyed.[17]

¶12 The sale will take place in the district in which the goods are seized.[18] However, if the laws of the state forbid those items to be sold or if the Commissioner determines that a sale would be more advantageous in another district, the property may be moved for sale elsewhere.[19]

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[11] 19 U.S.C. § 1609 (1976).

[12] 19 U.S.C. § 1610 (1976).

[13] 19 C.F.R. § 162.50 (1979).

[14] 19 U.S.C. § 1618.

[15] 19 U.S.C. § 1613 (1979), 40 U.S.C. § 304h, 304i (1979).

[16] 19 C.F.R. § 162.46 (1979).

[17] Id.

[18] 19 C.F.R. § 127.22 (1979).

[19] 19 U.S.C. § 1611 (1976).

¶13 Advertisement of the sale will be published for three weeks in a newspaper of extensive circulation where the property is to be sold.[20] Prospective buyers are then given a reasonable opportunity to inspect the goods.[21]

¶14 The customs regulations describe the sale as a public auction.[22] Details of the procedure involved can be found by looking at other laws dealing with the disposition of property. The regulations for the Bureau of Alcohol, Tobacco, and Firearms describe the alternative methods of sale — either open, competitive bids or sealed, competitive bidding.[23] In either case, the property is awarded to the highest bidder.[24] The purchaser takes the property "as is", without recourse against the United States and without any warranty, express or implied.[25] The terms of the sale are cash or cashier's check, no credit.[26]

Provision is made for those goods which are perishable or property that will decline rapidly in value.[27] In these cases, the customs official is empowered to sell the property as soon as possible after reasonable advertisement of sale.[28]

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[20] 19 C.F.R. § 127.25 (1979).

[21] Id.

[22] Id. § 127.27.

[23] 27 C.F.R. § 72.61 (1979).

[24] Id.

[25] Id. § 72.63.

[26] Id. § 72.64.

[27] 19 U.S.C. § 1611 (1976).

[28] 19 C.F.R. § 162.48 (1979).

¶15 The sale of land is also treated differently. Excess government land is sold after receiving written offers to purchase.[29] The terms of sale may be in the form of purchase money mortgage or land contract depending on the cost and the salability of the property.[30] The acceptance of a bid depends not only on the price offered but also on consideration of other factors.[31] Finally, the quitclaim deed is given unless another form is necessary to market the property.[32]

¶16 After sale, the proceeds are first used to pay the expenses of forfeiture and sale -- the cost incurred by seizing the property, maintaining custody, advertising and conducting the sale, and any court costs.[33] Any liens for freight or charges which have been properly filed with customs according to law are then paid.[34] The remainder is deposited with the Treasurer of the United States.[35]

¶17 Instead of being sold, property forfeited may be retained for official use.[36] Property which the seizing agency decides not to retain, is generally reported to the General Services Administration who may then request its use for another department.[37]

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[29] 41 C.F.R. § 101 - 47.304-6 (1978).

[30] Id. § 101-47.304-4.

[31] Id. § 101-47.305-1.

[32] Id. § 101-47.307-1.

[33] 19 U.S.C. § 1613 (1976).

[34] Id.

[35] Id.

[36] 40 U.S.C. § 304h, 304i (1976).

[37] 40 C.F.R. § 48.101-4 (1979).

¶18 The Secretary of the Treasury may also order that property be destroyed rather than sold where either 1) the proceeds of sale will be insufficient to cover the costs of sale, or 2) the sale of such property is prohibited by law.[38] Where the sale of property is illegal, the Secretary in his discretion may direct that the property be remanufactured into an article not prohibited which then can be sold.[39]

¶19 An alternative method of disposition, not specifically mentioned under the customs laws, is to donate the property. Forfeited wines and liquors may be donated to charitable organizations for their use.[40] In addition, federal regulations provide that excess government property of other forms may be donated to public agencies or nonprofit educational or public health institutions.[41]

B. Adaption for RICO

¶20 By combining the customs law with other laws dealing with the disposition of property, it is thus possible to construct a system for disposing of forfeited property. Two considerations affect the adaption of this system to RICO forfeitures: first, the congressional directive to provide for the rights of innocent persons, and second, the range of interests and property RICO affects.

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[38] 19 U.S.C. § 1611 (1976).

[39] Id.

[40] 41 C.F.R. § 101-48.2 (1979).

[41] Id. § 101-44.

¶21 The statute requires consideration of the rights of innocent persons, but does not define "innocent".[42] The broadest definition is that an innocent person is one who is not guilty under the statute. Yet, this definition would mean that the disposition would be restricted by the rights of the convicted defendant's colleagues, who themselves may be deeply involved in the illegality but are nevertheless not guilty under RICO.

¶22 At the other extreme, innocent can be defined as anyone who did not have reason to believe that criminal conduct had occured. This definition would enable the government to proceed irrespective of the rights of one who knew the suspicious circumstances, but not necessarily the illegal acts themselves. This appears to be too narrow a construction of innocent.

¶23 Lack of knowledge of the illegal activity then should be one earmark of the innocent person. But will knowledge of the illegality be sufficient to bar consideration as an innocent person? What of the sole proprietor who by extortion and other criminal acts is forced into partnership with the criminal? He has knowledge of the crimes, but is in fact a victim of them. Congress did not intend to ignore the rights of the victims. Thus, another element which should be considered is whether there was voluntary consent to the illegal acts.

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[42] 18 U.S.C. § 1963 (1976). "Person", however, is defined to include any entity capable of holding an interest in property. Id. § 1961(c). Consequently, the rights of innocent corporations and other entities must also be considered.

¶24 Should there also be a consideration of the level of involvement in the illegal activity? Requiring a level of involvement, however would insulate those who willingly chose to deal with an illegal enterprise. The requirement of knowledge and consent should operate sufficiently to protect those who are unable to protect themselves.

¶25 Thus, an "innocent person" under the statute would be one who either lacks knowledge of the illegal activity or did not voluntarily consent to his relationship with the criminal. Classifying a person as "not innocent" does not mean that his property will be taken away. It only means that in disposing of its property, the United States is not required to evaluate the effect on your property. For example, shares in a closely-held corporation will be disposed of irrespective of the other shareholders if they are "not innocent." Labelling them as innocent, however, may require that they be given some veto power over the sale of shares.[43]

¶26 A second factor to consider before fashioning a procedural system is the broad range of property interests § 1963 reaches. Under subsection (a), "any interest in, security of, claim against, or property or contractural right of any kind" can be forfeited.[44] Thus the solutions of current laws dealing

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[43]Given the definition of innocent persons, the determination may be approached on a class basis, where all members of the class could assert the same rights. For example, if one customer is innocent, protection of his rights protects the rights of all customers, whether innocent or not, since their interests are the same.

A question raised is how can innocent parties enforce their right to receive "due provision." A proceeding similar to remission should be instituted which would permit parties to object that their rights were not considered.

[44]18 U.S.C. § 1963(a) (1976).

with tangible goods may prove inadequate where the interest is an intangible, such as an ownership right.

¶27 Keeping in mind these two problems -- the rights of innocent parties and the variety of types of interests, the present system of disposition will be analyzed to determine its applicability to RICO. The paper operates on the basic assumption that the property has already been forfeited and the court has ordered seizure. Therefore, there is no discussion of the type of forfeiture proceeding, but only as to the final disposition of the property.

¶28 The requirements of notice of seizure, taking custody of the property, and appraisal occur prior to forfeiture under the customs law.[45] But, under § 1963, seizure occurs after forfeiture and these functions must be performed then.[46] Although a general discussion of the procedures of seizure is omitted, these specific aspects are addressed because of their relation to the final disposition and the rights of innocent parties.

¶29 Notice of seizure and forfeiture will be sent to anyone having an "interest" in the seized property. If narrowly construed, this would mean only the defendant would receive notice since only his interest was seized. However, seizure will affect the rights of others, for example, where a secured chattel is seized. Notice should therefore be given

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[45] 19 U.S.C. § 1602, 1605, 1606 (1976).

[46] 18 U.S.C. § 1963(c) (1976).

to those who appear to be innocent persons. This will enable them to exert their rights prior to disposition.[47]

¶30 Custody also raises questions of the rights of innocent persons. Should a seized enterprise be allowed to continue to operate awaiting the final determination or should it be closed? Again, the question of innocent persons affects the answer. For example, if the enterpirse is an apartment house it must continue to operate to respect the rights of the tenants. On the other hand, if the enterprise is a hardware store suspending operations will not harm its customers. Indeed, allowing the government to operate may give rise to claims by the customers, such as defective merchandise, for which they can not sue the government.

¶31 Appraisal can be linked to the final disposition of the property. Should the enterprise be evaluated as a going concern or at its liquidated value? This appears to be tied up with the final disposition of the property. If it is an illegal enterprise, such as a gambling operation, which will be dismantled, it should be appraised at its liquidated value. On the other hand, a business enterprise which will be sold as a going business should be appraised on that basis.

¶32 This brief treatment of these preliminary steps does not pretend to explore all the issues involved at these stages. Yet, it does show the enormous difficulties which arise in adapting even simple provisions to the requirements of the RICO statute.

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[47]The Attorney General should notify those who are apparently innocent parties, although later facts may show that the person does not qualitfy as an innocent person. This relieves the Attorney General from having to make immediate determinations of innocence.

¶33 The focus now turns to the more complex question, how is the property to be disposed of? Under § 1963, this decision is made by the Attorney General, relying on the customs laws and other laws dealing with the disposition of property.[48] Unlike these laws, however, RICO is not aiming at raising funds. Rather, the statute aims to remove the "cancer" of organized crime from the economy "by direct attack, by forceable removal and prevention of return."[49] Thus, the disposition decision should focus on severing the ties between the convicted defendant and the enterprise, instead of on how to get the most government revenue.

¶34 Furthermore, the rights of innocent persons must be considered, although they will not dictate a solution. Indeed, the situation may present innocent parties whose rights are directly opposed to each other. The Attorney General must balance these rights and the purposes of the act to determine how best to dispose of this property. Thus, each fact situation will have to be independently evaluated in light of these interests.

¶35 Sale of the interest, where possible, will be the usual method of disposition. Before sale, the necessary government inspections must take place. Any other legally required preliminary steps must be performed at this time. For example, state law may require prerequisites to a sale of a corporation.

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[48] 18 U.S.C. § 1963 (1976).

[49] See 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan).

¶36 The Attorney General must then decide where the property is to be sold. This will depend on the type of interest sold. Some interests, such as stocks, may be sold anywhere. In determining the place of sale, the geographic market aimed at also should be considered. Accessibility to the sale will be an important factor when aiming at a national market.

¶37 The sale should be advertised at the place of sale for a minimum of three weeks. If aiming for a broad market, then publicity must go beyond the place of sale. For example, the sale of an interstate corporation should be publicized in financial centers, such as New York City. The notice should be reasonably calculated to reach the buyers sought. Therefore, publicity need not be limited to newspapers but may be conducted through other media, such as trade journals or investment periodicals. If selling a fleet of bulldozers, a logical advertisement would be in a construction magazine.

¶38 The next problem is what type of sale should be conducted. Should the bidding system be utilized? Some property may have such limited marketability as to render a bidding system useless. Auction-type bidding may also result in low prices which will harm innocent parties such as creditors. An alternative method is the negotiated sale.[50] An innocent person through his familiarity with the market may be able to aid the Attorney General in negotiating a more favorable agreement. Or a negotiated sale may take place between the innocent person and the government.

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[50]Authority to conduct negotiated sales is found in the regulations concerning the sale of government property. 41 C.F.R. § 101-45.304 (1978).

¶39 Where a system of bidding is used, limitations may be imposed on who can offer a bid. For example, the rights of minority stockholders may require that only certain persons can bid for the controlling interest. Alternatively, innocent persons may be given a voice in deciding on the accepted bid. This will be important where partnership interests are sold. Or, instead, if a bid has been decided upon, the innocent persons may be given an opportunity to match the bid before it is accepted.

¶40 What determines which offer is accepted? If price alone is considered, serious problems may arise. First, the high bidder may in fact be another disquise of organized crime, thus not removing the interest from crime but recycling it. The high bidder may also be one who is powerful enough to have dstructive effects on the competitive market the enterprise operates in. Congress was also aware of and concerned about the effects of a criminal activity on a community.[51] Consideration of the community effects is thus also a valid element. The high bidder may be intending to drain the interest out of the economy, while the low bidder may be going to input new capital into the corporation and community. Finally, the effect on innocent parties must be accounted for in determining which bid is accepted.

¶41 The terms of the sale should also be evaluated. To offer only on terms of cash payment proves difficult when dealing with the high price of a corporation. Certain extensions of

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[51] See S. Rep. No. 617, 91st Cong., 1st Sess. 211-214 (1969).

credit, like a loan or mortgage, may be required in order to market the property. The Attorney General should determine the nature and availability of the credit under the same method as that utilized for excess government real property.[52] Generally the property should be sold without guarantees or warranties, but alteration may be allowed to protect the rights of innocent persons or to provide a market for the property.

¶42 Finally, if a sale occurs, how are the proceeds to be distributed? First, expenses incident to forfeiture and seizure should be paid. Innocent persons would have incurred these costs themselves in order to obtain their own interest the property. Therefore they are not harmed by paying these costs first. Next, by analogy to the customs law,[53] liens or security interests which have been perfected should be paid. The government can only sell its interest in the property and so must account to the secured party for his interest. Should the unsecured creditors be paid before the government? Since the statute is not designed to generate income, the government's monetary gain should come last. If an unsecured creditor could have obtained legal rights in the property to satisfy his claim, then he should be permitted payment.[54] What remains will then be deposited with the Treasurer as a criminal fine.[55]

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[52] 41 C.F.R. § 101-47,304-4 (1978).

[53] See 19 U.S.C. § 1613 (1976).

[54] The unsecured creditor must be able to show he could have reached the property to satisfy the debt. Otherwise, he will receive benefits solely because of the forfeiture.

[55] The priorities among creditors themselves may be determined either by reference to Article 9 of the Uniform Commercial Code or the provisions of the Bankruptcy Act. See U.C.C. § 9-301, 312, 11 U.S.C.A. § 507 (1979).

¶43 Instead of being sold, the property may be retained for government use. Retention of forfeited property under RICO, however, will be much more restricted. First the government can only retain its interest in the property. Consequently, the government is required to pay those with security interests, etc. Secondly, some forfeited property will be impracticable for the government to retain. For example, it is not feasible for the government to maintain a controlling interest in a private corporation.

¶44 Illegal property will not be sold, but destroyed. Property may also be destroyed if the proceeds of sale will not cover the costs of sale, at the discretion of the Attorney General. However, this will require consent of innocent persons such as the secured party. Rather than destroy the property, the Attorney General may give the property to the secured party or other innocent persons to protect their rights.

¶45 The final alternative for disposition is to donate the property. Since the statute is not directed at raising revenues, there is no directive that property be sold. The rights of innocent parties may bar donation. Yet, if these rights have been protected, donation of the property for public purposes is consistent with Congress' objectives. Suppose a gambling operation in the ghetto and the building in which it is run are forfeited. The building and the proceeds from the sale of equipment could be donated to a community organization to establish a vocational program, or begin a community center, or for another public purpose. In effect the victims of the crime would be receiving the criminal's benefits.

¶46 Special problems arise in disposing of complex business entities. How is a company to be disposed of -- as an entity or should it be liquidated and the assets sold? Ideally, the corporation should be sold as a going concern, thereby allowing continuity and protection of customers and creditors. If the business operates in a depressed segment of the economy or involves individual services, sale may be difficult or impossible. Then it should be liquidated and assets sold separately.

¶47 What if the firm is in financial difficulties? This may often be the case where the defendant has slowly drained the funds out of the business. Liquidiation by the government will leave some creditors unpaid. The solution here may be bankruptcy proceedings. Straight liquidation proceedings would make some provision for all creditors. Reorganization may also provide an answer. The financially insecure firm could be reorganized and then sold as an entity.

¶48 A final limitation on the disposition is that it be done "as soon as commercially feasible."[56] By adding the word "commercially," Congress intended that business factors should be considered. Therefore, if the only bids are low, the Attorney General is not forced to sell because of the time element. Furthermore, the provision for the rights of innocent parties modifies this time factor. However, the test is "feasibility" not "reasonableness." Consequently, if the Attorney General

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[56] 18 U.S.C. § 1963 (1976).

receives a reasonable offer, allowing due provision for the rights of innocent persons, he cannot wait for a better offer, although a businessman reasonably might do so. Likewise, if the Attorney General is faced with a choice between bankruptcy liquidation or reorganization of a firm, he should choose the fastest route, provided both affect innocent parties equally.

¶49 What is "commercially feasible" of course depends on the type of property interest. Therefore, time should be measured differently depending on the property involved. For example, a sale of chattel, such as a car, should be possible within a few weeks. However, sale of a corporation, with the necessary paperwork after sale, may take well over a year.

¶50 The laws of disposition of property give the Attorney General a range of alternatives. But, these choices are then limited by the type of property interest, the objectives of the statute, the time element, and most important, the rights of innocent parties. The result is that the Attorney General cannot adopt automatically the current rules on forfeiture, but instead must fashion new rules adapting the system to reflect the intent of Congress.

III. REMISSION AND MITIGATION OF FORFEITURES

A. Under the Customs Laws

¶51 Customs officials have the discretionary power to remit or mitigate forfeitures.[57] This power permits a person with

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[57] 19 U.S.C. § 1613, 1618 (1976). The statute gives the authority to remit to the Secretary of the Treasury, who redelegated his authority to lower custom officials. 8 Cust. B & Dec. 553, 554 (1974). Where property is judicially forfeited, the same function is performed by the United States Attorney. 19 C.F.R. § 171.2 (1979). The discussion of remission will encompass both those cases considered by the Justice Department and those by the customs officials, since the procedures are identical.

an interest in the seized property to petition for a cancellation of all or part of the forfeiture.[58] Prior to the forfeiture sale, a party may file a petition until sixty days after the mailing of notice of forfeiture.[59] A petition can also be filed after sale within three months from the date of sale.[60]

¶52 For remission or mitigation to operate, it must be found that either: 1) the violation occurred without the intent or the willful negligence of the petitioner, or 2) mitigating circumstances exist.[61] If the forfeited property has been sold, it must also be found that the petitioner did not nor could not have known of the seizure or forfeiture.[62]

¶53 Neither the laws nor the regulations define mitigating circumstances. The Justice Department regulations allow mitigation "where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship."[63] In setting the amount of the mitigating penalty, the customs service considers several factors.[64] These factors include: the proportionality between the amount of

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[58] 19 C.F.R. § 171.11, 21 (1979).

[59] Id. § 171.12.

[60] 19 U.S.C. § 1613 (1976).

[61] Id. § 1618.

[62] Id. § 1613

[63] 28 C.F.R. § 9.6 (1979).

[64] 8 Cust. B. & Dec. 553 (1974).

revenue lost and the forfeited value, contributory customs error, whether the petitioner cooperated with or impeded the investigation, any remedial action taken by the petitioner, petitioner's experience in importing, and the prior record of the petitioner.[65]

¶54 After reviewing the evidence, the official reaches a determination "on such terms and conditions as, under the law and in view of the circumstances, he shall deem appropriate."[66] A successful petition usually results in a monetary penalty in place of the forfeiture.[67] A dissatisfied claimant has sixty days within which to file a supplemented petition to obtain administrative review.[68]

¶55 Courts consider the remission of forfeitures to be "an act of grace," a discretionary power of the officer.[69] Consequently, the final administrative decision is not subject to judicial review.[70] However, courts will intervene where officials have not exercised their discretion but merely refused to consider the case.[71]

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[65] Id.

[66] 19 U.S.C. § 1613, 1618 (1976).

[67] R. Sturm, A Manual of Customs Law 139-145 (Supp. 1976).

[68] 19 C.F.R. § 171.33 (1979).

[69] United States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964).

[70] Id.

[71] United States v. One Buick Riviera, 463 F.2d 1168 (5th Cir. 1972).

B. The Procedure Under RICO

¶56 Under § 1963, Congress specifically directed that the remission and mitigation provisions of the customs law apply to the forfeitures to the extent applicable.[72] But, the procedure serves a different function in each statute. Under the customs law, forfeiture occurs after a determination that the property was involved in an illegal act, irrespective of the owner's own innocence.[73] The remission and mitigation procedures primarily provide relief for the innocent owner.[74] On the other hand, RICO's forfeiture operates only after the owner is found guilty and only to the extent of his interest in the property.[75] Consequently, here these provisions are not needed to protect the innocent owner. However, under § 1963, forfeiture takes place automatically upon conviction.[76] Remission and mitigation allow the punishment to be tailored to the individual case. In fact, they provide a type of sentencing discretion.

¶57 Who did Congress intend to exercise the power to remit and mitigate under § 1963? Arguably, since it involves sentencing discretion, the judge should be given this power.[77]

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[72] 18 U.S.C. § 1963 (1976).

[73] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-687 (1974).

[74] See 19 C.F.R. § 171.11, 13 (1979); 28 C.F.R. § 9.5 (1979).

[75] 18 U.S.C. § 1963 (1976).

[76] Id.

[77] The Second Circuit found authority for the judge to remit a forfeiture under the provision authorizing the court to order seizure on the terms it deems proper. United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979).

However, Congress apparently intended that this duty be performed by the Attorney General. First, remission and mitigation are among the "duties" imposed under the customs laws "with respect to the disposition of property."[78] These duties were assigned to the Attorney General under § 1963.[79] Second, Congress specified that the customs provisions with respect to remission and mitigation were to be used.[80] If a judicial determination had been wanted, the procedure under the internal revenue laws, where the court exclusively exercises the power to remit, could have been adopted.[81] Congress then must have intended remission and mitigation to operate as an administrative function of the Attorney General.

¶58 Since guilt of the owner has already been determined under the statute, the innocent owner standard used under the customs law would have no applicability here. Rather, the Attorney General must base his decision on the mitigating circumstance in the case. Analogies can be drawn from the factor considered in the customs laws — proportionality, contribution, cooperation, remedial action, experience, and prior record.[82] Thus, one consideration is whether the price of forfeiture is proportional

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[78] 18 U.S.C. § 1963(c) (1976).

[79] Id.

[80] Id.

[81] 18 U.S.C. § 3617 (1976).

[82] See n. 67 and accompanying text, supra.

to the harm done or the seriousness of the crime. The relationship of the defendant to other parties in the crime may also be important. For example, was the defendant key man of the operation, or was he merely a low level manager? In addition, cooperation with police or investigative officials should be considered. Another factor to be weighed is whether the defendant undertook any remedial or restitutionary measures toward his victims. Finally, the defendant's experience and involvement (or lack of involvement) with criminal activity and his criminal record should be considered.

¶59 Other circumstances to consider can be found in the principles of sentencing. The Model Penal Code suggests other factors, besides those discussed above, which should be weighed.[83] Circumstances which tend to excuse or justify the defendant's conduct though insufficient to constitute a defense, should be considered.[84] In addition, the hardship imposed upon the defendant's dependants is important.[85]

¶60 Finally, the purposes of the statute should be examined in light of the particular case. Does the forfeiture further the goals Congress intended to achieve? Will remission or mitigation be consistent with the statute's objective to eliminate the economic base of crime? The Attorney General should also consider the defendant's connection with organized crime. If the defendant is involved in organized crime, relevant

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[83] Model Penal Code § 7.01(2) (Proposed Official Draft 1962).

[84] Id.

[85] Id.

factors include his position in the organization, his power and authority, and the income he derives from organized crime.[86]

¶61 The law allows the Attorney General to determine remission or mitigation "upon such terms and conditions as he deems reasonable and just."[87] He should not routinely replace the forfeiture with a monetary penalty, for it would defeat the entire purpose of the forfeiture provision. Rather, he may order partial forfeitures or conditional remissions or other measures. The facts of the case and the mitigating circumstances involved should determine the particular form the mitigation takes. For example, where there is a young defendant with a prior good record, remission may be conditioned on completion of a probationary period, such as five years. Or, if the family of a defendant faces destitution because of the forfeiture, the Attorney General may allow a trust fund to be established from part of the proceeds for the benefit of the family.

¶62 An administrative review should be permitted of the remission or mitigation decision. Judicial review raises different problems under this statute, since a criminal proceeding is involved. Given the fact that remission and mitigation perform a sentencing function, judicial review should be permitted but only to the limited extent of normal appellate review of sentencing.

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[86] See Council of Judges, National Council on Crime and Delinquency, Crime and Delinquency, 103 (1968).

[87] 19 U.S.C. § 1613 (1976).

¶63 Thus remission and mitigation under § 1963 should be given a broad scope. The principles underlying the statute suggest that the form the mitigation takes, the circumstances considered, and the scope of review need to be expanded beyond the range of the customs laws to further the intent of Congress.

PRIVATE ACTION FOR INJUNCTIVE RELIEF

by
David A. Bailey

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I. SUMMARY

¶ 1 Injunctions are flexible and useful judicial orders. Courts may use injunctions to enjoin activites that are R.I.C.O. violations. The federal courts have jurisdiction to issue such writs under section 1964(a).

¶ 2 Section 1964(c) should be interpreted as granting the right of private individuals to sue and obtain injunctive relief. In light of the legislative history, and the specific grant of injunctive relief to the Attorney General, the courts might decide Congress did not intend section 1964 (c) to grant injunctive relief to private individuals. The courts, however, may find a private right to sue for injunctive relief implicit in the statute.

II. NATURE AND UTILITY OF A R.I.C.O. INJUNCTION

A. GENERALLY

¶ 3 Traditionally an equitable remedy, injunctive relief is a flexible and useful judicial tool. Injunctions are used both to enforce rights and to prevent wrongs.[1] Injunctions are in personam actions and are either mandatory or preventive.

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[1] J. High, A Treatise on the Law of Injunctions ch. 1, § 1 (4th ed. 1905).

Mandatory injunctions require the person to do a particular thing, while preventive injuctions require the person to refrain from some activity.[2]

¶ 4 A perpetual injunction is granted only after a final hearing. Preliminary injunctions and temporary restraining orders are issued to maintain the status quo between the parties until a final determination of the suit.[3] A preliminary injunction is granted only after notice to the adverse party and a hearing on the motion.[4] A temporary restraining order may be granted without notice to the adverse party.[5] A temporary restraining order is in effect for only a short time[6] while a preliminary injunction usually remains in effect until the final hearing.[7] A surety bond may be required for a preliminary injunction or a temporary restrain-

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[2] Id. at § 2.

[3] Id. at § 3.

[4] Fed. R. Civ. P. 65(a).

[5] Fed. R. Civ. P. 65(b). But see Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) (setting aside a temporary restraining order where no effort was made to contact the adverse party).

[6] Fed. R. Civ. P. 65(b) provides:

> [A temporary restraining order] shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

[7] See, e.g., Exhibitors Poster Exch. Inc. v. National Screen Serv. Corp., 441 F.2d 560, 561 (5th Cir. 1971).

ing order to indemnify the adverse party for damages which may be suffered due to a wrongful restraint.[8]

¶ 5 Injunctions can be molded to the particular necessities of each case.[9] They are remedial, not punitive.[10] A judge has broad discretionary power to determine whether to grant or deny an injunction, and his decision will not be overturned on appeal without a showing of abuse.[11]

¶ 6 Injunctions are enforced through civil or criminal contempt, or both.[12] In civil contempt proceedings, judicial sanctions may be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, or to compensate the complainant for losses sustained due to the defendant's refusal to obey the court.[13] The sanctions can include fines or imprisonment. Imprisonment is intended to coerce, not punish, the defendant since he can discharge himself by doing what he had previously refused to do.[14]

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[8] Fed. R. Civ. P. 65(c).

[9] Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

[10] Rondeau v. Mosinee Paper Corp., supra note 9; United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974) (injunction granted under 18 U.S.C. § 1964), cert. denied, 420 U.S. 925 (1975); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 826 (5th Cir. 1972).

