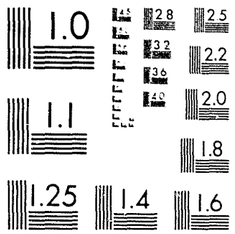

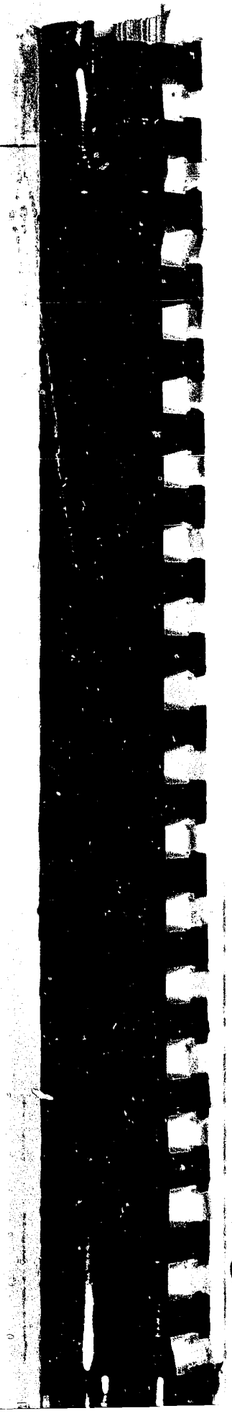

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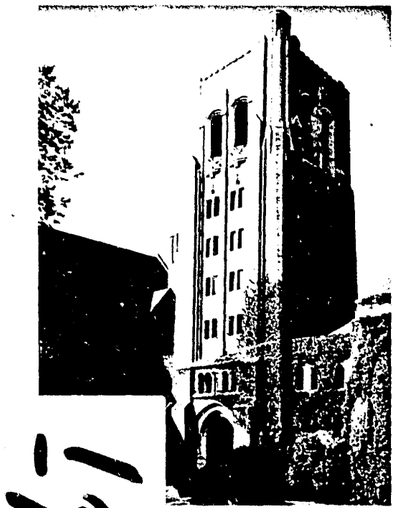

Techniques in the Investigation and Prosecution of Organized Crime

Materials on RICO
Individual Essays

G. Robert Blakey (ed.)

Volume Three

Cornell Institute on Organized Crime

Techniques in the Investigation and Prosecution of Organized Crime

Materials on RICO

Individual Essays

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PREFACE

This project is a continuation of the Institute's project to produce an analysis of most issues confronting a RICO litigant that resulted in the publication of two volumes in January, 1980. 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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Entity Liability Under RICO

by

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SUMMARY

The Racketeer Influenced and Corrupt Organizations Act (RICO) introduces investigative and remedial tools for criminal prosecutions. These materials examine the application of RICO's "entity" concept and forfeiture remedies in the event of corporate and group criminal liability. The examination begins with the historical foundations of corporate criminal liability. Next, the materials examine specific elements necessary to establish "entity" liability and the extent of RICO forfeiture remedies once liability is established. The circuit courts are divided on the issue of what interests are forfeitable; an issue that is crucial to the effectiveness of corporate and entity liability generally. Finally, the materials consider the alternative remedies for entity liability and the efficiency of each.

INTRODUCTION

¶1 Title IX of the Organized Crime Control Act[1] resulted from congressional recognition of the dangers posed by the infiltration of organized crime into our economic system. New investigative and remedial tools were authorized by Title IX of the Act, entitled Racketeer Influenced and Corrupt Organizations (RICO) (18 U.S.C. §1961 et. seq.). The primary objective of Title IX was the eradication of organized crime[2], but the act was not limited to organized crime.[3]

¶2 As finally enacted, RICO expanded entity as well as individual liability. Entity liability is vicarious, since no entity itself can act; the corporate or other entity's agent's conduct is imputed for the purpose of liability Not only may criminal fines be so imposed, but "any interest acquired or maintained... in violation of section 1962[4] [can be]... forfeited." These materials will examine the application and

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[1]Pub. L. No. 91-452, 84 Stat. 922 (1970).

[2]Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922-23 (1970).

[3]E.g., United States v. Parness, 503 F.2d 414 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975) (Persons include white collar criminals not just members of organized crime).

[4]18 U.S.C. §1962 (1976). Section 1962 (a) prohibits investment of proceeds from a pattern of racketeering activity. Section 1962 (b) prohibits acquiring ownership or lesser interests through a pattern of racketeering activity Section 1962 (c) prohibits conducting a pattern of racketeering activity while engaged in the affairs of an enterprise. Section 1962 (d) prohibits conspiring to violate any of the above!

scope of entity criminal liability under R.I.C.O. and the comparative efficacy over traditional criminal sanctions.

The History of Entity Criminal Liability

¶3 Both in the United States and England, the earliest cases held that a corporation or other entity could not commit a crime.[5] Without a mind, it could not formulate a criminal intent, and without a body it could not be punished by imprisonment or death.[6] The law of corporate criminal liability, however, soon borrowed principles from the civil law and grew with the expanison of vicarious liability in tort. In the sixteenth century, a master was liable for the torts of his servant only if he expressly commanded the servant to perform the particular act.[7] Due to the vagaries inherent in the notion of command, however, the theory of express command proved impracticable and yielded to the theory that the employment itself implies a fictional command, from the master to the servant, to engage in particular acts.[8] Courts eventually abandoned the fictional command theory and adopted instead

[5]Anonymous, 88 Eng. Rep. 1518 (K.B. 1701); 1 W. Blackstone, Commentaries 476 (8th ed. 1788).

[6]W. LaFave & A. Scott, Criminal Law 228 (1972).

[7]See Wigmore, Responsibility for Tortions Acts: Its History, Harv. L. Rev. 315, 383 441 (1894).

[8]See e.g. Hern v. Nichols, 91 Eng. Rep. 256 (1708).

the doctrine of respondeat superior.[9]

¶4 The first extension of vicarious criminal liability to a corporation, by the United States Supreme Court, occurred in the 1909 landmark case of New York Central R.R. v. United States.[10] Defendant carrier was indicted under the Elkins Act[11] for making illegal rebates to a skipper. The statute carried a presumption that acts of agents or employees of common carriers were deemed to be the acts of the corporation. Although Congress, in enacting the statute, contemplated extending only vicarious civil liability, the Court held:

> Applying the principles governing civil liability we go only a step farther in holding that the act of the agent, while excercising the authority delegated to him... may be controlled, in the interest of public policy, legimating his act to his employee and imposing penalties upon the corporation for which he is acting.[12]

¶5 With this sweeping stroke, the Court rendered coextensive the scope of a corporation's criminal liability for its agents' conduct with civil liability for its agents' torts. Moreover, the Court's language does not distinguish between an agent's acts and his mental state. Consequently, attributing to the corporation the agent's acts as well as his mental state

[9]W. Prosser, The Law of Torts 459 (4th ed. 1971).

[10]212 U.S. 481 (1909).

[11]32 Stat. 847 (1903) (current version at 49 U.S.C. §41 (1976).

[12]212 U.S. 481, 494 (1909).

involves the same principles of accountability.[13]

¶6 In United States v. Illinois Central R.R.[14] the Supreme Court reaffirmed the validity of New York Central and placed its imprimatur on the expansion of the holding eliminating the need to show any special corporate intent. Justice Butler, writing for a unanimous Court, justified the expansive federal rule of corporate criminal liability on the ground that the duty enforced by criminal sanctions arises, not out of the employer/employee relation, but rather as one declared by statute and owed by the corporation to the public.[15] Thus, the modern federal rule imposes criminal liability whenever an agent or employee of the corporation commits a crime within the scope of his authority[16] and with intent to benefit the corporation.[17]

I. Elements of Entity Liability Under RICO

Who May Be Liable

¶7 Section 1962 of Title IX proscribes conduct by any person.[18] The statute defines 'person' as including, "any entity capable of holding a legal or beneficial interest in property."[19] This definition is not exhaustive, but illustrative of the scope of "persons" under RICO[20]. According to the statute's specific mandate, its provisions are to be liberally construed[21] and this definition has been so read.[22]

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[13] See Edgerton, Corporate Criminal Liability, 36 Yale L.J. 827, 841 (1927) [hereinafter cited as Edgerton]; LaFave & Scott, supra note 5, at 229.

[14] 303 U.S. 239 (1938).

[15] Id. at 244. For a vigorous defense of the federal rule, see Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 Ky. L. J. 73, 124-129 (1976). In contrast to the American rule, with which only the English concur, most civil law jurisdictions either reject corporate criminal liability in toto (for example, the Phillipines and Czechoslovakia), or limit it either to narrow regulatory offenses (France, Belgium, Japan) or offenses for which the legislature has expressly included corporate liability (Germany). Mueller, Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21, 29-35 (1957).

[16] Several state codes limit the agents who may engage the corporation in a criminal transaction to high managerial agents.

> "High managerial agent" is defined as "an officer of a corporation or an unincorporated association,

(16 cont'd)

> or in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the coporation or association." Model Penal Code §2.07(4)(c) (1962).

Ill. Rev. Stat. §§ 5-4, 5-5 (1961); N.Y. Penal Law §20-20 (McKinney 1975); 18 Pa. Cons. Stat. Ann. §307 (a) (3) (Purdon 1973); Model Penal Code §2.07 (1962).

[17] 1 U.S. National Commission on the Reform of Federal Criminal Laws, Working Papers 163 (1970). [hereinafter cited as Working Papers].

[18] 18 U.S.C. §1962 (1976).

[19] 18 U.S.C. §1961 (3).

[20] This definition uses the word "include" not "is", "are", or "means" as in other definitions under RICO. See, e.g., 18 U.S.C. §1961 (1), (2), (5) or (6) (1976).

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

[22] U.S. v. Campanale 518 F.2d 352, 363, (9th Cir. 1975). "persons not limited to members of Organized Crime". cf. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 435 U.S. 1105 (1976).

How Liability is Incurred: "Enterprise"

¶8 Liability of the entity is necessarily vicarious. The federal courts follow the doctrine of respondeat superior. Consequently, any agent's act will be imputed to the entity as an imprimatur on which to base the entity's liability.[23] RICO is violated when a person acquires or maintains through an investment or conduct constituting a pattern of racketeering activity an interest in or control of an enterprise[24] or conducts or participates in the conduct of an enterprise's affairs through a pattern of racketeering activity.[25] Central to each category of violations is the concept of enterprise under RICO.

¶9 "Enterprise includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[26] This defintion is also illustrative rather than exhaustive. An enterprise under RICO has been liberally construed to include private businesses,[27]

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[23] N.Y. Central R.R. v. United States 212 U.S. 481 (1909).

[24] 18 U.S.C. §1962 (a) & (b) (1976)

> "(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 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.

[25] 18 U.S.C. §1962 (c) (1976).

> "(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."

[26] 18 U.S.C. §1961 (4).

[27] United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980).

labor unions,[28] illegitmate associations of individuals[29] and associations of individuals and corporations.[30] The holdings regarding the status of government agencies as enterprises, however, are inconsistent.[31]

¶10 The only limitation on the scope of "enterprise" is that it must affect interstate commerce.[32]

Pattern of Racketeering Activity

¶11 The acquisition under section 1962 (a) or (b)[33] must be with money directly or indirectly from or by acts through a pattern of racketeering activity. Conduct violative of section 1962 (c)[34] must also form a pattern. Section 1961 (1) defines and limits racketeering activity to enumerated federal and state offenses.[35] A pattern, "requires at least two acts of racketeering activity, one of which occured after the effective date of this chapter and the last within ten years (excluding any period of imprisonment)

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[28] United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir.), cert. dismissed, 439 U.S. 801 (1978)

[29] See United States v. Elliott, 571 F.2d 880, 898 (5th Cir.), cert. denied, 439 U.S. 953 (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 infrastructure that controls a secret criminal network."

[30] See United States v. Thevis, 474 F. Supp. 134, 137-39 (N.D. Ga. 1979). The association included several corporations and individuals associated to conduct a pornography business. The illicit nature of the association is not a determing factor.

[31] See 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. But cf. United States v. Frumento, 563 F. 2d 1083 (3d Cir. 1977), cert denied, 434 U.S. 1072 (1978). The Third Circuit disagreed and included a Bureau of Cigarette and Beverage Taxes in the definition of enterprise.

[32] Interstate telephone calls, mailings or purchases have been adequate to satisfy this condition. See, e.g., United States v. Elliott, supra note 29.

[33] 18 U.S.C. §1962 (a) & (b) (1976).

[34] 18 U.S.C. §1962 (c) (1976).

[35] 18 U.S.C. §1961 (1) (1976).

> "As used in this chapter-
> "'racketeering activity' means (A) any 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; (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) if the act indictable under section 659 is felonious, 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 (43lating 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

after commission of a prior act of racketeering activity.[36]

¶12 Sporadic activity is not sufficient to establish a pattern. Racketeering acts must be related such that they constitute a common scheme. The relationship must be proven not between each act, but between the acts and the enterprise to establish a section 1962 (c) violation.[37]

(35 cont'd)
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 felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

[36]18 U.S.C. §1961 (5) (1976).

(5)'pattern of racketeering activity' requires at least two acts of 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;

[37]See, e.g., United States v. Elliott, 571 F.2d 880, 899 (5th Cir.), cert. denied, 439 U.S. 953 (1978). The Court also elaborated on two cases reaching different conclusions:

We note that at least two district courts have construed "a pattern of racketeering activity",

¶13 Collection of an unlawful debt, however, may also violate section 1962 (a) or (b):[38] subsection (a) if proceeds of the debt are used to invest or acquire an enterprise; subsection (b) if through collection of the debt an interest or an enterprise is acquired. Only one such act is required to violate RICO in this fashion.

C. Elements Peculiar to Entity Liability

Scope of Employment or Authority

¶14 Scope of authority is one of two elements that distinguishes entity liability from individual liability. Courts, however, rarely discuss the scope of employment or authority in the criminal context. Nevertheless, a distinct

(37 cont'd)
as used in the Act, to require that the two or more acts of "racketeering activity" be interrelated. United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973). On its face, however, the statute does not require such "interrelatedness", and we can perceive no reason for reading it into the statutory definition. 18 U.S.C. §1961 (5). There is no constitutional principle that would prevent Congress from labeling the commission of two crimes within a specified period of time and in the course of a particular type of enterprise a "pattern" of activity, whether or not a sequence of two similar acts amounts to a pattern as that term is ordinarily understood.

Id. at 899 n. 23.

[38]18 U.S.C. §1962 (a) and (b) (1976). This theory has not been used to prosecute any RICO violators, in any reported decisions.

pattern emerges. In jurisdictions following the federal rule of respondent superior, it is the employee's function rather than his position or title that determines his authority to bind the corporation in a criminal transaction.[39] It is not necessary, on the otherhand, to identify a single, culpable individual. A corporation acquires the collective knowledge of its employees and will be liable notwithstanding that no one employee comprehended the unlawfulness of the totality of the individual acts.[40] In addition, acts committed outside the scope of employment may serve to bind the corporation provided the acts are subsequently ratified or adopted.[41]

¶15 Where the individual actor is an agent rather than an employee, the test is whether the agent acted within the scope of his authority. Scope of authority is broader than employment because it includes acts committed pursuant to implied and apparent, as well as actual authority.[42] This rule extends corporate liability consistent with the rule denying to corporate defendants the defense of ultra vires.[43] In each case, the corporation is denied the possibility of holding out its agents to third parties for the purpose of committing a crime and then later repudiating the agent's authority.

¶16 Only a few reported decisions involving RICO have imposed liability upon the corporation or other entity.[44]

[39] In United States v. George F. Fish, Inc., criminal violators of the Emergency Price Act of 1942 committed by a low level salesman were held sufficient to bind the corporation. The court held that

> "[N]o distinctions are made ... between officers and agents, or between persons holding positions involving varying degrees of responsibility."

154 F.2d. 798, 801 (2d. Cir.), cert. denied 328 U.S. 869 (1946). Many states, however, follow the "high Managerial Agent" rule, where only a high management official of the board of directors can bind the corporation. See e.g. Model Penal Code §2.07 (4) (c) (1962); N.Y. Penal Law §20.20 (McKinney 1975).

[40] United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974); United States v. Sawyer Transport, Inc., 337 F. Supp. 29 (D. Minn. 1971), aff'd 463 F.2d. 175 (8th Cir. 1972).

[41] Continental Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960).

[42] S. Rep. 553, 96th Cong., 2d Sess. 81 (1980). See also Continental Baking Co. v. United States, 281 F.2d 137, 150 (6th Cir. 1960) (apparent authority of general manager held sufficient to bind corporation). Apparent authority arises from manifestations by the principal to third parties which lead the latter to believe that the agent is authorized to act on behalf of the principal. Restatement Second of Agency §8 (1958).

[43] A corporation cannot absolve itself of criminal liability by arguing that the acts of its agent were ultra vires. United States v. Steiner Plastics Mfg. Co., Inc. 231 F.2d 149, 153 (2d Cir. 1956); Continental Baking Co. v. United States, 281 F.2d 137, 149-50 (6th Cir. 1969); United States v. Van Riper, 154 F.2d 492 (3d Cir. 1946); C.I.T. Corporation v. United States, 150 F.2d 85, 89 (9th Cir. 1945); United States v. Mirror Lake Golf & Country Club, Inc., 232 F. Supp. 167, 172 (1964); People v. Aquarian Age 2000, 85 Misc. 2d 504, 507, 380 N.Y.S. 2d 545 (Sup. Ct. Queens Co. 1976).

[44] See generally, United States v. Parness, 503 F.2d. 430; United States v. Marubeni, 611 F.2d. 763 (9th Cir. 1980); United States v. Thevis, 474 F. Supp. 134, (N.D. Ga. 1979); United States v. Grande, No. 78-5056 (4th Cir. 1980). United States v. Elliott, 571 F.2d 880 (5th Cir.) cert. denied 99 S. Ct. 349 (1978).

In these cases, the issue of scope of authority was not discussed, apparently for two reasons. First, in most cases the individual actor was either owner or chief operating officier of the enterprise.[45] Scope of authority is generally determined by an employee's function.[46] Consequently, that the illegal acts were within these actor's scope of authority may be easily infered from their broad function to run the company.

¶17 RICO's express language offers a second explanation. In two recent cases involving a lesser employee[47] and an agent,[48] the court failed to discuss scope of authority separately. At first glance this could be troublesome; however, closer scrutiny clarifies this result. These, as well as all of the above cases, involved prosecutions under section 1962 (c).[49] The relevant language states, "It shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate directly or indirectly in the conduct of such enterprise through a pattern of racketeering activity." Incorporated in

[45] See e.g. United States v. Huber, 603 F.2d 387 (2d Cir. 1979).

[46] See generally Note, 50 Geo. L. J. 547, 552 (1962).

[47] United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980).

[48] United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979).

[49] 18 U.S.C. §1962 (c) 1976.

the expressly proscribed conduct, therefore, is a requirement of relatedness to the affairs of the corporation. Most courts liberally construe "scope of authority" to include anything occuring during job related activity.[50] Thus, proof of one express element of §1962 (c) - conduct in affairs of the enterprise - satisfies a second element: imputable acts within the agent's scope of authority.

¶18 This was demonstrated in United States v. Nerone.[51] The trial court convicted appellants of violating §1962(c). Two of the appellants worked for Maple Manor Inc., which operated a mobile home park. They had participated in an illegal gambling operation in an associate's mobile home renting space in Maple Manor's park. Their acts were imputed to Maple Manor therefore finding the enterprise liable also. The Seventh Circuit, however, reversed the RICO conviction because the government had not proven that the imputable acts were conducted in the affairs of the enterprise.[52] Consequently, neither Maple Manor nor appellants had violated RICO.

[50] United States v. Hangar Ore, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977); United States v. Steiner Plastics Mfg. Co., Inc. 231 F.2d. 149 (2d Cir. 1956) and United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948). For a detailed discussion see also Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions; 92 Harv. L. Rev. 1227, (1979).

[51] United States v. Nerone, 563 F.2d 836 (7th Cir. 1977).

[52] Id. at 852.

Intent to Benefit the Corporation

¶19 In addition to proof of acts within his scope of authority, intent to benefit the corporation is the second distinguished element of entity liability. The corporation must be the intended beneficiary of the criminal conduct. If it is, the entity will be liable even if the act was misguided, or if the corporation received no actual benefit.[53] Although, according to the federal practice, the agent's position or title does not affect his power to bind the corporation, it may be probative of whether the actor intended to benefit the corporation.[54]

¶20 The factual circumstances necessary for proof of some elements under RICO raise a strong inference of intent to benefit the corporation. This could explain why this issue has not been discussed in most reported cases. Proof that conduct is "in the affairs of an enterprise" would usually support an inference that it was engaged in with intent to benefit the corporations.

¶21 Further light is shed on this aspect of the reported cases by the nature of RICO prosecutions where entity liability was imposed. The alleged predicate offense in the majority of cases was fraud or bribery. The immediate object was to

[53] Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir.), cert. denied, 326 U.S. 734 (1945).

[54] Standard Oil Company of Texas v. United States, 307 F.2d 120, 127 (5th Cir. 1962).

procure more busines for the corporation. Intent to benefit can reasonably be inferred from proof of this sort of predicate offense and has not been an issue on appeal.

¶22 Presumably, actions brought under section 1962 (a) or (b)[55] would prominently discuss the issues of "scope of authority" and "intent to benefit the corporation". The liberal construction of these elements of entity liability, however, compels the conclusion that these issues would rarely impede entity liability under RICO.

Scope of Entity Liability

¶23 The effectiveness of a criminal sanction as a deterrent depends in part upon its extent.[56] Violation of section 1962 may subject a corporation or other entity to a $25,000 fine and possible forfeiture under section 1963 (a)[57] or (b). Section 1963 (a) has express limitations upon its extent. It provides:

[55] 18 U.S.C. §1962 (a) & (b) (1976).

[56] See generally: Regulating Corporate Behavior 94 Harv. L. Rev. 1227 (1979).

[57] 18 U.S.C. §1963 (a) (1976). In general deterrence goals underlie corporate criminal sanctions. Offenses committed by corporations are punished almost exclusively by criminal fines. Ultimately, the effectiveness of the corporate fine depends upon the entity's ability to pass the cost on to its customers. Correctional aims, therefore, are inhibited by fines set so low that their imposition can be regarded as a cost of doing businesss. Mueller, Mens Rea and the Corporation 19 U. Pitt. L. Rev. 21,42 (1957) and Regulating Corporate Behavior 94 Harv. L. Rev. 1227, 1236 (1979).

> "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."

Section 1963 requires a nexus between the forfeitable interest and the violation of §1962.[58] This distinguishes RICO forfeiture from the general forfeiture of estate outlawed by Section 3563 of the United States Code.[59] This distinction has satisfied the courts as to the constitutionality of Section 1963 (a).[60]

¶24 RICO forfeiture has also been sustained against Eighth Amendment challenges that it constituted cruel and unusual punishment.[61] But the forfeitable interest is limited to a present interest. The right to future re-acquisition of such interest is maintained by the individual. In United States v. Rubin,[62] the Fifth Circuit overturned a lower court ruling, barring the defendant from ever holding union office again.[62a] After examination of the statute's language and legislative history, the court concluded that RICO forfeiture "contained no prophylactic ban on holding future offices."[63]

What is a Forfeitable "Interest"?

¶25 This issue has created the most controversy in decisions involving vicarious entity liability. It has been argued that the words "any interst" should be limited only to things, "acquired or maintained in violation of section 1962." No similar controversy has developed regarding forfeitable interest under section 1962 (a) or (b) which necessarily involve an acquired enterprise or interest.[64] Nonetheless, decisions involving violations of section 1962 (c)

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[58] See e.g., United States v. Grande, No. 78-3056 at 38 (4th Cir. 1980); United States v. Manino, No. 79 Cr. 444 (S.D.N.Y. April 23, 1980); United States v. McNary, No. 78-2102 at 13-15 (7th Cir. April 29, 1980); United States v. Nerone 563 F.2d 836 (7th Cir. 1977). This requirement has given only one court difficulty. In United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980), the nexus the court analyzed was not between the violation and the interest but between the linguistically similar section 1962 (a) and the forfeiture provision. Id. at 766. The violation, however, was of §1962 (c).

[59] 18 U.S.C. §3563 (1948).

[60] See United States v. Grande, No. 78-5056 at 38-39 (4th Cir. April 21, 1980); United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979).

[61] See United States v. Aleman, 609 F.2d 298 (2d Cir.), cert. denied, 100 S.Ct. 1345 (1979); United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979), and United States v. Grande, N. 78-5056 at 38-39 (4th Cir. April 21, 1980).

[62] United States v. Rubin, 559 F.2d 975, 991-93 (5th Cir. 1977), vacated and remanded, 99 S. Ct. 66 (1978), reinstated in relevant part, 591 F.2d 278 (5th Cir. 1979).

[62a] Id. at 991-93.

[63] Id. at 993.

[64] See, e.g., United States v. McNary, No. 78-2102 (7th Cir. April 29, 1980).

have reached contrary results as to whether income from a pattern of racketeering activity is a forfeitable interest.[65] In a departure from earlier circuit court opinions following a policy of liberal construction, the Ninth Circuit held illicit income was not a forfeitable interest.[66]

¶26 In United States v. Marubeni, the Ninth Circuit limited "any interest" to those "in any enterprise".[67] The corporation was convicted of conducting an enterprise through a pattern of racketeering activity, in violation of section 1962. The government sought forfeiture of income from contracts illegally procured.[68] Reasoning that "any interest" was ambiguous the court concluded:

(1) That the statutory purpose was to prevent infiltration of legitimate businesses therefore only interest in businesses need be forfeited.

(2) That the linguistic similarity between §1962 (a) and (b) and §1963 (a) meant they must intend the same meaning, thus "in any enterprise" should be added to §1963 (a).

(3) That §1962 (a) and (b) refers to income and §1963 (a) contains a one percent investment exception which would both be surplusage if income was a forfeitable interest for violation of 1962 (c) and

(4) That the legislative history requires the stricter interpretation of "interest".[69]

These conclusions are contrary to the express language and purpose of the statute and to its legislative history. Analysis of these conclusions will indicate their shortcomings.[70]

¶27 Interest is a word of common usage and is not defined in the statute. It may be defined as the most general term to denote a right, claim, title or legal share in something.[71] It is a general term and should include income, which is a lesser share. Use of a general term with a common known

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[65] See, e.g., United States v. Smaledone, 583 F.2d 1129, 1133 (10th Cir. 1978), cert denied, 439 U.S. 1119 (1979) (restaurant forfeited); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976) (cash compromise in lieu of four vending machine companies); United States v. Huber, 603 F.2d 387 (2d Cir. 1979) (cash compromise in lieu of forfeiture of three companies). However, these decisions do not discuss the forfeiture aspect. But cf. United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980) and United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979). These decisions exhaustively discuss forfeiture and conclude that only the violator's interest in an enterprise, not income or other interests with nexus to the violation, were forfeitable. Cf. United States v. Grande, N. 78-5056 (4th Cir. April 21, 1980) (50% interest in an enterprise forfeited by the violator; no discussion, however). In light of the statute's language, this limitation appears wrong. See notes 66-88 and accompanying text infra.

[66] United States v. Marubeni 611 F.2d 763, 766 (9th Cir. 1980).

[67] Id. at 769.

[68] Id. at 766.

[69] United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980) (summary of the holding).

[70] For an exhaustive analysis of the Marubeni decision, see Trojanowski, RICO Forfeitures, in 1 Techniques in the Investigation and Prosecution of Organized Crime: Materials on RICO 354 (G. Robert Blakey ed. 1980). [Hereinafter cited as 1 Materials on RICO.]

[71] Black's Law Dictionary 729 (5th ed. 1979).

meaning reflects no ambiguity. Resort to other sections of the statute was therefore unnecessary.[72]

¶28 Assuming arguendo that resort to other sections was proper, evidence of congressional intent is best found in its statement of purpose. The Marubeni court chose to focus upon the narrow intent "to prevent infiltration of legitimate business." Congress expressly stated a broader purpose: "to seek the eradication of organized crime."[73] Congress further stated the intent to provide "enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[74] The Ninth Circuit's narrow interpretation of congressional purpose is contrary to the broader purpose stated in the act. If congress intended to narrowly define interst, it could have added the words "in any enterprise".

¶29 The statute contains a specific mandate that its provisions shall be construed liberally.[75] Liberal construction of this provision would be more, not less inclusive as in Marubeni. Strict construction of a criminal statute can be waived by express congressional intent.[76] A majority of federal courts have recognized this and construed RICO provisions liberally.[77]

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[72] 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).

[73] Pub. L. No. 91-452, 84 Stat. 922-23 (1970).

[74] Id.

[75] Pub. L. No. 91-452, 84 Stat. 947, Title IX, §904 (a) (1970).

[76] Eisen, Liberal Construction under RICO, in IV Techniques in the Investigation of Organized Crime: Materials on RICO (G. Robert Blakey ed. 1980)

[77] 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, 439 U.S. 953 (1978); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977), cert. denied, 435 U.S. 951 (1978); 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).

¶30 The Ninth Circuit again disregarded the statute's language by referring to section 1962 (a) to define the forfeitable interest. Marubeni et al. were convicted of violating §1962 (c) and the statute specifically requires that the forfeitable interest have a nexus with the offense committed,[78] in this case section 1962 (c). A violation of section 1962 (c) entails committing the predicate offenses while conducting affairs of an enterprise. The violation focuses on conduct of the predicate offenses with the contingent circumstance of their commission during employment or agency for an enterprise. The interest commonly acquired from predicate offenses under RICO is income for the corporation,[79] not interest in enterprises.[80] Conduct violative of section 1962 (c) is the commission of predicate ofenses unlike subsection (a) or (b) which make specific

[78]"Whoever violates any provision of section 1962 ... shall forfeit ... any interest he has acquired or maintained in violation of section 1962 ...." 18 U.S.C. §1963 (a) (1) (1976).

[79]Entity liability under RICO section 1962 (c) has been primarily for white collar offenses such as bribery or fraud except when the enterprise has been illegal. See e.g. United States v. Huber, 603 F.2d 387 (9th Cir. 1979); United States v. Grande, No. 78-5056 (4th Cir. 1980); United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980). See also United States v. Elliott, 571 F.2d 880 (5th Cir.) cert. denied 99 S. Ct. 349 (1978).

[80]Cf., United States v. Marubeni, 611 F.2d 763, (9th Cir. 1980). (Interest gained from §1962 (c) racketeering was several million dollars in contracts); and United States v. McNary, No. 78-2102 (7th Cir. 1980) (Interest gained from §1962(a) violation was interest is an enterprise from illicit dollars invested.)

conduct after the predicate offenses the violation.[81] The Marubeni interpretation would make entity forfeiture sanctions surplusage when section 1962 (c) is violated.
If the court had focused on the proper subsection of 1962 its decision may have been different.

¶31 The Ninth Circuit's conclusion that section 1962 (a) and (b) would become surplusage if income were forfeitable under Section 1962 (a) indicates a misreading of the statute. Section 1962 (c) proscribes conduct that is performed while engaged in the affairs of an enterprise. An individual who is not conducting affairs of an enterprise could engage in a pattern of racketerring activity and not be liable under RICO unless he invests proceeds or uses racketeering acts to gain interest in an enterprise.[82] Subsection (a) and (b), however, proscribe conduct which an individual may violate whether conducting affairs of an enterprise or not. The primary acts under each subsection are different; therefore violations will entail acquisition of different interests. This reflects congressional recognition of the problem of corruption of legitimate businesses to get money

[81]To violate §1962 (a) or (b) the conduct required is acquisition of an interest in an enterprise after the predicate offenses forming and pattern of racketeering have occurred. Section 1962 (c), however, punishes the commission of the predicate offenses themselves if committed while conducting the affairs of an enterprise.

[82]18 U.S.C. §1962 (1970).

and power.[83] Interpreting section 1962 (c) to mandate forfeiture of income does not make (a) or (b) surplusage; those sections involve individual conduct not proscribed by (c).

¶32 The 1% investment exception does not become surplusage by the suggested interpretation of "any interest" including income.[84] It indicates an intent not to impose multiple sanctions where the small investor does not gain control; it does not indicate an intent not to sanction the conduct under Section 1962 (c). Congresssional recognition of this problem and its intent to provide broad new sanctions should not be thwarted by unnecessarily narrow interpretation.[85]

¶33 The potentially absurd results obtained by applying the Marubeni holding mandate the more expansive reading of section 1963 (a) (1). A wholly owned small company would be completely forfeited for violation by the owner as in

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[83]Pub. L. No. 91-452, 84 Stat. 922-23 (1970) ([orginized crime], "derives its power through money obtained from such illegal activities as gambling, loansharking, narcotics and other forms of vice")...

("this money and power, in turn, is being increasingly used to infiltrate legitmate business and labor unions").

[84]1 Materials on RICO, 368-374.

[85]Gore v. United States, 357 U.S. 386, 387-93 (1951). Congress can subdivide a course of conduct and provide separate penalties for each act. This action should not be thwarted because of judicial discomfort.

U.S. v. Huber.[86a] This would reach income and interests in the enterprise of illegal activities. A similar result could occur where a large corporation conducts the affairs of a wholly owned subsidiary to form a pattern of racketeering activity. Forfeiture of its interest means forfeiture of the whole corporation. Finally, the assets of an assocation in fact for the purpose of conducting its affairs in a pattern of racketeering activity would be forfeited completely.[86b] Interest in the enterprise would equal the entire enterprise including, therefore, its illicit income. Marubeni, however protects the illicit income of the corporation that vicariously violates the statute. The decision effectively eliminates RICO's corporate criminal sanctions in the context

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[86a]603 F.2d 387, 394-97 (2d Cir. 1979). Despite a jury finding and initial order for forfeiture of the company the court subsequently imposed a $100,000 cash payment in lieu of forfeiture. This discretionary act has been found by other circuits to be improper. See United States v. L 'Hoste, 609 F.2d 797, 810 (5th Cir. 1980) (Holding forfeiture mandatory).

[86b]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).

of an employee violating RICO. Only the individual's interest would be forfeitable.

¶34 These disparate outcomes reveal the inconsistency of such a narrow interpretation of "interest" under RICO. It presupposes that Congress sought to allow forfeiture for the small company and the association in fact but not the traditional large company. This appears a most unlikely supposition.

¶35 Evaluation of the legislative history of RICO lends more support to reading the plain language of section 1963 (a) (1) to include income among forfeitable interests.[87] If courts persist with this interpretation of "interest" it should be noted that if interest does not include income from activities it certainly should to preserve the efficacy of this sanction.[88]

¶36 Decisions regarding section 1963 (a) (2) [89] have been fewer and less troublesome. Courts have interpreted this section liberally to include forfeiture of offices or other positions of control.[90] But to cast a further shadow on the Marubeni interpretation of §1963 (a) (1), the income used in further racketeering activities is forfeitable.[91] This will result in income forfeiture not if you do but if you do twice!

III. Alternative Entity Criminal Sanctions

¶37 Deterrence is described by most commentators as the primary rationale for imposition of corporate criminal sanctions.[92] The efficacy of corporate criminal liability depends upon its success at achieving that and any other statutory objectives. RICO forfeiture has significant deterrent elements. Comparatively, it is better suited to these statutory objectives than other possible alternatives.

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[87] 1 Materials on RICO 374-377.

[88] The argument in favor of corporate criminal liability assumes that the threat of personal conviction of individual actors is not enough to adequately deter illegal corporate conduct for three reasons. First, the entity tends to conceal the real actor. Second, restricting the criminal sanction to individuals allows the corporate entity to benefit from the commission of the crime. Finally, corporate criminal liability may induce some shareholders to exercise greater supervision over management. Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 433 (1963) and G. Williams, Criminal Law (2d ed 1961).

[89] 18 U.S.C. §1962 (a) (2) (1970):

> ...
> ... (2) any interest in, security of, claim against, or property or contractual right of any kind

(89 cont'd)

> 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.

[90] United States v. Rubin, 559 F.2d 975, 991-93 (5th Cir.) vacated and remanded, 99 S. Ct. 67 (1978), reinstated in relevant part, 591 F.2d 278 (1979).

[91] United States v. Thevis 474 F. Supp. 134, 143-44 (N.D. Ga. 1979)

[92] Developments - Corporate Crime, Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1235 n. 16 (1979) [hereinafter cited as Regulating Corporate Behavior].

Individual versus Corporate Liability

¶38 Some commentators argue that corporations, unlike individuals, cannot be deterred because they are incapable of action.[93] This argument misconceives the nature of an organization for the purposes of criminal law. Corporate decisions are made by individuals. Their decision-making entails an evaluation of benefits and burdens of various courses of action; thus, they are particularly vulnerable to being deterred if the costs are sufficiently high. Deterrence may, therefore, play a stronger role in entity liability than in other areas of criminal law.[94]

¶39 RICO forfeiture makes the cost of individual criminal conduct very high. If the corporation may lose any illicit gain as well as face the potential for civil treble damage actions the policy formulators within will be inclined to avoid such conduct.[95] Excessive costs compared to the benefits of a particular activity have deterred such activity in the corporate regulatory field.[96] Individual liability, however, keeps the cost of the activity away from the entity itself. The corporation can mainatin its profits from the individual's misdeeds with impunity.[97]

¶40 Individual liability in the context of RICO's objectives suffers an additional infirmity. Organized crime's infiltration of a legitimate business is not deterred by an individual's incarceration. His organization will simply supply another individual while he serves a prison term.[98] Individual liability will not destroy the economic base of organized

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[93] See Working Papers, supra Note 17 at 188-89. Shareholders, however can act and therefore, theoretically, can be deterred and coerced. In fact, however, shareholders seldom engage in conduct constituting the offense. Thus, to the extent the beneficial owners are non-participants any sanctions imposed on the entity will not operate directly on the criminal actor.

[94] Regulating Corporate Behavior, supra note 92 at 1236 (1979).

[95] Comment, Increasing Community Control over Corporate Crime, 71 Yale L. J. 280, 302 (1961)

[96] The experience with Equal Employment Opportunity regulations under Executive Order #11246 indicates that if any activity is too costly it will be stopped. [at least in that case the blatant discriminatory activity].

[97] Corporate criminality has been criticized on the ground that the loss falls on the innocent shareholders. If punishment is justified by advancing corrective goals, however, public policy considerations outweigh any unfairness objection. See Working Papers, supra note 2, at 189 n. 77. Indeed, failure to punish the entity would unjustly enrich the shareholders. McAdams, Appropriate Sanctions for Corporate Criminal Liability, 46 U. Cin. L. Rev. 989, 994 (1977). Inasmuch as shareholders pay corporate tort and contract liabilities, the criminal fine is simply another risk of investment, a risk diminished somewhat by the limited liability of equity owners. Edgerton, supra note 17, at 837. See generally Model Penal Code §2.07, Comment at 148 (Tent. Draft No. 4, 1955); Mueller, supra note 1, at 39-40. Finally, if the corporation is closely-held there is no injustice to innocent shareholders since the fine simply punishes the guilty by means of a corporate rather than individual assessment.

[98] 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

crime which serves to perpetuate and expand its control. Congress sought to remedy this weakness in current sanctions with the re-introduction of criminal forfeiture.[99] Finally, the corporation often insulates the real perpetrators. Therefore, it may not be possible to find an individual to hold liable. Even if an individual malefactor can be found, his prosecution may not affect real corporate policy makers.[100]

¶41 A corporation's inability to form a specific state of mind does result in punishment with fictitious culpability. Failure to adequately control employees who might commit criminal violations could be at least reckless. Although the RICO cases are unclear as to what state of mind is required, commentators suggest at least recklessness for attendant circumstances would be appropriate for RICO criminal liability.[101] If so, this is more consistent with

(98 cont'd)
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).

99 18 U.S.C. §1963 (a) (1970).

100 See comment, Increasing Community Control over Corporate Crime, 71 Yale L. J. 280, 302-4 (1961); See also G. Williams, Criminal Law 865 (2d ed. 1961).

101 Cf. United States v. Stofsky, 409 F. Supp. 609 614 (S.D. N.Y. 1973)

corporate behavior.

¶42 In light of the statutory objectives under RICO[102] entity liability is more effective then individual liability alone.

Other Alternative Corporate Criminal Sanctions

¶43 RICO forfeiture is a departure from corporate criminal

(101 cont'd)
(The court concluded there was no separate scienter to commit a RICO violation.) This result seems untenable given the Supreme Court's holding in United States v. United States Gypsum, 438 U.S. 422 (1978) that mental state is always inferred to be an element of a crime unless expressly excluded by Congress.

102 The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrput legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

sanctions which generally include fines or individual penalties. Forfeiture has intrinsic benefits not evident in fines. Fixed fines have been inadequate to deter corporate criminal violations. Corporate violators have been classified as recidivists because of their repeated offenses.[103] This indicates that fixed fines are not imposed enough or are not large enough.[104] A fixed fine may have no relation to the actual benefit from the criminal conduct. In contrast, forfeiture under RICO divests the entity of all ill-gotten gains from the specific violation.[105] violation.[105]

¶44 A fixed fine large enough to deter crime would be unduly burdensome when violations are small and benefits are marginial. RICO is closer to a "rational calculation" since nothing is taken that was not related to the violation.

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[103]A study of the 70 largest domestic corporations revealed that 60% should be classified as "habitual criminals" with four convictions each, Sutherland, White Collar Crime 25 (1949), that almost 75% continuously violate the antitrust laws, Id. at 61, and that over 97% should be classified as recidivists, with two convictions each. Id. at 218. See also M. Clinard, Illegal Corporate Behavior (1979) (a comprehensive study of the 528 largest corporations in the United States).

[104]Meuller, Mens Rhea and the Corporation, 19 U. Pitt. L. Rev. 21, 42 (1957).

[105]"Whoever violates .... any provision of section 1962 ... shall forfeit ... any interest he has acquired or maintained in violation of section 1962...".

18 U.S.C. §1963 (a) (1) (1970) But cf. United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980) (Forfeiture is limited to interest in any enterprise).

¶45 Flexible fines[106] or multiple fines[107] also were possible alternatives for legislative drafters. These, as well as fixed fines, would be imposed by the judge only. Without procedural safeguards akin to those provided by RICO forfeiture, there is a great risk of arbitrariness.[108] The extent of forfeiture is determined by the jury under RICO and a forfeitable interest must have a proven relationship to the specific violation.[109] There is an element of fundamental fairness evident in the application and scope of forfeiture under RICO that is not evident with fines large enough for actual deterrence.[110]

¶46 RICO forfeiture is capable of the broad deterrent objectives of the Organized Crime Control Act.[111] This is

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[106]Black's Law Dictionary, 569 (5th ed. 1979).

[107]Id.

[108]Forfeiture under RICO is subject to the Rules of Evidence and the prosecution must meet the "beyond a reasonable doubt" standard of proff as to the interest's nexus with a violation of section 1962. Fines, however, are set by the judge, who is given no standards for setting the fine.

[109]18 U.S.C. §1963 (a) (1970).

[110]This paper operates on the premise that deterrence of Corporation and other entities is possible. This is supported by commentators and practical experience of regulatory agencies. See notes 92-102 and accompanying text supra.

[111]Pub. L. No. 91-452, 84 Stat. 922 (1970).

only if the letter and spirit of the law are followed by the courts. Departures such as those by the Marubeni and Thevis[112] courts curtail the effectiveness of the corporate sanctions and of the act as a whole. The pervasiveness of the problem addressed by this act requires adherence to its mandate to construe its provisions liberally and therefore to emphasize strict, not lenient application.

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[112] United States v. Marubeni, 611 F. 2d 763 (9th Cir. 1980) United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979).

The Measure of Damages Under RICO

by

Diane E. Campbell

and

Edwin John Lopez

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SUMMARY

¶1 The Racketeer Influenced and Corrupt Organizations Act provides both criminal and civil sanctions. Section 1964 (c) creates a treble damage action for "any person injured in his business or property by reason of a violation of section 1962." These materials examine the various types of damages which could result from a RICO violation and the current methods of measuring these damages in an attempt to ascertain the probable measures of damages under RICO.

I. Introduction: Civil Remedies Under RICO - Damages

¶2 One of the greatest potential strengths of the Racketeer Influenced and Corrupt Organizations Act[1] is found in its provisions for both criminal and civil sanctions. While the civil remedies have not, as yet, been vigorously pursued, they offer several advantages over the criminal prosecutions. The most important is the lower standard of proof in the civil proceeding. The civil plaintiff needs to prove his case by a preponderance of the evidence, not beyond a reasonable doubt. Other advantages inherent in the civil proceeding are the right of appeal, broad discovery that is allowed, and easy enforcement of injunctions.

¶3 RICO provides various types of civil remedies, including an action for treble damages plus attorney's fees for a plaintiff injured in his business or property by a violation of section 1962.[2] This action is modeled on the antitrust treble damage action. The elements which a plaintiff must prove in order to recover are:

1) a violation of section 1962;

2) injury to plaintiff's business or property resulting from such violation; and

3) proof of the amount of damages.

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[1] 18 U.S.C. §§ 1961-1968 (1977).

[2] 18 U.S.C. § 1964 (c) (1977).

¶4 These materials will address the question of what the measure of these damages will be, by examining the measures currently used in various types of damage actions and evaluating these methods in light of the remedial purpose of RICO.[3]

II. Damages Generally

¶5 Traditionally, the function of damages has been to compensate the victim for the harm he has suffered as a result of the defendant's wrong. Compensatory damages are a kind of substitutionary relief; giving the plaintiff a monetary substitute for what he has lost. Other types of damages have developed to fit differing circumstances. Nominal damages, awarding a minimal amount (usually $1.00), serve to vindicate a technical right where there has been no actual harm.[4] Punitive damages, that is, awarding an amount above and beyond the amount needed to make the plaintiff whole, serve to punish the defendant and to deter bad conduct. Courts also give damages for harm which is not measurable in dollars, awards for pain and suffering, mental anguish, and the like. These are often used as a sort of "back-door" method of awarding attorney's fees and the other nonrecoverable costs associated with litigation.[5]

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

[4] An example would be trespass to land where there has been no injury to the land.

[5] See D. Dobbs, Remedies, Ch. 3 (1973)

¶6 Multiple damages are available in some types of actions. The right to multiple damages is created by statute. Although the concept of multiple damages seems to be punitive, this is not entirely accurate. Multiple damages provide an incentive to a plaintiff in a case where he may be reluctant to sue. They also help to ensure that the victims of wrongful activity as a class will be adequately compensated.[6]

¶7 Under the traditional approach, when the court measures the damages a two step process is used. First, a rule of general damages is applied and then "special" damages are added. Special damages are those items of loss which are peculiar to the particular plaintiff. Usually, courts are willing to award general damages, but tend to be reluctant to award special damages. In addition, special limitations are applied to special damages: they must be proved to a reasonable certainty, and they are not recoverable if they are too remote.[7]

[6] For a more detailed discussion of multiple damages see K. Goering, The Characterization of Treble Damages: Conflict Between a Hybrid Mode of Recovery and a Jurisprudence of Labels, 1 Materials on RICO 428, 488, G. R. Blakey (ed.) (1980).

[7] See D. Dobbs, Remedies, Ch. 3 (1973). For a discussion of the various types of damages and the RICO treble damage provision, see K. Goering, The Characterization of Treble Damages: Conflict Between a Hybrid Mode of Recovery and a Jurisprudence of Labels, 1 Materials on RICO 428, G. R. Blakey (ed.) (1980).

III. Rico Offenses and Resulting Damages

¶8 The racketeering activities that are defined in Section 1961 of the statute give rise to a number of types of damages. Several deal with fraud,[8] an area of the law that has developed specific rules for the measure of damages.[9] A number relate to harm caused to a business or enterprise through various types of interference.[10] These damages would be similar to those found in the antitrust field. In addition, several offenses are included that might result in harm to property[11] or to persons.[12] By examining the methods for measuring damages that have been used in these areas, conclusions can be drawn as to the probable implementation under RICO.

IV. Damages Relating to Fraud

A. Two Stages in Damage Measurement

¶9 Damages are assessed in a two step process. First,

[8] 18 U.S.C. § 1341 (1973) (mail fraud), 18 U.S.C. § 1343 (1973) (wire fraud), any offense involving bankruptcy fraud or fraud in the sale of securities.

[9] See ¶9, infra.

[10] Extortion, bribery, etc. Most of the predicate offenses could result in some sort of harm to a business or enterprise affected by the offense directly or indirectly.

[11] Arson, 18 U.S.C. § 659 (1973) (theft from interstate shipment), 18 U.S.C. §§ 471, 472, 473 (1973) (counterfeiting).

[12] Murder, kidnapping, etc.

courts apply a rule of general damages. Then, they include "special" or "consequential" damages if such damages are adequately proved and are not considered to be too remote. Special damages include losses that are peculiar to the particular plaintiff and would not necessarily occur to other plaintiffs in similar circumstances.[13] General damages are those that flow from the wrong done by the defendant. For example, a defendant fraudulently induces a plaintiff to buy property by representing its worth as $50,000. The plaintiff pays $40,000 and the property is actually worth $35,000. The plaintiff spends $800 travelling to the property to inspect it and spends another $500 to have it appraised. The plaintiff would recover either $5,000 or $15,000 as general damages, depending on the rule of general damages applied. The plaintiff may also be able to recover the $1300 he spent for travel and the appraisal as special damages.

1. General Damages

¶10 A defendant's fraud usually involves a bargaining transaction between the parties and the transfer of something of value. Courts normally award general damages,

[13] Valley Die Cast Corp. v. A.C.W., Inc., 25 Mich. App. 321, 181 N.W.2d 303 (1970).

adding special damages that the plaintiff can prove.[14] There are two general measures of damages that are commonly used, benefit of the bargain[15] and out of pocket.[16] While courts have traditionally used one or the other of these measures exclusively, a third option of applying whichever traditional rule seems more just, has been emerging recently.[17]

a. Benefit of the Bargain Rule

¶11 The most commonly accepted measure of damages is the benefit of the bargain rule. Under this rule the plaintiff recovers the difference between the price paid and the value if the representations made were true. The purpose is to give the plaintiff his expectation interest for the loss of the bargain. This rule puts the plaintiff in the same financial position that he would have been in had the fraudulent representation been true. In Pace v. Parrish,[18] the defendant sold a large tract of farm land.[19] He claimed that all of the fences, including some remote ones, were in good repair.[20] After completing the purchase, the plaintiff discovered that some of the fences were down and in disrepair.[21] The plaintiff recovered $100, the cost of repairing the fences, which put him in the same financial position as if the fraudulent representation had been true.[22]

b. Out of Pocket Rule

¶12 A less widely accepted measure of damages is the out of pocket rule. Under this rule the plaintiff recovers the difference between the price he paid and the actual value of the property. The plaintiff does not recover for the loss of his bargain.[23] A simple illustration follows.

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[14] In Stamp v. Rippe, 29 Colo. App. 185, 483 P.2d 420 (1971), the plaintiff received benefit of the bargain damages. In addition the plaintiff was awarded the costs of hiring work done and other damages suffered as a result of the defendant's fraud.

[15] See ¶11, infra.

[16] See ¶12, infra.

[17] See ¶13, infra.

[18] 122 Utah 141, 247 P.2d 273 (1952).

[19] Id. at 143, 247 P.2d at 275.

[20] Id. at 143, 247 P.2d at 275-276.

[21] Id. at 147, 247 P.2d at 276.

[22] "The damage to the fence was fixed at actual estimated cost to put it in reasonable condition and repair." Id. at 150, 247 P.2d at 277.

[23] Few states use the out of pocket rule. In Price v. Mabrey, 231 Ark. 971, 333 S.W.2d 724 (1960), the Arkansas court first stated the out of pocket rule and then applied the benefit of the bargain rule. Though California has adopted, by statute, the out of pocket rule, the courts have sidestepped it in certain cases. See Ward v. Taggart, 51 Cal.2d 736, 336 P.2d 534 (1959). Idaho, Maryland, Minnesota, Mississippi, Montana, Pennsylvania, and Texas accept the out of pocket rule but qualify it by statute or otherwise in certain cases. See 13 A.L.R.3d 875 (1967).

A plaintiff pays $75,000 for a house that was represented as termite free. The house would have been worth $80,000 had the representation been true. The house with termites is worth $70,000. The plaintiff would be able to recover $5,000 because he paid $75,000 and got a house worth only $70,000. The plaintiff would not recover for the increase in value for which he bargained.[24]

c. Benefit of the Bargain or Out of Pocket, Whichever Is Most Just

¶13 Recently, the courts have been applying the rule that seems most just in the particular situation. This is a sensible approach since both the benefit of the bargain rule and the out of pocket rule have merit. The benefit of the bargain rule works as a deterrent. If it were not used, a defrauder could attempt to gain illicit profit through fraud with no risk of loss. Under the out of pocket rule the fraudulent vendor would simply have to return the amount paid in excess of the true value. Though the out of pocket rule has no deterrent effect, it can be very useful for plaintiffs since courts seldom deny recovery under this rule. Particularly in breach of contract cases, where the plaintiff's lost expectancy may be difficult to prove,

[24]Under the benefit of the bargain rule, the plaintiff would recover the difference between the actual value of the house ($70,000) and the value it would have had if no termites had been found ($80,000.) The plaintiff would recover $10,000.

the out of pocket rule would allow at least some recovery. The plaintiff should have the option to use either rule, providing he can prove the facts necessary to establish his claim. This rule has been explicitly adopted in Massachusetts,[25] New Jersey,[26] and Oregon.[27]

2. Special Damages

a. Generally

¶14 A plaintiff can recover general damages under one of the three rules discussed above. In addition, the plaintiff in a fraud case can recover special damages if he is able to prove them with reasonable certainty.[28] Thus, in addition to recovering the benefit of his bargain a plaintiff may recover lost profits. In Valley Die Cast Corp. v. A.C.W., Inc.,[29] a buyer of a car wash system recovered lost profits, upon showing with reasonable certainty that he had lost profits due to the seller's

[25]Rice v. Price, 340 Mass. 502, 164 N.E.2d 891 (1960).

[26]Zeliff v. Sabatino, 15 N.J. 70, 104 A.2d 54 (1954).

[27]Selman v. Shirley, 161 Or. 582, 85 P.2d 384 (1938).

[28]Baker v. Northwestern Nat'l Cas. Co., 26 Wis.2d 306, 132 N.W.2d 493 (1965).

[29]25 Mich. App. 321, 181 N.W.2d 303 (1970).

fraud.[30] Expenses incurred in adapting other property for use with the misrepresented property may be recovered. In Schwecke v. D. Leone, Inc.,[31] the plaintiff was induced by fraud to take a lease.[32] He purchased personal property especially adapted for use in this apartment, which would be useless elsewhere.[33] The plaintiff was allowed recovery upon proof that the premises were uninhabitable.[34]

¶15 A plaintiff may recover for injury to other property caused by the fraud. In Cole v. Gerhart,[35] the plaintiff recovered special damages when he proved with reasonable certainty that crops were lost due to a defective water well on the land he had purchased.[36] The defendant had

[30]"Although recovery of damages for loss of profits is a close question, resolution of this question was confined to that measure of damages controlled by the evidence which was reasonably certain and not speculative." Id. at 336, 181 N.W.2d at 310.

[31]21 N.J. Misc. 6, 29 A.2d 624 (N.J. Dist. Ct. 1942).

[32]Id. at 6, 29 A.2d at 626.

[33]Id. at 9, 29 A.2d at 627.

[34]"A defrauded party is not limited to general damages, but may also recover special damages which have proximately resulted from the fraud." Id. at 9, 29 A.2d at 627.

[35]5 Ariz. App. 24, 423 P.2d 100 (1967).

[36]"...we believe the jury should be permitted to consider any profits lost or losses sustained as to crops by reason of the failure of the well to come up to representations, up to the time of trial." Id. at 27, 423 P.2d at 103.

represented the land as free from defects.[37]

b. Special Expenses Incurred by Plaintiff

¶16 When a plaintiff incurs special expenses due to the defendant's fraud they may be recoverable. In McInnis & Co. v. Western Tractor & Equipment Co.,[38] the buyer of a tractor was forced to travel considerable distance to negotiate with third persons about its value and use.[39] Upon proving this with reasonable certainty, the buyer recovered for the travel expenses necessitated by the defendant's fraud.[40]

¶17 A plaintiff may recover special damages for attorney's fees spent in litigation with third parties caused by the defendant's fraud. In Spillane v. Corey,[41] the court awarded damages that were identical to the expenses

[37]Id. at 25, 423 P.2d at 101.

[38]67 Wash. 2d 965, 410 P.2d 908 (1966).

[39]Id. at 970-71, 410 P.2d at 912.

[40]"Where, as here, application of the benefit-of-the-bargain rule as the sole standard of damages will not tend to make the buyer whole because plaintiff has suffered injuries not entirely encompassed by the rule but which, nevertheless, follow as the natural and ordinary consequences of the wrong, additional damages thus caused will be allowed." Id. at 971, 410 P.2d at 912. "...[P]laintiff's journey to the final place of delivery to both protect the property and negotiate its final acceptance can be said to be a natural and ordinary consequence of the misrepresentation." Id. at 972, 410 P.2d at 912.

[41]323 Mass. 673, 84 N.E.2d 5 (1949).

the plaintiff had incurred in litigation with third parties.[42] This recovery did not violate the usual rule against allowance of attorney's fees since the fees covered are those incurred in other litigation.[43]

¶18 Normally, the plaintiff is barred from recovering damages he could reasonably have avoided by slight expense. In a fraud case, the plaintiff is entitled to recover any reasonable expenditure he does in fact make to minimize or avoid damages caused by the defendant's wrong, since reasonable expenditures of this kind are likely to reduce the defendant's ultimate liability.[44]

c. Punitive Damages

¶19 Punitive damages in fraud cases are allowed only where the fraud is gross, oppressive, or aggravated,[45] or where it involves violation of trust or confidence,[46] or where the fraud also amounts to another recognized tort.[47] To mitigate this rule, juries are often allowed to find gross or oppressive fraud. In J. Truett Payne Co. v. Jackson,[48] the defendant fraudulently represented a car as new.[49] The jury, finding the fraud gross, oppressive, and malicious, awarded the plaintiff $20,000 including punitive damages.[50] Some states, like New York, allow punitive damages in fraud cases only where the fraud is "aimed at the public generally and is gross and involves high moral culpability."[51]

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[42] "This expense was an additional 'loss directly and naturally resulting, in the ordinary course of events', from the false representations..." Id. at 676, 84 N.E.2d at 7.

[43] The rule against allowance of attorney's fees only forbids recovery of fees incurred in litigation with the tortfeasor himself.

[44] Cole v. Gerhart, 5 Ariz. App. 24, 423 P.2d 100 (1967).

[45] J. Truett Payne Co. v. Jackson, 281 Ala. 426, 203 So.2d 443 (1967), ("malicious, oppressive or gross"). See also, Poplin v. Ledbetter, 6 N.C.App. 170, 169 S.E.2d 527 (1969) in which the court said no punitive damages were allowed unless there was "insult, indignity, malice, oppression or a bad motive" in the fraud. For a more extensive explanation of punitive damages see 165 A.L.R. 614 (1946).

[46] Fowler v. Benton, 245 Md. 540, 226 A.2d 556, cert. denied, 389 U.S. 851 (1967).

[47] In Morris v. MacNab, 25 N.J. 271, 135 A.2d 657 (1957), the defendant, a man, fraudulently told the plaintiff, a woman, that he was unmarried and induced her to marry him. He was already married. The plaintiff recovered for mental anguish and punitive damages.

[48] 281 Ala. 426, 203 So.2d 443 (1967).

[49] Id. at 428, 203 So.2d at 444.

[50] "...[P]unitive damages are allowed in this state in fraud cases where the defendant has made false misrepresentations intended to defraud the plaintiff....[T]he awarding of punitive damages in such a case is discretionary with the jury, acting with regard to the enormity of the wrong and the necessity of preventing a similar wrong." Id. at 429, 203 So.2d at 446.

[51] Walker v. Sheldon, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961).

d. Interest

¶20 In fraud cases interest is usually awarded not only from the date of the judgment for the plaintiff, but from the time he first lost use of his money due to the defendant's fraud.[52]

B. Probable RICO Interpretation

¶21 The RICO provisions are to be liberally construed to effectuate the remedial purposes of the statute.[53] When courts are to assess damages in RICO cases they should keep this in mind and award those damages which will serve to compensate the victim and which will also serve to remedy the wrong done to society. The provision for treble damages advances this remedial aim. Since, in many cases, the defendant may be judgment-proof, the awarding of treble damages helps to balance the recoveries of the class of plaintiffs with the wrongs of the class of defendants.

¶22 In RICO cases which involve fraud, it would be most advantageous to the plaintiff for the courts to use the benefit of the bargain rule in measuring damages.[54] This rule also helps to serve as a deterrent since the defrauder will be required to compensate the victim for the difference between the actual value of the property and the value represented.[55] Using the benefit of the bargain rule would best serve to advance the aims of the statute.

¶23 Though courts have traditionally been reluctant to award special damages, they should be more willing to do so in RICO cases. General damages are seldom adequate to fully compensate the victim and to give full remedial effect to the statute special damages must be allowed.

V. Damages Relating to Business Harm

¶24 Since the RICO treble damage provision is modeled after antitrust treble damages, it will be most useful to examine the methods of measuring damages in antitrust cases. While the goals of the statutes differ, it seems likely that the general concepts of how to measure damage to a business, which are now used in antitrust cases, will also apply to RICO cases.[56]

A. Fact of Damage

¶25 Before the court even reaches the various theories and rules for measuring damages, the plaintiff must show that his

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[52] City of Salinas v. Souza & McCue Constr. Co., 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967).

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

[54] See ¶11, supra.

[55] See ¶11, supra.

[56] The following discussion on damages as measured in antitrust cases draws heavily on Timberlake, The Legal Injury Requirements and Proof of Damages in Treble Damage Actions under the Antitrust Laws, 30 Geo. Wash. L. Rev. 231 (1961). [hereinafter cited as Timberlake].

business has, in fact, been damaged. Under the antitrust law, the requirements for passing this preliminary test are rather stringent.[57] These requirements have been developed over the years to ensure that only cases where there has been genuine injury and where it is important to compensate the victim will result in damage awards.[58]

B. Measure of Damage

¶26 The plaintiff must furnish a factual basis for determining with reasonable certainty the extent of the damages suffered. Damages must always be proved for there is no presumption as to the amount of damages.[59] The cardinal rule is that damages must not be speculative.[60] The case of Bigelow v. RKO Radio Pictures, Inc.,[61] firmly established the rule that a plaintiff in an antitrust private treble damage action is not required to prove the amount of damages with exactness.[62] Nevertheless, the court also stated that damages can not be based on speculation and guesswork, even where the defendant's wrong has prevented more precise computation.[63] Following the Bigelow decision, lower courts have held that when the fact of damage is proved, evidence reasonably tending to show the amount of damages is all that is required. The standard of proof is relaxed where the defendant's tort has caused a "blackout" of evidence.[64] There are several theories of damages which can be used as a base for the damage award, to keep it from becoming too speculative.[65]

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[57] There is also the earlier hurdle of standing which the plaintiff must pass. See V. Seiling, Standing Rules and the RICO Treble Damage Action, 1 Materials on RICO 533, G. R. Blakey (ed.) (1980).

[58] For a discussion of these requirements see Timberlake, supra note 1, at 232-252.

[59] Sano Petroleum Corp. v. American Oil Co., 187 F.Supp. 345 (E.D.N.Y.1960); Camfield Mfg. Co. v. McGraw Electric Co., 70 F. Supp. 477 (D. Del. 1947).

[60] Central Coal & Coke Co. v. Hartman, 111 F. 96 (8th Cir. 1901); Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922).

[61] 327 U.S. 251 (1946).

[62] "...[T]he jury could return a verdict for the plaintiffs, even though damages could not be measured with...exactness ....[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly....Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery. Id. at 264-265.

[63] "...[E]ven where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." Id. at 264.

[64] William Goldman Theatres, Inc. v. Loew's, Inc., 69 F.Supp. 103 (E.D. Pa. 1946), aff'd, 164 F.2d 1021 (3rd Cir.), cert. denied, 334 U.S. 811 (1948); Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds, 340 U.S. 558 (1951).

[65] See ¶¶ 27-34 infra.

1. Diminution of Revenue From Business Actually Transacted

¶27 The plaintiff can recover out of pocket expenses caused by increased prices to him or losses suffered by reason of lowered prices at which he sold.[66] The burden of proof is met by showing,

(1) the cost or price level previously existing,

(2) the cost or price level during the period of the restraint, and

(3) the amount of business actually transacted during the period of the restraint.[67]

If there was a diversion of business the plaintiff can also prove the amount of profits it lost due to the unlawful act. Nevertheless, mere discrimination in price without more is not sufficient to establish the amount of damages.[68]

2. Loss of Profits Which Would Otherwise Have Been Made When Plaintiff Was Actually Operating The Business

¶28 These are the type of damages most frequently encountered in the antitrust field. The problem is to assemble the underlying data and to present it so that it fairly proves the amount of damages without guessing or speculation. There are three basic methods which are used to measure loss of anticipated profits. They are the before and after theory,[69] the yardstick theory,[70] and expert testimony as to anticipated gross receipts.[71]

a. Before and After Theory

¶29 The before and after theory requires a comparison of profits prior to the impact of the wrongful act with the profits made during the period of the violation, the difference being the anticipated profits lost by reason of the wrong.[72] If the plaintiff's business was increasing or decreasing before the wrongful act, the trier of fact can infer that this would continue.[73]

¶30 There are several conditions precedent for using this theory, as follows:

(1) the plaintiff's business must be one which was established and operating prior to the impact of

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[66] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Loder v. Jayne, 142 F. 1010 (E.D.Pa.), rev'd on other grounds, 149 F.21 (3d Cir. 1906).

[67] Timberlake, supra note 1, at 259.

[68] Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457, 459 (2d Cir.), cert. denied, 353 U.S. 965 (1957).

[69] See ¶29, infra.

[70] See ¶31, infra.

[71] See ¶33, infra.

[72] Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359 1927); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

[73] Frey & Son, Inc. v. Welch Grape Juice Co., 240 F.114 (4th Cir. 1917).

the violation,

(2) the prior earnings must have been reasonably uniform,

(3) the earnings during both periods must be in the same line of commerce, and

(4) the earnings during the prior period may not have been made when the plaintiff was a participant in, or a beneficiary of, the unlawful acts of the defendant.[74]

If these criteria can be met, the evidence of damages is the best that the plaintiff can offer, since the before and after theory uses the same business with its inherent strengths and weaknesses.

b. Yardstick Theory

¶31 This theory uses evidence of the gross receipts of the "yardstick" business to measure the volume of the plaintiff's gross receipts absent the unlawful act.[75] Certain fundamental conditions must be met in order to use this theory. The plaintiff must show that the two businesses are in fact comparable, that absent the violation the plaintiff's business would have done the same or better than the yardstick business and the yardstick business must be identical to the type of business of the plaintiff.

¶32 A few cases have used this theory without requiring that the businesses be exactly comparable. Minor differences may be taken into account by the trier of fact.[76] This theory provides an advantage for the plaintiff since he does not need to prove any pre-existing business. It can be useful when the impact is at the inception of the business. If the defendant's business is used as the yardstick the result will be inaccurate since it has benefitted from the restraint. The courts will allow use of the defendant's business as long as an adjustment is made to modify the effect of the benefit.[77]

c. Expert Testimony as to Anticipated Gross Receipts

¶33 This is the least desirable method of proof since the testimony will be excluded unless the actual knowledge and experience of the witness on the particular subject is shown to be adequate and sufficient.[78] The expert must

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[74] Timberlake, supra note 1, at 264.

[75] Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), cert. denied, 361 U.S. 961 (1960).

[76] See William Goldman Theatres, Inc. v. Loew's, Inc., 69 F.Supp. 103 (E.D.Pa. 1946), aff'd, 164 F.2d 1021 (3d Cir.), cert. denied, 334 U.S. 811 (1948); Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn. 1959), aff'd, 289 F.2d 418 (8th Cir. 1961).

[77] Victor Talking Machine Co. v. Kemeny, 271 F.810 (3d Cir. 1921).

[78] Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), cert. denied, 355 U.S. 835 (1957).

explain the method of reaching the figure and the figure must be based on the facts. If the expert's method is improper the testimony will be excluded. Despite the difficulties involved, this method has often been used successfully.[79]

3. Damages Based Upon Loss of or Injury to Investment in Property

¶34 Once the plaintiff proves loss of profits he can also prove that the value of the business is diminished. There are two types of factual situations which involve this injury to "good will", one where the plaintiff is ready, willing and able to engage in the line of commerce affected by the violation, the other where the plaintiff has abandoned or sold the business affected by the violation. In Atlas Building Products Co. v. Diamond Block & Gravel Co.,[80] the court recognized the right to damages for this type of injury.

[79] Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 176 F.2d 594 (2d Cir. 1949); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), cert. denied, 344 U.S. 837 (1952); Sablosky v. Paramount Film Distrib. Corp., 137 F.Supp. 929 (E.D.Pa. 1955); Atlas Bldg. Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960); Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F.Supp. 440 (E.D. Pa. 1960).

[80] 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960). "[The jury] might also consider as another element of damages the extent to which the value of appellee's profit or the net worth of its assets had been diminished as a result of the price discrimination." Id. at 958.

in the RICO statute[84] would have some effect on a plaintiff's business. In assessing the harm caused to the plaintiff's business courts are likely to look to the methods of measuring damages to a business that are currently used in the antitrust field.[85]

¶38 It is likely that the rigid requirements for proving the fact of damage,[86] and the standing rules[87] of the antitrust field will be relaxed or eliminated in RICO cases. This would help to advance the remedial aims of the RICO statute. The actual methods used to measure the various kinds of damages caused to the plaintiff's business by the defendant's actions, however, will probably remain about the same.[88] They have been fairly accurate and useful in the antitrust field, and with some modification will serve well under RICO.

