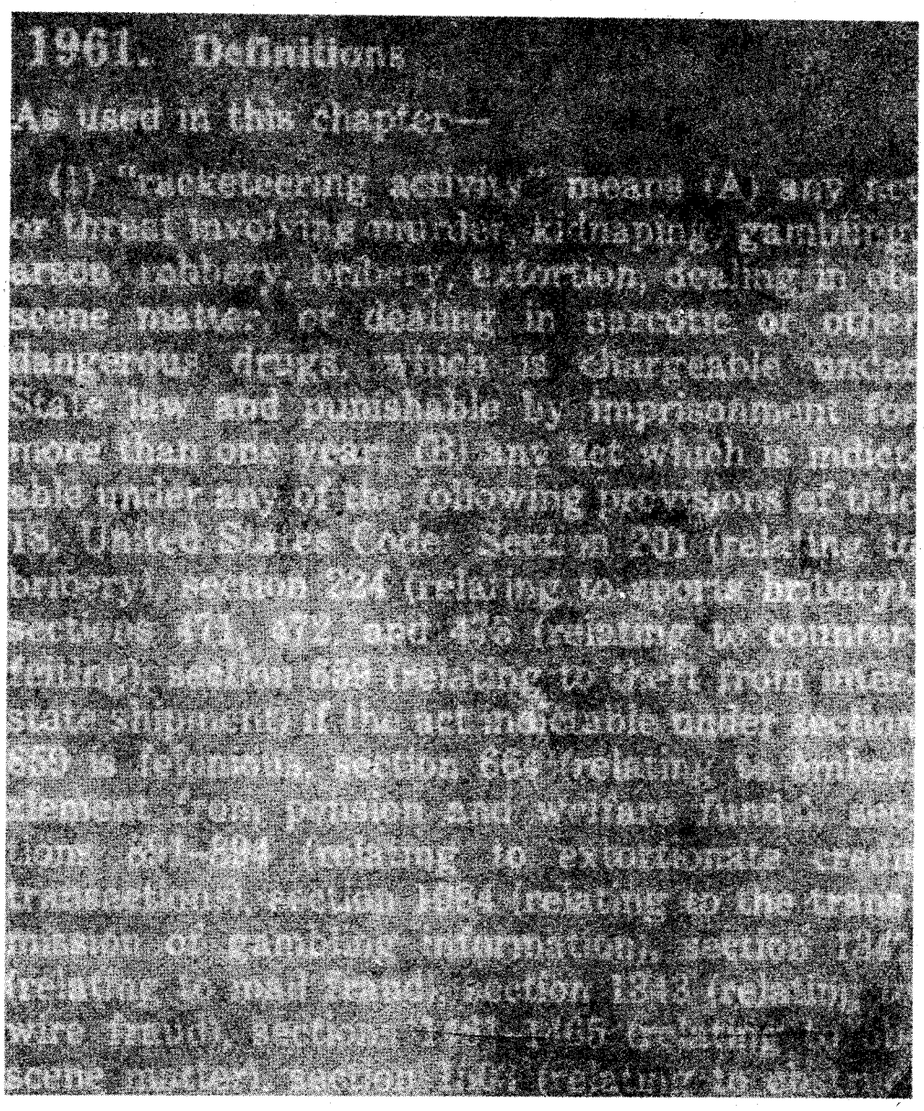
U.S. Department of Justice
Criminal Division

Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors


1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, 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), section 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), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 1951 (relating to obstruction of

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS

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PREFACE

This Manual has been prepared by the Organized Crime and Racketeering Section, Criminal Division, U.S. Department of Justice, to provide guidance to federal prosecutors in applying the RICO statute in criminal cases. The opinions and advice expressed in these pages are informal discussions of policy and law. Nothing in this Manual is intended to be a statement of official policy or to be binding against the federal government in any way. The official policies of the Criminal Division with respect to RICO prosecutions are set forth at Chapter 9-110 of the United States Attorneys' Manual. This Manual is intended to provide informal supplementary guidance; it does not supersede the provisions of the United States Attorneys' Manual, which must be adhered to in bringing a RICO prosecution or civil action. In addition, the advice and suggestions contained herein are subject to change; for the latest statements of guidance with respect to RICO prosecutions, contact the Organized Crime and Racketeering Section in Washington, D.C., at (202) 514-1214 (FTS 368-1214).

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criminal and civil penalties for persons who engage in a "pattern of racketeering activity" or "collection of an unlawful debt" that has a specified relationship to an "enterprise" that affects interstate commerce. The statute defines "racketeering activity" to include state felonies involving murder, robbery, extortion, and several other serious offenses, and more than thirty serious federal offenses including, for example, extortion, interstate theft offenses, narcotics violations, mail fraud, and securities fraud. A "pattern" consists of two or more of these state or federal crimes that occur within a statutorily prescribed time period. An "unlawful debt" is a debt that arises from illegal gambling or loansharking activities. "Enterprise" is defined to include any individual, partnership, corporation, association, or other legal entity, and any group of individuals associated in fact although not a legal entity. For example, an arson-for-profit ring can be a RICO enterprise, as can a small business or government agency.

Four different criminal violations, including conspiracy, are proscribed by RICO. Section 1962(a) makes it a crime to invest the proceeds of a pattern of racketeering activity or collection of an unlawful debt in an enterprise affecting interstate commerce.

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18 U.S.C. § 1958 (murder for hire, formerly designated § 1952A), and 18 U.S.C. §§ 2251-52 (sexual exploitation of children). Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (Nov. 18, 1988).

[6] The 1989 amendment added 18 U.S.C. § 1344 (bank fraud) as a predicate offense. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, Title IX, sec. 968, 103 Stat. 506 (Aug. 9, 1989).

I. Introduction

RICO -- the Racketeer Influenced and Corrupt Organizations statute -- was enacted October 15, 1970, as Title IX of the Organized Crime Control Act of 1970 [1] and is codified at 18 U.S.C. §§ 1961-1968. The statute was amended in some respects in 1978, [2] 1984, [3] 1986, [4] 1988, [5] and 1989. [6] The statute provides powerful

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[1] Pub. L. No. 91-452, 84 Stat. 941 (1970).

[2] The 1978 amendments to Section 1961 added cigarette bootlegging, 18 U.S.C. §§ 2341-2346, as a predicate offense, Pub. L. No. 95-575, § 3(c), 92 Stat. 2465 (1978), and changed the classification of "bankruptcy fraud" to "fraud connected with a case under Title 11," Pub. L. No. 95-598, Title III, § 314(g), 92 Stat. 2677 (1978).

[3] The 1984 amendments occurred in three stages. First, Congress amended the forfeiture provisions of Section 1963 to clarify proceeds forfeiture and other matters, and amended Section 1961 to add as predicate acts dealing in obscene matter (under state law and 18 U.S.C. §§ 1461-1465) and currency violations under Title 31. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, §§ 302, 901(g), 1020, 2301, 98 Stat. 2040, 2136, 2143, 2192 (1984) (effective October 12, 1984). Second, Congress added as predicate offenses three automobile-theft violations, 18 U.S.C. §§ 2312, 2313, and 2320 (now § 2321), Pub. L. No. 98-547, Title II, § 205, 98 Stat. 2770 (1984) (effective Oct. 25, 1984). Third, Congress deleted some expedition-of-action language from the civil provisions in §§ 1964(b) and 1966, Pub. L. No. 98-620, Title IV, § 402(24), 98 Stat. 3359 (1984).

[4] The 1986 amendments to § 1961 added 18 U.S.C. §§ 1512 and 1513, relating to tampering with and retaliating against witnesses, victims, or informants, Criminal Law & Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 50, 100 Stat. 3605 (1986) (effective November 10, 1986); created 18 U.S.C. §§ 1956 and 1957, relating to money laundering, Anti-Drug Abuse Act of 1986, Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 5071 (1986) and added 18 U.S.C. §§ 1956 and 1957 as RICO predicates, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1365, 100 Stat. 5088 (1986) (effective October 27, 1986); and added a new subsection to 18 U.S.C. § 1963 relating to forfeiture of substitute assets, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 5066 (1986) (effective October 27, 1986).

[5] The 1988 amendments provided for a life sentence where a RICO violation is based on a racketeering activity that itself carries a life sentence, made minor typographical corrections, and added three new predicate offenses: 18 U.S.C. § 1029 (credit card fraud);

provide for a life sentence "if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment."[8] Section 1963 also permits the government to seek pre-trial and, in some cases, pre-indictment restraining orders to prevent the dissipation of assets subject to forfeiture.

Section 1964 provides civil remedies for violations of the RICO offenses set forth in Section 1962. Section 1964(a) permits the United States to obtain any appropriate relief, including divestiture or dissolution of an enterprise and injunctions prohibiting further violations. Section 1964(c) permits any person who has been injured in his business or property by a RICO violation to recover treble damages, plus costs of the suit and reasonable attorneys' fees. Most courts have held that equitable relief is available solely to the government, whereas damages actions have, with few exceptions, been used only by private plaintiffs.

The remaining sections of the statute provide for civil investigative demands issued by the government, and concern other procedural matters in connection with civil RICO suits. For a full discussion of the civil RICO provisions, see United States Department of Justice, Civil RICO: A Manual for Federal Prosecutors (February 1988).

Pub. L. No. 98-596, § 6(a), 98 Stat. 3137 (1984), now codified at 18 U.S.C. § 3571 (formerly codified at 18 U.S.C. § 3623). This provision applies to offenses occurring on or after January 1, 1985.

[8] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (Nov. 18, 1988).

For example, a narcotics trafficker violates this provision if he purchases a legitimate business with the proceeds of multiple drug transactions.

Section 1962(b) makes it a crime to acquire or maintain an interest in an enterprise affecting interstate commerce through a pattern of racketeering activity or collection of an unlawful debt. For example, an organized crime figure violates this provision if he takes over a legitimate business through a series of extortionate acts or arsons designed to intimidate the owners into selling out.

Section 1962(c) makes it a crime to conduct the affairs of an enterprise affecting interstate commerce "through" a pattern of racketeering activity or collection of an unlawful debt. For example, an automobile dealer violates this provision if he uses the facilities of his dealership to operate a stolen car ring.

Section 1962(d) expressly makes it a crime to conspire to commit any of the three substantive RICO offenses.

Section 1963 provides a strong maximum criminal penalty for violating any provision of Section 1962: 20 years in prison and a fine of $25,000 or up to twice the gross profits of the offense, in addition to forfeiture of the defendant's interest in an enterprise connected to the offense, and his interests acquired through or proceeds derived from racketeering activity or unlawful debt collection. [7] In addition, in 1988 the statute was amended to

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[7] It should also be noted that Congress in 1984 increased the maximum fines for all federal felonies to $250,000 for individuals, $500,000 for organizations, or twice the proceeds of the offense.

as noted in the Preface, the policies described herein are subject to change.