[11] United States v. Corrick, 298 U.S. 435, 437-38 (1936); Farrington v. Tokushige, 273 U.S. 284, 290 (1927).

[12] United States v. U.M.W., 330 U.S. 258, 303 (1947).

[13] McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); United States v. U.M.W., 330 U.S. 258, 303-04 (1947).

[14] Duell v. Duell, 178 F.2d 683, 685 (D.C. Cir. 1949).

Criminal contempt sanctions, however, are imposed as punishment to vindicate the court's authority and dignity and cannot be ended or relieved by any act of the defendant.[15]

B. R.I.C.O INJUNCTIONS

¶ 7 The usefulness of a R.I.C.O. injunction to a private citizen is clear. Without having to wait for the Attorney General to act, a private citizen could get a court order commanding that R.I.C.O. activities be stopped. The injunction could include a divestiture order, restrictions on personal associations, or other restrictions to ensure the prohibited activities will cease.[16] This would allow a firm which is being forced out of business by a racketeering competitor, for example, to have the illegal activities of the competitor enjoined, and even have the competitor dissolved or reorganized to purge the criminal elements. All of this would be done in a civil proceeding, where the burden of proof is lower than in criminal proceedings. Non-compliance with the court's order would be punishable by either civil or criminal contempt, or both, which could involve severe fines and prison sentences.[17] Without the right to injunctive re-

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[15] Id; United States v. U.M.W., 330 U.S. 258, 302 (1947).

[16] Jurisdiction to award these remedies is specifically granted in 18 U.S.C. § 1964(a) (1976). But it is possible the federal courts will interpret § 1964(c) as not including this type of relief. See ¶¶ 16, 19-21.

[17] See, e.g., United States v. U.M.W., 330 U.S. 258, 302-04 (1947).

lief, the private individual could only recover treble damages, a much less effective remedy as the criminal activities would continue to plague him. Recovery of damages compensates only for past injuries, but the purpose and effect of an injunction is to prevent future violations.[18]

III. JURISDICTION OF THE FEDERAL COURTS

¶ 8 Before a federal court can competently address a problem, it must have jurisdiction over the parties, the subject matter, and the remedies requested. The problems and requirements of jurisdiction over the person are discussed in the materials on Instituting a RICO Civil Treble Damages Action: Jurisdiction, Venue, Service of Process, Pleading, and Parties, infra.

¶ 9 Jurisdiction over the subject matter is granted by 18 U.S.C. section 1964(a).[19] This section gives the court jurisdiction to grant any necessary equitable remedy. Congress

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[18] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

[19] 18 U.S.C. § 1964(a) (1976):

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

has the recognized power to extend or modify the equity jurisdiction of the federal courts.[20]

¶ 10 An accepted proposition is that it is outside the jurisdiction of a court of equity to enjoin the commission of a crime.[21] Since 18 U.S.C. section 1964 actions are equity actions "to prevent and restrain violations of section 1962 of this chapter,"[22] which are crimes, the defendant might raise this proposition as a defense. This defense should not succeed. The Supreme Court stated in In re Debs:[23]

> . . . it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened [sic] commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law.[24]

Since for a private individual to sue under section 1964, the acts must involve interference with his pecuniary or property rights, the federal courts have jurisdiction to

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[20] Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-65 (1939) (Frankfurter, J.); Williamson v. Berry, 49 U.S. (8 How.) 495, 536 (1850).

[21] In re Debs, 158 U.S. 564, 593 (1895). But see National Ass'n of Letter Carriers v. Independent Postal Sys., 470 F.2d 265, 271 (10th Cir. 1972) (indicating this proposition has never been an absolute rule).

[22] 18 U.S.C. § 1964(a) (1976); see note 19 supra.

[23] 158 U.S. 564 (1895).

[24] Id. at 593.

issue injunctive relief. Further, the proposition that the court has no jurisdiction to enjoin the commission of a crime is subject to exception in three situations: national emergencies, widespread public nuisances, and where a specific statutory grant of power exists.[25] Congress specifically granted the federal courts the power to enjoin any violations of R.I.C.O. crimes.[26]

¶ 11 The Congressional grant of jurisdiction over the actions is based on the interstate commerce power.[27] The courts have acknowledged that Congress, pursuant to its interstate commerce power, may make prohibited acts subject to both criminal and civil proceedings.[28] The civil proceeding is not made criminal by the fact that the acts complained of are punishable as crimes.[29] The private cause of action is not conditioned upon a previous conviction under the criminal provisions of R.I.C.O.[30]

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[25] United States v. Malas, 409 F.2d 358, 360 (7th Cir. 1969).

[26] 18 U.S.C. § 1964(a) (1976); see note 19 supra. Whether this power can be invoked by private individuals or only by the Attorney General is discussed in ¶¶ 12-29 infra.

[27] United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[28] Id. at 1357.

[29] Id; In re Debs, 158 U.S. 564, 599 (1895).

[30] Farmers' Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978).

IV. PRIVATE CAUSE OF ACTION FOR INJUNCTIVE RELIEF

A. EXPLICIT GRANT OF RIGHT TO OBTAIN INJUNCTIVE RELIEF

¶ 12 Although the government has used its right to invoke the injunctive power of the courts under R.I.C.O. several times,[31] there have been no attempts by private individuals to invoke that power. While the issue has not been raised in the courts, the language of the statute, its structure, and its purpose indicate that the statute creates a private right to sue for injunctive relief.

¶ 13 The Congressional grant of a private cause of action for R.I.C.O. violations is embodied in 18 U.S.C. section 1964 (c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee.[32]

Section 1964(c) specifically grants that "[a]ny person . . . may sue" whenever his business or property is injured by reason of a R.I.C.O. violation. There are no other restrictions on the right to sue. The statute also provides for recovery of treble damages and attorney's fees; these provisions should be read as expanding the remedies available to the private litigant; not restricting them.

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[31] E.g., United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[32] 18 U.S.C. § 1964(c) (1976).

¶ 14 Recovery of treble damages and attorney's fees would not be available without a specific statutory grant. The clause granting this special remedy to persons damaged by R.I.C.O. crimes expands the remedies available to the private individual. Significantly, the treble damage clause is preceded by "and," not by "to." By the plain meaning of the statute, the treble damage clause is supplemental to the preceding grant of the right to sue and the grant of injunctive power to the court under section 1964(a). The clause creates additional remedies for the private individual; it does not restrict the substantive right to sue.

¶ 15 The Congressional grant to private individuals of the right to sue, in the absence of statutory limitations, conveys the availability of all necessary and appropriate relief.[33] The Supreme Court has stated:

> [I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[34]

Since section 1964(c) provides a general right to sue whenever a private individual's property or business is injured, the individual should have the right to sue for all appropriate remedies, including injunctive relief.

¶ 16 The right to injunctive relief may be denied the private litigant by the court. In National Railroad Passenger

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[33] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969); State of Alabama v. United States, 304 F.2d 583, 590 (5th Cir.), aff'd, 371 U.S. 37 (1962).

[34] Bell v. Hood, 327 U.S. 678, 684 (1946).

Corp. v. National Association of Railroad Passengers[35] [hereinafter cited as Amtrak], the Supreme Court stated a basic principle of statutory construction: when a statute limits a thing to be done in a particular way, it excludes all other ways.[36] Since 18 U.S.C. section 1964(b) specifically indicates the Attorney General may obtain injunctive relief, and section 1964(c) does not specify private individuals may do the same, the argument is that the statute should be interpreted to deny the private litigant the right to injunctive relief. This argument should not be accepted by the court.

¶ 17 This principle of statutory construction is not appropriate to section 1964. Unlike the statute being interpreted in Amtrak,[37] section 1964 provides for a general right of private individuals to sue. The general right to sue, as indicated above, allows a suit for any appropriate remedy.[38] Further, the fact that it is specified the Attorney General has a certain remedy does not necessarily mean that private individuals are excluded from the remedy.[39]

¶ 18 Section 1964 was enacted as part of Title IX of the Organized Crime Control Act of 1970.[40] The Organized Crime

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[35] 414 U.S. 435 (1974).

[36] Id. at 458. This principle is often referred to by the ancient maxim expressio unius est exclusio alterius. Id.

[37] 414 U.S. 453, 458-59 (1974), supra note 35.

[38] See ¶ 15 supra and accompanying notes.

[39] See Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200 (1967) (holding the specific remedies were not exclusive, and injunctive relief could be obtained).

[40] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

Control Act of 1970 originated in the Senate and was sent to the House as S. 30.[41] Section 1964, as part of S. 30, included no provision for a private citizen's suit.[42] Only what are now parts (a), (b), and (d) were in section 1964. The private right of action, section 1964(c), was inserted by the House while in the Committee on the Judiciary.[43]

¶ 19 Although the statute grants private citizens a general right to sue, the Congressional intent to grant this right is not clear. Several of the Senate bills that were the predecessors of S. 30 had specific provisions clearly stating private citizens should have the right to sue for injunctive relief.[44] After S. 30 was sent to the House there were House bills submitted which included specific language granting a private citizen the right to sue for injunctive relief.[45] Further, during the floor debates on S. 30 in the House, Representative Steiger proposed an amendment that would have inserted such language.[46]

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[41] S. 30, 91st Cong., 1st Sess. (1969).

[42] Id. § 1964.

[43] See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 18 (1970).

[44] E.g., S. 1623, 91st Cong., 1st Sess. § 3(c), 115 Cong. Rec. 6996 (1969); S. 2049, 90th Cong., 1st Sess. § 4(c) (1967).

[45] E.g., H. 19215, 91st Cong., 2d Sess. § 1964)(c) (1970). Note that this bill includes a specific and separate grant of the right to sue for injunctive relief as well as the clause that is now 18 U.S.C. § 1964(c) (1976). Id. at § 1964(c), (e). This formulation was typical of the bills and amendments that included a specific grant to private individuals to sue for injunctive relief. This fact is due to the structure of the existing antitrust laws upon which these civil remedies were modeled. See ¶ 21 infra.

[46] 116 Cong. Rec. 35346 (1970).

¶ 20 In Amtrak,[47] the Supreme Court interpreted a statute with a similar legislative history. The statute in Amtrak originally provided only for suits brought by the government. An amendment was proposed specifically granting any private party the right to sue. The Committee redrafted the statute, allowing suits by private parties only in specific situations.[48] The Supreme Court interpreted the failure of the Committee to adopt the specific language of the amendment as indicative of Congressional intent to deny the general right to sue.[49] The legislative history of 18 U.S.C. section 1964 may be interpreted in a similar manner, resulting in a finding of Congressional intent to deny private individuals the right to sue for injunctive relief. Nevertheless, it may be argued that the legislative history of section 1964 is significantly different from that of the statute in Amtrak. In Amtrak, private individuals were granted the right to sue only under certain specific situations;[50] section 1964 creates a general right to sue whenever the individual is injured in his property or business.[51] As long as the private individual suing under section 1964 has been injured in his property or busi-

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[47] 414 U.S. 453 (1974), supra note 35.

[48] Id. at 459-61.

[49] Id. at 461.

[50] Id. at 456-57. Private individuals were granted a right to sue only in a case involving a labor agreement.

[51] See ¶¶ 13-15 supra.

ness, there is no question of looking for an inferred right to sue, as the plaintiffs in Amtrak urged the court to do. The injured party is specifically granted the right to sue by section 1964(c).

¶ 21 Some aspects of the legislative history of section 1964, on the other hand, could be read to mean that Congress may not have intended to grant private individuals the right to sue for injunctive relief. Section 1964 was conceived to create an antitrust-type cause of action to be used against organized crime.[52] The antitrust laws have two separate provisions granting private individuals the right to sue.[53] One is worded similarly to section 1964;[54] the other is a specific grant of the right of private citizens to obtain injunctive relief.[55] Both provisions were passed at the same time.[56] Many of the bills and amendments to R.I.C.O. that provided for a private cause of action included separate provisions for the right to injunctive relief and for

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[52] 113 Cong. Rec. 17999 (1967) (Sen. Hruska's remarks introducing S. 2048, 90th Cong., 1st Sess. (1967)); 115 Cong. Rec. 6993 (1969) (Sen. Hruska's remarks introducing S. 1623, 91st Cong., 1st Sess. (1969)); Bills Relating to Organized Crime Activities and Related Areas of Criminal Laws and Procedures: Hearings on S. 30, S. 975, S. 976, S. 1623, S. 1624, S. 1861 Before Subcomm. on Criminal Laws and Procedure, 91st Cong., 1st Sess. 406-07 (1969) (letter from Richard G. Kleindienst, Assistant Attorney General).

[53] 15 U.S.C. §§ 15, 26 (1976).

[54] 15 U.S.C. § 15 (1976).

[55] 15 U.S.C. § 26 (1976).

[56] As part of the Clayton Act, ch. 323, §§ 4, 16, 38 Stat. 731, 737 (1914).

the right to sue generally which were modeled after the antitrust provisions.[57] The insertion of a provision similar to the general right-to-sue provision, without a provision for the right of private individuals to obtain injunctive relief, suggests either a Congressional intent to deny private litigants injunctive relief, or recognition that the provision granting a general right to sue includes the right to injunctive relief.[58] This second argument is weakened by the fact that the report by the House Committee on the Judiciary described section 1964(c) as only providing for the recovery of treble damages.[59] The Congressional intent to either include or exclude a private cause of action for injunctive relief is virtually impossible to determine since it was never directly debated and since the Congressional actions are ambiguous.

¶ 22 Subsequent to passage of 18 U.S.C. section 1964, the Senate passed bills to amend the statute.[60] These bills expressly provided for actions by private individuals to obtain injunctive relief.[61] This legislation was

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[57] E.g., H. 19215, 91st Cong., 2d Sess. § 1964(c), (e) (1970); 116 Cong. Rec. 35346 (1970) (Rep. Steiger's proposed amendment to S. 30).

[58] Rep. Steiger indicated he thought the right to injunctive relief was in the statute as passed. He submitted his amendment to ensure the right was recognized. 116 Cong. Rec. 35346-47 (1970). But see note 59 infra.

[59] H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970). This obviously is not a complete description of the subsection, since no mention is made of recovering attorney's fees.

[60] S. 16, 92d Cong., 1st Sess., 118 Cong. Rec. 29368-69 (1972); S. 13, 93d Cong., 1st Sess., 119 Cong. Rec. 10319-21 (1973).

[61] S. 16, supra note 60, § 102(a); S. 13, supra note 60, § 1(a).

designed to clarify the rights granted and put the statute in a form parallel to the antitrust law.[62] Neither bill was acted upon by the House.[63]

B. IMPLICIT GRANT OF RIGHT TO OBTAIN INJUNCTIVE RELIEF

¶ 23 Even if the courts interpret the language of 18 U.S.C. section 1964 as not specifically granting the right of private individuals to obtain injunctive relief, they may imply the right. Though section 1964(c) may be interpreted as only granting the right to sue for treble damages and attorney's fees, such an interpretation would not necessarily exclude the right to seek injunctive relief.[64] In Cort v. Ash,[65] the Supreme Court outlined four factors relevant to determining whether a private remedy is implicit in a statute not expressly providing it. These factors are: first, is the plaintiff one of the class for whose special benefit the statute was enacted; second, is there any indication of legislative intent, explicit or implicit, to create or deny such a remedy; third, is it consistent with the

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[62] Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st & 2d Sess. 327-28, 333, 336 (1971-1972).

[63] See, e.g., S. Rep. No. 1070, 92d Cong., 2d Sess. 6-7 (1972); S. Rep. No. 80, 93d Cong., 1st Sess. 1 (1973) for legislative history.

[64] See J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); Miller v. Mallery, 410 F. Supp. 1283, 1287-88 (D. Or. 1976); Federal Maritime Comm'n v. Atlantic & Gulf/Panama Canal Zone, 241 F. Supp. 766, 775 (S.D.N.Y. 1965).

[65] 422 U.S. 66, 78 (1975).

underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and fourth, is the cause of action one traditionally relegated to state law in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law.[66]

¶ 24 The first inquiry, whether the private individual is a member of the class for whose special benefit the statute was enacted, is definitely a factor in favor of an implied right to sue for injunctive relief. One purpose of Title IX of the Organized Crime Control Act of 1970, is to eliminate the infiltration of legitimate businesses by organized crime. This goal is meant to protect the American economic system, and ultimately the American public, which is suffering billions of dollars of injury each year due to the activities of organized crime.[67] A private individual injured in his business or property by the prohibited activities is a member of the class for whose benefit the statute was enacted. The class is "[a]ny person injured in his business or property,"[68] as indicated by the express grant of remedies in section 1964(c) to this entire class.

¶ 25 This broad type of class was recognized by the Supreme Court in Bivens v. Six Unknown Named Agents of Federal

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[66] Id.

[67] From the report on S. 30 by the Senate Committee on the Judiciary, S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969).

[68] 18 U.S.C. § 1964(c) (1976).

Bureau of Narcotics.[69] In Bivens, the Court held that the Fourth Amendment was meant to protect from improper search and seizures and that a person can sue to obtain redress of injury to his Fourth Amendment rights even though no right to sue is explicitly granted.[70] Section 1964 is meant to protect individuals from the prohibited racketeering activities, and the class of people for whose benefit it was enacted is no broader or more amorphous than the class recognized in Bivens.

¶ 26 The second relevant factor outlined in Cort v. Ash is whether there is any indication of legislative intent, explicit or implicit, to create or deny such a remedy. R.I.C.O.'s legislative history as to this issue is ambiguous.[71] The fact that Congress did not adopt proposals to include specific language granting private individuals the right to injunctive relief suggests a legislative intent to deny this remedy. Nevertheless, the fact that a specific grant of the right to sue was inserted, and that its language varied from the proposals with separate sections on injunctive and damage remedies, may indicate a congressional intent to allow the right to sue for injunctive relief.

¶ 27 The third factor in determining whether a right to sue for injunctive relief should be implied from the stat-

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[69] 403 U.S. 388 (1971).

[70] Id. at 395-96.

[71] See ¶¶ 18-21 supra.

ute is whether this right to sue is consistent with the underlying purpose of the legislative scheme. This factor also weighs heavily for the granting of the right to sue for injunctive relief. The chief purposes of R.I.C.O. are to eliminate infiltration of businesses by organized crime and protect the American public.[72] Both of these objectives would be furthered by allowing private individuals the right to sue for injunctive relief.

¶ 28 The fourth relevant factor is whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law. This factor also allows the finding of an implied right to sue for injunctive relief. Section 1964 is based on the interstate commerce power and is a valid exercise of that power.[73] Further, granting injunctive relief in this situtation is not an action traditionally reserved to the states as is apparent from the fact that section 1964 specifically grants the Attorney General the right to obtain such relief.[74]

¶ 29 Since three of the four relevant factors are solidly for implying a right to obtain injunctive relief by private individuals, and the other factor is ambiguous, the courts

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[72] S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969).

[73] United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[74] 18 U.S.C. § 1964(b) (1976).

should be persuaded to imply the right if they do not recognize it as being explicitly granted. The Supreme Court has found implied rights to sue in previous cases[75] and has stated that "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned."[76]

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[75] See, e.g., Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

[76] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

THE CHARACTERIZATION OF TREBLE DAMAGES: CONFLICT BETWEEN A HYBRID MODE OF RECOVERY AND A JURISPRUDENCE OF LABELS

by

Kevin Goering

OUTLINE

Summary

¶1 The history of the law of damages has been one replete with confusion. Largely for the sake of convenience, courts resort even today to the use of numerous labels for different modes of recovery. The careless use of such labels, as well as the existence of substantial logical overlap between the various concepts, have been largely responsible for the difficulties encountered by judges when asked to "pigeon-hole" a given mode of recovery.

¶2 One of the most difficult concepts to characterize is that of treble damages, which combines aspects of both tort and criminal law, and which serves purposes both of punishment and of compensation. Because of the hybrid nature of treble damages, courts often struggle in an attempt to fit the concept into the traditional conceptual framework.

¶3 One of the most recently promulgated federal treble damage statutes is RICO section 1964(c). Because the statute has received little attention from private litigants, the construction which courts will give to section 1964(c) is as yet uncertain. Given the confusion in litigation under older treble damage provisions, however, one can be sure that the characterization will vary from jurisdiction to jurisdiction. The problem is an important one, as the courts' characterization could greatly affect the RICO plaintiff's ability to recover under section 1964. Moreover, fulfillment of the congressional purposes underlying the provision may depend largely on the resolution of the characterization issue.

I. Introduction: The RICO Treble Damage Provision

¶4 In 1970, Congress responded to the needs of organized crime victims by providing them with a new means of vindicating their rights: the treble damage action.[1] Patterned after federal antitrust legislation,[2] RICO section 1964(c) is designed to help "strike a critical blow at the organized crime conspiracy."[3] While the courts upheld the constitutionality of section 1964 in initial litigation,[4] limited case

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[1]Organized Crime Control Act of 1970, Title IX, 18 U.S.C. §§1961-68 (1976) Section 1964(c) provides:

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

[2]15 U.S.C. §1 et seq. (1976).

[3]President's Message to the Congress on a Program to Combat Organized Crime in America, 1969 Pub. Papers 315, 320-21 (April 23, 1969).

[4]See United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) (holding inter alia that the use of immunity to compel defendant to testify in a 1964 suit brought by the government or face civil contempt charges does not violate defendant's right to Due Process). See also Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278, 80 (D. Del. 1978) (following Cappetto, and holding that the private plaintiff need only prove the elements of his action under section 1964 by a preponderance of the evidence).

law leaves many questions as yet unanswered. The goal of these materials is to analyze the ways in which courts have historically dealt with various modes of recovery, and to predict which issues are likely to trouble the courts in the future with respect to the characterization of RICO treble damages.

¶5 Although the Cappetto case[5] involved a civil action for injunction and divestiture brought by the government under RICO section 1964(a), and is, therefore, distinguishable from the private litigant's treble damage action, the case nonetheless merits discussion here. In affirming the district court's order granting a preliminary injunction, the court, in addition to upholding the statute on constitutional grounds under the Commerce clause, outlined the procedural advantages available to plaintiffs in a civil (as opposed to a criminal) proceeding: broad discovery, a civil burden of proof, use immunity, and a trial by judge alone in suits for injunction. The court found that " [a] civil proceeding is not rendered criminal in character by the fact that the acts also are punishable as crimes."[6]

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

[6] Id. at 1357.

¶6 Many issues remain unresolved after Cappetto,[6a] and the constitutional issues will certainly reappear in subsequent litigation. Following the nature of the proceeding, the nature of the treble damage remedy is probably the most critical issue which the courts will confront in future section 1964(c) litigation.[6b] The basic problem is in determining

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[6a] Id.

[6b] It is appropriate at this point to briefly explain the terminology to be used throughout these materials. The terms "civil" and "criminal" do not relate to the character of the sanction, but solely to the mode of procedure. The distinction here, then, is simply between proceedings governed by rules of criminal procedure, as opposed to rules of civil procedure. These materials seek to avoid the traditional common law division of sanctions into civil and criminal categories. That division has never been entirely clear, as civil sanctions often impose punishment, and criminal sanctions are increasingly remedial in nature.

The words "punitive" and "penal" are sometimes confusing. In these materials, the terms refer to two distinct aspects of modern legal punishment. The first of these aspects is the notion of pain or deprivation inflicted on a person for purely vindictive or retributive purposes. In this sense, society punishes the person solely because he "deserves" it in some way for having transgressed the rules governing social behavior. This "past-looking" notion of punishment was the original and sole reason for the criminal law. At the time of the Enlightenment, however, punishment took on a second meaning based on the social utilitarian view of deterrence, the notion that infliction of pain or deprivation of life, liberty, or property will help shape future social conduct. The terms "penal" and "punitive" today encompass both notions above, and generally imply a requirement of moral blameworthiness on the part of the defendant involved.

whether the mode of recovery is primarily punitive or remedial in purpose.[7] Because existing antitrust case law is not dispositive of the characterization issue,[8] these materials focus broadly on general principles of Anglo-American jurisprudence, as well as on analogous statutory provisons.

Like the terms "penal" and "punitive", "compensatory", "remedial", and "regulatory" describe the nature of the sanction. The term "compensatory" appears in its usual sense, but it is necessary to avoid confusing the related terms "remedial" and "regulatory". Originally, all non-compensatory sanctions were necessarily penal in character. The term "remedial" no longer refers to punishment alone, but also describes sanctions designed to promote or protect certain governmental functions. In these materials, therefore, the term "remedial" encompasses both compensation and punishment. A remedial sanction is primarily compensatory and punitive in the social utilitarian sense of the word "punitive". The term "regulatory" is employed as essentially the equivalent of the word "remedial".

[7]The Seventh Circuit held:

> Section 1964 provides for a civil action in which only equitable relief can be granted. The relief authorized by that section is remedial not punitive and is of a type traditionally granted by courts of equity. (emphasis added)

Id. at 1357. Of course, the decision does not specifically apply to section 1964(c), which was not before the court.

[8]See Note, Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. §1964 (1970), 53 Tex. L. Rev. 1055, 1059 (1975).

II. BASIC MODES OF PECUNIARY RECOVERY

A. DAMAGES GENERALLY

¶7 The American law of damages finds its origin in Anglo-Saxon law of the Sixth Century.[9] Under the English common-law, damages were primarily a means of compensating the victim of a tort or breach of contract.[10] As Blackstone stated: "Another species of property acquired and lost by suit and judgment at law, is that of damages, given to a man by a jury as a compensation and satisfaction for some injury sustained."[11] In theory at least, the damage award originally served to compensate, not to punish for wrongful conduct, as did the sanctions of the criminal law. Moreover, though the measure of damages differed in actions for tort and actions for breach of contract, the purpose in the two actions was the same: com-

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[9] 1 T. Sedgwick, A Treatise on the Measure of Damages §7 (9th Ed. 1912) (Hereinafter Sedgwick)

[10] 1 Sedgwick §§29-30, at 24-26.

[11] 2 Blackstone Commentaries * 438.

pensation.[12] While the notion of punishment has invaded the law of torts,[13] it is still basic hornbook law that contract damages remain purely compensatory in purpose.[14]

¶8 There are, of course, limits to the losses for which the common law awards compensation. The first of these lies in the requirement of legal injury; hence the long-standing maxim

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[12] 1 Sedgwick §§29-30, at 24-26.

> In all cases, then, of civil injury and of breach of contract the declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed. * * * In short, the purpose of awarding damages is the same whatever the form of action.

Id. at 25-26.

[13] Prosser, Torts §2, at 9-14 (4th ed. 1971). See Notes 33-48 and Accompanying Materials infra.

[14] See Restatement of Contracts §§326, Comment C, 342 (1932) (all contract damages are comepnsatory, never punitive, though such damages may be awarded for harm that is difficult to estimate in terms of money). But see Murray, Contracts §231 (1974) (commentator finds an exception to the rule of no purpose of punishment in contract damage awards in situation of breach of promise to marry accompanied by fraud, deceit or humiliating conduct of promisee).

that damnum absque injuria gives no cause of action.[15] A second limitation on compensation is the foreseeability-related doctrine of proximate causation.[16] Thirdly, American courts do not, in the usual case, compel defendants to compensate prevailing plaintiffs for losses in the form of attorney's fees and costs of litigation.[17] Thus, the plaintiff receives

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[15] See Sedgwick §32, at 27-29,

(losses suffered absent a violation of plaintiff's legal rights are not compensable). Note that the converse situation, legal injury without actual loss, may entitle the plaintiff to recovery, in the form of nominal damages. See Notes - and accompanying materials infra.

[16] A leading case here is Smith v. Bolles, 132 U.S. 125 (1889), where the court described the doctrine as one requiring "that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract." Id. at 130.