[84] 18 U.S.C. § 1961 (1) (1973).

[85] See King v. Vesco, 342 F. Supp. 120, 122 (N.D. Cal. 1972), where the court pointed out that the RICO venue provisions were modeled after the Clayton Act venue provisions and stated "Thus, in order to properly construe the venue provision at issue in the instant case, it is necessary to turn to the antitrust provisions and the cases construing them."

[86] See ¶25, supra.

[87] See V. Seiling, Standing Rules and The RICO Treble Damage Action, 1 Materials on RICO 533, G.R. Blakey (ed.) (1980).

[88] See ¶¶ 26-34, supra.

¶35 The plaintiff must first prove that the business did indeed have a good will value.[81] Then the plaintiff must have evidence valuing the good will and what it would have been worth when the plaintiff was forced to sell. The measure of damages is relatively simple. The plaintiff must show the value which, but for the violation, the property would have had at the time of abandonment or sale and the value of the property for other uses or the sale price actually received. The difference equals the loss in value.[82]

¶36 Problems can arise in connection with the types of evidence that are admissible to prove value. It is best to show a change in the market value of the property or the amount that would be required to spend in order to adapt the property to another use. The value of the property must be determined as of the time of the injury. Subsequent events may be introduced as evidence of the inherent value at the time of the injury.[83]

C. Probable RICO Interpretation

¶37 Quite a few of the racketeering activities defined

[81] Bausch Machine Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935).

[82] Timberlake, supra note 1, at 279.

[83] Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689 (1933).

VI. Damages Relating to Loss of or Harm to Property

A. Traditional Measures

¶39 There are two basic measures of damages when injury is done to land itself or to structures on it.[89] The first, and most commonly used, is the diminution measure. It is computed by showing the difference in the value of the property immediately before and immediately after the injury to it. The plaintiff recovers the amount his property has diminished in value as a result of the injury.[90] The other measure awards the plaintiff the reasonable cost of restoring or repairing the damage.[91] Most courts use both measures and the selection of one test or another is based on an evaluation of which is most likely to give full and reasonable compensation.

¶40 When items of personal property are destroyed, the usual measure of damage is the market value of the property

[89] See D. Dobbs, Remedies, Ch. 5 (1973), the following discussion draws heavily on this chapter.

[90] Frankfort Oil Co. v. Abrams, 159 Colo. 535, 413 P.2d 190 (1966); Hale v. Glenn, 108 Ga. App. 579, 134 S.E. 2d 60 (1963); Realty Associates v. City of New York, 1 A.D.2d 1049, 152 N.Y.S.2d 766 (1956); Hogland v. Klein, 49 Wash.2d 216, 298 P.2d 1099 (1956).

[91] Union Pac. R.R. v. Vale, Or. Irrigation Dist., 253 F. Supp. 251 (D. Or. 1966); Frye v. Pennsylvania R.R., 187 Pa. Super. 367, 144 A.2d 475 (1958); Olson v. King County, 71 Wash.2d 279, 428 P.2d 562 (1967).

at the time and place of destruction.[92] Similar rules apply to conversion of property. If the property is not destroyed but merely damaged the plaintiff may recover damages as measured by the depreciation rule, the difference between the value of the property immediately before the damage and the value immediately after the damage.[93] Some courts reject this approach and substitute some other measure, such as the reasonable cost of restoring the property to its previous condition,[94] or use repair as the measure when it substantially restores the property and is less than the depreciation measure.[95]

¶41 Even if there has been no physical damage to a plaintiff's personalty or realty, he may have been injured in his "property". The term property includes intangible assets such as bank accounts and stocks. The diminution of a plaintiff's wealth amounts to an injury in his business or property under the antitrust laws.[96]

B. Probable RICO Interpretation

¶42 If a plaintiff's property is damaged or destroyed as a result of a defendant's RICO violation, it is most likely that the traditional measures will be used. The plaintiff will be awarded either the diminution in value or the replacement cost. While, in most cases, the plaintiff may be better off if he is awarded the replacement cost, the damages will be trebled and he is, more likely than not, going to be adequately compensated. Nevertheless, in light of the remedial aims of the RICO statute, it would be best to award the plaintiff the replacement cost so that he can restore the property.

VII. Damages Relating to Personal Injury or Death

A. Traditional Measures

¶43 In cases involving personal injury there are three basic kinds of losses plaintiffs prove.[97] They are pain and suffering, medical and other expenses incurred, and time losses or loss of earning capacity. In cases involving death, most states measure damages by the loss

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[92] Dubiner's Bootery, Inc. v. General Outdoor Advertising Co., 10 A.D.2d 923, 200 N.Y.S.2d 757 (1960). Adjustments are made for salvage value, New York State Elec. & Gas Corp. v. Fischer, 24 A.D.2d 683, 261 N.Y.S.2d 310 (1965).

[93] Robbins v. Voight, 280 Ala. 207, 191 So.2d 212 (1966); Merrill v. Tropoli, 414 S.W.2d 474 (Tex. Civ. App. 1967); Krueger v. Steffen, 30 Wis.2d 445, 141 N.W.2d 200 (1966).

[94] Johnson v. Scott, 258 Iowa 1267, 142 N.W.2d 460 (1966); Carl R. Anderson & Co. v. Suhr, 181 Neb. 474, 149 N.W.2d 101 (1967).

[95] Hunt v. Chicago, B. & Q. R. Co., 180 Neb. 375, 143 N.W.2d 263 (1966); Skaggs Drug Centers, Inc. v. City of Idaho Falls, 90 Idaho 1, 407 P.2d 695 (1965).

[96] "A person whose property is diminished by a payment of money wrongfully induced is injured in his property.... A man is injured in his property when his property is diminished." Chattanooga Foundry v. Atlanta, 203 U.S. 390, 396, 399 (1906).

[97] See D. Dobbs, Remedies, Ch. 8 (1973).

the death caused to the survivors.[98] A few states reject this approach and measure damages in the amount the decedent would have saved during his life expectancy (loss-to-estate). In all cases recovery is limited to pecuniary loss.

B. Probable RICO Interpretation

¶44 The RICO treble damages provision[99] creates a cause of action for persons injured in their "business or property." Consequently, injury or death of a person would not be compensable in a RICO action, that is, the usual measures of damages for personal injury and wrongful death could not be used. Nevertheless, if the injury or death affected the plaintiff's business or property in some way, it may be possible to recover some damages. In personal injury cases the cost of hiring a substitute or assistant is sometimes allowed as an item of damages.[100] If a plaintiff could show that he incurred additional expense to get the same work done when one of his employees

[98] See Comment, 44 N.C. L. Rev. 401 (1966).

[99] 18 U.S.C. § 1964 (c) (1977).

[100] See Annot., "Cost of Hiring Substitute or Assistant During Incapacity of Injured Party as Item of Damages in Action for Personal Injury" 37 A.L.R.2d 364 (1954).

was injured, he might be able to receive these expenses as part of the recovery under RICO. If the decedent had been a key employee in the business, it is possible that his death had an adverse effect on the business. This effect could be measured by a before and after test, with adjustments for changes in the business not related to the death. Recoveries of this sort may be allowed under RICO to help fulfill its remedial purposes.

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Liberal Construction of RICO

by

Deborah Eisen

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SUMMARY

¶1 In section 904(a) of the Racketeer Influenced and Corrupt Organization Statute (RICO), Title IX of the Organized Crime Control Act of 1970, Congress provided that its provisions [should] be liberally construed to effectuate its remedial purposes."[1] This innovative[2] liberal construction directive augmented the effectiveness of the statute's potent criminal and civil antitrust-type remedies and reinforced Congress' intent to create a statute that would launch a broad attack on organized crime as well as other forms of group criminality and its deleterious effects on society.

¶2 When construing RICO, courts ought to follow the legislative directive, and most courts have, in fact, given the statute abroad construction consistent with its remedial purposes. Nevertheless, a few courts, ignoring the directive have adopted an unjustifiably narrow interpretation[3] of the statute. These decisions reflect an inadequate understanding of the judicial function and a misapplication of the rules of statutory construction as well as a misuse of

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

[2]RICO is the only statute imposing criminal penalties which has a liberal construction directive in the United States Code.

[3]For the purposes of this paper, the terms "interpretation" and "construction" are used interchangeably.

legislative history. As a result, the courts have frustrated Congress' intent.

I. Introduction

¶3 Statutory construction is one of the most confused areas of the law.[4] American courts have been critized for having no coherent theory of statutory interpretation. Conflicting canons of construction have often led to inconsistent results.[5] Courts have been slow in recognizing that developments in the legal system have made many of the judicially - created interpretive aids outdated. The rule of strict construction exemplifies a rule that some courts still adhere to even though the historical justifications for the rule are long gone.[6]

¶4 Traditionally, courts have followed the rule that penal statutes are to be strictly construed.[7] The obsolescence

[4] See R. Dickerson, The Interpretation and Application of Statutes (1975); Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed, 3 Vand. L. Rev. 395 (1950); Johnstone, An Evaluation of the Rules of Statutory Interpretation. 3 Kan. L. Rev. 1 (1954); Horack, The Disintegration of Statutory Construction, 524 Ind. L. J. 335 (1949).

[5] Karl Llewellyn notes that every canon of construction can be countered by its opposite. Llewellyn, supra note 4, at 401. Llewellyn lists 28 "thrusts" and "parrys" a lawyer can use in arguing for a particular statutory interpretation. Id. at 401-06.

[6] See notes 42-46 and accompanying text infra.

[7] See notes 38-40 and accompanying text infra.

of the rule in light of modern conditions has gradually led to a trend toward liberal construction.[8] RICO's liberal directive illustrates the progress this trend has made. While many state legislatures have abrogated the rule and adopted liberal construction statutes,[9] the courts are far from sounding its death-knell. As some recent RICO decisions indicated, the attitude of strict construction lives on.[10]

¶5 In these decisions, the courts have either ignored or refused to apply Congress' liberal construction directive. They have tried to defend a strict construction of the statute on constitutional[11] and separation of power principles[12]. Neither of these justifications, however, can stand up to close scrutiny. The courts' misapplication of the rule of strict construction combined with its misuse of

[8] See note 45 and accompanying text infra.

[9] See note 45 and accompanying text infra.

[10] See United States v. Sutton, 605 F.2d 260 (6th Cir. 1979) (RICO not applicable where persons engaged in racketeering activity unrelated to any legitimate enterprise); United States v. Mandel, 415 F.Supp. 997 (D. Md. 1975) (Public entity (State of Maryland) not a RICO enterprise); United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980) (Criminal forfeiture limited to interest in RICO enterprise).

[11] E.g., United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1975).

[12] See note 60 and accompanying text infra.

the legislative history has reduced the effectiveness of RICO as a weapon against organized crime. One circuit[13] has limited its application to legitimate businesses only. A district court[14] has held that a government entity cannot constitute a RICO enterprise. Another decision has curtailed the scope of RICO's forfeiture provision.[15]

II. Fundamentals of Statutory Construction

A. Ambiguity and The Plain Meaning Rule

¶6 The function of the court in construing statutes is to carry out the will of the legislature within constitutional limits.[16] Not surprisingly, much controversy rages over how courts should go about ascertaining the meaning of a statute.[17]

¶7 Resolving ambiguity is the primary task of the court in construing statutes. Because words are imprecise symbols for conveying meaning, language is inherently ambiguous.[18] The equivocal nature of language, however, does not mean that every time a case involves a statute the court must resort to statutory construction. As Justice Frankfurter put it, "A problem of statutory construction can seriously bother courts only when there is a contest between probabilities of meaning."[19]

¶8 Unless the court decides that there is a substantial degree of ambiguity that could lead to more than one plausible interpretation, the court should accord the words of the statute their plain meaning.[20] The Supreme Court has explained when the rule is to be used: "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."[21] In other words, once the

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[13] United States v. Sutton, 605 F.2d 260 (6th Cir. 1979).

[14] United States v. Mandel, 415 F. Supp. 997 (D. Md. 1975)

[15] United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980).

[16] See Dickerson, supra note 4, at 12-13; Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col. L. Rev. 1299; 2A C. D. Sands, Sutherland Statutory Construction §§45.03 - 45.07, (4th ed. 1973). Sands observed:

> For the interpretation of statutes, "intent of the legislative" is the criterion, or test, that is most often recited. An almost overwhelming majority of judicial opinions on statutory issues are written in the idiom of legislative intent. The reason for this doubtless lies in an assumption that an obligation to construe statutes in such a way as to carry out the will, real or attributed, of the lawmaking branch of government is mandated by principles of separation of powers. Id. §45.05.

[17] See generally note 4 supra, Murphy Note 16 supra.

[18] Frankfurter, Some Reflections On the Reading of Statutes, 47 Colum. L. Rev. 527, 528.

[19] Id.

[20] See 2A C.D. Sands, supra note 16 at §46.01. See generally Murphy, supra note 16.

[21] United States v. Missouri Pac R.R., 278 U.S. 269, 278 (1929).

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court makes an independent determination from the statutory schem that no manifest ambiguity exists, it should not resort to any extrinsic aids or other canons of construction.[22]

¶9 Abuse of the plain meaning rule has opened it up to an onslaught of criticism.[23] Nonetheless, there are persuasive reasons for the continued vitality of the rule. It serves as a reminder to the court that the most important source in interpret

[22] Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Caminetti v. United States, 242 U.S. 470, 485 (1917). But see Fordham and Leach, Interpretation of Statutes in Derogation of the Common Law. 3 Vand. L. Rev. 438, 440 (1950). ("[A] court is not compelled by what appears to be a clear, literal interpretation to forego taking into account the common law or statutory background, the social matrix, legislative history and the consequence of a literal interpretation.") Boston Sand and Gravel Co. v. United States, 278 U.S. 41. Mr. Justice Holmes stated:

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. This is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."

Id. at 14-15.

[23] See Murphy, supra note 16; Dickerson, supra note 4, at 224 ("[T]he rule has sometimes been used to read ineptly expressed language out of its proper context, in violation of established principles of meaning and communication. To this extent it is an impediment to interpretation"), Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes, 25 Wash. L. Q. 2 (1939).

a statute are the words of the statute itself.[24] While the legislative history may be useful at times for discerning a broad legislative purpose, courts should use it cautiously since it is not an official declaration by the legislature.[25] The court should always keep in mind that only the statute is the law. The plain meaning rule is also consistent

[24] "Though we may not end with the words in construing a disputed statute, one certainly begins there." Frankfurter, supra note 18, at 535.
"[W]hen counsel talked of the intention of the legislature I was indiscreet enough to say I didn't care what their intention was, I only want to know what the words mean." Frankfurter (quoting Mr. Justice Holmes) supra note 18, at 538.

[25] See generally, Dickerson supra note 4, at 162-168.
In a famous concurring opinion, Mr. Justice Jackson wrote:

> Resort to 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... moreover it is only the words of the bill that have presidential approval, where the approval is given. It is not supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.
>
> Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are... To accept legislative

with legislative supremacy.[26] The farther away the court strays from the statute in its search for meaning, the more likely it wi- encroach on the legislative law-making power.

B. Differences in Construing Remedial and Penal Statutes

¶10 Traditionally, courts have made a distinction in the way they construe remedial and penal statutes. Courts have been inclined to construe liberally remedial legislation to suppress the evil and effectuate the statutes' remedial purpose[27]

(25 Cont'd)

> debates to modify statutory provisions is to make the law inaccessible to a large part of the country.
>
> By and large, I think our function was well stated by Mr. Justice Holmes. "We do not inquire what the legislature meant; we only inquire what the statute means."

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 348, 395-97 (1951).

[26]Johnstone defends the plain meaning rule:

> To deny that the plain meaning has any force or validity opens the door to violation of a fundamental objective in statutory interpretation. This position leads to a denial of legislative supremacy in the statutory field. Under such a view, statutes never are binding on a court as they never are clear. A court can always, make whatever rule it wishes and decide cases in any way it wishes, despite statutory meanings because it cannot be restricted by statutory language.

Johnston, supra note 4, at 13.

[27]See 3 C.D. Sands, Sutherland Statutory Construction §60.01 (4 ed. 1973).

while they have strictly construed penal statutes[28] to protect the party against whom a penalty may be imposed. Though courts and commentators have used the terms "strict" and "liberal" in different ways,[29] "the terms are meaningful characterizations of attitudes when 'liberal' is used to signify an interpretation that produces broader coverage or more inclusive application of statutory concepts, compared to speaking of more limited or use inclusive coverage as the result of strict constriction."[30]

¶11 Even without RICO's liberal directive, the statute should have been construed liberally to effectuate its remedial purposes. Unlike typical criminal statutes. RICO creates no new substantive offenses. Racketeering activity is based on the commission of at least two acts already prohibited under federal or state laws. The Statement of Findings and Purpose of the Organized Control Act of 1970 states that the primary purpose of the Act was "to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[31] The entire statute was, therefore, remedial in that it created

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[28]See 3 C.D. Sands, note 27 supra at §59.03.

[29]See Dickerson supra note 1 at 206.

[30]2A C.D. Sands, supra note 16 at §58.02.

[31]Pub. L. No. 91-452, 84 Stat. 922 (1970).

a new arsenal of remedies, civil as well as penal, to achieve its goal.

c. The Rule of Strict Construction

¶12 All statutes regardless of whether they are classified as remedial or penal should be construed to effectuate the legislative purpose.[32] The history and the application of the rule of strict construction reveals, however, a hostile attitude of the judiciary towards legislative innovation.

1. Statutes in Derogation of the Common Law

¶13 No other canon of interpretation better illustrates the reluctance of judges to acknowledge the superiority of statutory law over judge made law than the canon that statutes in derogation of the common law are to be strictly construed. The rule establishes a judicial presumption that the legislature did not intend to alter the common law unless the statute clearly indicated otherwise.[33]

¶14 It arose as an unfavorable response to the shift from the courts to the legislature as the primary law-makers.[34] No

[32] See Pound, Common Law and Legislation, 21 Harv. L. Rev. 383 ("The idea that an act may be strictly or liberally construed, without reference to the legislative intent, according as it is viewed either as a penal or remedial statute,... is in its very nature delusive and fallacious".) Id. at 386-87 n. 3 (quoting from Sedwick, Construction of Const. and Stat. Law, c. viii).

[33] See Fordham and Leach, supra note 22, Brown v. Barry, 3 U.S. 365 (1797).

[34] In 1875, more than 40% of court cases were based on common law litigation while the number dropped to 5% fifty years later. Almost all cases today rest on a statute. See Frankfurter, supra note 18, at 527.

persuasive justification can be given for a rule that so deprecates the role of legislation in a democratic society. Since almost any modern statute can be read as changing the common law and since the legislature is constitutionally the law making body, it is difficult to see any sense in such a presumption. Critics of the rule have observed that the "derogation" canon reflects an attitude of the courts which often nullifies legislative action.[35] No critic has condemned the canon more than Roscoe Pound who wrote: "it [the "derogation" canon] had its origins in archaic notions of interpretation generally, now obsolete, and survived in its present form because of judicial jealously of the reform movement; and that it is wholly inapplicable to and out of place in the American law of today."[36] Although most states have abrograted the common law rule by statute, courts at times have still invoked it.[37]

2. Strict Construction of Penal Statutes

¶15 Over a hundred years ago, Chief Justice Marshall wrote that "[t]he rule that penal laws are to be construed strictly is perhaps not much less old than construction itself."[38] The rule operates to construe ambiguities in favor of the

[35] Pound, supra note 32, at 387.

[36] Id. at 388.

[37] See Fordham and Leach, supra note 22 at 449-552.

[38] United States v. Wiltberger, 5. Wheat. 76, 95 (U.S. 1820).

criminal defendant.[39] The courts may broaden as well as narrow a statute to benefit the accused.[40] Though the courts may at one time have had reason to invoke the maxim, its use today is just as inconsistent with the constitutional division of power between the judiciary and the legislature as is the "derogation" canon. Proponents of the rule contend that strict construction of penal statutes is constitutionally compelled by due process requirements.[41] As the history of the rule demonstrates, however, there is no constitutional basis for the rule.

(a) History of Strict Construction

¶16 The English courts developed the rule of strict construction as a countervailing force to the severity of early criminal law that imposed the death penalty for the commission of virtually all felonies. Benefit of Clergy (freedom from the death penalty for common law felonies) was unavailable for a number of felonies from the reign of Henry VIII through 1765. By the mid-seventeenth century, therefore, the courts widely employed the maxim.[42]

¶17 The doctrine of strict construction, carried over to this country by English case law and text writers,[43] became equally imbedded in the American judicial system even though the reason for the rule's existence had long faded. By the nineteenth century, the death penalty had ceased to be the principal punishment for felonies. The uncontrolled application of the rule led Chief Justice Marshall to declare:

> Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature ... The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.[44]

For the most part, his declaration went unheeded.

¶18 Frustration with the common-law rule caused many state legislatures to either abrogate the rule or to adopt statutes that typically provided that all statutes should be "liberally construed" to effectuate "the true intent and

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[39] See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 749 (1935).

[40] Id.

[41] See United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976). Cf. United States v. Sutton, 605 F.2d 260, 269 (6th Cir. 1979) (court acknowledges the directive but construes statute narrowly holding that RICO is limited to legitimate enterprises).
Several dissents have also argued that the liberal construction directive violates due process. See United States v. Grzywacz 603 F.2d 682, 692 (7th Cir. 1979) (dissenting opinion, Swygert, J.); United States v. Davis, 576 F.2d 1065, 1069 (3d Cir. 1978) (concurring opinion, Aldisert, J.); United States v. Altese, 542 F.2d 104, 107 (2d Cir. 1976) (dissenting opinion, Van Graafeiland, J.).

[42] For a more extensive treatment of the history of strict construction, see Hall, supra note 39, at 749-51.

[43] For example, Blackstone wrote "[p]enal statutes must be construced strictly." 1 W. Blackstone, Commentaries *88.

[44] United States v. Wiltberger, 5. Wheat 76, 95 (U.S. 1820).

meaning of the legislature."[45] Many courts have either been unaware of these statutes, purposely ignored them, or interpreted them as not including penal statutes.[46] With the strong attachment courts have shown toward the rule of strict construction, it is not surprising to find that RICO's liberal construction directive has met resistance.

(b) Strict Construction and Fair Warning

¶19 Advocates of the strict construction doctrine have argued that the rule is necessary to insure that people are given fair warning of what constitutes punishable conduct.[47] Fair warning is one of the principle justifications for the constitutionally compelled void for vagueness doctrine.[48]

¶20 There is an essential difference, however, between construing an ambiguous statute and an indefinite one.[49] Ambiguous statutes are sufficiently definite to have meaning; the problem the court faces is choosing between possible meanings. In the situation of an indefinite statute the court concludes that a person cannot reasonably ascertain what conduct is proscribed (or penalty provided) because there is no clear meaning. Unlike an ambiguous statute, a court must invalidate the portion of a statute that is too vague.

¶21 A court may save a statute from being unconstitutionally vague by giving it a narrow construction. A liberal construction of RICO, though, does not make the statute unconstitutionally vague. Many courts have rejected vagueness

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[45] Statutes of this sort and the reaction of courts to them are considered in 3 C.D.Sands, supra note 27, at §59.07 and Hall, supra note 39, at 752-56. Only 2 states specifically require that penal statutes be construed strictly. See Fla. Stat. Ann. §755.021 (West 1976); 1 Pa. Cons. Stat. Ann. §1928 (Purdon Supp. 1974-79).

[46] Hall, supra note 39, at 755.

[47] See Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 Vand. L. Rev. 531, 539 (1950).

[48] See Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."); See generally, Note The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

[49] Two principal postulates have grown out of the philosophy that an individuals' life and liberty are to be vigilantly safeguarded. One rule is that criminal statues are to be strictly construed; the other, that a statute which fails to meet certain requirements for definiteness of standard is not a legal basis for punishment. These approaches are often the same because they are rooted in the same basic consideration and because the distinction between construction is whether particular conduct falls within the scope of the statute. The problem of vagueness, on the other hand, presents this question and in addition the question whether a court or individual ever can tell when conduct is or is not included and therefore whether the statute should fall completely.

Quarles, supra note 47, at 532.

challenges while construing RICO broadly.[50] A defendant has little reason to complain that he was not given fair warning since acts of racketeering are based on other state and federal offenses and since a minimum of two predicate acts are required.

¶22 The judges that have challenged the constitutional validity of the RICO directive are misguided in their use of authorities.[51] They have argued that due process principles require that penal statutes be strictly construed and, therefore, the directive as applied to the criminal provisions of the statute is unconstitutional.[52] As

[50] See e.g. United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (holding that RICO gives adequate notice that "enterprise" includes persons who participate in their own organization); United States v. Castellano, 416 F. Supp. 125, 128 (E.D.N.Y. 1975) (holding that RICO gives adequate notice and that "enterprise" includes illegitimate as well legitimate enterprises; United States v. Stofsky, 409 F.Supp 609, 613 (S. D. N.Y. 1973), aff'd, 527 F.2d 237 (2d Cir. 1975) (holding that the "conduct or participate" language of §1962 (c) is broad but not vague).

[51] The constitutionality of the directive has been challenged in dicta. See cases cited in note 41 supra.

[52] Judge Swygert's dissent in United States v. Grzywacz typifies the view of the strict construction proponents. It is unclear whether Congress intended its directive to apply to those sections which establish criminal liability or merely to the "remedial" provisions of Title IX. By applying thi directive to the criminal liability provisions, the majority has violated the due process principle that "statutes creating crimes are to be strictly construed..." United States v. Resnick 299 U.S. 207, 209 (1936).
See also Morissette v. United States 342 U.S. 246, 263 (1952); Smith v. United States, 360 U.S. 1, 9 (1959). See generally Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108 n. 3 (1972); Tribe, American Constitutional Law, 719-19 (1978).

authorities, these opinions either cite cases that involve the void for vagueness doctrine[53] or cases that are grounded on statutory, not constitutional principles.[54] Since RICO is not unconstitutionally vague and since no Supreme Court case has ever mandated that strict construction of penal statutes is constitutionally compelled, the logic of these opinions should not be followed.

(c) Dangers of Strict Construction

¶23 The continued use by courts of the rule of strict construction can only impede the success of legislative goals. As long as judges insist on construing penal statutes strictly, the defense will be encouraged to

[53] For example, all the authorities cited in note 52 supra, except United States v. Resnick, deal with the void for vagueness doctrine.

[54] Though the court in United States v. Resnick said, "Statutes creating crimes are to be strictly construed in favor of the accused," the court in deciding the case employed the plain meaning rule. 299 U.S. 207, 209-10 (1936).
Rewis v. United States, 401 U.S. 808 (1971) and Bell v. United States, 349 U.S. 81 (1955) are often cited to support the view that strict construction is constitutionally required. See United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976); United States v. Moeller, 402 F. Supp. 49, 59 (D. Conn. 1975).
In Rewis, the court citing Bell noted that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency."401 U.S. 808, 812 (1971). In a footnote, however, the court declared that "the questions in this case are solely statutory. No issue of constitutional dimension is presented." Id. at 811 n. 5

"find" ambiguities to avoid the application of the statute.[55] As long as able lawyers are paid high fees, statutes will be "ambiguous".

¶24 Though the deliberate nullification of the legislative will through the application of strict construction may have been politically justified in seventeenth century England, it cannot be defended in light of today's more sophisticated criminal justice system and democratic law-making process. Pound eloquently explained why courts should abandon the rule:

> In the sixteenth and seventeenth centuries the judiciary stood between the public, and the crown. It protected the individual from the state when he required that protection. Today, when it assumes to stand between the legislature and the public and thus again to protect the individual from the state, it really stands between the public and what the public needs and desires, and protects individuals against society which does need it.[56]

It is undisputably the function of the legislature to determine what conduct should be sanctioned and the severity of the sanction, whether civil or criminal. By adhering to the doctrine of strict construction, courts will continue to frustrate the legislative intent and will fail to give effect to the statute's meaning.[57]

(d) The Case for Liberal Construction

¶25 The modern trend of construing statutes liberally should be applauded. Where an attitude of construing statutes strictly caused unpredictability in the law, an attitude of liberal construction can restore stability in the law and make the law appear more rational.[58] One commentator noted that interpretive guides like liberal construction can predicate an attitude of mind "more likely to recreate the atmosphere surrounding the statute in its passage and thus more likely to give effect accurately to the real legislative purpose."[59]

¶26 By including the liberal construction directive in RICO, Congress instructed the judiciary as to the attitude it should adopt when interpreting the statute. Objections that interpretive provisions violate separation of powers principles by vesting the power to punish in the judiciary are unpersuasive.[60]

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[55] "[T]his lack of precision in criminal statutes affords numerous opportunities for astute and zealous defense counsel to discover or to create ambiguity in the meaning of a statute and then to urge an interpretation that will place the conduct of his client in a less unfavorable light." Quarles, supra note 47, at 531.

[56] Pound, supra note 32, at 403.

[57] Quarles, supra note 47, at 535.

[58] See Hall, supra note 39, at 760. Hall does believe there are some exceptional situations which justify strict construction of penal statutes. Id. at 762-68.

[59] Landis, A Note on "Statutory Interpretation", 43 Harv. L. Rev. 886, 892 (1930) Contra Horack, supra note 4, at 346 ("But why 'liberal construction'? No greater reason justifies artifical determination of meaning in favor of the statute then against it").

[60] The argument is sometimes advanced that strict construction of criminal statutes is advisable because of the separation of power among the

On the contrary, interpretive provisions discourage the courts from indulging in judicial legislating[61] and provide

(60 cont'd)

branches of government. This argument must assume that courts punish or legislate when they construe statutes liberally or at least non-strictly and that the power to punish is given to the legislature alone. The answer to this proposition is obvious. It is the primary duty of the legislature rather than the judiciary to make the law, but the courts often make law by confining or broadening the principles of the common law. The function of the courts is primarily to construe or interpret the laws, but this requirement does not mean that the courts should construe or interpret the law in any particular manner. Separation of powers is a doctrine which may militate against the validity of a statute when the statute is so vague as actually to have no meaning. If a court should by interpretation or construction give vitality to a meaningless combination of words, it would undoubtedly be legislating and its action would be obnoxious to general principles of government in this country. But when a statute is ambiguous, interpretation is necessary. And if the court is "making law" when it interprets the statute, it is making law regardless of whether its interpretation is strict or liberal. To say that a court is legislating when it construes a statute to include doubtful conduct seems to require the concession that a strict construction, by limiting the operation of the statute, repeals the statute in part, and thus legislates just as fully as in the converse situation. Quarles, supra note 47, at 534.

[61] [S]uch provisions [legislative mandates for liberal construction] can be rationalized as requests to the court to stop subverting normal meanings under the guise of "interpretation". Rather than a legislative intrusion into the province of the courts, it may merely be an attempt, in the form of a rule of law, to keep the courts form paying insufficient deference to its pronouncements in the field of the legislative. C. Nutting, S. Elliott, and R. Dickerson, Legislation 397 (4th ed. 1969).

guidance in how the legislature intended ambiguities to be resolved.

¶27 The enactment of RICO reflects Congress' concern about the effect of racketeering on the American economy. By following the directive to construe the statute liberally, courts can insure that RICO has the greatest inpact on the evil Congress perceived.

III. Problems Construing RICO

¶28 Though RICO is complex statute, it was carefully drafted.[62] Courts, facing questions of statutory construction, should rely primarily on the language of the statute and the interrelationship between each section before they turn to the legislative history. So far, cases involving statutory questions have principally involved sections 1961, 1962, and 1963. Section 1961 defines the major elements of the statute[63] including racketeering

[62] See Ianelli v. United States, 420 U.S. 770, 782-791 (1975).

[63] 18 U.S.C.A. §1961 (Supp. 1979). This section provides in part that:

As used in this chapter-
(1) "Racketeering activity" means (A) any 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; (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), section 471, 472, and 473 (relating

63 con'td.

to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, 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 obstruction of criminal investigations), sections 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 2341-2346 (relating to trafficking in contraband cigarettes), 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 fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;
(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date

activity,[64] person,[65] enterprise,[66] pattern of racketeering activity,[67] and unlawful debt.[68] Section 1962 lists the four prohibited activities;[69] all of which aim at curbing the

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(63 cont'd)
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;
(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;

[64] 18 U.S.C.A. §1961(1) (Supp. 1979).

[65] Id. §1961(3)

[66] Id. §1961(4)

[67] Id. §1961(5)

[68] Id. §1961(6)

[69] 18 U.S.C.A. §1962 (Supp. 1979). This section provides that:
§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

growth and impact of group crime as well as organized crime's infiltration into legitimate businesses. The third section provides for criminal penalties including criminal fofeiture.[70]

(69 cont'd)
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.
(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 Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 942. emphasis added).

[70] 18 U.S.C.A. §1963 (Supp. 1979) Section 1963(a) provides that:

§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 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.

A. Does RICO Apply Only to Members of Organized Crime?

¶29 The question has arisen whether RICO's sanctions apply exclusively to members of organized crime. The plain meaning of the statute unequivocally answers the question in the negative. Each of the four subsections of section 1962 makes clear that "any person" can be in violation of the act by engaging in the prohibited activity.[71] Section 1961 states that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property."[72] Though Congress undoubtedly intended the statute to reach the Mafia figure as well as other types of syndicate -connected individuals, it was far-sighted enough to realize that other individuals and organizations engage in "racketeering activities". For example, white-collar crime offenders fall within the scope of RICO. In addition, the use of the term "includes", which is a word of illustration, not a word of limitation, indicates that Congress intended an expansive application of RICO.[73]

¶30 In holding that RICO did not exclusively apply to members of organized crime, one district court noted that

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[71] See supra note 69.

[72] 18 U.S.C.A. 1961(3) (Supp. 1979).

[73] See Dreidger, Legislative Drafting, 27 Can. B. Rev. 291, 307 (1949) ("means restricts and includes enlarges the meaning of a word"); Burrows, Interpretation Sections, 8 N.Z.L. R. 33,43 (1978) ("means prefaces a comprehensive and exhaustive definition, where as includes introduces a definition which merely states some but not all of the things covered by the word.").

requiring proof that a defendant was a member of "organized crime" would have rendered the statute unenforceable.[74] The court also pointed out that the statute would probably be unconstitutional if the unlawful activity was based on one's status as a member of organized crime.[75]

¶31 Only one civil case, Barr v. WUI/TAS, Inc.,[76] has reached a contrary conclusion. Because the complaint did not suggest "that defendant is connected in any way with organized crime,"[77] the court denied plaintiff's motion to amend its complaint against the defendant, a telephone answering service, to include a count under RICO. The court, however, made no reference to the statutory language and relied solely on it's reading of the congressional history's references to the "mafia" and the "syndicate".[78] As Senator McClellan, one of the principal sponsors of the Organized Crime Control Act of 1970 explained, however, the term, organized crime "is a

[74] United States v. Mandel, 415 F. Supp. 997, 1018 (D. Md. 1976). Accord, United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975), cert. denied sub. nom. Grancich v. United States, 423 U.S. 1050 (1976) ("[T]he words of the statute are general. They contain no restrictions to particular persons."); United States v. Amato, 367 F. Supp. 547, 548 (S.D.N.Y. 1973).

[75] United States v. Mandel, 415 F. Supp. 997, 1019. (D. Md. 1976).

[76] 66 F.R. D. 109 (S.D.N.Y. 1975).

[77] Id. at 113.

[78] Id.

functional concept like 'white-collar crime', serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances".[79] No where in the legislative history is a statement that RICO was designed to apply only to organized crime. It is evident that the Barr decision was wrongly decided.

B. The Scope of "Enterprise" under RICO

¶32 The meaning of the word "enterprise" has been one of the most litigated issues under RICO. Challenging an effort to employ a broad scope for a RICO enterprise, defense counsel have raised three issues: whether the statutes proscribes the operation of illegitimate as well as legitimate enterprises, through a pattern of racketeering activity, whether a foreign business falls within the purview of the statute, and whether a government agency constitutes a RICO enterprise. An examination of the plain meaning of the statute coupled with its liberal construction directive leaves little doubt that Congress intended a RICO enterprise to encompass all three situations.

1. Illegitimate vs. Legitimate Enterprises

¶33 Defense counsel have often tried to convince the court that the statute should not be applied to persons engaged in racketeering activity unrelated to any legitimate enterprise. They contend that the term "enterprise" is ambiguous and that

[79] McClellan, The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties 46 Notre Dame Law. 55, 60-61 (1970).

the legislative history demonstrates that RICO's sole purpose was to prevent the infiltration of organized crime into legitimate business.[80] Of the circuits that have passed on the issue, all but one[81] have construed "enterprise" broadly, and have correctly held that it includes illicit as well as licit organizations.[82]

(a) A Look at the Statute's Plain Meaning

¶34 The plain meaning of the statute's language supports the majority's viewpoint. Section 1961(4) states that "'enterprise'" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[83]

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[80] Compare United States v. Sutton, 605 F.2d 260, 267 (6th Cir. 1979) ("The construction unmistakenly endorsed by the legislative history is the one appellants have urged--limiting section 1962 to the conduct of a 'legitimate' enterprise's affairs through racketeering activity.") with United States v. Elliott, 571 F.2d 880, 897 (5th Cir. 1978) ("On its face and in light of its legislative history, the Act clearly encompases...'enterprises which are from their inception organized for illicit purposes'." (quoting United States v. McLaurin, 557 F.2d 1064, 1073 (5th Cir. 1977).

[81] United States v. Sutton, 605 F.2d 260, 264-70, (6th Cir. 1979).

[82] See, e.g., United States v. Rone, 598 F.2d 564 (9th Cir. 1979); United States v. Swiderski, 593 F. 2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); United States v. Whitehead, No. 78-5160 (4th Cir. 1980); United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied sub nom. Delph v. United States, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925, (1975).

[83] 18 U.S.C.A. §1961(4) (Supp. 1979) (emphasis added).

Here, again, Congress introduced the definition with the term "include" to signify its intent to give "enterprise" a broad, unrestricted meaning. Further, section 1962(a), (b) and (c)[84] and Section 1963(a)[85] each speak in terms of "any enterprise". The statutory language unambiguously says, therefore, that all enterprises that are conducted through a pattern of racketeering activity or collection of unlawful debts falls within its interdiction. As the Second Circuit said:

> Congress could, if it intended any other meaning, have inserted a single word of restriction. Instead, it left out the word and inserted a clause providing that the provisions of the RICO statute "be liberally construed to effectuate its remedial purposes."[86]

If Congress had intended to limit RICO's application to only legitmate enterprises, it surely would have stated that clearly. As the Supreme Court remarked, the Organized Crime Control Act of 1970 "is a carefully crafted piece of legislation."[87]

¶35 The title and preamble of an act have long been acceptable

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[84] See note 69 supra.

[85] See note 70 supra.

[86] United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976).

[87] Ianelli v. United States, 420 U.S. 770, 789. (1975).

intrinsic aids to the courts in construing statutes.[88] Unlike the legislative history, the preamble to the Organized Crime Control Act of 1970 was voted on by the entire congress and was signed by the President. It is, therefore, the authoritative statement of both the Congressional purpose, and the evils that the Act was primarily designed to remedy.

¶36 Both the title of Title IX[89] and the Statement of Findings and Purpose[90] of Organized Crime Control Act of 1970 support the interpretation that the statute applies to illegal as well as legal enterprises. Had the sole congressional aim been to eliminate organized crime's involvement with legitimate enterprises, the first part of the title "Racketeer Influenced" would have sufficed. The addition of "corrupt organizations" evinces Congress' intention to include illicit enterprises within the scope of the statute.

¶37 In its broad statement of Findings and Purpose, moreover, Congress nowhere indicated that it was limiting the Act to organized crime activities only as they related to legitimate enterprises.[91] The stated purpose was to "seek the eradication of organized crime" by dealing with its

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[88] See 2A.C.D. Sands, supra note 16, at §§47.03-.04.

[89] 18 U.S.C. §§1961-1968 (1970).

[90] Pub. L. 91-452, 84 Stat. 922 (1970).

[91] Id.

"unlawful activities",[92] that is, all of its activities.

¶38 Where Congress wished to discuss organized crime as it involved legitimate business, it did so, as in its third finding where it found that the money and power of organized crime was being used to "corrupt legitimate business..."[93] In its fourth finding, Congress further found that "organized crime activities", not just the corruption of legitimate business, were weakening the stability of the nation's economic system as well as causing other serious problems.[94] In its fifth finding, Congress found that "organized crime continues to grow" because of existing limitations of the law, sanctions, and remedies available to the Government.[95] Congress then specifically stated that the purpose of the Act was to eradicate organized crime, not just deal with it in the context of legitimate business.[96]

¶39 The structure of section 1962 is consistent with the stated goal of eradicating organized crime. Taken together Section 1962 (a), (b), and (c) focus on three key aspects of organized crime: expansion through investment, expansion through racketeering, and racketeering gua

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[92] Id. at 923.

[93] Id.

[94] Id.

[95] Id.

[96] Id.

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 that, 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 ilicit 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 clearly designed to attack each major aspect of organized crime as well as the operations of other groups. An interpretation limiting the scope of "enterprise" to a licit organization would seriously undermine the legislative purpose of the statute.

(b) A critical analysis of United States v. Sutton

¶40 In United States v. Sutton,[97] the defendants had run a heroin distribution business and a large volume stolen property fencing operation. Ignoring the plain meaning of

[97] 605 F.2d 260 (6th Cir. 1979).

the statute, the Sixth Circuit reversed their convictions holding that a RICO enterprise must have "some ostensibly lawful purpose."[98] The court supported its conclusion on several grounds, none of which are persuasive.

The court contended that if it read the statute as including illicit businesses, the terms "enterprise" and "pattern of racketeering activity" would be redundant. This interpretation would presumably transform the statute into "a simple proscription against patterns of racketeering activity."[99] Apparently, the court did not understand the distinction between the terms. "Enterprise" is a concept that denotes an entity or group of persons organized for a particular purpose, while "pattern" is a concept that denotes the relationship, not between people, but between acts that "are interrelated by distinguishing characteristics and [are] not isolated events."[100]

¶41 The Sutton court also relied heavily on the statute's legislative history, citing numerous legislative sources, which it saw as supporting the proposition that the sole purpose of RICO was the "'elimination of organized crime and

[98] Id at 270.

[99] Id. at 265.

[100] 18 U.S.C.A. §3575(e) (Supp. 1980) (Title X of Organized Crime Control Act of 1970 which must be read in pari materia with Title IX).

racketeering into legitimate organizations operating in interstate commerce.'"[101]

¶42 The court, however, should not have examined the legislative history at all since no ambiguity existed on the face of the statute.[102]

In addition, the court is mistaken in its assertion that the legislative history clearly supports its holding.[103] It treats the legislative history as being exhaustive of the meaning of the statute rather than illustrative of one aspect of its application. Although the principal concern of Congress with reference to the RICO statute may have centered around organized crime's corruption of legitimate business, nowhere does the legislative history indicate that this was the statute's only purpose. Congress' avowed purpose was

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[101] 605 F.2d 260, 267 (6th Cir. 1979).

[102] See note 25 supra; Dickerson, supra note 4 at 195 ("The more realistic approach to legislative history would be to end or severely limit its judicial use").

[103] Commentators who have examined the legislative history have reached different conclusions. Compare Comment, Title IX of the Organized Crime Control Act of 1970: An analysis of Issues Arising In Its Interpretation, 27 De Paul L. Rev. 89, 98 (1977), ("The published legislative history of Title IX... convincingly indicates that Congress aimed exclusively at legitimate organizations"), With Atkinson, "Racketeer Influenced and Corrupt Organizations", 18 U.S.C. §§1961-68; Broadest of the Federal Criminal Statutes, 69 J. Crim. L. & Criminality 1, 13 (1978) ("Legislative history supports the broad interpretation of "enterprise").

"to seek the eradiction of organized crime",[104] which necessitates the elimination of the illegal enterprises, the source of its economic base. Further, the legislative history is replete with discussions concerning the use of the statute against illegal enterprises.[105]

¶43 The Sutton court also failed to follow the legislative directive. The court so convinced itself that the statute only had one purpose that it misread the directive. The court stated that "[a]lthough Congress had declared that RICO's provisions be liberally construed to effectuate its remedial purpose, we do not read that directive as authorizing us to write a new and substantially different

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[104] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923.

[105] Senator McClellan observed that

> [While credit card offenses] are commonly committed by persons having no organized crime connection, organized crime has made a big business out of dealing in stolen and counterfeit credit cards... Credit cards have therefore played a role in organized crime activities.

116 Cong. Rec. 18940 (1970). (emphasis added). The Department of Justice's view of Title IX, as described to the House Judiciary Committee conflicts with the Sutton court's conclusion.

> Title IX is designed to inhibit the infiltration of legitimate business by organized crime, and, like the previous title [Title VIII, relating to gambling enterprises], to reach the criminal syndicates' major sources of revenue.

H. Rep. No. 91-1549, 91st Cong., 2d Sess. 170 (1970) (emphasis added).

law. Appellant's construction fully serves the statute's remedial purpose..."[106] The directive actually reads "remedial purposes "[107] in the plural. If the court had read the statute in light of more than one remedial purpose, it might have reached a different result. For support, the court also turned to canons that require a lenient construction of criminal statutes. As earlier discussed, these canons carry no Constitutional weight.[108]

¶44 As the Sutton court has construed RICO, it does not apply to organized crime generally, but only to its "front-end" activities. Such an interpretation severely limits the broad scope of RICO that Congress intended as evidenced by the statutory language, the structure of the statute and, the liberal construction directive. The court's distinction between illegitimate and legitimate enterprises will make it more difficult for prosecutors to obtain a conviciton. Racketeers can circumvent the provisions of RICO, especially §1962 (c), with no more than a little planning or just blind luck. Legitimate businesses can be used as "fronts" with impunity as long as they are not used exclusively, but are combined with other people and non-business instrumentalities to create a new and larger illegal enterprise. The court actually creates a serious problem of proof since no clear line can be drawn between legitimate and illegitmate enterprises.

2. Foreign business

¶45 In a unique attempt to circumvent the application of RICO, one defendant, who engaged in fraud and racketeering activities in the United States to obtain an interest in a gambling hotel located outside the United States, contended that the meaning of "enterprise" did not cover foreign corporations.[109] The Second Circuit had no difficulty in refuting this argument. The court noted that the statutory language in no way restricted RICO to American enterprises, citing the legislative directive in support of its interpretation.[110] As the court stated, if it adopted the defendant's restricted reading, "the salutary purposes of the Act would be frustrated by such construction. It would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise."[111]

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[106] 605 F.2d 260, 269 (6th Cir. 1979).

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

[108] See notes 52-54 and accompanying text supra.

[109] United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974).

[110] Id.

[111] Id.

3. Government Entities

¶46 A number of recent RICO cases have involved the illegal activities of public officials. In these cases, the defendants asserted that their conduct did not fall within the purview of the statute because a government unit could not be a RICO enterprise. Only one court has adopted this narrow interpretation.[112] So far, the courts have found that a police department,[113] a sheriff's department,[114] a state Bureau of Cigarette and Beverage Taxes,[115] a state Alcohol Beverage Control Commission,[116] a traffic court,[117] and a governor's office,[118] can constitute an enterprise under RICO.

¶47 As these cases have observed, a government unit falls within the plain meaning of the statute either as a "legal entity" or as "a group of individuals associated in fact although not a legal entity."[119] The statute nowhere distinguishes between the public and private sectors. Further, as one court pointed out, two of the crimes listed as racketeering offenses - bribery under state and federal law and extortion under color of law - can only be violated in the context of government activity.[120]

¶48 In the third finding of the Act's Statement of Findings and Purpose, Congress expressed its concern over organized crime's subversion and corruption of democratic processes.[121] As one commentator stated, "the need to remove racketeering activity from government is as great or greater than the need to remove racketeering from private business. Corruption within a government does more to undermine democratic institutions and public confidence than does corruption of business."[122]

C. Scope of Criminal Forfeiture

¶49 RICO's criminal forfeiture provisions, one of the statute's most innovative remedial sanctions, was designed to take the profit out of crime and to destroy the source of money and

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[112] United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976). See text ¶87-94 infra.

[113] United States v. Brown, 555 F.2d 407, 415 (5th Cir. 1977); United States v. Grzywacz, 603 F2d 682, 686, (7th Cir. 1978).

[114] United States v. Baker, No. 79-5167 (4th Cir. 1980).

[115] United States v. Frumento, 563 F.2d 1083, 1092 (3d Cir. 1977).

[116] United States v. Barber, 476 F. Supp. 182, 191 (S.D.W.Va. 1979).

[117] United States v. Vignola, 464 F. Supp. 1091, 1097 (E.D. Pa. 1979).

[118] United States v. Sisk, 476 F. Supp. 1061, 1062 (M. D. Tenn. 1979).

[119] 18 U.S.C. 1961(4). (1970).

[120] United States v. Sisk, 476 F. Supp. 1061, 1062 (M. D. Tenn. 1979).

[121] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

[122] Atkinson, supra note 103 at 13.

power which enables organized crime to grow and flourish.[123] By ignoring the liberal construction directive and the plain meaning of the statute, several court's, which have narrowly construed these provisions, have undermined one of the most potent weapons against organized crime.[124]

¶50 Section 1963(a) (1) is designed to reach the "ill-gotten gains" that are "acquired or maintained" by those who engage in prohibited racketeering activity "in violation of section 1962". Section 1963(a) (2) provides for the removal of those who engaged in prohibited racketeering activity 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 ill-gotten gains of racketeering as well as the "economic base" of racketeering by mandating the seizure of ownership or control assets upon conviction for a section 1962 violation.

¶51 More specifically, the plain language of section 1963 (a) (1) mandates the forfeiture of "any interest... acquired or maintained in violation of section 1962". The word "any", as in the case of "any enterprise", is broad in its scope. Unlike the term "enterprise", 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."[125] The phrase "any interest" is not modified by any words of limitation and so it reaches the "ill-gotten gains" from a RICO enterprise regardless of their form.[126]

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[123] For a more extensive discussion of RICO's forfeiture provisions see Trojanowski, RICO Forfeitures : Tracing and Procedure 1 Materials on RICO 353 (ed. G. Robert Blakey 1980) upon which this section heavily relies.

[124] United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir 1980); United States v. Thevis, 474 F. Supp. 134 (N. D. Ga. 1979); United States v. Meyers, 432 F. Supp. 456 (W.D. Pa. 1977).

[125] Black's Law Dictionary 729 (5th ed. 1979).

[126] 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."

¶52 The scope of the phrase "any interest" is only 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 govefnment 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"[127] before the contents of the account would be forfeitable under section 1963 (a) (1).

¶53 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 section 1962." The target of section 1963 (a) (2) is the racketeer'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 violation of any part of section 1962 before a conviction will result in a

[127] 18 U.S.C. §1962 (c) (1970).

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).

¶54 The major issue involving RICO's forfeiture provisions concerns the scope of "any interest" under section 1963 (a) (1). Some courts have erroneously held that this section only subjects an interest in a RICO enterprise and not the illicit proceeds to forfeiture.[128] The recent case of United States v. Marubeni America Corp.[129] best illustrates this position.

1. An Analysis of United States v. Marubeni American Corp.

¶55 In United States v. Marubeni American Corp.,[130] 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.[131] On appeal, the government contended that the criminal forfeiture of "any interest" under section 1963 (a) (1) of RICO extended to the contract price received by Marubeni and Hitachi, another defendant.[132] Marubeni, on the other hand, contended that the criminal

[128] See note 124 supra.

[129] 611 F.2d 763 (9th Cir. 1980).

[130] Id.

[131] Id. at 763-64.

[132] Id. at 766.

forfeiture was limited to an "interest in the RICO enterprise"[133] under several principles of statutory construction[134] and under RICO's legislative history.[135] The District Court for the Northern District of California adopted Marubeni's position.[136]

¶56 The Ninth Circuit affirmed the district court's interpretation.[137] By reading the phrase "in any enterprise" into section 1963 (a) (1), the court narrowed the reach of the phrase "any interest".[138] The court's analysis, however, reflects its misunderstanding of the statute's purpose and a misuse of RICO's legislative history.

¶57 The circuit court's analysis suffers from the same myopic vision of the Sutton court. The circuit court found that the Congressional "purpose [in enacting RICO] was to rid legitimate organizations of the influence of organized crime,"[139] and "not to attack racketeering broadsides".[140] The court's misunderstanding 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.

¶58 The Marubeni court agreed with the district court that it was "natural"[141] to look to section 1962 "to discover what sorts of interest were forfeitable"[142] because section 1963 (a) (1) forfeiture is triggered by a violation of section 1962.[143]

¶59 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."[144]

¶60 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

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[133] Brief for Appellees at 4; United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980).

[134] Brief for Appellees at 15-29.

[135] Id. at 5-14.

[136] United States v. Marubeni Am. Corp., 611 F.2d 763, 764, 766 (9th Cir. 1980).

[137] Id. at 766.

[138] Id. at 769.

[139] Id. at 769 n. 11.

[140] Id. at 769.

[141] Id. at 766.

[142] Id.

[143] Id.

[144] 18 U.S.C. §1962 (b) (1970).

refers to interests in any enterprise'.[145] The circuit court quoted this analysis with approval.[146]

¶61 This suggested linguistic relationship between section 1963 (a) (1) and section 1962, however, provides no basis for the courts' addition of the restricting phrase "in an enterprise" to the phrase "any interest" in section 1963 (a) (1).

¶62 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 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.

¶63 If Congress had intended to limit section 1963 (a) (1) to the forfeiture of interests in enterprises, it would

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[145] Id.

[146] Id.

have included the word "enterprise" in this section, as it did in section 1962 (a), (b), and (c), and section 1963 (a) (2).[147]

¶64 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'".[148] The "distinction" seized upon by the district court and described by the circuit court is akin to the "distinction" between racketeering and "crime".

¶65 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".[149] According to the circuit court, "[t]he 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.'"[150]

¶66 Neither the word "interest", nor the word "income," is defined by RICO. As a word in common usage, "income" may be

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[147] 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.").

[148] United States v. Marubeni Am. Corp., 611 F.2d 763, 766 (9th Cir. 1980).

[149] Id.

[150] Id.

defined as "[t]he return in money from one's business, labor, or capital invested".[151] The word "interest", defined as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something",[152] is unlimited in scope and encompasses "income".

¶67 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.

¶68 In its analysis, the court also ignored the Congressional Statement of Findings and Purpose[153] that suggests that Congress intended the forfeiture provision to be read broadly. The Statement evidenced Congressional awareness of the illicit income of organized crime on American'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...[154]

Section 1963 (a) (1) is one of the tools that can help in fulfilling the Congressional goal of eradicating organized crime. This forfeiture provision was specifically designed as a remedy to reach organized crime's illicit income.

¶69 The Marabeni court, like the Sutton court, needlessly turned to the legislative history in its search for the meaning of the statute. Since the meaning of section 1963 (a) (1) is clear on its face, the court was unjustified in its use of the Congressional history.[155] The court, which never even mentioned RICO's liberal construction directive, ought to have used the directive to resolve any "ambiguity" in favor of enhancing, not limiting, the remedial impact of RICO.

¶70 Nevertheless, the legislative history nowhere asserts that only interests in enterprises are subject to RICO

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[151] Black's Law Dictionary 687 (5th ed. 1979).

[152] Id. at 729.

[153] Pub. L. No. 91-452, 84 Stat. 922 (1970).

[154] Id. at 922-23.

[155] See note 25 supra; 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.").

forfeiture. The Marubeni court offered several comments from the legislative history in support of its interpretation of the statute.[156] Though it is true that the legislative history, at times, refers to the forfeiture of interests in enterprises,[156a] these references describe only one type of forfeiture. They are not inconsistent with the existence of another type of foreiture that reaches racketeering income.[157] RICO's history is illustrative, not exhaustive. 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.

¶71 Further, the Marubeni court's reliance on two statements

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[156] United States v. Manubeni Am. Corp., 611 F.2d 763, 768-769 (9th Cir. 1980).

[156a] 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.").

[157] 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, supra note 79, at 141 ("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.").

cited in support of its interpretation is completely misplaced.[158] 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 make the goverment's case".[159] The court was hardly in a position to argue that the legislative history was unequivocal when it admitted that "[a] few ... statements in the legislative history...seem to support the government's position that Congress intended forfeiture of all "illgotten [sic] gains."[160]

B. Liberal Construction and Criminal Forfeiture

¶72 The Marubeni case illustrates how a court can defeat the legislative purpose of a statute by going beyond its plain meaning. Had the Marubeni court followed the Congressional directive to construe RICO liberally, it would have given section 1963 (a) (1) a broad construction consistent with its remedial purposes.

¶73 A few cases involving the forfeiture provisions have reached the correct result even though they did not turn to the liberal construction directive. In United States v.

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[158] See H. R. Rep. No. 91-1549, 91st Cong., 2d sess. 57 1970; 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).

[159] United States v. Marubeni Am. Corp., 611 F.2d 763, 768 n. 10 (9th Cir. 1980).

[160] Id.

Rubin,[161] the court held that forfeiture of union office was within the scope of section 1963(a) while inexplicably finding that section 1963 (a) must be strictly construed.[162] Though the court correctly analyzed the statutory language, it should have given effect to the Congressional directive. Another court, after examining the plain meaning of the statute, held that the section 1963 (a) forfeiture provisions were mandatory rather than discretionary.[163] It also never cited the directive to support its interpretation. In a dissenting opinion of a denial for an enbanc rehearing,[164] the judge argued that the language of section 1963 (a) should have been narrowly construed so that forfeiture would have been within the sentencing judge's discretion. Unless courts give effect to RICO's liberal construction directive, they run the risk of curtailing the impact of the statute's forfeiture provisions as well as its other remedial provisions.

IV. United States v. Mandel: A Case Study

¶174 The complex prosecution of Marvin Mandel, former governor of Maryland, is undoubtedly one of the most publicized cases

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[161] United States v. Rubin, 559 F.2d 975 (5th Cir. 1977) vacated and remanded 99 S. Ct. 68 (1978) reinstated in relevant part, 591 F.2d 278 (5th Cir. 1979).

[162] Id. at 991-992.

[163] United States v. L'Hoste, 609 F.2d 796, 812 (5th Cir. 1980)

[164] United States v. L'Hoste, 615 F.2d 383 (1980) (per curiam) (dissenting opinion, Tate, J.)

involving RICO. The government spent more than four years trying to convict Mandel and his associates on charges of mail fraud, bribery, and R.I.C.O.. During the course of the case, major issues were raised concerning the meaning and scope of the statute. Unfortunately, both the district court and the Fourth Circuit narrowly construed the statute and failed to give it the legislatively mandated broad reading. It is likely that the wide media coverage of the case, which involved a politically prominent figure, contributed to the courts' attitude of narrow construction.

A. Background of the Prosecution

¶175 The judicial opinions in the Mandel case lack the drama and intrigue captured by the media coverage. Governor Mandel was accused of using his executive powers and influence on the overwhelming democratic state legislative first to veto a bill in 1972 that would have given former owners of the Maryland and Marlboro Racetrack profitable additional racing days and then to persuade the legislature to override the veto, after his secret partners had obtained a concealed interest in the track from the discouraged former owners.[165] In return, prosecutors charged that Mandel had accepted interests in two real estate ventures as well as gifts of money, clothes, and jewelry.[166] The government sought not only the conviction

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[165] N.Y. Times, Nov. 25, 1975 at 59.

[166] N.Y. Times, Sept. 21, 1976 at 18.

of Mandel and his associates, but also forfeiture of their interests in their real estate and race track enterprises.

¶76 The political overtones of the case were reflected in the action of the trial judge. In an unusal move, the trial judge ordered that all the documents rather than just a few sensitive ones be sealed "'to avoid unnecessary publicity.'"[167] The Fourth Circuit, however, ruled that the trial judge's action was "'an unnecessary prior restraint on freedom of press'"[168] and violated the First Amendment. After the trial was underway, one of the jurors was offered a bribe to prevent Mandel's conviction. Prosecutors said that one of the two men indicted for the jury-tampering incident was known to have Mafia connections.[169] The trial judge was forced to declare a mistrial when other members of the jury learned of the bribery attempt.[170]

¶77 After twelve days of deliberation, one of the longest in Federal jury deliberation history, the jury in the second trial in August of 1977 found Mandel and the co-defendants guilty of fifteen counts of mail fraud and one count of prohibited

[167] N.Y. Times, July 22, 1976 at 14.

[168] Id.

[169] N.Y. Times, Oct. 12, 1976 at 15.

[170] N.Y. Times, Dec. 8, 1976 §1, at 1, col. 2

racketeering activity under RICO.[171] Each of the federal mail fraud counts carried a maximum of five years imprisonment and a $1,000 fine. The maximum penalty under RICO is twenty years imprisonment and a $25,000 fine. Mandel was sentenced to four years imprisonment. Three of the co-defendants were also given four year sentences plus a $40,000 fine. One co-defendant was given a twenty month sentence and a $10,000 fine.

¶78 On appeal, the Fourth Circuit in a 2-1 decision in January of 1979 overturned the convictions because of the trial judge's failure to instruct the jury properly.[172] In an en banc hearing in June of 1979, the Fourth Circuit reinstated the convictions in a split 3-3 vote.[173] On April 14, 1980, the Supreme Court denied certiorari.[174]

B. Construction of RICO

¶79 In the prosecution of Mandel and his associates, the courts were confronted with the three major issues concerning the scope of RICO. In all but one instance, the courts narrowly construed the statute. Though the prosecution was successful in convicting the defendants, ultimately, the congressional will suffered a defeat.

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[171] N. Y. Times, Aug. 24, 1977 at 1.

[172] United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979).

[173] United States v. Mandel, 602 F.2d 653 (4th Cir. 1979) (per curiam) cert. denied No. 79-1029 (1980).

[174] Mandel v. United States, No. 79-1029, (Sup. Ct. 1980).

1. The Scope of Forfeiture

¶80 Before the trial began, the prosecution requested that the district court enter a pretrial restraining order to prevent the defendants from transfering or disposing of the property and interests subject to forfeiture under Section 1963 (a).[175] Specifically, the enterprises involved were the Security Investment Company, one of the real esate ventures in which Mandel was given a 4% interest, and the Marlboro Race Track (Southern Maryland Argicultural Association, Inc.). The district court denied the prosecution's request.[176]

¶81 Section 1963 (b) gives the district courts "jurisdiction to enter such restraining orders or prohibitions ... in connection with any property ... as it shall deem proper."[177] Though this section gives the district court discretion in issuing a restraining order, the government would never be able to obtain such an order under the district court's analysis in Mandel. For guidance, the court examined the criteria used for determining whether a preliminary injunction should be granted in a civil case.[178] The analogy, though, is inappropriate. In a civil case, a preliminary injunction preserves the status quo between private parties pending the final determination of their respective rights. In contrast, the forfeiture provision is a mandatory criminal penalty triggered by a section 1962 violation. The purpose of the forfeiture provision is to destroy the economic and power base of those who engage in racketeering. A restraining order prevents the property or interest subject to forfeiture from being transferred or disposed of prior to conviction under section 1962. Without such precautionary measures on the government's part, the forfeiture provision, in most instances, would be unenforceable.

¶82 The district court in Mandel set a standard that the government would have to meet before it would issue a restraining order:

> [T]his standard would ... require the government to demonstrate that it is likely to convince a jury beyond a reasonable doubt that the defendants are in fact guilty of the crimes charged... A mere indictment, which is not evidence but only the formal mechanism by which the government brings criminal charges,...cannot meet that standard.[179]

The court also contended that issuance of a restraining order would be incompatible with the presumption of the defendant's innocence.[180] But as one district court that upheld the issuance of a restraining order under section 1963 (b) stated,

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[175] United States v. Mandel, 408 F. Supp. 679 (D. Md. 1976).

[176] Id.

[177] 18 U.S.C. 1963 (b) (1970).

[178] United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976).

[179] Id. at 683.

[180] Id.

"[a] [d]efendant is no more stripped of the presumption of innocence by [a] restraining order than would be the case were he required to post bond".[181]

¶83 Moreover, section 1963 in no way suggests that the government must meet the stringent standard adopted by the Mandel court. For all practical purposes, the government would first have to obtain a conviction under section 1962 since issuance of a restraining order would always prejudice the defendant according to the court's reasoning. Though the court may exercise its discretion, it ought not to apply a standard that nullifies the statute's remedial provisions.

¶84 In addition, even after conviction, the government did not succeed in obtaining the Security Investment Company through RICO's forfeiture provisions. After the jury returned its verdict the trial court entered a judgement of acquittal on one of the racketeering charges under section 1962 (c).[182] The Fourth Circuit affirmed the acquittal, holding that the co-defendants transfer of an interest in the Security Investment Company as part of a payoff in a mail fraud scheme did not "constitute the conduct of the business through a pattern of racketeering activity"

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[181] United States v. Scalzitti, 408 F. Supp. 1014, 1015 (W. D. Penn 1975).

[182] United States v. Mandel, 591 F.2d 1347, 1374 (4th Cir. 1979).

under section 1962 (c).[183] The Circuit Court adopted the district courts unjustifiably narrow reading of the statute.[184] Specifically, the Fourth Circuit excluded from the scope of the "conduct or participate" language of Section 1962 (c) a transfer of interest in an enterprise.[185] The court, in support of its interpretation, made a distinction between an active and passive interest in an enterprise. The court found that Mandel, having no management role, only had a passive interest in the company.[186]

¶85 Section 1962 (c), however, makes no such distinction. The plain language of the section in no way indicates that Congress intended to exclude a transfer of interest or to require that the party hold a management position. The section makes it unlawful for any person "to conduct or participate, directly or indirectly, in the conduct of such enterprises affairs through a pattern of racketeering activity."[187] The "directly or indirectly" language which the Mandel court never discusses, expresses Congress' intent that the section be given a broad construction. The court in United States v.

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[183] Id. at 1376.

[184] Id. at 1375-76.

[185] Id. at 1376.

[186] Id.

[187] See note 69 supra.

Stofsky[188] understood why Congress drafted section 1962 (c) in such broad terms. As the Stofsky court explained:

> The perversion of legitimate business may take many forms. The goals of the enterprise may themselves be perverted. Or the legitimate goals may be continued as a front for unrelated criminal activity. Or the criminal activity may be pursued by some persons in direct conflict with the legitimate goals, pursued by others. Or the criminal activity may, indeed be utilized to further otherwise legitimate goals. No good reason suggests itself as to why Congress should want to cover some, but not all of these forms...[189]

The Mandel court overstepped the bounds of legitimate judical statutory construction by creating distinctions that have no textual basis. By its narrow construction of section 1962 (c), the court also failed to give effect to RICO's liberal construction directive.

2. The Scope of "Organized Crime"

¶86 On one issue, the district court refused to narrow the scope of the statute. The court held that RICO did not apply exclusively to members of organized crime.[190] Though the court did note that the statute made no attempt to define the term "organized crime" and that the statute was based on conduct, not status, it relied primarily on the legislative history.[191] While the legislative history unequivocally supports the court's holding, it only needed to look at the unambiguous language of the statute to reach its result. The court, however, correctly realized that a contrary holding would render the statute unenforceable and would raise serious constitutional questions.[192]

3. The Scope of Enterprise

¶87 One of the RICO charges against Governor Mandel was dismissed because the district court narrowly construed the term "enterprise".[193] This decision is the only one that has held that a government unit cannot constitute a RICO enterprise.[194] In its decision, the court held that the State of Maryland did not fall within the definition of "enterprise" as a "legal entity".[195] The Mandel court defended its position on several grounds, none of which can stand up to close scrutiny.

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[188] 409 F. Supp. 609 (S.D. N.Y. 1973).

[189] Id. at 613.

[190] United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976).

[191] Id.

[192] Id. at 1019.

[193] Id. at 1022.

[194] For cases holding that a government entity can constitute a RICO enterprise, see notes 113-118 supra.

[195] United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976).

¶88 The court began its analysis by rejecting the plain meaning of the statute. It explained that it was "hesitant to construe such expansive and undefined terms as 'any legal entity' and 'any group of individuals associated in fact although not a legal entity', to the broad limits that the words taken by themselves suggest..."[196] In other words, the court refused to read the statute as Congress wrote it. Instead of discerning the legislative intent from the statute itself, the court turned to the legislative history. While the court conceded that the congressional history did not specifically consider the question whether an "enterprise" may include a government entity, it concluded from the legislative silence that Congress did not intend the statute to be construed so broadly.[197] Like the Marubeni and the Sutton court, the Mandel court read the legislative history as being exhaustive rather than illustrative. The court noted that the legislative history emphasized congressional concern over the infiltration of organized crime into legitimate business.[198] This observation led the court to the conclusion

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[196] Id. at 1020.

[197] Id. at 1020. Contra United States v. Barber, 476 F. Supp. 182, 188 (S.D.W.VA. 1979) ("[I]t appears inappropriate to interpret Congress' silence as an exception for all public entities").

[198] United States v. Mandel, 415 F. Supp. 997, 1020 (D. Md. 1976).

that Congress was not concerned at all with the effect of organized crime on government.[199] It does not logically follow that Congress intended to exclude government entities from the scope of the statute just because one of its primary concerns was the protection of legitimate business. The court's interpretation is further undermined by the Act's Statement of Findings and Purpose. Congress specifically found that the "money and power" [of organized crime] are increasingly used...to subvert and corrupt our democratic processes."[200] The court's holding is also inconsistent with the Congressional purpose "to seek the eradication of organized crime."[201]

¶89 The Mandel court next contended that Congress could not have meant an "enterprise" to include a government unit because of RICO's civil remedies.[202] The court erroneously reasoned that the treble damage, divesture and forfeiture provisions of section 1964[203] were only meant to apply to commercial

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[199] Id.