II. Definitions: 18 U.S.C. § 1961

A. Racketeering Activity

Section 1961(1) defines "racketeering activity" to mean any crime that is enumerated in subdivisions A, B, C, D, or E of this subsection. That list contains all of the offenses that may constitute racketeering activity; no crime can be a part of a RICO "pattern of racketeering activity" unless it is expressly included in this subsection.[10] The listed crimes are often informally called "predicate crimes," because they make up the "predicate" for a RICO violation.[11] The different introductory wording of subdivisions A, B, C, D, and E is significant: subdivision A includes "any act or threat involving" the named offenses; subdivisions B, C, and E include "any act which is indictable under" the listed statutes; and subdivision D includes "any offense involving" three named categories of offenses. One consequence of these differences in wording is that under some circumstances, conspiracies or attempts to commit the crimes listed in subsections A[12] and D[13] have been held to be proper RICO predicates, whereas a

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[10] See Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts--Criminal and Civil Remedies, 53 Temp. L. Q. 1009, 1030-31 (1980).

[11] See, e.g., United States v. Pepe, 747 F.2d 632, 645 (11th Cir. 1984); United States v. Ruggiero, 726 F.2d 913, 918 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

[12] See United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 98-99 (conspiracy to murder and attempted murder proper RICO predicates); United States v. Manzella, 782 F.2d 533

This Manual concentrates mainly on the criminal aspect of RICO, providing discussions of important legal issues and offering some practical advice for preparing indictments that are legally sufficient and conform to the Criminal Division's approval guidelines. In addition to the discussions in this Manual, it may be useful to consult some of the many published resources on RICO,[9] or to contact the Organized Crime and Racketeering Section for specific advice about a particular situation. This Manual is intended to be an informal guidebook for federal prosecutors and,

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[9] The list of published materials concerning RICO is extensive, and grows constantly. Some of the major sources are the following:

Legislative history: The major committee reports are S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) and H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970). The House Report is set out at 1970 U.S. Code Cong. & Admin. News 4007-91. A thorough treatment of the legislative history is given in Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts--Criminal and Civil Remedies, 53 Temp. L. Q. 1009, 1014-21 (1981). For a more exhaustive treatment of the legislative history, see Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237, 249-80 (1982). A brief history of the legislation is found in Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO, 65 Iowa L. Rev. 837, 838-45 (1980).

Law review articles: There has been a proliferation of articles on RICO since the early 1980s, as private civil RICO suits have become popular. For discussions of criminal RICO, see the Blakey & Gettings and Bradley articles cited supra, as well as Lynch, RICO: The Crime of Being a Criminal, 87 Colum. L. Rev. 661-764, 920-84 (1987) (in two parts). See also Goldsmith, RICO and Enterprise Criminality: A Response to Gerard E. Lynch, 88 Col. L. Rev. 774 (1988). In addition, for two very thorough, but defense-oriented treatments, see Tarlow, RICO Revisited, 17 Ga. L. Rev. 291 (1983); Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 Fordham L. Rev. 165 (1980). For a discussion of whether civil RICO has been used improperly, see Goldsmith & Keith, Civil Rico Abuse: The Allegations in Context, B.Y.U. L. Rev. 55 (1986).

Newsletters: Two RICO newsletters that report on current developments are the Civil RICO Report and the RICO Law Reporter.

offenses.

1. State Offenses. Section 1961(1)(A) includes as racketeering activity:

> any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.

The language "chargeable under State law" means that the offense must be one that generically was chargeable under state law at the time it was committed.[16] Thus, a state offense may be charged as a RICO predicate even though some state procedural provision has rendered the offense unprosecutable under state law at the time of the RICO indictment.[17] Even if the defendant has previously been convicted or acquitted of the offense in state court, it usually

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[16] See United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Salinas, 564 F.2d 688, 689-91 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978); United States v. Frumento, 563 F.2d 1083, 1087 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); United States v. Forsythe, 560 F.2d 1127, 1134-35 (3d Cir. 1977). There is no requirement that there be a conviction on the state charge for it to be used as a RICO predicate. United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986). See, e.g., United States v. Tsang, 632 F. Supp. 1336 (E.D.N.Y. 1986) (act committed by juvenile could be RICO predicate even though state law provided that juvenile offenders would not be imprisoned).

[17] See United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 109 S. Ct. 1319 (1989); United States v. Erwin, 793 F.2d 656 (5th Cir.), cert. denied, 479 U.S. 991 (1986); United States v. Paone, 782 F.2d 386 (2d Cir. 1986), cert. denied, 483 U.S. 1019 (1987); United States v. Tsang, 632 F. Supp. 1336 (S.D.N.Y. 1986); United States v. Licavoli, 725 F.2d 1040, 1046-47 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.), cert. denied, 439 U.S. 836 (1978); United States v. Fineman, 434 F. Supp. 189, 194-95 (E.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978).

conspiracy or attempt to commit an offense within subdivision B or C cannot be a RICO predicate unless an attempt or conspiracy to commit the offense is specifically included in the statutory offense, and thus is "indictable under" the listed statute.[14] Similarly, a solicitation may be considered to be an "act involving" specified offenses under subdivisions A and D, although no court has directly addressed the issue.[15] Examples of the different results under the various subdivisions are set forth below, in connection with the discussions of the various predicate

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(5th Cir.) (conspiracy to commit state-law arson proper RICO predicate), cert. denied, 476 U.S. 1123 (1986); United States v. Ruggiero, 726 F.2d 913, 919 (2d Cir.) (conspiracy to murder in violation of state law is an "act or threat involving murder" under 18 U.S.C. § 1961(1)(A)), cert. denied, 469 U.S. 831 (1984); United States v. Licavoli, 725 F.2d 1040, 1045 (6th Cir.) (same), cert. denied, 467 U.S. 1252 (1984); United States v. Welch, 656 F.2d 1039, 1063 n. 32 (5th Cir. 1981) (same) (dictum), cert. denied, 456 U.S. 915 (1982); United States v. Gambale, 610 F. Supp. 1515 (D. Mass. 1985) (same).

[13] See United States v. Phillips, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to import marijuana), cert. denied, 457 U.S. 1136 (1982); United States v. Weisman, 624 F.2d 1118, 1124 (2d Cir.) (conspiracies to commit securities fraud and bankruptcy fraud), cert. denied, 449 U.S. 871 (1980).

[14] See United States v. Ruggiero, 726 F.2d 913, 919-20 (2d Cir.) (conspiracy to violate 18 U.S.C. § 1955 is not a proper RICO predicate, because conspiracy is not "indictable under" that provision), cert. denied, 469 U.S. 831 (1984); United States v. Brooklier, 685 F.2d 1208, 1216 (9th Cir. 1982) (conspiracy to violate 18 U.S.C. § 1951 is a proper predicate because conspiracy is "indictable under" that provision), cert. denied, 459 U.S. 1206 (1983).

[15] See, e.g., United States v. Welch, 656 F.2d 1039, 1048 (5th Cir. 1981) (solicitation of and conspiracy to commit murder), cert. denied, 456 U.S. 915 (1982); United States v. Yin Poy Louie, 625 F. Supp. 1327, 1332 (S.D.N.Y. 1985) (conspiracy, solicitation, or attempt to murder), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986).

RICO statute.[21] The applicable state law is that which was in force at the time the state offense was committed.[22] Mis-citation of the state statute is not fatal, absent prejudice to the defendant.[23]

The language "punishable by imprisonment for more than one year" means so punishable at the time the offense was committed, not at the time the RICO indictment is brought.[24]

The language "act or threat involving" has been construed rather broadly, in accordance with its plain meaning.[25] Thus, courts have held[26] or stated in dictum[27] that conspiracy to murder

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[21] See United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 109 S. Ct. 1319 (1989); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988), cert. denied, 109 S. Ct. 1637 (1989); United States v. Erwin, 793 F.2d 656 (5th Cir. 1986); United States v. Anderson, 782 F.2d 908 (11th Cir. 1986); United States v. Paone, 782 F.2d 386 (2d Cir. 1986); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986).

[22] See United States v. Chatham, 677 F.2d 800 (11th Cir. 1982) (no error where RICO indictment cited superseded state statute, because actual statute was no more favorable to the defendant).

[23] Id. at 803.

[24] See, e.g., United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.), cert. denied, 439 U.S. 836 (1978). In United States v. Ruggiero, 726 F.2d 913, 920 (2d Cir.), cert. denied, 469 U.S. 831 (1984), the Second Circuit explained that, in order to amount to a predicate act under 18 U.S.C. § 1961(1)(A), a state charge must "include those elements which make the chargeable offense punishable by more than one year in prison."

[25] See supra page 6.

[26] United States v. Ruggiero, 726 F.2d 913, 919 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Licavoli, 725 F.2d 1040, 1044-45 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Gambale, 610 F. Supp. 1515, 1547 (D. Mass. 1985); cf. United States v. Manzella, 782 F.2d 533 (5th Cir.) (conspiracy to commit arson proper RICO predicate), cert. denied, 476 U.S. 1123 (1986).

can be charged as a RICO predicate,[18] although there is no requirement that the defendant have been previously convicted of, or charged with, any of the predicate offenses.[19] Similarly, the fact that a state criminal statute does not classify offenses exactly the way they are classified under RICO does not prevent that statute from being used as a RICO predicate; state law is incorporated within RICO for definitional purposes,[20] and any conduct that falls within one of the nine listed categories of offenses can give rise to a predicate crime. Also, state procedural and evidentiary rules are not incorporated under the

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[18] See United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir.) (prior acquittal in state court did not bar use of act as RICO predicate), cert. denied, 467 U.S. 1252 (1984); United States v. Frumento, 563 F.2d 1083, 1086-89 (3d Cir. 1977) (same), cert. denied, 434 U.S. 1072 (1978); United States v. Castellano, 610 F. Supp. 1359, 1414 (S.D.N.Y. 1985); cf. United States v. Yin Poy Louie, 625 F. Supp. 1327 (S.D.N.Y. 1985), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986) (prior conviction may be proved by introduction of the judgment of conviction, under Fed. R. Evid. 803(22)).

[19] Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916, 926 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985).

[20] United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 91; United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988), cert. denied, 109 S. Ct. 813 (1989); United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1979); United States v. Frumento, 563 F.2d 1083, 1087 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); United States v. Forsythe, 560 F.2d 1127, 1137-38 (3d Cir. 1977); United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Dellacroce, 625 F. Supp. 1387 (E.D.N.Y. 1986). See United States v. Traitz, 871 F.2d 368 (3d Cir.) (analyzing and approving district court's instructions on state law), cert. denied, 110 S. Ct. 78 (1989).