[17] C. McCormick, Damages §§60-61, at 234-37 (West, 1935). A different rule still prevails in England, where attorney's fees and costs are, as a general rule, still awarded to the prevailing party. As McCormick states:

> This rule allowing plaintiff his "costs" was broadened in 1275 by the Statute of Gloucester to cover also actions for the recovery of land, then an all-important type of litigation. A series of statutes, beginning in the reign of Henry VIII and ending in that of Anne, extended finally the same advantage to successful defendants. Thus, in the common law courts, the rule became established in England long before the American Revolution that, except in some cases where the plaintiff recovers only trivial dam-

no compensation for often substantial expenses he has incurred as a result of the defendant's misconduct.[17a]

B. NON-COMPENSATORY "DAMAGES"

¶9 Compensatory awards are not the only "damages" available to the injured plaintiff. The first example of non-compensatory damages is the award available to plaintiffs who prove

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ages, the party who wins a lawsuit is entitled to recover from the losing adversary the "costs" of the litigation.

Id. at 234-35.

Like the antitrust statutes, RICO section 1964 authorizes private plaintiffs to recover their costs, including attorney's fee. 18 U.S.C. §1964(e)(1976).

[17a]There are exceptions to the rule in America that no costs are recoverable. The first is, of course, where such fees and costs are expressly authorized by legislative enactment. See, e.g., 18 U.S.C. §1964(c) (RICO), 35 U.S.C. §285 (provision for attorney's fee awards in "exceptional cases" under Patent Law), 17 U.S.C. §505 (costs and attorney's fee recoverable under Copyright Law). In addition, American courts of equity have historically been more inclined than courts of law to award costs and attorney's fees in certain kinds of litigation: where the lawsuit was unfounded, where a wife prevails in a suit for divorce, or where a common fund, such as an estate, is the subject of the litigation. H. Oleck, Damages to Persons and Property §288, at 599 (Rev. ed. 1961).

an invasion of a legal right, but who fail to show any resulting loss. In this situation of injuria sine damno,[18] courts traditionally award so-called "nominal damages." Nominal damages permit a plaintiff to establish his legal rights[19] and, in England, may serve as "a mere peg on which to hang costs."[20] A related concept is that of "contemptuous damages," where a jury shows its disapproval of a successful

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[18]"Technically, the law requires not damage but an injuria or wrong upon which to base a judgment for the plaintiff, and therefore an injuria, although without loss or damage, would entitle the plaintiff to judgment." H. M. McGregor, Damages §293, at 213 (13th ed. 1972).

[19]An example of this use of nominal damages appears in the case of Pindar v. Wadsworth, 2 East 154 (1802), where plaintiff successfully maintained an action for injury done to the common when defendant took away manure. Although the plaintiff suffered no actual loss, the court entered judgment to prevent a mere wrongdoer from obtaining a right of common through repeated torts where no damage would result. The technique is also used in actions of trespass to land where a judgment may later be valuable if the trespassing defendant attempts to assert a right of way by implication. See McGregor, Damages §297, at 216.

[20]The quote is that of Maule, J. in Beaumont v. Greathead, 2 C.B. 494, 499 (1846). See McGregor, Damages §298, at 216; E. Jenks, The Book of English Law 255-56 (1929).

plaintiff's conduct by awarding very small damages.[21]

¶10 Also falling outside the realm of purely compensatory damages is the concept of "liquidated damages." Care must be exercised not to confuse the two senses in which courts employ the term. In its primary sense, liquidated damages are those which contracting parties stipulate as appropriate in the event of breach. Courts uphold such agreements unless they are not reasonably related to probable actual losses, as anticipated at the time of contracting.[22] A second type of

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[21] Thus, if the plaintiff alleges that the defendant wrote and published of him to the effect that he (the plaintiff) had stolen a coat from the lobby of an hotel, and the evidence in the case, while failing to show that the plaintiff had stolen a coat from an hotel, showed a long line of convictions of the plaintiff for stealing other things in other places, the plaintiff would (in the absence of privilege) be entitled to damages; but the jury might estimate the value of his damaged reputation at a farthing.

E. Jenks, supra Note 20, at 256.

[22] Murray, Contracts §234, at . Murray finds three distinct purposes served by such clauses: coercion of the promisor into performing, convenience to the parties in determining the probable loss from a breach, and placing a limit on liability.

"liquidated damage" recovery is that authorized by statute for actions brought thereunder. The latter provisions may or may not carry an express "liquidated damage" label.[23]

C. EXEMPLARY DAMAGES

¶11 The most controversial theory of pecuniary recovery awards prevailing plaintiffs in tort actions a sum exceeding his actual losses.[24] Alternatively labeled "punitive damages," "exemplary damages," "vindictive damages," or "smart money," the award is generally appropriate only where defendant's misconduct is wanton or malicious.[25] While the nature

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[23] Compare 18 U.S.C.A. §2520 (West Supp. 1979) (wiretap statute permitting injured plaintiff to recover "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation ... [emphasis added]) with Notes 86-88 and Accompanying Materials infra.

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> For well over a century controversy has surrounded exemplary damages. They have been denounced as "a monstrous heresy ... an unhealthy excrescence, deforming the symmetry of the body of law."

Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 518 (1957).

[25] C. McCormick, Damages §79, at 280.

> It must be shown either that the defendant was actuated by ill will, malice, or evil motive ... , or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.

of the defendant's conduct in the two cases is the most common factor distinguishing exemplary from compensatory awards, some jurisdictions do not accept the formula,[26] and further discussion is, therefore, essential to an understanding of the doctrine.

¶12 The term "exemplary damages" first appeared in English jurisprudence in the 1760's, in decisions arising out of the celebrated dispute over the publication of John Wilkes's North Briton.[27] At its origin, the term apparently served to

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[26]Four states (Louisiana, Massachusetts, Nebraska, and Washington) apparently reject the doctrine of exemplary damages altogether. Several other states (e.g, New Hampshire and Michigan) allow such damages, but justify them as extra compensation for intangible harm to plaintiffs. The latter view seems to have been the rule in England prior to the landmark case of Rookes v. Barnard, [1964] A.C. 1129, where the doctrine was severely limited in the House of Lords. Some forty American states still accept the doctrine in its purely punitive form. See McCormick, Damages §78, at 278-80; H. McGregor, Damages, (13th ed. 1972) §§300-305, at 218-22. See also Notes 33-35 and accompanying materials infra.

[27]The term enabled the courts to justify large damage awards in two actions brought against public officials for tortious interference in trying to prevent the publication of Wilkes's controversial work. H. McGregor, Damages §303, at 219-20 (13th ed. 1972).

justify excessive jury damage awards in certain types of cases.[28] In its formative years, the doctrine found its justification as punishment for the defendant, as well as serving as a deterrent to wrongful conduct.[29]

¶13 Exemplary damages soon made their way across the Atlantic, where the colonial, then both state and federal courts, accepted the doctrine of damages as punishment.[30] In 1851, Justice Grier expressed this view in a diversity action for trespass:

> It is a well-established principle of the common law, that in actions of trespass and in all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages

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[28] Sedgwick sees the development of the concept as resulting from changes in the role of the jury in Eighteenth Century England. Prior to this era, juries had almost unlimited discretion in awarding damages, and verdicts were set aside only in cases of mayhem. By the late Eighteenth Century, however, English law had formulated much more precise rules for the measure of damages in contract actions, and in tort actions involving injury to property. Such rules necessitated the ability of the court to reverse the jury verdict where damages awarded were excessive. In the limited cases where torts involved injury to "personal feelings and dignity, there remained no fixed rules of compensation and, hence, the term "exemplary damages" appeared to justify otherwise excessive verdicts in such cases. 1A. Sedgwick, Elements of the Law of Damages §349, at 688-89 (9th ed. 1912).

[29]
> [Punitive damages] serve to give outlet, in cases of outrageous conduct, to the indignation of the jurors, and they are defended as furnishing a needed deterrent to wrongdoing, in addition to that furnished by criminal punishment.

C. McCormick, Damages §77, at 275.

[30] See 1.A. Sedgwick, Damages §352, at 695-98 (9th ed. 1912).

> upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.
> *** In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances,
>
> showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.
> *** This has been always left to the discretion of the jury; as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.[31]

This punishment theory of exemplary damages has often come under attack in the past century.[32] Four states presently reject all punitive damages,[33] while at least two others regard them as additional compensation for the plaintiff's

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[31] Day v. Woodworth, 54 U.S. [13 Howard] 363, 71 [389, 398-99] (1851).

For an interesting discussion of the cases in which punitive damages are appropriate, see Prosser, Torts §2, at 10-14 (4th ed. 1971).

[32] See Notes 36-41, and accompanying materials infra.

[33] Among the states rejecting punitive damages are: Louisiana (Moore v. Blanchard, 216 La. 253, 43 So. 2d 599 (1949)); Nebraska (Wilfong v. Omaha & Council Bluffs St. R. Co., 129 Neb. 600, 262 N.W. 537 (1935)); Massachusetts (Boot Mills v. Boston & Me. R. Co., 218 Mass. 582, 106 N.E. 680 (1914)); and Washington (Anderson v. Dalton (40 Wash. 2d 894, 246 P. 2d 853 (1952).

injured feelings.[34] One state limits such damages in amount to the plaintiff's litigation expenses, based upon the peculiar notion that the egregious nature of the defendant's conduct somehow renders such costs legally compensable.[35]

¶14 Critics of the punishment theory have not remained silent. Perhaps the foremost opponent was Professor Greenleaf who, after reviewing the authorities, concluded that case references to punishment were almost exclusively obiter dictum, and that compensation should be the sole basis for all damage awards.[36] The primary objection to the punishment theory is that its presence in the law of torts conflicts with that field's avowed purpose of compensation. Moreover, say the critics, the goals of deterrence and retribution are more properly those of the criminal law.[37] Courts have objected

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[34]New Hampshire and Michigan fall within this category. See Bixby v. Dunlap, 56 N.H. 456 (1876); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922).

[35]See Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A. 357 (1941).

[36]See Greenleaf, Evidence §253, at 240-50 n. 2 (16th ed. 1899). See also H. McGregor, Compensation versus Punishment in Damages Awards, 28 Mod. L. Rev. 629 (1965) (arguing for a uniquely compensating theory of damages.)

[37]Dean Prosser states that "[i]n one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts." Prosser, Torts §2, at 9 (4th ed. 1971).

to the doctrine on the basis of a special notion of double jeopardy,[38] on grounds that the unavailability of criminal procedural safeguards violates the defendant's constitutional

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> The aim of the criminal law, as we have noted, is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages.

LaFave and Scott, Criminal Law (1972) ¶ 3, at 11.

[38] See, e.g., Taber v. Hutson, 5 Ind. 322 (1854)(holding that possible criminal charges for same act is a bar to an action for punitive damages based on the same act); Ellsworth v. Watkins, 101 N.H. 51 (1957). The double jeopardy problem is especially troublesome in the mass tort situation. A graphic illustration is the litigation surrounding the celebrated MER/29 defective drug incident, where one punitive damage award was followed by hundreds of such claims. The opinion of Judge Friendly in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) provides an invaluable analysis of the special double jeopardy problems in this area. "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." Id. at 839.

rights,[39] and on grounds that the doctrine is illogical and fundamentally unfair.[40] A final objection is that, because such elements as pain and suffering now enter into the award of compensatory damages, the doctrine no longer serves any compensatory purpose.[41]

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[39] See, e.g., T. Ford, The Constitutionality of Punitive Damages, The Case Against Punitive Damages 15 (Defense Research Institute 1969). The commentator compares punitive damages with criminal sanctions and concludes that punitive damages are sufficiently "criminal" to render their imposition without procedural safeguards violative of defendant's Fifth Amendment rights. cf. Notes 108-137.

[40] Perhaps the concept of punishment is best summarized in an early New Hampshire case:

> How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? [Fay v. Parker, 53 N.H. 342, 382 (1873)].

J. Duffy, Punitive Damages: A Doctrine which should be Abolished, The Case Against Punitive Damages 4, 10 (Defense Research Institute 1969). The commentator also argues that compensatory damages themselves constitute an effective deterrent to wrong-doing, and that "[t]he vague public policy of granting punitive damages because of a deterrent effect is not supported by any empirical facts." Id. at 11.

[41] See Greenleaf, Evidence §253, at 249 n. 2 (16th ed. 1899).

¶15 While the arguments against the presence of punishment in tort law are in some respects persuasive, they too often ignore the valid functions of the doctrine. Where the wrong, though not criminal as such, is substantial, and the actual pecuniary loss to plaintiff is slight, the availability of punitive damages gives injured parties the incentive to seek redress. Moreover, in practice, prosecutors often ignore such minor offenses to concentrate on serious crimes, leaving only civil sanctions to deter such wrong-doing.[42] In other words, society has a strong interest in encouraging private litigants to bring cases of this type to court. A related argument is that exemplary damages serve to compensate American plaintiffs for otherwise unavailable attorney's fees.[43]

¶16 Professor Sedgwick, a staunch defender of the punishment theory, points to the stark realities of the situation:

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[42] See Prosser, Torts §2, at 11; McCormick, Damages §77, at 276.

[43] See Prosser, Torts, §2, at 11.

> The historical facts already referred to show that it has its roots in that jealousy of the exercise of arbitrary and malicious power, to which the jury in our system of law has always been so keenly alive; and if it is an anomalous survival of a part of the old rule that the jury were judges of the damages, it must be inferred that it has survived because of its inherent usefulness.[44]

Logical inconsistency alone would not appear to warrant the abolishment of punitive damages, at least until broad reforms in the criminal law step in to redress those wrongs for which society now relies on private litigants.[45] A realistic assessment of the true role of exemplary damages is necessary, not merely theoretical analysis of the concept's logic.[46]

¶17 Despite the objections of some commentators, the doctrine of punitive damages is alive and well in American

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[44]Sedgwick, 1 Damages §354, at 700.

[45]For an interesting discussion favoring the use of punitive damages in private actions for securities fraud, see Comment, Punitive Damages in Implied Private Actions for Fraud under the Securities Laws, 55 Cornell L. Rev. 646 (1970).

[46]An excellent and authoritative outline of the law of punitive damages appears in S. Elkins, Punitive Damages in Commercial Litigation, Commercial Litigation 2d 109 (Practising Law Institute 1971).

jurisprudence.[47] Significantly for the purposes of these materials, Congress is aware of the doctrine's valuable function in encouraging litigation of certain cases, and has expressly provided for punitive damage awards in certain statutory causes of action.[48]

¶18 Unlike in America, English courts severely limited the availability of exemplary damages in the landmark case of Rooke v. Bernard,[49] where the House of Lords acted to

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[47] See Notes 30-35 and Accompanying Materials supra. Restatement (Second) of Torts §901 (19) provides:

> The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are:
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> (a) to give compensation, indemnity, or restitution for harms;
> (b) to determine rights;
> (c) to punish wrongdoers and deter wrongful conduct; and
> (d) to vindicate parties and deter retaliation or violent and unlawful self-help.

[48] See, e.g., 18 U.S.C. §2520 (1976) (authorizing "punitive damages" to private litigants in actions for violations of the wiretap statute). See also Prosser, Torts §2 at 10-14.

[49] [1964] A.C. 1129.

"remove an anomaly from the law of England."[50] Exemplary damages are now appropriate only in very limited circumstances,[51] although the English concept of so-called "aggravated damages" lives on. The latter doctrine permits courts to award compensation for normally non-compensable harm, especially where the defendant's conduct is especially wanton or reckless. In other words, "aggravated compensatory damages" are still proper, while "exemplary punitive damages" are not.

¶19 The essential question, therefore, is whether the terminology ("punitive" as opposed to "compensatory") makes any difference, especially given the reality that exemplary

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[50] [1964] A.C. 1129, 1121. The House of Lords confirmed the ruling in Rookes in 1972, in Broome v. Cassell & Co., 2 W.L. R. 645 (House of Lords 1972). For a good discussion of these cases and of their impact upon the English law of damages, see H. McGregor, Damages §§300-16, at 218-29.

[51] Exemplary damages are still available where authorized expressly by statute. Rookes v. Barnard, [1964] A.C. 1129, 1225. In his opinion. Lord Devlin also stated that such damages would remain appropriate in two limited common law situations: 1) where government servants have acted oppressively or arbitrarily, and 2) where "the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff." Id. at 1226.

damages do serve both punishment and compensation. In fact, the difference is of relatively slight importance in the usual case. Where the law of damages interrelates with other areas of the law, however, the distinction has historically been significant. A good example is the issue of whether a given action for damages survives the death of one of the litigants. At common law, causes of action for punitive damages abated upon the death of either party.[52] The justification for the rule was that, where the defendant died, society could no longer punish him.[53] The rule concerning deceased plaintiffs is less easily explained, though, insofar as exemplary damages compensate plaintiffs for harm

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[52] Sedgwick, 1 Damages §362, at 710.

[53] See Banes Coal Corp. v. Retail Coal Merchants Ass., 128 F.2d 645 (4th Cir. 1942). Care should be taken not to confuse survival of the entire cause of action with survival of a claim for punitive damages. In Barnes, the issue was whether a cause of action for punitive damages under the antitrust statutes. The court stated:

> The modern rule as to survivability, we think, is that actions for torts in the nature of personal wrongs, such as slander, libel, malicious prosecution, etc., die with the person, whereas, if the tort is one affecting property rights, the action survives. Id. at 649.

to feelings and dignity, such harm is personal to the plaintiff, whose estate has not truly suffered.[54]

¶20 Other important effects may flow from a court's characterization of damages as punitive in nature. For example, courts do not hold an employer vicariously liable for punitive damages recovered in an action against his employee, at least where the employer has not approved or ratified his employee's tortious act.[55] Whether or not a

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[54] [T]he reason for redressing purely personal wrongs ceases to exist either when the person injured cannot be benefited by a recovery or the person inflicting the injury cannot be punished, whereas, since the property or estate of the injured person passes to his personal representatives, a cause of action for injury done to these can achieve its purpose as well after the death of the owner as before. Id. at 649.

[55] Restatement (Second) of Torts §909, at 467.

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

cause of action passes to plaintiff's trustee in bankruptcy may turn on the characterization of the damage award,[56] and the holder of a compensatory judgment takes priority over punitive judgment creditors in the distribution of a bankrupt defendant's assets.[57] Under the Federal Tort Claims Act,[58] the federal government is not liable for

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(d) the principal or a managerial agent of the principal ratified or approved the act.

Id. at 467.

The majority rule in America, and the rule in the federal courts is that no express authorization of the servant's acts is required, and that whether the employer is to be held liable for punitive damages is a question of fact for the jury, which must be able to infer either malice on the part of the principal, or some sort of careless disregard. See Prosser, Torts §2, at 12. Bennett v. Salisbury, 78 F. 769 (2d Cir. 1897) (holding a publisher who was absent during the publication of a scandalous story as vicariously liable for exemplary damage award against one of his employees. See also, McCormick on Damages §80. at 282; Sedgwick, 1 Damages § 378, at 736-38; Lake Shore and Missouri Southern Ry. Co. v. Prentice, 147 U.S. 101, 107 (1892).

[56]See Notes 230-38 and Accompanying Materials infra.

[57]U.S.C.A. §726 (West Special Pamphlet 1979).

[58]28 U.S.C. §1948 (1976).

punitive damages,[59] and most courts refuse to assess such damages against municipal corporations.[60] Courts also resort to the punitive-compensatory distinction in deciding whether to permit the deduction of damage payments from defendant's gross income for tax purposes.[61] Finally, the distinction may bear on the issue of indemnification, because courts historically do not compel liability insurers to indemnify defendants for punitive damage payments.[62]

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[59] Id.

[60] Sedgwick, 1 Damages §3806, at 743.

[61] See Notes 242-45 and Accompanying Materials infra.

[62] See Prosser, Torts §2, at 12. Most liability insurance policies expressly exclude coverage for the insured's intentional torts. The problem therefore, lies in determining what the rule should be in the "gray area" of punitive damage awards for gross negligence. If the purpose of exemplary damage awards is punishment and deterrence, the reason seems to support the view that liability insurers should not be required to indemnify defendants for punitive damage judgments. See, e.g., Note, Insurance Against the Assessment of Punitive Damages, 20 U. Miami L. Rev. 192 (1965). Other problems arise where so-called "lump-sum" awards, not specifying which parts of the award are punitive and which are compensatory. The general rule is that insurers must indemnify defendants for such damage payments, and the courts will be reluctant to scrutinize such awards to determine the punitive portion. See Pennsylvania Thresher Co. and Farmer's Mut. Cas. Ins. Co. v. Thornton, 244 F.2d 823 (4th Cir. 1957).

Some courts, however, take the view that, where the jurisdiction does permit vicarious liability for punitive damages, an employer may shift such losses to his insurer.[63]

¶21 The lesson of the foregoing materials is that both compensation and punishment are accepted goals of the civil law in most jurisdictions. As Sedgwick put it, exemplary damages have "an inherent usefulness,"[64] and are an integral part of a comprehensive system of legal sanctions for wrongful conduct. Too often, however, courts succomb to the pitfalls of "pigeon-holing", and attempt to place a neat label of "compensatory" or "punitive" on the entire concept of exemplary damages. The tension between the goals of punishment and compensation has manifested itself repeatedly in

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[63] See, e.g., B. Cogan, Liability Insurance Protection from Punitive Damages, The Case Against Punitive Damages 23, 26-27 (Defense Research Institute 1969); Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 526-28 (1957). There is very little case law on this issue, and the question often depends on the wording of the insurance policy.

[64] See Note 44 and Accompanying Materials supra.

the law of torts. Again, attaching a simplistic "compensatory" label fails to explain why non-compensable harm suddenly suddenly becomes compensable as "aggravated compensation for accumulative harm"[65] where the defendant's conduct is particularly reprehensible. Punishment does, and indeed should, enter into the analysis if the law is to retain an effective set of sanctions and remedies to shape social behavior.[66]

D. PENALTIES

¶22 The tension between punishment and compensation leads us inevitably into the confusing sea of the law of penalties. The word "penalty" denotes very different ideas depending on the context in which it appears. Especially important in this regard is the overlap existing between the terms "damages"

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[65] See Note 142 and Accompanying Materials infra.

[66] See Note 44 and Accompanying Materials supra.

and "penalties".[67] Recognizing the overlap is only half the problem; the other difficulty lies in ascertaining the sense in which a given court is employing the term "penalty".

¶23 For the purposes of these materials, convenience necessitates limiting the discussion to pecuniary penalties, thereby setting aside the concept of corporal punishments. Even so limited, "the varying shades of meaning of the word 'penalty' are numerous."[68] Perhaps the easiest way to conceptualize the problem is to consider the various meanings of the words "penalty," "damages," and "forfeiture"[69] as lying along a definitional spectrum. At one end of the

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[67]The comments of the noted American jurist Charles Evans Hughes outline the approach to be taken in this area:

> When a court applies a principle you may readily recognize it an appreciate its application although not entirely content with the linguistic expression of it in the judicial opinion.

L. Vold, Are Threefold Damages under the Anti-Trust Act Penal or Compensatory?, 28 Ky. L. J. 116, 117 (1940) (quoting an excerpt from an address by Charles Evans Hughes before the Association of the Bar of the City of New York on January 16, 1930).

[68]Id. at 130. The commentator provides a revealing discussion of the myriad of ways in which courts employ the word "penalties"; and concludes that the term has at least ten different meanings in the context of pecuniary liability for wrongful conduct. See Id. at 130-37.

[69]See Notes 99-137 and Accompanying Materials infra.

spectrum lies the notion of pure compensation, at the other end that of punishment.[70] Clearly, all forms of pecuniary liability known to Anglo-American jurisprudence fall somewhere between the two extremes.

¶24 Near the "punishment" extreme of our definitional spectrum lies the penalty in its "strict" sense. The leading case in the area of penalties is Huntington v. Attrill,[71] involving an action brought to enforce in a Maryland court a judgment for fraud obtained in a New York state court. The issue was whether such a judgment was one for "penalty" within the rule that one sovereign's courts may not enforce the penal laws of another sovereign.[72] As stated by Mr.

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[70]The term "punishment" encompasses the utilitarian concept of deterrence for the purposes of these materials. See Note 6b supra.

[71]Huntington v. Attrill, 146 U.S. 657 (1892).

[72]The rule is one of international law, and applies equally to actions brought in the courts of one state under a penal statute of another state (the situation in Huntington, 146 U.S. 657 (1892)), to actions brought in federal court under a state penal statute (see Gwin v. Breedlove 43 U.S. [2 How.] 29 [21] (1844); Pennick v. Railroad Co., 103 U.S. 11 (1880)), and to actions (13 Otto) in state courts pursuant to federal penal statutes. Martin v. Hunter's Lessee 3 U.S. [1 Wheat.] 562 [304] (1816).

Justice Gray:[73]

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement of or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries'; the latter are a breach and violation of public rights and duties which affect the whole community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'" 3 Bl. Comm. 2.

A "strictly penal" law, therefore, is one "imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon."[74] Such statutes are "criminal" statutes, demanding criminal proceedings and the constitutional protections afforded the accused defendant.

¶25 Moving from the "strictly penal" area of the continuum leads first to the so-called "qui tam" proceeding,[75] which

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[73] Huntington v. Attrill, 146 U.S. at 668-69.

[74] Id. at 666-67 (citing United States v. Reisinger, 128 U.S. 398 (1888)).

[75] The action's appellation comes from the Latin phrase "qui tam pro domino rege quam pro se imposo sequitur," meaning "who brings the action as well for the king as for himself."

Bass Anglers Sports Soc. v. United States Plywood-Champion Papers, 324 F. Supp. 302, 306 (S.D. Tx 1971) dismissing the plaintiff's attempted qui tam action under Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§407, 411, 413 (1976)).

is basically a suit brought by a common informer to enforce a criminal statute.[76] Such an action has limited compensatory aspects in the sense that a percentage of any fines imposed on the defendant goes not to the state, but to the informer.[77] The primary distinction between such a statute

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[76] Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence * * * in this country ever since the foundation of our government.

Marvin v. Trout, 199 U.S. 212. 225 (1905).

The qui tam action did not exist at common law and requires other expressed or implied statutory authorization. Bass Anglers Sportsman's Society v. United States Plywood-Champion Papers, 324 F. Supp. 302, 306 (S.D. Tx. 1971). Accord, United States ex. rel. Matthews v. Florida-Vanderbilt Development Corp., 326 F. Supp. 289 (S.D. Fla. 1971), Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972). cf. United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n. 4 (1943):

> Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the [qui tam] action are construed to authorize him to sue. (Black, J. for the Court)(dictum)

Justice Black's dictum was disapproved in Matthews, 326 F. Supp. 289, and in Bass Angler's, 324 F. Supp. at 306.

[77] Perhaps the most widely used qui tam provision is that contained in the False Claims Act, 31 U.S.C. §§231-32 (1976). See, e.g., United States ex rel. Vance v. Westinghouse Electric Corp., 363 F. Supp. 1038 (W.D. Pa. 1973); Pettis ex rel United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978). Anyone may bring an informer's action under the False Claims Act,

and a strictly penal one is the particular mode of enforcement chosen by the legislature.[78] To be distinguished here is the statute authorizing a reward to the informer, but which does not permit a private action until the government has obtained a criminal conviction.[79]

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unless the action is based on information which was already in the government's hands prior to commencement of the suit. See Vance, 363 F. Supp. at 1040 n. 1. For a novel use of the Act, see United States ex rel. Thompson v. Hays, 432 F. Supp. 253 (D.D.C. 1976) (dismissing a private citizen's qui tam action against Representative Wayne Hays for violating the False Claims Act in the hiring of his "secretary," Elizabeth Ray). A qui tam action is also available to informers under the Patent Law, 35 U.S.C. §292(B) (1976).

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> The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with the government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.

Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 523 (1885).