[200] Pub. L. 91-452, 84 Stat. 922-23 (1970).

[201] Id.

[202] United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976).

[203] 18 U.S.C.A. §1964 (Supp. 1979) Section 1964 provides in part:

"§1964. Civil remedies

entities.[204] The court found it inconceivable that a "private citizen ... could bring a treble damage action against [a public] official and require forfeiture of office and dissolution of the state government."[205] As one district court pointed out, the Mandel court over looked that "divesture and civil forfeiture are discretionary sanctions to be used by the government and the court to fashion adequate remedies."[206]

"(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.
"(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.

[204] United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976).

[205] Id.

[206] United States v. Barber, 476 F. Supp. 182, 189 (S.D. W. Va. 1979).

A court would never order the dissolution of the state government as the Mandel court feared. On the other hand, there would be no objection to a court holding that forfeiture of a public office by a corrupt official was required by the statute. There is also no reason why a corrupt official should not be subject to a treble damages suit if private citizens have sustained damages because of his actions. After all, public officials have been, for example, subject to civil damage suits in civil rights cases. The flaws in the Mandel court's analysis are caused by its limited conception of the purpose of the statute.

¶90 The court also drew support for its interpretation from two canons of statutory interpretation. The first canon that guided the court is that, "[u]nless Congress has clearly indicated its intention to 'alter sensitive federal-state relationships', courts should be reluctant to give ambiguous phrases within a statute that effect".[207]

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[207] United States v. Mandel, 415 F. Supp. 997 1021 (D. Md. 1976). Contra Penin v. United States, 48 U.S.L.W. 4009 (1979). In an unanimous decision, the Supreme Court rejected the canon of concern with the federal-state balance once the sufficiency of the interstate nexus is established. The court held that once "Congress has clearly stated its intention to include violations of state as well as federal ..." law, this "reflects a clear and deliberate attempt on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement" and this "choice is for Congress, not the courts." Id. at 4012-13.

First, the definition of "enterprise" is not ambiguous so the court had no reason to employ the canon. Second, the construction of the term "enterprise" to include "states" would not seriously alter the federal state balance since most acts of racketeering are carried on in violation of federal law other than the RICO statute. The main thrust of RICO is to provide the government with "enhanced sanctions and new remedies to deal with the unlawful activities of organized crime."[208] Finally, an examination of the legislative history shows that Congress was well aware of the possible impact of Title IX on federal state relationships and that it carefully tailored the statue to strike a proper balance.[209]

¶91 The court next turned to the doctrine of ejusdem generis that requires that in an enumeration, broad language immediately followed by specific terms be construed narrowly.[210] The court, by employing this rule would limit the phrase "any legal entity" to private business and labor organizations.[211] Commentators have critized the doctrine for being an artifical means of determining the meaning of words.[212] Other courts that have held that government entities fall within the statutory definition of "enterprise" have refused to apply the rule.[213] In United States v. Frumento, the court explained that the doctrine "is not a rule of law but merely a useful tool of construction resorted to in ascertaining legislative intent. The rule should not be employed when the intention of the legislature is otherwise evident. Nor should it be applied to defeat the obvious purpose of the statute or to narrow the targets of congressional concern."[214] The enactment of RICO reflects Congressional concern over the devastating effects of organized crime on the American economy. Since many government entities are involved in large scale economic activities, it is unlikely that

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[208] Pub. L. 91-452, 84 Stat. 922 (1970).

[209] As originally drafted, Section 1961 (A) defined "racketeering activity" as "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." The Department of Justice took the position that this definition was "too broad and would result in a large number of unintended applications as well as tending toward a complete federalization of criminal justice." Measures Relating to Organized Crime: Meanings on S.30, S. 974, S.975, S.976, S.1623, S.1624, S.1861, S.2022, S.2122 and S.2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 405(1969). The Department's suggestion for narrowing the scope of Section 1961 (1) (a) was adopted by Congress. The Department stated that the version of Section 1961 (a) drafted by it and incorporated into the Act would be "both broad enough to include most state statutes customarily involved against organized crime, yet narrow enough to be constitutional." Id.

[210] See 2A C.D. Sands, supra note 16 at §47-17.

[211] United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976).

[212] See e.g., Horacu, supra note 4 at 339.

[213] E.g., United States v. Frumento, 563 F.2d 1083, 1090 (3d Cir. 1977); United States v. Barber, 476 F. Supp. 182, 187 (S.D.W.VA. 1979).

[214] 563 F.2d 1083, 1090 (3d Cir. 1977) (citations omitted).

Congress intended to limit the scope of the statute to the private sector.

¶92 The Mandel court's misunderstanding of RICO is also reflected in its refusal to apply the liberal construction directive to the entire statute.[215] The court based its refusal on the rationale that "the Act, with its civil and criminal provisions, has both punitive and remedial purposes."[216] It argued that only the civil provisions were remedial and were meant to be given a broad interpretation.[217] According to the court's logic, "enterprise" would be construed liberally in civil proceedings and strictly in criminal proceedings. Neither the language nor the structure of the statute supports this dichotomous approach that would lead to inconsistent interpretations.

¶93 The Mandel court reached its result by adopting an unduly narrow meaning of the word "remedial". Black's Law Dictionary defines "remedial" as "[a]ffording a remedy; giving means of obtaining redress;...intended to remedy wrongs and abuses".[218] By this definition the whole RICO statue is, of course, remedial. RICO creates a new arsenal of

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[215] United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

[216] Id.

[217] Id.

[218] Black's Law Dictionary 1162 (5th ed. 1979).

remedies, both civil and penal, to combat organized crime and other forms of group criminality because Congress found the existing remedies insufficient. Through the directive, Congress requires that the courts liberally construe ambiguities regardless of the nature of the proceedings.

¶94 According to the court, a liberal construction of the penal provisions would violate due process.[219] Strict construction of criminal statutes, however, is only a judicially created canon of construction, not a constitutionally compelled doctrine.[220]

C. Mandel in Perspective

¶95 The Mandel prosecution illustrates the effect that the attitude of the court can have on a case. At crucial junctures, both the district and circuit courts had a choice between narrowing or broadening the scope of RICO. In all but one instance, the courts, by exclusion, narrowed the statute. Their attitude of strict construction caused them to ignore the plain meaning of the statute and its liberal construction directive. As a result, the courts defeated rather than carried out the legislative will.

V. Conclusion

¶96 The importance of judicial attitude towards statutory construction cannot be underestimated. No matter how carefully

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[219] United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

[220] See notes 51-54 and accompanying text supra.

or clearly a legislature drafts a statute, the courts can potentially alter its intended meaning. The judicial function is to construe, not to re-write the law. For this reason, the courts should give the utmost deference to the words of the statute.

¶97 The majority of courts have obeyed RICO's legislative directive by adopting an attitude of liberal construction. The courts that have clung to outdated rules of statutory construction have not only impeded the Congressional goal of attacking racketeering, organized crime and other groups in our society, but have further eroded public confidence in our legal system. In the words of Roscoe Pound, "[t]he public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed."[221]

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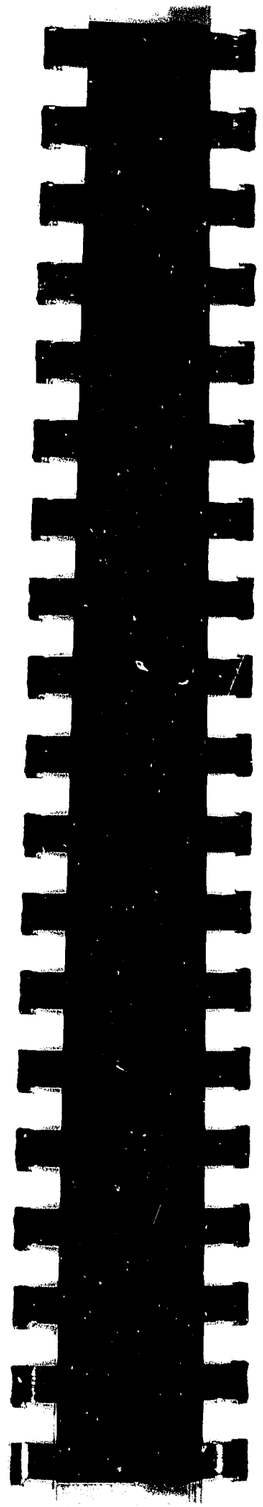
[221]Pound, supra note 32, at 407.

*These materials rely in part upon the analysis of a Note written by Craig Palm for the Cornell Law Review (see Note, RICO and the Liberal Construction Clause, 66 Cornell L. Rev. ____ (1980)).



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SUMMARY

¶1 The state of mind required, if any, to violate RICO has received little attention since the statute was enacted in 1970. Congress, in drafting RICO, consistent with the remainder of the federal criminal code, did not make explicit the state of mind, if any, required with respect to each element of the offense. The attempts that have been made, using traditional mens rea analysis, to determine the required state of mind issue provides the necessary analytical tools to determine the state of mind required, if any, for each element of a RICO violation. The conclusion reached in these materials, using those tools is that RICO requires a state of mind for the imposition of criminal liability, with respect to certain of its elements, independent of the state of mind required to commit the predicate offenses.

I. SCOPE

¶2 The state of mind required to violate RICO[1] has received little attention in the cases.[2] These materials will focus on the state of mind required, if any, to violate RICO criminally.[3]

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[1] 18 U.S.C. §§1961-1968 (1976)

[2] See ¶¶ 22-23 infra.

[3] RICO is not typical of criminal statutes. Indeed, it cannot be classified as either criminal or civil. The statute, like the antitrust laws it was based on, 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), provides for both criminal penalties, see 18 U.S.C.

¶3 RICO's structure is unique in that it incorporates a variety of federal and state offenses[4] into the definition of the activities it prohibits. Two analytically distinct inquiries with respect to mental state, therefore, must be undertaken to determine whether a criminal violation of RICO has occurred:

1) Did the defendent have the requisite mental state to commit the predicate offenses?

2) Did the defendent have the required mental state, if any, independent of the mental state for the predicate offenses, to violate RICO?

These materials, however, will deal with only the distinct mental state required to violate RICO.

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§1963(1976) and civil remedies, see 18 U.S.C. §1964. The treatment of the state of mind issue in antitrust law suggest the state of mind required to violate RICO civilly may be different than the state of mind required to violate RICO criminally. See United States v. United States Gypsum Co. 438 U.S. 422 (1978). In Gypsum the Supreme Court held that the state of mind required with respect to the result of the defendant's conduct is different in civil and criminal proceedings under the Sherman Act. To be punished criminally, the defendant is required, at a minimum, to act with knowledge that this conduct would produce anti-competitive effects, Id. at 444. In the civil context, however, the Sherman Act has, as a general rule, been interpreted to require no state of mind with respect to the anti-competitive effects. The defendant whose conduct has anti-competitive effects, therefore, can be held civilly liable without regard to his mental state.

In RICO, only one section has a result requirement. See 18 U.S.C. 1962(b) (1976). The state of mind required with respect to the result may be different if the proceeding is civil as opposed to criminal. Whether the state of mind required with respect to the existing circumstances specified in the statute is different for civil and criminal proceedings is unclear.

[4]The predicate offenses involve engaging in racketeering activities and collecting unlawful debts.

18 U.S.C. §1961(1) defines the "racketeering activities as: (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) if the act indictable under section 659 is felonious, 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 2421-2424 (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 oranizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11; fraud in the sale of securtites, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

Section 1961(6) defines "unlawful debt"as 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 of political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State of Federal law, where the usurious rate is at least twice the enforceable rate;

II. STATE OF MIND GENERALLY

¶4 A primary goal of any rational criminal justice system is to hold criminally liable only those people who are morally culpable.[5] Traditionally, the American criminal justice system has sought to protect the blameless by its basic premise that, as a general rule, criminal liability will be imposed only when there is "concurrence of an evil-meaning mind [and] an evil-doing hand."[6] Human conduct, therefore, generally will not be punished unless actuated by a culpable state of mind.[7]

¶5 When defining crimes, the mental element, often characterized traditionally as mens rea, scienter, or criminal intent,[8] has long been the source of confusion. The National Commission for the Reform of Federal Criminal Laws, horrified at the "confused and inconsistent ad hoc approach" to the mens rea issue, called for a "new departure."[9] In recent years, there has been "a general rethinking of traditional mens rea analysis."[10] A modern approach to the mens rea issue, "exemplified in the American Law Institute's Model Penal Code"[11] advanced significantly in the proposed federal code,[12] and cited approvingly by the Supreme Court,[13] seeks to end this confused state of affairs.

A. LANGUAGE

1. TRADITIONAL APPROACH

¶6 The major problem that has resulted from the confused state of affairs is inprecision in the drafting of criminal statutes. The state of mind required to violate a given statute is often unclear because legislatures traditionally have used a "staggering array" of words or phrases to define the mental element of the offense.[14] In the current federal code, for example, over seventy-five different descriptions are used.[15] It has been

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[5] See e.g. the general purpose sections of the following criminal codes: 1) American Law Institutes Model Penal Code §1022(c) (Prop. Off. Draft, 1962);
2) S.1722, 96th Cong., 1st Sess. §107(a)(1979)(The proposed new federal criminal code);
3) Ill. Ann. Stat. ch. 38, §1-2(b)(Smith-Hurd,1961).
See also Morrissette v. United States 342 U.S. 246,252(1952) ("[c]ourts of various jurisdictions have sought to protect those who are not blameworthy in mind from conviction...").

[6] Morrissette v.United States 342 U.S. 246, 251(1952). See generally Lafave and Scott, Criminal Law §24 (1972).

[7] Accidental conduct should not be punished for as Oliver Wendell Holmes wrote: "...even a dog distinguishes between being stumbled over and being kicked." Holmes, The Common Law 3, (1881).

[8] See Lafave and Scott, Criminal Law §27 (1972).

[9] 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 123 (1970).

[10] United States v. Bailey 26 Crim. L. Rptr. 3065, 3067(U.S. Sup. Ct. 1980).

[11] Id. at 3068.

[12] S.1722, 96th Cong. 1st Sess. (1979).

[13] United States v.Bailey 26 Crim L. Rptr. 3065 (U.S. SUP. Ct. 1980); United States v.United States Gypsum Company 438 U.S.422 (1978).

[14] 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 119 (1970).

[15] Id. The various terminology used in the federal code is listed.

suggested that "the courts have been unable to find substantive correlates for all these varied descriptions of mental states, and, in fact, the opinions display far fewer mental states than the statutory language."[16]

2. MODERN APPROACH

¶7 Under the "modern approach," only four primary words are used to describe culpable mental states.[17] In descending order of culpability, the possible culpable mental states are usually described as: 1) purposely (or intentionally); 2) knowingly; 3) recklessly; 4) negligently. By using this hierachy of culpable states of mind, the authors of the Model Penal Code hoped to, "dispel the obscurity with which the culpability requirement is treated when, such concepts as 'general criminal intent', 'mens rea ', 'presumed intent', 'malice', 'willfullness', 'scienter', and the like must be employed."[18] The new approach, for the most part, discards the language of the traditional analysis.

B. STATUTES AMBIGUOUS AS TO STATE OF MIND

¶8 The mental state required to commit a particular offense may also be unclear because many existing criminal statutes make no mention of the state of mind required for their violation. While constitutionally criminal statutes generally need not require a culpable state of mind,[19] it is a "familiar proposition that [t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[20] Consequently, it cannot be assumed, without further analysis, that the failure of a statute to specify a state of mind implies a legislative intent to create a crime that requires no culpable state of mind. In general, criminal statutes defining crimes having their origin in common law have been held to require a culpable state of mind; others have not been so construed.[21] The Supreme Court recently noted that it "has on a number of occasions read a state-of-mind component into an offense, even when the statutory definition did not

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[16] Id. at 120.

[17] See e.g. Model Penal Code §202(2) (Prop. Off. Draft 1962); S.1722 96th Cong. 1st Sess. §302(1979); United States v Bailey 26 Crim. L. Rptr. 3065, 3068(U.S. Sup Ct. 1980).

[18] Model Penal Code, Comments on §202 at 124(Tent. Draft No.4 1955).

[19] Shevlin-Carpenter Co. v. Minnesota 218 U.S.57(1910) (State statute making criminal the removal of trees on state land, even if done "accidently", held to be constitutional).

[20] United States v. United States Gypsum Co. 438 U.S.422, 436(1978) citing Dennis v. United States 341 U.S.494, 500 (1951). The major exception to the general rule requiring mens rea is the so-called "strict liability" or "public welfare" offense. See generally Lafave and Scott, Criminal Law §31 (1972); Sayre, Public Welfare Offenses 33 Colum. L. Rev. 55(1933). A person may be entirely blameless and still be convicted of a "strict liability" offense. Although Congress has created and the Supreme Court has approved "strict liability" offenses on infrequent occasions, they are generally looked upon with disfavor by the Court. See United States v. United States Gypsum Co. 438 U.S. 422, 437-438(1978). The Model Penal Code advocates the elimination of strict liability offenses where punishable by imprisonment. As the author of the Comment notes, these offenses are "indefensible in principle , unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of imprionment may be imposed." Model Penal Code, Comment on §205 at 140 (Tent. Draft No. 4 1955).

[21] Morrissette v. United States 342 U.S. 246, 263 (1952).

in terms so provide."[22] The problem, then, is to determine when a criminal statute, silent as to the mental element, requires a culpable state of mind for its violation. Consideration must also be given to which state of mind, if any, is applicable to which element of the offense.

1. TRADITIONAL APPROACH

¶9 Whether the statute requires any state of mind for its violation, under the traditional solution to the problem, depends largely on the type of statute involved. As just noted, statutes defining crimes having their origin in the common law have been held to require a culpable state of mind.[23] Statutes defining crimes classified as "regulatory"[24] or "wrong for policy reasons"[25] or "public welfare offenses"[26] generally are interpreted as requiring no state of mind for their violation. Several problems are immediately apparent with the traditional approach:

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[22]United States v. United States Gypsum Co. 438 U.S. 422,437 (1978).

[23]See note 21 and accompanying text supra.

[24]See e.g.United States v.Freed 401 U.S. 601(1971); United States v.Dotterweider 320 U.S. 277(1943); United States v. Balint 258 U.S. 250 (1922).

[25]See Note, Investing Dirty Money, 83 Yale Law Review, 1491,1502 (1974).

[26]See Sayre, Public Welfare Offenses 33 Colum. L. Rev. 55(1933).

1) The classifications are necessarily inprecise and, therefore, their usefulness is doubtful;[27]

2) The approach allows the courts, in effect, to define a major aspect of the crime, a result hardly consistent with the "principle of legality;"[28]

3) The traditional approach speaks only of implying a state of mind, not which one, and it says nothing about which elements should have a state of mind applicable to them.

2. MODERN APPROACH

¶10 Under the modern approach, these problems are largely eliminated. In both the Model Penal Code and the new proposed federal code, a general section on culpable states of mind is incorporated into the code itself.[29] The general section provides guidance in interpreting statutes which leave am-

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[27]See Morrissette v United States 342 U.S. 246,260(1952) ("Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition for the law on the subject is neither settled nor static.")

[28]See generally Hall, General Principles in the Criminal Law, ch. 2 (2nd Ed. 1961) The principle of legality "is in some ways the most fundamental of all of the principles [of criminal law]." Id. at 25. The principle, stated generally, requires that "no person may be punished except in pursuance of a statute which prescribes a penalty." Id. at 28. If the courts are allowed in their discretion to decide when a culpable state of mind is required, as they traditionally have been, the court, not the legislature, is defining the crime and this fundamental principle is clearly violated.

[29]Model Penal Code §202 (Prop. Off. Draft 1962); S.1722 96th Cong. 1st Sess. Ch. 3 (1979).

biguous the required state of mind.[30] In the Model Penal Code, for example, if the state of mind is left ambiguous, the statute is to be interpreted as requiring a minimum of recklessness. Strict liability[31] offenses as to some elements will exist, but only if the legislature makes it explicit that no culpable state of mind is required.

C. READING IN MENTAL STATE WITH RESPECT TO EACH ELEMENT

¶11 As noted, criminal statutes are also often unclear because the confused state of mens rea analysis has precluded legislatures from satisfactorily designating the mental state required for each distinct element of the crime.[32] The definition of virtually all crimes involve more than one element; for example, conduct, surrounding circumstances (of which there may also be several), and a result. Often the state of mind required for one of the elements should be different than for one of the others.[33] Yet few criminal statutes distinguish adequately between these elements.

1. TRADITIONAL APPROACH

¶12 The traditional solution is to allow the courts sound judgement to determine the required mental state for each element of the offenses. This solution, too, sometimes lends to inconsistent statutory interpretation and is hardly consistent with the "principle of legality."[34]

2. MODERN APPROACH

¶13 The modern approach seeks to solve the problem by incorporating into the general culpability section of the criminal code a guide to determine what state of mind is required for which element of the offense. The Model Penal Code, for example, suggests that if any state of mind is included in the statute, it should be assumed, as a general rule, that this state of mind

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[30] Id. Model Penal Code §202(3); S.1722 §303(b).

[31] See note 20 supra.

[32] The physical elements of a crime are customarily characterized as:
1) The conduct (either act or omission to act) proscribed by the statute;
2) Each attendant (or surrounding or existing) circumstance specified in the statute (if any);
3) The harmful result of the conduct specified in the statute (if any).
See generally Lafave and Scott, Criminal Law §8(1972).

[33] A simple illustration involves the law of statutory rape. A typical statute might read: It is unlawful for any man to have sexual intercourse with any girl under sixteen years of age. The

(33 cont'd)

physical elements of the offense would be: 1) Conduct - having sexual intercourse; 2) Attendant circumstances - a) girl; b) under 16 years of age; 3) Result - no result requirement. Should the man be required to intend to or only know that he is having sexual intercourse? Should the man be required to know that the person is a girl? Or is being reckless or negligent as to the sex of the person all that should be required to impose criminal liability. Finally, should the man be required to know that the girl was under sixteen? Or is recklessness or negligence all that should be required? It would be perfectly sensible, for instance, for a legislature to reach the conclusion that liability should be imposed only if the man intentionally engages in sexual intercourse knowing the person to be a girl but being reckless as to whether she is under sixteen.

[34] See note 28 supra.

applies to all of the "material elements"[35] of the offense.[36] If the statute includes no state of mind for any element, it should be assumed that a minimum of recklessness for each "material element" is required.[37]

¶14 The proposed federal code[38] adds sophistication to and improves the approach taken by the Model Penal Code. In the proposed code, if the statute is silent as to state of mind, section 303(b) requires that the state of mind to be proven with respect to:

(1) conduct is knowing[39]

(2) an existing (attendant) circumstance is reckless[40]

(3) a result is reckless[41]

The proposed code, in section 303(d), also classifies more satisfactorily the matters that require no culpable state of mind. These matters are: 1) legal;[42] 2) jurisdictional;[43] 3) grading;[44] 4) venue.[45] Section 303(d) reflects the treatment of these matters in the case law. Traditionally, legal matters, for a variety of reasons;[46] have not required a culpable state of mind. In

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[35]Material element is defined as: "an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct." Model Penal Code § 113(10) (Prop. Off. Draft 1962).

[36]See §202(4) (Prop. Off. Draft 1962). For example, in the case of statutory rape, if the statute explicitly required "knowingly have sexual intercourse", the minimum culpable state of mind for the other elements would also be knowing. If the statute included a jurisdictional element, however, no culpable state of mind would apply to it.

[37]Id. §202(3).

[38]S.1722, 96th Cong. 1st Sess. (1979).

[39]Section 302(b) provides in pertinent parts: "A person's state of mind is knowing with respect to his conduct if he is aware of the nature of his conduct."

[40]Section 302(c) provides in pertinent parts: "A person's state of mind is reckless with respect to an existing circumstance if he is aware of a substantial risk that the circumstance exists but disregards the risk... A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation."

[41]Section 302(c) provides in pertinent parts: "a person's state of mind is reckless with respect to a result of his conduct if he is aware of a substantive risk that the result will occur but disregards the risk." For a definition of "substantial risk," see note 40 supra.

[42]Section 303(d)(1) describes the legal matters as follows:
(1) EXISTENCE OF OFFENSE. - Proof of knowledge or other state of mind is not required with respect to--
(A) the fact that particular conduct constitutes an offense, or that conduct or another element of an offense is pursuant to, or required by, or violates, a statute or a regulation, rule, or order issued pursuant thereto;
(B) the fact that particular conduct is described in a section of this title; or
(C) the existence, meaning, or application of the law determing the elements of an offense.

[43]See S.1722, 96th Cong., 1st Sess. §303(d)(2).

[44]Id.

[45]Id.

[46]See generally Lafave and Scott, Handbook on Criminal Law §47 at 363-64(1972). Lafave and Scott discuss the arguments traditionally used to support the conclusion that ignorance or mistake of law is generally not an excuse.

addition, jurisdiction, grading, and venue matters have not required a culpable state of mind because they are generally thought irrelevant to the moral reponsibility of the defendant.[47]

¶15 The legal matters include the existence, meaning, or application of the law determining the elements of the offense. The defendant is not required to know (or have any other state of mind as to whether) his conduct violated a criminal law.[48] As is frequently said, "ignorance of the law is no excuse."[49] In addition, the defendant is not required to have any mental state with respect to the meaning or application of the law. Here, the code follows the Supreme Court which in Horning v. District of Columbia[50] held that misconceiving the meaning or application of the law is generally not a defense.

¶16 Similarly, matters in the code that would be solely a basis for jurisdiction require no culpable mental state. In United States v. Feola[51] the Supreme Court held that a culpable mental state need not be proven with respect to jurisdictional matters. The code follows the Feola approach. Feola involved 18 U.S.C. 111, a statute that prohibits assaulting a federal officer. The Court reasoned that whether the person charged with the assault had a culpable state of mind with respect to the federal status of the officer is irrelevant to his blameworthiness. Assaulting a federal officer is no worse, for example, then assaulting a state officer. The sole reason that the definition of the crime includes the requirement that the person assaulted must be a federal officer is to allow the federal government to exercise jurisdiction.

¶17 Finally, any matter in the code that is solely the basis for the grading of an offense will not require a culpable state of mind. The Supreme Court has not ruled on this issue, and in fact, few cases directly involve the problem.[52] The code does, however, reflect the traditional statutory treatment of grading matters.

¶18 Many criminal statutes prescribe more serious punishment for aggravated forms of the crime. In the law of larceny, for

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[47]With respect to the other matters, in general the factual matters involved in the code, a culpable state of mind is required. Each of these factual matters is relevant to the moral responsibility of the defendant.

[48]See Rex v. Esop 173 Eng.Rep. 203(1836) (Defendant's contention that the crime he is charged with was not a crime in his country rejected as a defense.)

[49]See generally LaFave and Scott Handbook on Criminal Law §47 at 362 (1972).

[50]254 U.S. 135 (1920) (The conviction of a pawnbroker was upheld where the pawnbroker, aware of a statute regulating the pawnbroking business, misconceived the meaning of the statute, and violated its terms).

[51]420 U.S. 671 (1975) (Government not required to prove any culpable mental state with repect to the federal status of undercover agents making a drug purchase who were assaulted by defendants).

[52]See generally Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 140-141 (1962).

example, the severity of punishment often depends on the value of the property stolen. A person who steals a diamond necklace, for instance, will often incur a harsher penalty than a person who steals a glass necklace. The problem arises when the person believes he is stealing a glass necklace but, in fact, steals a diamond necklace. Should such an individual be punished for stealing a necklace of glass or of diamonds? Since the value of the article stolen is generally not considered an "essential element of the crime,"[53] the traditional solution has been to punish the defendant for the actual value of the property, not his estimation of its worth.[54]

¶19 The law of statutory rape similarly reflects the traditional solution to this question. Statutory rape (sexual intercourse with a girl, not your wife, under sixteen years of age) was traditionally viewed as an aggravated form of the common law crime of fornication (intercourse with any woman, not your wife). Viewed as only an aggravated version of fornication statutory rape has generally been defined as requiring no state of mind with respect to the female's age. Since the man engaged in the illegal conduct anyway, reagardless of the female's age, the girl's age is merely a grading factor. The man is

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[53]See e.g. United States v. Belt 516 F. 2d 873, 875 (8th cir. 1975).

[54]See Lafave and Scott, Handbook on Criminal Law §87 at 635 n. 16 (1972) ("One who steals a piece of glass, believing it to be a diamond, is not guilty of grand larceny [as opposed to petty larcen]...; but one who steals a valuable necklace, believing it to be costume jewelry, is guilty of grand larceny.")

morally culpable for fornicating without regard to the female's age.[55] Statutory rape may be viewed merely as an aggravated form of fornication.

D. CONCLUSION

¶20 The modern approach to the mens rea issue introduces rationality into an area of the criminal law noted for its difficulty.[56] A rational approach to the issue is especially compelling when attempting to interpret complex modern criminal statutes. Traditional mens rea analysis is inadequate for the task.

III. RICO

A. PAST ATTEMPTS

¶21 In drafting R.I.C.O., Congress, consistent with the remainder of the current federal criminal code, did not designate with respect to each element of the offense the state of mind required for its violation. In cases involving RICO prosecutions, few courts have attempted to resolve this state of mind issue. Of those that have made the attempt, one approach taken has been that no additional state of mind is

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[55]See Commonwealth v Murphy 165 Mass. 66,70,42 N.§.504(1895) ("The defendants in the present cases know they were violating the law. Their intended crime was fornication, at the least"). See generally Lafave and Scott, Handbook on Criminal Law §47 at 360 (1972).

[56]See United States v. Bailey 26 Crim. L. Rptr. 3065, 3067 (U.S. Sup. Ct. 1980).

required to violate RICO.[57] Unfortunately none of the courts who reach this conclusion adequately analyze RICO in reaching their conclusion.

¶22 In United States vs Stofsky [58], for example, the court employs traditional mens rea analysis to justify that RICO does not contain "a requirement of scienter independent of or in addition to that necessary to prove the predicate crimes."[59] The court analogizes RICO to 21 U.S.C.§848,[60] a statute which had been characterized as a "business regulatory statute."[61] As something "not unlike" this "business regulatory statute," RICO, too, the court reasoned, did not require any additional state of mind.[62]

¶23 In United States v. Boylan[63], the second circuit recently asserted, "The RICO count does not involve a scienter element over and above that required by the predicate crimes..."[64] The court unfortunately offered no explanation of, or justification for, the conclusion reached.

¶24 One commentator has also addressed this state of mind issue.[65] In Investing Dirty Money, the author concludes, however, that a culpable state of mind should be required for a RICO violation. The author justifies her conclusion by characterizing section 1962(a)[66] as defining a crime "wrong on principle"

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[57] See United States v. Boylan 45 AFTR 2d 80-1546, 1547 (2d. Cir. April 29, 1980); United States v. White 386 F. Supp. 882, 883, (E.D. Wisconsin, 1974) (quoting from United States v. Stofsky); United States v. Stofsky 409 F. Supp. 609, 612 (S.D. N.Y. 1973).

[58] 409 F. Supp. 609 (S.D. N.Y. 1973).

[59] Id. at 612

[60] 21 U.S.C. 848 provides, in relevant parts, the following:

(a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(60 cont'd)

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

[61] United States v. Manfreed; 488 F. 2d 588 (2d Cir. 1973).

[62] United States v. Stofsky 409 F. Supp. 609, 612, (S.D. N.Y. 1973).

[63] 45 AFTR 2d 80-1546, (2d Cir. April 29, 1980).

[64] Id. at 1547.

[65] Note, 83 Yale L. Rev. 1491 (1974).

[66] See note 106 infra for text of 1962(a).

as opposed to a crime "wrong for policy reasons."[67] Since a crime "wrong on principle" is defined as engaging in blameworthy conduct, she contends that a culpable state of mind is required to violate 1962(a).[68]

B. A GRADING STATUTE ?

¶25 The analysis used in these attempts is not a substitute for the sophisticated analysis embodied in the modern approach to the mens rea issue. A possible interpretation of RICO, using the new approach would reach the same conclusion as the Stofsky court, but for different reasons. The conclusion that RICO requires no additional culpable state of mind for its violation, could be reached, using the new approach, if the statute were viewed as merely defining a crime that is an aggravated form of the predicate offenses. Viewed in this way RICO would be a grading statute, analogous to statutes defining the crime of grand larceny or statutory rape.[69] As a grading statute, it would require no culpable mental state, in addition to the culpable mental state required to commit the predicate offenses.

C. PREFERRED INTERPRETATION

¶26 If RICO defines crime that is only an aggravated form of

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[67]Note, 83 Yale L. Rev. 1491 (1974).

[68]Id. at 1507.

[69]See ¶ 19 sepra.

the predicate offenses, no further inquiry into the state of mind issue is necessary. The preferred interpretation of RICO, however, views the statute as defining a crime distinct from and of a different kind than the crimes defined by the predicate offenses.[70]

¶27 To view RICO as an aggravated form of extortion[71] (one of the predicate offenses), for example, seems absurd since the penalty for extortion (18 U.S.C. §1951) (20 years) is the same as the penalty for a RICO violation. The central issue in a RICO prosecution is not that the defendent engaged in a criminal act; any

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[70]See P. L. 91-452, 84 Stat. 947("nothing in [Title IX] shall supersede" other laws). In a variety of contexts, the courts have generally concluded that RICO defines a crime separate and distinct from the predicate crimes. The second circuit for example, recently wrote: "...Congress clearly defined separate crimes. The purpose of RICO was to establish new penal provisions and...enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." United States v. Boylan, 45 AFTR 2d 80-1546, 1547 (2d Cir. April 29, 1980) citing Organized Crime Control Act of 1970 Statements of Findings and Purpose 84 Stat. 922 (1970). The ninth circuit, discussing whether a defendant could be convicted under both RICO and the predicate offenses, viewed RICO as distinct and held that conviction under both RICO and the predicate offenses was not multiplicitous. See United States v. Rone 598 F. 2d 564, 571 (9th Cir. 1979). The fifth circuit, discussing the requirements of a conspiracy to violate RICO, concluded, "[t]hrough RICO, Congress defined a new separate crime to help snare those who make careers of crime. Participation in the affairs of an enterprise through the commission of two or more predicate crimes is now an offense separate and distinct from those predicate crimes. So too, is conspiracy to commit this new offense a crime separate and distinct from conspiracy to commit the predicate crimes." See United States v. Elliot 571 F. 2d 911 (5th Cir. 1978).

[71]The crime of extortion is defined in 18 U.S.C. §1951(1976).

of the predicate crimes punish individual criminal acts. The focus of RICO is on relationship. Relationship, not the conduct prohibited by the predicate offenses, is the essence of RICO.

1. RELATIONSHIPS INVOLVED

¶28 Three analytically distinct relationships must exist for a RICO violation to occur:

1). A relationship must exist between the individual[72] and either a) two or more racketeering acts[73] that form a pattern[74]; or b) the collection of an unlawful debt.[75]

2). A relationship must exist between the individual and an enterprise.[76]

3). A relationship must exist between the two or more racketeering acts or the debt collection and an enterprise.

The existence of each of these relationships is what distinguishes a RICO violation from a violation of any of the

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[72]The "individual" can be an "entity." 18 U.S.C §1961(3)(1976) defines "person" as including an:
entity capable of holding a legal or beneficial interest in property.

[73]See note 4 supra for the meaning of "racketeering activity."

[74]U.S.C. 1961(4)(1976) provides:
(5) "pattern of racketeering activity" requires at least two acts of 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 or imprisonment) after the commission of a prior act of racketeering activity;

[75]See note 4 supra for the meaning of "unlawful debt."

[76]18 U.S.C. §1961(4) illustrates "enterprise"
(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

predicate offenses.

¶29 The relationship between the individual and two racketeering acts or the collection of an unlawful debt may take any of three forms:

1). The defendant may actually engage in the conduct prohibited by the predicate offenses and, therefore, would be guilty as a principal[77] in the first degree.

2). The defendant may agree with others to engage in such conduct and, therefore, would by guilty of conspiracy to commit the act.[78]

3). The defendant may substantially facilitate such conduct, and, therefore, would be guilty as an aider and abettor (or principal in the second degree).[79]

As long as the defendant is involved in any of these ways with two or more racketeering acts or the collection of an unlawful debt, the first required relationship is satisfied.

¶30 The relationship required between the individual and an enterprise includes the individual who:

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[77]Principal is defined in 18 U.S.C. §2(1976) Section 2 provides:
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable a s a principal.
As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

[78]See Lafave and Scott, Handbook on Criminal Law §61(1972) for a general discussion of conspiracy law.

[79]See note 77 supra. See generally Lafave and Scott, Handbook on Criminal Law §64(1972)

1). conducts or participates in the affairs of an enterprise;[80]

2). acquires or maintains an interest in an enterprise;[81]

3). invests in an enterprise.[82]

Since, generally, a group of people constitute the enterprise involved[83], this relationship usually involves the individual with several parties. If the individual's relationship to the enterprise includes conducting or participating in the affairs of an enterprise, the individual has probably, as a practical matter, agreed with other members of the enterprise to engage in those activities. If the activities agreed to are two or more racketeering activities or unlawful debt collection, a

[80]18 U.S.C. §1962(c) (1976). For the text of 1962(c), see note 111 supra. The sections of RICO are discussed here in reverse order because the required relationships involved in 1962(c) are more common than the relationships involved in 1962(b) or 1962(a).

[81]18 U.S.C. 1962(b) (1976). For the text of 1962(b), see note 108 infra.

[82]18 U.S.C. §1962(a) (1976). For the text of 1962(a), see note 106 infra.

[83]Congress provided in 18 U.S.C. §1961(4) (1976) that an enterprise can consist of only a single individual. Congress, in so providing, was probably responding to past situations in which an interest in an entertainer or prize fighter has been acquired or maintained by engaging in criminal activity. See e.g. Carbo v United States 314 F. 2d 718 (9th Cir. 1963) (Threats and extortion are used to secure managerial control of a professional boxer.). Conceptualizing the entertainer or prizefighter as an enterprise facilitates a RICO prosecution. The need to conceptualize an individual as an enterprise, however, rarely arises.

conspiracy to violate RICO has occurred.

¶31 The final relationship that must exist is the racketeering acts or the debt collection must be related to the enterprise in one of the following ways:

1). The racketeering activities or unlawful debt collection must be engaged in while conducting or participating in the enterprises affairs.[84]

2). The racketeering activities or unlawful debt collection must cause the individual to acquire or maintain an interest in the enterprise.[85]

3). Income or the proceeds of income derived from racketeering activity or an unlawful debt collection must be invested in or used in an enterprise.[86]

Collection must be invested in or used in an enterprise.[86]

An individual, for example, associated with an enterprise, who engages or agrees to engage in racketeering activity cannot be convicted of violating RICO unless the criminal activity related in one of these ways to an enterprise.

2. CASE ILLUSTRATIONS

¶32 Illustrations of these required relationships, and a sounder legal approach to the state of mind issue different than that taken in United States v.Stofsky[87] and United States

[84]18 U.S.C. 1962(c) (1976) prescribes this relationship.

[85]18 U.S.C. 1962(b) (1976) prescribes this relationship.

[86]18 U.S.C. 1962(c) (1976) prescribes this relationship.

[87]409 F. Supp. 609 (S.D. N.Y. 1973). See ¶22 supra.

v. Boylan,[88] are provided by two recent, well reasoned[89], fifth circuit cases, United States v. Diecidue[90] and United States v. Elliot[91]. Involving defendants convicted of conspiracy to violate RICO, both cases draw appropriate distinctions among the required relationships. Moreover, in the conspiracy context, the court was forced to inquire into the character of the defendant's state of mind with respect to the enterprise and its

[88]45 AFTR 2d 80-1546 (2d Cir. April 29, 1980). See ¶23 supra.

[89]The opinions adeptly discuss the complex relationships involved in a RICO prosecution. Their consideration of the evidence demonstrated the judges understood these relationships. The fifth circuit, however, in determining the sufficiency of circumstantial evidence as a matter of law, uses a special standard. The standard stated in Elliot, is "whether the jury might reasonably have concluded that the evidence fails to exclude every reasonable hypothesis but that of guilt." See United States v. Elliot 571 F. 2d 880, 906 (5th Cir. 1978). This standard places a higher burden on the government than the standard suggested by the Supreme Court, See United States v. Holland 348 U.S. 121(1954), or the standard used in other circuits. See e.g. Dirring v. United States 328 F. 2d. 512 (1st Cir., 1964) cert. den. 377 U.S. 1003 (1964); United States v. Schipani 362 F. 2d 825 (2nd Cir., 1966); United States v. Allard 240 F. 2d. 840 (3rd Cir., 1957); United States v. Ragland 306 F. 2d 732 (4th Cir., 1962) cert. den. 371 U.S. 949 (1962); United States v. Van Hee 531 F. 2d 352 (6th Cir., 1976); United States v. Wigoda 521 F. 2d 1221 (7th Cir., 1975); United States v. Snow 525 F. 2d 317 (8th Cir., 1975); Unites States v. Heck 499 F. 2d 778 (9th Cir., 1974); United States v. Jackson 482 F. 2d 1167 (10th Cir., 1973) cert. den.414 U.S. 1159. The majority of courts apply a reasonable doubt standard to test the sufficiency of circumstantial as well as testimonial evidence. No special standard is generally used, therefore, to test the sufficiency of circumstantial evidence.

[90]603 F. 2d 535 (5th Cir. 1979).

[91]571 F. 2d. 880 (5th Cir. 1978).

activities. Without such an inquiry, the court could not have determined whether the defendant agreed with other members of the enterprise to commit two or more racketeering acts. Since the individual who violates the substantive prohibitions of RICO also generally conspires with other members of the enterprise to violate RICO's prohibitions,[92] the discussions in these cases of the mental state with respect to the enterprise's activities required for a conspiracy is relevant to a discussion of what should be held to be the mental state required to violate RICO substantively. These cases illustrate the importance of the mental element when attempting to prove that these required relationships, in fact, exist.

¶33 In Diecidue, the court overturned the conviction of Frank Boni Jr., a codefendant, because the government failed to show the required relationship between Boni, or Boni's criminal activity, and the enterprise involved as well as Boni's state of mind with respect to the enterprise and its activities. The government, in its case against Boni, introduced evidence that showed the following:

1). An enterprise existed, the affairs of which involved contract murders, armed robbery, distribution of counterfeit money, and stolen Treasury Bills.

2). Frank Boni transferred dynamite to members of the enterprise.

[92]See note 83 and accompanying text supra.

CONTINUED

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3). Frank Boni purchased cocaine from members of the enterprise.

Transferring dynamite, the court observed, was not one of the statutorily defined predicate offenses[93] and it was not shown how this transfer related to the affairs of the enterprise, the activities of which were conducted by a pattern of predicate offenses. Drug dealing was a statutorily defined predicate offense[94] but the government failed to show that the sale of cocaine was part of a pattern of predicate offenses of the enterprise. Finally, the court found that the evidence was insufficient to conclude that Boni agreed with other members of the enterprise to engage in any of the predicate offenses of the enterprise. The court explained this finding by observing that the government had introduced insufficient evidence suggesting that Boni "knew something" of the affairs of the enterprise.[95]

¶34 In Elliot,[96] the court overturned Eilliot's conspiracy conviction because the government failed to show a relationship between Elliot and the enterprise and a relationship between the criminal act engaged in and the enterprise. In the case against James Elliot, the government introduced evi-

[93]United States v. Diecidue 603 F. 2d 535, 556 (5th Cir. 1979).

[94]See 18 U.S.C. 1961(1)(A) (1976).

[95]United States v. Diecidue 603 F. 2d 535, 557 (5th Cir. 1979). This case provides little guidance as to the quantum of evidence sufficient to permit an inference of guilt.

[96]571 F. 2d 880 (5th Cir. 1978).

dence that showed the following:

1). An enterprise existed, the activities of which involved arson, theft, murder, drug dealing, and the obstruction of justice.

2). James Elliot received large quantities of amphetamines from a pharmacist, James Fuch.

3). James Elliot sold or gave meat stolen by members of the enterprise to James Fuch.

The government offered only inconclusive evidence that the amphetamines transaction was related to the affairs of the enterprise as such as opposed to being merely an isolated act.[97] A relatiohship between Elliot and the enterprise existed, the court found, because Elliot participated in the affairs of the enterprise by agreeing to distribute the stolen meat. The evidence, however, did not show beyond a reasonable doubt that Elliot "knowingly and intentionally joined the broad conspiracy to violate RICO."[98] The court concluded that the relationship between Elliot and the enterprise may have been limited to this one transaction and possibly did not extend to a pattern of predicate offenses of the enterprise.[99] Insufficient evidence

[97]The standard used by the fifth circuit to determine the sufficiency of the circumstantial evidence is higher than that commonly used. See note 89 supra. The evidence conceivably could have been sufficient in other circuits to support a conviction.

[98]United States v. Elliot 571 F. 2d 880, 970 (5th Cir. 1978).

[99]Id.

was introduced, therefore, using the standard applied by the fifth circuit, to justify reaching the conclusion that Elliot agreed to engage in any other racketeering acts related to the enterprise. The government, therefore, failed to show the required relationship between Elliot and the pattern of racketeering acts of the enterprise.

D. ANALYTICAL TOOLS

¶35 The existence of these relationships is what distinguishes RICO from the predicate offenses. If the statute is interpreted as defining a separate crime, further analysis is necessary to determine what state of mind is required for each element of the offense. Proper analysis of any criminal statute entails determining:

1) Who can violate the statute;

2) What conduct is proscribed by the statute;

3) What existing circumstances are specified in the statute;

4) What result of the conduct is required (if any);

5) What state of mind is required with respect to each element of the offense.

¶36 In the following materials, the language of RICO will be analyzed using the categories established in the proposed federal code (S.1722). Each element of a RICO violation will be categorized as: 1) conduct; 2) an existing circumstance; or 3) a result.[100] The matters constituting the existing circumstances will be categorized as: 1) legal;[101] 2) jurisdictional;[102] 3) grading;[103] 4) factual.[104] Finally, arguing analogously from the general culpability section of the proposed federal code (S.1722),[105] the state of mind applicable to each element of the offense will be determined.

[100] See note 32 supra.

E. STATUTORY ANALYSIS

A. 1962(a)[106]

¶37 1. Who

Any person who receives any income derived, directly or indirectly from:

(I) a pattern of racketeering activity in which the person participated as a principal; or

(II) collection of an unlawful debt in which the person participated as a principal;

[101] See ¶¶ 14 supra. Terms used in the statute that are defined in the statute are included in the category of legal matters. Each time such a term appears, the term constitutes a legal matter. Since no culpable state of mind is required with respect to the existence, meaning, or application of the law, each such term will not be identified. Only those legal matters which pose a specific problem will be discussed. See also ¶ 15 supra.

[102] See ¶¶ 14, 16 supra.

[103] See ¶¶ 17-18 supra.

[104] See note 47 supra.

[105] S.1722, 96th Cong., 1st Sess. ch. 3 (1979).

[106] The text of 18 U.S.C. 1962 (a) (1976) is as follows:
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 in acquisition of any interest in, or the establishment

can violate section 1962(a).

¶38 2. Conduct

a) The conduct proscribed by 1962(a) is:

(I) using

(A) directly; or

(B) indirectly

or

(II) investing

(A) directly; or

(B) indirectly

capital.

¶39 3. Existing Circumstances

a) The statute limits capital by specifying that it must by capital

(I) that is any part of income

or

(106 cont'd)
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.
The exception delineated in 1962(a) applies only to acquisitions of small interests without the intent to control. The exception implicitly requires something less than intent for large interests.

(II) that is the proceeds of income.

b) The statute specifies that the income must be:

(I) derived directly from

(A) a pattern of racketeering activity; or

(B) collection of an unlawful debt.

or

(II) derived indirectly from:

(A) a pattern of racketeering activity; or

(B) collection of an unlawful debt.

c) The statute limits use or investment by requiring that the using or investing of the capital must be:

(I) in acquisition of; or

(II) in the establishment of; or

(III) in the operation of

an enterprise

d) The statute limits enterprise by specifying that it must be "an enterprise"

(I) engaged in

(A) interstate commerce; or

(B) foreign commerce

(II) the activities of which affect

(A) interstate commerce; or

(B) foreign commerce.

¶40 4. Result

Section 1962 (a) does not require any result.

¶41 5. State of Mind

a) Conduct - The state of mind required by S.1722 with respect to conduct is knowing. The defendant, then, must knowingly use or invest, directly or indirectly, capital. The defendant cannot be convicted as a principal in the first degree for violating 1962(a) if, for some reason, he did not know he was using or investing capital.

b) Existing circumstances

(I) existing circumstance "a" involves a factual matter. S.1722 requires that the defendant was at least reckless as to whether the capital was income or the proceeds of income.

(II) existing circumstance "b" involves a factual matter. S.1722 requires that the defendant was at least reckless as to whether the income involved was from activity that constituted a pattern of racketeering or the collection of an unlawful debt. The defendant, of course, is not required to have any state of mind as to whether the activities the income was derived from violated any of the predicate offenses or, for that matter, with respect to whether the activities were criminal at all.

(III) existing circumstance "c" involves a factual matter. S.1722 requires that the defendant was at least reckless as to whether the use or investment of his money was related to an enterprise. The focus of 1962(a) is on the relationship between the "dirty money" and the enterprise. The defendant should be required to be at least reckless as to whether his use or investment of the income involves an enterprise.

(IV) existing circumstance "d" involves only a jurisdictional matter and with respect to it no culpable state of mind is required. The requirement that the enterprise affect interstate or foreign commerce is in the statute solely to allow the federal government to exercise jurisdiction.

The following is one example of what the prosecution would have to prove to obtain a conviction under 1962 (a):[107]

1) That the defendant received income indirectly from a pattern of racketeering activity in which he participated as a principal.

2) That the defendant used capital that is the proceeds of income

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[107] But cf. Devitt and Blackmar, Federal Jury Practice and Instructions Vol.2 §§56.26-56.28 (3rd ed. Pocket Part, 1980). Devitt and Blackmar's manual serves as a guide to federal judges in the giving of jury instructions. Section 56.26-56.28 set out the standard jury instruction used in the federal courts for prosecutions under 1962(a). The authors' treatment of 1962(a) is helpful but the authors, too, are victims of the confused state of mens rea analysis and their suggested jury instruction is inadequate with respect to the mental element. The authors' only suggestion, with reference to mental state, is that the government must prove beyond a reasonable doubt:

> that the defendant received income which he knew to be derived from (a pattern of racketeering activities) (the collection of an unlawful debt).

The authors' justification for reading in a knowledge requirement is, unfortunately, not provided. Devitt and Blackmar, perhaps unwittingly, have increased the government's task unjustifiably. The authors also do not include an instruction on mental state with respect to other elements of the offense.

The jury instructions that can be readily derived from these materials would alter the standard jury instructions used since RICO was enacted in 1970. Although this new instruction would add elements, proof of which was not required under the standard instruction, adoption of this new instruction by the federal courts would not mean that all previous instructions were reversible error. Unless defendant's counsel specifically objects to the instructions with respect to the mental element, defendant may not assign as error the standard intructions omission. See Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retiring to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection").

derived indirectly from a pattern of racketeering activity

in the operation of an enterprise

the activity of which affect interstate commerce.

3) That the defendant knowingly used the capital

aware of a substantive risk that the capital used was the proceeds of income

and aware of a substantial risk that the income was derived from activity that constituted a pattern of racketeering activity

and aware of a substantial risk that the capital used was in the operation of an enterprise.

B. 1962(b)[108]

¶42 1. Who

Any person can violate section 1962(b).

¶43 2. Conduct

a) Two distinct conductsare proscribed in 1962(b):

(I) engaging in activities; or

(II) collecting

¶44 3. Existing circumstances (limiting conduct)

If the conduct involved is "engaging in activities" the following circumstances must exist:

[108]The text of 18 U.S.C. §1962(b) (1976) is as follows:
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.

a) The activities are limited in that they must be activities

(I) that are racketeering activities;

b) The "racketeering activities" are limited in that they must be "racketeering activities"

(I) which form a pattern.

If the conduct involved is "collecting" the following circumstances must exist:

c) The defendant must collect

(I) a debt;

d) The debt is limited in that the statute specifies only a debt

(I) which is unlawful.

¶45 4. Result

The result of the conduct specified in the statute is that the person must engage in conduct:

(I) causing the person to acquire

(A) directly

(1) any interest in; or

(2) control of;

or

(B) indirectly

(1) any interest in; or

(2) control of; or

(II) causing the person to maintain

(A) directly

(1) any interest in; or

(2) control of;

or

(B) indirectly

(1) any interest in; or

(2) control of

an enterprise.

¶46 5. Existing circumstances (limiting the result)

a) The enterprise is limited in that it must be "an enterprise:"

(I) engaged in

(A) interstate commerce; or

(B) foreign commerce;

or

(II) the activities of which affect

(A) interstate commerce; or

(B) foreign commerce.

¶47 6. State of Mind

a) Conduct - The defendant must knowingly engage in activities or knowingly collect. This requirement simply means that the defendant must be aware of what he is doing.

b) Existing circumstances (limiting conduct).

(i) existing circumstance "a" involves only a legal matter. Therefore, no culpable state of mind is necessary with respect to it.

(ii) existing circumstance "b" involves a factual matter. The defendant is required to be at least reckless as to whether a relationship exists between the distinct activities. Relationship is the key idea of RICO. If the defendant is not aware of a substantial risk that the activities he engages in are related in some way he is guilty only of the predicate offenses, not RICO.

(iii) existing circumstance "c" involves a factual matter. S.1722 requires that the defendant was, at least, reckless that what he was collecting was a debt.

(iv) existing circumstance "d" involves a legal matter. Whether the debt was lawful or unlawful is a legal question, and with respect to the unlawful character of the debt, no culpable state of mind is required.[109]

c) Result - S.1722 requires a minimum of recklessness with respect to a result. The defendant, then, must be aware of a substantial risk that his conduct will result, for example, in his acquiring control of or maintaining an interest in an enterprise but disregard the risk and engage in the conduct anyway.

d) existing circumstance (limiting the result)

(i) existing circumstance "e" is a jurisdictional matter and with respect to it, no state of mind is required.

¶48 The following is one example of what the prosecution would have to prove to obtain a conviction under 1962(b):[110]

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[109]Congress has defined unlawful debt in such a way that the defendant will generally know the debt collected is unlawful. The usurious rate involved must be at least twice the enforcable rate. See 18 U.S.C. 1961(b)(1976). The defendant who misconceives the law or attempts to approach the line defining lawful and unlawful will generally not be guilty of collecting an unlawful debt with this definition.

[110]But cf. Devitt and Blackmar, Federal Jury Practice and Instructions Vol. 2 §56.34 (3rd Ed. Pocket Part 1980). In the charge suggested by Devitt and Blackmar no state of mind is included:

> In order to establish the offense charged in (Count_____ of) the indictment, three essential elements must be established beyond reasonable doubt:
> First: That the defendant (acquired) (maintained)

1) That a person

2) engaged in activities

that are racketeering activities

which form a pattern

causing the person

to acquire control of an enterprise

engaged in interstate commerce.

3) That the person knowingly engaged in the activities

aware of a substantial risk that the activities engaged in were related

and aware of a substantial risk that engaging in the activities would cause him to acquire control of an enterprise.

C. 1962(c)[111]

¶49 1. Who

a) Any person

(110 cont'd)

(any interest in) (control of) an enterprise; Second: That he acquired or maintained such interest or control through a pattern of racketeering activity, as hereafter explained; Third: That the enterprise was engaged in, or that its activities affected, interstate or foreign commerce.

As has been said before, the government has the burden of establishing every element of the offense by proof beyond reasonable doubt. The law never imposes on the defendant in a criminal case the burden of introducing any evidence or calling any witnesses.

The justification for including no state of mind requirement, especially with respect to the result, is unclear.

[111]The text of 18 U.S.C. 1962(c) (1976) is as follows:

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

(I) employed by; or

(II) associated with

an enterprise engaged in

(I) interstate commerce; or

(II) foreign commerce; or

an enterprise the activities of which affect

(I) interstate commerce; or

(II) foreign commerce.

¶50 2. Conduct

a) Two distinct conducts, as in 1962(b), are proscribed in 1962(c):

(I) engaging in activities; or

(II) collecting

¶51 3. Existing circumstances

As in 1962(b) if the conduct involved is "engaging in activities," the following circumstances must exist:

a) The activities are limited in that they must be activities that are

(I) racketeering activities.

b) The racketeering activities are limited in that they must be racketeering activities

(I) which form a pattern.

(111 cont'd)

or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

As in 1962(B) if the conduct is "collecting" the following circumstances must exist:

c. The defendant must collect

(I) a debt.

d. The debt is limited in that the statute specifies only a debt

(I) which is unlawful

Regardless of which conduct is engaged in, the following circumstances must exist:

e. The conduct must be engaged in

(I) while conducting

or

(II) while participating in

(A) directly or

(B) indirectly

the affairs of an enterprise.

f. The enterprise is limited in that it must be "an enterprise"

(I) engaged in

(A) interstate commerce or

(B) foreign commerce

or

(II) the activities of which affect

(A) interstate commerce or

(B) foreign commerce.

¶52 4. State of mind

a) Conduct - same as for conducts in 1962(b).

b) Existing circumstances

(I) Existing circumstances "a", "b", "c", "d", identical to the corresponding existing circumstances in 1962(b), require the same state of mind as their counterparts in 1962(b).

(II) Existing circumstance "e" involves a factual matter. The defendant is required to perceive a substantial risk that his conduct was connected with an enterprise, disregard the risk, and engage in the conduct anyway. Engaging in the prohibited conduct, then, ignorant of the relationship between the conduct and an enterprise, would be insufficient to violate RICO.

(III) Existing circumstance "f" is a jurisdictional matter, and with respect to it, no culpable state of mind is required.

¶53 The following is one example of what the prosecution would have to prove to obtain a conviction under 1962(c).[112]

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[112] But cf. Devitt and Blackmar, Federal Jury Practice and Instructions Vol. 2 §56.20 (3rd ed. Pocket Part, 1980). In the charge suggested by Devitt and Blackmar for section 1962(c) a state of mind requirement is included:

> In order to establish the offense charged (in Count_____) of the indictment, five essential elements must be established beyond reasonable doubt, as follows:
> First: That defendant was employed by or associated with an "enterprise," as defined in these instructions;
> Second: That the defendant engaged in a pattern of racketeering activity, as hereinafter defined, by knowingly and willfully committing, or knowingly and willfully aiding and abetting, of at least two acts of racketeering activity, as hereafter explained;
> Third: That at least two acts of racketeering activity occurred within ten years of each

1) That a person

associated with an enterprise

engaged in interstate commerce

2) engaged in activity

that are racketeering activities

that form a pattern

while indirectly participating in the affairs of an enterprise

engaged in interstate commerce.

3) That the person knowingly engaged in the activities

aware of a substantial risk that the activities engaged in were related

and aware of a substantial risk that he is engaging in the conduct while participating in the affairs of an enterprise.

(112 cont'd)

other, that one of such offenses took place after October 10, 1970, and that the offenses were connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not merely a series of disconnected acts;

Fourth: That through the commission of two or more connected offenses the defendant conducted or participated in the conduct of the enterprise;

Fifth: That the enterprise engaged in, or that its activities affected interstate (foreign) commerce.

As stated before, the burden is on the prosecution to prove beyond reasonable doubt each of the elements of the crime charged. The law never imposes on the

defendant in a criminal case the burden of introducing any evidence or calling any witnesses.

No explanation if offered as to what "knowingly and willfully" means or if there is a difference in meaning between the two words. No instruction is given on the state of mind required for the elements of the offense other than the conduct. The instructions suggested by Blackmar and Devitt for 1962(c), like the instructions suggested for 1962(a), see note 107 supra., and 1962(b), see note 112 supra, are inadequate with respect to the mental element in RICO violations.

RICO and Injunctions

by

Carolyn Mills

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SUMMARY

¶1 Organized crime is a major force in the business world today. The American economy depends on competitive market conditions to flourish; the illegal methods used by organized crime restrain competition and cripple legitimate businesses. The civil remedies provisions of RICO permit courts to issue injunctions against offenders. While the constitutionality of injunctions and their enforceability by contempt proceedings has been a matter of controversy in the past, today injunctive remedies are widely employed. The injunctive provisions of RICO are modeled after antitrust legislation, where injunctions are the foundation of decrees in monopoly cases. Consequently, antitrust cases are excellent examples of the types of relief that could be obtained under RICO to enjoin illicit activity in business. Yet, RICO has not been effectively used in prosecuting organized crime or other forms of group crime. In the ten years since its enactment, only one reported case has successfully invoked RICO's injunctive power. These materials offer a guide for the potentially wide scope of RICO injunctions.

Introduction

¶2 The infiltration of organized crime into American business poses a serious threat to the economic health of the country. Title IX of the Organized Crime Control Act of 1970, entitled Racketeer Influenced and Corrupt Organizations (RICO) was a response by Congress to this problem as well

as other forms of group crime. In addition to criminal sanctions, RICO provides civil remedies[1] for violations of its substantive provisions. Section 1964 (a) and (b) gives courts

[1]18 U.S.C. §1964 (1976)

> (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.
> (b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
> (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.
> (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

the authority to award equitable relief to a plaintiff in a RICO case. A court can issue an injunction to restrain the activities of a RICO offender, as well as order dissolution or divestiture of the defendant's business.

¶3 The injunctive provision of RICO has the potential to be an effective remedy against organized crime's business activities as well as racketeering in general in the legitimate market place. An injunction is an order by the court to compel a defendant to do, or refrain from doing, a specific act.[2] Equity is the appropriate relief where the legal remedy is inadequate. Yet, the maxim "equity will not enjoin a crime" is not strictly followed.[3] In the common law, public nuisances traditionally have been enjoined. The fact that a public nuisance is also punishable by criminal sanctions will not preclude equitable relief if the criminal remedy is ineffective in restraining the criminal activity.

III. Cigarette Bootlegging: A Sample Fact Pattern Where RICO Injunctions Could Be Successfully Employed

[2]For discussion on the use of equity to enjoin illegal activity, see Enjoining Illegality: Use of Civil Actions Against Organized Crime, ¶¶13-34 infra.

[3]D. Dobbs, Remedies §2.10 (1973).

¶4 Cigarette bootlegging[4] provides a good example of a criminal distribution system that could be significantly curtailed by the injunctive relief available under Section 1964 of RICO.

¶5 Cigarette smuggling is a response to the disparities between cigarette tax rates in the various states. Some states, such as New York, impose high taxes on cigarettes sold within their borders, while others tax their cigarettes at much lower rates. It is profitable, therefore, to buy cigarettes in a low tax state for use or sale in a high tax state.

¶6 Initially, most cigarette smuggling was done by individuals who merely crossed state lines to purchase their cigarettes more cheaply. As the gap between the tax rates widened, however, people began smuggling cigarettes on a large scale. It was not long before organized crime moved in on the smuggling business. Today, a major portion of the cigarette bootlegging traffic is controlled by organized crime families.

¶7 Normally, cigarette manufacturer sell to wholesaler/distributors or large retailers. Wholesalers

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[4]For a detailed discussion of cigarette bootlegging, see Cornell Institute on Organized Crime, Vol. 1, Cigarette Bootlegging: The Problem, Civil, and Criminal Remedies and M. Tonn, Cigarette Bootlegging: A Strategy for Attacking the Manufacturer Through Civil Litigation (Aug. 1980).

then supply the retail market: shops, vending machines, and wherever else cigarettes are sold. Cigarette taxes of the state of manufacture are assessed at the first transaction between the manufacturer and the distributor or authorized retailer. Cigarette taxes of the states of sale are assessed by the distributor at the point of his contact with the retailer.

¶8 The tax is calculated by running the cigarette packs through a machine that registers the total quantity and stamps the packs. In order to buy directly from a manufacturer a purchaser must have tax-stamping authority from his own state where he sells the cigarettes, i.e., a New York distributor must have authority from the state to affix the New York tax stamp before he can deal with a cigarette producer. The tax stamp has to be of the state in which the distributor is chartered and does most of its business: a New York distributor must pay the New York tax while a North Carolina distributor pays the lower North Carolina tax.

¶9 As it is the distributor who pays the tax, this is the point at which the cigarette smuggling process usually begins. There are at least two major ways in which high tax state distributors have evaded the tax:

(1) A wholesaler in a low tax state, especially the state in which the cigarettes are produced, buys cigarettes from the manufacturer and pays the state tax without affixing the stamp. The wholesaler then sells to northern retailers who counterfeit the stamp of their state or sell the cigarettes

unstamped. In cigarette producing states like North Carolina, it is illegal for in-state wholesalers to sell to retailers outside North Carolina, but the law is apparently consistently and profitably violated.

(2) A northern distributor from New York, for example, buys directly from the cigarette manufacturers in North Carolina. Legally, the New York distributor must then stamp the cigarettes and pay the New York tax, but smugglers transport the untaxed cigarettes north and either counterfeit the New York stamp or sell the packs unstamped.

¶10 The difference between what the northern distributor pays for the cigarettes, whichever way he obtains them, and the high price they command in the "impact state" (since the retail price reflects the state's high tax) is the substantial profit of the cigarette bootlegger.

¶11 The loss in revenues to the import states is huge and the infiltration of organized crime into the smuggling business has driven legitimate wholesalers and retailers out of businesss. The criminal justice system has been ineffective in combatting the situation, partly because in organized criminal operations no single person is indispensable. The long process of obtaining a conviction and sending an offender to prison does not make a dent in the operation as a whole; he is easily replaced. If a plaintiff could obtain injunctive relief against certain activities of manufacturers and/or distributors, however, cigarette smuggling could be substantially reduced. Under the civil

remedies provisions of RICO, a plaintiff is authorized to obtain that relief.

IV. Temporary Injunctive Relief

¶12 Preliminary injunctions and temporary restraining orders are stopping methods of obtaining injunctive relief before a full hearing on the merits of a case can be conducted. The required steps for obtaining a preliminary injunction in the federal court system are laid out in Rule 65(a)[5] and many states follow the same procedure.

A. Temporary Restraining Orders

¶13 A temporary restraining order, or ex parte injunction, is an injunction granted to the plaintiff without notice to the defendant.[6] The defendant is not bound by the rules, however, until he receives notice of its contents. Since the defendant does not have the opportunity to be heard before the injunction is issued, the plaintiff must show a more compelling need for relief than is required for a preliminary injunction.

B. Preliminary Injunctions

¶14 In order to obtain a preliminary injunction a plaintiff must give notice to the defendant and there must be a hearing on the motion.[7] The hearing is not a full trial on the merits,

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[5]Federal Rules of Civil Procedure.

[6]Fed. R. Civ. P. 65 (b).

[7]Fed. R. Civ. P. 65 (a).

but a preliminary procedure where the parties may offer their evidence in the form of affidavits. The judge has wide discretion to evaluate the reliability of the affidavits and to require a more acceptable form of proof if he deems them insufficient.[8] The plaintiff must post a security bond or protection for a defendant against an erroneous injunction.[9]

¶15 In order to obtain equitable relief at all, a plaintiff must demonstrate that the legal remedy is inadequate. In addition, a plaintiff who seeks a preliminary injunction or temporary restraining order must show that he will suffer irreparable harm if relief is denied.[10]

¶16 In considering a request for temporary relief, the court weighs the possible hardships to each side. Its aim is to preserve matters until the final hearing with as little harm to each party as possible.[11]

¶17 The tests of "inadequacy of legal remedy" and "irreparable harm" do not apply to the government when it seeks an injunction under Section 1964 of RICO.[12] When Congress enacted Section

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[8] D. Dobbs, Remedies §2.10 (1973).

[9] Fed. R. Civ. P. 65 (c).

[10] D. Dobbs, Remedies §2.10 (1973).

[11] Id. at §2.10.

[12] United States v. Cappetto, 502 F.2d 1351 (1974) Cert. denied, 420 U.S. 925 (1975).

1964 it considered injury to the public welfare inherent in any of the substantive RICO violations.[13] Consequently, it provided statutory authority for the government's right to injunctive relief.

C. Relaxed Requirements for Obtaining Injunctive Relief

¶18 Traditionally, plaintiffs in antitrust cases had to show a likelihood of success on the merits before they could obtain a preliminary injunction. The trend in recent cases, however, has been toward less stringent requirements. Generally, it is enough that the plaintiff show he is raising a serious question, which merits litigation, for the court to grant him a preliminary injunction.[14]

V. The Constitutional Framework of Injunctions

A. Nuisance Abatement and Traditional Injunctive Remedies

¶19 Since the late nineteenth century the use of an injunction to abate a public nuisance has withstood constitutional challenges on several fronts. The most common objection to the remedy of injunction was that it deprived defendants of their right to a trial by jury, guaranteed by Article III, Section 2 of the Constitution and the Sixth and Seventh Amendments. The Supreme Court dispensed with this argument by holding that suits in equity

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[13] 18 U.S.C. §1962 (1976) lays out the substantive violations.