Robbery

United States v. Ferguson, 758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 841 (1985); United States v. Ruggiero, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

Bribery

United States v. Traitz, 871 F.2d 368 (3d Cir.), cert. denied, 110 S. Ct. 78 (1989); United States v. Hocking, 860 F.2d 769 (8th Cir. 1988); United States v. Garner, 837 F.2d 1404 (7th Cir. 1987); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988), cert. denied, 109 S. Ct. 1637 (1989); United States v. Casamayor, 837 F.2d 535 (11th Cir. 1988), cert. denied, 109 S. Ct. 813 (1989); United States v. Kravitz, 738 F.2d 102 (3d Cir. 1984), cert. denied, 106 S. Ct. 1052 (1985); United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Dozier, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982); United States v. Horak, 633 F. Supp. 190 (N.D. Ill. 1986); United States v.Gonzales, 620 F. Supp. 1143 (N.D. Ill. 1985); United States v. Reynolds, No. 85-CR-812 (N.D. Ill. March 19, 1986).

Extortion

United States v. Delker, 757 F.2d 1390 (3d Cir. 1985); United States v. Cryan, 490 F. Supp. 1234 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980); United States v. Brooklier, 685 F.2d 1208 (8th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).

Dealing in Obscene Matter

United States v. Pryba, 900 F.2d 748 (4th Cir. April 9, 1990).

Dealing in Narcotic or Other Dangerous Drugs

United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), cert. denied, 481 U.S. 1018 (1987); United States v. Schell, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

2. Federal Title 18 Offenses. Section 1961(1)(B) includes as racketeering activity "any act which is indictable under" any of a list of federal criminal statutes. This provision is more narrow than subdivision A because the federal offense must be an "act" that is "indictable under" a listed statute; attempts and

is a proper RICO predicate. In view of this authority, it is the Criminal Division's policy that attempts, conspiracies, and solicitations to commit the listed state offenses may be charged as RICO predicates, as long as the attempt, conspiracy, or solicitation was chargeable under state law when committed. However, the use of these predicate offenses is not encouraged, and will not be approved in every case.

Representative cases charging state-law predicate offenses:

Murder

United States v. Finestone, 816 F.2d 583 (11th Cir. 1987); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Russotti, 717 F.2d 27 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Yin Poy Louie, 625 F. Supp. 1327 (S.D.N.Y. 1985), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986).

Kidnaping

United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); United States v. Shakur, 560 F. Supp. 347 (S.D.N.Y. 1983).

Gambling

United States v. Tripp, 782 F.2d 38 (6th Cir.), cert. denied, 475 U.S. 1128 (1986); United States v. Tille, 729 F.2d 615 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Ruggiero, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985).

Arson

United States v. Ellison, 793 F.2d 942 (8th Cir.), cert. denied, 479 U.S. 936 (1986); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); United States v. Melton, 689 F.2d 679 (7th Cir. 1982).

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[27] United States v. Welch, 656 F.2d 1039, 1063, n.32 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982).

conduct proscribed by the statute. These descriptions were included only for convenience, and do not limit the conduct that can be charged as a RICO predicate.[31]

a. Specific offenses. Although legal issues concerning federal predicate offenses often will be the same issues that arise in non-RICO prosecutions under those statutes, some of the offenses present issues that relate particularly to RICO prosecutions. One of the most frequently used federal RICO predicates is the mail fraud statute, 18 U.S.C. § 1341. Perhaps because of the scope of this statute, its use has attracted particular attention from defense attorneys and the courts.[32] In response to defense arguments, courts have generally held that the mail fraud statute may be used as a RICO predicate even though the conduct charged is also covered by another, more specific statute that is not a RICO predicate offense.[33] There have, however, been rulings that mail

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[31] United States v. Herring, 602 F.2d 1220, 1223 (5th Cir. 1979), cert. denied, 444 U.S. 1046 (1980). It should be noted that the applicability of 18 U.S.C. § 659, relating to theft from interstate shipment, is expressly limited by a non-parenthetical clause in 18 U.S.C. § 1961(1)(B), which requires that a violation of that statute be "felonious" in order to be a RICO predicate.

[32] See, e.g., Tarlow, RICO Revisited, 17 Ga. L. Rev. 291, 367 (1983).

[33] See, e.g., United States v. Porcelli, 865 F.2d 1352 (2d Cir.) (rejecting defense argument that mail fraud predicates could not be used for state sales tax violations because state had not criminalized such violations), cert. denied, 110 S. Ct. 53 (1989); Hofstetter v. Fletcher, 860 F.2d 1079 (6th Cir. 1988) (mailing of fraudulent tax return proper mail fraud RICO predicate and not improper because tax fraud is not RICO predicate); United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987) (same; relied on by court in Hofstetter, supra); United States v. Computer Sciences Corp., 689 F.2d 1181, 1186-88 (4th Cir. 1982) (mail fraud and wire fraud charges could be brought even though conduct was also charged

conspiracies cannot be used as predicate offenses unless they are expressly included within the terms of the listed statute. Thus, for example, a conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, is a RICO predicate[28] because § 1951(a) expressly makes conspiracy a crime, whereas a conspiracy to conduct an illegal gambling business cannot be a RICO predicate[29] because 18 U.S.C. § 1955 does not expressly make conspiracy a crime. However, because of the effect of 18 U.S.C. § 2, the general federal statute governing liability for aiding and abetting, one who aids and abets the commission of federal predicate offenses can be held liable for those offenses, and for a related RICO violation, in the same way as if he had committed the predicate acts as a principal.[30]

Each statute listed in Section 1961(1)(B) is accompanied by a parenthetical phrase that gives a brief description of the

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[28] United States v. Brooklier, 685 F.2d 1208, 1216 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); see also United States v. Vastola, 670 F. Supp. 1244 (D.N.J. 1987) (conspiracies may be RICO predicates); United States v. Biaggi, 672 F. Supp. 112, 122 (S.D.N.Y. 1987) (RICO conspiracy may be based on conspiracy predicates); United States v. Santoro, 647 F. Supp. 153, 176 (E.D.N.Y. 1986) (conspiracy to violate Hobbs Act proper RICO predicate), aff'd, 880 F.2d 1319 (2d Cir. 1989); United States v. Dellacroce, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986) (conspiracy can be predicate act); United States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985) (conspiracy is proper RICO predicate and does not cause duplicity).

[29] United States v. Ruggiero, 726 F.2d 913-20 (2d Cir.), cert. denied, 469 U.S. 831 (1984); see also United States v. Odesser, No. 85-6931 (E.D. Pa. November 5, 1986) (conspiracy to violate 18 U.S.C. §§ 2314 and 2315 not proper RICO predicates).

[30] See, e.g., United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 92-93 (explaining principle of aiding and abetting and applying it to the facts of a RICO predicate offense); United States v. Rastelli, 870 F.2d 822 (2d Cir.), cert. denied, 110 S. Ct. 515 (1989).

110 S. Ct. 53 (1989), where the Second Circuit rejected a defense argument that failure to pay sales tax could not be prosecuted under the mail fraud statute (and, therefore, RICO) because the state did not criminalize failure to pay such tax.

Because of legitimate concerns about the possible overuse of mail fraud to generate RICO cases out of relatively minor conduct, some policy limitations have been imposed on its use as a predicate offense. First, the use of mail fraud as a predicate is not generally encouraged, particularly in cases where other predicate crimes are charged, or where the conduct can be more accurately charged under some other RICO predicate offense, such as a state bribery statute. Second, the Organized Crime and Racketeering Section will not approve a proposed RICO indictment that contains as predicates mail fraud charges concerning federal tax evasion or related violations, unless the use of those charges is first cleared with the Criminal Section of the Tax Division.[35]

In addition to its policy implications, use of the mail fraud statute as a predicate offense involves a recently developed legal issue. Two Supreme Court decisions, McNally v. United States, 483 U.S. 350 (1987), and Carpenter v. United States, 484 U.S. 19

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[35] The Department's policy regarding the use of mail fraud charges in tax cases was formally announced in a "blue sheet" addition to the United States Attorneys' Manual, Section 6-4.211(1), on July 3, 1989. That policy requires Tax Division authorization for the charging of mail fraud counts, either independently or as RICO predicates, (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud scheme. The full text of the blue sheet is set out in Appendix C to this Manual.

fraud, as well as wire fraud, predicates were pre-empted by another statute.[34] The propriety of using mail fraud predicates to prosecute specific conduct was approached in a different way in United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied,

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under False Claims Act, 18 U.S.C. § 287), cert. denied, 459 U.S. 1105 (1983); United States v. Boffa, 688 F.2d 919, 931-33 (3d Cir. 1982) (mail fraud statute not preempted by labor statutes, despite some overlap in statutes' coverage), cert. denied, 460 U.S. 1022 (1983); United States v. Hartley, 678 F.2d 961, 990 n.50 (11th Cir. 1982) (use of mail fraud as RICO predicate not foreclosed where conduct could be prosecuted under False Claims Act), cert. denied, 459 U.S. 1170 (1983); United States v. Weatherspoon, 581 F.2d 595, 599-600 (7th Cir. 1978) (upholding use of mail fraud statute against acts also prosecuted under false statements statute); United States v. International Brotherhood of Teamsters, No. 88 Civ. 4486 (DNE) (S.D.N.Y. March 6, 1989) (RICO suit not pre-empted by the LMRDA, 29 U.S.C. § 483); United States v. Regan, 706 F. Supp. 1087 (S.D.N.Y. 1989) (tax evasion prosecuted under mail fraud statute); Illinois v. Flisk, 702 F. Supp. 189 (N.D. Ill. 1988) (tax fraud charged under mail fraud statute); United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1295-96 (E.D.N.Y. 1985) (allowed mail fraud predicates based on fraudulent mailings relating to tax liability); see also United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267, 282-83 (3d Cir. 1985) (LMRDA does not pre-empt Hobbs Act), cert. denied, 476 U.S. 1140 (1986); United States v. Dischner, No. A87-160 Cr (D. Alaska July 19, 1988) (allowed use of commercial bribery statute as RICO predicate even though conduct also could be covered by public bribery statute); United States v. White, 386 F. Supp. 882, 884-85 (E.D. Wis. 1974) (proper to charge interstate transportation of stolen motor vehicles under 18 U.S.C. § 2314 rather than specific statute, 18 U.S.C. § 2312). Note, with respect to the White case, that three specific motor vehicle violations--18 U.S.C. §§ 2312, 2313, and 2320--were made RICO predicates in an amendment effective October 25, 1984.

[34] See, e.g., Talbot v. Robert Matthews Distributing Co., No. 87 C 4731 (N.D. Ill. Jan. 12, 1989) (RICO suit involving conduct prohibited by labor laws was pre-empted by the NLRA); United States v. Juell, No. 84 C 7467 (N.D. Ill. June 30, 1987) (mail and wire fraud predicates pre-empted by NLRA § 8, 29 U.S.C. § 158 because, but for labor laws, those acts would not be fraud); Butchers' Union, Local No. 498, United Food & Commercial Workers v. SDC Investment, Inc., 631 F. Supp. 1001, 1011 (E.D. Cal. 1986) (mail and wire fraud predicates pre-empted by labor laws because liability is wholly dependent on labor laws).