[79] A good example of such a statute is the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §407 et. seq. (1976), where the court may it its discretion award one-half of any fines paid under the Act to informers. Several attempts to bring an implied qui tam action under this statute have failed. See, e.g., United States ex rel. Anderson v. Norfolk and Western Ry., 349 F. Supp. 121 (W.D. Va. 1972), Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972).

¶26 The term "penalty" also serves to distinguish punitive damages[80] (damages in the nature of a penalty, imposed primarily to punish) from compensatory damages. Again,[81] the line between the two is not clearly drawn, and such damages generally entail both punitive and compensatory aspects.[82]

The trend in the courts seems to be one of discouraging the qui tam action:

> [S]o far as [The False Claims Act] perpetuates the odious and happily nearly obsolete qui tam action, it should be regarded with particular jealousy.

United States v. Bausch & Lomb Optical Co., 131 F.2d 545 (2d Cir. 1942), aff'd, 320 U.S. 711 (1943).

[80] See Notes 24-52 and accompanying materials supra.

[81] See Notes 65-67 and Accompanying Materials supra.

[82] In fact, the sanction may well be viewed as compensatory insofar as the party initiating the suit is concerned, and punitive insofar as the defendant (who now must pay as a result of the proceedings) is concerned. See Huntington, 146 U.S. at 667-68. See also Notes 65-67 and accompanying materials supra.

> Congress intended the imposition of damages on the violator primarily as a deterrent to the violator rather than as a method of restitution to the buyer. The provision of a $25 minimum award, regardless of the excess over the maximum, clearly shows such intent. (emphasis added)

Porter v. Crawford and Doherty Foundry Co., 154 F.2d 431, 434 (9th Cir. 1946) (case dealing with Emergency Price Control Act of 1942).

¶27 Just as a statute providing for "damages" may actually create a penalty, a "penalty" provision may serve a remedial or compensatory purpose and, hence, provide for a species of damages running to the government. The true "civil penalty" is much like a fine in the criminal context, in that its basic purpose is to punish the violator of a statutory provision. The former is recoverable in a civil proceeding, while the latter is properly imposed only in a criminal proceeding.[83] Courts often liken remedial civil

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[83]Whether a penalty may be enforced by a civil action or by a criminal action only is a matter of legislative direction and intent. Where the statute contemplates recovery only through criminal proceedings. a civil remedy cannot be adopted. United States v. Regan, 232 U.S. 37 (1914).

At some point, the purposes of a given sanction become punitive enough to require a criminal proceeding. As one court stated:

> If the object of the penalty is primarily to punish the wrongdoer, the action is punitive. If, however, on the other hand, its primary object is to protect the public and effectuate a public policy ... , it is remedial and is a civil action.

Amato v. Porter, 157 F.2d 719 (10th Cir.), cert. denied, 329 U.S. 812 (1946).

penalties to liquidated damages,[84] in the sense that the penalty actually contemplates a liquidated compensation for harm caused to the government.

¶28 The notion of a penalty as liquidated damages requires a discussion of a very different meaning of the word "penalty." If, in dealing with a contractual liquidated damages clause,[85] the court finds that the stipulated sum was not a good faith pre-estimate of probable damages, the clause will be unen-

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[84] See, e.g., Helvering v. Mitchell, 303 U.S. 391, 398-99 (1938) (penalty provision under Revenue Act of 1928 is intended to provide compensation for harm to the government). Cf., Fair Labor Standards Act, 29 U.S.C. §203 (1976) ("liquidated damages" in form of double the amount of unpaid minimum wages assessed against an employer who violates the Act). In connection with the penalty provision of the Truth-in-Lending Act, 15 U.S.C. §1640 (1976), one court stated:

> The court concludes from the above discussion that the primary purpose of §1640 is remedial. The accumulative damage is meant to encourage debtors to seek their remedy under the Act, and it liquidates an uncertain damage. (emphasis added)

Porter v. Household Finance of Columbus, 385 F. Supp. 336 (S.D. Ohio 1974).

[85] See notes 22-24 and accompanying materials supra.

forceable as a "contractual penalty."[86]

¶29 The overlap between these various concepts becomes even more apparent as one considers the "looser senses" of the word "penalty". The so-called "statute penalty"[87] is a good example of a penalty in the loose sense. Such statutory provisions[88] serve primarily as incentive to private

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[86]Professor McCormick discusses this use of the word "penalty," which apparently developed from the use of so-called "penal bonds" to secure contracts under the early common law. Under the reigns of Anne and of William III, statutes were promulgated to require that plaintiffs recover only "damages," and not "penalties." Hence, the label "penalty" is attached to any clause requiring the payment of a sum disproportionate to a reasonable pre-estimate of actual damages in the event of a breach. See McCormick, Damages §147, at 600-602; H. Stephen, 2 Commentaries on the Laws of England, ch. V, at 157-60 (London 1845).

Liquidated damage clauses, where reasonable, are appropriate and enforceable in government contracts. See United States v. O.G. Innes Corp., 203 F. Supp. 60 (S.D.N.Y. 1962) (liquidated damage clause in a General Services Administration contract held valid and enforceable). But see Priebe & Sons v. United States, 332 U.S. 407, 411-12 (1947) (holding that a purported liquidated damage clause in a government contract is actually an uneforceable "penalty").

[87]L. Vold, Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory? 28 K.Y. L. J. 117, 132 (1942).

[88]Many statutes authroizing recovery above and beyond true legal compensation are justified on grounds that the added "penalty" encourages "private attorneys-general" to enforce statutory provisions. In fact, this is one of the major justifications for various multiple damage actions. See Note 193 and Accompanying Materials infra.

litigants to enforce the given statute. In other words, such a penalty, while it may help ensure both compensation and punishment, does not directly serve either purpose.

¶30 Even at the compensatory extreme of the definitional spectrum, courts often employ the term "penalty". In an early case, Judge Fitzhenry stated that "any recovery of damages may well be said to be 'in the nature of a penalty' where the defendant is required to pay for his breach of of duty."[89] All damages, then, may receive the penalty label[91] in the loose sense of the term.

¶31 What are the consequences of labeling a given provision a penalty? In addition to the effects discussed above in connection with penalty-like damages,[92] certain other consequences flow from the penalty label. The most important of these effects is that a suit for penalty may be subject to a differenct statute of limitations than is an action for

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[89] Standard Oil Co. v. Rokama Petroleum Corp., 9 F.2d 453 (S.D. Ill. 1925).

[91] See Vold, supra note 83, at 135-36.

[92] See Notes 53-67 and Accompanying Materials supra.

contract or tort damages.[93] Moreover, a penalty provision, though properly applied in a civil proceeding, may have punitive aspects such that it falls within certain procedural requirements generally reserved to criminal proceedings.[94]

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[93] See 28 U.S.C. §2462 (1976) (five-year federal statute of limitations for recovery of "penalties and forfeitures"); Koller v. United States, 359 U.S. 309 (1959) (the court, with three justices dissenting, holds that the penalty provisions of the Surplus Property Act of 1944, being remedial in purpose, are not subject to the provisions of section 2462).

[94] The argument that penalties labeled "civil" are really "criminal" and, hence, subject to the guarantees of the Fourth, Fifth, and Sixth Amendments appears in countless defense briefs, but is almost never successful. Such an attack on the self-disclosure requirement of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§407, 411 was successful in United States v. LeBeouf Bros. Towing, Inc., 377 F. Supp. 558 (E.D. La. 1974), where the court held that the civil penalty provisions were "quasi-criminal in nature," id. at 566, and that the Fifth Amendment self-incrimination privilege therefore applied in proceedings under the Act. The Fifth Circuit reversed, however, holding, with respect to the "civil" label:

> Only the most compelling demonstration of a contrary legislative intent would persuade us to ignore the plain words of the statute. The wording is unequivocal; by it Congress cannot have intended to extend immunity to civil cases, regardless of their nature.

United States v. LeBeouf Bros. Towing Co., 537 F.2d 149 (5th Cir. 1976), Accord, United States v. Atlantic Richfield Co., 429 F. Supp. 830 (E.D. Pa. 1977) ("plain wording" of Federal Water Pollution Control Act controls, absent special constitutional considerations), aff'd, 573 F.2d 1303 (3d Cir. 1978).

A federal jurisdictional statute[95] governing suits for penalties requires no amount in controversy, as do actions for damages. Finally, there exists a general rule of law to

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The district court in LeBeouf Brothers failed to consider the fact that due consideration must be given to the Congressional "civil" label. See United States v. J.B. Williams Co., 498 F.2d 414, 421 (2d Cir. 1974). In finding that a civil proceeding was appropriate under the penalty provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., the court stated:

> In the case sub judice, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a willful violation, are far more apparent than any "remedial" features. However, a deliberate and conscious refusal to abate a hazardous condition may bring about a situation where a heavy civil penalty might be needed to effect compliance with safety standards. In any event, we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy.

Frank Irey, Jr., Inc. v. Occupational Safety & H.R. Comm., 519 F. 2d 1200, 1204 (3rd Cir. 1974), aff'd sub nom. Atlas Roofing Co. v. Occupational Safety and H.R. Comm., 430 U.S. 442 (1977). Cf. Notes 108-137 and accompanying materials, infra.

[95] 42 U.S.C. §1355 (1976). Note that RICO section 1964 contains an express jurisdictional grant, which renders this issue irrelevant to an analysis of the RICO treble damage provision. Still, the jurisdictional issue shows another area in which the law distinguishes between punitive and remedial sanctions.

the effect that courts do not favor penalties.[96] Courts often consider a single statute as being "penal" for one purpose, while remaining remedial for other purposes.[97]

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[96]Speaking of penalties imposed pursuant to the Internal Revenue Code for failure to file a timely return, Chief Jedge Tuttle stated:

> The Law does not lightly impose penalties and courts look with disfavor upon forfeitures.

Baca v. Commissioner of Internal Revenue, 326 F.2d 189 (5th Cir. 1964). The notion that the law should discourage penalties and forfeitures seems to have originated in the English Courts of Equity. The penal bond in the private contract situation helps show how and why the concept developed:

> On the forfeiture of the bond, the whole penalty was formerly recoverable at law; but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz., his principal, interest and expenses, when the breach of the condition consisted in the mere non-payment of money, or the amount of damage actually sustained, where the breach was of a different kind. * * * [T]he like practice was in course of time introduced, by the same spirit of equity, into the courts of law.

H. Stephen, 2 Commentaries on the Laws of England, ch.V, at 159 (London 1845).

[97]A good example of such a statutory provision is the penalty provision in the Truth-in-Lending Act, 15 U.S.C. §1640(a) which, though punitive in many senses, has been held to be remedial for purposes of its transferability under the Bankruptcy Act, 11 U.S.C. §110.

Also, a given provision may impose a penalty if the government brings the action, while providing for damages in favor of a private litigant.[98]

> The Truth in Lending Act ultimately serves the dual purpose of providing a remedy for harm to the monetary interests of individuals while serving to deter socially undesirable lending practices. Congress focused on the individual consumer of credit as the person primarily injured who should be encouraged to prosecute actions and should be allowed to recover for harms done. This is not the sort of statutory scheme properly characterized as serial [under the Bankruptcy Act].

Murphy v. Household Finance Corp., 560 F.2d 206 (6th Cir. 1977).

[98] See, e.g., Popplewell v. Stevenson, 185 F.2d 111 (10th Cir. 1950) (action brought by tenant to recover civil penalty for rent overcharge under the Emergency Price Control Act of 1942).

> A suit of that kind brought by the Administrator is not intended to reimburse the injured party for the injury sustained by the exaction of rent in excess of the ceiling. Instead, it is an action for penalty and does not survive the death of the landlord. But a suit brought by the tenant for the recovery of compensation for the exaction of rent in excess of the ceiling, is not one for penalty. And it did not abate on the death of the defendant. (cites omitted).

Id. at 113.

E. FORFEITURE

¶32 Just as the word "penalty" has a number of different meanings depending on the context in which it appears,[99] the word "forfeiture" has at least three senses, two of which fall outside the scope of these materials. The doctrine of criminal forfeiture,[100] for example, is a strictly criminal sanction which is a descendant of the Anglo-Saxon procedure whereby convicted felons forfeited their property to the Crown.[101] A second use of the term "forfeiture" re-

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[99]For an excellent discussion of the various meanings of the word "forfeiture," see Note, Forfeiture of Property used in Illegal Acts, 38 Notre Dame Lawyer 727 (1963). An historical analysis of Anglo-American forfeiture law is presented in Note, Bane of American Forfeiture Law—Banished at Last?, 62 Cornell L. Rev. 768 (1977).

[100]The concept returned to American jurisprudence in 1970, with the passage of two criminal statutes: the Organized Crime Control Act of 1970, 18 U.S.C. §1963 (1976), and the comprehensive Drug Prevention and Control Act, 21 U.S.C. §848(a)(2)(1976). Pursuant to these statutes, convicted criminals must forfeit their interests in illegally obtained commercial enterprises.

[101]See Note 99 and Accompanying Materials supra. The most familiar of the English common law forfeiture sanctions was that consequent to attainder.

> Upon judgment therefore of death, and not before, the attainder of a criminal

lates to the relinquishment of rights, goods, or a sum of money pursuant to a harsh contractual provision.[102] The

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> commences, or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, — which tacitly confesses the guilt: and therefore either upon judgment of outlawry or of clevor, for treason or felony, a man shall be said to be attainted.
>
> The consequences of attainder are forfeiture and corruption of blood.

H. Stephen, 4 Commentaries on the Laws of England, ch. XXIII, at 446. Stephen finds the origin of the concept in Saxon law, forfeiture being a part of the old Scandinavian constitution.

> The natural justice of forfeiture or confiscation of property for treason is founded in this consideration,--that
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> he who hath violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society, and hath no longer any right to those advantages which before belonged to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief.

Id. at 448-49. See 4 W. Blackstone, Commentaries * 380-89. The United States Constitution forbids all bills of attainder. U.S. Const. art. I, §9, cl.3.

[102] See, e.g., Howard v. Federal Crop Insurance Corp., 540 F. 2d 695 (4th Cir. 1976) (court refuses to enforce a condition precedent which would work a harsh forfeiture of insurance coverage). See also Notes 85-86 and Accompanying Materials supra.

type of forfeiture relevant to the discussion here was before the court in a recent case arising under the Customs Laws:[103]

> The term "forfeiture" is best defined as the divestiture without compensation of property used in a manner contrary to the laws of the sovereign. Whenever a statute provides that upon the commission of a specified act, certain property used in or connected with that act shall be "forfeited," the forfeiture takes place immediately upon the commission of the act, and a conditional right to the property then vests in the government.[104]

An analysis of this concept of civil forfeiture is essential to an understanding of the potential constitutional issues surrounding RICO treble damage proceedings.

¶33 The civil forfeiture proceeding in England early developed into an in rem proceeding, where the Court of the Exchequer exercised jurisdiction directly over the illegal or illegally-used goods. The court conducted such proceedings independently of any in personam actions against the holder, whose personal guilt was not at issue.[105] What developed was the so-called "personification fiction,"[106] whereby the

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[103] 19 U.S.C. §1952 (1976).

[104] United States v. Eight Rhodesian Statues, 449 F. Supp. 193, 195 n. 1 (C.D. Ca. 1978).

[105] See Note, Forfeiture of Property Used in Illegal Acts, 38 Notre Dame Lawyer 727, at 727-28 (1963).

[106] A lengthy discussion of the fiction appears in Note, Bane of American Forfeiture Law—Banished at Last?, 77 Cornell L. Rev. 768, 781-85 (1977).

forfeited goods themselves were "guilty" in some way.[107]

¶34 Consistent with our discussion of penalties, it appears at first blush impossible to characterize any forfeiture proceeding as compensatory or remedial in nature. In the late Nineteenth Century, in fact, defense arguments that such proceedings are primarily punitive and, hence, inappropriate for purely civil proceedings, enjoyed some success before the Supreme Court. The result was a line of cases beginning with Boyd v. United States [108] in 1886. Although subsequent cases have severely limited the precedential value of these early forfeiture decisions, Boyd has never been overruled, and is revelatory on the subject

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[107] Such was the justification for the view that no prior criminal conviction of the defendant was required prior to the issuance of the decree of forfeiture. See, e.g., The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844). Recent cases have continued to rely on the personification fiction to explain forfeiture law. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[108] Boyd v. United States, 116 U.S. 616 (1886).

of punitive civil proceedings.[109]

¶35 To understand the true holding of Boyd and its progeny, one must distinguish between punitive and remedial forfeitures. While the line separating the two is not always entirely clear, the basic distinction is that, in the remedial forfeiture situation, the goods (often contraband) are forfeited regardless of the personal guilt of their owner while, in the punitive forfeiture case, the decree depends on proof that the owner intended to use the goods

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[109]The Boyd decision has been limited by subsequent cases to one situation only: the compelled production of testimonial incriminating evidence. Moreover, in Fisher v. United States, 425 U.S. 391 (1976), the court held that the targets of a tax investigation could be compelled to produce work papers which they had procured from their accountants and passed on their attorney. While not overruling Boyd, Justice White, for the Court, stated:

> It would appear that under that case [Bellis v. United States, 417 U.S. 85 (1974)] the precise claim sustained in Boyd would now be rejected for reasons not there considered.

Fisher v. United States, 424 U.S. 391, 408 (1976).

The Capetto briefs for writ of certiorari to the Supreme Court quote Boyd extensively, and rely on Boyd and its progeny as authority for the proposition that the Fifth Amendment privilege against self-incrimination should apply in suits brought by the government under RICO section 1964. See Petitioner's Brief for Writ of Certiorari at 16-21, United States v. Cappetto, 502 F. 2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

in violation of a criminal statute.[110] Another way to characterize the two sanctions is to say that the primary purpose of one is to regulate, while the purpose of the other is, of course, to punish.[111]

¶36 Congress broadened considerably the scope of civil forfeiture in American jurisprudence when it passed the Confiscation Acts[112] in 1862. These Acts, which provided for the forfeiture in civil proceedings of northern lands held by Confederate rebels, survived a constitutional attack

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[110]The distinction between punitive and remedial forfeitures is an elusive one. One way to conceptualize the problem is to ask whether the goods themselves, through their very nature or by the way they were used, furnish the evidence required for their own condemnation. If they do not, and the guilt of the owner is necessary to decree their forfeiture, then the forfeiture is primarily punitive and, according to several pre-Boyd cases, such proceedings are not appropriate for in rem jurisdiction. See, e.g., the Amy Warwick, 1 F. Cas. 808 (D. Mass. 1862) (No. 342), aff'd sub nom. The Prize Cases, 67 U.S. (2 Black) 635 (1863); Greene v. Briggs, 10 F. Cas. 1135 (C.C. D.R.I. 1852) (No. 5,764).

[111]See Notes 129-37 and accompanying materials infra.

[112]Act of July 17, 1962, 12 Stat. 589; Act of Aug. 6, 1861, 21 Stat. 319, 50 U.S.C. §212 (1976).

before the Supreme Court in 1871,[113] and the broad doctrine of civil forfeiture has been an important part of American jurisprudence ever since.[114]

¶37 In Boyd,[115] the Supreme Court heard a due process attack on a forfeiture proceeding brought against certain glass items for violation of the Customs Laws.[116] Because such forfeiture could take place only upon proof that the owner used them in violation of the criminal fraud provision of the same statute, the court held that the proceedings, "though they may be civil in form, are in their nature criminal."[117]

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[113]The Acts were upheld on the basis of Congress's exceptional war powers. Justice Field dissented on grounds that the Acts nonetheless violated due process because they in effect punished land-owners for treason without the need for a criminal conviction. See Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871); Miller v. United States, 78 U.S. (11 Wall.) 268 (1871); McVeigh v. United States, 78 U.S. (11 Wall.) 259 (1871).

[114]Perhaps the two most important forfeiture statutes today are those providing for seizures of vessels, vehicles or aircraft used in transporting contraband, 49 U.S.C. §§781-88 (1976), and those involving the illegal transportation and introduction into Indian property of unregistered liquor, 18 U.S.C. §§1261-65(1976). Numerous other forfeiture statutes are collected in Note, supra Note 99, at 729.

[115]116 U.S. 616 (1886).

[116]19 U.S.C. §§ 1602-19 (1976).

[117]Boyd v. United States, 116 U.S. at 634 (1886).

> As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.[118]

¶38 An important observation is that Boyd[119] dealt with a forfeiture statute requiring the intent of the owner to defraud the government. It is apparent from the more recent forfeiture cases that, absent the need for such an underlying criminal offense, the question of which procedural protections are mandated is merely one of statutory

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[118] Id. at 634. Accord, Lees v. United States, 150 U.S. 476 (1893) (following Boyd with respect to forfeiture proceedings under the Alien and Immigration Act of 1885); One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (Fourth Amendment criminal rule against unreasonable searches and seizures applies to an action for forfeiture brought by the State of Pennsylvania against a car used to transport unregistered liquor); Bramble v. Richardson 498 F.2d 968 (10th Cir. 1974) (civil forfeiture provisions of comprehensive Drug Control Act of 1970, 21 U.S.C. §881(d) are subject to limitations of Fourth and Fifth Amendments) cert. denied, 419 U.S. 1069 (1974); United States v. U.S. Coin and Currency, 401 U.S. 715 (1971) (Fifth Amendment privilege may be invoked in proceeding under 26 U.S.C. §7302 for forfeiture of money intended for use in illegal gambling).

[119] 116 U.S. 616.

construction, and the expressed or inferred intent of Congress is determinative.[120]

¶39 While the Boyd reasoning was applied to the doctrine of res judicata in Coffey v. United States,[121] it was never extended to other criminal protections such as the Sixth Amendment right of an accused to confront the witnesses

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> But since these corporate defendants cannot claim a pertinent constitutional protection, the issue is purely one of statutory construction and appellees are foreclosed by the clear statutory wording.

United States v. LeBeouf Bros. Towing Co., 537 F.2d 149 (5th Cir. 1976) (involving penalties under the Water Quality Improvement Act of 1970, 33 U.S.C. §1321 (b)(5)) cert. denied, 430 U.S. 987 (1976). For forfeiture cases containing similar language, see One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972); Bramble v. Richardson, 498 F.2d 968, 972 (10th Cir.), cert. denied, 419 U.S.1069 (1974).

[121]Coffey v. United States, 116 U.S. 436 (1886) (holding that acquittal in a prior criminal proceeding is a bar to subsequent forfeiture proceeding). While numerous courts have rejected Coffey, see Note 126 and cases cited infra, the rule apparently lives on in the Tenth, and perhaps in the Third Circuits. See United States v. One 1956 Ford Fairlane Tudor Sedan, 272 F.2d 704 (10th Cir. 1959); United States v. One Dodge Sedan, 113 F.2d 552 (3d Cir. 1940).

against him.[122] Even with respect to the privileges against self-incrimination[123] and unreasonable searches and seizures,[124] Boyd has limited vitality today. The more recent decisions have upheld civil forfeitures against due process attacks, and courts now uniformly hold that the burden of proof is

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[122]Just ten years after Boyd, the Supreme Court rejected an argument that the owner of goods subject to forfeiture must be afforded the same confrontation protections as the accused in a criminal proceeding. In permitting the government to admit into evidence a deposition taken of an adverse witness in Paris, France, Justice Harlan for a unanimous court found that the rules as to the Fourth and Fifth Amendments in Boyd had no application to the issue of Sixth Amendment rights.

> [A] criminal prosecution under article six of the Amendments is much narrower than a criminal case under Article Five of the Amendments.

United States v. Zucker, 161 U.S. 475, 482 (1896). See also United States v. Amore, 335 F.2d 329, 331 (7th Cir. 1964); United States v. Grannis, 172 F.2d 514 (4th Cir. 1949).

[123]See Note 109 and Accompanying Materials, supra.

[124]It is important to note that the Boyd ruling that the protections afforded the criminally accused with respect to unreasonable searches and seizures lives on. In One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), the court found that the State of Pennsylvania could not introduce evidence seized without a warrant in a proceeding for forfeiture of unregistered liquor.

by a preponderance of the evidence,[125] that the double jeopardy clause is not a defense where the owner was acquitted in a prior criminal proceeding,[126] that the Federal Rules of Civil Procedure apply to permit directed verdicts in favor of the government,[127] and even that the proper label

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[125] United States v. Regan, 232 U.S. 37 (1914); Bramble v. Richardson, 498 F.2d 968, 973 (10th Cir. 1974) (court rejects defendant's claim that In Re Winship, 397 U.S. 358 (19) requires proof beyond a reasonable doubt); United States v. One Assortment of 12 Rifles and 21 Handguns, 313 F. Supp. 641, 642 (N.D. Fla. 1970). Cf., Busti v. United States, 389 F.2d 485, 489 (5th Cir. 1968) (holding that reasonable ground for belief in guilt is sufficient to support a decree of forfeiture). See Compton v. United States, 377 F.2d 408 (8th Cir. 1967). (same as first 3 cases) Bramble cert. denied.

[126] See, e.g., Helvering v. Mitchell, 303 U.S. 391, 398-99 (1938); Epps v. Bureau of Alcohol, Tobacco and Firearms, 375 F. Supp. 345 (E.D. Tenn. 1973) (prior acquittal on criminal charges no bar to administrative forfeiture proceedings), aff'd, 495 F.2d 1373 (6th Cir. 1974). See also Glup v. United States, 523 F.2d 557, 561 (8th Cir. 1975) (principles of collateral estoppel do not apply to issues litigated in prior criminal proceeding which resulted in defendant's acquittal). But see Note 121 and cases cited supra.

[127] See Compton v. United States, 377 F.2d 408 (8th Cir. 1967); United States v. Twelve Ermine Skins, 78 F. Supp. 734 (D. Alaska 1948) (court may direct verdict or grant judgment h.o.v.).

for such proceedings is "remedial."[128] Even where an innocent and unknowing conditional sales vendor forfeited his automobile because the purchaser used it to transport unregistered liquor, the court dismissed a due process challenge, finding the reason for such statutes "too firmly fixed in the punitive and remedial jurisprudence of our country to be now displaced."[129] The lesson of these cases is that, even though a court may label a proceeding "quasi-criminal" for one purpose, it may well reject such a label where other rights are implicated.[129a]

¶40 A final line of forfeiture cases merits attention here. In Trop v. Dulles,[129b] a sharply divided court held, without a majority opinion, that section 401(g) of the Alien

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[128] See One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972) (Forfeiture and penalty under Tariff Laws serves to reimburse the government for losses due to fraud); United States ex rel. Marcus v. Hess, 317 U.S. 379, 388 ("forfeiture" of money under False Claims Act intended to ensure that government is made Whole). See also Hepner v. United States, 213 U.S. 103 (1909) (forfeiture of $1,000 under Alien Immigration Act of 1903 is remedial in nature).

[129] J.W. Goldsmith, Jr. - Grant Company v. United States, 254 U.S. 505 (1921).

[129a] See Note 122 and Accompanying Materials supra.

[129b] Trop v. Dulles, 356 U.S. 86 (1957).

and Immigration Act was unconstitutional, insofar as it permitted the forfeiture in a civil proceeding of a native-born American's citizenship following his conviction as a deserter. Chief Justice Warren stated:

> It is my conviction that citizenship is not subject to the general powers of the national government and therefore cannot be divested in the exercise of those powers. * * * The purpose of taking away citizenship is to punish him. There is no other legitimate purpose that the statute could serve. * * * Here the purpose is punishment, and therefore the statute is a penal law.[130]

¶41 The Dulles case and its progeny mean basically this: where citizenship or some other special constitutional right is involved, the court will be much more likely to scrutinize Congressional labels of "civil" and "remedial." Once such a right is implicated, the court employs a balancing test to determine whether the statute in question is properly "penal" or "regulatory."[131] Again, such an inquiry is proper

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[130] Id. at 92, 97.

[131] The word "regulatory" is apparently a synonym for the word "remedial" for the purposes of these materials, because, where such a label is appropriate, the given sanction may be imposed in a purely civil proceeding.