[14] See Beauty Craft Supply Co. v. Revlon, 402 F. Supp. 385, 388-89 (E. D. Mich. 1975) and Jacobson & Co. v. Armstrong Cork Co., 548 F.2d. 438, 442-43 (2d Cir. 1977).

brought for the purpose of enjoining a public nuisance do not require jury trials.[15] The abatement of a nuisance by summary proceedings enjoyed a common-law tradition long before the Constitution was adopted; the constitutional provisions for jury trials could not be presumed to abridge the common-law practice.[16] Enjoining a nuisance does not constitute a criminal proceeding; instead, it is an exercise of the state's power "to stop the continuance of a present, existing hurt."[17]

¶20 A second major argument against the injunctive remedy was that an injunction may have the effect of depriving a defendant of his property without due process of law as when property is seized[18] or the defendant is prohibited from using his premises to conduct activity which has been declared a nuisance.[19] This due process objection carried little

[15] Mugler v. Kansas, 123 U.S. 623, §673 (1887).

[16] Lawton v. Steele, 152 U.S. 133, 142 (1894).

[17] Davis v. Auld, 53 Atl. 118, 120 (1902).

[18] Lawton v. Steele, 152 d.S. 133 (1894). The plaintiff's nets were seized from illegal fishing grounds by the fish and game protector.

[19] Mugler v. Kansas, 123 U.S. 623 (1887). The plaintiff was enjoined from manufacturing liquor on his property pursuant to a Kansas prohibition statute. He argued that since his property was a beer brewery and the buildings could be used for no other purpose, the injunction deprived him of his property without due process or compensation.

weight with the Supreme Court, which stated that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."[20] In addition, if a person thinks his property was wrongfully seized he can bring an action for replevin against the government. The availability of a legal remedy accords the individual the jury trial and due process, which opponents of injunctions claim he is denied.[21]

B. Injunctive Relief and the National Prohibition Act

¶21 Enactment of the National Prohibition Act in 1919 [22] gave rise to much controversy over the validity of its abatement and injunction provisions. The ensuing litigation challenged particularly Section 22 of the Act,[23] which permitted the United States to bring a suit in equity to

[20] Id. at 665.

[21] Lawton v. Steele, 152 U.S. 133, 142 (1894).

[22] Act Oct. 28, 1919, ch. 85, 41 Stat. 305 (repealed 1935).

[23] Act Oct. 28, 1919, ch. 85, title II, §22, 41 Stat. 314:

> An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his dupties or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith

enjoin any nuisance defined in the Act (that is, the use of premises to manufacture or sell liquor.[24]) The court could, at its discretion, order the premises to be completely vacated for one year,[25] the so-called "padlock provision."[26] Section 23 of the Act[27] declared the activity of bootlegging a nuisance subject to injunctive relief by the court. It was not necessary for the plaintiff to show the defendant's intent to continue the offending activity in order to obtain

(23 cont'd)

> issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated the court may order that the room, house building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum
>
> of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

[24]Act Oct. 28, 1919, ch. 85, title II, §21, 41 Stat. 314:

> Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who

(24 cont'd)

> maintains such a common nuisance shall be guilty of a misdemeanor and upon convicition thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

[25]§22 of the National Prohibition Act. The trial court could at its discretion, permit the owner of the premises to post a bond as surety of compliance with the injunction, rather than "padlock" the property for a year. In Schlieder v. United States, 11 F.2d 337, 338 (5th Cir. 1926) the court held that the trial court's discretion was not absolute but had to operate to fulfill the intention of Congress in enacting the bond provision. Congress' intention, according to the court, was that a property owner not be denied the use of his property if he complied with the injunction, since §22 was a preventative measure, not a penalty. Id. at 347.

[26]United States v. Boynton, 297 F.261, 267 (E.D. Mich. 1924).

[27]Act Oct. 28, 1919, ch. 85, title II, §23, 41 Stat. 314.

> That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person,

an injunction so long as the plaintiff initiated the suit within sixty days of the offense.[28] Section 24[29] provided

(27 cont'd)

> or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.
>
> In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.
>
> For removing and selling property in enforcing this Act the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.
>
> Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

[28] But see United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied 420 U.S. 925 (1975) which reflects the traditional principles of equity, stating that an injunction should be issued only when a preponderance of the evidence indicates that defendants are likely to engage in future misconduct.

[29] Act. Oct. 28, 1919, ch. 85, title II, §24, 41 Stat. 314:

> In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation,

for contempt proceedings against a defendant who violated an injunction.

¶22 The combined effect of Section 21 through 24 was that a law enforcement officer could declare a building or even a person (a bootlegger) a public nuisance and bring an action in equity against the building owner or the bootlegger. The court could order an injunction against the operation of the building or the activity of the bootlegger, punishing a violation by a fine and/or imprisonment.[30] It was argued that the result was that a defendant could be "punished" for an offense without the benefit of a jury trial.[31] In

(29 cont'd)

> whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

[30] National Prohibition Act §24.

[31] Black, The Expansion of Criminal Equity Under Prohibition, 5 Wisc. L. Rev. 412 (1930), points out that the injunctive process deprives the defendant of the following rights guaranteed by the 5th and 6th Amendments: "(1) jury trial; (2) indictment by grand jury; (3) that the accused shall enjoy the right to a speedy and public trial; (4) to be informed of the nature and cause of the accusations against him; (5) to be confronted with witnesses against him; (6) to have compulsory process for obtaining witnesses in his favor; (7) to have the assistance of counsel for his defense." Id. at 414. Since a court of equity can only enforce its injunctive decrees by punishment for contempt, the efficacy of an injunction is actually no greater than that of normal criminal sanctions. "Criminal equity" merely operates to deprive an offender of a jury trial. Id. at 418-19.

addition, the building owner could be deprived of all the benefits of his property, such as occupancy, rental income, etc., by the summary proceedings of the padlock provision.[32]

¶23 Courts sustained the validity of Sections 21 through 24 against charges that the statutory provisions violated constitutionally guaranteed rights to a jury trial.[33] The Supreme Court held that the padlock provision was preventative, not punitive,[34] and that it was a suit in equity not requirng a jury trial.[35] The Court did not consider the constitutionality of the National Prohibition Act again.[36]

¶24 With few exceptions,[37] lower courts declared the padlock provision constitutional, upholding the authority of a court of equity to enjoin a nuisance by ordering the offending premises vacated.[38] The function of the injunction was to

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[32] National Prohibition Act §22.

[33] Rights guaranteed by Art. III §2, and the Sixth and Seventh Amendments.

[34] Grosfield v. United States, 276 U.S. 494 (1928).

[35] Duighan v. United States, 274 U.S. 195 (1927).

[36] 5 J. Moore Federal Practice §38.24 [3] (1979).

[37] United States v. Cunningham, 37 F.2d 349 (D. Neb. 1929). The court held §23 of the National Prohibition Act unconstitutional because it essentially punished criminal conduct (bootlegging) without permitting the defendant a jury trial.

[38] United States v. Boynton, 297 F.261, 266 (E.D. Mich. 1924).

prevent the continuance of the nuisance, not to punish the owner of the property.[39] Consequently, the acoutrements of criminal procedure, such as a jury trial, were not required,[40] even when the nuisance enjoined was bootlegging.[41] It was not necessary for the United States to show it would suffer irreparable injury in order to obtain an injunction; the power of the state to abate a nuisance was sufficient.[42] The Eighteenth Amendment conferred on Congress the power of the states to abate nuisances.[43] The injunctive provisions of the National Prohibition Act were compared to legislation providing such relief in Sherman Antitrust Act violations.[44]

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[39] Id. at 267.

[40] Schlieder v. United States, 11 F.2d 337, 347 (6th Cir. 1926). The fact that the injunction is a remedy, and not a punishment, is what allows such a result. If abatement of a nuisance were a penalty the contempt provisions of the National Prohibition Act would be unconstitutional.

[41] United States v. Lockhart, 33 F.2d 597, 601 (D. Neb. 1929); §23 of the National Prohibition Act; see United States v. Boynton, 297 F. 261 (E.D. Mich. 1924).

[42] United States v. Lockhart, 33 F.2d 597, 601 (D. Neb. 1929).

[43] United States v. Cohen, 268 F.420, 425-26 (E.D. Mo. 1920). But see Golding, Constitutional Questions Involved in the Abatement and Injunction Sections of the National Prohibition Act, 19 Ill. L. Rev. 71 76-77 (1929) which denies the authority of Congress to transfer the state's police power to the federal government.

[44] United States v. Lockhart, 33 F.2d 597, 602 (D. Neb. 1929).

VI. The Nature of Injunctive Relief in Antitrust Cases

¶25 Ten years after the enactment of the Organized Crime Control Act of 1970 there is a dearth of litigation effectively employing the civil remedies of RICO.[45] The injunctive relief available under Section 1964 of RICO is patterned on the antitrust remedies of the Sherman Act.[46] The potential power of the injunction as a means of combatting racketeering activity, then, is best illustrated by examining the use of injunctions in antitrust cases.

¶26 In issuing an injunction a court must consider not only established principles of equitable relief, but the purpose and permissible uses of the injunctive remedy as reflected in relevant case law. The injunctive relief availabe under Section 1964 and antitrust law is strictly remedial in purpose, not punitive.[47] A court may not fashion an injunctive decree that has as its actual purpose a punitive effect on the defendant.[48]

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[45] The only successful exception is U.S. v. Cappetto, 502 F.2d 1351 (1974) cert. denied, 420 U.S. 925 (1975). See ¶51 infra, for a discussion of the case.

[46] 15 U.S.C. §4 (1976) authorizes U.S. attorneys to institute proceedings in equity against antitrust violators.

[47] Id. at 81.

[48] Hartford-Empire Co. v. U.S., 323 U.S. 386, 409 (1945). See United States v. United States Gypsum Co., 340 U.S. 76, 89-90 (1950) which says that it is appropriate for a court to impose sterner measures, in its decree, on defendants who deliberately violated the law than on those whose offense was due to a reasonable misunderstanding of the law. The court is not advocating a punitive attitude toward the defendant, however; the probable reasoning underlying the Court's position is that defendants who committed an

¶27 In its remedial function a court decree should, where possible, operate to undo the damage caused by the defendants' criminal activity.[49] In addition, defendants who have violated the law should not be allowed to derive future benefits from their offense.[50] For example, where the offense is violation of the antitrust laws, dissolution of the defendant company or divestiture of some of its assets is often necessary to restore competition to the affected industry.[51] Dissolution is especially appropriate where the combination itself constitutes the violation.[52] The goal in such anti-monopoly

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(48 cont'd)
offense purposefully are more likely to repeat their misconduct than those whose offense was inadvertent. An injunction's purpose is to prevent future misconduct and defendants who are though more likely to engage in illegal behavior require the imposition of more stringent injunctions.

[49] United States v. United States Gypsum Co. 340 U.S. 76, 88 (1950).

[50] Id. at 89.

[51] Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128 (1948) where the Court said,

> "Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) it puts an end to the combination or conspiracy when that is itself the violation, (2) it deprives the antitrust defendants of the benefit of their conspiracy, (3) it is designed to break up or render impotent the monopoly power which violates the Act."

[52] United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944).

remedies is to return the market to its pre-monopolization state.[53] Where necessary to further a competitive market, the court should protect the divested interests of the offending company.[54] For a divestiture decree to be effective, the court must determine exactly which assets of the defendant company comprise the violation, or were illegally acquired, and order those specific assets divested.[55]

¶28 Since injunctive relief is not a penalty to the offender, but a preventative remedy aimed at furthering the public interest,[56] the court's primary consideration in framing an injunction should be the well-being of the industry.[57] Injunctive relief should be ordered only where it is required to accomplish an acceptable end, i.e., in a

[53] Ford Motor Co. v. U.S. 405 U.S. 562, 573 (1972).

[54] Id. at 575.

[55] Schine Chain Theatres, Inc. v. U.S., 334 U.S. 110, 126 (1948). But see F.T.C. v. National Lead Co., 352 U.S. 419 429 (1957) where the Court required only a "reasonable relation" between the remedy and the unlawful acts.

[56] L. Sullivan, Handbook of the Law of Antitrust, §55 (1977)

[57] An antitrust case where the court denied the government's request for dissolution because it considered such a drastic remedy to be against the public interest is U.S. v. Alcoa, 91 F. Supp. 333 (1950). Among the reasons the court offered to support its decision were that a uable aluminum industry was important to the nation, Alcoa was engaged in vital research which would be disrupted by dissolution, and it would be difficult to develop a competitive market atmosphere in the aluminum industry at that time. 91 F. Supp. at 416-17.

monopolization case the court should take notice that a defendant's share of the market has diminished to a point where the injunction requested is no longer necessary.[58] Similarly, before issuing an injunction, the court should be convinced by a preponderance of the evidence that the defendant is likely to continue its illegal activity unless specifically enjoined from doing so.[59] Yet the fact that the defendant may suffer economic hardship as a result of a decree is immaterial; the court looks only to the affect on the industry in issuing its decree.[60]

¶29 When the court orders equitable relief the decree may encompass more than the express violations of which the defendant has been convicted.[61] The court can enjoin a defendant from engaging in particular illegal practices which may be only related to the defendant's past conduct.[62] A decree must be specific in stating what activities are

[58] Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263, 293 (2d Cir. 1979).

[59] U.S. v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) cert. denied, 420 U.S. 929 (1975).

[60] U.S. v. Crescent Amusement Co., 323 U.S. 173, 189 (1974). See United States v. DuPont, 366 U.S. 316, 326-27 (1967).

[61] U.S. v. United States Gypsum Co., 340 U.S. 76, 88-89 (1950); Hartford-Empire Co. v. U.S., 323 U.S. 386, 409 (1945).

[62] U. S. v. Grinnell Corp., 384 U.S. 563, 579 (1966).

prohibited. An injunction that is vague puts the defendant in the precarious position of unintentionally violating it.[63] It thus defeats its purpose, which is to restrain only behavior that is detrimental to the welfare of the industry.

¶30 In an action for equitable relief, the trial court is in the best position to mold an injunction to the contours of each case.[64] The Supreme Court will interfere, however, where the decree is inappropriate[65] or the judge has abused his discretion.[66] The court which issues a decree retains jurisdiction to modify it if circumstances change or it proves insufficient.[67] In order to enforce an injunction the court usually awards inspection rights to the government.[68] Inspection rights enable the government to receive reports, examine financial statements or other documents, and sometimes even visit the defendant's physical plant to confirm that the defendant is obeying the injunction.

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[63] Hartford-Empire Co. v. U.S., 323 U.S. 386, 409 (1945).

[64] International Salt v. U.S., 322 U.S. 392, 401 (1947).

[65] United States v. United States Gypsum Co., 340 U.S. 76, 89, (1950).

[66] U.S. v. Crescent Amusement Co., 323 U.S. 173, 185 (1944).

[67] Los Angeles Meat & Provision Drivers Union v. U.S., 371 U.S. 94, 103 (1962); D. Dobbs, Remedies §2.10 (1973).

[68] United States v. Bausch & Lomb Co., 321 U.S. 707, 725 (1944); U.S. v. Grinnell Corp., 384 U.S. 563, 579 (1966); Hartford-Empire Co. v. U.S., 323 U.S. 386, 433 (1945).

VII. Examples of Injunctive Relief in Antitrust Cases

¶31 There are three types of equitable relief commonly ordered in antitrust cases: dissolution, divestiture, and injunction. Dissolution involves a court order to dissolve the existing business entity that has committed an antitrust violation, usually by breaking it into smaller, independent companies. A divestiture decree orders the defendant enterprise to rid itself of particular assets such as subsidiary firms or interests in outside companies. An injunction either compels a defendant to do, or prohibits it from committing, a specific act.

¶32 Divestiture and dissolution are particularly drastic remedies because they often result in an extensive restructuring of the affected industry. Yet, where such severe remedies are necessary to undo the damage that an antitrust violation has caused, the law authorizes the government to request them.[69] In fact, courts have not hesitated to order dissolution of a combination of business enterprises where that combination was formed for the purpose of monopolizing a market.[70] For example, a group of film exhibitors in the South combined to create a regional monopoly of the first run movie business. The

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[69] United States v. DuPont, 366 U.S. 316, 326-27 (1967). See discussion of United States v. United Shoe Machinery Corp. ¶¶ 36-39 infra.

[70] International Boxing Club of N.Y. v. United States, 358 U.S. 242, 259-60 (1959); U.S. v. Crescent Amusement Co., 323 U.S. 173, 183 (1944); U.S. v. Grinnell Corp. 384 U.S. 563 (1966).

combination used its domination of small, local theatre markets as a lever to force film distributors to make anticompetitive agreements with it in the monopolized markets. Using this and other anticompetitive methods, the combination purposefully drove independent theatre owners in the competitive markets out of business. The Supreme Court in United States v. Crescent Amusement Co.[71] held that where the combination itself is a violation of the antitrust laws[72] injunctions alone may be insufficient and that dissolution may be the most effective remedy.[73] The film exhibitors were ordered to sever their connections with each other by a prescribed program of divestiture and injunctions enjoining various practices.[74] Similarly, in International Boxing Club of New York v. United States,[75] two corporations successfully conspired to monopolize the business of promoting and broadcasting professional

[71] 323 U.S. 173 (1944). The opinion was delivered by Justice Douglas, with one dissent. Three of the justices did not participate in the decision.

[72] Crecent was convicted of violating sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, #2 (1976). Id. at 176.

[73] Id. at 189.

[74] Id. at 187-189. Crescent was enjoined from: acquiring financial interests in additional theatres without an affirmative showing that the acquisitions would not restrain competition; making certain franchise and licensing agreements with film distributors; combining with its affiliates or other theatre operators for the purpose of inhibiting competition.

[75] 323 U.S. 173 (1944).

world championship boxing contests. The Supreme Court explained its reasons for ordering dissolution:

> New corporations, if formed, would start off with clean slates free from numerous written and oral agreements and understandings now existent and known throughout the industry. Hence dissolution might well have the salutory effect of completely clearing new horizons that the trial judge was attempting to create in the boxing world, especially when effected in conjunction with the stock divestiture provision.[76]

¶33 A typical dissolution case is United States v. Grinnell Corp..[77] Through its affiliates, Grinnell was found to monopolize the central station alarm service industry, a fire and burglar alarm system that used electronic devices hooked to a central station to provide superior protection for its clients. The Supreme Court ordered Grinnell to divest itself of its stock in the three affiliates that together controlled over 87% of the national market. In addition, Grinnell was enjoined from acquiring any other interests in the central station alarm business.[78] The majority opinion, written by Justice Douglas,[79] stated that such an injunction was required because obtaining interests in other companies

[76] Id. at 260.

[77] 384 U.S. 563 (1966).

[78] Id. at 579.

[79] Justice Douglas' opinion represented the views of six members of the Court. The three justices who dissented objected to the Court's definition of the "relevant market" in the case, not to the remedies prescribed.

was one of the ways by which Grinnell had been able to monopolize the industry.[80] The Court addressed two other anticompetitive methods practiced by Grinnell: the requirement that clients sign a five-year contract and the lease-only policy concerning the alarm equipment installed on customers' property. While conceding the responsibility for a specific decree to the District Court, which could better examine the particularities of the case, the Court emphasized that the two practices should be deprived of their anticompetitive effects by an appropriate injunctive order.[81] The Court also suggested that the government be granted visitation rights to verify Grinnell's compliance with the decree.[82]

¶34 Courts have dissolved, not only business enterprises, but associations of people as well. Where a trade association was a vehicle for anticompetitive practices the Supreme Court in Hartford-Empire Co. v. United States[83] ordered it dissolved and issued a decree enjoining the defendant companies from joining or forming any such association for five years. A similar situation arose where some independent waste grease

[80] 384 U.S. at 579.

[81] Id. at 578-579.

[82] Id. at 579.

[83] 323 U.S. 386 (1945). The corporate defendants were found to have monopolized the industry of manufacturing glassmaking machinery.

peddlers joined a powerful meat and provision drivers union. They then used the strength of the union to fortify their coercive and threatening gestures to competitors in the grease peddling trade with the goal of driving the competitors out of business. In Los Angeles Meat & Provision Drivers Union v. United States,[84] the Supreme Court expelled the defendant grease peddlers from the Union and enjoined them from engaging in the various anticompetitive practices of which they had been convicted.[85]

¶35 Divestiture is the means by which dissolution of an enterprise is accomplished; it is also an extremely effective remedy when dissolution is not the goal. In antitrust cases, where the defendant is found to monopolize a market, the most efficient means of restoring competitive conditions to the industry is a decree by the court ordering the defendant to divest itself of a share of its assets. The object of the decree is to reduce the defendant's share of the market, while helping independent companies to become viable competitors.

¶36 If a court's initial decree does not succeed in abolishing a monopoly, the court is obligated to refashion its orders to fulfill that end. In 1953, for example,

[84] 371 U.S. 94 (1962).

[85] Id. at 98-99. The decree enjoined the union from permitting any grease peddlers to become members. Since the order was entered against the union, it applied to all grease peddlers, not just the four who had been joined as defendants. Id. at 101.

the government brought an antitrust suit against United Shoe Machinery Corp.,[86] seeking dissolution of the corporation into three separate companies. United Shoe manufactured shoemaking machinery and, primarily through the complex terms of its lease-only policy, effectively controlled the shoe machine market.

¶37 The District Court in United States v. United Shoe Machinery Corp. found United Shoe in violation of Section 2 of the Sherman Act, but did not grant the government's request for dissolution.[87] Instead, it directed its attention to the specific practices that had enabled United Shoe to monopolize the shoe machine industry. The court ordered United Shoe to make its machines available for sale as well as lease and to change the restrictive terms of its leasing arrangements to eliminate their anticompetit effects. United Shoe was also ordered to divest itself of its subsidiaries in the ancillary field of shoemaking supplies (such as eyelets, nails, and tacks) as well as its distributorships of supplies produced by other companies.[88] In its decree the court retained jurisdiction of the case, and ordered that ten years after the entry of the decree both

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[86] 110 F. Supp. 295 (D. Mass. 1953), 266 F. Supp. 328 (D. Mass. 1967), 391 U.S. 244 (1968), CCH 1969 Trad. Cas. ¶72,688 (D. Mass. 1969).

[87] 110 F. Supp. at 348.

[88] Id. at 351.

parties were to report to the court on its effects and the state of the shoe machinery market.[89]

¶38 In 1965, the government reported that United Shoe still monopolized the market and requested further relief. The District Court refused to modify the original decreee in the absence of "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions."[90] On the government's appeal, the Supreme Court reversed, stating in a unanimous opinion[91] that the trial court's duty was to eliminate the monopoly and if the original decree had not accomplished that purpose, it should be modified.[92] It was within the trial court's discretion in the initial suit to choose a remedy less drastic than complete dissolution,[93] but upon a showing that United Shoe's monopoly power had not been eradicated, the trial court was obligated to employ more stringent measures to restore competitive conditions to the industry.[94] The case was sent back to the District Court for it to determine whether

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[89] Id. at 354.

[90] 266 F. Supp at 330.

[91] United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968). One justice did not participate in the decision.

[92] Id. at 251-52.

[93] Id. at 250-51.

[94] Id. at 251-52.

United Shoe continued to monopolize the shoe machinery market and to take the appropriate remedial steps.

¶39 The final result, in 1969, was dissolution.[95] The District Court ordered United Shoe to reduce its share of the market to 33% by divesting itself of machine assets that had produced a gross revenue of eight and a half million dollars the year before. The machine assets could be sold only to parties who were or would be viable competitors in the shoe machine manufacturing industry, or parties which the government approved. United Shoe was ordered to furnish reasonably priced training, repair services, and replacement parts to purchasers of its machines and to issue for reasonable royalties nonexclusive licenses under the patents it owned at the time. To ensure compliance with the decree, United Shoe was ordered to submit reports to the Department of Justice when requested to do so.[96]

¶40 Since the aim of a decree in an antitrust case is to reestablish a competitive market in the monopolized industry, the court must take care to assure that the orders it issues help realize this goal. Dissolving a monopoly or ordering large scale divestiture may cure the antitrust violation, but without the presence of effective competitors in the

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[95] CCH 1969 Trad. Cas. ¶72,688 (D. Mass. 1969).

[96] Id. at pp. 86, 445-451.

industry, there can be no competitive market. Ford Motor Company was convicted of violating the Celler-Kefauver Antimerger Act[97] when it acquired Autolite, the second largest independent manufacturer of sparkplugs in the country. Before the acquisition, Ford was the single largest buyer of sparkplugs from independent manufacturers. By becoming a manufacturer itself, Ford significantly reduced the sparkplug market negating the competitive conditions its position as a potential entrant into the industry had inspired.

¶41 In Ford Motor Co. v. United States[98] the Supreme Court held that divestiture of Autolite by Ford was required to correct the imbalance in the sparkplug market.[99] The decree did not, however, end there. In order for competition to be restored, it was necessary that Autolite be a viable business entity after divestiture by Ford.[100] In its opinion, delivered by Justice Douglas, the Court expressed concern that without specific provisions aimed at protecting Autolite, the company would be unable to re-establish itself as a competitor in the sparkplug market. The divestiture decree was to eradicate monopolization in the industry; harming Autolite in the process would defeat the decree's purpose.

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[97] 15 U.S.C. §§18,21 (1976).

[98] 405 U.S. 562 (1972).

[99] Id. at 574.

[100] Id. at 575.

¶42 In this light, the decree handed down by the Court included a number of injunctions directed at Ford and benefitting Autolite. Ford was enjoined for ten years from producing sparkplugs; it was ordered to buy half its requirement of plugs from Autolite for five years, and the price at which Ford could sell plugs to its dealers was controlled.[101] In addition, Ford was restrained for five years from using its own trade name on sparkplugs it used in its cars or sold at its dealerships.[102] The rationale behind the restriction on Ford's use of its name was the existence in the replacement plug market of an "original equipment" (OE) tie. The "OE tie" is the tendency of dealers and garages to replace worn sparkplugs with the same brand as was originally installed in the car. If Ford were allowed to use sparkplugs with the Ford name in its cars, it would create a huge market for Ford sparkplugs, with subsequent monopolistic effects.[103]

¶43 Last, the Court ordered Ford to divest itself of Autolite in a way such that the employees of the sparkplug plant would not be disadvantaged by the sale.[104] Ford was required to sell only to a purchaser who would continue Autolite's existing employee benefits system, including wages. Ford itself had to provide jobs for any workers harmed by the discontinuation of non-sparkplug operations at the Autolite plant.

¶44 For a divestiture decreee to be effective in an anti-monopoly case the court must determine which of the defendant's assets were acquired by unlawful means. Schine Theatres v. United States[105] involved a fact pattern similar to Crescent Amusement Co.:[106] a large chain of motion picture theatres used the power of its combination to stifle competition, conspiring with film distributors as well as with each other to force competitors out of business.

¶45 The Supreme Court ruled unanimously[107] that while divestiture, ordered by the trial court, was the appropriate remedy, the decree issued below was not based on an adequate determination of exactly which theatres were "fruits of the conspiracy."[108] Ordering Schine to divest itself of theatres that were acquired by illicit methods would be the most efficient way of depriving the defendant of the benefits of its

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[101] Id. at 572-75.

[102] Id. at 576.

[103] Id. at 576.

[104] Id. at 572.

[105] 334 U.S. 110 (1948).

[106] See ¶32 supra.

[107] The opinion was written by Justice Douglas for the seven members of the Court who reviewed the case.

[108] Id. at 129.

conspiracy.[109] The Court recognized, however, that even such a remedy might be insufficient to eliminate Schine's monopoly power, as monopolization is in itself illegal, whether obtained unlawfully or not.[110] Consequently, the case was remanded to the District Court for it to make the findings of fact necessary to fashion an effective divestiture decree.[111] The injunctions entered by the District Court against Schine were sustained: restrictions on Schine's purchase of other theatres in the future, a prohibition against buying or booking films for theatres not owned by Schine, and dissolution of certain agreements between the defendant theatres.[112]

¶46 An injunction in antitrust cases is sometimes directed against an activity, which in itself is not unlawful, but has the effect of restraining competiton. In Federal Trade Commission v. National Lead Co.[113] the defendants were sellers of lead pigment who conspired to employ a common pricing system. The purpose of "zone delivered pricing" was to eliminate competitive pricing between the various lead sellers: prices for each type of lead were set according to geographical location of the buyer (the zone) and all the lead dealers adhered to them.[114] The defendants were found by the Federal Trade Commission to have violated Section 5 of the Federal Trade Commission Act.[115] The Commission issued an order prohibiting individual lead sellers from using the zone delivered pricing system. The Commission did not claim the pricing system itself was illegal but that concerted adherence to it constituted restraint of trade.[116] An order merely restraining the combination of lead sellers would be ineffective if the sellers could continue independently to use the same pricing system. The injunction against the use of the system was temporary, to be removed when competition was restored to the industry.[117]

¶47 In a unanimous opinion the Supreme Court supported the Commission's authority to issue such an order, emphasizing that the use of geographical territories to set prices was not illegal, but the purpose of eliminating price competition was. The Court said, "Although the zone plan might be used for some lawful purposes, decrees often supress a lawful device when it is used to carry out an unlawful purpose."[118]

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[109] Id. at 129.

[110] Id. at 129-30.

[111] Id. at 130.

[112] Id. at 127.

[113] 352 U.S. 419 (1957).

[114] Id. at 421-22.

[115] 15 U.S.C. §45.

[116] Id. at 424.

[117] Id. at 424-25.

[118] Id. at 430.

¶48 In issuing antitrust decrees against corporate defendants, courts are not limited to restraining only actions of the corporate entity. Courts have enjoined the executive officers of a business from holding positions in the defendant corporation or other companies. For example, in United States v. Crescent Amusement Co.,[119] the Court required one of the individual defendants to resign from his position as an officer of any of the affiliated defendant corporations except for Crescent itself. Another individual was ordered to give up his post as executive officer in the affiliates of Crescent; he could remain as an officer in one of the corporations only.[120]

¶49 In United States v. Grinnell [121] the Supreme Court modified the District Court's decree prohibiting Grinnell's president from working for any of the corporate defendants, but acknowledged the appropriateness of such an order in different circumstances:

> Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made on this record.[122]

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[119] 323 U.S. 173 (1944). See ¶32 supra.

[120] Id. at 189.

[121] 384 U.S. 563 (1966).

[122] Id. at 571.

¶50 As a final provision of an injunctive remedy, the court often awards the government "visitation" or "inspection" rights. The defendant is required to submit reports, financial documents, or other materials to the government to evidence its compliance with the court's decree. Inspection rights were awarded in United States v. Grinnell[123] and United States v. United Shoe Machinery,[124] discussed above.

VIII. The Use of Injunctions Under RICO

¶51 United States v. Cappetto[125] is an example of a case where the injunction provision of RICO[126] was successfully employed by the government to enjoin criminal activity. In Cappetto, the defendants were charged with conducting gambling operations in violation of 18 U.S.C. §1955[127] and Section 1962 of RICO.[128] The government obtained a preliminary

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[123] See ¶33 supra.

[124] See ¶¶36-39 supra.

[125] 502 F.2d 1351 (7th Cir. 1974), cert. denied 420 U.S. 925 (1975).

[126] 18 U.S.C. §1964 (a) and (b). See note 1 supra.

[127] 18 U.S.C.A. §1955 (1980) reads in part:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

[128] 18 U.S.C. §1962 (1976) outlines the substantive violations at which RICO is aimed.

injunction[129] under Section 1964 to restrain the defendants from gambling. The defendants in turn challenged the constitutionality of the civil remedies provision of RICO, claiming that Section 1964 proceedings were actually criminal in effect so they should be allowed to exercise the Constitutional rights[130] guaranteed to defendants in criminal cases.[131]

¶52 The Seventh Circuit rejected the defendants' arguments and affirmed Congress' authority to provide both criminal and civil remedies to enforce a statute. The availability of a criminal sanction along with civil proceedings does not in itself make the use of the civil proceeding criminal.[132]

¶53 The court then outlined the criteria for determining when an injunction is appropriate: "Whether equitable relief is appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future, a likelihood which is frequently established by inferences drawn from past conduct."[133] The court

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[129]"The preliminary injunction order merely enjoins further gambling activities pendente lite, relief clearly civil in nature and within the power of the District Court to grant." 502 F.2d at 1359.

[130]See ¶19.

[131]502 F.2d at 1355.

[132]Id. at 1357.

[133]Id. at 1359.

established that a preliminary injunction enjoining the defendants from gambling was justified in this case.

¶54 Cappetto was followed by the District Court in United States v. Winstead.[134] In Winstead, the government sought a temporary restraining order under Section 1964 to enjoin the defendants from gambling. The court acknowledged the availability of injunctive relief under Section 1964 and denied it only because the evidence did not establish that the defendants were continuing their gambling activities at the time the complaint was filed.[135]

IX. Suggested Application of Injunctive Remedies to Cigarette Bootlegging.

¶55 The types of decrees handed down in antitrust cases suggest the broad scope of equitable relief that would be available under RICO. Injunctions can reach individuals as well as organizations and may be swiftly enforced by the summary nature of contempt proceedings.

¶56 The injunctive remedies of RICO could be applied successfully to the problem of cigarette bootlegging. In attacking cigarette smuggling, the plaintiff's target should be the manufacturer. The cigarette manufacturing industry is composed of only a few giants, easily accessible to the legal process, in contrast to the numerous distributors and elusive organized

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[134]421 F. Supp. 295 (N.D. Ill. 1976).

[135]Id. at 296-97.

crime networks. The manufacturing companies are legitimate business enterprises and injunctions against them would be easier to enforce than a decree aimed at curbing the activities of wholly illicit operators. Since individual offenders in the cigarette smuggling business are often part of the larger entity of organized crime, even successfully prosecuting them will be ineffective in putting an end to smuggling, as they are easily replaced. Cigarette manufacturers represent the first step of the bootlegging process; highly visible and geographically immobile, they are the point at which the civil remedies of RICO would be most potent.

¶57 For an injunctive decree to be effective, it must be based on a thorough understanding of the mechanics of the activity (whether monopoly or criminal operation) sought to be enjoined.[136] Cigarette manufacturers play a key role in the smuggling process but their culpability may be difficult to prove.[137] Assuming, however, that a plaintiff can demonstrate the manufacturer's liability, it then becomes the court's responsibility to order the appropriate injunctive relief.

¶58 As illustrated in F.T.C. v. National Lead Co.,[138]

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[136]See the description of cigarette bootlegging ¶¶4-11.

[137]See M. Tonn, Cigarette Bootlegging: A Strategy for Attacking the Manufactuers Through Civil Litigation (Aug. 1980) (unpublished manuscript for Cornell Institute on Organized Crime.)

[138]Discussed ¶¶46-42 supra.

the court can enjoin business practices which are not unlawful in themselves but whose effect is a violation of the law. Cigarette manufacturers, for example, could be enjoined from selling cigarettes to buyers whose legitimacy is questionable. They could be required to collect and afix the tax and tax stamps of the states of ultimate sale at the point of manufacture.

¶59 Similarly, in the case where out-of-state buyers purchase the cigarettes and then sell them at home-in fact without paying the tax--the court could order the manufacturers to forward copies of sales receipts to the tax department of the buyer's state. The tax department in New York, for example, would receive records of sales from the manufacturers in North Carolina indicating the quantity sold to each purchaser from New York. The tax department would then compare that information to the tax returns of the distributors and wholesalers, bringing actions for tax evasion where significant differences appear. Such an order is similar in concept to the inspection rights given to the government in antitrust cases.

¶60 In the situation where the manufacturer sells to legitimate distributors within their own low tax state, and then those distributors sell to out-of-state smugglers, the court could limit the manufacturer's sales to the in-state buyers. If a court in an antitrust case can determine whether a dependent controls a national market, and exactly what steps are necessary to reduce its market share to a prescribed

level,[139] it should also be able to derive sufficiently accurate information on cigarette consumption within one state. This information could be used as the guide in restricting the sales of each manufacturer to conform to the state's demand. Adequate margins would be allowed in order not to stifle market competition between manufacturers and to compensate for fluctuations in consumption. The goal in cigarette bootlegging is not to eliminate every single untaxed pack of cigarettes in the country, but to wipe out the large scale bootlegging operations. The big time operators who control the cigarette smuggling business today do so because the profit in large volume activity is huge; remove the volume factor and bootlegging will be substantially eliminated.

¶61 Corruption within the organization of the manufacturer could impede the success of these suggested types of injunctions. Nevertheless, if a plaintiff can ferret out culpable individuals, they could be enjoined from holding positions in any cigarette manufacturing company, and would be subjected to criminal proceedings by prosecutors.[140]

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[139] See discussion of United States v. United Shoe Machinery Corp., ¶¶36-39 supra.

[140] See discussion of inspection rights, ¶¶30,50 supra. Arson for profit is another area of criminal activity where organized crime is profitably involved. "Arson empires often consist of a mob-connected "torch", who sets the fire, a corrupt insurance broker, an accommodating insurance adjuster, and a cooperative official in the fire department. See Gabel, "Arson and RICO", in 1 Techniques in the Investigation and Prosecution of Organized Crime: Materials on RICO 211-240 (G.R. Blakey ed. 1980). Injunctions obtained under RICO would be effective in breaking down these arson networks. An insurance company that has been convicted of taking part in arson activities could be ordered by the court to insure buildings at reasonable, rather than inflated, levels. Culpable employees in the insurance company or the fire department could be removed from their posts and enjoined from obtaining similar employment elsewhere. Arson organizations, like any corporate defendant in an antitrust case, could be dissolved.

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Procedural Aspects of Criminal RICO

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SUMMARY

¶1 These materials consider several procedural problems that may arise in the course of a RICO prosecution. Each section provides a discussion of the general legal principles governing that area and then remarks on their applicability to RICO.

I. Introduction

¶2 Title IX of the Organized Crime Control Act of 1970, entitled "Racketeer Influenced and Corrupt Organization (RICO)[1] is an unique criminal statute that represents a concerted congressional effort to combat organized crime and other group criminality with civil and criminal procedures and sanctions.[2] Congress, in enacting the statute, was concerned with the failure of traditional law enforcement efforts to contain the growth of organized crime.[3] Both the current substantive and

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[1]Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968, (1970), [hereinafter cited as RICO].

[2]Id. §§ 1961-1963 of the RICO statute define the words used in the Act, explain the prohibited conduct, and provide criminal remedies. Id. §§ 1964-1968 define the proceedings, remedies, and sanctions involved in a civil action brought under RICO.

[3]See Organized Crime Control Act of 1970, Pub. L. No. 91-542, § 1, 84 Stat. 922(1970) for a complete statement of the legislative purpose behind the Organized Crime Control Act of 1970. One of the premises underlying enactment of the statute was a recognition that "defects in the evidence-gathering process of the law" inhibited the "development of the legally admissible evidence necessary" to successfully hamper and restrict the activities of those who engage in organized crime. Id. It is well established that the term "organized crime" is not limited to members of La Cosa Nostra; United States v. Mandel, 415 F. Supp. 977, 1018 (D. Md. 1976).

procedural law are ineffective in curtailing the activities of those engaged in organized crime. Prosecution under RICO offers much improved prospects of effective control of "organized crime" and other forms of crime that is organized. Existing procedural law is not fully adapted to meet the peculiar needs of a RICO prosecution. These materials will focus on these procedural problems and how they may be solved. First, however, it is necessary to recite the basic provisions of the RICO statute.

A. Basic Provisions of RICO

1. Standards

¶3 The basic prohibitions of RICO are found in Section 1962,[4] which makes unlawful four activities by any person:

1. Using income derived from a pattern of racketeering activity to acquire an interest in an enterprise;[5]

2. Acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;[6]

3. Conducting the affairs of an enterprise through a pattern of racketeering activity;[7] and

4. Conspiring to commit any of these offenses.[8]

An understanding of these legal standards requires a look at the basic concepts used in their drafting.

B. Concepts

1. Persons

¶4 Section 1961(3) indicates that "person" "includes" "any individual or entity capable of holding a legal or beneficial interest in property."[9] This definition is an illustration;

[4] 18 U.S.C. § 1962 (a), (b), (c), and (d) (1970).

[5] 18 U.S.C. § 1962 (a) (1976) provides: 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.

[6] 18 U.S.C. § 1962(b) (1976) provides: 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 interst in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[7] 18 U.S.C. § 1962(c) (1976) provides: It shall be unlawful for any person employed by or associated with an 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.

[8] 18 U.S.C. § 1962(d) (1976) provides: It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

[9] 18 U.S.C. § 1961(3) (1976).

hence, it does not limit the concept.[10] Manifestly, this definition of "person" includes many groups in addition to members of "organized crime."[11]

2. Enterprise

¶5 A second vital concept in RICO is that of enterprise. To violate RICO, a person must acquire or maintain an interest in or control of an enterprise,[12] or conduct or participate in the conduct of an enterprise's affairs.[13] Section 1961(4) provides 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.[14] Here, too, the definition works by illustration, not by limitation.[15] Private businesses as well as labor organizations are enterprises under RICO.[16] The enterprise need not be legitimate.[17] Government agencies may also be enterprises.[18] The definition encompasses associations in fact, which are often formed for the purpose of engaging in criminal activites,[19] but

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[10] "Includes" is a term of enlargement, not of limitation. See. E.g., Highway & City Freight Drivers v. Gordon Transps., Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 99 S. Ct. 612 (1978).

[11] United States v. Gambino, 566 F.2d 414 (2d Cir. 1977), cert. denied, 435 U.S. 1006 (1978). See. e.g., United States v. Parness, 503 F.2d 430 (2d Cir. 1974). cert. denied, 419 U.S. 1105 (1975).

[12] 18 U.S.C. § 1962(b) (1976).

[13] 18 U.S.C. § 1962(c) (1976). Under this subsection, the person must be employed by or associated with the enterprise and the enterprise must be engaged in interstate commerce or its activites must affect interstate commerce.

[14] 18 U.S.C. § 1961(4) (1976).

[15] On the use of the word "includes," see supra note 10.

[16] See. E.g., United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978) (legitimate restaurant serving as front for narcotics trafficking); United States v. Brown, 583 F.2d 659 (3d Cir. 1978) (auto dealership), cert. denied, 99 S. Ct. 1217 (1979); United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (beauty college); United States v. Forsythe, 560 F.3d 1127 (2nd Cir. 1977) (bail bond agency); United States v. Parness, 503 F.2d 430 (2nd Cir. 1974) (foreign hotel and gambling casino), cert. denied, 419 U.S. 1105 (1975); United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978) (theater); United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977) (labor union), aff'd, 578 F.2d 1371 (2nd Cir.), cert. dismissed, 99 S. Ct. 43 (1978).

[17] United States v. Rone, 598 F.2d 564 (9th Cir. 1979); United States v. Castellano, 416 F. Supp. 125 (S.D.N.Y. 1975).

[18] See. E.g., United States v. Frumento, 563 F.ed 1083, 1092 (3d Cir. 1977) (Bureau of Cigarette and Beverage Taxes), cert. denied, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407 (5th Cir. 1977) (law enforcement department), cert. denied, 435 U.S. 904 (1978); United States v. Ohloon, 552 F.2d 1347 (9th Cir. 1977) (law enforcement department); Unites States v. Vignola, 464 F. Supp. 1091, 1095 (E.D. Pa. 1979) (Philadelphia Traffic Court). 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 activites. See S. Rep. No. 617, 91st Cong., 1st Sess. 16 (1969). Mandel clearly was wrongly decided.

[19] 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 (2nd Cir. 1976) (gambling), cert. denied, 420 U.S. 925 (1975). Such illegitimate associations are in fact usually connected with Section 1962(c) violations;

their purposes may be legitimate as well.[20] The group associated in fact may also change its membership in the course of its activity.[21]

3. Pattern of Racketeering Activity

¶6 A third concept, which has important procedural implications, is the pattern of racketeering activity. To violate RICO, the takeover or operation of an enterprise must be accomplished through a "pattern" of "racketeering activity." Section 1961(5) limits "pattern" by requiring that it include "at least two acts . . . , one of which occurred after the effective date of this chapter[22] and the last of which occurred within ten years . . . after the commission of a prior act.[23] Beyond this statutory limitation, the legislative history of RICO[24] as well as its judicial interpretation indicate that the racketeering acts must be "related."[25] Sporadic activity cannot constitute a pattern of racketeering activity. "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."[26] They may be unrelated to each other, but held together by a relationship to an enterprise.[27] A pattern may be found where the separate acts have had a similar purpose,[28] results,[29] participants,[30] victims, or methods of commission.[31] Under Section 1961(1), "racketeering activity"

(19 cont'd)
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.

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

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

[22] 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).

[23] 18 U.S.C. § 1961(5) (1976).

[24] S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

[25] See. 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").

[26] 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).

[27] United States v. Elliott, 571 F.2d 880, 899 (5th Cir. 1978). But see United States v. Stofsky, supra note 25. Elliott not Stofsky was correctly decided. See S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) (need only be not isolated).

[28] United States v. Gibson, 486 F. Supp. 1230, 1241-43 (S.D. Ohio 1980). See also, United States v. Rone, 598 F.2d 564 (1979); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977) cert. denied, 434 F.2d 1020 (1978); United States v. Morris, 532 F.2d 436 (5th Cir. 1976).

[29] Id. and cases cited therein.

[30] Id. and cases cited therein.

[31] Id. and cases cited therein.

is defined by incorporating state and federal offenses. The statute precisely limits those offenses that will prove "racketeering activity" to those listed in the statute. The state offenses are generically defined. Arson, bribery, and extortion are, for example, among the incorporated state crimes.[32] Many federal statutes are incorporated under RICO as well. Mail fraud[33] is perhaps the most inclusive of the federal statutes,[34] since it covers a broad range of criminal activity bottomed in fraud. Not surprisingly, certain procedural problems, most notably venue, are introduced when a federal RICO prosecution is brought utilizing state offenses to define the federal crime.

4. Liberal Construction

¶7 RICO is to be "liberally construed to effectuate its remedial purposes."[35] Generally, the courts have faithfully followed this Congressional directive .

5. Criminal Penalties

¶8 Proof of the foregoing permits the use of the expanded sanctions of RICO. Section 1963[36] provides for criminal remedies for a violation of its standards. A violator may "be fined not more than $25,000 or imprisoned not more than twenty years, or both."[37] These penalties sometimes, but not always, will exceed those that could be imposed for two viola-

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[32] 18 U.S.C. § 1961(1) (A) (1976). Other state crimes are murder, kidnapping, gambling, robbery, and dealing in narcotics. Id.

[33] 18 U.S.C. § 1341 (1976).

[34] 18 U.S.C. § 1961(1) (B)-(D) (1976) also includes federal bribery and wire fraud statutes, among others.

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

[36] 18 U.S.C. § 1963 (1976) provides: 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 acquired or maintained in violation of section 1962, and (2) any interst 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 an 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. 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.

[37] Id. § 1963(a).

tions of the incorporated offenses.[38] Besides a fine and imprisonment, the violator must[39] forfeit to the United States any interest he has acquired (all his ill-gotten gains) as well as any interest in an enterprise (his economic base) that affords him a source of power over the enterprise involved in the violation of RICO.[40] The statute authorizes the courts to enter

[38]For example, 29 U.S.C. § 186 (unlawful payments to a union representative) is a misdemeanor. 18 U.S.C. § 1(2) (less than one-year misdemeanor). When Section 186 is used as a "racketeering act," the potential penalties for a pattern of Section 186 payments is raised to the felony level. 18 U.S.C. § 1(1) (more than one-year felony). On the other hand, murder is also a "racketeering act." Usually, it may be sanctioned by itself at the life improsonment or death level. See. E.g., 18 U.S.C. § 1111. Under RICO, however, the penalty of imprisonment could not exceed twenty years.

[39]United States v. L'Hoste, 609 F.2d 796 (5th Cir. 1980) is a well reasoned and correctly decided decision. But see United States v. Huber, 603 F.2d 387 (2d Cir. 1979). L'Hoste, not Huber, reflects what Congress intended.

[40]18 U.S.C. § 1963(a) (1)-(2) (1976). A union official who breached his trust would not only have to disgorge his ill-gotten gains, he would have to give up his office. See. E.g., United States v. Rubin, 559 F.2d 975 (5th Cir. 1977) (forfeiture of union office). The Ninth Circuit in United States v. Marubeni America Corp., 611 F.2d (9th Cir. 1980), however, held that the only interests subject to forfeiture under section 1963(1) and (2) were those "in an enterprise." In so reading RICO, the Court ignored the statutes liberal construction clause (Pub. L. No. 91-452, 84 Stat. 947, Title IX, § 904(a) (1970)) and its Statement of Findings and Purpose (Id. at 84 Stat. 922) and read into the section 1963(a) (1) words ("in an enterprise") that were plainly not there. The court's construction of the subsection not only violated the plain meaning of the statute, it also contradicted the intent of its chief sponser. (See McClellan, "The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberty?" 46 Notre Dame Law 55, 141 (1970) ("Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organization prevention

restraining orders prior to conviction to prevent the transfer of the property threatened with forfeiture.[41] Subsection (c) prescribes that the Attorney General shall seize the forfeited property "upon such terms and conditions as the court shall deem proper."[42] It also provides that the provisions of the customs laws dictate the procedure for disposing of the property.[43] Finally, subsection (c) states that "[t]he United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons."[44]

¶9 An examination of these concepts reveals that a RICO prosecution has several advantages in attacking organized criminal activity. First, it allows the details of an entire criminal enterprise to be brought before the court. Second, by integrating state and federal offenses into a RICO count it is possible to join the efforts of state and federal authorities. Third, and most significantly, significant enhanced

of their return, and, where possible, forfeiture of their ill-gotten gains") (emphasis added). The decision is clearly wrong and should not be followed in the other circuits. For a detailed critique, see Materials, pp. 378a-378jj. For a contrary view, see Taylor, "Forfeiture Under 18 U.S.C. § 1963 -- RICO's Most Powerful Weapon," 17 Am. Crim. L. Rev. 379 (1980).

[41]18 U.S.C. § 1963(b).

[42]18 U.S.C. § 1963(c).

[43]Bailey, "Private Actions for Injunctive Relief", in 1 Techniques in the Investigation and Prosecution of Organized Crime: Materials on RICO 379-404 (G. R. Blakey ed. 1980).

[44]Id. at 388-90, 393-99.

sanctions can be obtained to neutralize proven malefactors.

These materials will examine several procedural problems raised by the unusual status of the predicate offenses of RICO.

II. Lesser Included Offenses and RICO

A. Introduction

¶10 A RICO conviction requires proof of at least two predicate offenses, which establish a pattern of racketeering activity.[45] These predicate offenses must be related to an "enterprise",[46] but need not be the same kind of criminal activity.[47] A troublesome, but quite important question is raised as to whether these predicate offenses are lesser included offenses of the RICO charge. At stake are two significant issues. First, is the defendant or prosecution entitled to an instruction to the jury that a predicate offense as a lesser included offense? Second, is consecutive sentencing barred by finding RICO predicate offenses lesser included offenses, and if so, does this coincide with a policy of enhanced penal sanction, mentioned in the RICO statute?[48] To

[45] 18 U.S.C. §§ 1961, 1962 (1970).

[46] 18 U.S.C. § 1961(4) (1970): "enterprise" includes any individual or entity capable of holding a legal or beneficial interest in property. Case law has broadly construed this term; see United States v. Elliott, 571 F.2d 880 (5th Cir. 1978).

[47] § 1961 defines "racketeering activity" to include a wide range of state and federal crimes.

[48] Statement of Findings and Purpose, Pub. L. 91-452, 84 Stat. 922-23 (1970).

resolve these questions, it is necessary to examine the definitional requirements of lesser included offenses and the rules governing their use.

B. Constitutional Provisions

¶11 Lesser included offenses are more than mere technicalities of statutory construction; significant constitutional considerations are involved.[49] A defendant's right to due process requires that he receive notice of the crimes charged against him.[50] This is necessary so that the defendant has adequate time to prepare a proper defense.[51] It has been held that a defendant has adequate notice when he is charged with the greater offense.[52] Hence, in most instances, a conviction on a lesser included offense will meet the constitutional requirements of due process.

¶12 Under the double jeopardy clause of the U.S. Constitution, the government may not prosecute a defendant on a lesser included offense once there has been an acquittal on the greater offense. Nor can there be a prosecution for the greater offense after an

[49] See, Comment: Jury Instructions on Lesser Included Offenses, 57 N.W.L. Rev. 62 (1962-63).

[50] Id.

[51] Id.

[52] Walker v. United States, 418 F.2d 137 (1977); see also United States v. Barbeau, 92 F. Supp. 196, 199 (Alaska, 1950) aff'd 193 F.2d 945, 947 (9th Cir.), cert. denied, 343 U.S. 968 (1952); 5 Orfield, Criminal Procedure Under The Federal Rules, § 31:11 at 137 (1967).

acquittal on the lesser included offense.[53] In Jeffers v. United States the Supreme Court stated:

> The general rule [is] that the Double Jeopardy Clause prohibits a State or Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense. . .[54]

The court went on to explain why the Double Jeopardy Clause mandates this result:

> What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecution for "the same offense." [We reaffirm] the rule that one convicted of the greater offense may not be subjected to a second prosecution on the lesser offense, since that would be the equivalent of two trials for "the same offense."[55]

The court concluded by asserting that "[B]ecause two offenses are "the same" for double jeopardy purposes. . . it follows that the sequence of the two trials for the greater and lesser offenses is immaterial. . ."[56]

C. Rule 31(c)

¶13 The doctrine of lesser included offenses developed at common law to help the prosecution when its proof failed as to some element of the crime charged.[57] It was soon recognized to have benefit to the defendant, since a jury may believe the defendant guilty of something and would find him guilty of the greater offense without the lesser included offense charge.[58] Rule 31(c) of the Federal Rules of Criminal Procedure is now the source of law on lesser included offenses.[59] This rule is simply a restatement of prior law.[60] It provides that:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.[61]

Despite the clear wording of the rule, it has been subject to different interpretations.

1. Strict Statutory Approach

¶14 The key term in the rule is the requirement that the lesser included offense be "necessarily-included" in the offense charged. Many courts have followed a strict statutory construction approach to determine when an offense is necessarily included in a greater offense. Emphasis is placed on the elements of the crime:

> It is always true that the greater offense contains an element which the lesser included offense does not; this is one of the reasons for the use of the terms "greater" and "lesser" to describe the two offenses, and

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[53] Jeffers v. United States, 432 U.S. 137 (1977); Brown v. United States, 432 U.S. 161 (1977).

[54] Jeffers v. United States, supra, 150-51.

[55] Id. at 151.

[56] Id. at 151.

[57] See. 2 C. Wright, Federal Practice and Procedure, § 515 at 372 (1969), and cases cited therein.

[58] See. 57 N.W.L. Rev. 62, supra. 2 C. Wright, supra, § 515 at 372.

[59] Fed. R. Crim. P. 31(c).

[60] See. 2 C. Wright, supra, § 515 at 372.

[61] Fed. R. Crim. P. 31(c).

why the lesser is thought to be in the greater.[62] Under this approach, the lesser included offense must involve fewer of the same constituent elements than the charged greater offense.[63] Courts utilizing this approach may make their determination, as to whether two crimes are greater and lesser-included by an examination of the elements of the crimes charged in the indictment. It must be impossible to commit the greater offense without committing the lesser one.[64]

2. Fact-Element Model

¶15 A close variant of this strict-statutory approach is the "fact-element[65] approach. Here courts examine the elements of the two crimes and the facts necessary to prove them. If the two crimes have similar elements and the facts used to prove the greater offense also prove the lesser one, then the lesser offense in a lesser included offense.[66] For example, a defendant is charged with assault with the intent to kill and at trial it is shown that he used a gun in the assault. This fact establishes all the elements necessary for a conviction of assault with a deadly weapon. Hence, assault with a deadly weapon is a lesser included offense.[67]

¶16 Both of these approaches focus primarily on the elements of the crime charged. The latter one permits some inquiry into the actual facts shown at trial, but only to a limited extent. Since the prosecution or defendant often may have a strong interest in obtaining a lesser included offense charge, the elements of the two offenses are frequently subject to tortuous reasoning to justify a lesser included-offense charge. Not surprisingly, this yields anomalous results and hence, the strict statutory approach is frequently criticized as being too rigid.[68]

3. Cognate Approach

¶17 In contrast to the strict statutory and fact-element tests is the "cognate" test.[69] Originally, the cognate approach examined the pleadings and permitted any offense to be charged whose elements were alleged in the indictment.[70] Therefore, joyriding would be a lesser included offense of grand larceny if an automobile had been stolen.[71] This approach, however,

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[62] United States v. Brewster, 506 F.2d 62, 75 (D.C. Cir. 1974).

[63] United States v. Cady, 495 F.2d 742 (1974). See also: Sansone v. United States, 380 U.S. 343 (1965). 5 Orfield, supra, § 31: 12; note 20 at 190 and cases cited therein.

[64] Note. Critique of Wisconsin's Lesser Included Offense Rule, Wis. L. Rev. 1979, 896, 905 (1979).

[65] Id. at 904.

[66] Id.

[67] Koenig, The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for the Michigan Courts, Det. Col. L. Rev. 1975: 41, 44.

[68] Id. at 46-47.

[69] Id. at 43-44.

[70] Id.

[71] Id.

has been limited by many courts because it is too broad to be fair or useful.[72]

¶18 The most important formulation limiting the cognate approach appears in United States v. Whittaker.[73] The court first rejected the strict statutory approach stating that:

> To determine that two offenses in a given case are in the relation of greater offense and lesser included offense is not as simple as defining the elements of the two offenses separately and laying them side by side.[74]

It then set up an alternate standard, which was designed to permit the flexibility that the strict statutory method lacked, while providing a set of standards absent in the cognate approach:

> A more natural, realistic and sound interpretation of the scope of "lesser included offenses,". . . is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the commission of the greater offense.[75]

The court justifies this application of the rule by arguing that the "necessarily included" language does not specify a particular point in the proceeding at which the determination is to be made. That is, the court, under Rule 31(c), does not have to analyze only the elements of the crime charged in the indictment, but rather, can examine both the crimes charged and evidence adduced at trial.[76] The concept of the "inherent relationship" between the greater offense and crime alleged to be a lesser included offense provides the necessary guidance to make this determination.[77]

¶19 Courts may find this inherent relationship if the two offenses protect the same interests[78] and if proof of the lesser offense is necessarily presented to prove the greater offense.[79] The requirement that the offenses protect the same interests was designed to include crimes which were de facto closely related even though elements analysis would not find a greater-lesser included offense relationship. Concurrently, it eliminated the possibility that any crime whose elements could be found in the facts proven could be charged as a lesser included offense. Although no cases have clearly defined the meaning of "same interest", arguably this limits a finding of a greater-lesser offense relationship proscribing the same general type of activity.

D. Supreme Court Decisions

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[72] Id.

[73] 447 F.2d 314 (D.C. Cir. 1971).

[74] Id. at 318. Accord. United States v. Pirio, 606 F.2d 908 (10th Cir. 1979); United States v. Raborn, 575 F.2d 688 (9th Cir. 1978); United States v. Stolarz, 550 F.2d 488 (9th Cir.) cert. denied, 434 U.S. 851 (1977).

[75] Id. at 319.

[76] Id. at 318.

[77] Id.

[78] Id.

[79] Id.

¶20 These conceptual approaches to the problems of lesser included offenses have received some attention from the Supreme Court.[80] The Court seems to utilize the fact-element model outlined above. In Sansone v. United States,[81] the Court stated:

> A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.[82]

First, the greater crime must contain all elements of the lesser one and some additional elements. Secondly, the facts at trial must prove the elements of the lesser crime and there must be factual uncertainty over those elements unique to the greater offense. The court, however, seems to have avoided the narrowness of the face-element model. In Jeffers v. United States,[83] the Court accepted the reasoning of the Seventh Circuit that conspiracy to distribute heroin[84] was a lesser included offense of conducting a continuing criminal enterprise to violate the drug laws.[85] By so, construing these statutes, the Court tacitly encourages a broad and flexible analysis of the element of a crime for the purposes of determining lesser included offenses.

[80] Brown v. United States, 432 U.S. 161 (1977); Jeffers v. United States, 380 U.S. 343 (1965); Berra v. United States, 351 U.S. 131 (1956).

[81] Sansone v. United States, supra, at 350.

[82] Id. Accord Jeffers v. United States, supra, at 150.

[83] Supra.

[84] 21 U.S.C. § 846.

[85] 21 U.S.C. § 848.

E. Implementation of Lesser Included Offenses

¶21 Once it is determined that an offense is a lesser included offense of a greater charged offense, the court must decide whether the defendant or prosecution is entitled to have the lesser included offense charged to the jury. It is clear that both prosecution and defendant may request that the lesser included offense be charged.[86] The Eighth Circuit in United States v. Scharf, has best stated the requirements for the defendant's use of a lesser included offense charge.

> The following conditions [must be] met: (1) An appropriate instruction must be requested; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence that would justify conviction of the lesser offense; (4) the proof on the differentiating element of elements must be sufficiently in dispute that the jury may consistently find the defendant innocent of the greater offense but guilty of the lesser; and (5) a charge on the lesser offense may appropriately be requested by either the prosecution or defense.[88]

The court is not required to charge lesser included offenses

[86] Keeble v. United States, 412 U.S. 205, 208, (1973): There was never any doubt that the prosecution could request a lesser included offense instruction. For some time, a defendant has had an equal reight to request a lesser included offense: it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense.

[87] 558 F.2d 498 (8th Cir. 1977).

[88] Id. at 502. See: United States v. Lamartina, 584 F.2d 764 (6th Cir. 1978); United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977); United States v. Madden, 525 F.2d 972 (5th Cir. 1976); Governor of Virgin Islands v. Carmona, 422 F.2d 95 (3d Cir. 1970); 5 C. Wright, supra, § 515.

sua sponte, there must be a request from a party to do so. Although once requested it is a matter of discretion for the trial court, reversible error will be found if a lesser included offense request is improperly denied. Therefore, if there is dispute over factual elements which distinguish the greater and lesser crimes, the lesser included offense charge should be given. There is some support for the idea that the trial court must give a lesser included offense charge if the evidence and crimes charged indicate that it might be successful, even if neither party requests it.[90] A defendant certainly can make this argument under Federal Rules of Criminal Procedure 52(b), that is, the plain error rule.[91] A defendant is not entitled to a lesser included offense charge if the factual elements to be resolved for both offenses are the same.[92]

F. Lesser Included Offenses and RICO

¶22 Very important questions arise when the above described law of lesser included offenses is applied to a RICO prosecution. Are RICO predicates lesser included offenses of the RICO offense? If so, then the defendant may obtain a lesser included offense

[89] United States v. Lamartina, supra; United States v. Crutchfield, supra; United States v. Madden, supra; Governor of the Virgin Islands v. Carmona, supra.

[90] 5 C. Wright, supra, § 515.

[91] Id. Fed. R. Crim. P. 52(b).

[92] Sansone v. United States, supra, at 349-50; United States v. Thompson, 492 F.2d 359 (8th Cir. 1974); 65 Geo. L. J. 445 (1976).

charge and the prosecution a conviction on the predicate offense (if a federal crime is used as a predicte) if the RICO conviction fails. This result, however, will vitiate the enhanced penal sanctions of RICO by making consecutive sentencing impossible.[93] These competing considerations are resolved by an examination of the statute and its purposes. Additionally, it is unclear whether the law of lesser included offenses permits a finding of a lesser included -- greater offense relationship where the predicate offenses are completely different from the greater offense.

1. Statutory Analysis

¶23 Discussion of this problem must begin with an examination of the statute. The statute clearly states that, "Nothing in this title shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies in addition to those provided in this title."[94] Although this language has received no judicial commentary, its undermines a finding of a lesser included offense status for predicate offenses. Each federal RICO predicate offenses has a congressionally mandated penalty structure. If RICO predicate offenses are lesser included offense of the RICO charge then their penalty structure will be ignored due to the constitutional bar on consecutive sentencing for lesser

[93] See the discussion of the Rone decision, infra, at § 24.

[94] § 904; United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979).

included and greater offenses.[95] The language of Section 904, arguably, is provided to avoid RICO provisions subsuming the federal remedies applicable to each predicate offense.

¶24 The language of the RICO statutes individual provisions also supports a finding that predicate offenses are not lesser included offenses in another important way. The "Statement of finding and purpose" of RICO states that, "[I]t is the purpose of this Act to seek eradication of organized crime in the United States. . . by providing enhanced sanctions and new remedies to deal with the unlawful activites of those engaged in organized crime."[96] (Emphasis added). The possibility of obtaining enhanced sanctions is dramatically reduced if the predicate offenses are considered lesser-included in the RICO charge. This is due to the above-mentioned constitutional restriction on consecutive sentencing of lesser-included and greater offenses. For this reason, a strong policy argument exists to bar predicate offenses from being lesser-included. A recent decision, United States v. Rone[97] states it thusly:

> There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern. The reake-

[95] Jeffers v. United States, supra; Brown v. United States, supra.

[96] Statement of Findings and Purpose, Pub. L. 91-452, 84 Stat. 922-23, (1970).

[97] 598 F.2d 564 (9th Cir. 1979); United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979).

> teering statutes were designed primarily as an additional tool for the prevention of racketeering activity, which consists in part of the commission of a number of other crimes. The Government is not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only. Such a requirement would nullify the intent and effect of the RICO prohibitions. . . . . Congress clearly intended the Act to provide for new penal prohibitions and enhanced sanctions. If we were to accept appellants' theory that sentences imposed for the predicate offenses may not run consecutively, then Congress' purpose would be thwarted. If the RICO sentence must run concurrently with a sentence for any predicate crime, there would be no "enhanced" penalties. A conviction under RICO would, in fact, grant immunity for the offenses charged in the "pattern of racketeering." With the maximum penalties for RICO violations much less than those might be obtained for the series of predicate crimes (18 USC § 1963), the RICO statutes would be rarely used.[98]

Hence, two important aspects of the RICO statute support a finding that predicate offenses are not lesser included offenses.

2. RICO and Approaches to Rule 31(c)

¶25 A statutory analysis tends to preclude an examination of the law of lesser included offenses with respect to RICO predicates. Nonetheless, this body of law, discussed above, may support a finding that RICO predicates are not lesser included offenses. The strict statutory and "fact-element" approaches to lesser included offenses would seem to include RICO predicates. RICO requires proof of each element of two predicate acts before the "greater" RICO conviction can be obtained.[99] However, there is

[98] Id. at 571-572.

[99] 18 U.S.C. §§ 1961, 1962 (1970).

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no identity of interests or actions between the two predicate offenses.[100] The strict statutory approach stresses that it must be impossible to commit the greater offense without also committing the lesser offense.[101] This requirement contemplates that the two crimes be closely related in the type of activity they prohibit. Clearly, it would be possible to commit a RICO violation by committing a variety of different acts which would serve as RICO predicates.

¶26 The cognate approach as explicated by the Whittaker[102] opinion would also exclude RICO predicates as lesser included offenses. The language of this opinion stresses the "inherent relationship" between the two offenses.[103] Emphasis is placed on the fact that the two offenses protect the same interests. RICO predicates protect quite different interests; thus extortion, mail fraud, wire fraud, etc., are not farily included by this approach either.

¶27 The lesser included offense doctrine developed from crimes which had degrees[104] to include crimes which were closely related. RICO predicates do not comfortably fit within that scheme.

[100] Id.

[101] Det. College of L. Rev. 1975:41 (1975).

[102] United States v. Whittaker, supra.

[103] Id.

[104] 2 Orfield, supra.

However, since there is no express prohibition in Rule 31(c) or in judicial language excluding RICO predicates from the scope of lesser included offense law, it is possible to argue that RICO predicates are lesser included offenses. This argument should fail, however, if the purposes of the statute are considered.

III. RICO and Criminal Venue

¶28 At present RICO prosecutions are subject to the general federal law of venue. The RICO statute contains no criminal venue provisions.[105] Although no RICO prosecutions have failed due to an inability to satisfy venue requirements, the law of venue is inadequate for RICO purposes. The federal rules utilize the "crime committed" formula[106] to determine proper venue. But where is the proper venue for a RICO charge whose predicate offenses have been committed entirely within different districts? No clear answer emerges from existing law.

¶29 RICO venue problems stem from its inclusion of many defendants and offenses within a single charge. Fortunately, adequate venue provisions have been established for the crime of conspiracy which has many of the same characteristics. Conspiracy venue law is broad and permits trials to take place in a wide variety of districts.[107] This approach provides an excellent

[105] RICO does contain a special provision for issuance of subpoenas in both civil and criminal proceedings. See. 18 U.S.C. § 1965(c) (1970).

[106] Fed. R. Crim. P. 18.

[107] See discussion of conspiracy venue, infra. ¶38.

model for RICO. Adoption of this would permit the RICO charge to be tried wherever an act had been done to further the criminal enterprise being prosecuted. Hence, if venue was proper for one predicate offense, it would certainly be proper for the RICO charge. As with conspiracy, substantive offenses which appear in the RICO charge as predicate offenses, could be tried with the RICO charge only if the requirements of the general federal venue law were met.

An examination of current venue law will reveal the special problems raised by RICO.

A. History of Criminal Venue

¶30 The basic requirement of the federal law of venue dictates that a crime be prosecuted where it was committed.[108] The defendant's right to be tried where the crime was committed evolved from the English common law right to a trial by a jury selected from the vicinage.[109] At first, vicinage guaranteed that jurors, who actively participated in judicial proceedings, were personally familiar with the parties and issues of the trial.[110] Later, when juries based their verdicts on the evidence at trial rather than personal knowledge, vicinage and venue were important as

[108] Fed. R. Crim. P. 18.

[109] See 1 C. Wright, Federal Practice and Procedure, § 301 at 577 (1969); Blume, The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue, 43 Mich. L. Rev. 59 (1944).