Another particular problem is presented by the obstruction-of-justice statutes that are listed as RICO predicates: 18 U.S.C. §§ 1503, 1510, and 1511. These statutes were amended, effective October 12, 1982, by the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248-58. The amendments changed Section 1503 so that it no longer expressly covers witness intimidation. That type of conduct is now covered by a new statute, 18 U.S.C. § 1512. Section 1512 was not added to the list of RICO predicates until November 10, 1986. It may be argued, however, that witness intimidation occurring before November 10, 1986, is covered by 18 U.S.C. § 1503, which still contains an omnibus provision prohibiting obstruction of the "due administration of justice." That clause historically was held to cover witness intimidation.[38] At least one court has held that Section 1503 does not cover any conduct that occurred after the enactment of the specific provision in Section 1512;[39] other courts have held that it does.[40] In fact,

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Supp. 1297 (N.D. Ill. 1988); Illinois v. Flisk, 702 F. Supp. 189 (N.D. Ill. 1988); United States v. Ianniello, 677 F. Supp. 233 (S.D.N.Y. 1988); United States v. Biaggi, 675 F. Supp. 790 (S.D.N.Y. 1987).

[38] See United States v. Lester, 749 F.2d 1288, 1291-96 (9th Cir. 1984) (after thorough discussion of the statutory-construction issues, court held that Section 1503, as amended, still covers some forms of witness-tampering).

[39] United States v. Hernandez, 730 F.2d 895, 898 (2d Cir. 1984).

[40] United States v. Rovetuso, 768 F.2d 809, 824 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986); United States v. Davis, 752 F.2d 963, 973 n.11 (5th Cir. 1985); United States v. Lester, 749 F.2d 962, 963-65 (5th Cir. 1984), cert. denied, 471 U.S. 1130 (1985); United States v. Beatty, 587 F. Supp. 1325, 1330-33 (E.D.N.Y. 1984) (distinguishing United States v. Hernandez, supra note 32, and holding that Section 1503 still covers non-coercive

(1987), analyzed the scope of the mail fraud statute and concluded that the statute could only be used where property rights, tangible or intangible, were sought to be protected under the statute. Thus, under these decisions, it became impossible to use the mail fraud (or the very similar wire fraud) statute to reach schemes such as those involving public corruption, where the defendant defrauded the citizens of their right to his honest services. However, in 1988, Congress corrected this problem by enacting 18 U.S.C. § 1346, which expressly defines "scheme or artifice to defraud," for purposes of the mail fraud and wire fraud statutes, to include a "scheme or artifice to deprive another of the intangible right of honest services."[36] Thus, the McNally issue is now only a problem where the conduct at issue occurred before November 18, 1988, the date that Section 1346 was enacted. For cases not covered by Section 1346, where there is some question as to whether property rights were involved in the fraud, prosecutors should refer to the Supreme Court cases and relevant circuit case law.[37]

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[36] Pub. L. No. 100-690, tit. VII, § 7603(a), 102 stat. 4508 (Nov. 18, 1988).

[37] See, e.g., Callanan v. United States, 881 F.2d 229 (6th Cir. 1989); United States v. Rastelli, 870 F.2d 822 (2d Cir.), cert. denied, 110 S. Ct. 515 (1989); United States v. Doherty, 867 F.2d 1352 (2d Cir. 1989); United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied, 110 S. Ct. 53 (1989); United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989); United States v. Perholtz, 836 F.2d 554 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987), vacated, 877 F.2d 481 (1989) (convictions overturned on McNally grounds); United States v. Wellman, 830 F.2d 1453 (7th Cir. 1987); United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); United States v. Berg, 710 F. Supp. 438 (E.D.N.Y. 1989); United States v. Regan, 706 F. Supp. 1087 (S.D.N.Y. 1989); United States v. Finley, 705 F.

Section 659

United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Piteo, 726 F.2d 53 (2d Cir.), cert. denied, 467 U.S. 1206 (1984).

Section 664

United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); United States v. Ostrer, 481 F. Supp. 407 (S.D.N.Y. 1979).

Sections 891-894

United States v. Doherty, 786 F.2d 491 (2d Cir. 1986); United States v. Persico, 621 F. Supp. 842 (S.D.N.Y. 1985); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Groff, 643 F.2d 396 (6th Cir.), cert. denied, 454 U.S. 828 (1981).

Section 1084

Section 1341

United States v. Horak, 833 F.2d 1235 (7th Cir. 1987); United States v. Busher, 817 F.2d 1409 (9th Cir. 1987); United States v. Standard Drywall Corp., 617 F. Supp. 1283 (S.D.N.Y. 1985); United States v. Martino, 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); United States v. Sheeran, 699 F.2d 112 (3d Cir.), cert. denied, 461 U.S. 931 (1983).

Section 1343

United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

Section 1344

Sections 1461-1465

United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987).

Section 1503

United States v. Vitale, 635 F. Supp. 194 (S.D.N.Y. 1985), dismissed on other grounds, 795 F.2d 1006 (2d Cir. 1986); United States v. Russotti, 717 F.2d 27 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Romano, 684 F.2d 1057 (2d Cir.), cert. denied, 459 U.S. 1016 (1982).

three Supreme Court Justices dissented from a denial of certiorari in United States v. Wesley, 748 F.2d 962 (5th Cir. 1984), cert. denied, 471 U.S. 1130 (1985), and argued that the Court should resolve the conflict between the circuits concerning whether Congress intended to remove witness intimidation from Section 1503 when it enacted Section 1512. The best course appears to be to charge the conduct occurring before November 10, 1986, under Section 1503, in jurisdictions other than the Second Circuit.[41]

Representative cases charging Title 18 predicate offenses:

Section 201

United States v. Persico, 646 F. Supp. 752 (S.D.N.Y. 1986), aff'd and rev'd on other grounds, 832 F.2d 705 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Perholtz, 622 F. Supp. 1253 (D.D.C. 1985); United States v. Perkins, 596 F. Supp. 528 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985); United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984).

Section 224

United States v. Burke, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

Sections 471-473

United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

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witness-tampering); see also United States v. Brand, 775 F.2d 1460, 1465 n.5 (11th Cir. 1985) (noting different viewpoints of other courts but not deciding the issue).

[41] See United States v. Hernandez, 730 F.2d 895, 898 (2d Cir. 1984). But see United States v. Beatty, 587 F. Supp. 1325, 1333 (E.D.N.Y. 1984) (Congress did not mean to limit § 1503 insofar as it sought to prevent obstruction of justice).

Section 2251-2252

Sections 2312-2313

Section 2314

United States v. Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 940 (1986); United States v. Conner, 752 F.2d 566 (11th Cir.), cert. denied, 474 U.S. 821 (1985); Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986); United States v. Haley, 504 F. Supp. 1124 (E.D. Pa. 1981).

Section 2315

United States v. DeVincent, 632 F.2d 155 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); United States v. Martin, 611 F.2d 801 (10th Cir. 1979), cert. denied, 444 U.S. 1082 (1980).

Section 2321

Sections 2341-2346

United States v. Legrano, 659 F.2d 17 (4th Cir. 1981).

Sections 2421-2424

United States v. Clemones, 577 F.2d 1247 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980).

3. Federal Title 29 Offenses. Section 1961(1)(C) includes as racketeering activity "any act which is indictable under" 29 U.S.C. § 186 or 29 U.S.C. § 501(c). Because of the "indictable under" language, the same considerations apply here as to the Section 1961(1)(B) offenses, with respect to charging attempts and conspiracies. Thus, because attempts and conspiracies are not expressly included within these statutes, they are not chargeable as RICO predicates.

Representative cases charging Title 29 predicate offenses:

Section 186

United States v. Carlock, 806 F.2d 835 (5th Cir. 1986); United States v. Pecora, 798 F.2d 614 (3rd Cir. 1986), cert. denied,

Section 1510

United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); United States v. Smith, 574 F.2d 308 (5th Cir.), cert. denied, 439 U.S. 931 (1978).

Section 1511

United States v. Welch, 656 F.2d 1039 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Feliziani, 472 F. Supp. 1037 (E.D. Pa. 1979), aff'd, 633 F.2d 580 (3d Cir. 1980).

Sections 1512-1513

Section 1951

United States v. O'Malley, 796 F.2d 891 (7th Cir. 1986); United States v. Hampton, 786 F.2d 977 (10th Cir. 1986); United States v. Walsh, 700 F.2d 846 (2d Cir.), cert. denied, 464 U.S. 825 (1983); United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); United States v. Dozier, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982).

Section 1952

United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 109 S. Ct. 1319 (1989); United States v. Hunt, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); United States v. Mazzei, 700 F.2d 85 (2d Cir.), cert. denied, 461 U.S. 945 (1983).

Section 1953

Section 1954

United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 461 U.S. 928 (1983); United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981).

Section 1955

United States v. Zemek, 634 F.2d 1159 (2d Cir. 1980), cert. denied, 450 U.S. 916 (1981); United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

Sections 1956-1957

Section 1958

The courts which have addressed this issue so far have held that marijuana offenses are proper RICO predicates.[45] Although one district court has held that they are not proper predicates,[46] that circuit has since ruled that marijuana offenses are RICO predicates.[47] It is the position of the Criminal Division that marijuana offenses are proper RICO predicates.

Representative cases charging federal generic predicate offenses:

Title 11

United States v. Weisman, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980); United States v. Tashjian, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981).

Securities Fraud

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); United States v. Pray, 452 F. Supp. 788 (M.D. Pa. 1978).

Narcotics

United States v. Kragness, 830 F.2d 842 (8th Cir. 1987); United States v. Finestone, 816 F.2d 583 (11th Cir. 1987); United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Fernandez, 576 F. Supp. 397 (E.D. Tex. 1983), aff'd, 777 F.2d 248 (5th Cir. 1985), cert. denied, 476 U.S. 1184 (1986).

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[45] See United States v. Williams, 809 F.2d 1072 (5th Cir.), cert. denied, 484 U.S. 896 (1987); United States v. Ryland, 806 F.2d 941 (9th Cir. 1986), cert. denied, 481 U.S. 1057 (1987); United States v. Tillett, 763 F.2d 628 (4th Cir. 1985); United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); United States v. Zielie, 734 F.2d 1447, 1462 n.11 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Castellano, 610 F. Supp. 1359, 1424-25 (S.D.N.Y. 1985); United States v. Harvey, 560 F. Supp. 1040, 1050 (S.D. Fla. 1982), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986).

[46] United States v. Wyatt, No. CR 84-215-CBM (C.D. Cal. Sept. 13, 1984).

[47] United States v. Ryland, 806 F.2d 941 (9th Cir. 1986), cert. denied, 481 U.S. 1057 (1987).

479 U.S. 1064 (1987); United States v. Kaye, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977); United States v. Cody, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984); United States v. DiGilio, 667 F. Supp. 191 (D.N.J. 1987).