The leading case in this area is Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) which, like Trop v. Dulles, supra Note 129, involved deportation proceedings and hence, forfeiture of citizenship. The court outlined seven criteria to be considered in the balancing test:

(1) Whether the sanction imposes an affirmative disability or restraint;

only where a fundamental right is involved,[132] and perhaps is limited to the situation in Dulles, where the forfeited thing was not goods, but a constitutionally protected status: i.e., citizenship. Absent a fundamental right, and where the Congressional language is not ambiguous, the courts are not to look beyond the statutory labels.[133]

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(2) The historical characterization of the sanction;
(3) Whether there is a scienter requirement;
(4) Primary purpose of the sanction (to punish or to regulate);
(5) Whether such behavior is already a crime;
(6) Whether alternative purposes are apparent.

See id. at 168-69. In Mendoza, the scales tipped toward criminality, and the court held that Due Process requires a full criminal proceeding.

[132] See Note 124 and accompanying materials supra.

[133] See, e.g., Frank Irey, Jr. Inc. v. Occupational Safety & H.R. Comm., 519 F.2d 1200, 1205 (3d Cir. 1974) (court discusses Mendoza, supra note 131, but decides that such an analysis is improper "because the Congressional intent is clear.")

> In Mendoza-Martinez the constitutionality of legislation divesting American citizenship turned on whether the sanction was civil or criminal. Thus judicial scrutiny of legislative label was required to prevent an unconstitutional exercise of power. Absent such constitutional considerations, the judicial function is to ascertain and apply the lawful will of the legislature. For that purpose, legislative labels are not suspect, but revelatory. If Congress chooses to call a dog a "horse," this court's task would be to apply the regulations on "horses" to dogs.

United States v. Atlantic Richfield Co., 429 F. Supp 830, 838 (E.D. Pa. 1977), aff'd, 573 F.2d 1303 (3d Cir. 1978).

¶42 The more recent forfeiture cases generally reaffirm the teachings of the cases dealing with punitive damages[134] and civil penalties.[135] Though all these sanctions clearly serve a punishment or deterrent function and are, in a sense, anomalies in the civil law,[136] courts nonetheless tend to find alternative remedial purposes sufficient to justify entirely civil proceedings. The results seem sound, in the sense that Congress has long authorized such sanctions in civil actions. The courts are not legislators and, unless they are willing to exclude all forms of civil punishment on the basis of an academic notion of logic alone, they must, under our constitutional system, yield to the legislative will.[137]

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[134] See Notes 24-52 and accompanying materials supra.

[135] See Notes 68-98 and accompanying materials supra.

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> No amount of zeal for the suppression of commercialized criminal activity, nor blind adherence to ancient traditions of law meant for another era, it is submitted, should be permitted to maintain in existence the anomalies and injustices in the law of forfeiture.

Note, Forfeiture of Property used in Illegal Acts, 38 Notre Dame Lawyer, 727, 740 (1963).

[137] See Note 133 and accompanying materials supra.

III. MULTIPLE DAMAGES

A. INTRODUCTION

¶43 The foregoing discussion on damages, penalties, and forfeitures shows the general approach which courts take when dealing with civil liabilities and sanctions. With these principles in mind, the focus of these materials turns to the multiple damage action, of which RICO section 1964(c) is a species. Like punitive damages,[138] forfeitures,[139] and penalties,[140] the multiple damage provision is difficult to categorize under the traditional headings. The resulting confusion surrounding this peculiar mode of recovery, and the surprisingly limited amount of case law available on the subject make predictions concerning the RICO treble damage action somewhat speculative. Still, the basic principles of the law of pecuniary recovery do offer a good deal of insight into the general approach courts will take in future litigation under the statute.

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[138] See Notes 24052 and accompanying materials supra.

[139] See Notes 99-137 and accompanying materials supra.

[140] See Notes 68-98 and accompanying materials supra.

B. MULTIPLE DAMAGES GENERALLY

¶44 What, then, is an action for statutory multiple damages? The recovery at first blush appears to fit neatly into one category of exemplary damages,[141] in the sense that it appears to award the plaintiff a good deal more than what would suffice to compensate him for the harm he has suffered. On the other hand, there is a sound argument that such actions are not primarily punitive at all but, rather, provide for "liquidated damages for accumulative

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[141] See Notes 24-52 and accompanying materials supra. Some courts have held that that part of the multiple damage award above actual compensation is punitive in nature, and hence is to be distinguished from the compensatory portion of the award. See, e.g., Woods v. Witzke, 174 F.2d 855 (6th Cir. 1949) (holding that only the "punitive portion" of the treble damage award under the Emergency Price Control Act is subject to the one-year statute of limitations, because the actual damage award is restitution for which equity court can ignore statute of limitations). See also McCormick on Damages §77, at 277.

With respect to the antitrust laws, some courts and commentators have described the treble damage award as providing for both compensatory and exemplary damages. See, e.g., United Copper Securities Co. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916); McCormick on Damages §77, at 277. But see Winkler-Koch Engineering Co. v. Universal Oil Products Co., 100 F. Supp. 15 (S.D.N.Y. 1951) (treble damages under federal antitrust laws are compensatory in nature).

harm."[142]

¶45 Or does the multiple damage statute provide for a civil penalty? Such a characterization might apply in situations where multiple recovery runs not to a private litigant, but to the government.[143] As is the case in all

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[142]Many commentators and courts have used the term "accumulative harm" to justify a "compensatory" label on multiple damage awards. See Vold, Are Threefold Damages under the Anti-trust Act Penal or Compensatory? 28 Ky. L.J. 117 (1940); United States v. Bornstein, 423 U.S. 303 (1976)(double damage award to government under False Claims Act designed to insure government compensated for accumulative harm); Porter v. Household Finance Corp. of Columbus, 385 F. Supp. 336, 340 (S.D. Ohio 1974) ("damages" of twice the finance charge under Truth in Lending Act, 15 U.S.C. §1601 et seq., is form of liquidated damages for harm to debtor); Schwarzel v. Holenshade, 121 F. Cas. 772 (No. 12,506) (S.D. Ohio 1866) (treble damage award under Patent Law designed to compensate plaintiff where actual damages would be inadequate for all harm plaintiff sustained); Burnett v. Ward, 42 Vt. 80, 93 (1869) (double damage provision for harm to sheep intended to compensate plaintiff for "accumulative harm.") Accord, Winkler-Koch Engineering Co. v. Universal Oil Products Co., supra Note 141.

[143]The best example of such a statutory provision is the double damage award available to the government under the False Claims Act. Many courts have focused on the fact that the award goes to the government in ruling that the award is a "penalty", and not "damages." See, e.g., United States ex rel. Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545 (2d Cir. 1942), aff'd, 320 U.S. 711 (1943). But see United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943) (holding that double damages under False Claims Act are compensatory even if recovered by government); accord, United States v. Templeton, 189 F. Supp. 179 (E.D. Tenn. 1961).

statutory actions, the characterization of the recovery could greatly affect a number of issues.[144]

¶46 It is somewhat difficult to trace the historical development of the multiple damage action. One commentator[145] finds an example of such recovery in an Old Testament parable, where David decreed that the thief of a poor man's lamb should die and "restore the lamb fourfold."[146] In any

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In litigation under the Emergency Price Control Act of 1942, 50 U.S.C.A. App. §1895, courts have distinguished between actions brought by the government from those brought by private persons. The former are considered as actions for penalties. Bowles v. Farmers National Bank of Lebanon, 147 F.2d 425 (6th Cir. 1945). Where the action is one brought by an individual, however, it is one for compensatory damages, not penalties. Fields v. Washington, 173 F.2d 701 (3d Cir. 1949).

> [I]t is an action for damages brought to compensate the individual who has been injured. It is, therefore, not in any true sense of the term an action for a penalty.

Id. at 703. See also Heitmuller v. Berkow, 165 F.2d 961 (D.C. Cir. 1948) (action by tenant under District of Columbia Emergency Rent Act is one for compensatory damages).

[144] See Notes 54-64 and accompanying materials supra.

[145] See Vold, supra note 142, at 118-21.

[146] 2 Samuel 12:1-6. Because the parable is an ancient one dealing with a primitive legal system, reliance upon the passage as proof of the compensatory nature of punitive damages is tenuous at best.

event, multiple damages were unknown to the common law, being purely a creature of statute.[146a] The earliest such statute was probably the Statute of Gloucester of 1278,[147] which authorized treble damages and forfeiture for waste.[148] Also appearing early in the development of English law were somewhat analogous statutes awarding prevailing defendants double costs in cases of vexatious litigation.[149] The primary purpose of both types of statutes was rather clearly one of punishment, and the double cost statutes had disappeared by the end of the Nineteenth Century.[150]

[146a] This observation may have important implications in the area of the applicable statute of limitations. Where jurisdictions provide limitations periods for "liabilities created by statute but not penalties and forfeitures." The fact that the multiple damage action originated in statutory law would at least seem to favor the use of the statutory liability limitations period as opposed to the period applicable to common-law torts. See Notes 280-94 and accompanying materials infra.

[147] 6 Edw. I (1278).

[148] For a novel case, where plaintiff asserted that the Statute of Gloucester was still in effect in Illinois in 1946, see Wise v. Potomac National Bank, 393 Ill. 357, 65 N.E. 2d 424 (1946).

[149] See Stephen, Commentaries on the Laws of England, Ch. X at 638, n.(d).

[150] Id. at 638, n.(d).

¶47 State statutes providing multiple damage actions have a long history in American jurisprudence.[151] In 1885, Justice Field stated:

> The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries.[152]

Such statutes are still an important part of the law of the states, and deal with such situations as: willful trespass to land or timber,[153] consumer protection,[154] willfully

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[151] Prosser, Torts §2, at 11.

[152] Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 523 (1885) (holding that double damages for negligence of railroad company does not violate Fourteenth Amendment).

[153] See, e.g., Russell v. Pryor, 264 Ark. 45, -- S.W.2d -- (1978); Daluiso v. Boone, 71 Cal. 2d 484, 455 P.2d 811, 78 Cal. Rept. 707 (1969); Baillon v. Bolander & Sons Co., 306 Minn. 155, 235 N.W. 2d 613 (1975); Smith v. Shiflett, 66 Wash. 2d 462, 403 F.2d 364 (1965).

[154] See, e.g., Lantner v. Carson, 1978 Mass. Adv. Sheets 640 (Sup. Jud. Ct. of Mass. 1978); Johnston v. Kirkland, 85 Wash. 2d 637, 538 P.2d 510 (1975).

causing a breach of contract,[155] infliction of permanent personal injuries,[156] in landlord-tenant situations,[157] and in the area of small property claims.[158] An interesting case for the purposes of these materials involved a Vermont statute authorizing double damages against the owner of a dog who kills, injures, or worries plaintiff's sheep.[159]

¶48 How have state courts dealt with multiple damage actions? As might be expected, the confusion surrounding such statutory provisions is as great as that in the area

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[155] See, e.g., Jackson v. Travelers Insurance Co. of Hartford, 403 F. Supp. 986 (M.D. Tenn. 1975).

[156] See, e.g., In re Garuhum, 349 Mass. 473, 209 N.E. 2d 183 (1965) (employer liable for double damages for willful injury to employee); Meierotto v. Thompson, 356 Mo. 32, 201 S.W.2d 161 (1947) (double damages for permanent personal injuries to plaintiff).

[157] See, e.g., Schweiger v. Superior Court of Alameda County, 3 Cal. 3d 507 (1970), 476 P.2d 97, 90 Cal. Rept. 729 (double damages for retaliatory eviction); Brunswick Corp. v. Key Enterprises, Inc., 431 Pa. 15, 244 A.2d 658 (1968) (double damages for distress and sale of property when no rent was actually due); Randall-Smith, Inc. v. 43d Street Estates Corp., 17 N.Y. 2d 99, 268 N.Y.S. 2d 306, 215 N.E. 2d 494 (1966) (treble damages for forcible ejectment); Berg v. Wiley, 264 Minn. 145, 264 N.W. 2d 145 (1978) (treble damages for forcible eviction).

[158] See, e.g., Rouse v. Weston, 243 Ark. 396, 420 S.W. 2d 83 (1967).

[159] See Burnett v. Ward, 42 Vt. 80 (1869).

of exemplary damages.[160] In fact, some courts characterize multiple damages simply as statutory punitive damages,[161] to which all the general rules of the given jurisdiction on punitive damages apply.[162] Other decisions hold that such provisions create penalties, and some even go so far as to apply such rules as that requiring strict construction of penal statutes.[163] While the emphasis of these materials is on federal jurisprudence, the approach of the state courts to the characterization problem is of course revelatory, and will become more and more important to victims of organized crime as more states enact RICO statutes of their own.

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[160] See Notes 24-52 and accompanying materials supra.

[161] See, e.g., Johnston v. Kirkland, 85 Wash. 2d 637, 538 P.2d 510 (1975) (court equates treble damages with punitive damages for purposes of retrospective application). At least one federal court has equated multiple damages with exemplary damages. United Copper Securities Corp. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916).

[162] See Notes 33-52 and accompanying materials supra.

[163] See, e.g., Rouse v. Weston, 243 Ark. 396, 420 S.W. 2d 83 (1967) (Small Property Claims Act, Ark. Stat. §75-918 is a penal statute to which rule of strict construction applies); Kortsan v. Poor Richards, Inc., 290 Minn. 339, 188 N.W. 2d 415 (1971) (treble damage statute for willful trespass is penal statute).

C. MULTIPLE DAMAGES IN FEDERAL LAW

¶49 The most celebrated multiple damage provision appeared in federal statutory law with the passage of the antitrust statutes in 1890. The Sherman Act[164] provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 165

While the antitrust treble damage provision is certainly the most widely litigated and discussed federal multiple damage provision, a number of other statutes authorize such recovery.[166] These materials contain references to sometimes little-known federal multiple damage provisions in the hope of providing a broader view of the problem.

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[164] 15 U.S.C. §1 et seq. (1976).

[165] 15 U.S.C. §15 (1976).

[166] See Notes 166-73 and accompanying materials infra.

¶50 Multiple damage actions in federal law include (or have included), inter alia, the following areas: patents,[167] trademarks,[168] price control,[169] veteran's benefits,[170] and false claims to the government.[171] Another important provision in the copyright laws[173] authorizes minimum statutory damages which, because they exceed normal compensation, are in many respects analogous to multiple damage statutes.

¶51 As one studies the case law under the federal multiple damage statutes,[174] it becomes apparent that there exist

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[167] 35 U.S.C. §281 et seq. (1976).

[168] Lanham Act, 15 U.S.C. §1117 (1976).

[169] Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. App. §925 (e) (1950). (Repeated by 70A Stat. 641, 1956). See also, Economic Stabilization Act of 1970, §210, 12 U.S.C.A. §1904 n (West Supp. 1979).

[170] 38 U.S.C. A. §1822, repealed by Act of Dec. 31, 1974, Pub. L. No. 93-569, 88 Stat. 1866 (West 1959) (any person selling property to veteran for price in excess of reasonable value of property liable for three times excess consideration).

[171] 31 U.S.C. §231 et seq. See also 22 U.S.C.A. §2399b (West Supp. 1979) (double damages for false claims under Foreign Assistance Act).

[173] 17 U.S.C. §503 et seq. (1976). Statutory minimum damages are also available under the Federal Wiretap Statute, 18 U.S.C. §2520 (West Supp. 1979), and the Privacy Act, 5 U.S.C. §552a (g) (1976).

[174] See Notes 167-173 and accompanying materials supra.

two varieties of such statutes: those designed primarily to punish parties for statutory violations,[175] and those designed to compensate the harmed individual,[176] the latter recovery sometimes being characterized as liquidated compensation for accumulative harm.[177] Courts do not always agree on the question of which label applies to a given

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[175]The False Claims Act, 31 U.S.C.§231 et seq. (1976). The Price Control Acts seem to fall within this group, insofar as recovery thereunder is based not upon plaintiff's losses, but upon the amount in excess of statutory levels which the violator has injured party.

[176]The Patent Law, 35 U.S.C. §281 et seq. (1976), the Antitrust Laws, 15 U.S.C. §1 et seq. (1976), and the Trademark Law, 15 U.S.C. §1117 (1976) tend to fall within this classification. The Lanham Act provides:

> Such sum in either of the above circumstances shall constitute compensation and not a penalty.

Id.

[177]See Note 142 and accompanying materials supra.

statute.[177a] The Emergency Price Control Act of 1942,[178] for example, created a penalty according to the majority of federal courts, but opinions also exist characterizing the Act as remedial in nature. Courts finding the statute to be remedial emphasize the need for compensation of the harmed individual, as well as the societal interest in creating statutory incentive liability.[179]

[177a] For example, with respect to the False Claims Act, 31 U.S.C. §231 et seq. (1976), the double damage clause has been described as "penal in nature." Amato v. Porter, 157 F.2d 719, 721 (10th Cir. 1945). Accord, United States ex rel. Brensibler v. Bausch & Lomb Optical Co., 131 F.2d 545, 547 (2d Cir.) (provision is "drastically penal"), aff'd, 320 U.S. 711 (1943). On the other hand, some courts have found the primary purpose of the Act to be one of insuring adequate compensation, and not punishment. See, e.g., United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). Accord, United States v. Templeton, 199 F. Supp. 179 (E.D. Tenn. 1961). Similar disagreement exists with respect to the Emergency Price Control Act of 1942, . Compare Porter v. Montgomery, 163 F.2d 211 (3d Cir. 1947) (purpose of Act to punish) with Everly v. Zepp, 57 F. Supp. 303 (E.D. Pa. 1944) and Dorsey v. Martin, 58 F. Supp. 722 (E.D. Pa. 1945) (purpose of Act to compensate and to encourage litigation).

[178] As amended 50 U.S.C.A. App. §925(e) (West 1959) (repealed 1956, 70A Stat. 641).

[179] See Note 178 supra. In connection with the antitrust laws, see Englander Motors, Inc. v. Ford Motor Co., 186 F. Supp. 82, 85 (D. Ohio 1960) (purpose of treble damages to encourage plaintiffs to bring actions), aff'd in part, rev'd on other grounds, 293 293 F. 2d 802 (6th Cir. 1961); Harrison v. Paramount Pictures, 115 F. Supp. 312 (E.D. Pa.), aff'd, 211 F.2d 405 (10th Cir. 1953), cert. denied 348 U.S. 828 (1954).

¶52 The other statutory provisions for multiple damages fall generally within the class of remedial statutes for most purposes. For example, courts have often held the antitrust provision as remedial for such purposes as assignability[180] and survivability[181] of claims, the

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[180] Hicks v. Bekius Moving and Storage Co., 87 F.2d 583 (9th Cir. 1937), United Copper Securities Co. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916); Isidor Weinstein Inv. Co. v. Hearst Corp., 303 F. Supp. 646 (N.D. Cal. 1969); Gerr v. Schering Corp., 256 F. Supp. 572 (S.D.N.Y. 1966); Momand v. Twentieth Century Fox Film Corp., 37 F. Supp. 649 (S.D.N.Y. 1940). But see BonVillain v. American Sugar Refining Co., 250 F. 641 (E.D. Ca. 1918) (treble damage right of action not assignable because of tort nature).

[181] The cases almost universally hold that the plaintiff's cause of action survives his death. Copper Liquor, Inc. v. Adolph Coors Co., 506 F. 2d 934 (5th Cir. 1975), rehearing denied, 509 F.2d 758 (5th Cir. 1976); Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645 (4th Cir. 1942) (claim survives death of either party); Moore v. Backus, 78 F. 2d 571, 576 (7th Cir.), cert. denied, 296 U.S. 640 (1935).

With respect to the death of the wrong-doer, some courts have held that the entire claim survives as long as the decedent's estate benefitted in some way. Sullivan v. Associated Billposters and Distributors, 6 F. 2d 1000 (2d Cir. 1925); United Copper Securities Co. v. Amalgamated Copper Co., 232 F. 574 (2d Cir. 1916). Another group says only the claim for actual damages survives defendant's death. Shires v. Magnavox, 432 F. Supp. 231, 234 (E.D. Tenn. 1976); Rogers v. Douglas Tobacco Bd. of Trade, 244 F.2d 471 (5th Cir. 1957). At least one court has held that the claim does not survive either party's death. Haskell v. Perkins, 28 F. 2d 222 (D.N.J. 1928), rev'd on other grounds, 31 F. 2d 53 (3d Cir. 1929). One novel case held that the entire claim survived defendant's death, but abated once his estate had been distributed. Lee v. Venice Work Vessels, Inc., 512 F.2d 85 (5th Cir.), cert. denied, 423 U.S. 1056 (1975).

statute of limitations,[182] and vicarious liability.[183] Even here, however, a surprising number of courts have disagreed, holding that the claim is one for penalty which does not, for example, survive the death of the wrong-doer.[184] The patent law provision has also received a remedial label in most, if not all, litigation under that statute.[185] The patent law provision has been universally held to survive,[186] and is proper for a purely

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[182] See, e.g., Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645 (4th Cir. 1942).

[183] See Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808 (E.D. Pa. 1975); Cott Beverage Corp. v. Canada Dry Ginger Ale, 146 F. Supp. 300 (S.D.N.Y. 1956), appeal dismissed, 243 F. 2d 795 (2d Cir. 1957).

[184] See Note 182 supra.

[185] See, e.g., Activated Sludge v. Sanitary District of Chicago, 64 F. Supp. 25 (N.D. Ill.), aff'd 157 F.2d 517 (7th Cir.) cert. denied, 330 U.S. 83 (1946); Armstrong v. Emerson Radio and Phonograph Corp., 132 F. Supp. 176 (S.D.N.Y. 1955); Perkins Oil Well v. Owen, 293 F. 759 (S.D. Cal. 1923).

[186] See Armstrong v. Emerson Radio and Phonograph Corp., 132 F. Supp. 176 (S.D.N.Y. 1955) (action for patent infringement survives death of plaintiff); Cheramie v. Orgeron, 434 F.2d 721 (5th Cir. 1970) (action for patent infringment survives death of defendant); Sullivan v. Associated Billposters and Distributors, 6 F.2d 1000 (2d Cir. 1925) (antitrust treble damage action survives death of either party).

civil proceeding where the court may even compel the defendant to testify against himself.[187]

¶53 What does the litigation under analogous federal statutes tell us in general with respect to the RICO treble damage action? In the first place, where litigants challenge the statute as being criminal in nature (as the Capetto[188] petitioners did), the Le Boeuf[189] rule will apply to limit the judicial inquiry, absent the implication of a fundamental constitutional right, to one of statutory construction.[190] In spite of the need for an underlying criminal offense, it seems unlikely that courts would go so far as to require criminal procedural safeguards such as the rule of strict construction[191] or proof beyond a reasonable doubt.[192] With respect to statutory construction,

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[187] See, e.g., Perkins Oil Well v. Owen, 293 F. 759 (S.D. Cal. 1923) (privilege against self-incrimination applies only in strictly criminal proceedings, not civil actions for patent infringement).

The burden of proof in such actions is the usual civil one, where plaintiff must prove his case by a preponderance of the evidence. Ramsey v. United Mine Workers, 401 U.S. 302 (1970); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 659 (D. Minn. 1974).

[188] Petitioner's Brief for Writ of Certiorari, United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[189] See Notes 94 and 120 and accompanying materials supra.

[190] See Note 133 and accompanying materials supra.

[191] Id.

[192] But see Notes 203-05 and accompanying materials infra.

nowhere in federal law is the Congressional intent any clearer regarding the remedial character of a statute than in the case of Title IX.[193]

D. GENERAL ARGUMENTS CONCERNING REMEDIAL NATURE OF SECTION 1964 (c)

¶54 Regardless of which precise issue faces the court, where the punitve versus remedial nature of the statute is crucial, plaintiffs bringing 1964(c) actions must emphasize the statute's compensatory aspects.[194] A finding that the provision also provides for punishment will be immaterial, as long as the primary purpose is seen as remedial.

¶55 One of the primary remedial arguments relating to the antitrust multiple damage provision is that it serves to compensate plaintiffs for intangible accumulative harm inherent in the typical antitrust case, where the offender is often a large corporation, while the injured party is frequently a small business, decidedly less powerful in

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193 The provisions of this title shall be liberally construed to effectuate its remedial purposes.

18 U.S.C. §904(a) (1970).

194 See Notes 53-67 and accompanying materials supra.

economic terms.[196] Above all, treble damages help to compensate plaintiffs for a genuine threat of future harassment at the hands of the powerful defendant.[197] Such an argument quite obviously applies a fortiori to the RICO treble damage action, where the offender is typically not only stronger financially, but perhaps a member of an organized crime conspiracy as well. Because the fear of harassment will be especially great in the typical RICO action, litigants will do well to argue that multiple damages merely serve to compensate the RICO plaintiff not only for harm to his business or property, but for the danger to his very life that a RICO action will frequently entail.

¶56 A related line of argument applying equally to all multiple damage actions is that, even if they do overcompensate some individual plaintiffs for legal harm, they help ensure that victims of wrongful activity as a class will receive adequate compensation. Again, the fear surrounding the typical private RICO action will undoubtedly keep a great number of RICO violations from ever reaching the courts, and difficulties of proof caused by the corresponding fears of the recalcitrant witness will preclude

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[196] See Note 142 and accompanying materials supra.

[197] See Note 142 and accompanying materials supra.

adequate compensation in many individual cases. Recovery of treble damages, therefore, helps to mitigate these inherent barriers to compensation.

¶57 Plaintiffs will certainly need substantial incentive to bring private actions against organized crime figures. To avoid frustrating the remedial purposes of the RICO provision,[197a] therefore, available damages must be attractive enough to convince organized crime victims that a civil action is worth their time, effort and, of course, their fear of harassment. Encouragement of enforcement is entirely consistent with the remedial nature of Section 1964(c).[198]

IV. SPECIFIC ISSUES TURNING ON CHARACTERIZATION OF TREBLE DAMAGES

A. INTRODUCTION

¶58 Because the particular issue involved in a given case may well change the court's approach to treble damages, these materials now turn to a brief individual analysis of the key issues which will turn on the characterization

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[197a] See Organized Crime Control Act of 1970, Pub. L. No. 91-452, §904(a), 84 Stat. 947 (1970).

[198] See Note 180 supra.

problem. While general arguments of compensation apply to each of these issues, certain contentions are more or less appropriate in specific situations. The analysis and recommendations are not exhaustive and, in the absence of significant case law under section 1964(c), one can only speculate with regard to the eventual approach courts will take to the enumerated issues in the RICO context.

B. CIVIL NATURE OF THE PROCEEDING

¶59 Although rejected by the Cappetto court,[199] a Boyd[200] type of reasoning may appeal to some judges presiding over Section 1964 litigation. In fact, an unreported memorandum opinion[202] included in an appendix to the Cappetto petitioners' brief for certiorari,[203] contains strong language from Dis-

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[199] United States v. Capetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[200] Boyd v. United States, 116 U.S. 616 (1886). See Notes 115-128 and accompanying materials supra.

[201] Boyd v. United States, 116 U.S. at 634.

[202] United States v. Finn, No. 74-C-2925 (N.D. Ill. 1975)

[203] Appendix to Petitioner's Brief for Certiorari, United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

trict Judge Marovitz to the effect that, not only should Boyd[204] apply to RICO civil suits brought by the government,[205] but that In re Winship[206] and In re Gault[207] dictate that the plaintiff must prove the violations beyond a reasonable doubt.[208]

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[204] Boyd v. United States, 116 U.S. 616 (1886).

[205]
> We fail to understand how a civil proceeding could be any more in substance a criminal one than the one herein. This is not to imply the unconstitutionality of 18 U.S.C. §1964, but rather to arge that Boyd compels that any proceedings of a quasi-criminal nature, like this one, are subject inter alia, to the strictures of the Fourth Amendment and that portion of the Fifth Amendment dealing with self-incrimination. (emphasis added)

United States v. Finn, No. 74-C-2925 (N.D. Ill. 1975), Appendix to Petitioner's Brief for Certiorari at 2-3. United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[206] In re Winship, 397 U.S. 358 (1970).