[110] Blume, supra.

limitations on the sovereign's use of judicial proceedings for political purposes. Venue assumed a special importance to the American colonists who resented that many offenses committed in the colonies were tried in England.[111] For this reason, the rights of venue and vicinage appear prominently in the Constitution.[112] This reflects a fundamental belief that it is unfair to subject a person to the economic and physical hardships attendant on a trial held in a distant forum.[113]

B. Constitutional Provisions

¶31 Article III, §2, clause three, provides that crimes will be tried in the state where committed, and the Sixth Amendment says that the accused shall be tried by an impartial jury of the state and district where the crime was committed. "Literally read, the Sixth Amendment guarantees a jury of the district and not a trial in the district."[115] Courts have

[111] 2 Orfield, Criminal Procedure Under The Federal Rules, § 18.3 at 728 (1966).

[112] U.S. Const. art. III, § 2 cl. 3; U.S. Const. amend. VI.

[113] United States v. Flaxman, 304 F. Supp. 1301, 1304, (S.D.N.Y. 1969): In order that the defendant be tried before the most informed jury, the Sixth Amendment directs that trial be had among those who know the local conditions surrounding the criminal acts and who should thus be able to draw the most accurate inferences from the evidence presented at trial. The venue provisions seek to avoid prejudice to a defendant's case that might well result from facing trial in a place where it would be difficult to obtain witnesses and prepare for trial. See. Blume, supra; Orfield, supra.

[114] U.S. Const. amend. VI.

[115] Orfield, supra, § 18.3.

construed it, however, to guarantee the defendant the right to trial in the state and district where the crime was committed.[116] Article III, §2, and the Sixth Amendment allow venue to be changed by legislative means.[117] Specific venue provisions are controlling but they must meet constitutional requirements.[117a]

C. Federal Rules of Criminal Procedure: 18

¶32 These provisions of the Constitution are embodied in Rule 18 of the Federal Rules of Criminal Procedure: "Except as otherwise provided by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."[117b] The crucial concept lies in the "crime committed" formula of the rule. Once it is determined where the crime was committed,

[116] Id. § 18.4 at 729: This seems sensible since if the defendant asserts his constitutional right to a trial by the jury of the vicinage, he may not be tried in any other district than that in which the crime was committed since only there can such a jury be impaneled.

[117] Id. § 18.5 at 731.

[117a] Id. See also; 1 C. Wright, supra, § 302 at 587: Congress lacks power to provide for trial in a district other than that which the offense was committed, but this is not a significant limitation on congressional power. By altering the verb in a statute it may alter the nature of the offense, and thus the proper venue, . . .

[117b] Fed. R. Crim. P. 18 (1966) (full text):
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

a finding of proper venue is simple.[118] This determination depends on the verb used in the statutory definition of the offense;[119] a tremendous variety of definitional verbs exist. A partial list of these verbs includes: accepting, receiving, promising, offering, making, presenting, mutilating, and issuing. Hence, generalizations about the venue possibilities of different crimes are difficult to make.[120] In RICO prosecutions, venue of predicate offenses can only be determined, under Rule 18, by a "nice" analysis of the definitional verbs of the offenses.

D. Continuing Offenses

¶33 Many crimes, especially complex ones like those contemplated by the RICO statute, are committed in more than one district. 18 U.S.C. § 3237 states that venue will lie in any district in which an offense was begun, continued, or completed.[121] This continuing offense venue provision also provides for offenses involving the use of mails or of transportation in interstate

[118] See Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula, 9 U.C.L.A.L. Rev. 751 (1962): See also; 1 C. Wright, supra, note 15 at 584; Orfield, supra; Orfield, Venue of Federal Criminal Cases, 17 U. Pitt. L. Rev. 375.

[119] 1 C. Wright, supra, at 584 (quoting Judge Dobie): All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed. See. Dobie, Venue in Criminal Cases in the United States District Court, 12 Va. L. Rev. 287 (1926).

[120] 1 C. Wright, supra, at 586.

[121] 18 U.S.C. § 3237 (1948).

or foreign commerce; venue can lie for those offenses in any district from, through, or into which such commerce or mail moves.[122] A continuing offense has been described in this manner:

> A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each.[123]

Offenses such as kidnapping, receiving stolen property, and conspiracy are ordinarily continuing offenses, while the crimes of burglary, arson, rape, and murder would not be considered continuing offenses.[124]

¶34 Application of continuing offense venue to factual situations raises a problem of interpretation: where and when does an offense begin? Generalizations about the case law are difficult to make, because the venue problems in any particular case will depend on the statutory language of the offense. One court has approved venue in a district where a scheme (not a conspiracy) to defraud in the sale of securities through the use of mails was formed, but where no mailings had occurred. Venue was also proper where the use of the mails had occurred.[125]

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[122] Id.

[123] Armour Packing Co. v. United States, 153 F.1, 5-6 (8th Cir.), aff'd 209 U.S. 56 (1907).

[124] Abrams, supra, at 790.

[125] United States v. Coshin, 281 F.2d 669 (2d Cir. 1960).

¶35 Since a RICO conviction requires proof that a pattern of racketeering activity affected interstate commerce, it is likely that many predicate offenses charged will be continuing ones. For this reason 18 U.S.C. § 3237 is an extremely valuable provision since it allows for a finding of venue in many districts.

E. Offenses Outside District

¶36 Special problems may arise where a continuing crime takes place, in part, outside of the territorial boundaries of the United States or in some other manner which makes it difficult to locate the crime for venue purposes.

¶37 "Article III, Section 2, of the Constitution lays down the rule that if an offense is "not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed [126] 18 U.S.C. § 3238 provides statutory definitions to the constitutional mandate:

> The trial of all offenses begun or committed upon the high seas or outside the jurisdiction of any particular State or district, shall be in the district in which the offender. . . is arrested or first brought. . .[127]

In United States v. Jackson,[128] smuggling of heroin into the United States was considered a continuing offense and venue was properly laid in the district where the package of heroin first entered the country and in the district where the package

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[126] 1 C. Wright, supra, § 304 at 594.

[127] 18 U.S.C. § 3238 (1948).

[128] 482 F.2d 1167 (10th Cir.), cert. denied, 414 U.S. 1159 (1973).

finally arrived.

F. Conspiracy Venue

¶38 The importance of Federal Rules of Criminal Procedure 18 and 18 U.S.C. §§ 3237, 3238 for venue in a RICO prosecution is clear. Venue under the laws of conspiracy[129] has less direct application to current RICO prosecutions, but may provide an ideal model for the development of criminal venue under RICO. As one commentator has argued:

> Among the advantages which conspiracy gives the federal prosecutor is a general loosening of the requirements of venue, . . . a conspiracy charge offers to the prosecutor greater discretion as to the place of trial with respect to crimes having multi-district contacts -- that the multiple venue possibilities are greater in a conspiracy prosecution than in a case involving some other federal crime.[130]

¶39 18 U.S.C. § 371 makes it a crime to conspire to commit an offense against the United States. Venue for the crime of conspiracy can be laid either in the district where the agreement was made or in any district where any overt act in furtherance of the conspiracy was committed.[131] The seminal case of conspiracy venue law is Hyde v. United States,[132] where venue was permitted in a district where one conspirator had committed overt acts in furtherance of the conspiracy, but where his co-conspirator had never been.[133]

¶40 The only significant limitation on the multi-venue possibilities of conspiracy venue is the requirement of an overt act related to the conspiracy. It need not be illegal, important, complex, or logically related to the goal of the conspiracy.[134] The overt act can constitute an omission to act.[135] A crime that is the object of a conspiracy can serve as an overt act for venue purposes and also be charged as a substantive offense.

1. Conspiracy Venue for Substantive Offenses

¶41 The multi-venue possibilities of the crime of conspiracy are numerous. However, these multi-venue possibilities exist only for prosecution of the crime of conspiracy. Venue for the substantive offense that was the object of the conspiracy must be separately satisfied if it is to be joined with the conspiracy charge.[135a] If overt acts committed in furtherance of the conspiracy are charged as substantive offenses, venue as to each

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[129] 18 U.S.C. § 371.

[130] Abrams, supra, at 753.

[131] The common law had no overt act requirement; agreement alone was sufficient to constitute the crime of conspiracy.

[132] 225 U.S. 347 (1912).

[133] Id.

[134] Abrams, supra, at 765: the necessary contribution of the overt act to the criminal purpose is not measured by any test of importance or substantiality. Nor does it matter that the act is temporarily or physically remote from the completion of the object; or that it is equivocal with respect thereto; or that it is otherwise legal and innocent; or that it is a simple and commonplace activity.

[135] Id. at 769: The act requirement has been met, at least in some contexts, by an omission which was done with the purpose of effecting the object of conspiracy.

[135a] United States v. Hughes Tool Co., 78 F. Supp. 409 (D. Hawaii 1948); United States v. Choate, 276 F.2d 724 (5th Cir. 1960).

particular substantive offense must be found independent of the conspiracy charge.[136] The conspiracy charge can be joined with any one substantive offense that was also an overt act, but joinder of the other overt acts charged as substantive offense will not necessarily be permitted. Venue for overt acts tried as substantive offenses will be governed by the venue provisions of Rule 18 and § 3237.

G. Venue and RICO

¶42 The venue problems in a RICO prosecution are the same as in any other crime: where was the crime committed. To answer, it is necessary to ask what law governs. If venue for the RICO charge with its predicate offenses A and B is determined on the basis of Rule 18 and § 3237 there will be two possible results. Venue for A and B may be found in the same district. Hence, it is correct to state that the RICO crime was committed in the district in which venue can be found for both predicates. This may happen somewhat infrequently when a large number of counts are involved. The other possible result would be that venue could be found for only one predicate offense. Does this mean that the RICO charge (as opposed to a substantive charge) could not be brought at all, since the crime, for venue purposes, was not committed anywhere? And since no two predicate offenses were committed in the same district, prosecution is barred. It is entirely reasonable that if each predicate offense is also charged as a substantive offense, it would be impossible to try the RICO and all substantive counts in the same proceeding. But it seems questionable to say that a RICO charge, which might be proven,

could not be brought due to operation of venue laws.

1. Relevance of Conspiracy Venue Law

¶43 The law of conspiracy developed to counter the peculiar threats inherent in crimes committed by an organized group of individuals. Unlike crimes committed by a single felon; murder or robbery, for example - conspiracy crimes may take place in several different districts and involve actions by conspirators which are not illegal in themselves. Yet these actions are connected by a single illegal purpose. For this reason, it was necessary to create a crime which recognized this problem. RICO was designed to combat "highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."[137] RICO, like conspiracy, attempts to attack crime involving a group of individuals engaged in a variety of criminal activities.

¶44 The law of conspiracy and RICO are closely related by more than the type of activity and defendants they try to reach. An analogy can be drawn between the law of conspiracy and the substantive RICO violations (§ 1962 a, b, c).[138] The concepts of enterprise and pattern, like the agreement to conspiracy, can

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[136] Id.

[137] Statement of Findings and Purpose, Pub. L. 91-452, 84 Stat. 922-23 (1970).

[138] 18 U.S.C. § 1962, (a), (b), (c) (1970).

serve to hold together many different types of crimes, committed in many different places. The predicate offenses that make up the pattern of racketeering related to the enterprises can be considered like the overt acts committed in a conspiracy. The predicate offenses are acts done to further the common scheme just as overt acts are done to further the goals of the conspiracy

¶45 Conspiracy venue law is designed to cope with the venue problems associated with the prosecution of group crime. Since RICO has the same objective, it seems logical and necessary to utilize the same type of venue provisions.

2. Venue and RICO Objectives

¶46 Further, the purposes of RICO clearly would be thwarted by restrictive venue rules. The statute mandates that "the provisions of this title shall be liberally construed to effectuate its remedial purposes."[139] Since most criminal statutes are narrowly construed, this provision indicates the intention of Congress to fashion a statute which broadly and flexibly approaches the problems of organized crime and other forms of group crime. A second related aspect of RICO is that by making a pattern of racketeering activity an element in the crime, the entire pattern of criminal activity must be placed before the court.[140] By so structuring the statute, Congress clearly desired that crimes which were a part of a criminal enterprise, wherever they occurred, be tried in the same proceeding. Therefore, the purposes of RICO would be frustrated by an application of venue law which took no account of the statute's objectives. Broadening venue for RICO, either by judicial development or congressional action, would mean that the RICO crime would be committed in any district where a significant act in furtherance of the criminal enterprise occurred. This would effectuate the statute's overriding purposes and be consistent with existing constitutional and statutory provisions. While it follows that RICO could be tried anywhere where an overt act occurred relating to its commission, it does not follow that separate charges of the predicate offenses could be joined with the RICO count. Venue for them would have to be separately determined, as in the case of conspiracy charges and substantive counts.

IV. RICO and Joinder

A. Introduction

¶47 Joinder and severance under the federal rules play a crucial role in facilitating and shaping trials in complex criminal prosecutions involving multiple counts and defendants.[141] The

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[139] Title IX, § 904, 84 Stat. 947(a). See United States v. Kaye, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977).

[140] See discussion of joinder and severance under RICO, infra, for the mechanics of this process.

[141] Fed. R. Crim. P. 8, 13, 14.

structure of RICO avoids many of the potential limitations imposed by the federal laws of joinder and severance. Since RICO predicate offenses are an integral part of the RICO crime, they do not need to be "joined" as would otherwise be required by Federal Rules of Criminal Procedure, Rule 8(a). Similarly, predicate offenses as well cannot be "severed" as permitted by Rule 14. Since joinder and severance have tremendous strategic importance for the prosecution in bringing all aspects of a criminal enterprise before the court, these special RICO provisions have profound implications. To see why, it is necessary to examine the existing law of joinder and severance.

B. Law of Joinder

1. Joinder of Offenses

¶48 Joinder of offenses in one indictment against one defendant is governed by Rule 8(a) of the Federal Rules of Criminal Procedure which states that:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.[142]

The "same or similar character" test of Rule 8(a) joinder is the most liberal, conceptually, of the offense joinder tests.

[142] Fed. R. Crim. P. 8(a).

The relationship between the two crimes joined under this test need not be as close as under the other tests of offense joinder. Same or similar character test joinder will be permitted when the offenses are of the same type (e.g., two bank robberies), or they involve the same modus operandi, or when the evidence as to the two counts substantially overlaps.[143]

¶49 Joinder of offenses under Rule 8(a) can be sustained when the joined offenses are based on the same act or transaction. In United States v. Park[144] the word "transaction" was defined to mean an act or series of acts that need only be connected logically. In Park, the court upheld joinder of a gun and drug charge, because they were both discovered during a search of apellants apartment.[145] Related acts will be joined when they stem from the same transaction. Thus, perjury, unlawful possession of a stolen treasury check, and uttering the check were properly joined, because they were logically connected to the theft and cashing of the check.[146]

¶50 The final test of offense joinder under Rule 8(a) permits joinder where two or more acts are connected together or form parts of a common scheme or plan. In United States v. Isaacs,

[143] See Decker, Joinder and Severance in Federal Criminal Cases: An Examination of Judicial Interpretation of the Federal Rules, 53 Notre Dame Law. 147, 149-54 (1977-1978) and cases cited therein.

[144] 531 F.2d 354 (5th Cir. 1976).

[145] Id. at 761.

[146] United States v. Jamar, 561 F.2d 1103 (4th Cir. 1977).

perjury and a variety of substantive counts concerning race track stock fraud were joined because "They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing."[147]

2. Joinder of Defendants

¶51 Joinder of defendants in a criminal indictment is set forth in Rule 8(b) of the Federal Rules of Criminal Procedure.[148] Rule 8(b) covers either of two situations: multiple defendants charged with one crime; or multiple defendants charged with several crimes. The significant difference between Rule 8(a) and Rule 8(b) is that the same or similar character test no longer serves as a basis for joinder under Rule 8(b). Additionally, joinder of offenses and defendants is always determined by Rule 8(b) when more than one defendant is prosecuted.[149] Offenses may be very similar in type of crime or modus operandi, but joinder will not be permitted on this basis if multiple defendants are involved. The other two tests for Rule 8(b) joinder are the same as those in Rule 8(a) and the standards required in Rule 8(b) joinder are substantially the same as those described in determining the propriety of joinder of offenses under Rule 8(a).[150]

¶52 In multi-count, multi-defendant indictments, conspiracy is often charged and can properly serve to cement together crimes and defendants whose interrelatedness might otherwise seem too weak for joinder.[181] If properly joined at a pre-trial stage, joinder of defendants and offenses will survive the dismissal of the count that served as the original basis for joinder, whether it be a conspiracy count or another count.

¶53 Of course in any joinder case, serious philosophical and evidentiary concerns are at stake. The thrust of the law is to individualize guilt, and trials where many defendants are joined together on many different counts pose serious difficulties in realizing the ideal of the individuation of guilt. A defendant may rightly fear that the jurors will be prejudiced against him, or confused, by evidence introduced against a co-defendant.[152] Further, defendants may be hampered in their efforts to present a defense, because their co-defendants, who might otherwise testify on their behalf, will refuse to take the stand in fear of opening themselves up to cross-examination.[153]

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[147] United States v. Isaccs, 493 F.2d 1124, 1159 (7th Cir.), cert. denied, 417 U.S. 976 (1974). See also: United States v. Webster, 437 F.2d 327 (3d Cir.), cert. denied, 402 U.S. 932 (1970).

[148] Fed. R. Crim. P. 8(b).

[149] 1 C. Wright, supra, at 304; Decker, supra, at 154.

[150] Decker, supra, at 154.

[151] Id. at 158-60; See: Johnson, supra; Abrams, supra.

[152] See e.g., United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966); Kata v. United States, 321 F.2d 7, cert. denied, 375 U.S. 903 (1963).

[153] See. United States v. McLaurin, 555 F.2d 1069, 1074 (5th Cir. 1977), for discussion of misjoinder for prejudice and dangers of joint trials. See also, United States v. Elliott, supra; United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978).

Balanced against these justifiable concerns of the defendant are the interests of the government in the most economical and convenient prosecution. If joinder were not permitted, prosecutors would be required to bring many different trials all involving substantially the same evidence.

C. RICO and Joinder

¶54 A typical RICO prosecution involves a RICO charge with its predicate offenses and separate substantive charges for each predicate offense where the predicate offense violates a federal statute. Separate counts where the offenses are state violations, of course, cannot be joined and tried in a federal court. The law of joinder, outlined above, functions here in two ways. With the substantive offenses, normal joinder provisons apply. Since these substantive offenses arise out of the same criminal enterprise, their joinder provides few difficulties.[154] These substantive offenses, however, can be misjoined and may also be severed under Rule 14.[155] The law of joinder does not apply to the predicate offenses of the RICO charge. Rather the RICO statute itself determines whether these offenses and defendants may be joined.

1. RICO Enterprise as Joinder

¶55 Consideration of joinder of the predicate offenses in

[154] See ¶28 et. seq. for discussion of the possible venue problems raised by such joinder.

[155] See Following section on Severance for fuller discussion.

RICO cases requires clarification of two key concepts of the RICO statute. The pattern of racketeering that is a required element of a RICO violation must be comprised of at least two predicate offenses which need not be related to each other. In order to form a pattern of racketeering, the predicate offenses need only be related to the enterprise engaged in interstate commerce, whose conduct or operation the pattern of racketeering is affecting.[156]

¶56 The enterprise concept of the RICO statute is somewhat analogous to the common scheme or plan element of Rule 8 joinder. Nevertheless, the RICO enterprise requires an association in fact that "furnishes a vehicle for the commission of two or more predicate offenses."[157] The RICO enterprise concept can include a highly diversified criminal activity, loosely connected and joined together by a desire to "make money."[158] In United States v. Elliott a wide variety of different crimes, involving different people and committed over several years, were found properly joined, because they were all part of a pattern of racketeering used to conduct the affairs of an enterprise (RICO § 1962(c)). If the RICO enterprise concept did not exist, misjoinder might have been found in the Elliott case. The acts of racketeering alleged in Elliott could have been deemed unrelated

[156] United States v. Elliott, supra.

[157] Id.

[158] Id.

to one another and therefore inadequate to meet the requirement of Rule 8(b) joinder.[159]

¶57 The importance of the "enterprise" concept, as a surrogate for joinder, can be seen in United States v. Sutton,[160] where the court determined that the concept of enterprise did not include illegitimate enterprises. The court then threw out the substantive RICO count because the RICO enterprise was not legitimate, and also determined that the three hundred and twenty nine counts were improperly joined. The Court reasoned that the various offenses alleged could be divided into approximately four separate categories of crimes which could not meet the test of Rule 8(b) joinder without the connection between defendants and offenses supplied by the § 1962(c) and RICO conspiracy charge. The Court stated that crimes within the various categories might be joined but joinder between the categories of crimes simply could not be upheld without the RICO charges.[161]

2. RICO and Connally Prosecution

¶58 The value of the enterprise concept in RICO to the prosecution of organized criminal activity is very great. It allows a large variety of offenses to be joined and thereby

[159] Without the conspiracy and substantive RICO allegations, it is probable that the court would have found a series of independent conspiracies.

[160] 605 F.2d 260 (6th Cir. 1979).

[161] Id.

permits the jury to examine the entire scope of the alleged activity. An excellent example of how this might be used appears in the case of John Connally.[162] Connally was charged with three offenses: (1) accepting two $5,000 payments for influencing the Secretary of Agriculture's decision to raise the milk support price; (2) conspiracy with Jake Jacobson to obstruct a grand jury investigation of graft; (3) perjury before the grand jury.[163] The trial court judge granted Connally's motion to sever the perjury count from the corruption charges. By so doing, an important aspect was removed from the jury's consideration, i.e. did Connally lie before the grand jury. Had the jury been considering this issue along with the others, it is possible that the credibility of Connally's story would have seemed less compelling. This is important where a prominent politician is indicted, since he may have an established reputation which makes his assertions at trail seem a priori credible. Connally was acquitted and the perjury charge was dropped.

Under RICO, the perjury charge, at least arguably, would be obstruction of justice[164] and hence a predicate offense.

[162] Blakey, Techniques in the Investigation and Prosecution of Organized Crime: Manuals of Law and Procedure, Joinder and Severance, (1979).

[163] Id. at ¶32.

[164] United States v. Griffin, 589 F.2d 200 (5th Cir. 1979); contra, United States v. Essex, 407 F.2d 219 (6th Cir. 1969).

Under these circumstances, Connally could not have severed the perjury charge as a predicate offense of the RICO charge. It could have been severed only as a substantive count. The result would be that the jury would have heard evidence about Connally's possibly false testimony to the grand jury. With this evidence, a conviction may have resulted. Significantly, an important defense tactic - severance- would have been vitiated. Interestingly, in United States v. Isaacs,[165] the former governor of Illinois and Court of Appeals judge was convicted on corruption charges where the perjury count was not severed.

¶60 Joinder problems frequently thwart the prosecution of large enterprise crime. The structure of RICO removes many of these problems.

V. RICO and Severance

A. General Provisions of Rule 14

¶61 Closely related to the question of joinder is that of severance. Severance is provided for by Rule 14 of the Federal Rules of Criminal Procedure,[166] which is a restatement of prior law.[167] Courts rarely grant severance.[168] Therefore, the defendant has a heavy burden to prove that joinder was prejudicial and hence that severance should be granted:[169]

> It is imperative to recognize on appeal Rule 14 prejudice is conceived only in terms of constitutional dimensions. It is most frequently identified as that prejudice which violates a defendant's right to a fair trial.[170]

Nonetheless, it is a persistent argument on appeal from a RICO conviction.[171]

¶62 Severance is mandatory if the original joinder was improper and reversible error is committed if it is not granted.[172] A few appellate courts have applied the harmless error rule where improper denial of the defendant's severance motion resulted in no prejudice.[173]

¶63 If the original joinder is proper then Rule 14 allows the court discretion to sever defendants or offenses, if prejudice

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[165] United States v. Isaacs, supra.

[166] Fed. R. Crim. P. 14.

[167] 1 C. Wright, Federal Practice & Procedure, § 221 (1965).

[168] 2 Orfield, Criminal Procedure Under the Federal Rules. § 14 et. seq. (1966); 1 C. Wright, Federal Practice and Procedure, § 221 at 431 (1969); 66 Journal of Criminal Law and Criminology 44, 47 (1975).

[169] See United States v. McLaurin, 555 F.2d 1069, 1074 (5th Cir. 1977), for the best discussion of misjoinder and prejudice under Rule 14. See also; United States v. Elliott, supra; United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978).

[170] 53 Notre Dame Lawyer 147, 178 (1977); see also; United States v. Chovanec, supra.

[171] United States v. Aleman, 609 F.2d 298 (7thCir. 1979); United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977); United States v. Vignola, 464 F. Supp. 1091 (1979); United States v. Chovanec, 467 F. Supp. 41 (S.D.N.Y. 1979); United States v. Thevis, 474 F. Supp. 117 (N.D. Ga. 1979).

[172] McElroy v. United States, 164 U.S. 76 (1896); Tillman v. United States, 406 F.2d 930 (5th Cir.) vacated on other grounds as to one defendant and cert. denied as to all others, 395 U.S. 830 (1969).

[173] United States v. Parson, 452 F.2d 1007 (9th Cir. 1971).

is shown.[174] Generally, courts will attempt to balance the needs of judicial economy -expediency and cost - with the potential of prejudice to the defendant.[175] Many argue that the interests in economy are given too great an emphasis by the courts.[176] But as long as the same evidence is to be used at both trials,[177] and there is a limited chance of significant jury confusion, courts will not grant severance. The decision of the trial court will be reversed only if there has been an abuse of discretion.[178]

¶64 Severance may be requested by the government or the defense.[179] The cases do not clearly indicate whether failure to make a motion for severance waives the right to raise that issue on appeal.[180] There is also authority that failure to renew a motion for severance at the appropriate time at trial will result in a waiver of that issue.[181] In contradistinction, other courts have held that once the severance motion is made and denied, the court has a continuing duty to grant severance if prejudice appears at trial.[182] Further, a trial court may order severance on its own motion.[183] Appellate courts may also examine the trial court proceedings to determine whether severance should have been granted.[184]

B. Grounds For Severance

1. Generally

¶65 Defendants typically raise several arguments to demonstrate prejudice sufficient to justify severance of offenses. Defendants

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[174] Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964); Roth v. United States, 339 F.2d 863 (10th Cir. 1964); 1 C. Wright, supra, § 221 at 432.

[175] United States v. Rogers, 475 F.2d 821, 828 (7th Cir. 1973); United States v. Andreadis, 238 F. Supp. 800 (E.D.N.Y. 1965).

[176] Note, Joinder of Substantive Offenses and Perjury in One Indictment, 66 J. Crim. L. & Criminology 44, 47 (1975).

[177] United States v. Jones, 374 F.2d 414 (2nd Cir. 1967).

[178] See. E.g., Opper v. United States, 348 U.S. 84 (1954); United States v. Turcotte, 515 F.2d 145 (2nd Cir.) cert. denied. 432 U.S. 1032 (1975).

[179] Fed. R. Crim. P. 14. Of course, the government will seek severance less often since it largely determines the parties and issues to be tried by framing the indictment.

[180] Defendant must request: United States v. Franklin, 452 F.2d 871 (8th Cir. 1971); Mee v. United States, 316 F.2d 467 (8th C.r), cert. denied, 377 U.S. 997 (1963); contra: United States v. Guterma, 181 F. Supp. 195 (N.Y. 1960); 1 C. Wright, supra, § 221 and cases cited therein.

[181] United States v. Carlson, 547 F.2d 1346 (8th Cir.), cert. denied, 431 U.S. 914; United States v. Johnson, 540 F.2d 954 (9th Cir.), cert. denied, 429 U.S. 1025 (1976); United States v. Porter, 441 F.2d 1204 (8th Cir.), cert. denied, 404 U.S. 911 (1971).

[182] United States v. Gentile, 495 F.2d 626 (5th Cir. 1974); Schaffer v. United States, 362 U.S. 511 (1960).

[183] United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975); United States v. Guterma, 181 F. Supp. 195 (E.D.N.Y. 1960).

[184] United States v. Swainson, 548 F.2d 657 (6th Cir. 1977); Gajewski v. United States, 321 F.2d 261 (9th Cir.), cert. denied, 375 U.S. 968 (1963); 1 C. Wright, supra, § 221 at 434.

assert that the jury will assume that he must be a "bad man" to be charged with so many offenses;[185] that proof on a stronger count will induce the jury to convict on a weaker one;[186] and that the multiplicity of issues and defenses will confuse the jury or render a coherent defense impossible.[187] Although courts recognize merit in these contentions,[188] they are rarely deemed sufficient to justify severance.[189]

2. Cross Doctrine

¶66 One important argument for severance of offenses is that the defendant is inhibited from testifying on one count but not on others. Since he may wish to do this for strategic purposes, he is forced to either remain silent, and not exercise his right

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185 Johnson v. United States, 356 F.2d 680 (8th Cir.), cert. denied, 385 U.S. 857; Pummill v. United States, 297 F.2d 34 (8th Cir. 1961).

186 United States v. Sherman, 84 F. Supp. 130 (E.D.N.Y.), rev'd in part on other grounds, 171 F.2d 619 (2nd Cir.), cert. denied, 337 U.S. 931 (1948); 1 C. Wright, supra, § 222 at 438.

187 United States v. Lewis, 547 F.2d 1030 (8th Cir. 1976) (severance denied: crimes simple and distinct); United States v. Roe, 495 F.2d 600 (10th Cir.), cert. denied, 419 U.S. 858 (1974); Robinson v. United States, 459 F.2d 847 (D.C. Cir. 1972).

188 Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964): The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes and find guilt, when, if considered separately, it would not so find.17

189 See e.g., note 19, supra.

to testify; or, testify to only those counts he wishes to, inviting prejudice to his defense on other counts; or, testify to all counts despite an unwillingness to do so. In Cross v. United States,[190] the court held that, under these circumstances, the defendant was prejudiced by the joinder of offenses within the meaning of Rule 14.[191] The holding in Cross has been limited by other circuits facing the issue.[192] These courts have insisted that the defendant make a showing that his testimony as to one count would be especially valuable and to other counts especially damaging.[193]

2. Bruton Doctrine

¶67 Rule 14 permits severance of defendants as well as offenses.[194] Not surprisingly, defendants raise many of the same objections to denial of severance of defendants. The possibility of jury confusion, the appearance of the defendant as

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190 335 F.2d 987 (D.C. Cir. 1974).

191 Id. at 989: It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the meaning of Rule 14.

192 United States v. Jamar, 561 F.2d 1103 (4th Cir. 1977); (defendant must show a "particularized need"); Baker v. United States, 401 F.2d 958 (D.C. Cir.) on remand 301 F. Supp. 973, aff'd, 430 F.2d 499 cert. denied, 400 U.S. 965 (1968); United States v. King, 335 F. Supp. 523, aff'd in part, rev'd in part, 478 F.2d 454 (9th Cir.), cert. denied, 414 U.S. 846 (1973).

193 See. Id.

194 Fed. R. Crim. P. 14.

a "bad man"[195] and the simple fact that defendant claims a better chance of acquittal at a simplified proceeding[196] are common to both Rule 14 motions. But there are appreciable differences between the two types of joinder. One of the most troublesome aspects of joinder of defendants is that of the testimony of co-defendants. In Bruton v. United States[197] the Supreme Court held that the confession of a co-defendant that implicated the defendant, even with limiting instructions, could not be used against co-defendant since the damage of prejudice was too great. The court reasoned that the prejudicial effects of an incriminating confession by a co-defendant that also implicated the defendant could not be eliminated by careful limiting instructions. The Bruton decision has been limited somewhat by a recent line of cases which assert that Bruton is not violated where the defendant has an opportunity to cross-examine the confessing co-defendant.[198]

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[195] See e.g., United States v. Huffa, 367 F.2d 698, 709, (7th Cir.), rev'd on other grounds, 387 U.S. 231 (1966).

[196] Robinson v. United States, 210 F.2d 29 (D.C. Cir. 1954).

[197] 391 U.S. 123 (1968).

[198] Nelson v. O'Neil, 402 U.S. 622 (1971); Government of Virgin Islands v. Ruiz, 495 F.2d 1175 (3d Cir. 1974); United States v. Sims, 430 F.2d 1089 (6th Cir. 1970); Duggar v. United States, 434 F.2d 345 (10th Cir. 1970); see, 1 C. Wright, supra, Supplement 1979 § 224 and cases cited therein.

4. Conspiracy

¶68 The testimony of a co-defendant may also pose a problem where the co-defendant wishes to exercise his right not to testify and the defendant needs that testimony to establish his defense. Courts are reluctant to sever defendants on this basis[199] unless there is a persuasive showing that the co-defendant will provide important testimony.[200]

¶69 Finally, joinder of defendants raises special problems in conspiracy cases. Conspiracy law allows the prosecution certain procedural benefits which may prejudice a defendant.[201] Importantly, broader venue possibilities and the ability to use out-of-court statements by co-conspirators increase the chances of prejudice to defendant. Courts are generally unwilling, however, to sever defendants in a criminal conspiracy proceedings.[202]

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[199] United States v. Wood, 550 F.2d 435 (9th Cir. 1976); United States v. Jackson, 549 F.2d 517 (8th Cir. 1977); United States v. Cruz, 536 F.2d 1264 (9th Cir. 1976); United States v. Wilson, 500 F.2d 715 (5th Cir. 1974).

[200] United States v. Vigil, 561 F.2d 1316 (9th Cir. 1977); United States v. Martinez, 486 F.2d 15 (5th Cir. 1973); United States v. Shuford, 454 F.2d 772 (4th Cir. 1971).

[201] See. 1 C. Wright, supra, § 226; Anno: Right of Defendants in Prosecution For Criminal Conspiracy to Separate Trials, 82 ALR 3d 366 (1978), for a discussion of the many grounds used to challenge denial of severance motions.

[202] See E.g., United States v. Ricco, 549 F.2d 264 (2nd Cir. 1977); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976); United States v. Bernstein, 533 F.2d 775 (2nd Cir.), cert. denied, 492 U.S. 998 (1976). Contra: United States v. Butler, 494 F.2d 1246 (10th Cir. 1974); United States v. Balistrieri, 346 F. Supp. 336 (E.D. Wis. 1972).

Rather courts rely on limiting instructions to avoid prejudice.[203]

C. Special Advantages of RICO

¶70 Severance under Rule 14 is a remedy which courts will use primarily when the defendant's right to a fair trial is jeopardized. The court has discretion, however, to sever either defendants or offenses when "justice requires."[204] For this reason many complex prosecutions involving multiple defendants and counts may be complicated by the granting of severance. This danger is particularly great when a prosecution of organized crime or criminal enterprise is involved. The prosecutor seeks to bring the entire range of criminal activity before the court. Severance may also damage the prosecution of a single defendant, as in the case of John Connally discussed above.[205] There, the severance of the perjury charge from the corruption counts may have diminished the chances of gaining a conviction on any count. Therefore, severance is potentially damaging to any criminal prosecution.

[203] See. E.g., Hanger v. United States, 398 F.2d 91 (8th Cir.), cert. denied, 393 U.S. 1119 (1968).

[204] Fed. R. Crim. P. 14.

[205] See. ¶58, supra.

¶71 One of the most valuable aspects of the RICO statute is that it avoids the dangers of severance outlined above. For example, consider a prosecution under RICO with a RICO charge and several substantive offenses listed in the indictment. The defendant may wish to sever the substantive offenses from the RICO charge. Even if he is successful, he will not be able to keep from the jury the facts related to those substantive offenses as they are included in the RICO count as predicate offenses. Since the substantive charges are RICO predicates, proof of them is necessary to find the "pattern of racketeering activity" required for a conviction on the RICO charge.[206]

¶71 These predicate offenses are elements of the RICO charge; severance relates to joined offenses not to the elements of a crime. Hence, the "enterprise" concept of RICO serves as a special joinder provision which unites several different criminal acts as predicate offenses. Because the offenses are part of the statute, they may not be severed. As a consequence an important defense tactic has been eliminated.

VI. Verdicts and RICO

A. Basic Problems

¶72 There are two basic problems with verdicts in RICO prosecutions. Both arise from a RICO prosecution which involves

[206] 18 U.S.C. § 1962 (1970).

a RICO charge with predicate offenses also charged as substantive offenses. First, it may be unclear whether the jury found the pattern of racketeering necessary to properly obtain a RICO conviction. This uncertainty is caused by the fact that the jury does not specify which two predicate offenses satisfy the "pattern" requirement. If the jury returns a guilty verdict on one of the predicate offenses charged as substantive offenses, and guilty on the RICO offense, it is possible that the predicate offense which received acquittal was one of the two offenses necessary to prove the pattern of racketeering. If this were so, then the RICO conviction could not stand. This problem can be resolved fairly easily by reference to the genral law of verdicts which permits inconsistency in verdicts and discourages judicial speculation about them.

B. General Law of Verdicts

¶73 The second problem arises when one of the predicate offenses as a substantive count is reversed by an appellate court. Assuming that the original jury verdict was guilty on the RICO count and all substantive counts, reversal raises the possibility that the appellate court has removed one of the two crimes used to establish the pattern of racketeering activity. The courts are divided as to whether this result requires that the entire RICO conviction be reversed. Arguably the courts could utilize certain tests to determine whether reversal is necessary rather than choose either automatic reversal or affirmance. Such a test would require examination of the evidence to determine whether sufficient evidence existed without the reversed count to support finding a pattern of racketeering activity. To resolve these problems it is necessary to first examine the legal framework of verdicts.

B. General Law of Verdicts

¶73 Verdicts are governed by Rule 31(a) of the Federal Rules of Criminal Procedure.[207] It provides that the verdict must be unanimous[208] and must be returned to the judge in open court.[209] The verdict represents a legal decision on the facts of the case. It must be certain[210] and cannot be waived.[211] The jury is presumed to perform its duty, including following a court's instructions.[212] If there are multiple defendants in a multiple count indictment, the jury is expected to return a separate verdict for each count and defendant.[213]

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[207] Fed. R. Crim. P. 31(a).

[208] Fed. R. Crim. P. 31; Andreas v. United States, 333 U.S. 740, 748 (1972). The states are not required to have an unanimous verdict. Apodaca v. Oregon, 406 U.S. 404 (1972).

[209] Fed. R. Crim. P. 31; United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

[210] Glenn v. United States, 420 F.2d 1323 (D.C. Cir. 1969); United States v. DiMatteo, 169 F.2d 798 (3d Cir. 1948).

[211] United States v. Scalzitti, 578 F.2d 507 (3d Cir. 1978); United States v. Lopez, 581 F.2d 1338 (9th Cir. 1978); Hibden v. United States, 204 F.2d 834 (6th Cir. 1953).

[212] Eses v. United States, 335 F.2d 609 (5th Cir.), cert. denied, 379 U.S. 964 (1964); Donaldson v. United States, 248 F.2d 364 (9th Cir.), cert. denied, 356 U.S. 922 (1957).

[213] United States v. Brilliant, 274 F.2d 618 (2nd Cir.), cert. denied, 363 U.S. 806 (1960), United States v. DiMatteo, 169 F.2d 798 (3d Cir. 1948); United States v. Crescent-Kelvin, 164 F.2d 582 (3d Cir. 1948); Super v. United States, 27 F.2d 648 (9th Cir. 1928).

¶74 It is a fundamental principle of the law of verdicts that the verdict need not be rational.[214] There is no requirement of consistency between counts of an indictment;[215] each count is treated as though it were a separate indictment for jury deliberation purposes.[216] A jury can acquit on one count of an indictment but convict on another count even though the evidence is the same as to both counts and the defendant could not have committed the one crime without committing the other. All that is required of a verdict is that the evidence be sufficient to support it.[217]

¶75 In 1932, the Supreme Court in Dunn v. Unites States stated that "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."[218] In Dunn, a three count indictment charged defendant with "1) a common nuisance by keeping for sale at a specified place intoxicating liquors, 2) unlawful possession of intoxicating liquor, and 3) unlawful sale of such liquor."[219] The jury found the

[214] Horning v. Dist. of Col., 254 U.S. 135 (1920); United States v. Moylan, 417 F.2d 1002 (4th Cir.), cert. denied, 397 U.S. 910 (1969).

[215] Hamling v. United States, 418 U.S. 87 (1974); Dunn v. United States, 284 U.S. 390 (1932); United States v. Haynes, 554 F.2d 231 (5th Cir. 1977); Battsell v. United States, 403 F.2d 395 (8th Cir.), cert. denied, 394 U.S. 1094 (1969).

[216] Dunn v. United States, supra.

[217] Battsell v. United States, supra; Aggers v. United States, 366 F.2d 744 (8th Cir. 1966), cert. denied, 385 U.S. 1010 (1966); See. 2 C. Wright, § 514 and cases cited therein.

[218] 284 U.S. 390, 393 (1932).

[219] Id.

defendant guilty of the first but not the second two counts. The Supreme Court reiterated the opinion of another court: "that the verdict may have been the result of compromise, or of leniency on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."[220]

¶76 It has been said that the apparent inconsistency of a jury's verdict may represent leniency toward the defendant on the jury's part or the price that society pays for jury unanimity.[221] Another rationale for permitting inconsistent verdicts is the belief that what the judicial system seeks through jury verdicts is the opinion of the country. If juries were required to return rational or consistent verdicts, they would be prevented from performing their rightful function -- to represent the people's opinion on the given issue.[222] Inconsistent verdicts are not, however, permitted in a non-jury case.[223] A jury's verdict is considered sacrosanct, and a jury's logic will not be analyzed.[224]

[220] Id. 20. The Dunn court quoted the Steckler opinion.

[221] See. Id.; United States v. Maybury, 274 F.2d 899 (2d Cir. 1960).

[222] United States v. Maybury, supra note 221

[223] United States v. Maybury, supra; note 221, Note, Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts, 71 (Col. L. Rev. 321 (1971).

[224] United States v. Zane, 495 F.2d 683 (2nd Cir. 1974).

¶77 The great respect given to the jury verdict reflects the strong historical and philosophical committment to the jury system. Every attempt is made to allow the jury to render an impartial verdict free from the pressures and influence of the judge, police, friends, and the press. By so doing, the defendant's right to a fair trial and the prosecution's need for certain convictions is protected. It is with great reluctance that the jury verdict, already subject to many protections, is overturned on appeal for inconsistency. There are cases, however, where courts have overruled jury verdicts, not for insufficent evidence, but for what may be only an apparent inconsistency.[225] A special problem exists when this inconsistency is created by the appellate court overturning some, but not all, of the counts in the original verdict.

C. RICO Problems: Proposed Solutions

1. Inconsistent Verdicts

¶78 An examination of the law of verdicts suggests the answer to the problem of a finding of not guilty on a predicate offense charged as a substantive count and guilty on the RICO charge. Since consistency is not required of the jury verdict[226] and the jury is presumed to follow the court's instructions,[227] it is

[225] See generally, Annot. Inconsistency of Criminal Verdicts As Between Different Counts of Indictment or Information, 18 ALR 3d 259 (1969).

[226] See supra, note 215.

[227] See supra, note 212.

reasonable to assume that the jury found the requisite pattern of racketeering activity. This assumption is buttressed by the fact that the jury knew that there would be a finding of not guilty on one of the substantive counts. Reversal of the RICO conviction would necessitate unwarranted speculation into the jury's deliberations.

2. Dansker, Brown, Parness, and Huber

¶79 A more complex problem is raised by an appellate court reversal of some predicate offenses charged as substantive offenses. Here it is more difficult to be sure that reversal is not removing proof of an essential element of RICO. Nor have the courts settled this problem.

¶80 In United States v. Dansker[228] a jury returned a verdict of guilty on a count that charged a conspiracy having two objectives. On appeal, the evidence as to one of the objectives of the conspiracy was found insufficient to sustain a conviction. The court of appeals concluded that since it could not be determined on which objective the jury had found defendant guilty, the guilty verdict on the conspiracy count must be reversed.[229]

The Dansker opinion was cited to support the decision of the Third Circuit in United States v. Brown.[230] The appellants

[228] 537 F.2d 40 (3d Cir. 1976).

[229] Id. at 51-52. A similar result was reached in United States v. Tarnopol, 561 F.2d 466 (3d Cir. 1977).

[230] 583 F.2d 659 (3d Cir. 1978).

in Brown were found guilty of using extortionate means to collect credit, Count I; conspiracy, Count 2; mail fraud, Counts 5, 6, and 9; and violations of § 1962(b), Count 13, and § 1962(d), Count 14. On appeal the evidence was held insufficient to prove the mail fraud, Counts 5 and 6. The jury had been properly instructed that a finding of guilt on any of the substantive counts, 1, 5, 6, or 9, would sustain a finding of guilt on the RICO counts. In reversing the convictions on counts 5 and 6 for insufficient evidence, the court stated that the RICO counts would have to be reversed too, because the jury may have relied on counts 5 and 6 in reaching their verdict on the RICO violations. Since there was no way to tell whether the jury found the predicate offenses to consist of counts 5 and 6, or counts 1 and 9, or any combination thereof, the court decided it must overrule the RICO convictions.[231]

¶81 In United States v. Parness,[323] the Second Circuit reached a conclusion antithetical to that of the Brown court. It concluded that conviction on any two of the alleged three acts of racketeering was sufficient to establish the necessary pattern of racketeering activity and sustain a RICO conviction.[233]

[231] Id.

[232] 503 F.2d 430 (2nd Cir. 1974).

[233] Id. at 438.

¶82 In United States v. Huber,[234] the appellant challenged the sufficiency of the evidence on several counts and tried to advance the Brown argument -- if any counts that might form the pattern of racketeering are reversed, then the RICO violation must be reversed also. The Huber court declined to decide the issue and indicated that there were two sides to the Brown argument, one side being the Parness approach.[235]

¶83 The reasoning provided in the Brown, Parness, and Huber opinions does not satisfactorily address the problems raised by appellate court reversal of some substantive counts. If Brown and Parness become the alternatives - reversal of RICO conviction where a substantive count is reversed or affirmance of RICO if two predicate acts still remain - inequities could easily result. Consider two extreme cases. Case one involves a large number of predicate offenses (charged as substantive counts), for example twenty, one of which is reversed on appeal for insufficiency of the evidence. It seems doubtful that the Brown approach would be sensible here. The nineteen remaining convictions clearly would support a finding of a pattern of racketeering activity and reversal of the RICO conviction would be unnecessary and costly. In case two, however, a large number of the predicate offenses are reversed but two predicates (again as substantive offenses) remain. Here there is a significant question whether the jury

[234] 603 F.2d 387 (2nd Cir. 1979).

[235] Id.

based its finding of a pattern of racketeering activity on two of the many reversed counts. Application of the Parness approach allowing the conviction to stand might be unfair to the defendants. Nor is it satisfactory to assume that the jury's verdict is acceptable if the remaining two counts are supported by the evidence.

3. Proposed Solutions

¶84 Arguably, a better resolution to this problem would be to set standards for appellate review of RICO convictions in this situation. These standards could emphasize two related ideas. First, there must be two RICO counts that are simply supported by the evidence and which a reasonable jury could use to find a pattern of racketeering activity. And second, no special circumstances exist in the case, i.e. reversal of a majority of the counts, which make the finding of a pattern of racketeering activity particularly unreliable. Standards of this sort would preserve the benefits of the Parness approach: limited intrusion into jury functioning, preservation of actual RICO convictions and a willingness to allow inconsistencies in verdicts. Concurrently it would retain the protections to the defendant inherent in the Brown opinion where circumstances require them, without placing every RICO conviction in jeopardy.

4. Special Verdict

¶85 Finally a policy argument could be made that for RICO prosecutions a special verdict might be utilized. Special verdicts, though frowned upon in the general criminal law as an intrusion on the jury's functions, are sanctioned for use in

criminal forfeiture cases (Federal Rules of Criminal Procedure 31(e)). The jury could be asked to return with its general verdicts a special verdict indicating which two counts made up the pattern of racketeering. In United States v. Rone,[236] a special verdict form was returned on count II of the indictment, which was the substantive RICO offense. It indicated that the jury had found appellants guilty of all of the acts of racketeering alleged in the indictment. The court did not discuss the special verdict form or why it had been used. Special verdicts are not favored because they limit the jury's deliberative role.[237] Hence their usefulness may be very restricted.

CONCLUSION

¶86 Substantive law always exists in a procedural context. Indeed, procedure often defines the boundaries of substantive law in surprising and not altogether positive ways. The RICO statute contains certain provisions which help insure its effectivensss. But at present, many difficulties have yet to be resolved. It can only be hoped that the courts heed the congressional concern over the growth of organized criminal activity and implement flexible procedural approaches to guarantee the effectiveness of RICO.

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[236] 598 F.2d 564 (9th Cir. 1979).

[237] See United States v. O'Looney, 544 F.2d 385 (9th Cir. 1976); United States v. McCracken, 488 F.2d 1337 (2nd Cir. 1971), cert. denied, 404 U.S. 939 (1971); United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

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Record, Tape, and Film Piracy

and

RICO

by

Marty Roberts

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SUMMARY

¶1 Piracy is a general term for the unauthorized duplication and subsequent sale and distribution of a record, tape, or film. The problem exists because the pirates have access to materials that can be duplicated, the duplicating process is simple, fast, and inexpensive, and the potential profits are enormous. Hundreds of millions of dollars are lost by the industries, by the performers, and by the federal and the state governments due to piracy.

¶2 Records, tapes, and films are now granted full copyright protection, but sanctions under the copyright law are insufficient to deter piracy in light of the profits that can be made. RICO provides additional legal sanctions to combat piracy; its substantial criminal and civil sanctions could provide, if utilized, one of the most effective deterrents against this high profit crime. The usefulness of RICO in combatting piracy has only just begun to be realized. The Government and the industries should adopt litigation strategies to insure its continued, effective use against pirates and also against legitimate retailers who are selling pirated products.

I. The Problem Defined

A. What is Piracy?

¶3 Piracy is a general term for the unauthorized duplication and subsequent sale and distribution of a record, tape, or film. It is unauthorized because the duplication and the sale are done without the consent of the copyright holder in violation of federal and state copyright laws. Piracy is a white collar offense that, in fact, involves both organized crime offenders and a large number of amateurs. The sale of pirated materials results in lost industry profits, lost royalties to the legal copyright holder, and lost federal and state tax revenues. Piracy is not a new phenomenon. To varying degrees it has always affected the film and recording industries. Advances in duplicating technology, however, have transformed a once manageable loss into a multi-million dollar drain of profits that threatens the long term economic viability of the industries.

1. The Recording Industry

¶4 In the recording industry there are several forms of piracy.

a. Piracy usually consists of taping a legitimate recording and then selling the spurious tape. Less frequently, it involves the duplication of a record. A pirated record or tape is easy to detect. Attributes that distinguish a pirated album or tape from a legitimate one include:

1. Unfamiliar or misspelled company names or trademarks;[1]
2. Cheap looking or plain colored packaging or both;
3. Legal sounding statements on the cover, for example; the phrase: "All copyrights have been complied with";
4. A mixture of artists or groups on the same tape or album;
5. Locale of sale, pirated material is prevalent in flea markets and at street corner markets although it also appears in reputable stores; and
6. Low price.[2]

Piracy was the most common form of unauthorized duplication until 1977. As a result of the new copyright laws[3] and the increased investigation into and prosecution of pirates, piracy diminished. Tape and album counterfeiting, however, replaced piracy as the major form of unauthorized duplication.[4]

b. Counterfeiting consists of duplicating an album or tape and also duplicating its label, album cover design, and any other identifying marks. Many of the counterfeit albums and

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[1] Stereo Rev., Jan. 1980, at 34.

[2] Irwin, "Piracy on the High C's", N.Y. News, Jan. 27, 1974 (reprint).

[3] Copyright Act of 1976, Pub. L. No. 94-553, §101, 90 Stat. 2541 (1977).

[4] Billboard, Nov. 3, 1979, at 1.

tapes are reproduced so accurately that neither the consumer nor the recording companies can easily distinguish the authorized from the unauthorized version .[5]

c. Bootlegging (performance or personal piracy) consists of taping live performances or taping directly off the airwaves.[6]

2. The Film Industry

¶5 In the film industry, the term piracy is used to refer to any form of unauthorized duplication.

B. The Extent of the Losses

1. The Recording Industry

¶6 According to the Recording Industry Association of America (RIAA), the industry lost $400 million to counterfeiters in 1979. FBI estimates put the loss at closer to $600 million. The RIAA estimates that one-fourth of all prerecorded tapes and one-tenth of all albums sold are counterfeits. Further, the RIAA estimates that another $200 million is lost through piracy and bootlegging.[7] None of these estimates include lost royalties or lost tax revenue, which undoubtedly run in the hundred millions.

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[5] See Rolling Stone, April 17, 1980, at 9.

[6] Losses resulting from this form of piracy are minimal when compared with losses resulting from piracy and counterfeiting. The recording industry, however, has expressed concern over the boom in blank tape sales and also expressed anger with radio stations who are encouraging taping off the airwaves. See Billboard, Oct. 27, 1979, at BT1 - BT16.

[7] L. A. Times, March 22, 1980, at 20.

2. The Film Industry

¶7 It is estimated that the movie industry loses $100 million to $700 million a year in ticket sale revenue due to piracy.[8] Unestimable losses result from lost television sales revenue, lost tax revenue, and lost royalties.

¶8 Film piracy is one of the fastest growing white collar crimes in the world, chiefly because of technological advances made by the video cassette industry[9]. This industry is growing at a fast pace; "[i]n 1978, Japan exported almost one million videocassette machines and it will be 1.4 million by next year. blank videocassettes are being manufactured at a rate of 2.5 million a month".[10] It is estimated that Americans will spend $50 million on recorded videotapes with at least $25 million spent on pirated material.[11] This growth, coupled with the recent Betamax[12] decision, holding that audiovisual copyright holders do not have the monopoly power over their material to prevent off-the-air copying by owners of videotape

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[8] Wall St. J., Aug. 23, 1979, at 6; Am. Film, July - Aug. 1978, at 57.

[9] Id.

[10] Billboard, July 21, 1979, at 26.

[11] Village Voice, Oct. 8, 1979, at 88 (Estimates are for 1979).

[12] Universal City Studios v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Cal. 1979) (An appeal is expected. Most commentators think either the Supreme Court or Congress will have to decide this issue).

recorders if the copying is done in their own homes for private, non-commerical use, indicates that the movie industry's losses may rapidly escalate.

C. The International Dimension

¶9 The recording and film industries are experiencing the piracy problem on an international basis. This problem is compounded by the lack of uniform, international copyright laws in this area[13] and a high worldwide demand for American music and movies.

1. The Recording Industry

¶10 In the Arab countries, where there are no copyright laws protecting either records or tapes, pirated materials are manufactured and then exported to nearby countries. Estimates indicate that the pirates control one-half of the market in Italy and control nearly all the market in Turkey.[14]

2. The Film Industry

¶11 Recent international raids[15] highlighted the magnitude of the international film piracy problem. Piracy thrives abroad because of the large numbers of videocassette machines, a more limited selection of television programming, and a policy of staggered releases for American films.[16] Key areas of pirate activities include South Africa[17] and the Arab countries[18] as well as Europe, Australia, and the Far East.[19]

II. The Copyright Laws

A. Pre-1976 Music Copyright Protection

¶12 Musical compositions have had federal copyright protection since 1831.[20] This protection, however, did not cover the mechanical means of reproducing the copyrighted

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[13] See, 22 ASCAP Copyright L. Symp. 53 (1977) (International copyright is based on a territorial principle. Thus, the legislation of one nation has no affect outside the territory of the enacting jurisdication and the rights of an author are determined by the national law of the state where the protection is sought). Cf., Sheldon v. Metro-Goldyn Pictures Corp., 106 F.2d 45 (2d Cir. 1939), aff'd, 309 U.S. 390 (1940) (L. Hand) (while holding that the exhibition of pictures abroad was itself not prohibited by the copyright law, the court nevertheless awarded the profits made from foreign exhibitions since the prints were infringed in the United States).

[14] Billboard, July 21, 1979, at 27.

[15] Billboard, Jan. 15, 1980, at 3; Hollywood Rep., Dec. 11, 1979, at 1 (coordinated raids in the United Kingdom and Holland on December 6, 1979 netted more than 1,000 feature films and more than 6,000 prerecorded bootleg videocassettes).

[16] Variety, Oct. 25, 1978, at 7; Daily Telegram (Sydney), April 21, 1979, at 17.

[17] Film and Entertainment, June 1978, at 5 (officials think the problem has been brought under control by recent police crackdown and the introduction in Parliament of a new copyright bill).

[18] L. A. Times, July 13, 1977, at 6 (many argue that the biggest problem is in the Middle East where there are "more video-cassette players and more home movie screens... than anywhere else in the world").

[19] E.g., Panorama, Feb. 1980, at 92; Malay Mail, Feb. 1980, at 2; Strait Times (Singapore), Jan. 30, 1980, at 1; Australian, Feb. 21, 1980, at 3.

[20] Statute Feb. 3, 1831, 4 Stat. 436 and subsequent laws.

composition.[21] In 1909, the copyright law was amended.[22] These changes seemingly prohibited the mechanical reproduction of a copyrighted musical composition. Nevertheless, a proviso limited the breadth of this protection.[23] Once a composer recorded his composition or allowed it to be recorded by another, he had to permit any other person, provided they gave proper notice and paid the royalty fee, to make similar use of the composition.[24] Under judicial interpretation of the similar use proviso, subsequent recordings could not be duplicates of the original recording. Instead, they had to be reproduced from the original written composition.[25]

¶13 Under this statute, no criminal actions could be brought in cases of unauthorized use of a copyrighted musical composition, but the copyright holder could bring an infringement action, in which he could recover the infringer's profits and his

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[21] See White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 17 (1907) (The court narrowly defined a copy of a musical compostion as a "written or printed record of it in intelligible form" and stated that "in no sense can musical sounds that reach us through the sense of hearing be said to be copies as the term is generally understood, and as we believe it was intended to be understood....").

[22] 1909 Copyright Act, Pub. L. No. 349, c. 320, §1, 35 Stat. 1075 (1909). Section 1(a) provides that the copyright owner shall have the exclusive right to "print, reprint, publish, copy, and vend the copyrighted work". Section 1(e) provides that the holder of a copyright of a musical composition shall have the exclusive right "[t]o make any arrangement or setting of it or of the melody of it in a system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

[23] 1909 Copyright Act, Pub. L. No. 349, ch. 320, §1(c), 35 Stat. 1075 (1909). And provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. And provided further, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the Copyright Office, and any failure to file such notice shall be complete defense to any suit, action, or proceeding for any infringement of such copyright.

[24] Id. Note this section also sets out the compulsory licensing requirement.

[25] Aeolian Co. v. Royal Music Roll Co., 196 F. 926, 927 (W.D.N.Y. 1912). ("The provision of the statute (§1(e)) that 'any other person may make similar of the copyrighted work' becomes automatically operative by the grant of the license', but the subsequent user does not thereby secure the right to copy the perforated rolls or records. He cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same, but must resort to the copyrighted composition or sheet music, and not pirate the work of a competitor who has made an original perforated roll".). Subsequent cases reaffirmed this position; compulsory licensing was denied to pirates. Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), cert. denied sub nom. Rosner v. Duchess Music Corp., 409 U.S. 847 (1972). The Duchess case and its progeny is criticized at 2 Nimmer On Copyright 139 (1976). Nimmer contends that if record pirates paid the royalty fee they were exempt from further liability under pre-1971 statues.

actual damages.[26] Alternatively, the copyright holder could bring an action for injunctive relief, in which he could recover royalty payments in lieu of profits and damages.[27] Despite these sanctions, most piracy cases were brought on the grounds of unfair competition[28] or common law copyright.[29]

¶14 Many attempts were made to amend the copyright law to provide greater coverage for sound recordings.[30] Finally, in 1971 the Sound Recording Amendment[31] was added to the federal copyright statute.[32] Added in part in response to

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[26]1909 Copyright Act, Pub. L. No., 349, ch. 320, §25(e) 35 Stat. 1075 (1909). (e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damange a royalty as provided in subsection 1(e).

[27]Id. Royalty payment was two cents for every record manufactured.

[28]See, Staff of Subcomm. on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 86th Cong. 2d Sess., The Unauthorized Duplication of Sound Recordings 47 (Comm. print 1961) (study No. 26 by Barbara Ringer) [hereinafter cited as Ringer]. The traditional basis of an unfair competition argument that (1) plaintiff and defendant were engaged in competition with each other; (2) defendant appropriated an asset that plaintiff had acquired through the investment of skill, money, time, and effort; and (3) defendant fraudulently passed off the appropriated asset as the plaintiff's, were relaxed by the courts in order to reach equitable results in this area. E.g., Fonotipio Ltd. v. Bradley, 171 F. 951 (E.D.N.Y. 1909), overruled on other grounds, 194 F.2d 914, 916 (2d Cir. 1952) (injunctive relief granted in abscence of the passing off requirement).

[29]Halpern, "Sound Recording Act of 1971", 40 Geo. Wash. L. Rev. 964, 969-70 (1972); Yarnell, "Recording Piracy is Everybody's Burden: An Examination of its Causes, Effects and Remedies", 20 Bull. Copyright Soc'y. 240 (April 1973); Ringer, at 20. Under the doctrine of common law copyright, the author has exclusive control over the first publication of his work. Once the work is published it loses this common law protection and only statutory copyright applies. Common law copyright provides little protection for most works. Distribution of a sound recording, however, is not considered publication of the work. Thus, common law copyright protection is available for a sound recording until the musical composition is published.

[30]See Ringer for a summary of these attempts.

[31]1971 Sound Recording Amendment. Pub. L. No. 92-140, 85 Stat. 391 (1972). Constitutionality upheld Shabb v. Kleindiest, 345 F. Supp. 589 (D.C. Cir. 1972).

[32]17 U.S.C. §101 et seq. (1977).

the growing piracy problem,[33] this amendment bestowed copyright status on the recording itself;[34] it protected recordings fixed in a tangible medium after February 15, 1972.[35] Recordings fixed prior to this time were protected by state statutes[36] or by common law copyright.[37] Coupled with increased investigation and prosecution of pirates, this amendment is credited with reducing the amount of record piracy.[38]

[33] See, U.S.C. Vol. 2. 92nd Cong., 1st. Sess., 1971, at 1567.

[34] 17 U.S.C. § 1 (f) (1972). The copyright owner shall have the exclusive right "[t]o reproduce and distribute to the public by sale or other transfer of ownership or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording."

[35] 1971 Sound Recording Amendment, Pub. L. No. 92-140, 85 Stat. 391, §3 (1972).

[36] E.g., Cal. Penal Code §653(n) (West 1980). Constitutionality upheld Tape Industries Association of America v. Younger, 316 F. Supp. 340 (C.D. Cal. 1970). Appeal dismissed for want of jurisdiction, 401 U.S. 902 (1971). Although copyright power is primarily a federal concern, U.S. Const. Art. I. §8, it is not exclusively a federal power. Goldstein v. California, 412 U.S. 546 (1972), rehearing denied, 414 U.S. 883 (1973). At this time eight states had anti-piracy statutes.

[37] See note 29 supra.

[38] See Rolling Stone, April 17, 1980, at 20.

B. Pre-1976 Film Copyright Protection

¶15 In 1912, an amendment to the federal copyright law added "motion picture photoplays" and "motion pictures other then photoplays" to the list of protected works;[39] it gave the copyright holder the exclusive right to copy and to preclude unauthorized processing and reproduction of films.[40] Prior to the technological changes of the late 1960's, the film industry viewed piracy as an annoyance, not as a major industry problem.[41] The post-1971 crackdown on record and tape piracy highlighted the film piracy problem and led to the creation of the Film Security Office and the beginnings of the film industry's war on piracy.[42] Sanctions, however, under the pre-1976 copyright laws were not high. Fines ranged from $250 to $5,000, a small sum in comparison to the profits that could be made through pirate activities.[43]

[39] Act of Aug. 24, 1912, 37 Stat. 488 c 358, § 5(l), §5(m). Prior to this date they were registered for copyright protection as photographs. Edison v. Lubin, 122 F.240 (3rd Cir. 1903), Am. Mutoscope v. Edison, 137 F. 262 (C.D.N.J. 1905).

[40] Id.; See also, Independant Film Distrib., Ltd. v. Chesapeake Indus., Inc., 250 F.2d 951 (2d Cir. 1958).

[41] Am. Film July-Aug. 1978, at 57-9.

[42] Id.

[43] Copyright Act of July 30, 1947, c. 391, 61 Stat. 652, §101 (b) (1947).

C. The 1976 Act

¶16 In 1976, the copyright law was substantially revised.[44] These changes provided increased protection for records, tapes, and films. Under this act, protected works of authorship include "motion pictures and other audiovisual works"[45] and "sound recordings".[46]

1. Exclusive Rights

¶17 Under this statute, if the copyright holder complies with the notice,[47] deposit,[48] and compulsory licensing provisions,[49] he is granted the exclusive right to do or to authorize another to do the following:

1. [T]o reproduce the copyrighted work in copies or phonorecords;
2. To prepare derivative works based on the copyrighted work;
3. To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.[50]

2. Limitation - The First Sale Doctrine

¶18 The first sale doctrine limits the copyright holders control over his work once he has sold or otherwise disposed of it. The new owner is entitled to dispose of the work as he wishes.[51] This doctrine does not apply to temporary loans of the work, for example, to movie leases.[52] The federal courts disagree over the applicability of this doctrine to music or film piracy cases. The ninth circuit requires a showing that the allegedly infringed work has not

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[44] Pub. L. 94-553, Title I, §101, Oct. 19, 1976, 90 Stat. 2541, effective January 1, 1978, except sections 118, 304(b), and Chapter 8, which are effective October 19, 1976.

[45] 17 U.S.C. §102 (1977) defines motion pictures as "audiovisual works consisting of a series of related images which when shown in succession impart an impression of motion, together with accompanying sounds, if any. 17 U.S.C. §101 (1977) defines audiovisual works as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

[46] 17 U.S.C. §102 (1977). Sound recordings are "works that result from a fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

[47] 17 U.S.C. §401, 402, 405 (1977).

[48] 17 U.S.C. §407 (1977).

[49] 17 U.S.C. §115 (1977) (This section states that compulsory licensing is not available to record pirates).

[50] 17 U.S.C. §106 (1977).

[51] 17 U.S.C. §109(a) (1977). Notwithstanding the provisions of §106 (3), the owner of a particular copy or phonorecord lawfully made under this tile, or any other person authorized by such owner, is entitled without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

[52] 17 U.S.C. §109(c) (1977). The privileges described by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession from the copyrighted owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

been the subject of a first sale,[53] while the District of Columbia circuit has held that first sale issues are not present in cases involving pirated material.[54]

3. Penalties for Infringing

¶19 The 1976 copyright act provides broad civil and criminal infringement remedies. The copyright owner who prevails in a civil infringement action is entitled to recover actual damages suffered as a result of the infringement and "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[55] Alternatively, the copyright owner may elect to recover statutory damages.[56] For nonwillful infringement, fines range from $250 to $10,000.[57] A willful infringer can be fined up to $50,000.[58] Further, an award of court costs and attorney's fees may be granted at the court's discretion.[59]

[53] United States v. Wise, 550 F.2d 1180 (9th Cir.), cert. denied, 434 U.S. 929, rehearing denied, 434 U.S. 977 (1977); United States v. Atherton, 561 F.2d 747 (9th Cir. 1977); United States v. Moore, 604 F.2d 1228 (9th Cir. 1979).

[54] United States v. Whetzel, 589 F.2d 707 (D.C. Cir. 1978).

[55] 17 U.S.C. §504 (b) (1977).

[56] 17 U.S.C. §504 (c) (1) (1977).

[57] Id.

[58] 17 U.S.C. §504 (c) (2) (1977).

[59] 17 U.S.C. §505 (1977).

¶20 If an individual infringes a copyright willfully for commercial advantage or private gain, he has committed a criminal offense.[60] If convicted, the infringer can be fined $25,000 or imprisoned for one year, or both.[61] The court can also order the destruction of all non-authorized duplicates and all duplicating equipment.[62]

D. Contributory Infringers

¶21 Individuals who do not do the actual duplicating but who are involved in some aspect of the infringement of a copyright may be held liable as a contributory or vicarious infringer. An owner of a bar, for example, can be held civilly liable if a band he hires plays copyrighted music without authorization from the copyright holder.[63] A retail store chain can be held civilly liable if one of its stores, without the knowledge or consent of the chain, sells pirated tapes, records, or films.[64]

[60] 17 U.S.C. §506 (a) (1977).

[61] Id.

[62] 17 U.S.C. §506 (b) (1977).

[63] E.g., Keca Music, Inc. v. Dingus McGee's Co., 432 F. Supp. 72 (W.D. Mo. 1977); Chess Music, Inc. v. Sipe, 442 F. Supp. 1184 (D. Minn. 1977); Warner Bros., Inc. v. O'Keefe, 468 F. Supp. 16 (S.D. Iowa 1977).

[64] E.g., Shapiro, Bernstein Co., Inc. v. H. L. Green Co., Inc. 316 F.2d 304 (2d Cir. 1963); See also Audio-Visual Communications, Sept. 1978, at 25.

E. Copyright and Obscenity

¶22 Traditionally, a defense of "obscenity" could be used in a copyright infringement suit. This defense was based on common law notions; it is not part of the copyright statutes.[65] The courts uniformly refused to grant copyright protection to an obscene work.[66] Recently, however, the fifth circuit broke with this view and held that the alleged obscenity of a work does not excuse its infringement.[67] Thus, an area that once could legally and profitably be exploited by film pirates has begun to be closed.

III. The Industries

¶23 Piracy thrives because the pirate has access to materials that can be duplicated, the duplicating process is simple, fast, and inexpensive, and the potential profits are enormous.

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[65] See Phillips, "Copyright in Obscene Works: Some British and American Problems", 6 Anglo-Am. L. Rev., 138 (1977); 46 Fordham L. Rev. 1037, 1038 (1978). The current copyright statute is silent on the obscenity issue.