Section 501(c)

United States v. Thordarson, 646 F.2d 1323 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); United States v. Rubin, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979).

4. Federal Generic Offenses. Section 1961(1)(D) includes as racketeering activity:

> 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.

Because this subdivision uses the language "any offense involving," it includes attempts and conspiracies.[42] One issue that arises from time to time in cases with federal narcotics violations as predicate offenses is whether offenses involving marijuana are proper RICO predicates. Defense counsel may argue that they are not, because marijuana is not classified as a "narcotic" drug under federal law.[43] In addition, an argument may be based on language in the legislative history.[44]

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[42] See United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) (conspiracy to possess and distribute a controlled substance); United States v. Phillips, 664 F.2d 971, 1015 (5th Cir. 1981) (conspiracy to commit offense involving narcotics and dangerous drugs), cert. denied, 457 U.S. 1136 (1982); United States v. Weisman, 624 F.2d 1118, 1123-24 (2d Cir.) (conspiracy to commit offense involving bankruptcy fraud or securities fraud), cert. denied, 449 U.S. 871 (1980).

[43] See Tarlow, RICO Revisited, 17 Ga. L. Rev. 291, 359-62 (1983).

[44] See id. at 359-60 & n.24.

C. Person

The definition of "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." This definition also has not had a significant impact on criminal litigation; it is broad enough to include any individual or corporation that is a potential criminal RICO defendant.[50] In the civil context, however, the definition is of more importance. Under Section 1964(c), a treble-damages action is available to "[a]ny person injured in his business or property by reason of a violation of Section 1962 . . . ." Of major importance to government attorneys is the question of whether the United States is a "person" entitled to sue for treble damages under RICO. This question has not been conclusively resolved by the courts. However, the Second Circuit has held that the government may not recover treble damages in civil RICO actions, because it is not a

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[50] The definition uses the word "includes" rather than "means;" this usage can be construed as indicating that the definition is a broad, expansive one. See Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts--Criminal and Civil Remedies, 53 Temp. L. Q. 1009, 1022-23 & n.78 (1980). However, in United States v. Bonanno Organized Crime Family, 879 F.2d 20 (2d Cir. 1989), the Second Circuit upheld the dismissal of the government's RICO complaint as to defendant Bonanno Crime Family because, as an association in fact, the Bonanno Family could not be a "person" under RICO capable of violating § 1962. Another court has noted in dictum that a division of a corporation is not a "person" that can be a RICO defendant. United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983). This court observed, on the other hand, that the corporate division can be an "enterprise," because the definition of "enterprise" in 18 U.S.C. § 1961(4) does not depend on the definition of "person" in 18 U.S.C. § 1961(3). See also Modern Settings v. Prudential-Bache Securities, 629 F. Supp. 860, 863 (S.D.N.Y. 1986) (corporation cannot be a "person" under respondeat superior theory of liability).

5. Federal Title 31 Offenses. Section 1961(1)(E), added by the October 12, 1984 amendments, includes as racketeering activity "any act which is indictable under the Currency and Foreign Transactions Reporting Act." Those violations, codified at 31 U.S.C. §§ 5311-5324, are of considerable use as predicate offenses involving money laundering in narcotics prosecutions. In drafting a RICO indictment that includes Title 31 predicate acts, it is important to be aware of the policy against generating several predicate acts from what is essentially a single criminal transaction.[48] In addition, it is important to be aware of the ex post facto issue that may arise if an indictment alleges Title 31 predicate acts that occurred on or before the dates those offenses were added to the list of RICO predicates.[49]

B. State

The definition of "state" includes any of the fifty states, as well as the District of Columbia, Puerto Rico, and United States territories, possessions, political subdivisions, and their departments, agencies, and instrumentalities. The primary importance of this definition is in connection with the definition of state law for purposes of the predicate crimes listed in Section 1961(1)(A) and in connection with the definition of "unlawful debt" in Section 1961(6), which also incorporates state law. To date, this definition has not been a significant factor in RICO litigation.

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[48] See infra notes 111, 112, 114, 115, 122 and accompanying text.

[49] See infra notes 135, 137, 138, 140, 141 and accompanying text.

D. Enterprise

The term "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." 18 U.S.C. § 1961(4). Initially, several courts refused to extend RICO to the activity of organizations whose purpose was exclusively criminal, on the ground that congressional intent in enacting RICO was to eliminate the infiltration of legitimate business by organized crime.[55] It is now settled that the term "enterprise" for purposes of RICO encompasses both legitimate and illegitimate enterprises. United States v. Turkette, 452 U.S. 576 (1981).[56] Prosecution under RICO, however, does not depend on proof

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[55] United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), rev'd, 452 U.S. 576 (1981); United States v. Sutton, 605 F.2d 260, 264-76 (6th Cir. 1979), vacated, 642 F.2d 1001 (1980) (en banc), cert. denied, 453 U.S. 912 (1981). See also United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979) (Ely, J., dissenting), cert. denied, 445 U.S. 946 (1980); United States v. Altese, 542 F.2d 104, 107 (2d Cir. 1976) (Van Graafeiland, J., dissenting), cert. denied, 429 U.S. 1039 (1977).

[56] See also United States v. Doherty, 867 F.2d 47 (1st Cir. 1989); United States v. Hocking, 860 F.2d 769 (8th Cir. 1988); United States v. Blackwood, 768 F.2d 131 (7th Cir.), cert. denied, 474 U.S. 1020 (1985); United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); United States v. Bledsoe, 674 F.2d 647, 662 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1983); United States v. Thevis, 665 F.2d 616, 626 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); United States v. Martino, 648 F.2d 367, 380-81 (5th Cir. 1981), rev'd in part on other grounds, 681 F.2d 952 (5th Cir.) (en banc), cert. denied, 456 U.S. 949 (1982); United States v. Clark, 646 F.2d 1259, 1267 n.7 (8th Cir. 1981); United States v. Sutton, 642 F.2d 1001, 1006-09 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912 (1981); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980),

"person" within the meaning of 18 U.S.C. § 1964(c).[51] One district court in a treble-damages suit brought by the government denied, without opinion, a motion to dismiss on this ground.[52] The Department is seeking legislation to make it clear that the United States can recover treble damages under civil RICO. Until such legislation is enacted, no such cases can be brought in the Second Circuit. However, the Organized Crime and Racketeering Section will consider approving suits for treble damages in other circuits, in appropriate circumstances.

Some reported cases have involved suits under Section 1964(c) by state and local governments. Two courts have ruled that state governments have standing to sue for treble damages under RICO,[53] while another court has held, without discussion, that a state is entitled to recover treble damages.[54] For further discussion of standing under 18 U.S.C. § 1964(c), see Civil RICO: A Manual for Federal Prosecutors (February 1988), at IV(D)(2).

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[51] United States v. Bonanno Organized Crime Family, 879 F.2d 20 (2d Cir. 1989) (relying in part on analogous provision in Clayton Act, which does not recognize standing of United States to recover treble monetary damages in antitrust cases). The government did not pursue an appeal of this decision.

[52] United States v. Barnette, No. 85-754-CIV-J-16 (M.D. Fla. Sept. 5, 1985).

[53] State of Michigan v. Fawaz, 848 F.2d 194 (6th Cir. 1988); City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536 (E.D.N.Y. 1987). Other courts have not ruled on the issue, but have allowed § 1964(c) suits by state and local governments. See Alcorn County v. United States Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984); Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984); Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D. Md. 1980).

[54] Commonwealth of Pennsylvania v. Cianfrani, 600 F. Supp. 1364, 1369 (E.D. Pa. 1985).

as well as private entities can constitute a RICO "enterprise."[59]

The "enterprise" concept encompasses the following types of associations: commercial entities such as corporations[60] or groups of corporations[61] (both foreign and domestic),[62] partnerships,[63] sole

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F.2d 28 (3d Cir. 1984), cert. denied, 471 U.S. 1015 (1985). Cf. United States v. Turkette, 452 U.S. 576, 580 (1981) ("[t]here is no restriction upon the associations embraced by the definition [of enterprise]").

[59] United States v. Lee Stoller Enterprise, 652 F.2d 1313, 1318 (7th Cir.), cert. denied, 454 U.S. 1082 (1981); United States v. Clark, 646 F.2d 1259, 1263 (8th Cir. 1981); United States v. Frumento, 563 F.2d 1083, 1090-92 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); see also United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Barber, 476 F. Supp. 182 (S.D. W. Va. 1979), aff'd, 668 F.2d 778 (4th Cir.), cert. denied, 459 U.S. 829 (1982).

[60] See, e.g., United States v. Kravitz, 738 F.2d 102, 113 (3d Cir. 1984) (health care delivery corporation), cert. denied, 470 U.S. 1052 (1985); United States v. Hartley, 678 F.2d 961, 988 n.43 (11th Cir. 1982) (corporation producing seafood products), cert. denied, 459 U.S. 1170 (1983); United States v. Webster, 639 F.2d 174, 184 n.4 (4th Cir.) (tavern and liquor store), cert. denied, 454 U.S. 857 (1981); United States v. Zemek, 634 F.2d 1159, 1167 (9th Cir. 1980) (taverns), cert. denied, 450 U.S. 916 (1981); United States v. Weisman, 624 F.2d 1118, 1120 (2d Cir.) (theater), cert. denied, 449 U.S. 871 (1980); United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978) (restaurant serving as front for narcotics trafficking), cert. denied, 441 U.S. 933 (1979); United States v. Brown, 583 F.2d 659, 661 (3d Cir. 1978) (auto dealership), cert. denied, 440 U.S. 909 (1979); United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977) (bail bond agency).