[207] In re Gault, 387 U.S. 1 (1967) (holding that juvenile proceedings, though civil in name, require proof beyond a reasonable doubt).

[208] In expressing his view that proceedings under RICO section 1964 required a standard of proof beyond a reasonable doubt, Judge Marovitz focused on the stigma attaching to civil proceedings of the type dealt with in Winship, 397 U.S. at 364.

> The stigma which attaches at a delinquency proceeding is bottomed, to some extent, on a finding that the accused committed a crime. 397 U.S. at 374. The exact same stigma attaches to the enjoining of racketeering. See 18 U.S.C. §1961(1)(B). Hence we conclude that civil proceedings like those being conducted herein are subject to a criminal burden of proof.

United States v. Finn, supra Note 205, at 3.

¶60 Judge Marovitz's comments are primarily dicta, as the issue of the applicability of procedural safeguards was not before the court in its ruling denying the defendants' motion to dismiss.[209] The finding that defendants could claim the Fifth Amendment in response to the government's requests for admission,[210] however, is properly part of the court's holding. Again, like Cappetto,[211] Finn[212] is distinguishable from the section 1964(c) action in that the former involved a suit brought by the government for injunction, while the latter is a private action for damages.[213] Still, Finn[214] may provide an important clue regarding just

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[209] Judge Marovitz pointed to this fact when he stated:

> [A]nd though defendants seem aware that we are bound by this precedent [Capetto], they nonetheless futilely attempt to re-argue the correctness of Cappetto. Defendants' energies are better saved for a proper court of review.

Id. at 2.

[210] United States v. Finn, supra Note 205.

[211] Id. at 4.

[212] United States v. Finn, supra Note 205.

[213] See Note 98 and accompanying materials supra.

[214] United States v. Finn, supra Note 205.

how far some courts will go in future RICO litigation.

¶61 The Finn[215] approach is objectionable in several respects, and it seems doubtful that the Seventh Circuit would have affirmed the district court's ruling. Above all, the decision ignores the clear legislative history of Title IX,[216] which indicates Congress intended that the reasonable doubt standard would not apply to RICO civil actions.[217] Proper rules of statutory construction seem to dictate that the courts follow such clear legislative direction.[218] Congress expressly referred to the remedial purposes of Title IX,[220] purposes which are even more clearly remedial in the private litigant's civil action

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[215] Id.

[216] See Note 193 supra.

[217] See, e.g., S. Rep. No. 617, 91st Cong., 1st Sess. at 160 (1969).

[218] See Notes 96 and 133 and accompanying materials supra.

[220] See Note 193 supra.

for damages than in the government's suit for injunction.[221] Requiring a criminal burden of proof in the treble damage action would clearly run counter to this expressed legislative purpose.

C. SURVIVABILITY OF THE TREBLE DAMAGE CLAIM

¶62 In contrast to the old common law view that actions ex delicto[222] do not survive the death of either party, the current trend in the federal courts is to hold that actions based on wrongs to property survive the death of either plaintiff or defendant.[223] The modern view finds support in the notion that, where the plaintiff's property is harmed, his estate suffers and properly deserves

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[221]The definition of the word "remedial" implies both protection of the public and compensation.

> If, however, on the other hand, [the statute's] primary object is to protect the public and to effectuate a public policy sought to be accomplished by the Act, it is remedial and is a civil action.

Amato v. Porter, 157 F.2d 719 (10th Cir. 1946). In this sense, RICO sections 1964(a) and (c) are both "remedial." Section 1964 is more "remedial" in the sense that it also provides for compensation of injured parties.

[222]See W. Prosser, Handbook of the Law of Torts §126, at 898-90 (4th ed. 1971).

[223]See Schreiber v. Sharpless, 110 U.S. 76, 80 (1884).

compensation.[224] Similarly, where the defendant dies, there is little reason why his estate should not be liable for his wrong, especially in view of the compensatory purposes of the treble damage action.[225] On the other hand, suits for penalties do not survive the death of the defendant under federal law.[226]

¶63 With several exceptions,[227] the federal courts hold that multiple damage claims survive the death of either party.[228] Some state courts in jurisdictions equating treble damages with punitive damages[229] may be inclined to

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[224] Cf. Notes 53-55 and accompanying materials supra.

[225] See Notes 196-198 and accompanying materials supra.

[226] Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) (actions for penalties and forfeitures under Copyright Law do not survive death of defendant).

[227] See Note 182 and accompanying materials supra.

[228] See Note 182, and accompanying materials supra. With respect to patent survivability, see Cheramie v. Orgeron, 434 F.2d 721 (5th Cir. 1970); Activated Sludge v. Sanitary District of Chicago, 64 F. Supp. 25 (N.D. Ill.), aff'd, 157 F.2d 517 (7th Cir.), cert. denied, 330 U.S. 83 (1946); Armstrong v. Emerson Radio and Phonograph Corp., 132 F. Supp. 176 (S.D.N.Y. 1955).

[229] See Note 161 and accompanying materials supra.

hold that the damage amount above actual legal compensation abates upon the death of either party. But even in these jurisdictions, an emphasis on the special need in the RICO action for adequate compensation may convince the courts to rule in favor of survivability.

D. ASSIGNABILITY AND RELATED ISSUES UNDER THE BANKRUPTCY LAW

¶64 Related to the issue of survivability are the questions of assignability of the treble damage claim and of transferability of the claim to plaintiff's trustee in bankruptcy. The prospects for the RICO treble damage claim are bright in both respects. Courts generally hold both antitrust[230] and patent infringment[231] claims to be assignable. Moreover, because a cause of action under the Bankruptcy Act[232] is transferable if it survives,[233] this

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[230] See Note 181 and accompanying materials supra.

[231] See, e.g., Herman v. Detroit Shipbuilding Co., 295 F. 423 (E.D. Mich. 1924); John L. Rie, Inc. v. Shelly Bros, Inc., 366 F. Supp. 84 (D. Pa. 1973).

[232] 11 U.S.C.A. §70a (West Special Pamphlet 1979).

[233] See Murphy v. Household Finance Corp., 560 F.2d 206 (6th Cir. 1977)(cause of action for "twice the finance charge" under Truth-in-Lending Act, 15 U.S.C. §130(a)(2)(A), transferrable to plaintiff's trustee in Bankruptcy).

issue appears settled as well.

¶65 Another issue under the Bankruptcy Act[234] is whether a RICO judgment creditor will receive equal status with respect to priority in payment of claims as the holder of a compensatory judgment against an insolvent RICO defendant. The Act[235] distinguishes between compensatory and punitive awards, and give priority to the former.[236] Because the only defendants accessible to the RICO plaintiff may well be "low on the totem pole" of organized crime, the problem of insolvency could become a common barrier to recovery. The task for the RICO plaintiff, of course, is to convince the courts that treble damages compensate for accumulative harm,[237] and are not the equivalent of punitive damages awardable at the jury's discretion. Furthermore, the expressed remedial purpose[238] of the statute provides strong policy arguments that recovery should not turn uniquely upon which label courts decide to pin on the damage award.

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[234] 11 U.S.C.A. §726 (West Special Pamphlet 1979).

[235] Id.

[236] Id. §§726(3), (4).

[237] See Note 68 and accompanying materials supra.

[238] See Note 217 and accompanying materials supra.

E. VICARIOUS LIABILITY

¶66 The common law rule was that courts may not assess exemplary damages against a principal for the acts of his agent, unless the principal authorized or ratified the acts in question.[239] While it is difficult to imagine that a RICO defendant would not have ratified, at least implicitly, the racketeering activities of his agent, the situation is not beyond the realm of possibility. Obtaining a compensatory label for the treble damage award will enable plaintiffs to completely avoid the possibility that a court's rules on vicarious liability would preclude recovery.

¶67 The question of liability of a corporation for the acts of its officers, however, will undoubtedly arise in future section 1964(c) litigation. Courts uniformly hold corporations liable for the acts of their officers in antitrust treble damage situations.[240] Even if a court decides

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[239] See Note 56 and accompanying materials supra.

[240] See Note 184 and accompanying materials supra. Corporate officers who participate in, or ratify the acts of the corporation may be personally liable for treble damage claims against the corporation. Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808 (E.D. Pa. 1975).

to label RICO treble damages "punitive," litigants should point to the reality that, where a RICO defendant is acting on behalf of a legitimate corporation, the accessibility of that corporation's assets may be crucial to the plaintiff's recovery. It is, of course, likely that such assets would be tainted by the racketeering activity so as to bring them within the divestiture[241] provision of Title IX.

F. THE TAXATION ISSUE

¶68 Because the activities of a RICO defendant may qualify as a trade or business under the federal tax laws, the characterization issue may arise where the defendant seeks to deduct as business expenses the cost of the treble damage award.[242]

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[241] 18 U.S.C. §1964(a) (1976).

[242] I.R.C. § 162(a) allows "as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." In a leading case in this area, the Court held that an illegal bookmaking operation falls within the definition of "trade or business." Commissioner v. Sullivan, 356 U.S. 27 (1958). The Court emphasized the nature of the income tax as a tax on net income only and allowed a deduction for rent payments. Id. at 29.

Prior to 1969, courts generally denied deductions for payments characterized as penalties, at least where the taxpayer's conduct was willful.[243] If RICO treble damages receive a remedial label, therefore, such a judicial approach to the problem of deductibility might permit RICO defendants to shift a portion of their liability to the federal government.

¶69 Since 1969, however, the tax laws contain express policy limitations on the deductibility of certain business expenses such as fines and penalties paid to the government and two-thirds of an antitrust treble damage award.[244] The legisla-

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[243]The test for deductibility was whether "the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct." Tank Truck Rentals, Inc., 356 U.S. 30, 33-34 (1958) (fines for violating truck weight limits not deductible). Accord, Commissioner v. Longhorn Portland Cement Co., 148 F.2d 276 (5th Cir. 1945) (penalties under state antitrust statute not deductible). When courts found no such public policy threatened, however, the deduction was permitted. See, e.g., Commissioner v. Sullivan, note 242 supra; National Brass Works v. Commissioner, 182 F.2d 526 (9th Cir. 1950) (allowing deduction of treble damage payment for "innocent violation" of Emergency Price Control Act of 1942); Jerry Rossman Corp. v. Commissioner, 175 F.2d 711 (2d Cir. 1949) (penalty for pricing violation deductible). The I.R.S. uniformly allowed deductions for treble damage payments under the antitrust laws, unless paid to the government. Rev. Rul. 64-224, 1964-2 C.B. 52. A thorough discussion of the pre-1969 approach to deduction of fines and penalties may be found in S. Scallen, The Deductibility of Antitrust Treble Damage Payments, 52 Minn. L. Rev. 1149 (1968).

[244]I.R.C. §§ 162(f), (g). Because it is not "paid to a government," the RICO treble damage award falls outside the statutory exclusions. See also Treas. Reg. §§ 1.162-21, 1.162-22 (1975).

tive history behind the 1969 amendments clearly states that the enumerated limitations are to be "all-inclusive."[245] Absent further legislation, therefore, judges may not presently deny the deduction on grounds of public policy alone. By arguing that such expenses are not "ordinary and necessary," however, the I.R.S. may still succeed in denying the deduction in a majority of RICO cases.[246] Such an approach would preserve the deterrent effect of RICO treble damages without unnecessarily drawing attention to the award's punitive aspects, a situation that could lead judges to ignore the award's remedial nature in other areas of litigation.

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[245]The Senate Finance Committee has made its intention that Congress, not the courts, should control deductibility. "The provision for the denial of the deduction for payments in these situations which are deemed to violate public policy is intended to be all-inclusive. S. Rep. No. 91-552, 91st Cong., 1st Sess. 274 (1969).

"The committee continues to believe that the determination of when a deduction should be denied should remain under the control of Congress." S. Rep. No. 92-437, 92nd Cong., 1st Sess. 72. See Rev. Rul. 77-243, 1977-2 C.B. 57.

[246]The leading case on this point is Welch v. Helvering, 290 U.S. 111 (1933), where Cardozo, J. outlines a rather vague test for the fact-finder to use in determining whether an expense is "ordinary and necessary." "Life in all its fullness must supply the answer to the riddle." Id. at 112. Another requirement is that the expense incurred be related to the trade or business. See David B. Trott, 38 T.C.M. (P-H) 85 (1969) (expenses in defending bribery charge not sufficiently connected to trade or business of law practice to allow deduction).

Deductibility and public policy are discussed in J. Chommie, Federal Income Taxation § 47, (2d Ed. 1973), at 90-91; and in Mertens, 4A Law of Federal Income Taxation § 25.131 (Supp. 1973 and 1979).

tributable to their involvement in racketeering activities.[246]

G. COMPUTATION OF THE TREBLE DAMAGE AWARD

¶70 A seemingly minor issue turning on the characterization question involves the manner in which courts are to compute multiple damage awards. The issue came before the Supreme Court in a recent case,[247] however, and merits some discussion here.

¶71 In United States v. Bornstein,[248] the court dealt with the question of whether compensatory payments made in partial settlement prior to trial should be subtracted from a damage award[249] before or after that amount was doubled. The Court found that, in view of the compensatory purpose of double damages under the False Claims Act,[250] the damages should be doubled prior to deduction of pre-trial payments.[251]

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246 While it would perphaps be convenient to attach a tag or label to civil liability for price violations, to do so by use of the term "penalty" confuses more than it simplifies. What is considered a penalty differs with circumstances and viewpoints.

Id. at 529.

247 United States v. Bornstein, 423 U.S. 303, 313-316 (1976).

248 Id.

249 False Claims Act, 31 U.S.C. §231 et seq. (1976).

250 Id.

251 United States v. Bornstein, 423 U.S. at 316.

Certainly, the compensatory aspects of the RICO treble damage action argue in favor of a like approach in litigation under section 1964.

H. CONTRIBUTION AND INDEMNIFICATION

¶72 The characterization problem also has important implications where, as in the usal RICO case, there are two or more wrong-doers. Whether courts focus primarily on the compensatory or punitive aspects of section 1964(c) will be a crucial factor in the decision whether to permit one RICO defendant to compel his co-conspirators to share in his treble damage liability. The issue of contribution and indemnification is a complex one, and involves an area of tort law that has been in a period of rapid change over the past few years.[252] While the many complex issues[253]

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[252] See Prosser, Torts §50, at 307-08 (4th ed. 1971). At least twenty-three states now permit some form of contribution among joint tortfeasors.

[253] Related issues here include the particular jurisdiction's rules on settlement and release, as well as procedural rules governing joinder of parties and third-party practice or impleader. See Prosser, Torts §§47-49, at 293-305 (4th ed. 1971).

surrounding the problem go beyond the scope of these materials, certain basic considerations seem to point to the desirability of a limited contribution rule in section 1964(c) litigation.

¶73 Will courts characterize the RICO treble damage action as sounding in tort?[254] It is now fairly well settled that the antitrust treble damage claim sounds in tort,[255] as does the statutory action for patent infringement.[256] Because the cause of action arises out of damage inflicted on the plaintiff, the RICO private action seems to fall within the classification of a statutorily-created tort.[257]

¶74 Assuming the action sounds in tort, recent antitrust cases are helpful in posing the basic question of contribution and indemnification. Strangely enough, fede-

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[254] See Note 289 and accompanying materials infra.

[255] Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Simpson v. Union Oil Co. of California, 311 F.2d 764, 768 (9th Cir. 1963); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967, 970 (7th Cir. 1943), cert. denied, 321 U.S. 792 (1944).

[256] See, e.g., Carbice Corp. of America v. American Patents Development Corp., 283 U.S. 27 (1931); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975).

[257] See Northwestern Oil Co. v. Socony-Vacuum Oil Co., supra Note 255, at 970.

ral courts had not faced this precise issue until recently, and no circuit court had ruled on the matter until 1979.[258] Several district courts[259] had ruled, however, that under governing federal law,[260] there was no right to contribution nor to indemnification in antitrust cases. These decisions relied on five primary policy considerations,[261] of which

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[258] Professional Beauty Supply v. National Beauty Supply, 594 F.2d 1179, 1182 (8th Cir. 1979). For an interesting discussion of the contribution issue written prior to its appearance in antitrust litigation, see P. Corbett, Apportionment of Damages and Contribution among Coconspirators in Antitrust Treble Damage Actions, 31 Fordham L. Rev. 111 (1963) (hereinafter cited as P. Corbett, Contribution).

[259] See, e.g., El Camino Glass v. Sunglo Glass Co. [1977-1] Trade Reg. Rep. (C.C.H.) ¶61, 533 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). See also Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D. Ga. 1973) (dictum).

[260] Federal law governs the issue of contribution in federally-oriented statutory actions. See Note 259 and cases cited supra; Professional Beauty Supply v. National Beauty Supply, 594 F.2d 1179, 1182 (8th Cir. 1979).

[261] As outlined in Professional Beauty Supply, id. at 1183-85, the major objections include:

(1) Congress intended to exclude contribution in antitrust cases.
(2) Allowing contribution will interfere with plaintiff's control of the lawsuit.
(3) Right to contribution may deter settlement.
(4) Contribution will further complicate antitrust suits.
(5) The deterrent effect of the antitrust law is better served by not permitting defendants to shift liability to other wrong-doers.

the most important were the fear that such a rule would over-complicate litigation and lessen plaintiff's control over the lawsuit, and that the deterrent effect of the antitrust laws would somehow suffer if intentional violators could shift a part of their burden to other violators.

¶75 In February 1979, however, the Eighth Circuit[262] boldly formulated a contribution rule in antitrust cases. In Professional Beauty Supply v. National Beauty Supply,[263] the court held, largely on the basis of equity between the parties, that, "under certain circumstances, an antitrust defendant may be entitled to pro rata contribution from other joint tort feasors.[264] The court held, however, that no indemnification would lie.[265]

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[262] Professional Beauty Supply v. National Beauty Supply, 594 F.2d 1179 (8th Cir. 1979). Senior District Judge Hanson filed a strong dissent in opposition to the contribution rule, citing the lack of congressional authorization, as well as the lack of any compelling reason for adopting a rule which could adversely affect antitrust litigation. Id. at 1188-90.

[263] Id.

[264] Id. at 1182.

[265] Id. at 1186. Contribution and indemnity are two different concepts. Contribution distributes damages among joint tortfeasors by requiring each to pay a proportionate share. Indemnification, on the other hand, is the process whereby the court shifts the entire loss from one tortfeasor to another, more culpable tortfeasor. The best example of indemnification is where an "actively' negligent actor must indemnify a "passively" negligent actor. See Prosser, Torts §51, at 310-11 (4th ed. 1971).

¶76 What are the basic policy considerations with respect to permitting contribution in RICO treble damage cases? Focusing on deterrence would seem at first blush to favor a rule against contribution, as a wrong-doer would be inclined to avoid participating, even in a limited way, in a racketeering scheme, if he knows he faces joint and several liability,[266] without the possibility of contribution.[267] Moreover, if the fear of over-complicating lawsuits is a legitimate one,[268] plaintiffs may be less likely to bring actions to enforce the RICO provisions.

¶77 Focusing on compensation[269] and basic principles of fairness,[270] however, argues persuasively for a limited

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[266]The rule of joint and several liability for antitrust violations leading to treble damage awards is well-settled. See, e.g., Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 (5th Cir. 1976).

[267]See, e.g., Union Stodkyards Co. V. Chicago R. Co., 196 U.S. 217, 224 (1905); Sabre Shipping, supra Note 259, at 1343; Flintkote Co. v. Lysfjord, 256 F.2d 368 (9th Cir. 1957).

[268]The court's ability to sever certain issues and parties from the trial of the main claim certainly mitigates against the danger of over-complication. Professional Beauty Supply, supra Note 258, at 1185.

[269]See Notes 193-198 and accompanying materials supra.

[270]Judge Stephenson stated that "[t]he deciding factor in our decision is fairness between the parties." Professional Beauty Supply, supra Note 258, at 1185.

contribution rule in RICO litigation. There seems to be little reason for forcing one defendant to bear the entire treble damage burden when others were equally or even more at fault.[271] Moreover, the insolvency problem means that, where contribution is allowed, plaintiffs may stand a better chance of recovering.[272] Adopting a pro rata contribution rule would leave the deterrent function largely intact, because the minor participant in a conspiracy would not be encouraged to get involved just because his comparative liability would be slight in the event of a damage award.[273] Finally, such a rule would avoid the inequitable ability of plaintiffs to see only one defendant, thereby allowing the other wrong-doers to go scot-free.[274]

¶78 Courts can also avoid the complexity and plaintiff control problems by requiring, as some states already do,

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[271] See id. at 1185; Prosser, Torts §50, at 307 (4th ed. 1971).

[272] Cf. Notes 239-241 and accompanying materials supra; Notes 277-279 and accompanying materials infra.

[273] See Professional Beauty Supply, supra Note 258, at 1182 n. 4; Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975); Prosser, Torts §50, at 310 (4th ed. 1971).

[274] See Note 273 and cases cited supra.

that a defendant first pay the judgment before his cause of action for contribution accrues.[275] Besides eliminating the ability of a third party defendant to implead others prior to the plaintiff receiving his judgment, such a rule may extend the statute of limitations,[276] thus making the assets of RICO conspirators who are unknown or unavailable at the time of plaintiff's complaint available after the original limitations period has run.

I. INDEMNIFICATION BY LIABILITY INSURERS

¶79 Little, if any, case law exists concerning the duty of liability insurers to indemnify their policy-holders for treble damage payments.[277] Many, if not

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[275] Missouri, Louisiana, Delaware and Michigan apparently have such a contribution rule, which requires that the defendant be cast in judgment in order to have a cause of action for contribution. Prosser, Torts §50, at 307 n. 61.

[276] The fact that the statute of limitations has run against the original plaintiff's claim generally does not bar the defendant's suit for contribution. See Prosser, Torts §50, at 309.

[277] See Notes 62-64 and accompanying materials supra.

most, policies specifically exclude indemnity for intentional tort liability. Where the policy language is more ambiguous, however, the insurance issue may arise in section 1964(c) litigation.

¶80 The decision whether to permit RICO defendants to shift treble damage liability to their insurers is not an easy one. Permitting indemnification certainly favors the RICO plaintiff who faces a penniless violator who, himself, may be subject to the claims of numerous victims. In such situations, the availability of the large assets of the insurance company would foster compensation.

¶81 From a deterrence point of view, however, a rule permitting indemnification is undesirable.[278] As in the tax situation, the deterrent policy dictates that racketeers not be able to avoid all punishment through the use of insurance.

¶82 Given the availability of criminal sanctions, as well as civil divestiture and injunction under RICO,

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[278] Id. A similar approach was taken with respect to indemnification for penalties assessed under the Refuse Act, 33 U.S.C. §§407, 411 (1976). See Tug Ocean Prince, Inc. v. United States, aff'd in part, rev'd on other grounds, 584 F.2d 1151 (2d Cir. 1978), 436 F. Supp. 907 (S.D.N.Y. 1977). See also Haskell, Public Policy and the Insurance Policy, Ill. B.J. 780 (1970).

the best approach is probably to favor the primary goal of RICO treble damages: compensation of injured parties. Such an approach will change nothing in the usual case, where insurance policies by their very terms exclude indemnification for such wrongs. Moreover, focusing on compensation in this area will make compensatory arguments more viable in other crucial areas of RICO litigation.[279]

J. STATUTE OF LIMITATIONS

¶83 Undoubtedly the most troublesome issue facing RICO plaintiffs involves the applicable statute of limitations. Where a federally created right is unaccompanied by a special limitations provision, federal courts usually search for an appropriate state statute.[280] Such was the federal approach in antitrust litigation prior to the passage of a federal statute of limitations in 1955,[281] as well as in litigation under other, now repealed, treble damage

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[279] See Notes 222-241 and accompanying materials supra; Notes 280-94 and accompanying materials infra.

[280] See, e.g., Koller v. United States, 359 U.S. 309 (1959); Campbell v. Haverhill, 155 U.S. 610 (1895); Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964); Barnes Coal Corp. v. Retail Coal Merchants Association, 128 F.2d 645 (4th Cir. 1942).

[281] See Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 397-99 (1906).

provisions unaccompanied by statutes of limitations.[282] While the choice of which state law to apply in this area involves questions of forum-shopping falling outside the scope of these materials, the question of which statute within a state applies turns largely on how courts characterize RICO treble damages.[283]

¶84 The forum state's characterization of the statute will normally govern the choice of which limitations period to use. Depending on the state involved, the choice will be between any or all of the following statutes: those governing torts,[284] written or oral con-

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[282] See, e.g., Farris v. San Diego Federal Savings and Loan, 140 F. Supp. 703 (D.C. Cal. 1956) (holding that California State statute of limitations for actions created by statute other than penalties applies to Veteran's claim under Servicemen's Readjustment Act of 1944, 38 U.S.C.A. §1822 (1959) (repealed 1974)). 88 Stat. 1866.

[283] For a detailed discussion of the statute of limitations issue as it applies to section 1964(c) litigation, see, generally, The Statute of Limitations in a Civil RICO Suit for Treble Damages, infra (these materials).

[284] See, e.g., Park-In Theatres v. Paramount-Richards Theatres, 90 F. Supp. 727 (D. Del.), aff'd, 185 F.2d 407 (3d Cir.), cert. denied, 341 U.S. 950 (1950); Local Trademarks v. Price, 170 F.2d 715 (5th Cir. 1948).

tracts,[285] liabilities created by statute but not suits for penalties and forfeitures,[286] suits for penalties,[287] and relief not otherwise provided for.[288] The choice is significant, as the penalty limitations period is typically very short, one or two years,[288a] while the contract period, for example, is much longer.[289] Consequently, the applicable statute may greatly affect the RICO plaintiff's ability to bring his action at all.

¶85 Federal courts generally agree that treble damage actions sound in tort, and that the federal penalty

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[285] Such an approach has been taken in private actions brough under the Fair Labor Standards Act. See, e.g., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310 (8th Cir. 1946); Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945), aff'd, 327 U.S. 757 (1946).

[286] See, e.g., Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); Bomar v. Keyes, 162 F. 2d 136 (2d Cir.), cert. denied, 332 U.S. 825 (1947).

[287] See, e.g., Hoskins Coal and Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (5th Cir. 1948), cert. denied, 342 U.S. 947 (1952); Southern Package Corp. v. Walton, 196 Miss. 786, 18 So. 2d 458 (1944).

[288] See, e.g., Lassiter v. Guy F. Atkinson Co., 162 F.2d 774 (9th Cir.), vacated on other grounds, 166 F.2d 144 (9th Cir. 1947); Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D. Utah 1950).

[288a] The average period among the states considered is 1.5 years. See materials cited Note 283 supra, at 75.

[289] See Note 283 and accompanying materials supra.

statute of limitations does not apply.[290] Many state courts,[291] however, and at least one federal court[292] have held the antitrust suit to be one for penalty, to which the penalty provision applies. In the RICO situation, a focus on the substantive offenses could conceivably lead some courts to apply the contract statute of limitations.

¶86 The most common choice will likely be between the tort and penalty statutes of limitations. A survey of state law indicates that a number of states hold that the penalty provision applies to all actions for punitive or multiple damages.[293] The application of such a short statutory period is patently undesirable from the standpoint of the RICO plaintiff, who may be unaware that he even has a cause of action until the penalty statute of limitations has run.

¶87 For the above reasons, RICO plaintiffs must carefully choose their forum state to avoid the short penalty limitations period. Such a choice may not be available,

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[290] See Note 281 supra.

[291] See, e.g., Berg v. Baldwin 31 Minn. 541, 18 N.W. 821 (1884); Southern Package Corp. v. Walton, 196 Miss. 786, 18 So. 2d 458 (1944).