[66] E.g., Martinetti v. Maguire, 16 F. Cas. 920 (No. 9173) (C.C.Cal. 1867), Barnes v. Minen, 122 F. 480 (C.C.S.N.Y. 1903); Bullard v. Esper, 72 F. Supp. 548 (N.D. Tex. 1947); Khan v. Leo Feist, Inc., 70 F. Supp. 450, (S.D.N.Y. 1947); Broder v. Zeno Mauvis Music Co., 88 F.74 (C.C.N.D. Cal. 1898); Simonton v. Gordon, 12 F.2d 116 (S.D.N.Y. 1925); Cain v. Universal Pictures Co., Inc., 47 F. Supp. 1013, (S.D. Cal. 1942).

[67] Mitchell Brothers Film Group v. Cinema Adult Theater, ____ F.2d ____ 203 USPQ 1041 (5th. Cir. 1979). Reversing the lower court which accepted the obscenity defense. ____ F. Supp. ____ 192 USPQ 138 (N.D. Tex. 1976).

A. The Recording Industry

¶24 To copy a record or tape, the pirate need only acquire a legitimate tape or record. To duplicate the original tape, "the pirate puts it on a master duplicating machine to which are attached as many as 20 'slave' recording units with blank tapes. These pick up the electronic impulses of the original.[68] With this system, 20,000 tapes can be reproduced during each twenty-four hour period.[69] Duplicating a record is more complicated and is, therefore, less frequently done; it requires "hydraulic presses, steam to build up the pressure, lacquered platters, (and) such supplies as vinyl compounds."[70]

¶25 In addition to duplicating the album or tape, counterfeiters also take a picture of the original tape or album cover and reproduce it. The process of reproducing and sizing distorts the color and the sharpness of the image and this distortion, although not always easy to detect, distinguishes an authorized version from an unauthorized version.[71] Another distinguishing factor is that pirated and counterfeited records and tapes are sonically

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[68] Irwin, "Piracy on the High C's", N.Y. Sunday News, Jan. 27, 1974 (reprint).

[69] Id.

[70] Id.

[71] N.Y. Times, Feb. 28, 1980, at C1; Rolling Stone, April 17, 1980, Daily News, March 7, 1980, at 4.

inferior to the original version because they are several generations removed from it. This difference, however, is only apparent on the best stereo systems.[72]

¶26 The recording industry also has an internal problem, pirates acquiring records and tapes from individuals within the industry. In many instances, this results in pirated or counterfeit albums and tapes appearing in stores before the company has officially released the product.[73]

¶27 The pirate's profits are high because they are able to avoid the legitimate industry's overhead costs by waiting for a record to become a hit and then duplicating duplicating songs they think will become big hits.[74] Classical works or works by unknown artists are seldom illegally duplicated and sold. Recent works that were heavily pirated includes the original movie soundtracks of "Saturday Night Fever" and "Grease", works by Donna Summer, The Bee Gee's, and the Eagles.[75] The counterfeiters potential profits are enormous. It costs $1.50 to duplicate an album and $.75 to duplicate a tape which can then be sold at the current market price of $5.00 to $8.00.[76]

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[72] Id.

[73] See Billboard, Oct. 20, 1979, at 4.

[74] 28 Stereo Rev. 63 (March 1972).

[75] Wash. Post, March 9, 1980, at H1.

[76] L.A. Times, March 22, 1980, at 21.

B. The Film Industry

¶28 Generally, film studios do not sell films. Instead, they license them for limited use for a limited period of time.[77] A rental arrangement is made between the studio and the distributor. In turn, the distributor makes various rental arrangements with individual theater owners. The terms of a typical license agreement reserve title to the film in the studio and require the return of the film at the end of the license period.[78]

¶29 Once a film is produced approximately 300 to 400 prints are sent to the distributor who then distributes them to his branch offices, the exchanges, where screenings are done and contracts with the exhibitors are finalized. The prints are then distributed to 3,000 to 12,000 exhibitors for public showings in theaters.[79] In addition, various

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[77] Usually, film studios are in charge of the production activities and film distributors are in charge of distribution. Prior to 1949 this was not the case. The major motion picture companies had their own distribution system and also frequently owned theater chains. This practice was outlawed in the Paramount Conseat Decrees of 1948. See Nolan, "Copyright Protection for Motion Pictures: Limited or Perpetual". ASCAP, Copyright L. Symp. 1970. United States v. Paramount Pictures, Inc., 344 U.S. 131 (1948), remanded 85 F. Supp. 881 (S.D.N.Y. 1949). Gregory, Making Film Your Business, Schocker Books, N.Y., 1979 at 134-36.

[78] See United States v. Wise, 550 F.2d 1180 (9th Cir.). cert. denied, 434 U.S. 929, rehearing denied, 434 U.S. 922 (1977).

[79] Nolan, Copyright Protection for Motion Pictures: Limited or Perpetual". ASCAP, Copyright L. Symp. 1970, at 178-79.

other prints are loaned to V.I.P.'s in Hollywood, military bases, hotels, and airlines. Later, prints are loaned to television networks, Home Box Office, and film libraries.[80]

¶30 Uusually, the "borrowing" of a film by pirates occurs along these distribution routes. Changed technology has made the duplicating process quick and it now requires little equipment. Film in transit frequently disappears for short periods of time, for example, overnight, and then reappears.[81] Projectionists are thought to be the pirates' best source for films; it is claimed that many projectionists have standing offers from pirates for $5,000 for each film they deliver.[82] The developing labs and the salvage companies are other sources used to obtain master films.[83]

¶31 The pirates' influence is not felt exclusively along the distribution chain; it is also felt within the studio. Frequently film pirates, as do record and tape pirates, obtain a master copy of a film before it has been officially released.

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[80] Id. at 179; Am. Film, July - Aug. 1978, at 60; United States v. Drebin, 557 F.2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904, rehearing denied, 438 U.S. 908 (1978).

[81] See Clev. Plain Dealer, Dec. 4, 1977, at 30.

[82] Variety, July 10, 1979.

[83] Am. Film, July-Aug. 1978, at 59. For a discussion of the salvage company link see United States v. Wise, 550 F.2d 1180, 1184 (9th Cir.), cert. denied, 434 U.S. 929, rehearing denied, 434 U.S. 977 (1977).

Thus, they must have a connection within the industry.[84]

¶32 The duplicating process requires two videorecording machines. The master is played on one machine, while the other machine records the image. Once a good print is obtained from the original as many as 400 duplicates can be created off this print and each of these duplicates can be used to make 400 more copies. Thus, a pirate could produce 160,000 copies from one good master.[85] With a minimal investment, cost of the duplicating equipment, the black cartridges, and the cost of the bribe to obtain the master print, a pirate's profits can be enormous. It is estimated that some pirates have made $14 million a year.[86]

¶33 The quality of a pirated film varies. If it is a videocassette of an older movie, the consumer is often unable to distinguish between an authorized and an unauthorized version. But if it is a print of a big name film that is still playing in the major movies house, it is probably a pirated version.[87]

¶34 An alternative method of pirating film involves copying a film directly off the airwaves. The proliferation of Home

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[84] See Am. Film, July - Aug. 1978, at 59.

[85] Daily News, April 10, 1978, at 14; Daily Telegram (Sydney), April 21, 1979, at 17.

[86] Detroit Free Press, Jan. 21, 1979.

[87] Village Voice, Oct. 8, 1929, at 88.

Box Office has facilitated this form of duplication. These prints, however, are usually of poor quality and sell for less on the black market.[88]

IV. Industry Measures to Combat Piracy

¶35 The recording and film industries have initiated some internal changes with the intent of reducing the piracy problem.

A. The Recording Industry

¶36 RSO, one of the labels hardest hit by the counterfeiting wave, hired private, plainclothes investigators to maintain constant surveillance of points along the record-making line to prevent internal leakage.[89]

¶37 The National Association of Recording Merchandisers has held workshops to discuss guidelines for internal control of the industry to prevent the unknowing purchase and sale of counterfeit products.[90]

¶38 As a result of recent allegations that retailers are returning counterfeit albums and tapes interspersed with the legitimate versions to obtain cash refunds from the company, the companies have tightened their return policies and procedures.[91] The percentage of returns accepted has been

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[88] Id.

[89] Variety, Dec. 20, 1978; Record World, Dec. 23, 1978.

[90] Billboard, Feb. 23, 1980, at 18.

[91] Variety, Feb. 6, 1980, at 1.

reduced by RCA, A & M, and Associated Labels.[92] Arista has begun a policy of examining all returns in an attempt to catch the counterfeit product.[93]

B. The Film Industry

¶39 The film industry has tightened security measures inside the plants and along the distribution lines in an attempt to prevent the borrowing of films;[94] it has also adopted a policy of indicting pirates with copyright infringement and also with additional offenses, for example violations of 18 U.S.C. §2314,[95] in an attempt to net stiffer penalties.[96]

¶40 The film companies have also begun to fight pirates with their own weapons, videocassettes. United Artists recently entered into an agreement to rent twenty of its pictures for videocassette distribution.[97] In the future,

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[92] Billboard, Oct. 27, 1979, at 1.

[93] Cash Box, March 15, 1980, at 68.

[94] Am. Film, July-Aug. 1978, at 59.

[95] See note 116 infra for text. The $5,000 statutory minimum has posed some problems. In United States v. Whetzel, 589 F.2d 707 (D.C. Cir. 1978), the court refused to consider the actual copyright cost of the unauthorized tapes in determining whether this minimum had been met.

[96] Am. Film, July - Aug. 1978, at 62. See United States v. Atherton, 561 F.2d 747 (9th Cir. 1977); United States v. Whetzel, 589 F.2d 707 (D.C. Cir. 1978).

[97] Variety, April 11, 1979, pt. 5.

it is expected that cassette versions of a film will be released by the film companies simultaneously with the movie.[98]

¶41 State legislators have also attempted to counter the piracy problem. In 1971, when the Sound Recording Amendment was enacted, only eight states had anti-piracy laws to protect pre-1972 works.[99] Today, all the states, with the exception of Vermont, have passed anti-piracy laws. Oregon was the first state to enact an anti-video taping law, making it illegal to produce or sell unauthorized videotapes of motion pictures.[100] All these measures have helped in the war against piracy but none have put a serious dent into pirate activities.

IV. RICO

A. Introduction

¶42 RICO[101] provides an additional weapon to combat the piracy problem. Its sanctions are much higher than those provided by the copyright law. RICO's criminal and civil penalties provide one of the most effective deterrents against this high profit crime. The advantages of RICO include the ability inanciallyto immobolize the enterprise through the use of it's criminal forfeiture provisions and to make

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[98] Wall St. J., June 27, 1980, at 27.

[99] See note 36 supra.

[100] 1979 Or. Laws, c. 550.

[101] 18 U.S.C. §1961-1968 (1976).

whole actual injuries suffered by victims of the fraud through the treble damage suits. In addition, RICO enables either the Government or private individuals to commence a suit against the pirates to obtain injunctions.

¶43 Although the principle purpose behind RICO was to curtail the infiltration of organized crime into legitimate business,[102] it was not, as finally adopted, so limited. Section 1962(c) provides an effective tool to combat the piracy problem.

> [I]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities 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 debts.[103]

To explain the usefulness of RICO a few words on the meaning of this section may be in order.

B. Structure

1. Person

¶44 As defined by the statue, a person "includes any individual or entity capable of holding a legal or beneficial interest in property."[104] This definition works by

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

[103] 18 U.S.C. §1962 (c) (1976). These materials do not deal with the collection of unlawful debts. They are confined to patterns of racketeering activity.

[104] 18 U.S.C. §1961 (3) (1976).

illustration not by limitation.[105] Those "persons" who can violate RICO include white-collar criminals[106] as well as members of organized crime.[107] Thus, this section applies to most types of pirates.

2. Enterprise

¶45 To violate section 1962 (c) a person must conduct or participate in the conduct of an enterprise's affairs. An enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group with individuals associated in fact though not a legal entity.[108] This definition is illustrative.[109] Included under this definition are common pirate enterprises,

[105] "Includes" is a term of enlargement, not of limitation. See e.g. Highway & City Freight Drivers v. Gordon Transps, Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002 (1978); American Fed'n or Television and Radio Artists v. NLRB, 462 F.2d 887, 889-90 (D.C. Cir. 1972); Argosy Limited v. Hennigan, 404 F.2d 14.20 (5th Cir. 1968); Federal Power Comm 'n v. Corporation Comm'n, 362 F. Supp. 522, 544 (W.D. Okla. 1973), aff'd, 415 U.S. 961 (1974).

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

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

[108] 18 U.S.C. §1961(4) (1976).

[109] See note 105 supra.

private businesses[110] or associations in fact formed for the purpose of engaging in criminal activity.[111]

3. Racketeering Activity

¶46 Racketeering activity is defined by incorporating a broad spectrum of specific state and federal offenses. These include violations of certain state laws[112] and

[110] See, e.g., United States v. Brown, 583 F.2d 659 (3d Cir. 1978) (auto dealership), cert. denied, 440 U.S. 909, rehearing denied, 441 U.S. 918 (1979); United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (beauty college); United States v. Forsythe, 560 F.2d 1127 (2d Cir. 1977) (bail bond agency); United States v. Parness, 503 F.2d 430 (2d Cir. 1974) (foreign hotel and gambling casino), cert. denied, 419 U.S. 1105 (1975); United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978) (theater).

[111] See 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 illegitmate associations are in fact usually connected with Section 1962 (c) violations United States v. Elliot, 571 F.2d 880, 898 (5th Cir.), cert. denied, 439 U.S. 953 (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.

[112] 18 U.S.C. §1961(1) (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargable under State law and punishable by imprisonment for more than one year.

violations of specific sections of Title 18.[113] Sections of particular reference to the piracy problem because they are frequently violated by the pirates are §1341 (mail fraud),[114]

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[113] 18 U.S.C. §1961 (1) (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), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, 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 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic).

[114] 18 U.S.C. §1341 (1976). 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 Post Office Department, 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.

§1343 (wire fraud)[115] and §2314 (interstate transportation of stolen property).[116]

4. Pattern of Racketeering Activity

¶47 To violate section 1962(c), the operation of an enterprise must be conducted through a pattern of racketeering activity.[117] The essential elements of this pattern are:

1. At least two acts;
2. One of which occurred after October 15, 1970; and
3. The last of which occurred within ten years of the commission of the prior act.[118]

The legislative history of RICO[119] and its judicial interpretation indicate that the racketeering acts must be related. Sporadic activity does not constitute a pattern

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[115] 18 U.S.C. §1343 (1976) 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 wiretaps, 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 six years, or both.

[116] 18 U.S.C. §2314 (1976) in pertinent part reads: Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud... [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[117] 18 U.S.C. §1961 (5) (1976).

[118] Id.

[119] S. Rep. No. 617, 91st. Cong., 1st Sess. 79 (1969).

of racketeering activity.[120]

C. Sanctions

1. Criminal Penalties

¶48 RICO criminal penalties are set out in section 1963, which states that a violator may "be fined not more than $25,000, or imprisoned not more than twenty years, or both".[121]

[120] See United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) ("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.").

[121] 18 U.S.C. §1963 (1976) 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 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. (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 any 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. 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 theprovisions 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.

The violator must forfeit to the United States any interest he has acquired as a result of the racketeering and also any interest he owns in an enterprise which affords him a source of power over the enterprise involved in the violation of RICO.[122] Thus, both ill gotten gains and bases of economic power are subject to forfeiture.

2. Civil Remedies

¶49 Section 1964 allows either the Attorney General or "any person injured in his business or property" to bring a civil suit.[123] Available equitable relief includes divesture of an interest in an enterprise, restrictions on future activities or investments, and dissolution or reorganization of the enterprise.[124] In addition, if the suit is brought by a private party, the plaintiff may also obtain treble

[122] Id.

[123] 18 U.S.C. §1964 (b) (c) (1976).

[124] 18 U.S.C. §1964 (a) (1976). 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.

damages and costs, including a reasonable attorney's fee.[125]

D. Application

¶50 The usefulness of RICO in combatting record, tape, and film piracy has only just begun to be realized. Illustrations of how RICO was used successfully in several recent cases can provide a basis for understanding how RICO applies in this area and also establishes how it should be used in future piracy litigation.

¶51 In a recent record counterfeiting case, John La Monte, president of House of Sounds, Inc. and principle in James Enterprises, Inc. plead nolo contendere to a 149 count indictment. This indictment charged him with racketeering (18 U.S.C. §1961 et seq.), wire fraud (18 U.S.C. §1343) and copyright infringement (17 U.S.C. §§101 et seq.).[126] Based on the RICO forfeiture provisions, La Monte was required to forfeit his interest in House of Sounds and in James Enterprises.[127] In addition, he was required to serve 18 months in jail and to pay a $25,000 fine.[128] It is likely that these penalties, especially the forfeitures, will take La Monte out of the counterfeiting business.

¶52 Indictments growing out of the recent FBI sting operations, the Modsound[129] and Mi Porn[130] raids, may also be based on RICO violations. John Jacobs, special attorney of an Organized Crime Strike Force, indicated, after the Modsound raids, that stress would be laid on RICO indictments rather than on copyright violations because of RICO's more stringent penalties.[131] George Tucker, for example, was indicted as a result of Modsound raids of his house and his duplicating plant, Super-Dupers, Inc., with, among other charges, one count of violating 18 U.S.C. §1962(c), nine counts of violating 18 U.S.C. §1343 (wire fraud) and also

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[125] 18 U.S.C. §1964 (c) (1976). 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.

[126] United States v. La Monte, 455 F. Supp. 952 (E.D. Pa. 1978) (an attempt to obtain a motion to suppress was denied. Defendant's plea at this time was not guilty.

[127] Yarnell, Anti-Piracy News, March 9, 1979, at 1-2, Note, according to Yarnell, this was the first successful counterfeiting prosecution under RICO.

[128] Id.

[129] After a two year undercover investigation federal agents posing as record and tape pirates smashed a $350 million-a-year piracy ring and seized $100 million worth of pop records, cartridges, cassettes and developing equipment in a raid that spanned five states. See The Charlotte Observer, Dec. 7, 1978, at 1, Winston-Salem J., Dec. 7, 1978, at 1; Greensboro Daily News, Dec. 7, 1978, at A-1, N.Y. Times, Dec. 7, 1978.

[130] A two and one-half year undercover operation centered in Miami in which federal agents posed as pornography video peddlers and distributed obscene material nationwide through a mail order business. The investigation led to raids in ten states. L. A. Times, Feb. 15, 1980, at pl. 1 p. 3. Variety, Feb. 10, 1980, at 1.

[131] Billboard, Dec. 16, 1978, at 1.

eleven counts of copyright violation.[132]

¶53 The Sam Goody investigation, resulting in part from taped conversations between federal undercover agents and Tucker during the Modsound investigation, has also resulted in RICO indictments. Sam Goody Corporation, its president, George Levy, and its vice president, Sam Stolen, have all been indicted for one count of racketeering, three counts of interstate transportation of stolen property, and twelve counts of copyright violation. All three have pled not guilty and the case is still pending.[133]

¶54 A similar reliance on RICO indictments has resulted from the Mi Porn raids. The underlying allegations include interstate transportation of obscene material, mail fraud, and wire fraud.[134]

VI. Litigation Strategies

¶55 Eliminating record, tape, and film piracy would benefit the Government, by increasing tax revenues, and benefit the film and recording industries, by increasing profits. Thus,

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[132]Tucker's motion to suppress evidence and to dismiss other allegations was denied. United States v. Tucker, 481 F. Supp. 182 (E.D.N.Y. 1979). In his subsequent guilty plea; however, the RICO charges were dropped. The Record, March 4, 1980.

[133]See Variety, March 12, 1980, at 91; Cash Box, March 15, 1980, at 68.

[134]See L.A. Times, Feb. 15, 1980, at pt. 1 p. 3; Variety, Feb. 15, 1980, at 1.

the Government and the industries should develop an anti-piracy program based on RICO litigation. The goal of this program should be twofold. First, to persuade retailers who are selling both authorized and unauthorized products to stop selling the unauthorized materials. Second, to eliminate large producers of pirated material. RICO allows either the Government or a private individual to institute a suit,[135] and it provides for criminal as well as civil sanctions.[136] Careful consideration should be given by the Government and private parties to these remedies in litigation against these two groups.

¶56 The Government should bring criminal suits against large scale producers of pirated material. The aim of these prosecutions is to put the pirates out of business. The prosecutions should be, if possible, enlarged to include outlets as co-defendants to facilitate subsequent civil suits by victims of piracy. Thus, the Government should seek the maximum penalties, a twenty years prison sentence, a $25,000 fine, if the defendant is solvent, and criminal forfeiture.[137]

¶57 RICO civil suits can be brought by either the Government

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[135]See notes 121 and 123 supra.

[136]See notes 121 and 124 supra.

[137]See note 121 supra.

or private individuals.[138] The advantage of having a civil suit brought by a private party is that the private party can be awarded treble damages,[139] one of the potentially most effective deterrents against a high profit crime. The film and recording industries should establish a strike force of lawyers prepared to use RICO to eliminate, or to at least reduce, the piracy problem. The industry should concentrate its litigation on using RICO civilly against retailers, who are engaging in the sale of authorized and unauthorized products. Substantial criminal sanctions of high money judgments resulting from such suits should convince retailers to abandon their infringing activities; the attractiveness of potential profits might not be high enough to counter these sanctions and judgments. these retailers would also eliminate a large part of the piracy problem, such piracy cannot exist on a large scale without retail outlets.

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[133] See note 135 supra.

[139] See note 126 supra.

Cigarette Bootlegging:
A Strategy for Attacking
the Manufacturers through
Civil Litigation

by
Martha Tonn
John Trojanowski

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SUMMARY

¶1 Cigarette bootlegging drains needed tax revenue from states and localities and generates other serious crimes, including murder, hijacking and official corruption. All levels of the cigarette industry are involved in bootlegging. Laws exist to control bootlegging, but in the past, enforcement efforts have not been focused on cigarette manufacturers. Cigarette manufacturers are the legally responsible level with the highest degree of control over the flow of cigarettes into illicit traffic. Litigation directed at the manufacturer provides greatest hope for industry self regulation and clean-up. Elaborate record-keeping at each level of the industry eases the effort of obtaining evidence and would facilitate successful litigation. The Racketeer Influenced and Corrupt Organizations Act (RICO) provides for both civil and criminal suits, but civil suits would be preferable because of lower standard of proof, broad discovery provisions, and because the objective of the suit would be reform, not vindictive justice.

I. Introductory Comments

¶2 These materials propose civil litigation against the cigarette manufacturers themselves, to end illegal bootlegging. Litigation would be initiated by State Attorneys General as the injured party under 18 U.S.C. 1964 (c). Such litigation combines the advantages of a civil suit, including a lower standard of proof and broad discovery, with the injunctive and treble damage provisions of RICO. The desired impact of these materials is not to discourage other forms of litigation. Rather, they demonstrate how to confront cigarette bootlegging through one type of litigation designed for maximum impact on

the illicit trafficting of cigarettes.

II. Cigarette Bootlegging

A. The Problem

¶3 Cigarette bootlegging is the introduction of cigarettes purchased in a state with a low cigarette tax rate into a state with a high cigarette tax rate without payment of the tax imposed by the second state. The large tax differential that exists between various states makes cigarette bootlegging a highly profitable criminal activity.

¶4 The amount of cigarette bootlegging has been steadily increasing since the late nineteen-sixties.[1] It is generally agreed that bootlegging becomes profitable when the tax differential reaches at least ten cents per pack of cigarettes.[2] In 1960 the largest tax differential between any two states was eight cents per pack.[3] In 1965 the largest tax differential was eleven cents.[4] Then, as now, the cigarette manufacturing states (North Carolina, Virginia, and Kentucky) were low tax states. Today the largest tax spread between two states is nineteen cents,[5] and the differential between North Carolina and New York City is twenty-one cents per pack.[6]

¶5 The North Carolina-New York City spread is two dollars and ten cents per carton of ten packs, one hundred and twenty-six thousand dollars per trailer truckload of one thousand cases. The financial lure of cigarette smuggling is obvious. The extent of the problem is indicated by estimates that one out of every three packs of cigarettes sold in Philadelphia and one out of every two packs sold in New York City are contraband.[7]

¶6 Cigarette bootlegging is not a victimless crime. Every dollar of cigarette tax revenue lost to a state means either a one dollar increase in the general tax burden imposed on its citizens.[8] The revenue loss of a state affects every citizen of that state. It is estimated that in 1975 thirty-four states lost a total of $390.8 million tax dollars through bootlegging.[9] The 1975 estimated loss for Pennsylvania was $35.6 million.[10] It is estimated that Pennsylvania now loses $1 million per week in revenue.[11] Those states that attempt to combat the smugglers

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[1] Cigarette Bootlegging: A State AND Federal Responsibility, Advisory Commission on Intergovernmental Relations (May 1977) [hereinafter cited as ACIR Report].

[2] Id. at 9.

[3] Id. at 12.

[4] Id.

[5] See tables 2 & 3 in appendix.

[6] See id. at 69, and tables 2 & 3

[7] S. Rep.No.962, 95th Cong, 2d Sess. 4, reprinted in [1978] U.S.Code Cong. & Ad. News 5518, 5519; ACIR Report, supra note 3, at 69, 112; The Philadelphia Inquirer, May 6, 1979, at 14-A.

[8] ACIR Report, supra note 3, at 2.

[9] Id. at 64-65.

[10] Id.

[11] Newsweek, February 25, 1980, at 51; The Philadelphia Inquirer, May 6, 1979, at 1-A.

are forced to increase their expenditures for tax collection and law enforcement. Increased costs further erode the value of the taxpayer's dollar.

¶7 Cigarette bootlegging also gives rise to the commission of other crimes. Trailer trucks are hijacked. Warehouses are burglarized. Rivals, witnesses and informants are assaulted and murdered. Politicians, law enforcement figures, members of the judiciary, legislators, and other public officials are corrupted.[12]

B. Examples of Bootleg Operations

¶8 The following is an outline of two types of bootlegging operations in one state. Bootlegging operations vary from state to state and within each state. This outline should be viewed only as an example. In addition, because the Pennsylvania litigation discussed focused on individual smugglers, manufacturer facilitation was not explored.

1. The North Carolina-Pennsylvania Cigarette Traffic

¶9 Unless within an exception, the sale of unstamped cigarettes is a misdemeanor in North Carolina.[13] Under North Carolina law all cigarette distributors, including cigarette manufacturers, must affix the states' two cent tax stamps to each pack of

[12] See generally S. Rep. No. 962, 95th Cong., 2d Sess. 6, reprinted in (1978) U.S. Code Cong. & Ad. News 5518, 5521; ACIR Report, supra note 3, at 3; The Philadelphia Inquirer, May 6, 1979, at 1-A, 14-A, 15-A; The Philadelphia Inquirer, May 7, 1979, at 1-A, 8-A; The Philadelphia Inquirer, May 8, 1979, at 1-A, 10-A, 11-A.

[13] N.C. Gen. Stat. §105-113.27-.33 (1979).

unstamped cigarettes in their possession prior to any intrastate resale.[14]

One exception exists for cigarettes shipped by manufacturers to other licensed distributors.[15] Another exception exists for

> The sale of cigarettes to a nonresident wholesaler or retailer registered through the Secretary who has no place of business in North Carolina and who purchases the cigarettes for the purposes of resale not within this State and where the cigarettes are delivered to the purchaser at the business location in North Carolina of the distributor who is also licensed as a distributor under the laws of the state of the nonresident purchaser.[16]

That is the only situation in which North Carolina tax stamps need not be affixed prior to the sale of cigarettes in North Carolina to a nonresident for purposes of out of state resale.

¶10 A legitimate Pennsylvania distributor, licensed by Pennsylvania and registered with North Carolina, buys cigarettes in bulk from the manufacturer in North Carolina to acquire his stock at the lowest possible cost. Four of America's six major cigarette manufacturers have production facilities in North Carolina: American Brands, Inc. (American Tobacco), Liggett Group, Inc., Lowes Corp. (Lorillard), and R. J. Reynolds Industries, Inc.[17] The cigarettes purchased from these

[14] N.C. Gen Stat. §105-113.20 (1979).

[15] N.C. Gen Stat. §105-113.10 (1979).

[16] N.C. Gen. Stat. §105-113.9 (1979).

[17] 1 Moody's Industrial Manual 77 (1979); 2 Moody's Industrial Manual 2563, 2573, 2904 (1979).

manufacturers bear neither the North Carolina, nor the Pennsylvania tax stamp. The distributor trucks these cigarettes to his Pennsylvania warehouse where he imprints the Pennsylvania tax stamp on each pack. A meter on the stamping machine records the number of packs stamped. The distributor then remits eighteen cents for each stamp affixed, less a three per cent commission for serving as a state tax agent, to the Bureau of Cigarette and Beverage Taxes of the Pennsylvania Department of Revenue.[18] The cigarettes are then resold to distributors, retailers, and members of the public.

¶11 The sixteen cent tax differential that exists between North Carolina with its two cent per pack tax and Pennsylvania with its eighteen cent per pack tax is a strong incentive to cigarette bootlegging. A typical trailer truckload of one thousand cases of cigarettes (sixty thousand cartons, six hundred thousand packs) generates a gross profit of ninety-six thousand dollars through the differential alone. If a dealer's markup is added, the profit is bigger still.

¶12 Pennsylvania smugglers generally purchase cigarettes from North Carolina distributors rather than from manufacturers. Contrary to North Carolina law, the cigarettes purchased do not bear that state's tax stamp. The North Carolina distributor either evades his state's cigarette tax, or, more probably, runs the cigarettes through a stamping machine in such a way that they remain unstamped while the machine's meter keeps track of the number of cigarettes processed by the distributor. The distributor can then pay his own state's tax on all of the cigarettes he handles while keeping any desired number of cigarettes unstamped and, thus, readily saleable to smugglers.

¶13 Cigarette bootleggers are highly desirable customers for the distributor since they buy in quantity and pay in cash. The distributor's sales to smugglers benefit the manufacturer as well as the distributor. The more cigarettes the distributor sells, the more cigarettes the manufacturer sells; and the more cigarettes the manufacturer sells, the greater his profits. The manufacturer will give the distributor a 3.25% discount if he pays his bills promptly.[19] The distributor's cash sales to bootleggers enable him to take advantage of that discount. The manufacturer, in turn, increases his cash flow, and eliminates the possibility that the bills will never be paid.

¶14 The bootlegger trucks his unstamped cigarettes north to a warehouse in Pennsylvania. The trip takes about eight hours. Once in Pennsylvania, the cigarettes are imprinted with the Pennsylvania tax stamp to make resale safe. The stamp may be counterfeited, or it may be imprinted by an authorized stamping machine. There are over 250 licensed wholesalers in Pennsylvania. At least twenty of them have owners or employees

[18] See Pa. Stat. Ann. tit. 72,§§3169.301.302 (Purdon) (Supp. 1979).

[19] Forbes, December 15, 1977, at 47.

with criminal records.[20] John Sebastian LaRocca, reputed LCN boss of Pittsburgh, is vice-president of Keystone Sales.[21] The late Angelo Bruno, reputed LCN boss of Philadelphia and Southern New Jersey, listed his occupation as cigarette salesman for John's Wholesale Distributors, Inc. in 1977 and 1978.[22] During the first eighteen months of Bruno's association with John's, the corporation's volume went from forty thousand to two hundred thirty thousand cartons per month.[23] A number of Bruno's associates have also been connected with John's over the years.[24]

¶15 A Pennsylvania statute provides in relevant part that

> Applicants for wholesale (cigarette dealer's) license or renewal thereof shall meet the following requirements:
> ....
> (2)....The applicant or any shareholder controlling more than ten per cent of the stock, if the applicant is a corporation or any officer or director of said applicant is a corporation, shall not have been convicted of any crime involving moral turpitude.25

¶16 In 1971 John's wholesale cigarette license was revoked by the Secretary of Revenue pursuant to this statute. Raymond

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[20] The Philadelphia Inquirer, May 6, 1979, at 14-A.

[21] The Philadelphia Inquirer, May 7, 1979, at 8-A.

[22] The Philadelphia Inquirer, May 7, 1979, at 8-A.

[23] Forbes, December 15, 1977, at 47.

[24] Id.

[25] Pa. Stat. Ann. tit. 72, §3169.403 (Purdon) Supp. 1979)

Martorano, a reputed lieutenant of Angelo Bruno, was a fifty percent stockholder of John's. Martorano had been convicted of the sale of untaxed liquor in 1951, the possession and transportation of untaxed liquor in 1952, and the possession and sale of opium derivatives in 1954 and 1955.[26] The Supreme Court of Pennsylvania ordered the license restored. The court found that,

> [t]o interpret 403(2) as a blanket prohibition barring anyone who has been convicted of a crime of moral turpitude without regard to the remoteness of those convictions or the individual's subsequent performance would be unreasonable. We cannot assume that the legislature intended such an absurd and harsh result. 27

¶17 As a result of this decision, individuals with criminal records can become licensed cigarette stamping agents as well as licensed cigarette wholesalers since the statutory requirements for the two licenses are similar.[28] Once the Pennsylvania Tax Stamp is affixed to each pack of bootlegged cigarettes, the criminal wholesaler blends them with his licit inventory and resells them to other wholesalers, retailers, or the general public.

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[26] Secretary of Revenue v. John's Vending Corp., 453 Pa. 488, 490-91, 309 A. 2d 358, 360 (1973).

[27] Id. at 494, 309 A. 2d at 362 (1973). At the time this decision was handed down Martorano was serving a six month prison term for refusing to answer the questions of a grand jury investigating organized crime; The Philadelphia Inquirer, May 6, 1979, at 14-A; The Philadelphia Inquirer, May 7, 1979 at 8-A.

[28] Compare Pa. Stat. Ann. tit. 72, §3169.402 (Purdon) (Supp. 1979) with Pa. Stat. Ann. tit. 72, §3169.403 (Purdon) (Supp. 1979).

¶18 Pennsylvania has criminalized the sale of unstamped cigarettes,[29] the possession of unstamped cigarettes,[30] the counterfeiting of tax stamps,[31] the tampering with stamping equipment,[32] and other activity associated with bootlegging.[33] Pennsylvania's efforts to combat bootlegging under these statutes in the past, however, have often been thwarted by inefficiency, ineptitude, and corruption.

¶19 Yahn & McDonnell is the largest licensed cigarette wholesaler in Philadelphia. In 1978 it collected $18.3 million in cigarette taxes for the state.[34] In 1973 the Revenue Department compared the records of Yahn & McDonnell with those of the cigarette manufacturers. The audit revealed that the firm had sold three hundred seventeen thousand more cartons of cigarettes than it had purchased from the cigarette manufacturers. Yahn & McDonnell paid the state $560,000 in back taxes plus a $60 thousand penalty. It was not subjected to a criminal investigation or prosecution, and the source of the cigarettes was never determined. The firm's licenses were not revoked.[35]

¶20 Much of the hiring of the Bureau of Cigarette and Beverage Taxes, the primary cigarette tax enforcement agency, has been based on the personal and political connections of the job applicants, rather than on their qualifications.[36] In 1977 the Pittsburgh office of the Bureau cost the state $300,000 to operate. The office's thirty employees confiscated fewer than four hundred cartons of cigarettes during the entire year.[37] Those cigarettes cost the state approximately $750 per carton to intercept. The Pennsylvania tax on a carton of cigarettes is only $1.80.

¶21 The Bureau's other major office is located in Philadelphia. In 1975 a tax agent informed Paul Landau, the then head of the Bureau, alleged that the supervisor of the Philadelphia office, Joseph Trout, was a bootlegger. The agent was transferred to another office, and Landau did not investigate the charge. In 1978 Trout was convicted for his involvement in a smuggling operation that cost the state $750 thousand in tax revenues.[38] In 1972 the FBI

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[29] Pa. Stat. Ann. tit. 72, §3169.902 (Purdon) (Supp. 1979).

[30] Pa. Stat. Ann. tit. 72, §3169.903 (Purdon) (Supp. 1979).

[31] Pa. Stat. Ann. tit. 72, §3169.904 (Purdon) (Supp. 1979).

[32] Pa. Stat. Ann. tit. 72, §3169.905 (Purdon) (Supp. 1979).

[33] E.g., Pa. Stat. Ann. tit. 72, §3169.906-.909 (false record keeping; impoundment of vending machines stocked with illicit cigarettes; failure to comply with duties under the Cigarette Tax Act).

[34] The Philadelphia Inquirer, May 7, 1979, at 8-A.

[35] The Philadelphia Inquirer, May 8, 1979, at 8-A, 10-A. See Pa. Stat. Ann. tit. 72, §3160.405 (Purdon) (Supp. 1979).

[36] The Philadelphia Inquirer, May 6, 1979, at 14-A; The Philadelphia Inquirer, May 8, 1979 at 1-A, 10-A.

[37] The Philadelphia Inquirer, May 6, 1979, at 14-A; The Philadelphia Inquirer, May 8, 1979 at 10-A.

[38] The Philadelphia Inquirer, May 6, 1979, at 14-A.

CONTINUED

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had informed Landau of an impending raid on a smuggler. The next day the smuggling operation shut down.

¶22 In 1973 a Pennsylvania grand jury indicted Melvin Shelton, supervisor of the Philadelphia office, for larceny, extortion, bribery, and blackmail in connection with cigarette bootlegging. Robert Kane, the Pennsylvania attorney general, ordered that no disciplinary action be taken against Shelton regardless of the outcome of the prosecution.[39] The charges were eventually dismissed because the office of the Philadelphia district attorney, Emmett Fitzpatrick, a Democrat, failed to bring the case to trial in a timely fashion. The case was begun under Fitzpatrick's predecessor Arlen Specter, a Republican. Robert Kane attempted unsuccessfully to have the state pay Shelton's legal bill of $12,563.[40]

A. The Frumento Story[41]

¶23 In 1971 John Sills, the man in charge of patronage for Peter Camiel, chairman of the Philadelphia Democratic City Committee, attempted to secure Rocco Frumento's appointment as an inspector for the Pennsylvania Bureau of Cigarette and Beverage Taxes. Prior to his appointment, Frumento met Vito Pisciotta, a

[39] Id.

[40] Id.; The Philadelphia Inquirer, May 8, 1979, at 10-A.

[41] The Philadelphia Inquirer, May 6, 1979, at 14-A; The Philadelphia Inquirer, May 7, 1979, at 8-A; The Philadelphia Inquirer, May 8, 1979, at 10-A. See United States v. Frumento, 563 F. 2d 1083 (3d Cir. 1977). All of the information in the following discussion of the Frumento case was taken from these sources.

Philadelphia lawyer, and Pisciotta's client, Harold Sharp, a Philadelphia cigarette wholesaler with prior felony convictions. Pisciotta, Sills and Frumento then held a series of meetings where Frumento revealed a plan to smuggle large quantities of untaxed cigarettes into the state, using his position with the Cigarette Bureau to protect his accomplices. In August 1971 the bootleg operation began. At approximately the same time as the beginning of this conspiracy, Frumento's appointment to the Bureau was approved. Approval came after state senator Henry J. Ciafrani held up Governor Shapp's proposal for a state income tax until he agreed to hire Frumento. Frumento was known to be a cigarette smuggler; in the past he had been arrested in a truck transporting bootleg cigarettes. The bootleg operation continued for about thirty weeks, terminating with the arrest of Harold Sharp on March 13, 1972. In May of 1972 John sills was arrested subsequent to a grand jury investigation. Sills, Sharp, Millhouse, the supervisor of the District II Office of the Bureau, and Frumento were charged with extortion, bribery, conspiracy to accept bribes, and conspiracy to evade payment of Pennsylvania's cigarette tax. Sills, Frumento, and Millhouse were tried and acquitted in the Philadelphia Municipal Court. A special investigating grand jury indicted the principals again. The charges were dismissed for lack of timely prosecution after Emmett Fitzpatrick succeeded Arlen Specter as District Attorney, and Fitzpatrick failed to bring to trial the case that Specter initiated. In 1976 Frumento, Sills, Millhouse and Vito Pisciotta were convicted of federal income tax violations and violation of Section 1962(c) of RICO. The convictions were upheld on appeal.

Unfortunately, the prosecution's focus did not extend beyond the smuggler level. In addition, no follow up civil litigation under RICO was undertaken.

¶24 Rocco Frumento was murdered on February 14, 1977. He was rumored to have been willing to cooperate with the authorities in exchange for a lighter sentence.

b. The McCurry Prosecution[42]

¶25 Suppliers became the target of federal agents in the investigation and arrest of the "McCurry" ring. The FBI discovered the ring through surveillance of Southern Wholesale Company in Goldsboro, North Carolina, a supplier of cigarettes to the Philadelphia area. Agents staked out the warehouse for months, watching unmarked rental trucks transport unstamped cigarettes from the wholesale company to Philadelphia warehouses. On two occasions the agents were spotted and they feared that the operation was over. In 1978, however, Southern's Vice-President volunteered to cooperate with enforcement officials in exchange for leniency in sentencing. Bryan was wired with a recording device and conversations with Fred McCurry, a prominent Philadelphia businessman suspected of having ties to organized crime and a key figure in interstate cigarette smuggling, were taped. The tapes were instrumental in a federal grand jury indicting McCurry, Bryan and eight others in June, 1979 for conspiracy, racketeering and trafficking in contraband. According to the indictment, the ring was responsible for the smuggling of 4 million cartons of untaxed cigarettes into Pennsylvania between 1972 to 1979, with an attendant revenue loss to Pennsylvania of $7.5 million in taxes. McCurry and four others received prison sentences, Bryan and three others were put on probation; the tenth fatally shot himself. This violent end paralled earlier violence when in 1976 an associate of McCurry was murdered.

¶26 The McCurry prosecution made effective use of the 1978 Federal Contraband Cigarette Law and RICO to prosecute wholesalers. It fails, however, in the same way as the Frumento prosecution. No subsequent civil litigation was undertaken and the failure to extend the prosecution to the manufacturer level deprived the effort of any real impact on the traffic itself.

c. The Industry

¶27 The legitimate cigarette distribution industries in the states with serious bootlegging problems have suffered serious financial set-backs. Their insurance and security costs have risen sharply.[43] Sales and profit margins have declined drastically. Competitors selling bootleg cigarettes are always able to undercut the prices offered by legitimate dealers since their costs are as much as 50% lower.[44] Large numbers of distributors and

[42] The information about McCurry was taken from Newsweek, February 25, 1980, at 51.

[43] ACIR Report, supra note 3 at 21.

[44] Forbes, December 15, 1977 at 44.

retailers have been forced out of business or have been taken over by bootleggers. Over seven thousand firms have gone out of business since 1967 in New York City alone.[45] As the number of firms in the field declines, the number of employees in the industry follows suit.[46]

¶28 It is estimated that approximately 50% of the nations' illicit cigarette traffic is controlled by organized crime.[47] In the northeast alone, organized crime is estimated to smuggle more than one billion packs of cigarettes each year with a profit of over $105 million.[48] The income from bootlegging swells the pool of capital available to organized crime for investment in both licit and illicit operations. There are indications that organized crime has acquired cigarette distributors in at least one low tax state,[49] as well as in several high tax states.[50] The danger also exists that organized crime may attempt to infiltrate the cigarette manufacturers themselves,

[45] See S. Rep.No. 962, 95th Cong., 2d Sess. 7, reprinted in (1978) U.S. Code Cong. & Ad. News 55185522; ACIR Report, supra note 3, at 21; Forbes, December 15, 1977 at 44.

[46] Id.

[47] S.Rep. No. 962, 95th Cong., 2d Sess. 6, reprinted in (1978) U.S. Code Cong. & Ad. News. 5518, 5521.

[48] ACIR Report, supra note 3, at 21.

[49] Id., at 5.

[50] Forbes, December 15, 1977, at 47; The Philadelphia Inquirer, May 6, 1979, at 14-A.

or at least their export operations.[51] Access to cigarettes destined for export would increase organized crime's profit margin since those cigarettes are not subjected to either federal or state cigarette taxes.[52] In the short run, the manufacturers have no interest in discouraging the traffic in contraband cigarettes since bootlegging increases the consumption of cigarettes, and, therefore the profits of the manufacturers. In the long run, however, the corruption of their sales and export operations would threaten their very existence. Individuals working for the manufacturer who are capable of criminally and civilly implicating the corporation, profit in the short run from bootlegging activities yet do not have the long range perspective necessary to discourage such activities.

¶29 Even as public knowledge of the bootlegging problem increases, so does the amount of traffic itself. Despite optimistic official reports,[53] cigarette bootlegging continues to be a pervasive problem. New means of bootlegging cigarettes have developed[54] and tax collection figures have not increased

[51] Forbes, December 15, 1977, at 48.

[52] Id.

[53] See Newsday, "Clearing the Air Alone 1-95", June 18, 1980 and Binghamton Sunday Press, "New State Stamps expected to slow cigarette bootlegging," June 15, 1980.

[54] In Florida the latest form of bootlegging to present a problem involves the sale of bootlegged cigarettes by charitable organizations to provide funding support for the organization. Members of the organizations are ready purchasers and the profits serve as an easy source of cash for organizations needing extra money. Tobacco Tax News, Tobacco Tax Council of Florida, June, 1980.

in a statistically significant manner that would justify a conclusion of effective enforcement.

¶30 New York is the one state on record as feeling extremely optimistic about solving cigarette bootlegging.[55] Cigarette tax collections have been reported as being up seven million dollars but official figures show an increase of only $4.1 million or 1.26% between March 31, 1979 and March 31, 1980.[56] New York City accounts for the increase; the upstate area actually suffered a tax collection decline.[57] Increased revenue does not, however, automatically permit an inference that bootlegging has decreased. In the same year period, industry officials report an increase in consumption - one explanation for the increase in revenue collections.[58] An additional explanation can be seen in New York City's increase in tourism and retail expenditures over the same period of time.[59] Tourists do not have access to bootlegged cigarettes; their increasing retail purchases of retail cigarettes add to the increased revenue collection. Projections for the future show continued increases, subject to modification depending on changes in the economy. The tourism and retail figures are considered to be conservative estimates.

¶31 New York officials also took to a new tax stamp to substantially decrease bootlegging[60] but industry officials are less optimistic.[61] Even with a new stamp, counterfeiting and corrpution will facilitate the sale of bootlegged cigarettes. New tax stamps will not curb the sale of cigarettes through illicit channels. Cigarettes without an authorized stamp can be sold illicitly through bars, beauty shops, apartment buildings and even post offices and benevolent organizations in some instances.[62]

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[55] Newsday, supra. note 53.

[56] Figures provided by New York Tax Agent Ronald Lewis in an interview in New York City on June 25, 1980. The seven million dollar figure appears in the Binghamton Sunday Press, supra. note 53.

[57] Revenue collection figures were provided by the Tobacco Tax Council, P.O. Box 8269, 5407 Patterson Ave., Richmond, Virginia 23226.

[58] Information given by Arnold Gordon, President of Jack Gordon, Wholesale Tobacco Company, Inc. in Syracuse, New York, on July 2, 1980. Mr. Gordon is also the current president of the Upstate Cigarette Wholesaler's Association. He can be reached at 1-315-422-0207. His company address is 1000 Erie Blvd. W., Syracuse, N.Y.

[59] Tourism and retail figures were obtained from Ms. Lori Miller at the New York Visitor and Information Bureau. (212-397-8252). The expenditure date is from an International Association Convention and Visitor Bureau Survey conducted under the auspices of the United States Travel Data Center in Washington, D.C. The link between retail expenditures, tourists, and increased tax revenue collection was pursued at the suggestion of Morris Weintraub, Editor of Vending Times and head of the Council Against Cigarette Bootlegging. He can be reached at 212-697-3868.

[60] See the Binghamton Sunday Press, supra note 53.

[61] Mr. Weintraub and Mr. Gordon both expressed concern over the stamp's effectiveness, although both were pleased with New York State's concern.

[62] See note 54 supra.

¶32 Solutions through changed tax structures have often been proposed.[63] While a uniform tax rate nationwide would remove the profit motive that perpetuates bootlegging it is not a practical proposal under current political conditions. State taxes are set according to state priorities and revenue needs and any attempts at uniformity would significantly affect state efforts.[64] Low tax states resist the change and blame the problem on high tax states and their "unreasonable" taxes. High tax states are dependent on cigarette tax revenues and consider any uniform reduction a political and fiscal impossibili Political pressures and economic realities make tax solutions highly unlikely.

¶33 Another proposed solution is improved accounting for and licensing of cigarettes coming into the state. A bill to that effect has been submitted in the New York State Assembly but no action has been taken.[65]

¶34 Some records are currently required by statute and many more are kept as a consequence of efficient business practices. Any law endorcement efforts against manufacturers will require procurement and use of existing records.[66]

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[63] ACIR Report, p. 13. See also Second Report of The N.Y.S. Special Task Force on Cigarette Bootlegging and The Cigarette Tax. (December, 1976), p.5. The two reports are available from Al Donati, the Committee's Chairman, at 212-488-5980 or Attn: Al Donati, Two World Trade Center, N.Y., 10047

[64] Id.

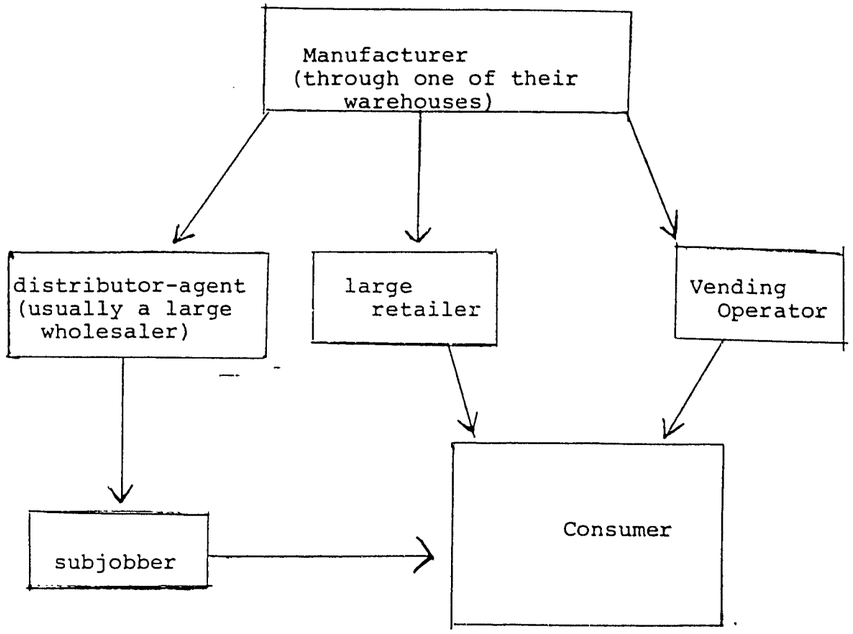
[65] Mr. Donati's office has copies of the bill.

[66] Industry information was provided by Morris Weintraub in a series of telephone conversations.

¶35 Manufacturers should be the target of anti-bootlegging litigation. Manufacturers exercise the ultimate control over the flow of cigarettes from their warehouses to the consumer. Manufacturers have the capacity to control the diversion of cigarettes from legitimate to illegitimate trade.

¶36 In a legitimate operation a cigarette manufacturer sells to a distributor agent. An agent is licensed in his state to stamp cigarettes; this licensing serves as his authorization to order directly from the manufacturer. The agent then stamps the cigarettes and sells them to either a subjobber or a retailer. A subjobber does not have stamping authority so he buys from an agent prior to distributing the cigarettes to retailers. Retailers, such as gas stations and supermarkets, purchase from the subjobber or distributor-agent and sell to the consumer. In some instances vending operators are licensed to stamp cigarettes and serve as a direct link between the consumer and manufacturer. Occasionally large supermarkets get taxing authority so that they too can buy directly from the manufacturer and sell to the consumer. Generally, however, the agent is a large wholesaler who deals in cigarettes as well as cigars, candy and sundries.

¶37 Of these commercial entities, the manufacturer is the most complex in its chain of organization. A manufacturer, as an entity, consists of positions ranging from chairman of the board to "Missionary Men" - the people that put up displays, visit retailers and vending operators, and generally account for and promote the flow of cigarettes from the manufacturer. While parties at all levels of the corporate structure may criminally or civilly implicate the corporation, individuals at each level clearl have different degrees of knowledge and involvement in any



bootlegging enterprises. These materials will define the manufacturer as any individual who can criminally or civilly implicate the corporation, the only constraints being traditional limits imposed by the civil and criminal law.

¶38 Manufacturers are ideal targets for litigation in that they are legally liable and in a position to control bootlegging in a bootlegging operation. Many agents reveal sufficient mens rea to merit punishment but limited resources prevent continued apprehension of all such agents. Successful judgments against one or more of the six major cigarette manufacturers could result in the adoption of effective controls at the source of the cigarette traffic. It would, for example, be physically possible to have all cigarettes stamped and all taxes tabulated for the individual states before the cigarettes left the possession of the manufacturers. The manufacturers could easily be reimbursed for their costs out of the states' increased revenues. Any extra costs involved in the extra storage and stamping would be far less than continued litigation expenses. The stiff penalties available under the Racketeer Influenced and Corrupt Organizations statute[67] (RICO) provide a real incentive for manufacturers to protect themselves through federal anti-bootlegging efforts. Successful RICO litigation could remove the economic advantages of manufacturer facilitation of bootlegging and makes prevention the financially feasible choice.

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[67] 18 U.S.C. §§1961-1968 (1976).

¶39 A changed system of stamp affixation is only one of the anti-bootlegging weapons that a manufacturer possesses. Manufacturers could design in-house record keeping systems with a clear system of authority for double checking.[68] Those with authority for overseeing the inventory and accompanying records would face disciplinary action by the company if any cigarettes disappeared from legitimate channels of trade.[69] Subjecting manufacturers to civil or criminal liability would surely hasten workable in-house solutions.

[68]This would be similar to the standards that the proposed New York bill seeks to establish.

[69]Current recordkeeping procedures are explained in the litigation strategy section of these materials; ¶¶85-111 infra.

III. Manufacturer Liability - The Law

A. Generally

¶40 In 1978, at the urging of enforcement officials and members of the industry, the federal "Trafficking in Contraband Cigarettes" Act was passed.[70]

¶41 Section 2342 of the statute provides that,

> (a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.
> (b) 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.

¶42 Section 2341 (2) defines the key phrase "contraband cigarettes" 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, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than--
> (A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1954 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 ir 1555) or an agent of such person;
> (B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

[70]18 U.S.C. §§2341-2346 (1976 Supp. II, 1979).

(C) a person--
(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for any pay cigarette taxes imposed by such State; and
(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or
(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties[.][71]

The exception created by section 2341 (2) (A) means that a cigarette manufacturer cannot directly violate section 2342(a). Nevertheless, a manufacturer may be criminally liable as a co-conspirator,or accomplice, if his sales facilitate the violation of the statute by one of his distributor-buyers. The distributor may violate section 2342(a) through his membership in a corspiracy to smuggle unstamped cigarettes into a high tax state without the payment of the tax imposed by that state. On the other hand, a distributor's knowing possession of unstamped cigarettes in violation of the law of his state[72] will not violate section 2342(a) unless he also fails to comply with his state's "accounting and payment requirements."[73] Since a distributor can comply with his state's "accounting and payment requirements" by tampering with his stamping machine so that it counts cigarettes without stamping them, he is likely to do so in order to minimize the possibility of detection. Therefore, the focus should be directed at those cases in which the distributor-buyer is part of a cigarette bootlegging conspiracy.

B. Conspiracy/Complicity:General Analysis

¶43 Conspiracy is traditionally defined as an agreement between two or more persons "either to do an unlawful act or a lawful act by unlawful means"[74] In addition, the general conspiracy statute in the United States Code requires an "act to effect the object of the conspiracy."[75] It is necessary to apply a detailed analytical framework to the crime of conspiracy in order to understand how a manufacturer's cigarette sales may violate the federal conspiracy statute.

¶44 The modern mode of analyzing criminal statues begins by determining the class of persons who may violate the statute at issue. It then isolates the elements of the offense: conduct, surrounding (attendant) circumstances, and result. Finally, it determines the kind of culpable state of mind required for each individual element of the offense.[76] The possible states of

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[71] 18 U.S.C. §2341(2) (1978 Supp. II, 1979).

[72] See, e.g., N.C. Gen. Stat. §105-113.20 (1979).

[73] 18 U.S.C. §2341 (2) (1978 Supp. II, 1979).

[74] Rex v. Jones, 110 Eng. Rep. 485, 487 (1832).

[75] 18 U.S.C. §371 (1976).

[76] See United States v. Bailey, 100 S. Ct. 624, 630-32 (1980); S. 1722, 96th Cong., 1st Sess. §§301-303 (1979(; S. Rep. No. 553, 96th cong., 2d Sess. 59-69 (1980); Model Penal Code §2.02, Comment (Tent. Draft No. 4, 1955); W. LaFave & A. Scott, Handbook on Criminal Law 191-95 (1972).

mind are intent[77] (purpose),[78] knowledge,[79] recklessness,[80] and negligence.[81] Certain "strict liability" elements may have no state of mind requirement. The federal general conspiracy statute contains no explicit state of mind requirements.

¶45 Any person, including a corporation,[82] can violate the federal conspiracy statute.[83] The conduct required to violate the statute is agreement.[84] The requisite state of mind for

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[77] A person's state of mind is intentional with respect to--
(1) his conduct if it is his conscious objective or desire to engage in the conduct; or
(2) a result of his conduct if it is his conscious objective or desire to cause the result.
S. 1722, 96th Con., 1st Sess. §302(a) (1979).

[78] A person acts purposely with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
Model Penal Code §2.02(a) (Proposed Official Draft 1962).

[79] A person's state of mind is knowing with respect to--
(1) his conduct if he is aware of the nature of his conduct;
(2) an existing circumstance if he is aware or believes that the circumstance exists; or
(3) a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.
S. 1722, 96th Cong., 1st Sess. §302(b) (1979).

A person acts knowingly with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
Model Penal Code §2.02(b) (Proposed Official Draft 1962).

[80] A person's state of mind is reckless with respect to--
(1) an existing circumstance if he is aware of a substantial risk that the circumstance exists but disregards the risk; or
(2) a result of his conduct if he is aware of a substantial risk that the result will occur but disregards the risk;
except that awareness of the risk is not required if its absence is due to self-induced intoxication. A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.
S. 1722, 96th Cong., 1st Sess. §302(c) (1979).

(80 cont'd)
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
Model Penal Code §2.02 (c) (Proposed Official Draft 1962).

[81] A person's state of mind is negligent with respect to--
(1) an existing circumstance if he ought to be aware of a substantial risk that the circumstance exists; or
(2) a result of his conduct if he ought to be aware of a substantial risk that the result will occur.
A substantial risk means a risk that is of such a nature and degree that to fail to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.
S. 1722, 96th Cong., 1st Sess. §302(d) (1979).

A person acts negligently with respect to a material element of an offense when he sould be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
Model Penal Code §2.02 (d) (Proposed Official Draft 1962).

[82] See e.g. Alamo Fence Co. v. United States, 240 F.2d 179, 181, (5th Cir. 1957).

[83] See 18 U.S.C. §371 (1976).

[84] See Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943); Aikens v. Wisconsin, 195 U.S. 194, 205 (1904).

that element of the offense is intent.[85] The agreement may be tacit rather than explicit.[86] "The proof [of the existence of the agreement], by the very nature of the crime, must be circumstantial."[87] Similarly, intent may be inferred from the circumstances of the individual case.[88]

¶46 Plurality of parties is one of the surrounding circumstances of the crime of conspiracy. The agreement essential to membership in the conspiracy must be between at least two parties.[89] A manufacturer can enter into an agreement with a Distributor-Bootlegger conspiracy through his contact with Distributor. In either case, the state of mind required for this element of the offense is knowledge.[90] Manufacturer must know of the existence of his co-conspirators.[91] He need not know their identity,[92] nor their number.[93]

[85] Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943).

[86] Id. at 714.

[87] Id.

[88] Id. at 713.

[89] See Morrison v. California, 291 U.S. 82, 92 (1934).

[90] See Direct Sales Co. v. United States, 319 U.S. 703,709 (1943); United States v. Falcone, 311 U.S. 205, 208, 210 (1940).

[91] Id.

[92] See Blumenthal v. United States 332 U.S. 539, 557-58 (1947).

[93] See United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944).

¶47 A Manufacturer/Distributor/Bootlegger/Wholesaler conspiracy would fit the "chain" conspiracy pattern. Each member of a "chain" conspiracy implicitly knows of the existence of the other members or "links" necessary to the successful functioning of the conspiracy since he knows the scope of the conspiracy as a whole.[94] He need not know all of the details of the conspiracy.[95]

¶48 Once Manufacturer is a member of a conspiracy, he is liable as a principal for any foreseeable offense committed by a fellow conspirator in furtherance of the conspiracy.[96] He is also liable for any offense committed in furtherance of the conspiracy before he joined it.[97]

¶49 Another surrounding circumstance is that the conspiracy must have an unlawful purpose. Manufacturer, a seller, must know that Distributor, a buyer, intends to supply unstamped cigarettes to a bootlegger before there is any possibility of subjecting Manufacturer to criminal liability; it is not necessary that Manufacturer know that the conduct is illegal.[98]

¶50 Section 371 requires that there be a nexus between the unlawful purpose and the federal government.[99] This attendant

[94] See Blumenthal v. United States, 332 U.S. 539, 556-59 (1947).

[95] Id. at 557

[96] See Pinkerton v. United States, 328 U.S. 640, 645-48 (1946).

[97] See United States v. Sansone, 231 F.2d 887, 893 (2d Cir.), cert denied, 351 U.S. 987 (1956).

[98] Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943)

[99] 18 U.S.C. §371 (1976).

circumstance is jurisdictional and has no state of mind requirement associated with it.

¶51 In addition, section 371, unlike the common law, requires the commission of an overt act in furtherance of the conspiracy during its existence.[100] The act can be caused by any member of the conspiracy.[101] The act can be the substantive offense which is the purpose of the conspiracy;[102] however, the crime of conspiracy has no result requirement.

¶52 In so far as is relevant to the purposes of these materials, the crime of conspiracy is similar to liability resting on a complicity theory. The difference would be that complicity has a result (the completed offense) requirement. The federal complicity statute places no limitation on the type of person who can violate it: a corporation engaged in the manufacture of cigarettes is within its reach.[103]

¶53 Section 2 sets out the conduct element of the offense: "[W]hoever...aids, abets, counsels, commands, induces or procures."[104] The state of mind required for the conduct element of complicity is intent.[105] Manufacturer must intend to aid the Distributor-Bootlegger conspiracy.

[100] Id.; Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943).

[101] See 18 U.S.C. §371 (1976).

[102] Pinkerton v. United States, 328 U.S. 604, 644 (1946).

[103] See 18 U.S.C. §2(1976).

[104] Id.

[105] Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943).

¶54 The existence of the person (or conspiracy) aided is an attendant circumstance of the crime. The requisite state of mind is knowledge.[106] Manufacturer must know the Distributor-Bootlegger conspiracy exists. The person (or conspiracy) aided need not be aware of the aid given or its source.[107]

¶55 Another surrounding circumstance is the purpose of that person (or conspiracy). The necessary state of mind for this element of the offense is knowledge.[108] Manufacturer must know of the use to which the Distributor-Bootlegger conspiracy plans to put cigarettes that Manufacturer sells to Distributor. Nevertheless, Manufacturer need not know that the use is actually illicit.[109]

¶56 The federal complicity statute requires that the crime aided be "an offense against the United States."[110] This surrounding circumstance is both legal and jurisdictional in nature and has no attendant state of mind requirement.

¶57 Unlike conspiracy, complicity has a result requirement. The offense aided must actually be committed.[111] The unlawful objective must be attained. The state of mind required for the

[106] United States v. Falcone, 311 U.S. 205, 210 (1940).

[107] See State ex rel. Martin v. Tally, 102 Ala. 25, 70-76, 15 So. 722, 739-41 (1894).

[108] Direct Sales Co. v. United States, 319 U.S. 703, 709, 711 (1943).

[109] See Mack v. United States, 112 F.2d 290, 292 (2d Cir. 1940).

[110] 18 U.S.C. §2 (1976).

[111] Id.

result element of the offense is intent.[112] Moreover, this is implicit in the requirement that the conduct element of the offer be performed intentionally. Manufacturer must intend that the Distributor-Bootlegger conspiracy smuggle the cigarettes that Manufacturer sells to Distributor into a high tax state.

C. The Pre-Falcone/Direct Sales Cases

¶58 The 1920's and Prohibition brought with them the first group of cases to hold commercial sellers criminally liable when goods they sold were used for an illicit purpose by their buyer. Prior to Falcone[113] and Direct Sales[114] in 1940 and 1943, uniform state of mind requirements for conduct, surrounding circumstance and result did not exist. An analysis of the pre-1940 cases, how ever, reveals that the courts demanded more than that a sale knowingly facilitated the illegal conduct and required generally that the state of mind approach that of intent to aid the conduct itself or profit from it.[115] The question then becomes whether the attendant circumstances sufficiently demonstrate that the supplier shared the intent to achieve the purposes of the buyer. A "stake in the venture" as such was not found to be essential, although it was thought to be relevant.[116]

[112] See United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

[113] United States v. Falcone, 311 U.S. 205 (1940)

[114] Direct Sales v. United States, 319 U.S. 703 (1943).

[115] LaFave and Scott, Criminal Law §61 at p. 466 (1972).

[116] U.S. v Salcido-Medina, 483 F2d 162, 165 (9th Cir. 1973) Cert. denied, 414 U.S. 1070.

¶59 In Rudner v. United States,[117] for example, a seller of whiskey was convicted of conspiracy to violate the National Prohibition Act.[118] The defendant was convicted based on his "repeated sales of whiskey in large quantities...under circumstances amply justifying the conclusion that he knew it was being regularly transported to Canton for general bootlegging purposes."[119] The continuing and frequent sales of large quantities were the attendant circumstances that convinced the court that the whiskey merchant's conduct warranted his being found criminal.[120]

¶60 Pattis v. United States[121] also involved a conspiracy to violate the National Prohibition Act.[122] In this instance, the defendant sold and delivered the materials to be used in making whiskey. He made the sales after being informed of the purpose for which they were being sought, and in addition, made arrangements to sell the whiskey that the other conspirator manufactured.[123] His assistance as well as his promises of future aid demonstrated the defendant's guilt, state of mind, and involvement in the illegal use that his co-conspirator planned.

[117] Rudner v. U.S., 281 F. 516 (6th Cir. 1922)

[118] Id.

[119] Id.

[120] Id.

[121] Pattis v. United States, 17 F. 2d 562 (9th Cir. 1927).

[122] Id.

[123] Id. at 563

¶61 Anstess v. United States[124] is another bootlegged liquor case. In Anstess the defendant seller made only one sale but the sale was of extremely large quantities of whiskey and grain alcohol and was made with knowledge of the intended illegal transportation.[125] The Anstess court noted the contraband nature of the goods.[126] The court defined the defendant's conduct as active participation.[127] The test the court relied on - "...If an inference of guilt may be fairly drawn, the evidence meets the test of legal sufficiency..."[128]- does not meet today's standards. The analysis of the court, however, does reveal a concern that the defendant's level of participation not be punishable absent sufficient circumstances to draw an inference of a guilty state of mind.

D. Falcone v. United States/Direct Sales v. United States

¶62 Prior to Direct Sales the Circuit Courts split over the necessity of intent to further the buyer's use.[129]

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[124] Anstess v. United States, 22 F.2d 594 (7th Cir. 1977).

[125] Id. at 595.

[126] Id.

[127] Id.

[128] Id.

[129] Backun v. U.S., 112 F.2d 635 (4th Cir. 1940) held that knowledge was enough. Backun states; "The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale by merchandise." Id. at 637. United States v. Peoni, 100 2d 401 (1938), the leading case to the contrary, held a "purposive attitude" to be necessary. Id. at 402. Peoni and Backun are both accomplice liability, not conspiracy, cases.

United States v. Falcone and, more particularly, Direct Sales v. United States are the two Supreme Court cases that clarify the standard for criminal liability of the commercial seller. Falcone and Direct Sales make it clear that the key elements of the offense committed by the seller, be it conspiracy or aiding a conspiracy, are the seller's "knowledge the buyer will use the goods illegally,"[130] the seller's knowledge of the existence of the conspiracy in which the buyer is a member[131] and the seller's intent"to further, promote and cooperate in"[132] "the buyer's intended illegal use."[133]

¶63 Absent a confession, an informant, or electronic surveillance, the question then becomes one of the quantity and quality of circumstantial evidence sufficient to prove these state of mind elements of the offense. "The proof, by the very nature of the crime, must be circumstantial and therefore inferential."[134] The factual analyses undertaken by the Supreme Court in Falcone, and Direct Sales provide guidelines for the answer of the evidentiary question, that is, the amount of circumstantial evidence sufficient to infer "intent" as well as "knowledge."

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[130] Direct Sales Co. v. United States, 319 U.S. 703, 709.

[131] Id.; United States v. Falcone, 311 U.S. 205, 210 (1940).

[132] Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943).

[133] Id.

[134] Id. at 714.

¶64 In Falcone several commercial sellers of various "articles of free commerce"[135] were charged with aiding and abetting a conspiracy through their sales of sugar, yeast and cans to members of a conspiracy engaged in "the production of illicit distilled spirits."[136] The sales volume of the defendants was "materially larger during the periods of activity of the illicit still." [137] Several of the sellers had "casual and unexplained meetings"[138] with members of the conspiracy. The Court found that this evidence did no more than show knowledge by the sellers that the goods sold "would be used for illicit distilling." [139] It did not permit the inference that the sellers knew of the existence of the conspiracy. [140] The Court held that without knowledge of the conspiracy between the buyer and others the sellers could not be party to it. [141] Since the government failed to prove each element of the offense charged, the Court affirmed the reversal of the defendants' convictions. [142] (The Court did not consider the issue of conspiracy solely between the seller and buyer.)