[61] United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979) (group of corporations can be an enterprise within meaning of RICO), cert. denied, 445 U.S. 927 (1980); United States v. Perkins, 596 F. Supp. 528, 530-31 (E.D. Pa.), aff'd, 749 F.2d 28 (3d Cir. 1984) (group of corporations set up by defendant to defraud government constituted a RICO enterprise), cert. denied, 471 U.S. 1015 (1985); United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987) (enterprise could consist of group of individuals and corporations); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1253 (E.D. Mich. 1987)(combination of individuals and corporations meets enterprise definition); Trak Microcomputer Corp. v. Wearne Bros., 628 F. Supp. 1089, 1094-95 (N.D. Ill. 1985) (group of corporations can constitute RICO

that the defendant or the enterprise is connected to organized crime.[57]

1. Types of Enterprises

The courts have given a broad reading to the term "enterprise." Noting that Congress has mandated a liberal construction of the RICO statute in order to effectuate its remedial purposes, and pointing to the expansive use of the word "includes" in the statutory definition of the term, the courts have held that the list of enumerated entities is not exhaustive but merely illustrative.[58] Thus, public or governmental entities

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cert. denied, 453 U.S. 911 (1981); United States v. Provenzano, 620 F.2d 985, 992-93 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Aleman, 609 F.2d 298, 304-05 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Rone, 598 F.2d 564, 568-69 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

[57] H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893 (1989); United States v. Hunt, 749 F.2d 1078, 1088 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); United States v. Romano, 736 F.2d 1432, 1441 (11th Cir. 1985); United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). See also United States v. Gottesman, 724 F.2d 1517, 1521 (11th Cir. 1984); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir.), aff'd in part, rev'd in part, 710 F.2d 1361 (8th Cir. 1982), cert. denied, 464 U.S. 1008 (1983); United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1984); United States v. Uni Oil, Inc., 646 F.2d 946, 953 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982); United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

[58] United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984); United States v. Thevis, 665 F.2d 616, 625 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Angelilli, 660 F.2d 23, 31 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982). See also United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Perkins, 596 F. Supp. 528, 530-31 (E.D. Pa.), aff'd, 749

and political associations;[68] governmental units such as the offices of governors and state legislators,[69] courts and judicial offices,[70]

Cir.), cert. denied, 444 U.S. 864 (1979); United States v. Kaye, 556 F.2d 855 (7th Cir.) (Local 714 of the International Brotherhood of Teamsters), cert. denied, 434 U.S. 921 (1977); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975) (applying RICO without discussion to Local 626 of the International Brotherhood of Teamsters), cert. denied, 423 U.S. 1050 (1976); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 335 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) (Local 560 and its benefit fund), cert. denied, 476 U.S. 1140 (1986); United States v. Field, 432 F. Supp. 55, 57-58 (S.D.N.Y. 1977) (International Longshoremen's Association), aff'd, 578 F.2d 1371 (2d Cir.), cert. denied, 439 U.S. 801 (1979); United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977) (applying RICO without discussion to the International Production Service & Sales Employees Union, but dismissing action for failure to establish a pattern of racketeering activity); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973) (applying RICO to a union representing workers in New York's fur garment manufacturing industry), aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).

[67] United States v. Weatherspoon, 581 F.2d 595, 597-98 (7th Cir. 1978) (beauty college approved for veterans' vocational training by the Veterans Administration).

[68] Hudson v. LaRouche, 579 F. Supp. 623, 628 (S.D.N.Y. 1983) (unincorporated national political association affiliated with a political candidate).

[69] Commonwealth v. Cianfrani, 600 F. Supp. 1364 (E.D. Pa. 1985) (Pennsylvania Senate); United States v. Thompson, 685 F.2d 993 (6th Cir. 1982) (en banc) (applying RICO to the Tennessee Governor's Office, but questioning the wisdom of not defining the enterprise in the indictment as a "group of individuals associated in fact that made use of the office of Governor of the State of Tennessee"), cert. denied, 459 U.S. 1072 (1983); United States v. Long, 651 F.2d 239 (4th Cir.) (office of Senator in the South Carolina legislature), cert. denied, 454 U.S. 896 (1981); United States v. Sisk, 476 F. Supp. 1061, 1062-63 (M.D. Tenn. 1979), aff'd, 629 F.2d 1174 (6th Cir. 1980) (Tennessee Governor's Office), cert. denied, 449 U.S. 1084 (1981); see also United States v. Gillock, 445 U.S. 360, 373 n.11 (1979) ("[o]f course, even a member of Congress would not be immune under the federal Speech or Debate Clause from prosecution for the acts which form the basis of the ... [RICO] charges there"). But see United States v. Mandel, 415 F. Supp. 997, 1020-22 (D. Md. 1976), rev'd on other grounds, 591 F.2d 1347 (4th Cir.), aff'd on rehearing, 602 F.2d 653 (4th Cir. 1979) (en banc) (state of Maryland not an "enterprise" for RICO

proprietorships[64] and cooperatives;[65] benevolent and non-profit organizations such as unions and union benefit funds,[66] schools,[67]

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enterprise).

[62] United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974) (foreign corporation can constitute a RICO enterprise), cert. denied, 419 U.S. 1105 (1975).

[63] United States v. Cauble, 706 F.2d 1322, 1331 (5th Cir. 1983) (limited partnership), cert. denied, 465 U.S. 1005 (1984); United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982) (partnership), cert. denied, 464 U.S. 828 (1983); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981) (partnership may be enterprise), cert. denied, 454 U.S. 1156 (1982); Eisenberg v. Gagnon, 564 F. Supp. 1347, 1353 (E.D. Pa. 1983) (limited partnership); United States v. Jannotti, 501 F. Supp. 1182, 1185-86 (E.D. Pa. 1980), rev'd on other grounds, 673 F.2d 578 (3d Cir.) (en banc) (law firm operated through payment of bribes), cert. denied, 457 U.S. 1106 (1982).

[64] United States v. Benny, 786 F.2d 1410 (9th Cir.), cert. denied, 479 U.S. 1017 (1986); McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985); United States v. Tille, 729 F.2d 615, 618 (9th Cir.), cert. denied, 471 U.S. 1064 (1984); United States v. Melton, 689 F.2d 679 (7th Cir. 1982); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 676 (N.D. Ind. 1982). However, the sole proprietorship is not favored as a RICO enterprise. See cases infra at page 52.

[65] United States v. Bledsoe, 674 F.2d 647, 660 (8th Cir. 1982) (dicta), cert. denied, 459 U.S. 1040 (1983).

[66] United States v. Robilotto, 828 F.2d 940, 947 (2d Cir.) (Local 294 of the International Brotherhood of Teamsters), cert. denied, 484 U.S. 1011 (1988); United States v. Delker, 782 F.2d 1033 (3d Cir. 1985) (unpublished opinion) (union officials used union as enterprise), cert. denied, 476 U.S. 1141 (1986); United States v. Provenzano, 688 F.2d 194, 199-200 (3d Cir.) (Local 560 of the Teamsters Union), cert. denied, 459 U.S. 1071 (1982); United States v. LeRoy, 687 F.2d 610, 616-17 (2d Cir. 1982) (Local 214 of Laborers International Union of North America), cert. denied, 459 U.S. 1174 (1983); United States v. Scotto, 641 F.2d 47 (2d Cir. 1980) (Local 1814 of the International Longshoremen's Association), cert. denied, 452 U.S. 961 (1981); United States v. Boylan, 620 F.2d 359 (2d Cir.) (applying RICO without discussion to Local 5 of the AFL-CIO), cert. denied, 449 U.S. 833 (1980); United States v. Rubin, 559 F.2d 975, 989 (5th Cir. 1977) (unions and employees welfare benefit plans), vacated and remanded, 439 U.S. 810 (1978), aff'd in part and rev'd in part on other grounds, 591 F.2d 278 (5th

offices,[72] tax bureaus,[73] and executive departments and agencies;[74] and associations in fact.[75] However, an enterprise cannot be an

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Cir. 1977) (applying RICO without discussion to the Vice Squad of the Charleston, South Carolina Police Department), cert. denied, 434 U.S. 1077 (1978); United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977) (Macon, Georgia Municipal Police Department), cert. denied, 435 U.S. 904 (1978); United States v. Cryan, 490 F. Supp. 1234, 1239-44 (D.N.J.) (applying RICO to Sheriff's Office of Essex County, New Jersey, but limiting RICO culpability to only those defendants who actually committed or authorized the acts charged in the indictment), aff'd, 636 F.2d 1211 (3d Cir. 1980).

[72] United States v. Goot, 894 F.2d 231, 239 (7th Cir. 1990); United States v. Yonan, 800 F.2d 164 (7th Cir. 1986) (Cook County State's Attorney's Office), cert. denied, 479 U.S. 1055 (1987); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980) (Office of Prosecuting Attorney of Hancock County, West Virginia).

[73] United States v. Burns, 683 F.2d 1056, 1059 n.2 (7th Cir. 1982) (Cook County, Illinois, Board of Tax Appeals), cert. denied, 459 U.S. 1173 (1983); United States v. Frumento, 563 F.2d 1083, 1089-92 (3d Cir. 1977) (Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes), cert. denied, 434 U.S. 1072 (1978).

[74] United States v. Hocking, 860 F.2d 769 (8th Cir. 1988) (Illinois Department of Transportation); United States v. Dozier, 672 F.2d 531, 543 & n.8 (5th Cir.) (Louisiana Department of Agriculture), cert. denied, 459 U.S. 943 (1982); United States v. Angelilli, 660 F.2d 23, 33 n.10 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980); United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.) (warden of county prison), cert. denied, 439 U.S. 836 (1978); State of Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245, 247-48 (D. Md. 1980) (Construction and Building Inspection Division of the Department of Housing and Community Development for the City of Baltimore); United States v. Barber, 476 F. Supp. 182, 191 (S.D. W.Va. 1979) (West Virginia Alcohol Beverage Control Commission).

[75] United States v. Turkette, 452 U.S. 576, 581 (1981); United States v. Stefan, 784 F.2d 1093, 1103 (11th Cir.) (enterprise consisting of a group of individuals associated in fact sufficient where individuals identified by name), cert. denied, 479 U.S. 1009 (1986); United States v. Mitchell, 777 F.2d 248, 259 (5th Cir. 1985) (group of individuals associated together for the purpose of importing marijuana sufficient for RICO enterprise), cert. denied, 476 U.S. 1184 (1986); United States v. Local 560, Int'l Brotherhood

police departments and sheriffs' offices,[71] county prosecutors'

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purposes), cert. denied, 445 U.S. 961 (1980). Mandel, however, has been discredited by all courts that have considered the issue, including the Fourth Circuit. See, e.g., United States v. Angelilli, 660 F.2d 23, 33 n.10 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981); United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980); see also United States v. Powell, No. 87 CR 872-3 (N.D. Ill. February 27, 1988) (City of Chicago proper enterprise for purposes of RICO); State of New York v. O'Hara, 652 F. Supp. 1049 (W.D.N.Y. 1987) (in civil RICO suit, City of Niagara Falls proper enterprise).

[70] United States v. Blackwood, 768 F.2d 131 (7th Cir.) (Cook County Circuit Court), cert. denied, 474 U.S. 1020 (1985); United States v. Conn, 769 F.2d 420 (7th Cir. 1985) (Cook County Circuit Court); United States v. Angelilli, 660 F.2d 23, 30-34 (2d Cir. 1981) (New York City Civil Court), cert. denied, 455 U.S. 945 (1982); United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981) (applying RICO without discussion to Municipal Court of El Paso, Texas), cert. denied, 455 U.S. 949 (1982); United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (judicial circuit); United States v. Bacheler, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court); United States v. Joseph, 526 F. Supp. 504, 507 (E.D. Pa. 1981) (Office of the Clerk of Courts of Lehigh County, Pennsylvania); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979) (same), cert. denied, 444 U.S. 1072 (1980).