[292] See Haskell v. Perkins, 28 F.2d 222 (D.N.J. 1928).

[293] See, e.g., Note 287 and accompanying materials supra.

however, where both the forum and lex loci states opt for the penalty statute. In these instances, RICO plaintiffs should emphasize the compensatory policies underlying section 1964(c).[294] Surely the legislative intent dictates that a longer limitations period apply to ensure that victims of organized crime or racketeering-type activity as a class receive adequate compensation. Indeed, barring a substantial number of actions on the basis of a penalty label above runs counter to every expressed and implied purpose of section 1964(c). Arguing in this manner may allow RICO plaintiffs to avoid the penalty provisions even in those states which applied the shorter period in antitrust cases before 1955.

V. CONCLUSION

¶88 Confusion will probably continue to surround the characterization of multiple damage statutes, awards, and causes of action. Courts should avoid attaching neat labels to the concept, and should recognize it as a hybrid mode of recovery combining aspects of compensation and punishment, while not falling neatly into either category of legal sanction.

¶89 A frank approach to the realities of the difficult

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[294] See Notes 193-98 and accompanying materials supra.

war on organized crime and the systematic violation of the law by others is certainly in order, and will promote a broad, remedial approach to section 1964(c). Given the historical approach of courts to the general law of pecuniary recovery, however, the "jurisprudence of labels" is likely to live on in many jurisdictions. Careful scrutiny of what judges are really saying, and not merely what they appear to be saying on the surface, will help litigants avoid the pitfalls inherent in the characterization problem.

STANDING RULES AND THE RICO TREBLE DAMAGE ACTION

by

Valerie Seiling

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SUMMARY

¶ 1 The Racketeer Influenced and Corrupt Organizations Act (RICO)[1] provides for private treble damage actions. Section 1964(c) confers the right to sue for treble damages on "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter . . ."[2] This section is closely modelled after section 4 of the Clayton Act[3] which creates a private treble damage action for "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ."[4] Both statutes are worded broadly and on their face seem to create a private cause of action for anyone who can prove that an injury to his "business or property" was caused by a violation of either section 1962 or the anti-trust laws.

¶ 2 Despite such broad language, the federal courts severely limit the number of private plaintiffs in the anti-trust field through the enforcement of stringent standing

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[1] 18 U.S.C. §§ 1961-1968 (1976).

[2] 18 U.S.C. § 1964(C) (1976).

[3] 113 Cong. Rec. 17999 (1967) (Remarks by Senator Hruska upon introduction of S. 2048 and S. 2049).

[4] 15 U.S.C. § 15 (1976).

requirements.[5] The courts use a variety of tests[6] to determine standing for private antitrust litigation.[7] These materials examine those tests and the reasons that prompted their development.[8]

¶ 3 To date, the antitrust standing rules have not been applied to RICO treble damage actions.[9] Nor should those requirements be applied to RICO in the future. The antitrust laws differ in purpose and focus from RICO. Moreover, the policies that prompted the development of the antitrust standing rules are not found behind RICO. To burden the private RICO action with antitrust standing rules would only reduce the number of possible plaintiffs in an area that does not need such restrictions.

I. THE RATIONALE BEHIND THE ANTITRUST STANDING RULES

¶ 4 The antitrust laws are designed to prevent restraints

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[5] "Standing" requirements are designed to help courts determine who are proper parties to the litigation.

[6] See notes 43-88 and accompanying text infra (the "business or property" test); see notes 89-132 and accompanying text infra (the "direct injury" test); see notes 133-58 and accompanying text infra (the "target area" test).

[7] This paper deals only with the private plaintiff in a treble damage action. For a discussion of government treble damage suits and parens patriae actions under the Clayton Act, see generally II P. Areeda and D. Turner, Antitrust Law, ¶ 342 (1978).

[8] See notes 10-29 and accompanying text infra.

[9] This may be because the overwhelming majority of RICO cases have been brought under its criminal provisions. To date, only four civil actions under RICO have been reported. One case was dismissed for improper venue. King v. Vesco, 342 F. Supp. 120 (N.D. Cal. 1972). The second case, involving a securities fraud, is still pending in a Third Circuit district court. Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978). Neither of these cases address the standing issue.

on trade and to protect free competition.[10] The civil treble damage action under Section 4 of the Clayton Act helps achieve those objectives by deterring violations and compensating injured parties.[11] Although courts repeatedly stress the importance of the private treble damage action, they continue to limit the number of prospective plaintiffs by means of various standing requirements. The courts are actually balancing the positive policies of compensation and deterrence against countervailing policies supporting standing limitations.[12]

¶ 5 Several policies are frequently cited by courts denying standing to prospective plaintiffs. Standing is often

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[10] In Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973), the court stated:

> The goal of the Federal antitrust laws is to safeguard the interplay of competitive forces in the far-flung commerce of the Nation. The Sherman Act . . . "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." [Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958)]. Its "fundamental purpose . . . was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraints of trade." [Charles A. Ramsay Co. v. Associated Billposters, 260 U.S. 501, 512 (1923)]. The Clayton Act . . . had these wholesome aims no less in view, but sought its contribution to them through a regulatory technique of its own.

Id. at 1319-20.

[11] See Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 (1978); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n. 10 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

[12] Berger and Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 850 (1977) [hereinafter cited as Berger and Bernstein].

denied because the recoveries sought are deemed duplicative,[13] ruinous,[14] speculative,[15] or windfall.[16] In addition, courts sometimes justify standing requirements on the ground that opening the doors would put too much of an administrative burden on the courts.[17]

¶ 6 The policy against duplicative recoveries is well-supported since double liability may force defendants to pay six-fold damages.[18] The policy against ruinous recoveries is closely related. Ruinous recoveries bankrupt defendants and may unintentionally cause increased concentration in an industry.[19] Such a result is counter-productive to the

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[13] See Hawaii v. Standard Oil Co., 405 U.S. 251, 262-64 (1972); Loeb v. Eastman Kodak, 183 F. 704, 709 (3d Cir. 1910); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 484 (S.D.N.Y. 1973).

[14] See Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972).

[15] Pitchford v. PEPI, 531 F.2d 92, 97 (3d Cir. 1975), cert. denied, 426 U.S. 935 (1976); Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269, 1273-74 (2d Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

[16] See Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956).

[17] See notes 27-29 and accompanying text infra.

[18] See Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 30 (E.D. Pa. 1970), aff'd per curiam sub nom. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971). See also Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 484 (S.D.N.Y. 1973).

[19] Berger and Bernstein, supra note 12 at 852.

purposes behind antitrust legislation that seek to protect free competition.[20]

¶ 7 The policy against windfall recoveries usually means that plaintiffs should not receive multiple recoveries for a single injury.[21] The antitrust courts, however, also interpret this policy to mean that plaintiffs whose injuries are too incidentally caused are not entitled to recover under Section 4.[22] Some courts adopt the reasoning that "strangers" to a commercial relationship would be recipients of windfalls if allowed to recover treble damages.[23]

¶ 8 Denying a plaintiff standing on the ground of speculative injury implies that the claimant cannot prove that the claimant cannot prove that the injury exists.[24] A court may suspect that a plaintiff with a dubious claim is suing in order to coerce a settlement from a defendant who wishes to avoid expensive litigation. The problem with this argument is that a court prejudices the merits of the plaintiff's claim as a matter of law, before the claimant has an oppor-

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[20] See supra note 10.

[21] Berger and Bernstein, supra note 12 at 853.

[22] See e.g. Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

[23] See P. Areeda, Antitrust Analysis 72 (1974).

[24] Berger and Bernstein, supra note 12 at 854.

tunity to present all his evidence.[25] Moreover, such a standing barrier may conflict with the Supreme Court's liberal view regarding the quantum of evidence necessary to get to the jury on questions of injury and damages.[26]

¶ 9 The administrative burden argument has some merit in light of the increasing number of treble damage actions.[27] The vitality of this policy argument, however, is open to serious question after the recent Supreme Court decision in Reiter v. Sonotone, Corp.[28] In that case, the Court made it clear that concerns over burdening already crowded dockets could not be a "controlling consideration" in a section 4 standing determination based on a "business or property" inquiry.[29]

II. THE ANTITRUST STANDING RULES

¶ 10 The courts recognize that antitrust violations inherently create endless ripples of injury.[30] Nevertheless, the courts limit the number of potential plaintiffs through

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[25] Berger and Bernstein, supra note 12 at 854-55. Cf. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (Court laid down stringent rules for dismissal of a complaint).

[26] Berger and Bernstein, supra note 12 at 855 n. 216. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969), rev'd on other grounds, 401 U.S. 321 (1971); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946).

[27] See the court's discussion of the problem in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[28] 99 S. Ct. 2326 (1979). For a discussion of this case, see notes 71-78 and accompanying text infra.

[29] Id. at 2333.

[30] Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

the use of standing rules.[31] Those rules screen potential plaintiffs[32] and dispose of many cases at an early stage in the judicial process.[33]

¶ 11 Standing to sue in antitrust litigation has a different focus than traditional Constitutional law standing.[34] In Constitutional litigation, the threshold inquiry is injury in fact.[35] That requirement is mandated by the Constitution's Article III[36] "case or controversy" language and by judicial policies of self-restraint.[37] Antitrust standing, on the

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[31]As the Supreme Court said in Hawaii v. Standard Oil Co.: "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [citation omitted] 405 U.S. 251, 263 n. 14 (1972).

[32]Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1146 (6th Cir. 1975).

[33]The defendant typically raises the standing issue by making a Rule 12(b)(6) motion (Fed. R. Civ. P. 12(b)(6))), or by a motion for summary judgment (Fed. R. Civ. P. 56).

[34]Berger and Bernstein, supra note 12 at 813 n. 11. See also Bogosian v. Gulf Oil Corp., 561 F.2d 434, 447 n. 6 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

[35]Berger and Bernstein, supra note 12 at 813 n. 11. See Warth v. Seldin, 422 U.S. 490, 498-499 (1975). For a general discussion of standing in constitutional litigation, see J. Nowak, R. Rotunda, and J. Young, Handbook on Constitutional Law, 68-85 (1978) [hereinafter cited as Nowak].

[36]U.S. Const. art III, § 2, cl. 1.

[37]Article III, Section 2 of the Constitution defines the limited jurisdiction of the federal courts:

> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls;

other hand, goes beyond the initial inquiry of injury in fact.[38] To establish standing, an antitrust plaintiff must show two elements: first, an injury to his "business or property,"

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> - to all Cases of admiralty and maritime Jurisdition; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the States where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Courts have extended the case or controversy language to mean that federal courts may not give advisory opinions, decide moot questions, or entertain cases that are feigned, unripe, premature or abstract. See Nowak, supra note 35 at 54-68.

[38] Berger and Bernstein, supra note 12 at 813 n. 11. The antitrust plaintiff must allege injury to his "business or property" and that economic injury satisfies the requirement of injury in fact.

and second, that his injury was "by reason of" a violation of the antitrust laws.[39]

¶ 12 The dividing line between the "business or property" requirement and the causation requirement is not as distinct as it seems. A plaintiff may not have a cause of action because he does not have injury to his "business or property" within the meaning of section 4.[40] A different court, however, may deny standing to a plaintiff similarly situated on the ground that the injury, although recognized as one to "business or property," is too remote or indirect like "by reason of" an antitrust violation.[41] Thus, a court may look at the same aspect of the case and use either of the

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[39]These two requirements are deduced from the statutory language of § 4 of the Clayton Act; 15 U.S.C. § 15 (1976). For cases that explicitly require the two steps, see Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 500 (10th Cir. 1978); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31 481 F.2d 122, 126 (9th Cir.), cert. denied, 414 U.S. 1045 (1973); SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 171 (2d Cir.) cert. denied, 395 U.S. 943 (1969).

[40]E.g. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (indirect purchasers not injured in their business or property within the meaning of § 4).

[41]E.g., Donson Stores, Inc. v. Am. Bakeries Co., 58 F.R.D. 481, 485 (S.D.N.Y. 1973) (retail grocery store operators were denied standing because the alleged price-fixing occurred at another point in the chain of supply and therefore, their injury was indirect).

two standing rules to decide it.[42]

A. The "Business or Property" Requirement

¶ 13 An antitrust plaintiff suing for treble damages must first show that the alleged injury was to his "business or property."[43] The courts interpret "business" in its ordinary, usual sense.[44] The term encompasses practically all industrial and commercial enterprises,[45] including those of

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[42] E.g., Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The Supreme Court held that indirect purchasers were not injured in their "business or property" within the meaning of § 4. The Court of Appeals, however, had granted standing on the ground that the plaintiffs were within the target area of the economy which reasonably could have been foreseen would be endangered by the breakdown of competitive conditions. Illinois v. Ampress Brick Co., 536 F.2d 1163, 1167 (7th Cir. 1976). The lower court dealt with the case as a causation problem; the Surpeme Court explicitly denied addressing standing, 431 U.S. at 728 n. 7, and dealt with the issue as that of the substantive scope of § 4. See notes 126-30 and acoompanying text infra for discussion of this case.

[43] E.g. Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 500 (10th Cir. 1978); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir.), cert. denied, 414 U.S. 1045 (1973); Cleary v. Chalk, 488 F.2d 1315, 1319 n. 17 (D.C. Cir. 1973), cert. denied 416 U.S. 938 (1974).

[44] Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942).

[45] Blackford, "Business or Property" Entitled to Protection Under Section 4 of the Clayton Act, 26 Mercer L.R. 737, 738 (1975) [hereinafter cited as Blackford]. See Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972) (Supreme Court said that "business or property" refers to "commercial interests or enterprises"). But cf. Reiter v. Sonotone, 99 S. Ct. 2326, 2332 (1979) (the Supreme Court held that "commercial interests or enterprises" could not be interpreted to mean that "only injuries to a business entity are within the ambit of § 4. See notes 70-78 and accompanying text infra for discussion of this case).

non-profit plaintiffs[46] and labor unions.[47] The plaintiff must have, however, a legal right to engage in the business in order to obtain protection under section 4.[48] Judicial decisions as to whether claims are injuries to business or property may mask policy decisions as to what kinds of interests deserve protection.[49]

¶ 14 Loss of employment after an alleged antitrust violation is sometimes said to constitute injury to business or property.[50] Employees such as commission salesmen or stockbrokers that can be categorized as quasi-businessmen generally are recognized as having injury to business or property.[51]

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[46] II P. Areeda and D. Turner, Antitrust Law, ¶ 337b (1978). See also Friends of Animals, Inc. v. American Veterinary Med. Ass'n, 310 F. Supp. 1016 (S.D.N.Y. 1970). But cf. Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934, 938 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977) (non-profit condominium corporation was not injured in its "business or property" since the plaintiff was merely "a conduit in collecting the assessments and paying the rent to the defendants").

[47] Areeda, supra note 46 at ¶ 334b. See Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976); Int'l Ass'n Heat and Frost Insulators and Asbestos Workers v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973), mod. on other grounds, 494 F.2d 1353 (1974).

[48] Blackford, supra note 45 at 743. E.g. Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922).

[49] Berger and Bernstein, supra note 12, at 811 n. 8.

[50] Areeda, supra note 46, at ¶ 338a.

[51] Id. E.g., Quinonez v. Nat'l Ass'n of Securities Dealers, Inc., 540 F.2d 824, 829-30 (5th Cir. 1976) (securities stockbroker was injured in his "business" when alleged antitrust violation deprived him of the opportunity to apply the skills he had developed); Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967) (a commission salesman with an exclusive territory and established clientele was injured in his "business or property" when he suffered a loss of employment due to antitrust violation).

On the other hand, ordinary employees discharged after an alleged unlawful merger are usually held not injured in their business or property.[52] The Third,[53] Fifth,[54] and Seventh Circuits[55] generally hold that the loss of employment or the opportunity to be employed is an injury to business or property. These circuits, however, sometimes require that employees be the targets of the defendants' activities.[56]

¶ 15 Frequently, a would-be businessman claims that an antitrust violation prevented his entry into a line of business.[57] The majority view holds that the plaintiff need

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[52]Areeda, supra note 46 at ¶ 338b. See Reibert v. Atlantic Richfield Co., 471 F.2d 727, 730 (10th Cir.), cert. denied, 411 U.S. 938 (1973).

[53]See Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 100 (3d Cir.), cert. denied, 434 U.S. 823 (1977); Asbestos Workers v. United States Contractors Ass'n, 483 F.2d 384, 394 (3d Cir. 1973), modified 494 F.2d 1353 (1974).

[54]See Quinonez v. Nat'l Ass'n of Securities Dealers, Inc., 540 F.2d 824 (5th Cir. 1976); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976); Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967).

[55]See Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 334 (7th Cir. 1967); Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942).

[56]See Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1177 (5th Cir. 1976); Asbetos Workers v. United States Contractors Ass'n, 483 F.2d 384, 396-97 (3d Cir. 1973), modified 494 F.2d 1353 (1974).

[57]See Solinger v. A & M Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978), cert. denied, 99 S. Ct. 1999 (1979); Hecht v. Pro-Football, Inc., 570 F.2d 982, 987-88 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978); Martin v. Phillips Petroleum Co., 365 F.2d 629, 632 (5th Cir.), cert. denied, 385 U.S. 991 (1966); Peller v. Int'l Boxing Club, 227 F.2d 593 (7th Cir. 1955); Waldron v. British Petroleum Co., 231 F. Supp. 72, 81 (S.D.N.Y. 1964).

not have a business already in existence to sue for treble damages.[58] The rationale is that there should not be a difference between an individual who is driven out of business and one who is prevented from going into business.[59]

¶ 16 If a plaintiff alleges that he was prevented from starting a business, he must demonstrate that he intended and was prepared to engage in that business.[60] Mere hope or expectation is not enough.[61] In order to determine whether a prospective businessman has a business or property interest under the meaning of section 4, the courts will generally look at the following four factors:

(1) the background and experience of the plaintiff in his prospective business;

(2) any affirmative action on the part of the plaintiff to engage in the proposed business;

(3) the ability of the plaintiff to finance the business and purchase equipment and facilities; and

(4) the consummation of any contracts by the plaintiff.[62]

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[58]Blackford, supra note 45 at 739. See e.g., American Banana Co. v. United Fruit Co., 166 F.261 (2d Cir. 1908), aff'd on other grounds, 213 U.S. 347 (1909); But cf. Duff v. Kansas City Star Co., 299 F.2d 320 (8th Cir. 1962) (plaintiff had to have existing business or property interest).

[59]Blackford, supra note 45 at 739.

[60]Waldron v. British Petroleum Co. 231 F. Supp. 72, 81 (S.D.N.Y. 1964).

[61]Blackford, supra note 45, at 739; see Peller v. Int'l Boxing Club, 227 F.2d 593, 596 (7th Cir. 1955).

[62]Waldron v. British Petroleum Co., 231 F. Supp. 72, 81-82 (S.D.N.Y. 1964).

Failure on one or more of these factors means that the plaintiff's interest will be categorized as mere expectancy and standing will be denied.[63]

¶ 17 The second term, "property," is held to have a "naturally broad and inclusive meaning."[64] It is wider in scope and more extensive that the word "business."[65] Property includes, for example, expenditures to defend against patent infringement suits and a labor union's opportunity to obtain members.[66] The interest of a taxpayer or citizen, however, is not considered business or property.[67] Personal injuries[68] and loss of consortium are also not injuries to property under section 4.[69]

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[63] E.g. Martin v. Phillips Petroleum Co., 365 F.2d 629, 633-34 (5th Cir.), cert. denied, 385 U.S. 991 (1966) (the plaintiff was not injured in his "business" since he had no experience in the prospective business, could not finance the project, made no investment in facilities or equipment, and had no contracts).

[64] Reiter v. Sonotone, 99 S. Ct. 2326, 2330 (1979).

[65] Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

[66] See Int'l Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973), mod. on other grounds, 494 F.2d 1353 (1974); Tugboat v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976).

[67] See Ragar v. T.J. Raney & Sons, 388 F. Supp. 1184 (E.D. Ark.) aff'd, 521 F.2d 795 (8th Cir. 1975) (citizens could not sue on behalf of injured municipality); Cosentino v. Carver-Greenfield Corp., 433 F.2d 1274 (8th Cir. 1970) (private citizens lacked standing to sue on behalf of injured municipality).

[68] Hamman v. United States, 267 F. Supp. 420, 432 (D. Mont. 1967), appeal dismissed, 399 F.2d 673 (9th Cir. 1968).

[69] Id.

¶ 18 The circuits disagreed whether consumers were injured in their business or property when forced to pay higher prices as a result of antitrust violations.[70] The Supreme Court, however, recently settled this question in Reiter v. Sonotone.[71] Consumers who paid a higher price for hearing aids purchased for personal use were held to sustain an injury in their within the meaning of section 4.[72] The Court reasoned that money was clearly a form of property[73] and the plaintiffs' status as consumers could "not change the nature of the injury . . . suffered or the intrinsic meaning of 'property.'"[74] The Court recognized that "[i]t is in the sound commercial interests of the [consumers] of goods and services to obtain the lowest price possible . . ."[75] Consequently, the Court found injury to the consumers' property on the basis of retail purchasing, a commercial transaction.

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[70] See Beckers v. Int'l Snowmobile Indus. Ass'n, 581 F.2d 1308 (8th Cir. 1978) (consumers did not suffer injury to "business or property" under Clayton Act); Theophil v. Sheller-Globe Corp., 446 F. Supp. 131 (E.D.N.Y. 1978) (private consumers had standing when forced to pay inflated price); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221 (D. Calif. 1977) (consumers not claiming injury to any business or commercial interest lack standing); Weinberg v. Federated Dep't Stores, Inc.. 426 F. Supp. 880, 885 (N.D. Cal. 1977) ("business or property" does not include consumer pocketbook interests); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973) (consumers had standing).

[71] 99 S. Ct. 2326 (1979).

[72] Id. at 2331.

[73] Id. at 2330.

[74] Id. at 2332.

[75] Id.

¶ 19 The Reiter Court, however, refused to limit business or property to business interests, and explained that a previous decision[76] defining business or property as "commercial interests or enterprises" could not be interpreted to mean that "only injuries to a business entity are within the ambit of § 4."[77] Higher prices were considered an injury to property as they were a part of commercial transactions which were clearly a part of commercial interests.[78]

B. The Second Step: The Causation Requirement

¶ 20 The "by reason of" language of section 4 requires a causal relationship between the antitrust violation and the plaintiff's injury. This concept is similar to the proximate cause theory in torts.[79] Legal causation or proximate cause requires not only "but for" causation, but also a sufficiently close relationship between the plaintiff and defendant.[80]

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[76]The Supreme Court was referring to Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972). In Hawaii, the Court held that injury to a state's economy, for which the state sought redress as parens patriae, was not included under § 4. The Court noted that "business or property" referred to "commercial interests or enterprises," and denied recovery because injury to a state's economy did not harm commercial interests, 405 U.S. at 264.
Congress, however, legislatively overruled Hawaii with the passage of the Antitrust Improvements Act of 1976, 15 U.S.C. § 15c (1976). That act created a parens patriae action for § 4 of the Clayton Act. RICO does not have a provision for the parens patriae action.

[77]99 S. Ct. at 2332.

[78]Id.

[79]For an explanation of the proximate cause theory in torts, see W. Prosser, Handbook of the Law of Torts, 236-70 (4th ed. 1971) [hereinafter cited as Prosser].

[80]Prosser, supra note 79, at 236, 244.

In torts, the defendant's liability is often determined in terms of the "duty" concept.[81] The defendant's liability depends upon whether the plaintiff is a risk within the scope of any duty owed the plaintiff by the defendant.[82] In a private antitrust action, however, there is no comparable duty element. As a result, courts must consider cases in terms of directness of injury.[83]

¶ 21 The courts disagree as to what constitutes a sufficiently direct injury.[84] Consequently, the circuits devised a number of different tests for directness that reflect competing theories of causation.[85] In general, the tests can be put into three categories: first, the older and stricter "direct-injury" test, second, the more flexible "target-area" test, and third, the most recent "zone of interests" test.[86] Although each test emphasizes different factors,[87] all

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[81] See Prosser, supra note 79, at 244-45, 254-63. See also Judge Cardozo's opinion in Palsgraf v. Long Island R.R., 248 N.Y. 339, 340-47, 162 N.E. 99 (1928).

[82] See Prosser, supra note 79, at 244-45, 254-63.

[83] Pollock, The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action, 57 Nw. U.L. Rev. 691, 700 (1963).

[84] See Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148 (6th Cir. 1975).

[85] Id.

[86] See notes 89-178 and accompanying text infra for detailed description of each test and its application.

[87] The direct-injury test, for example, is primarily concerned with the relationship between the plaintiff and defendant.

three examine the relationship between the plaintiff and defendant, the nature of the industry involved, the purpose of the antitrust laws and the alleged effect of the antitrust violation upon the plaintiff.[88]

1. The Direct-Injury Test

¶ 22 The direct-injury test focuses primarily on the relationship between the plaintiff and defendant.[89] It permits actions only by plaintiffs whose injuries are considered to be "direct" or "proximate" result of prohibited anticompetitive activity.[90] If the plaintiff is separated from the defendant by an intermediate antitrust victim,[91] standing is

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[88] E.g. Cromar Co. v. Nuclear Materials Equipment Corp., 543 F.2d 501, 506 (3d Cir. 1976); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

[89] In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 127 (9th Cir.), cert. denied, 414 U.S. 1045 (1973). For a discussion of the direct-injury rule, see Berger and Bernstein, supra note 12 at 813-30.

[90] See Nationwide Auto Appraiser Serv. v. Ass'n of Cas. & Sur. Cos., 382 F.2d 925, 929 (10th Cir. 1967); Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); New Sanitary Towel Supply v. Consolidated Laundries Corp., 211 F. Supp. 276, 279 (S.D.N.Y. 1962), adhered to on reargument 213 F. Supp. 123, 124 (S.D.N.Y. 1963); Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322, 327 (S.D.N.Y. 1959); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956).

[91] The direct-injury test is similar to older contract notions of privity. Some courts have defined directness of injury in terms of whether the plaintiff is in privity with the defendant. See Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963). Most antitrust courts, however, reject privity as the standard because it denies standing to competitors. See South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), cert. denied, 385 U.S. 934 (1966). See also Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 689 (8th Cir. 1966); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955).

usually denied by attaching conclusory labels to the injury such a "indirect,"[92] "remote,"[93] "incidental,"[94] or "consequential."[95]

¶ 23 The direct injury test originated in the Third Circuit in Loeb v. Eastman Kodak Co.[96] In that case, a corporate stockholder was denied standing to challenge an alleged antitrust violation that injured the corporation.[97] The stockholder's injury was deemed "indirect, remote, and consequential."[98] The court feared duplicative recoveries would result if every shareholder or creditor of an injured corporation was allowed to sue for treble damages.[99] Consequently, the court held that the alleged injury was sustained by the corporation and stockholders could not sue.[100]

¶ 24 The Loeb reasoning also extends to other categories of plaintiffs. Some courts use a strict categorization ap-

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[92] Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910) (decided under § 7 of the Sherman Act, the predecessor of § 4 of the Clayton Act).

[93] Id.

[94] Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967).

[95] Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910). See Berger and Bernstein, supra note 12, at 813 n. 12.

[96] 183 F. 704 (3d Cir. 1910).

[97] Id. The corporation was forced out of business by the defendant's alleged antitrust violations. See also note 92, supra.

[98] Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).

[99] Id.

[100] Id.

proach whereby plaintiffs are neatly granted or denied standing depending on the descriptive category into which they fall.[101] New types of plaintiffs are either fit into existing categories or placed into newly created ones.[102] Using categorization, the courts deny standing to patentees,[103] franchisors,[104] partners,[105] corporate officers[106] and most suppliers.[107] The circuits, however, differ as to whether

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[101] Berger and Bernstein, supra note 12, at 820.