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[135] Id. at 710.

[136] United States v. Falcone, 311 U.S. 205, 206, 207.

[137] Id. at 208, n.1.

[138] Id. at 210.

[139] Id. at 209.

[140] Id. at 210.

[141] Id.

[142] Id. at 210-11.

¶65 In Direct Sales the defendant corporation, a registered drug manufacturer and mail-order wholesaler, was charged with conspiracy to violate the Harrison Narcotic Act by selling morphine sulphate to a registered physician who distributed the drug illegally. [143] The physician, Dr. Tate, purchased the drug in large quantities, at frequent intervals, and over a long period of time (seven years) in response to an aggressive direct mail merchandizing campaign by Direct Sales. [144] Direct Sales offered fifty per cent discounts on narcotics, and offered morphine sulphate for sale in 500, 1000, and 5000 tablet lots while its competitors offered 100 tablet lots. [145] The Bureau of Narcotics had informed Direct Sales that it was being used as a drug source by physicians violating the Harrison Narcotic Act, and that the average physician had legitimate need for only 200 to 400 quarter grain tablets of morphine sulphate per year. [146] From November 1937 to January 1940 alone, Dr. Tate purchased 79,000 half grain tablets from Direct Sales. [147] Throughout its long course of dealing with Dr. Tate, Direct Sales complied with the provisions of the Harrison Narcotic Act as to the use of certain required order forms. [148]

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[143] Direct Sales Co. v. United States, 319 U.S. 703, 704 (1943).

[144] Id. at 705-07.

[145] Id.

[146] Id. at 707.

[147] Id. at 706.

[148] Id. at 703-04.

¶66 The Supreme Court distinguished between the types of goods sold in Falcone and Direct Sales. The Court classified the sugar, yeast, and cans in Falcone as "articles of free commerce...not restricted as to sale by order form, registration, or other requirements. When they left the seller's stock and passed to the purchaser's hands, they were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations." [149] On the other hand, the Court classified the morphine sulphate in Direct Sales as a "restricted commodity." [150] The Court found that the difference between the two types of goods "arising from ...[morphine sulphate's] inherent capacity for harm and from the very fact...[that it is] restricted, makes a difference in the quantity [but not the quality] of proof required to show knowledge that the buyer will utilize the article unlawfully." [151] "Without...[that] knowledge, the intent [to conspire] cannot exist." [152]

¶67 The closer a good is to the "restricted" end of the "restricted"--"free commerce" spectrum of commodities posited by the Court in Direct Sales, the less proof is necessary to infer that the seller knew of the buyer's planned illegal use of the good. Moreover, the more "restricted" the good, the greater the weight to be given to additional factors such as

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[149] Id. at 710.

[150] Id. at 711.

[151] Id.

[152] Id.

quantity of sales, frequent sales, a long course of dealing between seller and buyer, sales stimulation by the seller, the form of the sales as compared to the industry norm, the seller's profit motive or other "stake in the venture," and so forth. [153] These same factors may be used to infer the seller's intent to conspire with the buyer. [154] The difference in the proof required for two elements of the offense is one of quantity rather than quality of evidence. [155] The pre-Direct Sales Cases are valuable in their application of similar standards. Even without the definite articulation of an intent standard, the court evaluated the surrounding circumstances to determine legal liability.

¶68 Because Direct Sales is a conspiracy inter sese case, it does not explicitly discuss the type or quantum of evidence necessary to prove the existence of a conspiracy between buyer and others, joined or aided by the seller. Since the existence of a conspiracy is analytically an intermediate step between the seller's knowledge of the buyer's purposed illegal use of the goods sold and the seller's intent "to further, promote and cooperate in" [156] "the buyer's intended illegal use" [157] of the goods, it follows that the quality of evidence required is the same as that necessary for these other two elements of the

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[153] Id. at 705, 707, 711, 712, 713.

[154] See id. at 712.

[155] See id. at 712-13.

[156] Id. at 711.

[157] Id.

offense.[158] It likewise follows that the quantity of evidence required is more than that needed to infer knowledge of the buyer's intended illicit use, and less than that needed to infer the seller's intent to conspire. No particular evidentiary factor or position on the "restricted"--"free commerce" spectrum of goods is necessary to infer intent or either type of knowledge.

¶69 In Direct Sales the Supreme Court used tobacco as an example of a free commerce good. That classification of tobacco may have been appropriate in 1943, but it is hardly accurate today. In 1943 thirty-one states had cigarette taxes, but only one, Louisiana, had a tax greater than five cents per pack.[159] Cigarette bootlegging did not become a major problem until the late 1960's when tax rates rose above ten cents per pack.[160] At that time, the states began to respond by imposing major regulatory schemes upon the cigarette traffic. Today, the traffic in cigarettes, like the traffic in morphine sulphate, is heavily regulated.[161] In the case that upheld the constitutionality of the Jenkins Act the court reasoned that requiring monthly reports on cigarettes was constitutional even though other tobacco products are not similarly regulated, because Congress regulates based on

[158] See id. at 709-10.

[159] Tobacco Tax Council, The Tax Burden on Tobacco 9 (1979). See Table 2 in appendix.

[160] ACIR Report, supra note 3, at 1, 9.

[161] See, e.g., N.C. Gen Stat. §§ 105-113.2 - .40 (1979); Pa. Stat. Ann. tit. 72, §3169.101 - .1203 (Purdon) (Supp. 1979).

the existing need.[162] This decision indicates the special, controlled nature of cigarettes today. Moreover, unstamped cigarettes, like morphine sulphate, have an "inherent capacity for harm."[163] Many states depend on the income from cigarette taxes to meet their revenue needs. Every unstamped, unrestricted pack of cigarettes endangers the economic life of these states. Cigarette bootleggers make up the major outlet for those cigarette "which get...outside the channels of legitimate trade."[164] Today, cigarettes are properly classified as restricted goods.

E. Post Falcone/Direct Sales Cases

¶70 Falcone and Direct Sales remain essential to the analysis of fact patterns in which a commercial seller provides goods or services that a buyer uses for an illicit purpose. Few of the subsequent cases, on either the federal or the state level, however, make explicit use of the methodology developed by Falcone and Direct Sales, and fewer yet do anything to clarify it. Many courts simply cite Falcone and Direct Sales as sources for some

[162] See Consumer Mail Order Ass'n. of America v. McCarth, 94 F.Supp. 705 (1950). aff'd, 340 U.S. 925

[163] Direct Sales Co. v. United States, 319 U.S. 703, 711, (1943)

[164] Id. at 710.

general principle of conspiracy law.[165] Other courts apply the two cases to situations in which the seller's possession of the goods sold was itself illegal,[166] or to other situations insufficiently analagous to warrant consideration of the publishe opinions.[167] Nevertheless, the fact patterns and analyses in several cases are worth examination.

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[165] E.g., United States v. Schoenhut, 576 F.2d 1010, 1028 (3d Cir. 1978) (relevance of stake in venture to proof of conspiracy); United States v. Powell, 564 F.2d 256, 258 (8th Cir. 1977) (use of circumstancial evidence to prove conspiracy); United States v. Haldeman, 559 F.2d 31, 112 (D.C. Cir. 1976) (nature of conspiratorial intent); United States v. Salcido-Medina, 483 F.2d 162, 165 (9th Cir. 1973) (stake in venture not essential to proof of conspiracy); La Caze v. United States, 391 F.2d 516, 519 (5th Cir. 1968) (use of circumstantial evidence to prove conspiracy); Stanley v. United States, 245 G.2d 427, 430 (6th Cir. 1957) ("co-conspirator" must know of existence of conspiracy).

[166] E.g., United States v. Monroe, 552 F.2d 860, 862 (9th Cir. 1977) (conspiracy to distribute heroin); United States v. Mayes, 512 F.2d 637, 647 (6th Cir. 1975) (conspiracy to transport, sell, or receive stolen vehicles); United States v. Salerno, 485 F.2d 260, 262 (3d Cir. 1973) (conspiracy to transport stolen securities in interstate commerce); United States v. Butler, 446 F.2d 975, 979 (10th Cir. 1971) (conspiracy to sell heroin); United States v. Chamley, 376 F.2d 57, 60 (7th Cir. 1967) (conspiracy to transport forged securities in interstate commerce); Bartoli v. United States, 192 F.2d 130, 131-32 (4th Cir. 1951) (conspiracy to sell counterfeit currency).

[167] E.g., United States v. Consolidated Packaging Corp., 575 F. 2d 117, 126 (7th Cir. 1978) (conspiracy to fix prices); United States v. Klein, 515 F.2d 751, 753 (3d Cir. 1975) (conspiracy to commit mail fraud); United States v. Nelson, 419 F.2d 1237, 1240 (9th Cir. 1969) (robbery of federally insured financial institution); Mosheim v. United States, 285 F.2d 949, 952 (5th Cir. 1960) (conspiracy to swear falsely in a bankruptcy proceeding); United States v. Johnson, 165 F.2d 42, 49 (3d Cir. 1947) (conspiracy to obstruct justice); Quirk v. United States, 161 F.2d 138, 141 (8th Cir. 1947) (conspiracy to purchase corn for more than legal ceiling price).

¶171 In United States v. Kertess,[168] the defendant, a chemical dealer, was charged with two conspiracies to export platinum group metals in violation of regulations promulgated pursuant to a presidential proclamation on July 2, 1940.[169] The defendant falsely told those he purchased the metals from that they would not be exported.[170] Regulations required that all sellers of platinum group metals identify themselves in applications for export licenses.[171] The defendant had a co-conspirator apply for the necessary license and identify himself, rather than the defendant, as the seller.[172] The application was approved, and the metals were exported without a valid license issued in the name of the defendant seller.[173] In the second conspiracy, the defendant exported thirty-five ounces of rhodium via a co-conspirator-courier without applying for an export license.[174] The transaction was not entered on the defendant's books, and the relevant files were not kept at his office.[175] The court

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[168] 139 F.2d 923 (2d Cir. 1944).

[169] Id. at 925-29.

[170] Id. at 927.

[171] Id. at 925-26.

[172] Id.

[173] Id. at 926.

[174] Id. at 927-28.

[175] Id. at 928-29.

seemingly decided that the violation of the export regulations and the failure to treat the rhodium shipment as a normal business transaction satisfied the evidentiary requirements of Falcone and Direct Sales.[176]

¶72 In United States v. Loew,[177] the defendant, a grocer, sold sugar to bootleggers and the sales led to a charge of conspiracy to run unregistered stills.[178] Defendant took sugar orders by telephone in code rather than openly at his store.[179] He delivered the sugar to a coalyard at night.[180] He failed to keep records of his sugar sales as required by government regulations.[181] One bootlegger told defendant that the sugar purchases were for a "syndicate."[182] The court found that this evidence of unusual transactions, lapses in record keeping, and awareness of a "syndicate" proved knowledge of the buyers' illicit use of the sugar, knowledge of the existence of the conspiracy, and intent to join the conspiracy.[183]

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[176] Id. at 927-29.

[177] 145 F.2d 332 (2d Cir. 1944).

[178] Id.

[179] Id.

[180] Id.

[181] Id. at 332-33.

[182] Id. at 332.

[183] Id, at 332-33.

¶73 In United Stated v. Piampiano,[184] the defendant, a sugar supplier, was charged with conspiracy to violate the internal revenue law through the operation of an illicit still.[185] Defendant supplier abruptly began purchasing large quantities of sugar from his wholesaler.[186] He paid cash, and concealed the purchases from his partners.[187] He picked up the sugar in an unmarked truck rather than in a marked partnership truck.[188] The truck used was eventually found at a raided still loaded with sugar from defendant's wholesaler.[189] In two conversations the defendant revealed knowledge of the still and its operations.[190] The court found that the evidence of the unusual nature of the sugar transactions, defendant's efforts to conceal those transactions, and defendant's conversations about the still with others proved knowledge of the illegal use to which the sugar was put, knowledge of the existence of the conspiracy, and intent to participate in the conspiracy under Direct Sales.[191]

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[184] 271 F.2d 273 (2d Cir. 1959).

[185] Id.

[186] Id. at 156.

[187] Id.

[188] Id.

[189] Id.

[190] Id. at 274-75.

[191] Id.

¶174 In United States v. Grunsfeld [192] the named defendant was charged with conspiracy to manufacture and distribute phencyclidine (PCP).[193] Defendant chemist sold three or four large shipments of laboratory equipment and chemicals to a member of the conspiracy.[194] Defendant's profits were large, and, in two instances, were greater than the cost of the goods sold.[195] The articles sold were "hard-to-get items...often used in the production of illegal drugs."[196] The court pointed to the level of defendant's profits, and stated that "he promoted the very purposes of the conspiracy rather than merely supplying it."[197] Implicitly the court applied the "stake in venture" factor mentioned in Direct Sales.[198] The court distinguished Falcone by noting the "hard-to-get" and harmful nature of the goods sold.[199] Whether defendant was a commercial seller is unclear on the facts.

¶175 In People v. Lauria[200] the defendant, who operated a telephone answering service, and three prostitutes, who subscribed to his service, were charged with conspiracy to commit prostitution.[201] The appellate court affirmed the lower court order setting aside the indictment.[202] Defendant admitted knowing that some of his customers were prostitutes.[203] The Lauria court found it permissible to infer from this evidence that defendant knew his service was being used for illegal purposes, but the court found no basis for inferring that defendant intended to further a criminal conspiracy.[204] Nevertheless, the court stated that,

> Inflated charges, the sale of goods with no legitimate use, sales in inflated amounts, each may provide a fact of sufficient moment from which the intent of the seller to participate in the criminal enterprise may be inferred. In such instances participation by the supplier of legal goods to the illegal enterprise may be inferred because in one way or another the supplier has acquired a special interest in the operation of the illegal enterprise. His intent to participate in the crime of which he has knowledge may be inferred from the existence of his special interest.205

¶176 In dictum, the court stated that "a supplier who furnished equipment which he knows will be used to commit a serious crime [a nonregulatory felony] may be deemed from that

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[192] 558 F.2d 1231 (6th Cir. 1976).

[193] Id. at 1233.

[194] Id. at 1234, 1236.

[195] Id. at 1236.

[196] Id.

[197] Id.

[198] See Direct Sales Co. v. United States, 319 U.S. 703, 713 (1943).

[199] 558 F.2d at 1236.

[200] 251 Cal. App, 2d 471, 59 Cal. Rptr. 628 (1967).

[201] Id. at 475, 59 Cal. Rptr. at 630.

[202] Id. at 473, 483, 59 Cal. Rptr. 628, 635, 636.

[203] Id. at 475, 477, 59 Cal. Rptr. at 630, 631-32.

[204] Id. at 477, 59 Cal. Rptr. at 632.

[205] Id. at 480, 59 Cal. Rptr. at 633-34.

knowledge alone to have intended to produce the result."[206] The court relied primarily upon two English non-conspiracy, non-seller cases for this proposition.[207] In Direct Sales the Supreme Court noted that "[t]here may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken."[208] Under Direct Sales the key is the evidentiary showing,[209] not whether goods sold were used to commit a felony.[210] The Lauria dictum should not, therefore, be relied upon in the analysis of all commercial sales transactions under federal law.

F. RICO

¶77 Title IX of the Organized Crime Control Act of 1970,[211] Racketeer Influenced and Corrupt Organizations (RICO),[212] provide

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[206] Id. (emphasis in original).

[207] Regina v. Bainbridge, [1959] 3 W.L.R. 656 (one who purchased oxygen cutting equipment for another knowing it would be used for breaking and entering held guilty as accessory though without knowledge that any specific premises were target); Sykes v. Director of Public Prosecutions, [1962] A.C. 528 (one who passively concealed from authorities his knowledge of receipt of stolen firearms by others held guilty of misprison of felony, extant common law misdemeanor. See also National Coal Board v. Gamble, 42 Crim. App. 240 (1958) (Coal seller whose employee knew he overloaded purchaser's lorry held guilty of aiding and abetting purchaser who drove overloaded lorry on public highway).

[208] Direct Sales Co. v. United States, 319 U.S. 703, 712 (1943)

[209] Id.

[210] See People v. Lauria, 251 Cal. App. 2d 471, 480-82, 59 Cal. Rptr. 628, 634-35 (1967)

[211] Pub. L. No. 91-452, 84 Stat. 922 (1970).

[212] 18 U.S.C. §§1961-1968 (1976).

another means of attacking cigarette bootlegging. Sections 1962(c) and (d) of RICO are central to the approach. Section 1962(c) provides 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 unlawful debt.[213]

¶78 Section 1962(c) may be violated by "any person"[214] employed by or associated with an enterprise engaged in interstate commerce. Section 1961(3) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property."[215] A cigarette manufacturer is a person for the purposes of RICO. Such a person may violate the statute by conducting, or participating in the conduct of an enterprise's affairs.[216] Section 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity."[217] A cigarette bootlegging enterprise conceptualized as an association in fact could encompass, for example, a North Carolina manufacturer,

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[213] 18 U.S.C. §1962 (c) (1976).

[214] 18 U.S.C. §1962(c) (1976).

[215] 18 U.S.C. §1961(3) (1976).

[216] 18 U.S.C. §1962(c) (1976). See note 215 supra for text.

[217] 18 U.S.C. §1961(4) (1976).

a North Carolina distributor, an interstate trucker, a Pennsylvania wholesaler, and a Pennsylvania retailer. The enterprise's affairs must be conducted "through a pattern of racketeering activity."[218] Section 1961(1) defines "racketeering activity" as any one of eight types of state felonies or twenty-five types of federal crimes.[219] The federal cigarette bootlegging statute[220] is one of the enumerated types of racketeering activity. Section 1961(5) limits the term "pattern or racketeering activity" by requiring two acts of racketeering activity committed within ten years of each other.[221] The two acts must be related to a common enterprise; they cannot be committed in isolation.[222] Thus, two acts of cigarette bootlegging could bring an enterprise within the scope of section 1962(c).

¶79 Section 1962(d) provides that"[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." [223] RICO's enterprise concept is at the core of section 1962(d) since it is central to the three substantive RICO offenses.[224] Because

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[218] 18 U.S.C. §1962(c) (1976).

[219] 18 U.S.C. §1961 (1) (1976).

[220] 18 U.S.C. §2341-2346 (1978 Supp. II, 1979).

[221] 18 U.S.C. 1961(5) (1976).

[222] See S.Rep. No. 617, 91st Cong., 1st Sess. 79 (1969).

[223] 18 U.S.C. §1962(d) (1976).

[224] 18 U.S.C. §1962 (a), (b), & (c) (1976).

of the multi-faceted nature of the RICO enterprise, a wide-ranging pattern of activity can be prosecuted as one conspiracy.

¶80 "To be convicted as a member of an enterprise conspiracy [under section 1962(d)], an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes."[225] An agreement to commit the two predicate offenses is not enough. There must be an agreement to become associated with an enterprise whose affairs are conducted through a pattern of racketeering activity. The analytical and evidentiary guidelines developed by Falcone and Direct Sales are applicable to RICO.

¶81 Section 1963(a) of RICO 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."[226] Section 1963(a) (1) mandates the forfeiture of "any interest... acquired or maintained in violation of Section 1962."[227] The phrase "any interest" includes the profits generated by the RICO enterprise.[228] Section 1963(a) (2) mandates the forfeiture of "any interest in...a source of influence over, any enterprise

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[225] United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), cert denied, 439 U.S. 1050 (1978) (emphasis in original).

[226] 18 U.S.C. 1963(a) (1976).

[227] 18 U.S.C. 1963(a)(1) (1976).

[228] Contra, United States v. Marubeni American Corp., 611 F.2d 763, 766, 769 (9th Cir. 1980) (RICO forfeiture reaches only interests in enterprises). But see J. Trojanowski United States v. Marubeni America Corp. and the Scope of RICO Forfeiture in 1 Materials on RICO 378a (G. Robert Blakey ed 1980).

...established, operated, controlled, [or] conducted...in violation of section 1962."[229]

¶82 In addition, civil remedies modeled after those of the antitrust laws are available under section 1964 of RICO. Section 1964(a) provides for "appropriate" injunctive relief to be addressed to violations of section 1962.[230] The court may enjoin any person, including a corporation, from engaging in section 1962 conduct. It may also order reorganization, divestiture, or dissolution. Under section 1964(c) "any person injured in his business or property by reason of a violation of section 1962" may sue for treble damages.[231] A state deprived of its tax revenues by a cigarette bootlegging enterprise would be such an injured party. Proceeding civilly under RICO means that normal discovery is available, and that the burden of proof need only meet the "preponderance of the evidence" standard.

¶83 On the other hand, the federal cigarette bootlegging statute provides for a penalty of up to five years of imprisonment, or a fine of up to $100,000, or both.[232] If a felony was the object of the conspiracy, the federal general conspiracy statute provides for a penalty of up to five years of imprisonment, or a fine of up to $10,000 or both.[233] The federal

[229] 18 U.S.C. 1963(a) (2) (1976).

[230] 18 U.S.C. 1964(a) (1976).

[231] 18 U.S.C. 1964(c) (1976).

[232] 18 U.S.C. §2344 (a) (1978 Supp. II, 1979).

[233] 18 U.S.C. §371 (1976).

complicity statute makes the aider and abettor punishable as a principal in the crime committed.[234] The relative impact of the penalties and remedies available under RICO requires that serious consideration be given to proceeding under that statute.

¶84 The standards set forth in these materials can be met in cigarette bootlegging litigation against manufacturers. To perpetuate bootlegg operations, conspirators alter records, make incriminating and/or false statements, initiate illicit transactions, attempt to conceal certain sales, maintain continuing relationships with buyers who are of questionable integrity, and engage in enough other activities to create a pattern of surrounding circumstances to permit an inference that the seller intends to "further, promote and cooperate" in "the buyer's intended illegal use."[235]

IV. Litigation Strategy[236]

A. Standards to Meet

¶85 To convince a jury by a preponderance of the evidence of the manufacturer's guilt of aiding and abetting or conspiracy to violate the federal cigarette bootlegging statute and RICO,

[234] 18 U.S.C. §2 (1976).

[235] Direct Sales v. United States, 319 U.S. 703, 711 (1943).

[236] These materials delineate a litigation strategy for prosecuting cigarette manufacturers. Consequently all of the information and people designated as important for the prosecutive effort have been identified with manufacturer liability in mind. This strategy can be modified for other types of prosecutorial efforts but should not be viewed as being comprehensive as to the legal liability of any other parties. Different types of inculpatory evidence exist for each party and each type of bootlegging operation.

enough evidence must be offered to the jury to permit an inference of the manufacturer's requisite state of mind. The task can be framed with the jury instructions in mind. The following instructions explain the elements for a conspiracy conviction:

§ 27.07 Consideration of Evidence-Success of Conspiracy Immater[illegible] Definition of "Overt Act"

> In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully[237] became a member of the conspiracy.
>
> If it appears beyond a resonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and that the (a) defendant willfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common object or purpose and in fact may have failed of so doing.
>
> The extent of any defendant's participation, moreover, is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in the conspiracy.
>
> An "Overt act" is any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

¶86 For aiding and abetting the result requirement must be added and the agreement requirement omitted.[238]

¶87 The key to securing convictions against the manufacturer is the presentation of enough evidence for the jury to find or infer the necessary culpability of the manufacturer. Little doubt can be expressed on the proposition that the conduct itself (the sale of cigarettes) facilitates the bootlegging.

B. Gathering The Evidence - Pre-Complaint

¶88 An accumulation of evidence should begin with an analysis and compilation of the literature on bootlegging that is publicly available. Many general articles on cigarette bootlegging have been written, as have case studies of specific bootlegging operations.[239] Morris Weintraub, head of the Council Against Cigarette Bootlegging, maintains an extensive library on bootleg information.[240] He should be contacted at the initial stage of investigation for documents and general assistance.

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[237] The term "willfully" has a broad meaning in criminal law and can mean intentionally, knowingly or recklessly. See Final Report of the National Commission on Reform of Federal Criminal Laws, §302(1)(e)(1971). In the conspiracy context the cases require a knowledge of the existence of the conspiracy and the "defendant" seller's intent to "further, promote and cooperate in" the intended illegal use. See the discussion of Direct Sales in these materials. This instruction is from Dewitt and Blackmor, Federal Jury Practice and Instructions Civil and Criminal (1977).

[238] See the discussion of aiding and abetting in paragraphs 53-57 of these materials.

[239] See The Philadelphia Inquirer, May 6-9, 1979 for an extensive discussion of cigarette bootlegging in Pennsylvania. See also Forbes, Dec. 15, 1977, 43-48; Newsweek, Feb. 25, 1980, at 51; ACIR Report, supra note ; Combatting Cigarette Smuggling, Law Enforcement Assistance Administration U.S. Department of Justice (January, 1976); New York State Reports, supra note 63.

[240] See note 59, supra.

¶89 Bootleg cases should be the second source of information. They provide not only general background material about bootlegging operations and applicable laws, but also lead to other information sources.[242]

¶90 After the preliminary reading, two groups of people should be contacted; inhouse people and "out-of-house", but sympathetic people. In-house people are those enforcement people with information about bootlegging. As preparation for the arrest of seven bootleggers in June of 1980, New York State tax agents worked extensively in North Carolina.[243] This leg work resulted in the accumulation of specifics about industry sales patterns and techniques as well as knowledge of low tax state enforcement efforts. Pennsylvania officials who participated in efforts to curtail bootlegging in that state possess valuable information about the cigarette industry.[244]

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[241] See generally United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977) United States v. Wholesale Tobacco Distributors of New York, et al., 1979 - 1 Trade Cas. (CCH) ¶62,588 (S.D.N.Y., April 18, 1979), United States v. Wholesale Tobacco Distributors of New York, Inc. 1977-1 Trade Cas. (CCH) ¶61,535 (S.D.N.Y., June 30, 1977).

[242] The materials may, for example, mention enforcement officers, company officials or industry officials who can serve as valuable sources of information. Written materials may also be mentioned.

[243] See Newsday "Clearing the Air Alone 1-95", June 18, 1980. Agent John Mullins also mentioned his trip to North Carolina in a phone conversation with one of the authors of this paper on June 18, 1980.

[244] See The Philadelphia Inquirer, May 6, 1979, at 1-A, The Philadelphia Inquirer, May 7, 1979 at 1-A, The Philadelphia Inquirer, May 8, 1979, at 1-A.

¶91 Out-of-house sources include industry officials known to be sympathetic to major enforcement efforts and journalists who have investigated bootlegging.[245] Inhouse and out-of-house people are likely to offer different perspectives on bootlegging. Although they share a familiarity with bootlegging, the nature of their positions leads to different enforcement theories. The conflict in theories maximized their usefulness at this stage by forcing out more information and constantly raising questions.

¶92 After reviewing the literature and interviewing these sources,[246] an analysis of statistical information should be completed. Tax, consumption and inventory figures are generally not readily available, but at this stage of the investigation a broad knowledge of source assures accessibility. The Tobacco Tax Council and individual state tax agencies[247] constantly update this information for their own files. With cooperation from these sources industry statistics can be obtained. State laws reveal which agencies keep documents on the cigarette industry and what documents are required. Individual manufacturers,

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[245] Note 239 upra lists articles, the authors of which should be contacted.

[246] The Council keeps a great deal of statistical information and also keeps a file of general bootleg information. For information, contact:

June Sears
Research Manager
Tobacco Tax Council
5407 Patterson Avenue
Richmond, Virginia 23226

[247] Generally, the State Tax Information is not as easy to obtain, but agents should certainly attempt to get the information from both places, so comparisons can be made.

distributors, retailers and other industry agents maintain extensive records as a result of federal and state requirements and the demands of running an efficient business. Whatever documents can be obtained without formal discovery should be sought as early as possible; preferably prior to the filing of the complaint. Confidential documents can be sought when formal discovery begins.

¶93 The Jenkins Act, 15 U.S.C. §§ 375-378[248] requires invoice reports and basic business information for certain cigarette sales. The text reads:

> (a) Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall-
> (1)first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement of offer is disseminated a statement setting forth his name and trade name(if any), and the address of his principal place of business and of any other place of business; and
> (2)not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.
> (b)The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

¶94 This statute was directed primarily at mail order bootlegging; consequently, it is of limited use in the fight against today's bootlegging.[249] It does, however, indicate something about the type of industry documents that are generally kept.[250]

¶95 The federal "Trafficking in Contraband Cigarettes"[251] Statute also has a record keeping provision. Section §2343 provides:

> (a) Any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Secretary may prescribe by rule or regulation. The Secretary may require such person to keep only-
> (1) the name, address, destination (including street address),vehicle license number, driver's license number, signature of the person receiving such cigarettes, and the name of the purchaser;
> (2) a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another); and
> (3) a declaration of the name and address of the recipient's principal in all cases when the recipient is acting as an agent.
> Such information shall be contained on business records kept in the normal course of business. Nothing contained herein shall authorize the Secretary to require reporting under this section.
> (b) Upon the consent of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction, or pursuant to a

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[248] 15 U.S.C. §§375-378 (1976).

[249] ACIR Report, p. 27.

[250] Any bootlegg statute with a record-keeping provision will be useful for the information about types of records that it provides. It also aids in inferring what additional documents are generated as a result of the requirements.

[251] 18 U.S.C. §§2341-46 (1978 Supp. II, 1979).

> duly issued search warrant, the Secretary may enter the premises (including places of storage) of such person for the purpose of inspecting any records or information required to be maintained by such person under this chapter, and any cigarettes kept or stored by such person at such premises.

¶96 In the recent arrest of seven cigarette smugglers the government charged the men with violations of the Jenkins Act and the contraband cigarette act.[252]

¶97 In addition to federal statutes designed to curb bootlegging, individual state departments of revenue require that certain records be kept.[253] Noncompliance is punishable by retraction of licenses as well as by criminal penalties.

¶98 In North Carolina, one of the three lower tax states and home of production facilities of four out of the six major manufacturers, the cigarette tax law[254] contains extensive reportion provisions. Requirements include monthly reports from distributors,[255] and in some instances, from manufacturers.[256]

¶99 Beyond these required reports are the reports that the businesses choose to keep. Whether for in-state statutory

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[252] The indictment is on file in the United States District Court in Norfolk, Virginia.

[253] Contact individual state tax commissioners initially to learn of statutory and administrative requirements. That is the quickest way to learn of the varied types of requirements that may exist in each state.

[254] Taxation, §§105-113.2 to 105-113.40.

[255] §105-113.18(1)

[256] §105-113.10

compliance, statutory requirements of purchasers,[257] or as a matter of business custom, numerous documents are generated in the series of transactions that carry cigarettes from the manufacturer to the consumer.

¶100 Manufacturers, throughout the country, store cigarettes in large warehouses that generally each service several states. When the manufacturer ships cigarettes to the warehouse the warehouse takes inventory and prepares complete inventory records. Copies of the records are sent to the manufacturer so that both the warehouse and the manufacturer possess copies. This is the first level of recordkeeping. The next transaction is the sale of cigarettes to an authorized agent in another state.[258] Generally these sales are based on standing orders. Changes occur only if a modification is required. The warehouse bills the purchaser and retains a copy for the warehouse records. A copy of every bill that the manufacturer (or his warehouse) sends to the agent goes to the tax commissioner in the agent's state. When delivery to the agent is made the agent signs the invoice and keeps a copy for his files. The agent will have a certain time period to pay, often with discounts if early payment is made.

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[257] When one level of the industry - the purchaser, in this instance - is required to keep certain documents, that requirement has an effect on the rest of the industry. The seller will maintain duplicate records and/or use special forms to assist the buyer's compliance with statutory requirements.

[258] Generally statutes require that to have the authority to purchase, an agent must have the authority to affix the state stamp in the state where the sale to the ultimate consumer will be completed.

¶101 The distributor-agent sends cigarettes to and bills the retailer. Some distributors bill by brand, others by the size of the cigarette. The retailer receives a copy of the bill with the cigarettes and generally may pay cash or pay on credit. Retailers then sell to consumers, maintaining sales records through inventory and sales receipts.

¶102 In some cases retailers purchase from subjobbers who have purchased from wholesalers. In these instances another level of documents exists.

C. Using the Evidence

¶103 Any information obtained should be analyzed to provide a working picture of sales patterns. With these records the areas of illegal trafficking can be roughly identified. Obviously, a crystallized picture will not emerge until the final phases of civil discovery, but with this information the problem can be defined with enough particularity to file the complaint.

D. Gathering the Evidence - Post-Complaint

¶104 Upon the filing of the complaint formal discovery begins. Subpoenas and depositions[259] are the two most useful discovery tools for this investigation. Both should be used

[259] What follows are checklists for oral and written depositions from 8 Federal Prodedural Forms, Lawyers Edition. Oral depositions should be used whenever possible to maximize this stage's effectiveness. Precise questioning through written depositions is simply not possible. The extra information obtained justified the additional cost.

§ 23:61 Checklist-Procedural steps involved in initiating deposition on oral examination [FRCP 30]

.Commencement of action
.Stipulation or motion for leave of court to take deposition when
-Deposition to be taken by plaintiff and prior to 30 days after service of summons and complaint on defendant, and prior to any discovery initiated by defendant [§§23:72, 23:91]
-Deposition to be taken of prisoner [23:81]
.Special notice by plaintiff for taking deposition within 30 days of service of summons and complaint and without leave of court [§23:71]:
-Statement regarding reason for early taking
--Person to be examined is about to depart district where action is pending and more than 100 miles from place of trial; or
--Person to be examined about to depart United States; or
--Person to be examined bound on a voyage to sea
-Indication of unavailability of person unless deposition taken within 30-day period
-Specification of facts supporting statement
-Signature of plaintiff's attorney
-Contents of Standard notice (see next item)
.Stipulation or motion for order, that deposition be recorded by other than stenographic means, if desired [§§23:171, 23:172]
.Issuance of subpoena to non-party witness [§§23:111,23:112]
.Notice of examination, without leave of court [§23:94]:
-Time and place for taking deposition
-Name and address of each person to be examined, if known; or, if name not known, general description sufficient to identify person or particular class or group
-If subpoena duces tecum is to be served on deponent, include or attach designation of materials to be produced at deposition
-If party to be deponent, and when applicable, instead of subpoena duces tecum attach request for production of documents or things under FRCP 34 [§§23:291 et seq.]

§23:62 Checklist-Procedural steps involved in initiating deposition on written questions [FRCP 31(a)]

.Commencement of action
.Stipulation, if possible and desired, for taking deposition on written questions, to include [§§23:92, 23:93]:
-Names of counsel and their agreement to stipulate
-Names and address of person to be deposed
-Place of deposition
-Designation of any documents or things to be produced
-Name and title of officer to preside at deposition
.Motion for leave of court to depose prisoner on written questions [§23:81]
.Notice of taking deposition on written questions, without leave of court[§23:96]:
-Written questions to be propounded by presiding officer
-Name and address of person to answer questions, if known, and if not, general description of person to answer

with the aim of obtaining evidence that convinces a jury of the manufacturer's knowledge of and intent to participate in bootlegging operations. To narrow the task from the outset, a time period - for example, the 1979-80 fiscal year - from which documents will be requested, should be chosen.

¶105 The subpoenas are potentially most valuable for:

1) identifying where the cigarettes are diverted from the flow of legal traffic and

2) demonstrating the knowledge of individuals at various levels of the company about the company's facilitation of illegal traffic.

¶106 To achieve the first of these goals, the books and records from the retailers, distributors, vending operators, warehouses and manufacturers should be subpoened for the appropriate fiscal year. At this point the tedious task of really tracking the flow of cigarettes from the manufacturer must be done. Just as with the Yahn and McDonnell audit, the

sufficient to identify him or class to which he belongs
-Name or descriptive title and address of officer before whom deposition to be taken
-Date of notice
-Name and address, for service of cross-questions, of noticing party or his counsel
-Service of questions and notice on every other party
-Delivery of questions and notice to designated officer
.Subpoena to compel attendance of nonparty witness including, when institution subpoenaed, advice of duty to designate person to testify [§§23:111,23:112,23:113]
.If cross questions have been served, service of redirect questions within 10 days thereafter[§23:97]

work will be tedious, but productive. Unlike with Yahn and McDonnell, this effort should end in successful litigation that would have an impact on the traffic as well as

¶107 To establish the second goal of providing evidence for proof of the manufacturer's state of mind (absent a finding of evidence constituting a direct admission) a variety of documents should be requested. Those that should be particularly helpful include;

1) reports turned in by missionary man (salesman),[260]

2) reports of National Sales Managers;[261]

3) Memos from in-house counsel on the legal issues implicit in a bootlegging operation;[262]

4) reports from trade meetings at each level of the industry;[263]

[260]These reports should give an accounting of the stock and sales patterns of retailers. They can be compared to the orders the retailers made and to their actual stock for any discrepancies.

[261]The national Sales Manager reports are likely to contain copies of reports that salesman turn in, summaries of those reports and analysis of regional sales, and possibly a discussion of any inconsistencies in sales.

[262] With a problem as serious and widely discussed as cigarette bootlegging, it is likely that companies have had in-house counsel prepare memos on the situation. These memos are useful in that they reveal manufacturer knowledge of the bootlegging problem.

[263]Mr. Gordon, of Jack Gordon Tobacco, informed me that trade meetings exist for each level of the cigarette industry and that bootlegging is often discussed at these meetings. Reports from those meetings would indicate the knowledge about bootlegging of everyone at the meeting and would also identify those officials who are particularly informed about bootlegging.

5) speeches made by industry officials on the bootlegging problem;[264]

6) travel itineraries of missionary men and National Sales Managers and Management Officials in the cigarette division of the company;[265]

7) office files on bootlegging.[266]

¶108 With this information the litigator can identify the source of bootlegging and the company's awareness of the bootlegging situation. The depositions should use the knowledge obtained in the first stage of discovery. With this knowledge prior to taking the depositions, series of questions can be skillfully drafted to elicit admissions and/or diminish credibility. Either serves to substantiate an inference of the manufacturer's knowledge of and intent to facilitate cigarette bootlegging.

[264] Obtaining the speeches, most of which are probably made at industry conferences, is also for the purpose of revealing manufacturer knowledge of bootlegging. This high degree of awareness can effectively be contrasted with the inaction of the manufacturers.

[265] These should be accumulated to compare with information obtained through depositions, again so that any discrepancies can be noted.

[266] Any office files should be sought, as such files may compile a variety of information on bootlegging.

¶109 Prior to taking depositions a strategy should be designed to cope with deponents who raise the privilege against self-incrimination.[267] Methods do exist to minimize any loss of information due to deponents' claiming the privilege.[268]

¶110 The key to effective use of depositions in a bootlegging prosecution is a realistic appraisal of the situation and the deponent's involvement. Bootlegging is a multimillion dollar operation and RICO prosecutions impose several penalties. This makes direct admissions or clear-cut answers unlikely. Even without this, however, the depositions can be extremely useful. An individual whose position within the industry denotes competence can quickly impair his credibility and provide evidence of his own knowledge of the operation by denying awareness of a problem widely discussed within the industry[269] and by demonstrating ignorance of his own records.[270] A useful deposition would elicit information from an employee of the manufacturer that reveals their familiarity with boot-

[267] See Pickens "Discovery Rights for the RICO Plaintiff" Materials on RICO (G. Robert Blakey ed. 1980).

[268] Id.

[269] See Note 263, Supra.

[270] It is likely that officers would feign ignorance rather than admit knowledge of discrepancies.

legging and concomitant failure to control the problem.[271]

¶111 From the depositions witnesses for the trial can be selected with knowledge of their answers and their usefulness.

Conclusion

¶112 Cigarette bootlegging continues to be a serious problem. The prosecutive and legislative efforts to curb bootlegging that have been made have not been successul. Litigation directed at individual smugglers in single smuggling enterprises may stop small operations, but it does little to curb the bootlegging traffic itself. To eradicate bootlegging, a prosecution must reach the manufacturer - the source of contraband cigarettes - and create an economic incentive for the manufacturers to effectively police their own industry. Such a prosecution represents a realistic and useful alternative to past efforts.

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271 This sample deposition is designed for a National Sales Manager employed by one of the four manufacturers located in North Carolina. He operates out of the manufacturers New Jersey warehouse that services several Northeastern states.

#1 Are you _____ _____.

#2 Do you work as a National Sales Manager for _____ Co.?

#3 Do you read The New York Times?
The Philadelphia Inquirer?
The Trenton Herald?
The Wall Street Journal?

#4 You've read some of the stories on bootlegging, then?

#5 Are you familiar with these trade reports on bootlegging?

#6 We have a record that you attended a conference where cigarette bootlegging was discussed. Do you recall the conference?

#7 This bootlegging memo came across your desk on _____, do you recall its contents?

#8 Your firm appears quite aware of the bootlegging problem.

#9 Were any new inventory and accounting systems considered in an effort to curtail bootlegging?

(271 cont'd)

#10 According to our records no new system has been adopted. Who opposes a new system?

#11 I see that sales continued to _____ distributor, even after they were linked with bootlegging efforts. Who made that decision?

#12 When dealing with a suspect distributor, are any safeguards employed? We couldn't find any additions in record keeping when dealing with someone suspected of bootlegging.

This line of questions should be developed to discover or confirm exactly what articles, reports, seminars or bootlegging the employee is familiar with and to develop the failure of that information to lead to any efforts to curtail bootlegging.

Lower echelon employees such as "missionary men" should be questioned about gaps in the inventory records. For example:

#1 This record shows that _____ retailer bought _____ cases of cigarettes from the distributor, but only _____ % of those were sold through his store or returned. What accounts for the difference?

#2 Your company sold _____ cases to _____ distributor but only _____ % of those were sold to retailers. What do you know about that?

Every discrepancy in the records must be covered with the employees.

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The Massage Parlor Problem and RICO Civil Remedies

by Robert E. Rohde

TABLE OF CONTENTS

I. SUMMARY

¶1 "Massage Parlors", enterprises that are in fact houses of prostitution, have dramatically increased in number in the 1970's. Their increase has not only contributed to the deterioration of downtown business districts,[1] but they have also expanded into suburban and residential areas with a similar adverse impact.[2]

¶2 Conventional law enforcement methods have proved inadequate in reducing the number of massage parlors. Police often have difficulty gathering sufficient evidence to obtain convictions for prostitution and related offenses. Attempts by municipalities to zone or license massage parlors out of existence become game-like as the parlors grow adept at either circumventing or complying with regulations.

¶3 The civil provisions of RICO[3] offer an approach that could be effectively used to control massage parlors. These materials examine the massage parlor problem and the shortcomings of conventional remedies; they outline possible applications of the civil RICO provisions and the advantages of a RICO approach.

II. Massage Parlors: The Problem

¶4 Massage parlors[4] have become the modern brothel. The majority maintain a facade of legitimacy, while offering an array of sexual services. In addition to promoting prostitution, massage parlors create a number of ancillary problems. They have a harmful effect on neighboring businesses,[5] depreciate property values,[6] and generally contribute to the deterioration of the area in which they are located.[7]

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[1] For example, the League of New York Theater Owners and Producers maintains that the burgeoning number of massage parlors in Midtown Manhattan threatens the continued existence of New York's theaters. N.Y. Times, Nov. 20, 1975, at 45 col. 6. See also N.Y. Times, Nov. 10, 1975, at 46, col. 3.

[2] City officials of Clinton, New York, attribute the unwillingness of middle-income families to move into available apartments in the city to the opening of several massage parlors. N.Y. Times, Nov. 20, 1975, at 45, col. 6.

[3] RICO is an acronym for the Racketeer Influenced and Corrupt Organizations (18 U.S.C. §§ 1961-1968 (1976)) Title [XI] of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941.

[4] "Massage parlor" is used in a generic sense. It also refers to similar enterprises calling themselves "leisure spas", "modeling studios", "conversation studios", etc.

[5] "Legitimate businessmen and theater owners have complained that massage parlors, peep shows, adult bookstores, and hotels that cater to prostitutes contribute to the rise in crime and reduce the number of visitors to the midtown area with the result that legitimate businessses suffer an economic loss". Address by Governor Carey (July 14, 1975), reported in N.Y. Times, July 15, 1975, at 31, col. 3.

[6] See N.Y. Times, Feb. 22, 1976, §3, at 1, col. 1.

[7] "Generally, massage parlors [in New York City] assault the public to a greater extent than other sex-related businesses. Massage parlors are more likely to handbill than are other sex businesses. These sexually explicit hand bills are thrust at unwilling passersby, are then usually discarded, and end up as litter on public streets. Massage parlors are more likely than are other adult uses to plaster posters on building facades where they further assault public sensibilities. The consequence of these kinds of advertising assaults is that massage parlors on the east side [of Manhattan] may have an undesirable environmental impact on the west side -- and vice-versa. City of New York, Times Square Action Plan: Final Report 46 (June 1980).

Massage parlors often do not report the full amount of their revenues, evading federal, state and local taxes.[8] And they are often profitable "investments" for organized crime.[9]

¶5 Although massage parlors have existed in large metropolitan areas for a number of years, their number has increased dramatically in the last decade.[10] The number of massage parlors in midtown Manhattan reached 59 in 1976;[11] there were 75 in Chicago[12] and 50 in Washington in 1975.[13] Their growth has not been confined to run-down neighborhoods; several have opened on New York's East Side.[14] They have also spread to suburban areas and small cities and towns far from major urban areas.[15]

[8] Id. at 62. See N.Y. Times, Oct. 28, 1977, §2, at 3, col. 1.

[9] N.Y. Times, Feb. 22, 1976, §3, at 1, col. 1.

[10] See, e.g., Rossmusen and Kuhn, The New Masseuse, 5 Urban Life 271, 272 (1976) (Survey in one western city indicated that the number of massage parlors jumped from 3 to 150 in four years).

[11] Supra note 7.

[12] Chi. Tribune, July 15, 1977, §3, at 3, col. 1.

[13] Wash. Post, Dec. 7, 1975, § B, at 1, col. 1.

[14] N.Y. TImes, Feb. 22, 1976, §3, at 1, col. 1.

[15] See N.Y. Times, Jan. 7, 1974, at 55, col. 6 (massage parlors open in Des Moines, Wichita, San Diego, Colorado Springs, Minneapolis, Portland, Ore.).

¶6 Massage parlors share many of the characteristics of legitimate businesses. They advertise their services, usually by "handbilling" or displaying posters on building facades, but some advertise in "men's" magazines or the yellow pages of phone books. Many accept major credit cards.[16]

¶7 Massage parlors can generally be divided into two types: "bust-out" operations and highly organized "clubs". Both are highly profitable. "Bust-out" operations are the smaller of the two, usually employing less than 30 masseuses. They charge an $8 to $20 basic fee; sexual services are extra. Their clientele is transient making them more vulnerable to infiltration by undercover police officers. Because they have a low overhead,[17] "bust-out" parlors can make a substantial short-term profit before they are closed by law enforcement officials. For example, James Ragonesi, a low level New York crime figure, leased four furnished parlors for a total of $500 per day. The lessee-operator realized a $5,000 per week profit on the four parlors for a year.[18]

[16] One Washington, D.C. massage parlor estimated that 50% of its customers use credit cards to pay their bills. Wash. Post, Jan. 9, 1978, at 1, col. 5.

[17] It has been estimated that a massager parlor can be opened for as little as $2,000. Verlarde and Warlick, Massage Parlors, 11 Society 63, 67 (1973).

[18] N.Y. Times, July 27, 1977, at 1, col. 2.

¶8 The often luxurious "clubs" are more sophisticated in their operation. They rely on an established clientele and elaborate screening techniques to detect undercover policemen and avoid criminal convictions. "Clubs" charge $30 to $50 for a half-hour session and can make a $750,000 to $1,000,000 profit in a year.[19]

¶9 There are many indications that the mob, attracted by large profits, controls massage parlors in urban areas.[20] Typically, the involvement of organized crime takes the form of either hidden ownership or profit skimming.[21] For example, Bruno Pennissi, a nephew of Carlo Gambino, was listed as owner of two New York massage parlors and was believed to have interests in three others. The New York Times reports that Pennissi tried to gain control of the East Side parlors to impress Mafia superiors.[22] One lower echelon mob figure was reported to have interests in fifteen parlors on the West Side of Manhattan.[23] And

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[19] Id.

[20] Verlarde and Warlick, supra note 14, at 73.

[21] "There are kickbacks.... People running many of the places [massage parlors] are front men doing it for a commission. A lot of crime people are getting the big profits". Statement of Lieutenant Frank Damiana of the Manhattan South Public Morals Squad, N.Y. Times, July 27, 1977 at 1, col. 2.

[22] N.Y. Times, July 27, 1977, at 1 col. 2.

[23] Id.

Martin Hodas, who made a fortune in pornography, testified at his trial for tax evasion that he paid over $100,000 in "protection" money in one year.[24]

III. Traditional Approaches to the Control of Massage Parlors

¶10 The attempts of law enforcement officials to control massage parlors by obtaining convictions for prostitution offenses have met with frustration. Massage parlors and masseuses employ a variety of techniques to identify undercover officers posing as customers, thereby avoiding arrest. Masseuses sometimes ask their customers if they belong to a law enforcement agency and request identification proving the customer does not. They are careful not to solicit sexual services, but get the customer to request them. Some ask the customer to sign a statement to the effect that he solicited the massuese. The more sophisticated "clubs" keep files and photographs of their clientele. Identification is required of "applicants" and some examine the customer's credit history.[25]

¶11 Convictions for prostitution offenses are often difficult to obtain because police are unwilling to disrobe or participate in an act of prostitution to get the

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[24] Id.

[25] One Chicago "club" successfully identified detectives posing as customers on eleven consecutive attempts by police to obtain evidence of prostitution. Chi. Tribune, March 17, 1977, at 14, col.

necessary evidence.[26] A "crackdown" on massage parlors by the Chicago Police Department illustrates the difficulty in obtaining convictions. Intensive law enforcement efforts over a period of two years succeeded in closing all but five of the city's massage parlors. In 1976 and 1977, those five parlors were raided forty-four times and still remained open. Charges stemming from twenty-five of the raids were pending in July of 1977, ten resulted in the dismissal of all charges and of the remaining nine the heaviest jail sentence was two days and the largest fine $25.[27]

¶12 Because convictions for prostitution offenses have been difficult to obtain, many cities have turned to zoning and licensing as a means of controlling massage parlors.

¶13. Licensing ordinances attempt to impose requirements so severe that massage parlors find it almost impossible to comply. For instance, the City of San Antonio, Texas, requires masseuses to disclose any criminal arrests, furnish fingerprints, and such other information as the police chief deems necessary as well as meet specified educational requirements.[28] The City of Falls Church, Virginia imposes

[26] See P. Rasmussen and L. Kuhn, The New Masseuse, in 5 Urban Life, 271, 289 (1976). In New York, for instance, two convictions for prostitution are required to enjoin the operation of a house of prostitution, convictions for solicitation are insufficient. N.Y. Pub. Health Law §2324 (a) (McKinney 1977).

[27] Chi. Tribune July 15, 1977, §3, at 3, col. 1.

[28] San Antonio, Tex., Code Ch. 18, art. IV.

a $5,000 annual licensing fee on all massage parlors.[29] Other cities have tried to force massage parlors to close by strictly enforcing building, fire, and health codes.[30]

¶14 Zoning ordinances are generally of two types: the first prohibits a person from giving a massage to someone of the opposite sex for a fee, and the second is a comprehensive, "adult-use" statute limiting the number of massage parlors, peep shows, pornographic bookstores and X-rated theaters that can locate in a given area.[31] The Supreme Court has upheld the constitutionality of "adult-use" statutes[32] and has dismissed challenges to other zoning and licensing ordinances for want of a substantial federal question.[33]

¶15 Licensing and zoning are, however, limited approaches to the control of massage parlors. Both attempt to control the facade rather than attack the illegal conduct. The result is an unavoidable adverse impact on legitimate masseuses, masseurs, and businesses, such as health spas, that offer massage.[34] These must often comply with

[29] See Rogers v. Miller, 401 F. Supp 826 (E.D. Va. 1975) (constitutionality of Falls Church, Virginia, licensing ordinance upheld).

[30] N.Y. Times, May 24, 1978, §B, at 3, col. 1.

[31] See, e.g., Detroit, Mich., Ordinance §§ 742-G, 743-G (1972).

[32] Young v. American Mini Theaters, 427 U.S. 50 (1975).

[33] See, e.g., Smith v. Keator, 419 U.S. 1043 (1974).

[34] See Chi. Tribune, April 26, 1975, §3, at 1, col. 1. See generally, A. Verla de, Becoming Prostituted, 15 Brit. J. of Criminology 257 (1975).

licensing regulations that are in fact designed for prostitutes or zoning ordinances that limit the patrons of legitimate masseuses and masseurs to persons of the same sex.

¶16 Moveover, zoning and licensing have met with only moderate success. Licensing does little to reduce the number of massage parlors;[35] the parlors simply become more careful to comply with regulations. They circumvent zoning ordinances by adopting different facades. Establishments calling themselves "modeling studios", "rap studios", "dance schools", etc. have sprung up in the place of massage parlors. In New York, fifty establishments offering sexual services were able to avoid ordinances aimed at massage parlors by calling themselves "no-liquor bars".[36] Three massage parlors illegally adopted the certificates of occupancy of prior tennants and maintained that they were jewelers and clothing stores providing "fitting and showing" rooms for their customers.[37]

¶17 The cost required in manpower and funds to enforce

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[35] In one city the number of massage parlors jumped from to after the enactment of licensing ordinances. Id. at 257.

[36] N.Y. Times, May 24, 1978, §B, at 3, col. 1.

[37] N.Y. Times, April 29, 1978, at 24, col. 1.

statutory provisions prohibiting prostitution and zoning and licensing ordinances is high.[38] It is often prohibitive in small cities and suburban areas.[39] Although larger cities usually maintain vice squads, prosecutors and police departments faced with a high volume of violent crimes give prostitution a low priority.

¶18 When cities are willing to expend the resources necessary to close massage parlors, the solution may be only temporary. Time is required to gather evidence and obtain an order enjoining the operation of a massage parlor. The massage parlor remains open while the case is being litigated.[40] Because they have a low overhead and a high income potential, "bust-out" operations can make a substantial short-term profit before they are closed. The threat of being padlocked does little to offset the economic incentive and new parlors will open in the place of those closed.

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[38] The City of New York received a $432,692 grant to fund a team of inspectors to search for ordinance violations of massage parlors in Times Square and attempt to close the parlors. N.Y. Times, July 15, 1975, at 31, col. 4. The grant was only one-fourth the amount requested by the city and, according to the Chairman of the Times Square Law Enforcement Coordinating Committee, would provide only minimum capability. N.Y. Times, Nov. 2, 1975, at 1 col. 3.

[39] A police raid of massage parlors in one small town resulted in the arrests of five masseuses. A city official estimated that the cost of the raid and prosecution of the cases would be $30,000. Veslarde and Warlick, supra note 14, at 73.

[40] One New York massage parlor, padlocked as a public nuisance, was reopened the same day when its lawywers successfully fought a temporary restraining order. N.Y. Times, May 24, 1978, §B, at 3, col. 1.

IV. Civil RICO as a Means of Controlling Massage Parlors: Prospe

¶19 The RICO civil remedies[41] injunctions as well as treble damages provide several advantages over zoning and licensing as a means of controlling massage parlors. First, the threat of triple damages presents the economic disincentive that a mere padlock -type injunction cannot. Because a RICO damage suit can threaten short-term profitability, new massage parlors may be discouraged from opening after

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[41] 18 U.S.C. §1964 states:

> (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... 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. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
> (c) Any person injured in his business or property by reason of a violation section 1962 of this chapter may sue therefore in any appropriate United States district court and shall cover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

the existing ones have been closed. Second, the injured RICO plaintiff, if successful, will in fact recover threefold any damages he can prove plus court costs and reasonable attorney's fees. A triple damage recovery might well offset at least a portion of the expense of investigation and litigation incurred by a city. In addition, the prospect of recovering triple damages creates an incentive for private individuals to bring RICO actions.

¶20 Businesses that supply goods and services to massage parlors, particularly landlords and credit card companies, may also be liable for triple damages as coconspirators.[42]

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[42] 18 U.S.C. §1962 provides:

> (a) It shall be unlawful for any person who has any income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt... 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....
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through the 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 enterprises 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.

Landlords, because they usually lease to massage parlors at twice the market rate, and credit card companies, who are supplying credit to an illegal business for a fee, may have a sufficient special interest in the illegal activity to establish an intent to participate in it.[43] The threat of such liability should deter otherwise legitimate businesses from dealing with massage parlors. A refusal by landlords, for instance, to lease to massage parlors would immediately reduce the number of parlors.[44] Further, the RICO plaintiff who can join a legitimate business as a coconspirator obtains a defendant with discoverable assets.

¶21 RICO also provides equitable relief. Section 1964 (a)[45] specifically gives the federal district courts the power to enjoin violations of RICO offenses.[46] While contrary arguments can be made it would seem that the district courts also have the power to enjoin violations of RICO in connection with actions brought by persons under Section 1964 (c).[47]

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[43] See People v. Lauria, 251 Cal. App. 2d 471 (1967).

[44] The City of New York attributes a 30% drop in the number of Midtown Manhattan sex businesses in significant part to property owners having forced the tennants out. City of New York, Times Square Action Plan: Final Report, 74 (June 1980).

[45] See note 38, supra.

[46] See note 39, supra.

[47] See generally, Private Action for Injunctive Relief, in I Materials On RICO 407 (G. Blakey ed., 1980).

V. Massage Parlors and Racketeering Activity: The Legal Requirements

¶22 Section 1962 (c) prohibits conducting the affairs of an enterprise, engaged in or affecting interstate commerce,[48] through a pattern of racketeering activity. A massage parlor easily falls within the meaning of "enterprise".[49] A "pattern of racketeering activity", defined in Section 1961 (5), requires at least two of the offenses listed in Section 1961 (1), one of which occurred after the effective date of the statute,[50] and one of which occurred within ten years of the prior act.[51] The acts must also have a common nexus or interrelationship to form a pattern.[52] In a civil

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[48] This requirement could be satisfied by a massage parlor's use of interstate mails to collect customer credit card balances, acceptance and subsequent presentation of customer checks drawn on out-of-state banks, catering to an interstate clientele, use of interstate telephone facilities to conduct the massage parlor's business, etc..

[49] 18 U.S.C. §1961 (4) (1976) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

[50] The effective date is October 15, 1970.

[51] 18 U.S.C. §1961 (a) (1976).

[52] The Department of Justice quotes the following language from S.1 §1906 (c) as a guideline: "[A pattern is formed by acts of racketeering activity] 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...." U.S. Dept. of Justice, An Explanation of the RICO Statute 44 (4th ed.).

proceeding, a violation of Section 1962 need only be established by a preponderence of the evidence.

¶23 Two of the offenses listed in Section 1961 (1) are related to prostitution: Section 1952 (Interstate Travel in the Aid of Racketeering)[53] and Sections 2421 - 2424 (The White Slave Act).[54]

¶24 Section 1952 prohibits interstate travel or the use of an interstate facility with the intent to distribute the proceeds of or promote or facilitate the promotion of an illegal activity (including prostitution). Interstate travel or the use of an interstate facility can be established in various ways; massage parlors accepting credit cards must use interstate mails to collect the bills; telephone calls or travel to another state to conduct the business of the massage parlor or the active encouragement of interstate patronage could violate Section 1952. For example, three brothers, Carlos, Victor and Felipe Herrera, owned and operated one of New York's largest massage parlors. Carlos and Felipe commuted daily from their condominium in New Jersey to work at the club. Victor often visited the condominium and traveled to the club afterward. The brothers also made a number of interstat telephone calls relating to the business of the club.

[53]18 U.S.C. §1952 (1976).

[54]18 U.S.C. §§2421-2424 (1976).

The Court of Appeals for the Second Circuit found this activity a sufficient use of interstate facilities to uphold the convictions of all three brothers under Section 1952.[55]

¶25 The White Slave Act prohibits the transport of a female in interstate commerce for the purpose of prostitution (§2421) and the coercion or enticement of a female (§2422) or minor female (§2423) to go from one place to another in interstate commerce for the purpose of prostitution. The Act also requires anyone harboring an alien female for the purpose of prostitution to report certain information to the Commissioner of Immigration and Naturalization. (§2424).

¶26 It is a common practice for pimps and prostitution rings to move prostitutes from one state to another, often placing them in massage parlors.[56] By allowing the prostitute to work in the massage parlor and taking a percentage of her earnings, the massage parlor's operators conspire to violate the White Slave Act. In United States v. Clemones,[57] Edward LeCompte and Kathy Hatmaker, operators of houses of prostitution, were

[55]United States v. Herrera, 584 F.2d 1137 (2d Cir. 1978).

[56]See e.g. N.Y. Times, Nov. 15, 1977, at 29, col. 1. (runaways recruited by pimps in Minnesota were brought to New York City and placed in massage parlors and hotels).

[57]United States v. Clemones, 577 F.2d 1247, modified, 582 F.2d 1373 (5th Cir. 1978) cert. denied 100 S. Ct. 1313 (1980).

convicted of conspiracy to operate an interstate prostitution ring through a pattern of racketeering activity. LeCompte ran a truck stop near Newport, Tennessee, where he kept prostitutes and received a percentage of their earnings. Billy Johnson, a pimp and central figure in the prostitution ring, brought prostitutes from out-of-state on three occasions and placed them at the truck stop. Johnson also brought one of his prostitutes from Georgia to Hatmaker's house of prostitution in Knoxville, Tennessee. On another occasion, one of the prostitutes working at Hatmaker's left Knoxville to meet Billy Johnson in Atlanta. The Fifth Circuit upheld the convictions stating that the jury could infer that both LeCompte and Hatmaker knew that the essential nature of the conspiracy embraced a pattern of racketeering activity.

¶27 Bribery,[58] although not directly related to prositution, is a Section 1961 offense frequently committed by massage parlors.[59] Because many cities have enacted zoning and licensing ordinances, massage parlors have turned to the bribery of public officials to prevent enforcement.

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[58] "Bribery" is used in a generic sense in Section 1961.

[59] See N.Y. Times, March 24, 1977, §2, at 4, col. (patrolman indicted for accepting bribes); N.Y. Times, March 26, 1977, at 8, col. 1 (nineteen policemen indicted in San Francisco massage parlor bribery scheme).

VI. Standing to Bring Suit

¶28 The United States Attorney General may bring a civil RICO action to enjoin violations of Section 1962.[60]

¶29 Section 1964 (c) also allows a "person" to bring a RICO action if he can show 1) an injury to business or property, and 2) that the injury occurred "by reason of" a RICO violation. This provides an advantage over other approaches to the control of massage parlors, since an injured party does not have to wait for law enforcemnt officials to bring an action but may do so himself.

¶30 For example, a homeowner could sue a neighboring massage parlor for injury due to the depreciation of his property value.[61] The fact and amount of damages could be established through the testimony of real estate appraisers. A retail or retail service business that is losing customers due to the operation of a massage parlor[62] could establish

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[60] 18 U.S.C. §1964 (b) (1976).

[61] "Many of the factors which make or depress value exist in the neighborhood rather than in any individual property. 'Economic' (i.e. neighborhood) obsolescence may contribute more to accrued deterioration than all other items combined." J. Stewart, Real Estate Appraisal in a Nutshell. 64 (1964). "Any neighborhood that is subject to... infiltration of inharmarious social elements should be penalized in estimating value". E. North, Appraisal of Apartment Buildings, in Encyclopedia of Real Estate Appraising 196 (1959).

[62] See note 3 supra.

damages by showing a decrease in business since the massage parlor opened. Damages could also be measured by making a comparison of the volume of business of the injured store with that of a similar store over the same period of time. While RICO actions embodying these theories would be without legal precedent, earlier cases sustain actions brought by businesses and residents for damages and to enjoin the operation of bawdyhouses as private nuisances.[63]

¶31 A municipality is also included within the meaning of "person" in Section 1964 (c).[64] If, for instance, massage parlors were hurting neighboring businesses, a city might sue for damages due to its decreased business and sales tax revenues.[65] A similar suit for damages in decreased tax revenues based on depreciated property values presents two additional complications. First, property values are assessed for tax purposes by the taxing municipality and

[63] See Bisso v. Southworth, 71 Tex. 765, 10 S.W. 523 (1888) (recovery of damages for loss of rents due to presence of bawdy house in vicinity); Tedescki v. Berger, 150 Ala. 649, 43 S. 960 (1967) (bawdy house causes private injury to resident next door; resident may obtain damages for depreciation of property values). See generally, 24 Am. Jur. Disorderly Houses §§ 37-47. (1966).

[64] 18 U.S.C. §1961 (3) (1976) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property."

[65] Section 1964 (c) should be liberally construed to include tax revenues as "business or property." See Organized Crime Control Act of 1970 Pub. L. No. 91-452, §904(a), 84 Stat. 947.

depend to a high degree on the discretion of the assessor.[66] Nevertheless, objections by defendants to a city's use of its own assessment as a basis of damages could be quelled by obtaining corroborating, independent appraisals. Second, property assessments tend to under reflect changes in property values.[67] Because cities need a stable tax base and since there is sometimes little other evidence of the value of a piece of property, assessors rely heavily on prior assessments.[68]

¶32 A state could bring an action under Section 1964 (c) for injury to its general economy. In an antitrust suit, the state of Georgia successfully enjoined discriminatory rate fixing by common carriers that discouraged shipments into the state, thereby injuring its general economy. Granting an injunction under Section 16 of the Clayton Act,[69]

[66] 1 Bonbright, Valuation of Property 485-86 (1937).

[67] From 1961 through 1972 property values in New York City increased an average of 114% while assessed values only increased 47%. See R. Bahl, A. Campbell, D. Greytale, Taxes, Expenditures and the Economic Base §4 (1974).

[68] Bonbright note 63 supra.

[69] Section 16 of the Clayton Act, 15 U.S.C. §26, provides for injunctive relief:

> "any person, firm, corporation, or association shall be entitled to sue and have relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws..."

the court stated:

> Georgia is not confined to suits designed to prohibit only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia .... [W]e find no indication that, when Congress fashioned those [antitrust] civil remedies, it restricted States to suits to protect their proprietory interests. Suits by a State, parens patriae, have long been recognized. There is no reason why those suits should be excluded from the provision of the antitrust acts.[70]

Injury to the economy occurs by reason of the operation of a massage parlor in the sense that every dollar spent on illegal services enters an illicit economy and is drained from the legitimate economy. Massage parlors, because they derive their income from an illegal source, usually do not report the income for tax purposes. Since massage parlors are often controlled by organized crime, their income does not re-enter the legitimate economy but is "invested" in other criminal enterprises. The criminal economy becomes a stain on the legitimate economy; the injury it causes is real.

¶33 A municipal corporation, in so far as it is a governing body, has an interest in its local economy analogous to that of the state in the general economy. A municipality might assert standing on a similar basis.

Conclusion

¶34 The civil provisions of RICO are demonstratedly applicable to massage parlors. As a means of controlling the massage parlor problem RICO promises to be far more effective than previously attempted approaches. In light of the current out ry of business owners and residents concerning massage parlors and increased spending by local, state, and federal governments to control them, the real question is why no civil RICO actions have been brought.

¶35 The answer seems to be simple ignorance of the statute. To make RICO an effective means of controlling massage parlors, law enforcement officials must become increasingly aware of the statute's civil provisions, they must encourage private individuals, who have been injured, to bring RICO actions, and they must cooperate with private RICO plaintiffs.

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[70] Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945). In Hawaii v. Standard Oil, 405 U.S. 251 (1972) the Supreme Court held that injury to the general economy of the State of Hawaii did not give it standing to sue under Section 4 of the Clayton Act. Section 4, after which Section 1964 (c) was modeled, provides treble damages for injury to business or property due to an antitrust violation. Noting that the legislative histories of teh Sherman and Clayton Acts were not clear as to why Congress included the "business and property" requirement in Section 4 and not Section 16, the Court, nevertheless, denied Hawaii standing to sue because it learned that a triple damage recovery by the state would be duplicative and would lessen competition. This antitrust rationale is inapplicable to Section 1964 (c). In fact, RICO was written as an independent statute, rather than as an amendment to the Sherman Act, at the suggestion of the American Bar Association - Section of Antitrust Law, to eliminate inappropriate and unnecessary obstacles such as the antitrust "standing to sue" requirements. See Relating to the Control of Organized Crime in the United States: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the Comm. on the Judiciary, House of Representatives, 91st Cong., 2d Sess. 147-49 (1970).

93581

Federal and State RICO

Statutes Compared

by

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SUMMARY

¶1 These materials compare the text of the federal RICO statute with the texts of the various state RICO statutes. The states that have enacted RICO statutes are Pennsylvania, Hawaii, Arizona, Florida, Rhode Island, Georgia, and Indiana. RICO statutes are pending in New Jersey, California, and Massachusetts.

I. Introduction

¶2 The text of each section of the federal RICO statute is set out, followed by the text of the corresponding provision of each state's RICO statute. A brief comparison follows each section.