[71] United States v. DePeri, 778 F.2d 963 (3rd Cir. 1985) (Philadelphia Police Department), cert. denied, 475 U.S. 1109 (1986); United States v. Alonso, 740 F.2d 862, 870 (11th Cir. 1984) (Dade County Public Safety Department, Homicide Section), cert. denied, 469 U.S. 1166 (1985); United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984) (Chicago Police Department), cert. denied, 472 U.S. 1017 (1985); United States v. Davis, 707 F.2d 880, 882-83 (6th Cir. 1983) (Sheriff's Office of Mahoning County, Ohio); United States v. Lee Stoller Enterprise, Inc., 652 F.2d 1313, 1316-19 (7th Cir.) (Sheriff's Office of Madison County, Illinois), cert. denied, 454 U.S. 1082 (1981); United States v. Bright, 630 F.2d 804, 829 (5th Cir. 1980) (Sheriff's Office of DeSoto County, Mississippi); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980) (Office of County Law Enforcement Officials), cert. denied, 449 U.S. 1078 (1981); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (Sheriff's Department of Wilson County, North Carolina); United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979) (Police Department of Madison, Illinois), cert. denied, 446 U.S. 935 (1980); United States v. Burnsed, 566 F.2d 882 (4th

individuals associated in fact," provided the indictment is otherwise sufficient.[79] However, if the government in its indictment and at trial clearly elects one theory of enterprise over another, it must prove the existence of the kind of enterprise upon which it has based its case.[80] In one case, a RICO conspiracy conviction was reversed when the trial court, in response to a question from the jury during deliberations, said that the government did not have to prove that the enterprise was a particular organized crime family, even though the indictment alleged that that family was the enterprise.[81]

When the type of enterprise under consideration is a "legal" entity, there is little difficulty in proving the existence of the enterprise. Proof that the entity in question has a legal

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[79] United States v. Alonso, 740 F.2d 862, 870 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); cf. United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's office is either a legal entity or a group of individuals associated in fact); United States v. Brown, 555 F.2d 407, 415 (5th Cir. 1977) (Macon, Georgia Police Department is at least a group associated in fact, and may also be a legal entity), cert. denied, 435 U.S. 904 (1978).

[80] United States v. Cauble, 706 F.2d 1322, 1331 n.16 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Bledsoe, 674 F.2d 647, 660 (8th Cir. 1982) (although a co-op, as a legal entity, could clearly qualify as an enterprise under RICO, the government cannot argue on appeal that the enterprise was one or more of the cooperatives since the case was not tried on that theory), cert. denied, 459 U.S. 1040 (1983).

[81] United States v. Weissman, 899 F.2d 1111 (11th Cir. 1990).

inanimate object, such as an apartment.[76] An enterprise can also be comprised of a combination of these entities.[77] As one court has noted, the definition of the term "enterprise" is of necessity a shifting one, given the fluid nature of criminal associations.[78]

The government need not specify in a RICO indictment whether the enterprise charged is a "legal entity" or a "group of

of Teamsters, 780 F.2d 267, 273 (3d Cir. 1985) ("Provenzano group," group of individuals, could constitute enterprise), cert. denied, 476 U.S. 1140 (1986); United States v. Santoro, 647 F. Supp. 153 (E.D.N.Y. 1986) ("Lucchese Family" alleged as association-in-fact enterprise), aff'd, 880 F.2d 1319 (2d Cir. 1989); Van Dorn Co. v. Howington, 623 F. Supp. 1548, 1554 (N.D. Ohio 1985) (unnamed association of defendants could constitute proper enterprise).

[76] Elliott v. Faufus, 867 F.2d 877 (5th Cir. 1989).

[77] See, e.g., United States v. Stolfi, 889 F.2d 378 (2d Cir. 1989) (local union and its welfare benefit fund); United States v. Feldman, 853 F.2d 648 (9th Cir. 1988) (association of five corporations and two individuals, including the defendant); United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988) (group of individuals, corporations, and partnerships); San Jacinto Savings Association v. TDC Corp., 707 F. Supp. 1577 (M.D. Fla. 1989) (informal association of corporations and individuals with common purpose of making money from schemes); United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987) (enterprise could consist of group of individuals and corporations); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1253 (E.D. Mich. 1987) (group of individuals and corporations proper enterprise); United States v. Dellacroce, 625 F. Supp. 1387, 1390 (E.D.N.Y. 1986) (two "crews" of the Gambino Crime Family and their supervisor sufficient RICO enterprise); United States v. Aimone, 715 F.2d 822, 826 (3d Cir. 1983) (enterprise may be comprised of a combination of "illegal" entities and a group of individuals associated in fact), cert. denied, 468 U.S. 1217 (1984); United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Campanale, 518 F.2d 352, 357 n.11 (9th Cir. 1975) (enterprise composed of two corporations and a union), cert. denied, 423 U.S. 1050 (1976).

[78] United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979).

v. Turkette, 452 U.S. 576, 583 (1981).[85] An association-in-fact enterprise may, however, change its membership during the course of its activity.[86] The issues of ongoing organization, continuing membership, and separate existence are factual ones for the jury, subject to the same review on appeal as any other factual determination.[87]

While the courts uniformly have rejected claims that RICO's enterprise concept is unconstitutionally vague,[88] they have

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[85] See also United States v. Kragness, 830 F.2d 842, 855-56 (8th Cir. 1987) (enterprise proper under Turkette test); United States v. Washington, 797 F.2d 1461, 1476 (9th Cir. 1986) (approving jury instruction that enterprise is "structured organization conducting its affairs through some type of racketeering activity"); United States v. Mitchell, 777 F.2d 248, 259 (5th Cir. 1985) (enterprise as a "group of individuals associated in fact, to promote and facilitate the illegal importation and smuggling of multi-ton quantities of marijuana"), cert. denied, 475 U.S. 1096 (1986). But see Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988) (not proper enterprise where group had one, short-lived goal).

[86] See, e.g., United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); United States v. Hewes, 729 F.2d 1302, 1310-11 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985); United States v. Cagnina, 697 F.2d 915, 922 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Riccobene, 709 F.2d 214, 223 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980), cert. denied, 453 U.S. 911 (1981); United States v. Clemones, 577 F.2d 1247, 1253 (5th Cir.), modified on other grounds, 582 F.2d 1373 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980).

[87] United States v. Riccobene, 709 F.2d 214, 222 (3d Cir.), cert. denied, 465 U.S. 849 (1983). See United States v. Feldman, 853 F.2d 648 (9th Cir. 1988) (evidence sufficient to show that association of five corporations and two individuals did possess the organization and continuity required of a RICO enterprise).

[88] See United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. DeRosa, 670 F.2d 889, 895 (9th Cir.), cert. denied, 459 U.S. 993, 1014 (1982); United States v. Scotto, 641 F.2d 47, 52-53 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Zemek, 634 F.2d 1159,

existence satisfies the enterprise element.[82] Proof of an association-in-fact enterprise, on the other hand, requires evidence of the existence of "a group of persons associated together for a common purpose of engaging in a course of conduct." United States v. Turkette, 452 U.S. 576, 583 (1981). However, the existence of an enterprise and the existence of racketeering activity are distinct elements of a RICO claim; thus, an association-in-fact enterprise is an entity that is separate and apart from the pattern of racketeering in which it engages. Id.[83] While the proof used to establish the existence of the enterprise may coalesce with the proof used to establish the pattern of racketeering, proof of one does not necessarily establish the other. Id.[84]

2. Establishing the Enterprise

The existence of an enterprise is proved "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States

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[82] See, e.g., United States v. Kirk, 844 F.2d 660 (9th Cir.), cert. denied, 109 S. Ct. 222 (1988); United States v. Cauble, 706 F.2d 1322, 1340 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

[83] See United States v. Bascaro, 742 F.2d 1335, 1362 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); United States v. Phillips, 664 F.2d 971, 1011 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Anderson, 626 F.2d 1358, 1365 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

[84] See Hofstetter v. Fletcher, 860 F.2d 1079 (6th Cir. 1988); United States v. Ellison, 793 F.2d 942, 950 (8th Cir.), cert. denied, 479 U.S. 936 (1986); United States v. Qaoud, 777 F.2d 1105, 1115 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986).

has not issued restrictive rulings about the definition of the enterprise in criminal cases,[91] and may be coming closer to the majority view, which reflects the looser and broader definition of enterprise adopted by the Supreme Court in Turkette.[92]

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racketeering), cert. denied, 459 U.S. 1040 (1983).

[91] See, e.g., United States v. Flynn, 852 F.2d 1045 (8th Cir.), cert. denied, 109 S. Ct. 511 (1988); United States v. Leisure, 844 F.2d 1347 (8th Cir.), cert. denied, 109 S. Ct. 324 (1988); United States v. Ellison, 793 F.2d 942, 950 (8th Cir. 1986) ("evidence. . . of the enterprise and the pattern of racketeering activity may in some cases coalesce"); United States v. Lemm, 680 F.2d 1193, 1198-1201 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983).

[92] See, e.g., United States v. Napier, 884 F.2d 581 (6th Cir. 1989) (drug ring called the "Young Boys Incorporated" had adequate ongoing organization and structure); Hofstetter v. Fletcher, 860 F.2d 1079 (6th Cir. 1988) (group selling insurance policies was proper enterprise where there was independent, ongoing organization); United States v. Weinstein, 762 F.2d 1522, 1537 & n.13 (11th Cir. 1985) (rejecting Eighth Circuit's definition of RICO enterprise and reiterating adoption of the Turkette enterprise definition), cert. denied, 475 U.S. 1110 (1986); United States v. Hewes, 729 F.2d 1302, 1310 (11th Cir. 1984) (rejecting Eighth Circuit's view that the enterprise must have a distinct, formalized structure, and relying instead on the court's language in United States v. Elliott, 571 F.2d 880, 898 (5th Cir.), cert. denied, 439 U.S. 953 (1978), that an enterprise includes any group of individuals "whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes"), cert. denied, 469 U.S. 1110 (1985); United States v. Zielie, 734 F.2d 1447, 1462-63 (11th Cir. 1984) (same), cert. denied, 469 U.S. 1189 (1985); United States v. Tille, 729 F.2d 615, 626 (9th Cir.) (there need not be proof of actual employment or association independent of racketeering activity; proof of association with the illegal activities of the enterprise is sufficient), cert. denied, 469 U.S. 845 (1984); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21-23 (2d Cir. 1983), cert. denied, 465 U.S. 1025 (1984); United States v. Mazzei, 700 F.2d 85, 89-90 (2d Cir.) (government need not prove that the alleged enterprise engaged in activities separate and distinct from those specifically contemplated in the conspiracy), cert. denied, 461 U.S. 945 (1983); United States v. DeRosa, 670 F.2d 889, 895-96 (9th Cir.) (defendants' ongoing relationship for the purpose of selling and distributing narcotics was sufficient to establish existence of criminal enterprise under Turkette definition), cert. denied, 459 U.S. 993 (1982); United States v. Griffin, 660 F.2d 996, 999-1000

disagreed as to the scope of an association-in-fact enterprise. Thus, they have taken differing positions on the degree of proof necessary to establish the existence of an enterprise that is sufficiently distinct and separate from the underlying pattern of racketeering.