[102] Id. E.g., Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269, 1274 (2d Cir. 1975), cert. denied, 423 U.S. 1073 (1976) (the court said that "[t]he instant plaintiffs, consumers of a non-target, are at least equally remote [as other categories that are usually denied standing]).

[103] E.g., SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 943 (1969); Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678, 679-80 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956).

[104] See Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971); Nationwide Auto Appraiser Serv. v. Ass'n of Cas. & Sur. Cos., 382 F.2d 925, 929 (10th Cir. 1967).

[105] See Coast v. Hunt Oil Co., 195 F.2d 870, 871 (5th Cir.), cert. denied, 344 U.S. 836 (1952).

[106] See Pitchford v. PEPI, 531 F.2d 92, 97 (3d Cir. 1975), cert. denied, 426 U.S. 935 (1976); Gerli v. Silk Ass'n of America, 36 F.2d 959, 960 (S.D.N.Y. 1929).

[107] See John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 500 (9th Cir. 1977) (beer supplier denied standing); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971) (supplier denied standing); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963) (supplier's injury was "too far removed from the direct injury); Minersville Coal Co. v. Anthracite Export Ass'n, 335 F. Supp. 360, 365 (M.D. Pa. 1971) (supplier denied standing); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956) (supplier denied standing). But cf. Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 688-89 (8th Cir. 1966) (the court characterized the plaintiff as a competitor, rather than a supplier, and granted standing).

employees,[108] lessors[109] and parties in the chain of distribution or supply have standing.[110]

¶ 25 Employees of an injured corporation are frequently denied standing on the ground that their injured interests are not "business or property."[111] The courts, however, also use the causation requirement to limit employee standing. The Fifth and Seventh Circuits allow employee antitrust lawsuits.

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[108]For circuits that allow employee standing, see Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99 (3d Cir.), cert. denied, 434 U.S. 823 (1977); Quinonez v. Nat'l Ass'n of Securities Dealers, Inc., 540 F.2d 824, 829-30 (5th Cir. 1976); Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176-77 (5th Cir. 1976); Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 334 (7th Cir. 1967); Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 701 (D. Colo. 1970).

For circuits denying standing to employees, see Pitchford v. PEPI, Inc., 531 F.2d 92, 97 (3d Cir. 1975), cert. denied, 426 U.S. 935 (1976); Contreras v. Grower Shipper Vegetable Ass'n, 484 F.2d 1346, 1347 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974) ("employees" were farmers); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 732 (10th Cir.), cert. denied, 411 U.S. 938 (1973); Miley v. John Hancock Mut. Life Ins. Co. 148 F. Supp. 299, 302-03 (D. Mass.), aff'd per curiam, 242 F.2d 758 (1st Cir.), cert. denied, 355 U.S. 828 (1957).

[109]For decisions granting standing to lessors, see Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975); Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957); Johnson v. Ready Mix Concrete Co., 318 F. Supp. 930 (D. Neb. 1970).

For cases that deny lessors standing, see Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), cert. denied, 352 U.S. 890 (1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), aff'd, 211 F.2d 405 (3d Cir. 1954), cert. denied, 348 U.S. 828 (1954).

[110]See ¶¶ 27-30 infra on passing-on problem.

[111]See discussion supra ¶ 14.

They consider such injury "direct" rather than incidental.[112] District courts in the Second Circuit, however, disagree on employee standing.[113] Some Second Circuit cases indicate that the courts may require competitive injury for standing.[114] If so, employee antitrust suits would fare poorly in the Second Circuit. The Third Circuit rejects the "competitors only" rule and opts for a more eclectic approach.[115] Consequently, employee antitrust suits brought in the Third Circuit would probably survive motions for summary judgment.

¶ 26 The categorization approach produces similar conflicts among the circuits in suits by lessors. Typically, a landlord with a percentage lease sues a third party alleging that that party's anticompetitive conduct damaged the tenant's

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[112] See Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 334 (7th Cir. 1967). These two cases used the "business or property" requirement to categorize the plaintiffs.

[113] Compare Michelman v. Clark-Schwebel Fiber Glass Corp., 1974-1 Trade Cas. ¶ 74, 974 (S.D.N.Y. 1974), rev'd on other grounds, 534 F.2d 1036 (2d Cir. 1976) (employee had standing) and Vandervelde v. Put & Call Brokers & Dealers Ass'n, 334 F. Supp. 118, 153-54 (S.D.N.Y. 1972) (employee had standing to recover salary loss) with Hans Hansen Welding Co. v. American Ship Bldg. Co., 1973-2 Trade Cas. ¶ 74, 739 (S.D.N.Y. 1973) (employees denied standing) and Bywater v. Matshushita Elec. Indus. Co., 1971 Trade Cas. ¶ 73, 759 (S.D.N.Y. 1971) (employees denied standing because injury was too "remote"). See also Berger and Bernstein, supra note 12, at 823.

[114] E.g. GAF Corp. v. Circle Floor Co., 463 F.2d 752, 758 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973); Uniroyal, Inc. v. Jetco Auto Serv., Inc., 461 F. Supp. 350, 356 (S.D.N.Y. 1978).

[115] See Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99-100 (3d Cir.), cert. denied, 434 U.S. 823 (1977).

business and consequently reduced the landlord's rent.[116] The Second and Third Circuits label such injury too remote for antitrust standing.[117] The Seventh, Eighth, and Ninth Circuits, however, reach the opposite conclusion and allow standing.[118]

¶ 27 In the past, circuits using a categorization approach split over questions involving the "passing-on" of injury in chains of distribution and supply.[119] Defendants typically asserted that plaintiffs passed on any overcharges to customers.[120] Indirect purchasers, on the other hand, wanted to use the pass-on theory offensively to recover treble damages for overcharges allegedly passed on to them.[121]

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[116] E.g. Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 316 (E.D. Pa. 1953), aff'd, 211 F.2d 405 (3d Cir. 1954), cert. denied, 348 U.S. 828 (1954).

[117] See Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), cert. denied, 406 U.S.930 (1972); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518, 519 (3d Cir.), cert. denied, 352 U.S. 890 (1956).

[118] See Hoopes v. Union Oil Co., 374 F.2d 480; 485-86 (9th Cir. 1967); Congress Bldg. Corp. v. Loew's, Inc., 246 F.2d 587, 594-95 (7th Cir. 1957); Johnson v. Ready Mix Concrete Co., 318 F. Supp. 930, 933 (D. Neb. 1970).

[119] Compare, In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974) (indirect purchasers could sue) and Lefrak v. Arabian Am. Oil Co., 405 F. Supp. 597 (E.D.N.Y. 1975) (allowed indirect purchasers to sue) with Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973) (indirect purchasers could not sue) and Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff'd per curiam sub nom. Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (indirect purchasers could not sue).

[120] E.g. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487-88 (1968).

[121] E.g. Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).

¶ 28 The passing-on dilemma, however, no longer exists. In Hanover Shoe, Inc. v. United Shoe Machinery Corp.,[122] The Supreme Court rejected the defense that plaintiffs passed on overcharges to customers. In that case, a shoe manufacturer sought treble damages from a manufacturer of shoe machinery. The plaintiff alleged that the defendant's policy of leasing machinery and refusing to sell it was an antitrust violation.[123] In effect, the Court allowed direct purchasers to recover illegal overcharges whether or not they had passed them on to customers.[124] The Hanover Court believed that proof of passing-on would require complex and uncertain economic theory and data and thus entail an "unsurmountable" evidentiary burden.[125]

¶ 29 The Supreme Court used the same reasoning to reject the offensive use of passing-on. In Illinois Brick Co. v. Illinois,[126] the Court held that indirect purchasers were not injured in their "business or property" under the meaning of section 4 and thus, could not sue.[127] The Court

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[122] 392 U.S. 481 (1968).

[123] Id. at 483-84.

[124] Id. at 494.

[125] Id. at 493.

[126] 431 U.S. 720 (1977).

[127] Id. at 729.
The Court, however, did name narrow exceptions to the holding: when indirect purchasers sustain section 4 injuries through "cost-plus" contracts or through other arrangements between direct purchasers and subsequent purchasers that circumvent "market forces" and hence avoid problems of proof. 431 U.S. at 736. For a later case falling under an exception to Illinois Brick, see In re Sugar Antitrust Litigation, 579 F.2d 13, 19 (3d Cir. 1978).

examined the policy issues raised by the pass-on dilemma and concluded that only direct purchasers should be allowed to sue.[128] Indirect purchasers were considered to have little incentive to sue since they had such a small amount at stake.[129] The deterrence objective of the antitrust treble damage suit would best be furthered by allowing only direct purchasers to sue.[130]

¶ 30 The passing-on problem illustrates the arbitrariness of the categorization approach. Using categories, a court may grant or deny standing merely by attaching conclusory labels such as indirect purchaser[131] or lessor[132] without regard to who actually sustained injury.

2. The Target Area Test

¶ 31 The target area test focuses on the claimant's relationship to the area of the economy allegedly injured by the antitrust violation.[133] Plaintiffs held to be "targets" of a violation, or within its "target area" are given standing,

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[128] Illinois Brick Co. v. Illinois, 431 U.S. 720, 729-46 (1977). The Court noted that it was not addressing a standing issue, but rather the substantive scope of § 4, id. at 728 n. 7. But, in effect, the decision held that indirect purchasers had no standing since they could not, as a matter of law, sustain injury to business or property under § 4.

[129] Id. at 725-26.

[130] Id. at 745-46.

[131] See Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[132] See, e.g., Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972).

[133] E.g., Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

while others are denied standing because of indirectness.[134] Although the target area test is more flexible than the direct-injury test, it too suffers from difficulties of application.

¶ 32 The original target area test allowed standing if a plaintiff could show that "he [was] within that area of the economy . . . endangered by a breakdown of competitive conditions in a particular industry."[135] Difficulties with the test emerged when courts tried to determine which parties were actually within the endangered area. Arguably, the target area could include any claim of damage in any market adversely affected by an antitrust violation.[136]

¶ 33 In an effort to define the periphery of the target area, circuits added other restrictions to the test. The Ninth Circuit attached a "foreseeability" requirement; a plaintiff was within the target area of a violation if he "[was] in the area which it could reasonably be foreseen

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[134] Compare Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292, 1296 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) (plaintiff outside target area denied standing) with Blankenship v. Hearst Corp., 519 F.2d 418, 426 (9th Cir. 1975) (plaintiff in target area had standing).

[135] Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).

[136] See Berger and Bernstein, supra note 12 at 831. See also Int'l Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d 384, 397-98 (3d Cir. 1973), modified on other grounds, 494 F.2d 1353 (3d Cir. 1974).

would be affected . . ."[137] For example, a newspaper distributor had standing to sue a newspaper publisher for an alleged antitrust attempt to fix the price at which carriers supplied by the plaintiff could sell to their customers.[138] The court held it was foreseeable that such a price-fixing scheme would affect the distributors.[139]

¶ 34 A number of courts extended the foreseeability target area test and asked whether the plaintiff had been "aimed at."[140] In the Fifth Circuit, for example, union employees were given standing because the court determined that the anticompetitive conspiracy was aimed at them as much as it was aimed at their employer.[141] Another attempt at limiting the target area required the plaintiff to show that the violation was a "material cause" or substantial factor "in the occurrence of the damage."[142] A recent case,

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[137] Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir.), cert. denied, 379 U.S. 880 (1964). An earlier decision in the Ninth Circuit laid the groundwork for the foreseeability requirement by asking whether the plaintiff had been "aimed at." Karseal v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955).
For a discussion of the appropriateness of the foreseeability requirement, see Berger and Bernstein, supra note 12, at 835.

[138] Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975).

[139] Id. at 426. See also Solinger v. A & M Records, Inc., 586 F.2d 1304, 1311 (9th Cir. 1978), cert. denied, 99 S. Ct. 1999 (1979).

[140] See Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1177 (5th Cir. 1976); Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292, 1296 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972).

[141] Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1177 (5th Cir. 1976).

[142] E.g. Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

for example, denied a plaintiff standing on the ground that the plaintiff's insubordination alone would have justified termination of his employment.[143] Consequently, the alleged antitrust violation was not the material cause of his injury.[144]

¶ 35 Another addition to the target area test requires the plaintiff to show injury of a type that the antitrust laws were intended to prevent.[145] The Supreme Court used this test to deny a plaintiff recovery in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.[146] In that case, the defendant acquired a number of bowling centers after those centers defaulted on payments for equipment. The plaintiff, a competitor, claimed that had the centers been allowed to close, his business and profits would have increased since his share of the market would have been larger.[147]

¶ 36 The Supreme Court recognized that the purpose of the antitrust laws was to foster competition.[148] The defendant's

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[143] Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 501 (10th Cir. 1978).

[144] Id.

[145] See Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 500-01 (10th Cir. 1978); Solinger v. A & M Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978), cert. denied, 99 S. Ct. 1999 (1979); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), cert. denied, 411 U.S. 939 (1973).

[146] 429 U.S. 477 (1977).

[147] Id. at 481.

[148] Id. at 488.

actions accomplished just that. Consequently, the plaintiff could not use the antitrust laws to sue for an unprotected injury.[149] Any losses the plaintiff sustained were a result of the increased competition among bowling centers. The plaintiff suffered no antitrust injury.[150]

¶ 37 The Fourth and Fifth Circuits require that the plaintiff show he is within the target area and has been "proximately injured thereby."[151] In effect, the courts define the target area by deciding which groups of potential plaintiffs have been proximately injured. For example, in an antitrust tying-arrangement case, only a party subject to the tie and other sellers or competitors of the tied product are considered proximately injured.[152] Hence, a

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[149] Id.

[150] As the Court said:

> Plaintiffs must prove antitrust injury, which is to pay injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489.

[151] See Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313, 317 (5th Cir. 1976), cert. denied, 429 U.S. 1096 (1977); Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 49 (5th Cir. 1974) cert. denied, 419 U.S. 1110 (1975); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), cert. denied, 385 U.S. 934 (1966). But see Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 271-72 (5th Cir. 1979) (court does not mention "proximate").

[152] Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313, 317 (5th Cir. 1976), cert. denied, 429 U.S. 1096 (1977).

plaintiff who is neither is not within the target area.[153] This target area test is similar to the categorization approach[154] both in application and problems. Both tests leave unsolved the question of what constitutes a proximate injury.

¶ 38 The problems with the target area test do not end with the difficulty in defining which plaintiffs are in the target area. The test, particularly with the added foreseeability requirement, is susceptible to contradictory judicial interpretations.[155] Consequently, similar facts may result in conflicting decisions among circuits all of whom espouse the target area test. In addition, many decisions under this test contradict rulings rendered under the direct injury categorization approach.[156] For example, an employee may be denied standing under the target area test,[157] yet obtain standing under the categorization approach.[158]

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[153] The plaintiff in Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), cert. denied, 429 U.S. 1096 (1977), was denied standing since he was neither.

[154] See notes 101-110 and accompanying text supra.

[155] Berger and Bernstein, supra note 12, at 835.

[156] Id.

[157] See Hans Hansen Welding Co. v. American Ship Bldg. Co., 1973-2 Trade Cas. ¶ 74, 739 (S.D.N.Y. 1973); Bywater v. Matshushita Elec. Indus. Co., 1971 Trade Cas. ¶ 73, 759 (S.D.N.Y. 1971).

[158] See Dailey v. Quality School Plan, Inc., 380 F.2d 484, 486-87 (5th Cir. 1967); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 334 (7th Cir. 1967).

3. The Zone of Interests Test

¶ 39 The Sixth Circuit pioneered its own test for directness of injury.[159] In Malamud v. Sinclair Oil Corp.,[160] the Court of Appeals for the Sixth Circuit adopted the "Zone of Interests" test.[161] This test was first developed by the Supreme Court[162] for use in administrative law actions challenging governmental actions.[163]

¶ 40 The Zone of Interests approach involves a two-pronged analysis. First, the plaintiff must allege that "the defendant caused him injury in fact."[164] Second, the

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[159] As the Court of Appeals for the Sixth Circuit said:

> Having examined the two competing approaches, we are of the opinion that as standing doctrines both theories really demand too much from plaintiffs at the pleading stage of a case. The difficulty stems from confusion between the determination of a litigant's standing and a decision on the merits of his position.

Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1149 (6th Cir. 1975).

[160] 521 F.2d 1142 (6th Cir. 1975).

[161] Id. at 1151.

[162] The "Zone of Interests" test was first used by the Supreme Court in Ass'n of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

[163] A number of commentators suggest that the "Zone of Interests" test is inapplicable as a test for antitrust standing. See Antitrust Law - Standing - A Plaintiff Alleging Actual Injury to An Interest Arguably Within the Zone Protected by the Federal Antitrust Law Has Standing to Sue Under Section 4 of the Clayton Act, 45 Geo. Wash. L. Rev. 100, 109 (1976); Lytle and Purdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am U. L. Rev. 795, 806 (1976).

[164] Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975).

test requires that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[165] The problem with this test is that it depends upon the same inquiry necessary for the target area test: what interests are meant to be protected by the antitrust laws?[166]

¶ 41 The three tests for "by reason of" causation produce inter-circuit and intra-circuit conflicts. The label a particular circuit uses is not conclusive, since a circuit may name a certain tests and yet grant or deny standing on the basis of other criteria or stricter requirements.[167] In

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[165] Id. citing Ass'n of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970).

[166] See also notes 145-50 and accompanying text supra.

[167] The Second Circuit espouses the target area test, but operationally, its test is so restrictive that it could be classified as a direct-injury test. See GAF Corp. v. Circle Floor Co., 463 F.2d 752, 758 (2d Cir. 1972), petition for cert. dismissed, 413 U.S. 901 (1973) (court required injury to a competitive position); Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) (lessor denied standing); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971) (supplier denied standing); SCM Corp. v. Radio Corp. of America, 407 F.2d 166, 169 (2d Cir.), cert. denied, 395 U.S. 943 (1969) (court required competitive injury).

See also Note, Standing To Sue in Private Antitrust Litigation: Circuits in Conflict, 10 Ind. L. Rev. 532, 536-38 (1977).

general, the First[168] and Third[169] Circuits are the most restrictive. Standing in the Second Circuit is difficult to obtain and prospects for loosening up the strict rules seem slim.[170] The Fourth[171] and Fifth Circuits[172] follow the hybrid proximate target area test and have average

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[168] See Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D. Mass.), aff'd per curiam. 242 F.2d 758 (1st Cir.), cert. denied, 355 U.S. 828 (1957); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907 (D. Mass. 1956); see also Ames v. American Tel. & Tel. Co., 166 F. 820 (C. Mass. 1909).

[169] See Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir. 1975), cert. denied, 426 U.S. 935 (1976); Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971); Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.), cert. denied, 352 U.S. 890 (1956); Minersville Coal Co. v. Anthracite Export Ass'n, 335 F. Supp. 360 (M.D. Pa. 1971); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), aff'd, 211 F.2d 405 (3d Cir. 1954), cert. denied, 348 U.S. 828 (1954). But cf. Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir.), cert. denied, 434 U.S. 823 (1977) (court used an eclectic approach to grant standing); Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d 501 (3d Cir. 1976) (court used a case by case method and granted standing).

[170] See Western Geophysical Co. v. Bolt Assocs., 584 F.2d 1164 (2d Cir. 1978); Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), cert. denied, 423 U.S. 1073 (1976); GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), cert. dismissed, 413 U.S. 901 (1973); Calderone Enterprises Corp. v. United Artists Theater Circuits, Inc., 454 F.2d 1292 (2d Cir. 1971) cert. denied, 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 943 (1969); Uniroyal, Inc. v. Jetco Auto Serv., Inc ., 461 F. Supp. 350 (S.D.N.Y. 1978).

[171] See South Carolina Council of Milk Producers, Inc. v. Newton, 350 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934 (1966).

[172] See Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), cert. denied, 429 U.S. 1096 (1977); Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39 (5th Cir. 1974), cert. denied, 419 U.S. 1110 (1975); see also Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979); Donovan Constr. Co. v. Florida Tel. Corp., 564 F.2d 1191 (5th Cir. 1977), cert. denied, 435 U.S. 1007 (1978); Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975).

standing requirements. The newer Sixth Circuit standing test makes it more liberal than most of the other circuits.[173] The practical value of the test, however, is still unclear. The Seventh Circuit uses the Sixth Circuit's Zone of Interests Test and seems to be among the most liberal.[174] The status of the antitrust plaintiff in the Eighth Circuit is difficult to ascertain. The trend seems to be toward adopting the flexible target area approach, but the courts still use some stricter direct-injury language.[175] The Ninth Circuit is clearly the most liberal, denying standing only to those remotely located.[176] The Tenth Circuit's holdings are confusing, however the trend seems to be toward tightening

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[173] See Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1149 (6th Cir. 1975).

[174] See Illinois v. Ampress Brick Co., Inc., 536 F.2d 1163 (7th Cir. 1976), rev'd sub nom., Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[175] See Ragar v. T.J. Raney & Sons, 388 F. Supp. 1184 (E.D. Ark.), aff'd, 521 F.2d 795 (8th Cir. 1975).

[176] See Solinger v. A & M Records, Inc., 586 F.2d 1304 (1978), cert. denied, 99 S. Ct. 1999 (1979); Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975); Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971). But cf. Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978) (standing denied to employee); Contreras v. Grower Shipper Vegetable Ass'n, 484 F.2d 1346, 1347 (9th Cir.), cert. denied, 415 U.S. 932 (1974) (farmers denied standing to sue ass'n of lettuce sellers for alleged antitrust activity that resulted in a decreased demand for produce).

up the standing rules.[177] The D.C. Circuit appears to be following the liberal lead of the Ninth Circuit.[178]

C. Damage Tests and Standing Rules

¶ 42 The causation requirement with respect to antitrust standing is also carried over to the determination of damages. Although the antitrust plaintiff does not have to prove the amount of injury with great precision,[179] he must show that the injury was caused by the alleged violation.[180] An injury could follow an antitrust violation and yet not be grounds for recovery.[181]

¶ 43 In Brunswick Corp. v. Pueblo Bowl-O-Mat, for example, the Supreme Court denied the plaintiff any damage recovery because its injury was not caused by the illegality alleged.[183] The defendant, one of the largest manufacturers and distributors

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[177] See Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973) (court used direct injury test to deny employees' standing); Nationwide Auto Appraiser Serv. v. Ass'n of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967) (court espoused narrow direct-injury approach); Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289 (D. Colo. 1969) (direct-injury test). For a more liberal decision, see Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699 (D. Colo. 1970).

[178] See Cleary v. Chalk, 488 F.2d 1315 (D.C. Cir. 1973), cert. denied, 416 U.S. 938 (1974); Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries, 367 F. Supp. 536 (D.D.C. 1973).

[179] See Areeda supra note 46, at ¶ 335a.

[180] Id. at ¶ 346.

[181] Id.

[182] 429 U.S. 477 (1977).

[183] Id. at 488.

of bowling alley equipment, took over and began operating a number of bowling centers after those centers defaulted on payments for leased equipment. The plaintiff argued (1) that the acquisitions were unlawful because of their potentially harmful effect on competition; (2) the defendant's presence in the market was therefore unlawful; and (3) if the defendant had not interfered, the other centers would have gone out of business and thus, plaintiff would have gained more customers.[184] On the basis of the last allegation, the plaintiff claimed that it was injured and entitled to damages for the profits it would have gained had those centers been left alone to fail.[185]

¶ 44 The Court denied any damage recovery because the plaintiff's injuries were not at the heart of the rationale for condemning the defendant's acquisitions.[186] The defendant had attempted to preserve competitive activity - precisely what the antitrust laws were designed to further. The illegality of the merger actually rested on the identity of the acquiring firm - not on the merger itself.[187] Consequently, the plaintiff could not recover for injury not

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[184] These allegations were set out in the Court of Appeals opinion, 523 F.2d 262, 272-73 (3d Cir. 1975), reversed, 429 U.S. 477 (1977).

[185] Id.

[186] 429 U.S. at 488. See Areeda supra note 46, at ¶ 346.

[187] See Areeda supra note 46, at ¶ 346.

caused by the illegal act.

¶ 45 Damage tests can masquerade as standing rules. Plaintiffs with non-existent or unduly speculative damage claims may be denied access to the courts at the outset.[188] Similarly, plaintiffs whose injuries are not the result of the alleged antitrust violation may be denied damage recovery. Both standing rules and damage tests serve to limit the number of antitrust suits.

III. CONCLUSION: THE INAPPLICABILITY OF ANTITRUST STANDING RULES TO RICO

¶ 46 Antitrust standing rules should not apply to RICO treble damage actions. Although the statutory language for private actions is similar,[189] the antitrust laws differ markedly in purpose and focus. Moreover, the policies and reasons that prompted development of the antitrust standing rules[190] are not found behind RICO.

¶ 47 RICO is aimed at controlling fundamentally corrupt activity.[191] Antitrust legislation, on the other hand, has an economic focus and is basically regulatory. The antitrust laws are designed to protect fair trade and

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[188] An argument can be made that the decision regarding damages should follow a trial on the liability issue. The costs of litigation, however, support the view that plaintiffs with slim chances or prospects of any positive and reasonably measurable damage should be denied access to the court. See Areeda supra note 46, at ¶ 335.

[189] See notes 1 - 4 and accompanying text supra.

[190] See notes 10-29 and accomapnying text supra.

[191] S Rep. No. 617, 91st Cong., 1st Sess. 1-2, 81 (1969).

preserve free competition.[192] As such, they can be classified as malum prohibitum. RICO, however, deals primarily with criminal activities[193] that are malum in se. The severity of RICO offenses necessitates stronger enforcement mechanisms.

¶ 48 RICO was, in fact, designed to be a stronger measure than the antitrust laws. The antitrust laws proved unsatisfactory as a means of stopping organized crime's infiltration of legitimate business.[194] Consequently, Congress enacted RICO as separate legislation. RICO was modelled after antitrust law, but better tailored to combat organized crime and racketeering. Standing rules from the antitrust field were not meant to apply to the new statute. Indeed, the American Bar Association supported the separate RICO bill because it would avoid "a commingling of criminal enforcement goals with the goals of regulating competition," and would not subject the private litigant to antitrust standing or proximate cause obstacles.[195]

¶ 49 The rationale behind the antitrust standing rules is inapplicable to RICO. Although the large number of private antitrust suits necessitates standing requirements, such a situation is not imminent under RICO. In the nine

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[192] L. Sullivan, Antitrust 14 (1977).

[193] Some of the crimes constituting racketeering activity under RICO include: murder, kidnapping, arson and robbery, 18 U.S.C. § 1961 (1976).

[194] See Hearings on S. 30 and Related Proposals Before Subcomm. on the Judiciary. 91st Cong. 2nd Sess. 149 (1970).

[195] P. 27 Legis Hist. 116 Cong. Rec. 6993-6995 (1969). Also p. 128-29.

years since RICO was passed only four civil RICO actions have been recorded.[196] Clearly, private RICO actions do not represent an administrative burden. The RICO plaintiff apparently needs more incentive to sue.

¶ 50 Antitrust standing rules protect defendants from multiple liability and ruinous recoveries.[197] To ruin an antitrust defendant would, in some cases, lessen competition and increase concentration in that particular industry.[198] RICO, on the other hand, is less concerned with protecting defendants. Its main objective is to stop the infiltration of legitimate business by organized crime and control racketeering activity.[199] There is no overriding policy for protecting defendants as there is in antitrust. Putting at least some types of defendants out of business would generally further the goals of RICO. In addition, public policy would be best served by allowing a large number of RICO plaintiffs to sue. Most claimants are faced with insolvent defendants. Consequently, allowing more plaintiffs to sue would mean a greater chance of making guilty defendants pay.

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[196] See note 9 supra.

[197] See notes 18-20 and accompanying text supra.

[198] See note 19 and accompanying text supra.

[199] H.R. Rep. No. 1549, 91st Cong., 2d Sess. 1, 1-2 (1970) (Statement of Findings and Purpose), reprinted in RICO Legis. Hist. 174-175, supra.