¶3 The cites to the statutes, in order of enactment, are:

Federal	18 U.S.C. §§1961-1968 (West Supp. 1979)
Pennsylvania	18 Pa. Cons. Stat. Ann. §911 (Purdon 1973)
Hawaii	Hawaii Rev. Stat §§842-1-842-12 (1976)
Arizona	Ariz. Rev. Stat. Ann. §§13-2312-13-2315 (1978)
Florida	Fla. Stat. Ann. §§943.46-943.464 (West Cum. Supp. 1979)
Rhode Island	An Act Relating to Racketeer Influenced and Corrupt Organizations, Chapter 204, 1979, R.I. Pub. Laws 791 (1979)
Georgia	Geo. RICO Act, HB803 (1980)
Indiana	Senate Enrolled Act No. 194, 2d Regular Session 101st General Assembly (1980)*
New Jersey	Proposed RICO Statute, Assembly, No. 1079, Introduced February 11, 1980
California	Proposed RICO Statute, Draft of May 7, 1980
Massachusetts	Proposed RICO Statute, Senate No. 771, (1979)

In each of the subsequent sections the text of the federal and the state statutes will be set out in the order of enactment.

* Indiana recently enacted their RICO statute in the form of Senate Enrolled Act No. 194.

II. Title

¶4 The statutes are titled as follows:

Federal	RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
Pennsylvania	Corrupt organizations
Hawaii	ORGANIZED CRIME
Arizona	Illegal control of an enterprise; illegally conducting an enterprise; classification
Florida	Florida RICO (Racketeer Influenced and Corrupt Organization) Act.
Rhode Island	AN ACT Relating to Racketeer Influenced and Corrupt Organizations.
Georgia	'Georgia RICO (Racketeer Influenced and Organizations) Act.'
Indiana	Racketeer Influenced and Corrupt Organizations.
New Jersey	Racketeer Influenced and Corrupt Organizations
California	"California Control of Profits of Criminal Enterprise Act."
Massachusetts	Racketeer Influenced and Corrupt Organizations

¶5 Generally, the state legislatures have incorporated the phrase "racketeer influenced and corrupt organizations" in the title. Where the phrase has not been used the title reveals a focus similar to that of the federal statute.

III. Racketeering Activity

¶6 Racketeering activity is defined as:

Federal

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]—

(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) if the act indictable under section 659 is felonious, 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 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS § 186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS § 501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

Pennsylvania

(h) Definitions.—As used in this section:

(1) "Racketeering activity" means:

(i) any act which is indictable under any of the following provisions of this title:

Chapter 25 (relating to criminal homicide) [4]

Section 2706 (relating to terroristic threats)

Chapter 29 (relating to kidnapping) [5]

Chapter 33 (relating to arson, etc.) [6]

Chapter 37 (relating to robbery) [7]

Chapter 39 (relating to theft and related offenses) [8]

Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)

Section 4109 (relating to rigging publicly exhibited contest)

Chapter 47 (relating to bribery and corrupt influence) [9]

Chapter 49 (relating to perjury and other falsification in official matters) [10]

Section 5512 through 5514 (relating to gambling)

Chapter 59 (relating to public indecency) [11]

(ii) any offense indictable under section 20(d) of the act of September 26, 1961 (P.L.1664), known as "The Drug, Device and Cosmetic Act" (relating to the sale and dispensing of narcotic drugs); [12]

(iii) any conspiracy to commit any of the offenses set forth in subclauses (i) and (ii) of this clause; or

(iv) the collection of any money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law.

Any act which otherwise would be considered racketeering activity by reason of the application of this clause, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

(h) Definitions.—As used in this section:
(1) "Racketeering activity" means:

[See main volume for text of (1)(i)]

(ii) any offense indictable under section 13 of the act of April 14, 1972 (P.L. 233, No. 64), known as "The Controlled Substance, Drug, Device and Cosmetic Act" (relating to the sale and dispensing of narcotic drugs);

Hawaii

§842-1 Definitions.

"Racketeering activity" means any act or threat involving, but not limited to murder, kidnapping, gambling, arson, robbery, bribery, extortion, larceny or prostitution, or any dealing in narcotic or other dangerous drugs which is chargeable as a crime under state law and punishable by imprisonment for more than one year.

Arizona

§ 13-2301

D.

4. "Racketeering" means any act, committed for financial gain which is chargeable or indictable under the laws of this state and punishable by imprisonment for more than one year, regardless of whether such act is charged or indicted, involving:

(a) Homicide.

(b) Robbery.

(c) Kidnapping.

(d) Forgery.

(e) Theft.

(f) Bribery.

(g) Gambling.

(h) Usury.

(i) Extortion.

(j) Extortionate extensions of credit.

(k) Dealing in narcotic drugs or dangerous drugs.

(l) Trafficking in explosives, weapons or stolen property.

(m) Leading organized crime.

(n) Obstructing or hindering criminal investigations or prosecutions.

(o) Asserting false claims including, but not limited to, false claims asserted through fraud or arson.

Florida

943.461 Definitions

As used in ss. 943.46-943.465:

(1) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

(a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:

1. Section 210.18, relating to evasion of payment of cigarette taxes.
2. Section 409.325, relating to public assistance fraud.
3. Chapter 517, relating to sale of securities.
4. Section 550.24, s. 550.35, or s. 550.36, relating to dogracing and horseracing.
5. Section 551.09, relating to jai alai frontons.
6. Chapter 552, relating to the manufacture, distribution, and use of explosives.

7. Chapter 562, relating to beverage law enforcement.
8. Chapter 687, relating to interest and usurious practices.
9. Chapter 782, relating to homicide.
10. Chapter 784, relating to assault and battery.
11. Chapter 787, relating to kidnapping.
12. Chapter 790, relating to weapons and firearms.
13. Section 796.01, s. 796.03, s. 796.04, s. 796.05, or s. 796.07, relating to prostitution.
14. Chapter 806, relating to arson.
15. Chapter 812, relating to theft, robbery, and related crimes.
16. Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes.
17. Chapter 831, relating to forgery and counterfeiting.
18. Chapter 832, relating to issuance of worthless checks and drafts.
19. Chapter 837, relating to perjury.
20. Chapter 838, relating to bribery and misuse of public office.
21. Chapter 843, relating to obstruction of justice.
22. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or s. 847.07, relating to obscene literature and profanity.
23. Section 849.09, s. 849.14, s. 849.15, s. 849.23, s. 849.24, or s. 849.25, relating to gambling.
24. Chapter 893, relating to drug abuse prevention and control.
25. Sections 918.12-918.14, relating to tampering with jurors, evidence, and witnesses.

(b) Any conduct defined as "racketeering activity" under 18 U.S.C. s. 1961 (1)(A), (B), (C), and (D).

(2) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in the state in whole or in part because the debt was incurred or contracted:

(a) In violation of any one of the following provisions of law:

1. Section 550.24, s. 550.35, or s. 550.36, relating to dogracing and horseracing.
2. Section 551.09, relating to jai alai frontons.
3. Chapter 687, relating to interest and usury.
4. Section 849.09, s. 849.14, s. 849.15, s. 849.23, s. 849.24, or s. 849.25, relating to gambling.

Rhode Island

"7-15-1. DEFINITIONS. —

(a) "Racketeering activity" means any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, larceny or prostitution, or any dealing in narcotic or dangerous drugs which is chargable as a crime under state law and punishable by imprisonment for more than one year.

Georgia

26-3402. Definitions. As used in this chapter:

(a) 'Racketeering activity' means to commit, t attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeabl by indictment under the following Georgia laws:

(1) Code Chapter 79A-8, relating to controlled substances.

(2) Code Chapter 79A-7, known as the 'Dangerous Drugs Act.'

(3) Subsection (j) of Code Section 79A-811, relating to marijuana.

(4) Code Chapter 26-11, relating to homicide.

(5) Code Chapter 26-13, relating to bodily injury and related offenses.

(6) Code Chapter 26-14, relating to arson.

(7) Code Section 26-1601, relating to burglary.

(8) Code Section 26-1701, relating to forgery in the first degree.

(9) Code Chapter 26-18, relating to theft.

(10) Code Chapter 26-19, relating to robbery.

(11) Code Sections 26-2012, 26-2013, 26-2014, 26-2016, and 26-2017, relating to prostitution and pandering.

(12) Code Section 26-2101, relating to distributing obscene materials.

(13) Code Section 26-2301, relating to bribery.

(14) Code Section 26-2313, relating to influencing witnesses.

(15) Code Chapter 26-24, relating to perjury and other falsifications.

(16) Code Section 26-2501, relating to tampering with evidence.

(17) Code Section 26-2703, relating t commercial gambling.

(18) Code Section 58-206, relating t distilling or making liquors.

(19) An Act known as the 'Georgia Firearm and Weapons Act,' approved April 8, 1968 (Ga. Law 1968, p. 983), as amended.

(20) An Act to prohibit certain unauthorize transfers and reproductions of recorded material, approved February 27, 1975 (Ga. Laws 1975, p. 44 as amended.

Indiana

(d) "Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1, a violation of IC 35-23-4.1 that is listed in IC 35-23-4.1-18; an offense specified in IC 35-30-10.1-2; an offense specified in IC 35-30-11.1-1; murder (IC 35-42-1-1); battery as a Class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1), theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2), fraud (IC 35-43-5-4), bribery (IC 35-44-1-1), official misconduct (IC 35-44-1-2), conflict of interest (IC 35-44-1-3), perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4), dealing in cocaine or a narcotic drug (IC 35-48-4-1), dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3), dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10).

New Jersey

2C:41-1. Definitions. For purposes of this section and N. J. S. 2C:41-2 through N. J. S. 2C:41-7: a. "Racketeering activity" means

(1) any of the following crimes which are crimes under the laws of New Jersey or are equivalent crimes under the laws of any other jurisdiction:

(a) murder

(b) kidnapping

(c) gambling

(d) prostitution

(e) obscenity

(f) robbery

(g) bribery

(h) extortion

(i) criminal usury

(j) violations of Title 33 of the New Jersey Statutes

(k) violations of the "Cigarette Tax Act," P.L. 1948, c. 65 (C. 54:40A-2) and amendments and supplements thereto.

(l) arson
(m) burglary
(n) theft and related crimes
(o) forgery and fraudulent practices

(p) fraud in the offering, sale or purchase of securities

(q) alteration of motor vehicle identification numbers

(r) unlawful manufacture, purchase, use or transfer of firearms

(s) unlawful possession or use of destructive devices or explosives

CONTINUED

5 OF 6

(t) violation of Sections 112 through 116 inclusive of the "Casino Control Act," P.L. 1 c. 110 (C. 5:12-112 through 116)

(u) violation of Section 19 of the "New Jersey Controlled Dangerous Substances Act," P.L. 1970, c. 226 (C. 24:21-19), except possession of 64 grams or less of marijuana

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(2) any conduct defined as "racketeering activity" under Title 18, United States Code, s. 1961 (1)(A), (B) and (D).

California

186.2. For purposes of the application of this chapter, the following definitions shall govern:

(1) "Criminal profiteering activity" means any act committ or attempted or any threat made for financial gain or advanta which act or threat may be charged as a crime under any of th following sections of the California codes:

(A) Arson, as defined in Section 447 of the Penal Code.

(B) Bribery, as defined in Sections 67, 68, and 69 of the Penal Code.

(C) Felonious assault, as defined in Section 245 of the Penal Code.

(D) Embezzlement, as defined in Sections 424 and 503 of the Penal Code.

(E) Extortion, as defined in Section 518 of the Penal Cod

(F) Forgery, as defined in Section 470 of the Penal Cod

(G) Gambling, as defined in Sections 337a to f, inclusive, and Section 337i of the Penal Code.

(H) Kidnapping, as defined in Section 207 of the Penal Code.

(I) Mayhem, as defined in Section 203 of the Penal Code.

(J) Murder, as defined in Section 187 of the Penal Code.

(K) Pimping and pandering, as defined in Section 266 of the Penal Code.

(L) Receiving stolen property, as defined in Section 496 of the Penal Code.

(M) Robbery, as defined in Section 211 of the Penal Code.

(N) Solicitation of crimes, as defined in Section 653 of the Penal Code.

(O) Terrorism, as defined in Section 422 of the Penal Code.

(P) Theft, as defined in Section 484 of the Penal Code.

(Q) Trafficking in controlled substances, as defined in Sections 11351, 11352, and 11353 of the Health and Safety Code.

(R) Violation of the laws governing corporate securities, as defined in Sections 25540 and 25541 of the Corporations Code.

(S) Presentation of a false or fraudulent claim as defined in Insurance Code section 556.

(T) Conspiracy to commit any of the crimes listed above, as defined in Section 182 of the Penal Code.

Massachusetts

(f) "Racketeering activity" means conduct constituting any offense punishable by imprisonment for more than one year involving: (i) syndicated gambling; (ii) narcotics and controlled substances; (iii) loan-sharking; (iv) theft and fencing; (v) extortion, corruption and related matters; (vi) arson or the unlawful burning of a building; (vii) counterfeiting; (viii) firearms or explosives; (ix) forgery; (x) maiming; (xi) kidnapping; (xii) manslaughter; (xiii) murder; (xiv) perjury and related matters; (xv) prostitution; (xvi) regulation of alcohol and distilled spirits; (xvii) securities fraud; or (xviii) any conspiracy or endeavor to commit any of the foregoing.

¶7 A wide variety of predicate offenses are set forth under both the federal and the state definitions of racketeering activity. The federal definition includes eight offenses chargeable under state law and a number of violations of the federal code. Most of the state definitions include only state offenses. Florida and New Jersey, however, include violations of 18 U.S.C. §1961(1) (A), (B), and (D), with Florida also including violations of 18 U.S.C. §1961(1) (C).

IV. State

¶8 The federal definition of state is:

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

There is no corresponding definition in the state statutes.

V. Person

¶9 Person is defined as:

Federal

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

Pennsylvania

(2) "Person" means any individual or entity capable of holding a legal or beneficial interest in property.

Hawaii

"Person" includes any individual or entity capable of holding a legal or beneficial interest in property.

Rhode Island

(b) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property.

Indiana

"Aggrieved person" means a person who owns an interest in real property or in an enterprise that is the object of corrupt business influence (IC 35-45-6-2).

New Jersey

b. "Person" includes any individual or entity holding or capable of holding a legal or beneficial interest in property.

California

(2) "Person" means any individual or entity capable of holding a legal or beneficial interest in property.

These definitions of person are virtually identical to the federal definition. There is no definition of person in the Arizona, Florida, Georgia, or Massachusetts statutes.

VI. Enterprise

¶10 Enterprise is defined as:

Federal

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

Pennsylvania

(3) "Enterprise" means any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce.

Hawaii

"Enterprise" includes any sole proprietorship, partnership, corporation, association, and any union or group of individuals associated for a particular purpose although not a legal entity.

Arizona

2. "Enterprise" means any corporation, association, labor union, or other legal entity or any group of individuals associated in fact although not a legal entity.

Florida

(3) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental, as well as other, entities.

Rhode Island

(c) "Enterprise" includes any sole proprietorship, partnership, corporation, association, or other legal entity, and any union or group of individuals associated for a particlular purpose although not a legal entity.

Georgia

(b) 'Enterprise' means any sole proprietorsh
partnership, corporation, business trust, unior
chartered under the laws of this state, or other le
entity, or any unchartered union, association, or gr
of individuals associated in fact although not a legal
entity, and it includes illicit as well as li
enterprises and governmental as well as other entities.

Indiana

(b) "Enterprise" means a:
(1) sole proprietorship, partnership, business trust, or governmental entity; or
(2) union, association, or group, whether a legal entity or merely associated in fact.

New Jersey

c. "Enierprise" includes any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities"

California

(3) "Enterprise" means (A) any sole proprietorship, partnership, corporation, business, labor union, association, or other legal entity, or (B) any group of individuals associated in fact although not a legal entity, including illicit entities as well as legitimate entities.

Massachusetts

(a) An "enterprise" is any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which purports to be engaged in lawful business, holding itself out as such in any manner including: (i) presenting itself to the public as a lawful business; (ii) organizing itself under, or entering into, any agreement which on its face is intended to be legally binding, or other than an agreement to receive personal or consumer goods or services; or (iii) operating under any government license, charter, grant, or other privilege or authority; or any state, regional, county or municipal unit, agency or body.

¶11 The federal definition has been used in all of the state statutes. The more recent state definitions, e.g., Georgia, New Jersey and California, add language reflecting judicial interpretations of the federal definition.

VII. Pattern of Racketeering Activity

¶12 Pattern of Racketeering Activity is defined as:

Federal

(5) "pattern of racketeering activity" 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;

Pennsylvania

(4) "Pattern of racketeering activity" refers to a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section.

Florida

(4) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

Georgia

(c) 'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity which have the same or similar intents, results, accomplices, victims, or methods of commission and which are otherwise interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this chapter and that the last of such incidents occurred within four years after a prior incident of racketeering activity.

Indiana

(c) "Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

New Jersey

d. "Pattern of racketeering activity" requires (1) engaging in at least two incidents of racketeering conduct, one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years (excluding any period of imprisonment) after a prior incident of racketeering activity; and

(2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

California

(4) "Pattern of criminal profiteering activity" means engaging in at least two incidents of criminal profiteering, as defined by this act, which:

(A) Have the same or a similar purpose, result, principals, victims, methods of commission or are otherwise interrelated by distinguishing characteristics; and

(B) Are not isolated events.

Acts which would constitute a "pattern of criminal profiteering activity" may not be used by a prosecuting age to seek the remedies provided by this chapter unless at least one of the incidents occurred after the effective date of t chapter and the last incident occurred within five years (excluding any period of imprisonment) after the commission of a prior incident of criminal profiteering.

Massachusetts

(e) "Pattern of racketeering activity" means two or more separate acts of racketeering activity, at least one of which occurred after the effective date of this title, that have the same or similar intents, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

¶13 The federal statute requires two acts of racketeering activity, one occurring after the effective date of the statute and the other within ten years of the prior act. The legislative history (S. Rep. No. 617, 91st. Cong. 1st Session 79) (1969), as well as the case United States v. Elliot, (571 F.2d 880, 899 (5th Cir. 1978)), require that the acts not be isolated. The more recent statutes, e.g., Florida, Georgia, Indiana, New Jersey, California, and Massachusetts explicitly require that these acts not be isolated but related. All of the states prohibit the ex post facto application of the statute. The maximum interval allowed between the two acts varies from four to ten years.

Hawaii, Arizona, and Rhode Island do not require the showing of a pattern of racketeering activity.

VIII. Unlawful Debt

¶14 Unlawful debt is defined as:

Federal

(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;

Hawaii

"Unlawful debt" means a debt incurred or contracted in an illegal gambling activity or business or which is unenforceable under state law in whole or in part as to principal or interest because of the law relating to usury.

Florida

(2) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in the state in whole or in part because the debt was incurred or contracted:
(a) In violation of any one of the following provisions of law:
1. Section 550.24, s. 550.35, or s. 550.36, relating to dogracing and horseracing.
2. Section 551.09, relating to jai alai frontons.
3. Chapter 687, relating to interest and usury.
4. Section 849.09, s. 849.14, s. 849.15, s. 849.23, s. 849.24, or s. 849.25, relating to gambling.
(b) In gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law.

Rhode Island

(d) "Unlawful debt" means a debt incurred or contracted in an illegal gambling activity or business or which is unenforceable under state law in whole or in part as to principal or interest because of the law relating to usury.

New Jersey

e. "Unlawful debt" means a debt

(1) Which was incurred or contracted in gambling activity which was in violation of the law of the United States, a state or political subdivision thereof; or

(2) 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; or

(3) 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

(4) Which was incurred in connection with 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.

California

(6) "Unlawful debt" means any debt incurred or contract in connection with any gambling activity which occurred in violation of the laws of the State of California.

¶15 Only five of the state statutes prohibit collection of an unlawful debt. The state definitions of unlawful debt are similar to the federal definition.

IX. Racketeering Investigator

¶16 Racketeering investigator is defined as:

Federal

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

Pennsylvania

(5) "Racketeering investigator" means an attorney, investigator or investigative body so designated in writing by the Attorney General and charged with the duty of enforcing or carrying into effect the provisions of this section.

Rhode Island

1) The attorney general shall designate, from within the department of attorney general, an investigator to serve as racketeer document custodian and such racketeering investigators as he shall determine to be necessary to serve as deputies to such officer.

¶17 The only states which define this term are Pennsylvania and Rhode Island. These definitions are similar to the federal definition

X. Racketeering Investigation

¶18 Racketeering investigation is defined as:

Federal

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

Pennsylvania

(6) "Racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this section or of any order, judgment, or decree of any court duly entered in any case or proceeding arising under this section.

¶19 Pennsylvania is the only state that defines this term. The definition is the same as the federal definition.

XI. Documentary Material

¶20 Documentary material is defined as:

Federal

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

Pennsylvania

(7) "Documentary material" means any book, paper, record, recording, tape, report, memorandum, written communication, or other document relating to the business affairs of any person or enterprise.

Arizona

5. "Records" means any book, paper, writing, record, computer program or other material.

Florida

(5) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonorecord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into useable form, or other tangible item.

Indiana

(a) "Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

New Jersey

f. "Documentary material" includes any book, paper, document, record, writing, drawing, graph, chart, photograph, phone record, magnetic tape, computer printout, other data compilation from which information can be translated into useable form, or other tangible item.

¶21 Five states define this term. The definitions are the same as or broader than the federal definition.

XII. Attorney General

¶22 Attorney general is defined as:

Federal

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

New Jersey

g. "Attorney General" includes the Attorney General of New Jersey, his assistants and deputies. The term shall also include a county prosecutor or his designated assistant prosecutor if a county prosecutor is expressly authorized in writing by the Attorney General to carry out the powers conferred on the Attorney General by this chapter.

California

(5) "Prosecuting agency" means the Attorney General of the State of California or the district attorney of any county within the State of California.

¶23 Two states define Attorney General. Again, the definitions are similar to the federal definition.

XIII. Prohibited Activities

¶24 The prohibited activities under each RICO statute are:

Federal

§ 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 [18 USCS § 2], 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 engages 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.

(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.

Pennsylvania

(b) Prohibited activities.--

(1) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity in which such person participated as a principal, 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: Provided, however, 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 issue held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase, do not amount in the aggregate to 1% 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: Provided, further, That if, in any proceeding involving an alleged investment in violation of this subsection, it is established that over half of the defendant's aggregate income for a period of two or more years immediately preceding such investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that such investment included income derived from such pattern of racketeering activity.

(2) It shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

(4) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (1), (2) or (3) of this subsection.

Hawaii

§842-2 Ownership or operation of business by certain persons prohibited. It shall be unlawful:

(1) For any person who has received any income derived, directly or indirectly, from a racketeering activity or through collection of an unlawful debt, 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.

(2) For any person through a racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) For any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt.

Arizona

§ 13-2312.

A. A person commits illegal control of an enterprise if such person, through racketeering or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise.

B. A person commits illegally conducting an enterprise if such person is employed or associated with any enterprise and conducts or participates in the conduct of such enterprise's affairs through racketeering.

C. A knowing violation of this section is a class 3 felony.

Florida

§43.462 Prohibited activities and defense

(1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsections (1), (2), or (3).

Rhode Island

"7-15-2. PROHIBITED ACTIVITIES. —

(a) It shall be unlawful for any person who has knowingly received any income derived, directly or indirectly, from a racketeering activity or through collection of an unlawful debt, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in the acquisition of an interest in, or the establishment or operation of any enterprise.

b) It shall be unlawful for any person through a racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

c) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt.

Provided, however, 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 section if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in a 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, either in law or in fact, confer the power to elect one or more directors of the issuer.

Georgia

26-3403. Prohibited activities. (a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature including money.

(b) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

Indiana

Sec. 2. (a) A person:
(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;
commits corrupt business influence, a Class C felony.

New Jersey

2C:41-2. 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 he has participated as a principal within the meaning of N. J. S. 2C:2-6 to use or invest, directly or

indirectly, any part of the income, or the proceeds of the 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 trade or 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 section, provided that the sum total of the securities of the issuer held by the purchaser, the members of his family, and his or their accomplices in any pattern of racketeering activity or in the collection of an unlawful debt does not amount in the aggregate to 1% of the outstanding securities of any one class, or does not, either in law or in fact, empower the holders thereof to elect one or more directors of the issuer, provided, further, that if, in any proceeding involving an alleged investment in violation of this section, it is established that over half of the defendant's aggregate income for a period of 2 or more years immediately preceding the investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that the investment included income derived from a pattern of racketeering activity.

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 activities of which affect trade or commerce.

c. It shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the 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.

California

186.4. It is unlawful for any person to acquire or maintain, either directly or indirectly, any interest or degree of control of any enterprise through a pattern of criminal profiteering activity or through the collection of an unlawful debt. Any person who violates this section is guilty of a felony and shall be punished by a term of two, four or six years and a fine of One Hundred Thousand Dollars ($100,000), or by a combination of such imprisonment and fine. Punishment of violations of this section by criminal penalties shall not prevent any qualified person or prosecuting agency from seeking civil recovery for the same violations.

186.5. It is unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of criminal profiteering activity. Any person who violates this section is guilty of a felony and may be punished by a term of two, four or six years and a fine of One Hundred Thousand Dollars ($100,000), or by a combination of such fine and imprisonment. Punishment of violations of this section by criminal penalties shall not prevent any qualified person or prosecuting agency from seeking civil recovery for the same violations.

Massachusetts (a) Takeovers by racketeering means: Anyone who acquires, or attempts to acquire, an interest or position in an enterprise through one or more acts of racketeering

(b) Racketeering through an enterprise: Anyone who conducts an enterprise through racketeering, uses an enterprise to facilitate racketeering, or engages in racketeering activity against an enterprise in which he is an officer, agent, employee, or interest-holder

¶25 The federal RICO statute delineates four offenses. Florida and New Jersey have patterned this portion of their statutes after the federal format. Pennsylvania follows the format closely but does not include as any part of the offense the collection of an unlawful debt. Rhode Island also follows the federal statute but does not prohibit a conspiracy to violate the other provisions of the section. The other states follow the intent of the federal statute, though their language and format vary.

XIV. Criminal Penalties

¶26 The criminal penalties for engaging in a prohibited activity are:

Federal **§ 1963. Criminal penalties**

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] 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 [18 USCS § 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 USCS § 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 any 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. 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 [18 USCS §§ 1961 et seq.] 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.

Pennsylvania

(2) The Attorney General and the district attorneys of the several counties shall have concurrent authority to institute criminal proceedings under the provisions of this section.

Hawaii

§842-3 Penalty; forfeiture of property. Whoever violates this chapter shall be fined not more than $10,000, or imprisoned not more than ten years, or both, and shall forfeit to the State any interest or property he has acquired or maintained in violation of this chapter.

Upon conviction of a person under this chapter, the circuit court shall authorize the county attorney or prosecutor, or the attorney general, to seize all property or other interest declared forfeited under this chapter upon such terms and conditions as the court shall deem proper. The State shall dispose of all property or other interest seized under this chapter as soon as feasible making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the State, it shall expire, and shall not revert to the convicted person.

Arizona

§ 13-2313. Judicial powers over racketeering criminal cases

During the pendency of any criminal case charging an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, the superior court may, in addition to its other powers, issue an order pursuant to § 13-2314, subsections B and C. Upon conviction of a person for an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312, the superior court may, in addition to its other powers of disposition, issue an order pursuant to § 13-2314.

Florida

943.463 Criminal penalties and alternative fine

(1) Any person convicted of engaging in activity in violation of the provisions of s. 943.462 is guilty of a felony of the first degree and shall be punished as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) In lieu of a fine otherwise authorized by law, any person convicted of engaging in conduct in violation of the provisions of s. 943.462, through which he derived pecuniary value, or by which he caused personal injury or property damage or other loss, may be sentenced to pay a fine that does not exceed three times the gross value gained or three times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution reasonably incurred.

(3) The court shall hold a hearing to determine the amount of the fine authorized by subsection (2).

(4) For the purposes of subsection (2), "pecuniary value" means:

(a) Anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else the primary significance of which is economic advantage; or

(b) Any other property or service that has a value in excess of $100.

Rhode Island

"7-15-3. PENALTIES FOR VIOLATIONS. — Whoever violates this chapter shall be fined not more than ten thousand dollars ($10,000), or imprisoned not more than ten years, or both, and may forfeit to the state any interest or property he has acquired or maintained in the violation of this chapter, provided that the value of the property forfeited shall not exceed the sum of the money invested in violation of section 7-15-2(a) plus the appreciated value of said money.

Upon conviction of a person under this chapter, the superior court shall authorize the attorney general to seize all property or other interest declared forfeited under this chapter upon such terms and conditions as the court shall deem proper. The state shall dispose of all property or other interest seized under this chapter as soon as feasible making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the state it shall expire and shall not revert to the convicted person.

Georgia

26-3404. Criminal penalties and alternative fine.

(a) Any person convicted of engaging in activity in violation of the provisions of Code Section 26-3403 is guilty of a felony and shall be punished by not less than five nor more than 20 years' imprisonment or the

fine specified in subsection (b) or both.

(b) In lieu of any fine otherwise authorized by law, any person convicted of engaging in conduct in violation of the provisions of Code Section 26-3403 may be sentenced to pay a fine that does not exceed the greater of $25,000.00 or three times the amount of any pecuniary value gained by him from such violation.

(c) The court shall hold a hearing to determine the amount of the fine authorized by subsection (b).

(d) For the purposes of subsection (b), 'pecuniary value' means:

(1) Anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or

(2) Any other property or service that has a value in excess of $100.00.

Indiana

35-50-2-6. Class C felony. — A person who commits a class C felony shall be imprisoned for a fixed term of five [5] years, with not more than three [3] years added for aggravating circumstances or not more than three [3] years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars [$10,000].

New Jersey

2C:41-3. Criminal penalties. Any person who violates any provision of N. J. S. 2C:41-2 shall be guilty of a crime of the first degree and shall forfeit to the entity funding the prosecuting agency involved

a. Any interest including money he has acquired or maintained in violation o

this chapter and

b. 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, acquired, maintained, operated, controlled,

conducted, or participated in the conduct of, in violation of this chapter.

California

186.6(a) Any person convicted pursuant to this chapter shall forfeit to the state any interest acquired in violation of this chapter. The court may make such orders, including, the posting of bonds and the appointment of masters, as it finds necessary to secure such interests during the person's trial and to transfer them after his conviction. If a property right or other interest is not exercisable or transferable for value by the convicted person, the court shall order that it expire and not revert to the convicted person.

(b) The court shall, in making its orders, protect the interests of those who may be involved in the same business enterprise or labor union as the convicted person, but who have not been convicted pursuant to this chapter and who were not involved in the commission of the criminal profiteering activi

Massachusetts

Section 2. Criminal Penalties

(a) Takeovers by racketeering means: Anyone who acquires, or attempts to acquire, an interest or position in an enterprise through one or more acts of racketeering shall, upon conviction for the racketeering act(s): (i) forfeit any interest or position in that enterprise; (ii) be enjoined from acquiring a further interst, or continuing to engage, in the same type of endeavor on a finding that he is likely to commit further acts of racketeering in the field.

(b) Racketeering through an enterprise: Anyone who conducts an enterprise through racketeering, uses an enterprise to facilitate racketeering, or engages in racketeering activity against an enterprise in which he is an officer, agent, employee, or interest-holder shall, upon conviction for the racketeering act(s): (i) forfeit any interest or position in that enterprise; (ii) be enjoined from acquiring a further interest or continuing to engage, in the same type of endeavor on a finding that he is likely to commit further acts of racketeering in the field.

¶27 A violation of the federal RICO statute can result in a fine of $25,000, a prison sentence of 20 years, or both. There is also a criminal forfeiture provision. Generally, the state RICO statutes have lower fines and prison sentences, for example, $10,000 and ten years. Some state statutes include civil rather than criminal forfeiture provisions (e.g., Florida).

XV. Civil Remedies

¶28 The civil remedies provided by the RICO statutes are:

Federal

§ 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 [18 USCS § 1962] 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.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] 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.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Pennsylvania

(d) Civil remedies.—

(1) The several courts of common pleas, and the Commonwealth Court, shall have jurisdiction to prevent and restrain violations of subsection (b) of this section by issuing appropriate orders, including but not limited to:

(i) ordering any person to divest himself of any interest direct or indirect, in the 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; and

(ii) making due provision for the rights of innocent persons, ordering the dissolution of the enterprise, ordering the denial, suspension or revocation of charters of domestic corporations, certificates of authority authorizing foreign corporations to do business within the Commonwealth of Pennsylvania, licenses, permits, or prior approval granted to any enterprise by any department or agency of the Commonwealth of Pennsylvania; or prohibiting the enterprise from engaging in any business.

(2) In any proceeding under this subsection, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination, the court may enter preliminary or special injunctions, or take such other actions, including the acceptance of satisfactory performance bonds, as it may deem proper.

(3) A final judgment or decree rendered in favor of the Commonwealth of Pennsylvania in any criminal proceeding under this section shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this subsection.

(4) Proceedings under this subsection, at pretrial, trial and appellate levels, shall be governed by the Pennsylvania Rules of Civil Procedure and all other rules and procedures relating to civil actions, except to the extent inconsistent with the provisions of this section.

Hawaii

§842-8 **Civil remedies.** (a) The circuit courts of the State shall have jurisdiction to prevent and restrain violations 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, 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. In any action brought by the State under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

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

(d) A final judgment or decree rendered in favor of the State in any criminal proceeding brought by the State under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the State.

Arizona

§ 13-2314. Racketeering; civil remedies

A. A person who sustains injury to his person, business or property by racketeering as defined by § 13-2301, subsection D, paragraph 4 or by a violation of § 13-2312 may file an action in superior court for the recovery of treble damages and the costs of the suit, including reasonable attorney's fees. The state may file an action in behalf of those persons injured or to prevent, restrain, or remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

B. The superior court has jurisdiction to prevent, restrain, and remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders.

C. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

D. Following a determination of liability such orders may include, but are not limited to:

1. Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

2. Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of this state, to the extent the constitutions of the United States and this state permit.

3. Ordering dissolution or reorganization of any enterprise.

4. Ordering the payment of treble damages to those persons injured by racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312.

5. Ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of

racketeering in § 13–2301, subsection D, paragraph 4 or a violation of § 13–2312, civil and criminal, incurred by the state or county as appropriate to be paid to the general fund of the state or county which brings the action.

6. Payment to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:

(a) Any interest acquired or maintained by a person in violation of § 13–2312.

(b) Any interest in, security of, claims against or property or contractual right of any kind affording a source of influence over any enterprise which a person has established, operated, controlled, conducted or participated in the conduct of in violation of § 13–2312.

(c) An amount equal to the gain a person has acquired or maintained through an offense included in the definition of racketeering in § 13–2301, subsection D, paragraph 4.

Florida

943.464 Civil remedies

(1) Any circuit court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of s. 943.462 by issuing appropriate orders and judgments, including, but not limited to:

(a) Ordering any defendant to divest himself of any interest in any enterprise, including real property.

(b) Imposing reasonable restrictions upon the future activities or investments of any defendant, including but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of the provisions of s. 943.462.

(c) Ordering the dissolution or reorganization of any enterprise.

(d) Ordering the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state.

(e) Ordering the forfeiture of the charter of a corporation organized under the laws of the state, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of s. 943.462 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

(2) All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of a provision of ss. 943.46–943.464 is subject to civil forfeiture to the state. The state shall dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, it shall expire. All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. The proceeds realized from such forfeiture and disposition shall be promptly deposited in the treasury of the state and immediately credited to the General Revenue Fund of the state.

(3) Property subject to forfeiture under this section may be seized by a law enforcement officer upon court process. Seizure without process may be made if:

(a) The seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant.

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding based upon this section.

(4) In the event of a seizure under subsection (3), a forfeiture proceeding shall be instituted promptly. Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement officer making the seizure, subject only to the order of the court. When property is seized under this section, pending forfeiture and final disposition, the law enforcement officer may:

(a) Place the property under seal.

(b) Remove the property to a place designated by court.

(c) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(5) The Department of Legal Affairs, any State Attorney, or any state agency having jurisdiction over conduct in violation of a provision of this act may institute civil proceedings under this section. In any action brought under this section, the circuit court shall proceed as soon as practicable to the hearing and determination. Pending final determination, the circuit court may at any time enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performnce bonds, as the court may deem proper.

(6) Any aggrieved person may institute a proceeding under subsection (1). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(7) Any person who is injured by reason of any violation of the provisions of s. 943.462 shall have a cause of action for three-fold the actual damages sustained and, when appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred.

(a) The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this section.

(b) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state has in the same property or proceeds.

(8) A final judgment or decree rendered in favor of the state in any criminal proceeding under this act shall estop the defendant in any subsequent civil action or proceeding as to all matters as to which such judgment or decree would be an estoppel as between the parties.

(9) The Department of Legal Affairs may, upon timely application, intervene in any civil action or proceeding brought under subsection (6) or subsection (7) if he certifies that, in his opinion, the action or proceeding is of general public importance. In such action or proceeding, the state shall be entitled to the same relief as if the Department of Legal Affairs had instituted the action or proceeding.

(10) Notwithstanding any other provision of law, a criminal or civil action or proceeding under this act may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of the provisions of this act, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsection (6) or subsection (7) which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.

(11) The application of one civil remedy under any provision of this act shall not preclude the application of any other remedy, civil or criminal, under this act or any other provision of law. Civil remedies under this act are supplemental, and not mutually exclusive.

Rhode Island

"7-15-4. CIVIL REMEDIES.—

a) The superior courts of the state shall have jurisdiction to prevent and restrain violations 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, or ordering dissolution or reorganization of any enterprise, making due provisions for the rights of innocent persons.

(b) The attorney general may institute proceedings under this section. In any action brought by the state under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of this chapter may sue therefor in any appropriate court and shall recover treble damages and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the state in any criminal proceeding brought by the state under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the state.

Georgia

26-3405. Forfeiture. (a) All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding under the following rules.

(b) A RICO forfeiture proceeding shall be governed by the Georgia Civil Practice Act, except to the extent that special rules of procedure are stated herein.

(c) A RICO forfeiture proceeding shall be an in rem proceeding against the property.

(d) A RICO forfeiture proceeding shall be instituted by complaint and prosecuted by the district attorney of the county in which the property is located or seized. The proceeding may be commenced before or after seizure of the property.

(1) If the complaint is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of the court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine ex parte whether there is reasonable cause to believe that the property is subject to forfeiture and that notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property. If the court finds that reasonable cause does not exist to believe the property is subject to forfeiture, it shall dismiss the complaint. If the court finds that reasonable cause does exist to believe the property is subject to forfeiture but there is not reasonable cause to believe that prior notice would result in loss or destruction, it shall order service on all persons known to have or claim an interest in the property prior to a further hearing on whether a writ of seizure should issue. If the court finds that

there is reasonable cause to believe that the property is subject to forfeiture and to believe that prior notice would cause loss or destruction, it shall without any further hearing or notice issue a writ of seizure directing the sheriff of the county where the property is found to seize it.

(2) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, such seizure shall be reported by said officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within 30 days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in paragraph (1) of this subsection (d), the date and place of seizure.

(e) After the complaint is filed or the seizure effected, whichever is later, every person known to have or claim an interest in the property shall be served, if not previously served, with a copy of the complaint and a notice of seizure in the manner provided by the

Georgia Civil Practice Act. Service by publication may be ordered upon any party whose whereabouts cannot be determined.

(f) (1) Any person claiming an interest in the property may become a party to the action at any time prior to judgment, whether named in the complaint or not. Any party claiming a substantial interest in the property may upon motion be allowed by the court to take possession of the property upon posting bond with good and sufficient security in double the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interest of another not subject to forfeiture. Such a party taking possession shall not remove the property from the territorial jurisdiction of the court without written permission from the court.

(2) The court may, upon such terms and conditions as prescribed by it, order that the property be sold by an innocent party who holds a lien on or security interest in the property at any time during the proceedings. Any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest shall be paid into court pending final judgment in the forfeiture proceeding. No such sale shall be ordered, however, unless the obligation upon which the lien or security interest is based is in default.

(3) Pending final judgment in the forfeiture proceeding, the court may make any other disposition of the property which is in the interest of substantial justice.

(g) After service of process all further proceedings shall be as provided in the Georgia Civil Practice Act; except that any party may bring one motion to dismiss at any time and such motion shall be heard and ruled on within 10 days. Any party may demand a jury trial.

(h) The interest of an innocent party in the property shall not be subject to forfeiture. An innocent party is one who did not have actual or constructive knowledge that the property was subject to forfeiture.

(i) Subject to the requirement of protecting the interest of all innocent parties, the court may after judgment of forfeiture make any of the following orders for disposition of the property:

(1) Destruction of contraband, the possession of which is illegal;

(2) Retention for official use by any agency of this state or any political subdivision thereof. When such agency or political subdivision no longer has use for such property, it shall be disposed of by judicial sale;

(3) Transfer to the Department of Archives of

property useful for historical or instructional purposes;

(4) Retention of the property by any innocent party having an interest therein, upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property; such a plan may include, in the case of an innocent party who holds a lien on or security interest in the property, the sale of the property by said innocent party under such terms and conditions as may be prescribed by the court and the payment into court of any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest;

(5) Judicial sale of the property;

(6) Transfer of the property to any innocent party having an interest therein equal to or greater than the value of the property; or

(7) Any other disposition of the property which is in the interest of substantial justice and adequately protects innocent parties.

(j) The net proceeds of any sale or disposition after satisfaction of the interest of any innocent party, less the greater of one-half thereof or the costs borne by the county in bringing the forfeiture action, shall be paid into the general fund of the state treasury. The costs borne by the county or one-half of

the net proceeds of sale or disposition, whichever is greater, shall be paid into the treasury of the county where the forfeiture action is brought.

26-3406. Other civil remedies. (a) Any superior court may, after making due provisions for the rights of innocent persons, enjoin violations of the provisions of Code Section 26-3403 by issuing appropriate orders and judgments including, but not limited to:

(1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property;

(2) Imposing reasonable restrictions upon the future activities or investments of any defendant including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of the provisions of Code Section 26-3403;

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the state; or

(5) Ordering the forfeiture of the charter of a corporation organized under the laws of the State of Georgia or the revocation of a certificate authorizing a foreign corporation to conduct

business within the State of Georgia upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of Code Section 26-3403 and that, for the prevention of future criminal activity, the public interest requires that the charter of the corporation be forfeited and that the corporation be dissolved or the certificate be revoked.

(b) Any aggrieved person or the state may institute a proceeding under subsection (a). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

(c) Any person who is injured by reason of any violation of the provisions of Code Section 26-3403 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive

damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation, reasonably incurred.

(1) The defendant or any injured person may demand a trial by jury in any civil action brought pursuant to this Code section.

(2) Any injured person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state or the county (other than for costs) has in the same property or proceeds. To enforce such a claim, the injured person must intervene in the forfeiture proceeding prior to its final disposition.

(d) A conviction in any criminal proceeding under this chapter shall estop the defendant in any subsequent civil action or proceeding as to all matters proved in the criminal proceeding.

Indiana

Sec. 2. The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) order a defendant to divest himself of any interest in any enterprise or real property;

(2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons.

Sec. 3. (a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred.

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may

order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) an amount equal to three (3) times his actual damages;
(2) the costs of the action;
(3) a reasonable attorney's fee; and
(4) any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state of Indiana has in the same property or proceeds.

Sec. 6. In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2.

New Jersey

2C:41-4. Civil remedies. a. The Superior Court, making due provisions for the rights of innocent persons, shall have jurisdiction to prevent and restrain violations of N. J. S. 2C:41-2, by issuing appropriate orders, including, but not limited to:

(1) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

(2) 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 found to be in violation of N. J. S. 2C:41-2;

(3) Ordering the dissolution or reorganization of any enterprise;

(4) Ordering the denial, suspension or revocation of the charter of any corporation organized under the laws of this State and to deny, suspend or revoke the license of any foreign corporation authorized to do business in the State of New Jersey;

(5) Ordering the denial, suspension or revocation of the license

or permit granted to any enterprise by any department or agency of the State of New Jersey;

(6) Entering a cease and desist order which specifies the conduct which is to be discontinued, altered or implemented by any person;

(7) Ordering the restitution of any moneys or property unlawfully obtained or retained by any person found to be in violation of N. J. S. 2C:41-2;

(8) Assessing civil penalties as may be necessary to punish misconduct and to deter future violations, which penalties may not exceed $100,000.00; and

(9) Ordering forfeiture to the entity funding the prosecuting agency involved of any interest he has acquired or maintained in violation of this chapter and any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprises he has established, operated, controlled, conducted, or participated in the conduct of, in violation of this chapter.

(10) Imposing any or all of the foregoing sanctions in combination with each other.

b. In any action brought by the Attorney General under this chapter, the Superior Court shall have the jurisdiction to enter restraining orders or prohibitions, or to take 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 chapter, as it shall deem proper.

c. Upon conviction of a person under this chapter, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon 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 State, it shall expire and shall not revert to the convicted person.

d. The Attorney General may institute proceedings in Superior Court for violations of N. J. S. 2C:41-2. In any action brought under this section, the court shall proceed as soon as practicable

to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter restraining orders or prohibitions, or take other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

e. Any person damaged in his business or property by reason of a violation of N. J. S. 2C:41-2 may sue therefor in any appropriate court and shall recover threefold any damages he sustains and the cost of the suit, including a reasonable attorney's fee.

f. A final judgment rendered in favor of the State in any criminal proceeding brought under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding.

California

186.7. Any person injured by an act in violation of this chapter may apply for assistance as provided in Section 13961 of the Government Code or may sue the person or persons responsible for the act for three times his actual damages and costs, including reasonable attorney's fees.

186.8(a) The Attorney General or district attorney may file a civil action on behalf of the state instead of, or in addition to, a criminal prosecution against a person accused of violating the provisions of this chapter. Recovery may be three times actual damages as measured by the total costs to state and local governments of investigating, prosecuting, and trying the case. Any amounts recovered in excess of actual damages shall be deposited in the Indemnity Fund as provided in Section 13967 of the Government Code.

(b) During such an action, the court may make such orders including the posting of bonds and the appointment of masters,

as it finds necessary to secure defendant's property in an amount equal to the damages requested.

(c) If the defendant is found liable, the court, in order to prevent or restrain any future violations of this chapter, may:

(i) Order the defendant to divest himself of any interest acquired in violation of this chapter or of any interest in any business enterprise or labor union acquired or maintained in violation of this chapter.

(ii) Order such reasonable restrictions on the activities or investments of the defendant as would insure his future compliance with the provisions of this chapter.

(iii) Order the dissolution or reorganization of any business enterprise or labor union acquired, maintained, or operated in violation of this chapter.

(d) The court shall, in making its orders, protect the interests of those who may be involved in the same business enterprise or labor union as the defendant, but who have not been found liable pursuant to this chapter and who were not involved in the commission of the criminal profiteering activity.

Massachusetts

Section 3. Civil Remedies

(a) Acquisition of an enterprise by a racketeer; (i) anyone who has been convicted of, or is shown to have been engaged in acts constituting a pattern of racketeering activity may be enjoined in a suit brought by the Attorney General, or his designee, or a district attorney, or his designee, from acquiring, or compelled to divest himself of, any interest or position in an enterprise if it is found that funds acquired through racketeering have facilitated the acquisition or attempted acquisition of his interest or position by being used directly to purchase or finance his interest or position; (ii) it is an affirmative defense to an action under this section that the proceeds were used to purchase securities of the

enterprise on the open market without intent to control or participate in the control of the enterprise, or to assist another person to do so, if the securities of the enterprise held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase do not amount in the aggregate to one percent or more 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.

(b) Racketeer influenced and corrupt enterprises — Any enterprise conducted through or used to facilitate a pattern of racketeering may be subject to dissolution on motion of the Attorney General or a district attorney. It is a defense to such action that those controlling or managing the enterprise had no reason to know of the racketeering activity, or took steps to stop it after discovering it.

Section 7. Treble Damage Action

(a) Suit by Injured Person — If any person, including a corporation or government body, is injured by reason of any conduct for which the Attorney General or a district attorney could seek relief under Sections 2 or 3(b), that person may bring a civil action and recover damages as specified in subsection (b), attorney's fees, and costs of investigation and litigation, reasonably incurred.

(b) Treble Damages — Damages recoverable in actions brought under subsection (a) shall be three-fold the actual damages sustained. Any amount restored to a person from a forfeited interest shall be deducted after the treble damages have been computed.

(c) Limitations — No action shall be brought under this subsection more than six years after it accrues.

Section 8. Estoppel

In any action or proceeding under sections 3 or 7, the defendant will be estopped as to all findings necessary to a final judgment already rendered by a court of competent jurisdiction in a criminal action or proceeding.

¶29 The federal civil remedies section gives the district courts jurisdiction to issue orders that will prevent or restrain RICO violations. The Attorney General may bring a RICO civil action. A person injured in his business or property may bring a civil action for treble damages, attorney's fees, and costs. A prior criminal conviction for the same offense estops the defendant from disclaiming liability.

¶30 The civil remedies included in the state RICO statutes vary. Most are very similar to the federal provisions. The Pennsylvania and Hawaii statutes, however, make no provision for treble damage actions. Some state statutes provide for special periods of limitation (e.g., Florida).

XVI. Venue and Process

¶31 The federal RICO statute includes a section on venue and process:

Federal

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter [18 USCS §§ 1961 et seq.] 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 [18 USCS §§ 1964] 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 chapter [18 USCS §§ 1961 et seq.] 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 [18 USCS §§ 1961 et seq.] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

There are no corresponding sections in the state statutes.

XVII. Expedition of Actions

¶32 The federal RICO statute includes a section on expedition of actions:

Federal

§ 1966. Expedition of actions

In any civil action instituted under this chapter [18 USCS §§ 1961 et seq.] 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.

Arizona

G. This state may, in any civil action brought pursuant to this section, file with the clerk of the superior court a certificate stating that the case is of special public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or presiding chief judge of the superior court in which such action is pending and, upon receipt of such copy, the judge shall immediately designate a judge to hear and determine the action. The judge so designated shall promptly assign such action for hearing, participate in the hearings and determination and cause the action to be expedited.

Arizona is the only state with a corresponding section.

XVIII. Evidence

¶33 The sections regarding evidence are as follows:

Federal

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter [18 USCS §§ 1961 et seq.] the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

Hawaii

§842-9 Evidence. In any proceeding ancillary to or in any civil action instituted by the State 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.

Rhode Island

"7-15-5. EVIDENCE. — In any proceeding ancillary to or in any civil action instituted by the state 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.

¶34 Hawaii and Rhode Island are the only states which follow the federal lead by including this section.

XIX. Civil Investigative Demand

¶35 The sections regarding civil investigative demands are as follows:

Federal

§ 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 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.

(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 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 [18 USCS §§ 1961 et seq.]. 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.

(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 [18 USCS §§ 1961 et seq.], 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 [18 USCS §§ 1961 et seq.], 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 investigator 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 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 material so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

Pennsylvania

(f) Civil investigative demand.—

(1) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary material relevant to a racketeering investigation, he may issue in writing, and cause to be served upon such person or enterprise, a civil investigative demand requiring the production of such material for examination.

(2) Each such demand shall:

(i) state the nature of the conduct constituting the alleged racketeering violation which is under investigation, the provision of law applicable thereto and the connection between the documentary material demanded and the conduct under investigation;

(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) 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;

(iv) identify a racketeering investigator to whom such material shall be made available; and

(v) contain the following statement printed conspicuously at the top of the demand: "You have the right to seek the assistance of any attorney and he may represent you in all phases of the racketeering investigation of which this civil investigative demand is a part."

(3) No such demand shall:

(i) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by any court in connection with 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 subpoena duces tecum issued by any court in connection with a grand jury investigation of such alleged racketeering violation.

(4) Service of any such demand or any petition filed under this subsection shall be made in the manner prescribed by the Pennsylvania Rules of Civil Procedure for service of writs and complaints.

(5) 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.

(6) (i) Any party upon whom any demand issued under this subsection has been duly served shall make such material available for inspection and copying or reproduction to the racketeering investigator designated therein at the principal place of business of such party, or at such other place as such investigator and such party thereafter may agree or as the court may direct pursuant to this subsection, on the return date specified in such demand. Such party may upon agreement of the investigator substitute copies of all or any part of such material for the originals thereof.

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

(iii) Upon completion of:

(A) the racketeering investigation for which any documentary material was produced under this subsection; and

(B) any case or proceeding arising from such investigation, the investigator shall return to the party who produced such material all such material other than copies thereof made pursuant to this subsection which have not passed into the control of any court or grand jury through introduction into the record of such case or proceeding.

(iv) When any documentary material has been produced by any party under this subsection for use in any racketeering investigation, and no 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 party 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 party.

(7) Whenever any person or enterprise fails to comply with any civil investigative demand duly served upon him under this subsection or whenever satisfactory copying or reproduction of any such material cannot be done and such party refuses to surrender such material, the Attorney General may file, in the court of common pleas for any county in which such party resides or transacts business, and serve upon such party a petition for an order of such court for the enforcement of this subsection, except that if such person transacts business in more than one county such petition shall be filed in the county in which party maintains his or its principal place of business.

(8) Within 20 days after the service of any such demand upon any person or enterprise, or at any time before the return date specified in the demand, whichever period is shorter, such party may file, in the court of common pleas of the county within which such party resides or transacts business, and serve upon the Attorney General 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 subsection or upon any constitutional or other legal right or privilege of such party.

(9) At any time during which the Attorney General is in custody or control of any documentary material delivered by any party in compliance with any such demand, such party may file, in the court of common pleas of the county within which such documentary material was delivered, and serve upon the Attorney General a petition for an order of such court requiring the performance of any duty imposed by this subsection.

(10) Whenever any petition is filed in any court of common pleas under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and, after a hearing at which all parties are represented, to enter such order or orders as may be required to carry into effect the provisions of this subsection.

Hawaii

§842-10 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 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.

(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 subpoena duces tecum issued by a court of the State 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 subpoena duces tecum issued by a court of the State 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 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, from the organized crime unit established pursuant to section 28-71, an investigator to serve as racketeer document custodian and such racketeering investigators as he shall determine 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.

(4) Whenever any attorney has been designated to appear on behalf of the State 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 State. 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 investigator 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 court of the State for any judicial circuit 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.

(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 court of the State for the judicial circuit 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 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 court of the State for the judicial circuit 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 court of the State 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.

Arizona

§ 13-2315. Racketeering; investigation of records; confidentiality; court enforcement; classification

A. A custodian of the records of a financial institution as defined in § 13-2301 shall, at no expense to the financial institution, produce for inspection or copying the records in the custody of such financial institution when requested to be inspected by the attorney general or a county attorney authorized by the attorney general, provided such person requesting such information signs and submits a sworn statement to the custodian that the request is made in order to investigate racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312. Such records may be removed from the premises of the financial institution only for the purpose of copying the records and shall be returned within forty-eight hours. The attorney general or an authorized county attorney or any peace officer designated by such county attorney or the attorney general shall be prohibited from using or releasing such information except in the proper discharge of official duties. The furnishing of records in compliance with this section by a custodian of records shall be a bar to civil or

criminal liability against such custodian or financial institution in any action brought alleging violation of the confidentiality of such records.

B. The attorney general or the authorized county attorney may petition the superior court for enforcement of this section in the event of noncompliance with the request for inspection. Enforcement shall be granted if the request is reasonable and the attorney general or the authorized county attorney has reasonable grounds to believe the records sought to be inspected are relevant to a civil or criminal investigation of an offense included in the definition of racketeering in § 13–2301, subsection D, paragraph 4 or a violation of § 13–2312.

C. The investigation authority granted pursuant to the provisions of this section may not be exercised by a county attorney in the absence of authorization by the attorney general.

D. Any person releasing information obtained pursuant to this section, except in the proper discharge of official duties, is guilty of a class 2 misdemeanor.

Florida

943.465 Civil investigative subpoenas

(1) As used in this section, "investigative agency" means the Department of Legal Affairs or the office of a state attorney.

(2) If, pursuant to the civil enforcement provisions of s. 943.464, an investigative agency has reason to believe that a person or other enterprise has engaged in, or is engaging in, activity in violation of this act, the investigative agency may administer oaths or affirmations, subpoena witnesses or material, and collect evidence pursuant to the Florida Rules of Civil Procedure.

(3) If matter that the investigative agency seeks to obtain by the subpoena is located outside the state, the person or enterprise subpoenaed may make such matter available to the investigative agency or its representative for examination at the place where such matter is located. The investigative agency may designate representatives, including officials of the jurisdiction in which the matter is located, to inspect the matter on its behalf and may respond to similar requests from officials of other jurisdictions.

(4) Upon failure of a person or enterprise, without lawful excuse, to obey a subpoena, and after reasonable notice to such person or enterprise, the investigative agency may apply to the circuit court for the judicial circuit in which such person or enterprise resides, is found, or transacts business for an order compelling compliance.

Rnode Island

"7-15-7. CIVIL INVESTIGATIVE DEMAND. —

(a) Whenever the attorney general has reasonable cause to believe that any person or enterprise may have knowledge or be in possession, custody or, control of any documentary material, pertinent to an investigation of a possible violation of this chapter, he may, prior to and/or following the institution of a civil or criminal proceeding thereon, issue in writing and cause to be served upon such person or enterprise a civil investigatory demand by which he may:

(1) Compel the attendance of such person and require him or her to submit to examination and give testimony under oath; and/or

(2) Require the production of documentary material pertinent to the investigation for inspection and/or copying; and/or

3) Require answers under oath to written interrogatories. The power to issue investigative demands shall not abate or terminate by reason of the bringing of any action or proceeding under this chapter. The attorney general may issue successive investigatory demands to the same person in order to obtain additional information pertinent to an ongoing investigation.

4) In the event the attorney general initiates a civil investigatory demand prior to a criminal indictment for violation of this chapter, then the commencement, contents and results of such civil investigatory demand shall be held in the strictest confidence by the attorney general and shall remain so until such time as a civil action is commenced, indictment for violation of this chapter returned or removal of said confidentiality is ordered by a justice of the superior court.

b) Contents of Investigative Demand. —

Each investigatory demand shall:

1) State the nature of the conduct constituting the alleged racketeering violation of this chapter which is under investigation and the provisions of law applicable thereto;

2) Prescribe a reasonable return date no less than twenty (20) days from the date of the investigative demand, provided that an earlier date may be prescribed under compelling circumstances;

3) Specify the time and place at which the person is to appear and give testimony, produce documentary material, and furnish answers to interrogatories, or do any or a combination of the aforesaid;

4) Identify the custodian to whom any documentary material shall be made available;

5) Describe by class any documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified; and

6) Contain any interrogatories to which written answers under oath are required.

7) Advise in writing the person upon whom the demand is served that the material or statements may constitute a basis for prosecution against said person.

c) Prohibition Against Unreasonable Demand. —

No investigatory demand shall:

1) Contain any requirement which would be unreasonable or improper if contained in a subpoena or a subpoena duces tecum issued by a court of this state; or

2) Require the disclosure of any material which would be privileged from disclosure if demanded by a subpoena or a subpoena duces tecum issued by a court of this state.

d) Service of Investigative Demand. —

An investigative demand may be served by:

1) Delivering a duly executed copy to the person to be served, or if the person is not a natural person, 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;

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

3) Mailing by certified mail, return receipt requested. a duly executed copy addressed to the person to be served, or if the person is not a natural person, addressed to its principal office or place of business in this state, or if it has none in this state, to its principal office or place of business.

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

e) Authorization to Examine. —

The examination of all persons pursuant to this section shall be conducted by the attorney general or a representative designated in writing by him, before an officer authorized to administer oaths in this state. The statements made shall be taken down steographically or by a sound recording device and shall be transcribed.

f) Rights of Persons Served with Investigative Demands. —

Any person required to attend and give testimony or to submit documentary material pursuant to this section shall be entitled to retain, or on payment of lawfully prescribed cost to procure, a copy of any document he produces and of his own statements as transcribed. Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented and advised by counsel. Counsel may advise such person in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the attorney general may petition the superior court for an order compelling such person to answer such question. The information and materials supplied to the attorney general pursuant to an investigative demand shall not be permitted to become public or be disclosed by the attorney general or his employees beyond the extent necessary for legitimate law enforcement purposes pursuant to this chapter.

g) Witness Expenses. —

All persons served with an investigative demand, other than those persons whose conduct or practices are being investigated or any officer, director or person in the employment of such person under investigation, shall be paid the same fees and mileage as paid witnesses in the courts of this state. No person shall be excused from attending such inquiry pursuant to the mandate of an investigative demand or from giving testimony, or from producing documentary material or from being required to answer questions on the ground of failure to tender or pay a witness fee or mileage unless demand therefore is made at the time testimony is about to be taken and unless payment thereof is not thereupon made.

h) Custody of Documents. —

1) The attorney general shall designate, from within the department of attorney general, an investigator to serve as racketeer document custodian and such racketeering investigators as he shall determine 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 custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute copies of all or any part of such material for 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, other than for legitimate law enforcement purposes pursuant to this chapter. 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.

(4) Whenever any attorney has been designated to appear on behalf of the state 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 state. Upon the conclusion of any such case on 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 the investigation for which any documentary material was produced under this chapter, and 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 custodian pursuant to this section, 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 chapter, 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 custodian, to the return of all documentary material.

Provided, however, that no documentary material shall be tendered, delivered or otherwise made available to any other state, federal or municipal agency.

Anyone who knowingly and willfully violates the provision of this section shall, in addition to any civil liability, be punished by a fine of not more than five hundred dollars ($500.00) and/or imprisonment for no longer than one (1) year.

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 chapter or the official relief of such custodian from responsibility for the custody and control of such material, the attorney general shall promptly designate another racketeering investigator to serve as custodian thereof, and 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 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.

i) Enforcement of Investigative Demands for Production. —

Whenever any person fails to comply with any civil investigative demand duly served upon him under this chapter requiring the production of documentary material 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 superior court and serve upon such person a petition for an order of such court for the enforcement of the demand.

j) Refusal of Persons Served to Testify or Produce Documents. —

Whenever any natural person shall neglect or refuse to attend and give testimony or to answer any lawful inquiry or to produce documentary material if in his

power to do so in obedience to an investigative demand duly served upon him under this chapter, he may be adjudged in civil contempt by the superior court until such time as he purges himself of contempt by testifying, producing documentary material or presenting written answers as ordered. Any natural person who commits perjury or false swearing in response to an investigative demand pursuant to this section shall be punishable pursuant to the provisions of title 11, chapter 33 of the general laws.

k) Motion to Quash. —

Within twenty days after the service of an investigatory demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, the person served may file in the superior court 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.

l) Right of persons producing documents. —

At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with an investigatory demand, such person may file in the superior court 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.

m) Duty to testify. —

1) If, in any investigation brought by the attorney general pursuant to this section, any individual shall refuse to attend or to give testimony or to produce documentary material or to answer a written interrogatory in obedience to an investigative demand or under order of court on the ground that the testimony

or material required of him may tend to incriminate him, that person may be ordered to attend and to give testimony or to produce documentary material or to answer the written interrogatory, or to do an applicable combination of these. The order as aforesaid shall be an order of court given after a hearing in which the attorney general has established a need for the grant of immunity, as hereinafter provided.

2) The attorney general may petition the presiding justice of the superior court for an order as described in subsection (1) of this section. Such petition shall set forth the nature of the investigation and the need for the immunization of the witness.

3) Testimony so compelled shall not be used against the witness as evidence in any criminal proceedings against him in any court. However, the grant of immunity shall not immunize the witness from civil liability arising from the transactions about which testimony is given, and he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or in failing to answer or in producing evidence or failing to do so in accordance with the order. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in civil contempt by the superior court until such time as he purges himself of contempt by testifying, producing documentary material or presenting written answers as ordered. The foregoing shall not prevent the attorney general from instituting other appropriate contempt proceedings against any person who violates any of the above provisions.

New Jersey

2C:41-5. 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 an investigation under this chapter, or whenever the Attorney General believes it to be in the public interest that an investigation be made, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon the person, a civil investigative demand requiring him to produce the material for examination.

b. Each demand shall:

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

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

(3) 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 the material shall be made available.

c. No demand shall:

(1) Contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued in aid of a grand jury investigation; or

(2) Require the production of any documentary evidence which would be otherwise privileged from disclosure if demanded by a subpena duces tecum issued in aid of a grand jury investigation.

d. Service of any demand 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 the 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 a copy in the United States mail, by registered or certified mail duly addressed to the person at his principal office or place of business.

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

f. Any person upon whom any demand issued under this section has been duly served shall make the material available for inspection and copying or reproduction to the Attorney General at the principal place of business of that person in the State of New Jersey or at such other place as the Attorney General and the person thereafter may agree and prescribe in writing, on the return date specified in the demand or on a later date as the Attorney General may prescribe in writing. Upon written agreement between the person and the Attorney General, copies may be substituted for all or any part of the original materials. The Attorney General may cause the preparation of any copies of documentary material as may be required for official use by the Attorney General. While in the possession of the Attorney General no material so produced shall be available for examination, without the consent of the person who produced the material, by an individual other than the Attorney General or his duly appointed representatives. Under reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in his possession shall be available for examination by the person who produced the material or any duly authorized representatives of the person.

g. Upon completion of:

(1) The review and investigation for which any documentary material was produced under this section, and

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

h. When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no 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 the investigation, the 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 section so produced by the person.

i. 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 material cannot be done and the person refuses to surrender the material, the Attorney General may file in the Superior Court a petition for an order of the court for the enforcement of this section.

2C:41-6. Investigations. a. Whenever it shall appear to the Attorney General, either upon complaint or otherwise, that any person shall have engaged in or engages in or is about to engage in any act or practice prohibited or declared to be illegal by N.J.S. 2C:41-2 or sections 3 through 16 of this amendatory and supplementary act, or whenever the Attorney General believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit the person to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes is to be in the public interest to investigate. The Attorney General may also require any other data and information as he may deem relevant and may make any special and independent investigations as he may deem necessary in connection with the matter. In connection with any investigation the Attorney General is empowered to subpena witnesses, compel their attendance, examine them under oath before himself or a court of record, and require the production of any books or papers which he deems relevant or material to the inquiry. The power of subpena and examination shall not abate or terminate by reason of any action or proceeding brought by the Attorney General under chapter 41 of Title 2C of the New Jersey Statutes. No person shall be excused from attending an inquiry in compliance with a subpena, or from producing a paper or book, document or any other record, or from being examined or required to answer questions on the ground of failure to tender or pay a witness or mileage fee unless demand therefor is made at

the time testimony is about to be taken and as a condition precedent to offering the production or testimony and unless payment thereof be not thereupon made.

b. If a person subpenaed to attend an inquiry shall fail to obey the command of the subpena without good cause, he shall be guilty of a crime of the fourth degree. If a person in attendance upon an inquiry pursuant to subpena, or if a person required to file with the Attorney General a statement in writing under oath or otherwise, refuses to answer a question or produce evidence of any other kind or make the required statement in writing under oath or otherwise on the ground that he may be incriminated thereby, and if the Attorney General, in a writing directed to the person being questioned orders that person to answer the question or produce the evidence or the statement in writing under oath or otherwise, that person shall comply with the order. After complying, and if but for this section he would have been privileged to withhold the answer given or the evidence produced or the statement in writing under oath or otherwise given, the testimony, evidence or statement, and the evidence derived therefrom, may not be used against the person in any prosecution for a crime or offense concerning which he gave answer or produced evidence or submitted a written statement under the order of the Attorney General. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing evidence or failing to produce evidence or in presenting a written statement or failing to do so in accordance with the order. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in contempt in accordance with the rules of court and committed to the county jail until such time as he purges himself of contempt by testifying, producing evidence or presenting a written statement as ordered. The foregoing shall not prevent the Attorney General from instituting civil contempt proceedings against any person who violates any of the above provisions.

c. Notwithstanding subsection b., whenever any person fails to comply with any subpena duly served upon him under this section the Attorney General may file in the Superior Court a petition for an order of the court for the enforcement of this section.

Massachusetts

Section 4. Scope of Investigation; Civil Investigative Demands

(a) Whenever the Attorney General, or his designee, or a district attorney, or his designee believes a person or enterprise has engaged in or is engaging in any method, act or practice which could result in action being taken under section 3, he may conduct an investigation to ascertain whether in fact such person or enterprise has engaged in or is engaging in such method, act or practice. In conducting such investigation he may (i) take testimony under oath concerning such alleged unlawful method, act or practice; (ii) examine or cause to be examined any documentary material of whatever nature relevant to such alleged unlawful method, act or practice; and (iii) require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material. Such testimony and examination shall take place in the county where such person resides or has a place of business or, if the parties consent or such person is a nonresident or has no place of business within the Commonwealth, in Suffolk County.

(b) Notice of the time, place and cause of such taking of testimony, examination or attendance shall be given by the Attorney General, or district attorney, or their designee, at least ten days prior to the date of such taking of testimony or examination.

(c) Service of any such notice may be made by (i) delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (ii) delivering a duly executed copy thereof to the principal place of business in the commonwealth of the person to be served; or (iii) mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(d) Each such notice shall: (i) state the time and place for the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if

the name is not known, a general description sufficient to identify him or the particular class group to which he belongs; (ii) state the statute and section thereof, under which the investigation is being conducted and the general subject matter of the investigation; (iii) describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded; (iv) prescribe a return date within which the documentary material is to be produced; and (v) identify the members of the Attorney General's or district attorney's staff to whom such documentary material is to be made available for inspection and copying.

(e) No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

(f) At any time prior to the date specified in the notice, or within twenty-one days after the notice has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county.

(g) Immunity — An individual shall not be excused from complying with a C.I.D. or other order under this section on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty, forfeiture or divestiture if he has been granted immunity by a justice of the Supreme Judicial Court or the Superior Court as provided by (revised) ch. 233, 20E and 20G.

¶36 The state civil investigative demand sections are very similar to the federal section. All provide extensive discovery to facilitate RICO actions.

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