The Eighth Circuit's concept of an enterprise is the strictest--one that requires the enterprise to have an existence entirely distinct and independent of the racketeering activity.[89] Thus, the Eighth Circuit requires that the enterprise have "an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts [of racketeering]."[90] However, in recent years the Eighth Circuit

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1170 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981); see also United States v. Anderson, 626 F.2d 1358, 1364 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981); United States v. Aleman, 609 F.2d 298, 305 & n.12 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir.), cert. denied, 441 U.S. 933 (1979); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

[89] See Bennett v. Berg, 685 F.2d 1053, 1060 (8th Cir.) (RICO requires proof of a fact other than the facts required to prove the predicate acts of racketeering), aff'd in part and rev'd in part, 710 F.2d 1361 (1982) (en banc), cert. denied, 464 U.S. 1008 (1983); United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

[90] United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981); see also United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir.) (rejecting "minimal association" as sufficient to prove enterprise and requiring that an enterprise possess a "distinct structure" such as the "command system of a Mafia family" or the "hierarchy, planning and division of profits within a prostitution ring;" an enterprise must be more than an informal group created to perpetrate the acts of

However, to the extent that the Eighth Circuit has attempted to restrain the indiscriminate application of RICO to the commission of two offenses that also happen to constitute predicate offenses under RICO, its warnings should be heeded.[95] Indeed, the Third Circuit in United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983), adopted many of the principles espoused by the Eighth Circuit.[96] Riccobene provides a helpful analysis of the type of proof necessary to establish the existence of an association-in-fact enterprise, and a prosecutor drafting a RICO indictment should study it carefully. As the court in Riccobene explained (709 F.2d at 222-23) (citations and footnotes omitted):

> The "ongoing organization" requirement relates to the superstructure or framework of the group. To satisfy this element, the government must show that some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual. There must be some mechanism for controlling and directing the affairs of the group on an on-going, rather that an ad hoc, basis. This does not mean that every decision must be made by the same person, or that authority may not be delegated.

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[95] The courts have on several occasions indicated sensitivity to possible government abuse of the RICO statute. See, e.g., United States v. Russotti, 717 F.2d 27, 34 n.4 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.), cert. denied, 449 U.S. 871 (1981); United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980).

[96] See also United States v. Tillett, 763 F.2d 628, 631 (4th Cir. 1985) (relying on Turkette definition of enterprise and adding that enterprise must exist separate and apart from the pattern of racketeering activity); United States v. DiGilio, 667 F. Supp. 191, 195 (D.N.J. 1985) (applying Riccobene test).

To the extent that the Eighth Circuit's original position was premised on a requirement that evidence establishing the enterprise's existence must be distinct from the evidence establishing the pattern of racketeering, in our view, it was too restrictive.[93] The Supreme Court has clearly stated that while the pattern of racketeering activity and the enterprise are separate elements of a RICO violation, the government need not adduce different proof for each element. United States v. Turkette, 452 U.S. 576, 583 (1981).[94]

(4th Cir. 1981) (circumstantial evidence, common purpose, and composition supports inference of continuity, unity, shared purpose and identifiable structure), cert. denied, 454 U.S. 1156 (1982); United States v. Errico, 635 F.2d 152, 156 (2d Cir. 1980) (network of jockeys and bettors, joined together for the "single, illegal purpose" of betting on fixed horse races constituted an enterprise), cert. denied, 453 U.S. 911 (1981); Temple University v. Salla Bros., 656 F. Supp. 97, 102 (E.D. Pa. 1986) (applying Turkette definition); Zahra v. Charles, 639 F. Supp. 1405, 1407 (E.D. Mich. 1986) (enterprise exists under Turkette where members function as a continuing unit and existence is separate and apart from the pattern of racketeering); Karel v. Kroner, 635 F. Supp. 725, 728 (N.D. Ill. 1986) (organization, allegedly a partnership, which purchased horses on five occasions sufficiently structured for alleging a RICO enterprise under Turkette definition).

[93] In Bennett v. Berg, 685 F.2d at 1060, the Eighth Circuit stated that separate proof was required to establish the "enterprise" and "pattern of racketeering" elements. However, in United States v. Lemm, 680 F.2d at 1199, the court readily admitted that the proof as to these two elements may coalesce in particular cases. See also United States v. Ellison, 793 F.2d 942, 950 (8th Cir.), cert. denied, 479 U.S. 936 (1986).

[94] See also United States v. Kragness, 830 F.2d 842, 856 & n.11 (8th Cir. 1987); United States v. Mazzei, 700 F.2d 85, 89 (2d Cir.), cert. denied, 461 U.S. 945 (1983); United States v. Bagnariol, 665 F.2d 877, 890-91 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Winter, 663 F.2d 1120, 1135 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1982).

conspiracy to kill a prominent Croatian journalist and politician, and attempted bombings.

The court of appeals upheld the substantive count convictions, but reversed the RICO convictions. Relying on the statutory language of RICO, as well as language in United States v. Turkette, 452 U.S. 576 (1981), the court held that the RICO statute applies only to cases in which the enterprise or the predicate acts have a financial purpose. 700 F.2d at 65. Finding that the enterprise in question was devoted solely to advancing the defendants' political cause in a nonfinancial way, the court ruled it to be beyond the scope of RICO.

It is clear, however, that Ivic did not hold that all RICO enterprises must have a profit-seeking purpose. As noted earlier (see supra notes 69-74), the circuits, including the Second Circuit, are in agreement that a government entity may constitute a RICO enterprise. It is only necessary that either the RICO enterprise or the pattern of racketeering have an economic goal. Indeed, in a subsequent decision, United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983), the Second Circuit upheld the RICO convictions of members of a Croatian terrorist group where the predicate acts of racketeering included the extortion of money which was to be used to finance the group's criminal political activities. The court rejected a claim that "quite apart from the nature of the predicate acts, the enterprise must be 'the sort of entity one joins to make money'." 706 F.2d at 56 (quoting United States v. Ivic, 700 F.2d at 60). The Second

> The second necessary element for an enterprise under RICO is that 'the various associates function as a continuing unit.'... This does not mean that individuals cannot leave the group or that new members cannot join at a later time. It does require, however, that each person perform a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization.
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> * * *
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> The third and final element in establishing the enterprise is that the organization must be 'an entity separate and apart from the pattern of activity in which it engages.' ... As we understand this last requirement, it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

3. <u>Requirement of Profit-seeking Purpose</u>

The Second Circuit has ruled that the RICO statute may not be applied to cases in which neither the enterprise charged nor the predicate acts alleged have a financial purpose. In <u>United States v. Ivic</u>, 700 F.2d 51 (2d Cir. 1983), the government brought a RICO indictment against members of a Croatian national terrorist organization. The indictment charged an association- in-fact enterprise organized for the purpose of "us[ing] terror, assassination, bombings, and violence in order to foster and promote [the defendants'] beliefs and in order to eradicate and injure persons whom they perceived was in opposition to their beliefs." The alleged predicate acts of racketeering included

the enterprise was alleged to be a group of corporate entities associated in fact, one court refused to permit one of those corporations to be a defendant, reasoning that the other corporations were mere shells, and that the defendant really was identical to the enterprise.[99] The Eleventh Circuit is the only

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1986); Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir.1985), cert. denied, 474 U.S. 1058 (1986); B.F. Hirsch, Inc. v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122, 123 (5th Cir. 1986); Haroco, Inc. v. American Nat'l Bank, 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985); United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986); Bennett v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982), rev'd in part, aff'd in part, 710 F.2d 1361, cert. denied, 464 U.S. 1008 (1983) (affirming dismissal of count naming identical defendant and enterprise, but permitting amendment on remand); United States v. Benny, 786 F.2d 1410 (9th Cir.), cert. denied, 479 U.S. 1017 (1986); Rae v. Union Bank, 725 F.2d 478 (9th Cir. 1984); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213 (10th Cir. 1987). See also Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279, 1287 (4th Cir. 1987); Masi v. Ford City Bank & Trust Co., 779 F.2d 397, 401 (7th Cir. 1985); Temple University v. Salla Bros., 656 F. Supp. 97, 103 (E.D. Pa. 1986); Hatherley v. Palos Bank & Trust Co., 650 F. Supp. 832, 835 (N.D. Ill. 1986); Gaudette v. Panos, 644 F. Supp. 826, 841 (D. Mass. 1986); Abelson v. Strong, 644 F. Supp. 524, 533 (D. Mass. 1986); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 806 (E.D. La. 1986); Frota v. Prudential-Bache Securities, 639 F. Supp. 1186, 1192-93 (S.D.N.Y. 1986); Van Dorn Co. v. Howington, 623 F. Supp. 1548, 1554 (N.D. Ohio 1985); Anisfeld v. Cantor Fitzgerald & Co., 631 F. Supp. 1461, 1467 (S.D.N.Y. 1986); Moore v. A.G. Edwards & Sons, Inc., 631 F. Supp. 138, 145 (E.D. La. 1986); Dunham v. Independence Bank, 629 F. Supp. 983, 991 (N.D. Ill. 1986); Modern Settings v. Prudential-Bache Securities, 629 F. Supp. 860, 863 (S.D.N.Y. 1986); Grant v. Union Bank, 629 F. Supp. 570, 575 (D. Utah 1986); Hudson v. LaRouche, 579 F. Supp. 623, 628 (S.D.N.Y. 1983); Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 23-24 (N.D. Ill. 1982); Field v. National Republic Bank, 546 F. Supp. 123, 124 n.5 (N.D. Ill. 1982); Van Schaick v. Church of Scientology of California, Inc., 535 F. Supp. 1125, 1136 (D. Mass. 1982).

[99] United States v. Standard Drywall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985).

Circuit's holding in Ivic is undoubtedly correct, as suggested by the purpose and legislative history of the statute. Moreover, since most RICO prosecutions against terrorist groups will include racketeering activity designed to yield money,[97] Ivic will bar prosecution in only a narrow range of cases.

4. Defendant as Enterprise

a. Corporate defendants. One issue that has split the circuits is whether a corporation can be both the defendant and the enterprise in either a criminal prosecution or civil action brought pursuant to 18 U.S.C. § 1962(c). The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits have concluded that 18 U.S.C. § 1962(c) requires separate entities as the liable "person" and as the "enterprise" which has its affairs conducted through a pattern of racketeering.[98] Where

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[97] See, e.g., United States v. Ellison, 793 F.2d 942 (8th Cir.) (affirming conviction of member of terrorist group where only one racketeering act had some economic motivation), cert. denied, 479 U.S. 937 (1986); United States v. Ferguson, 758 F.2d 843 (2d Cir.) (successful RICO prosecution of a terrorist organization which committed a series of armed car robberies, prison escapes, and kidnapings, even though group had a political purpose), cert. denied, 474 U.S. 841 (1985); United States v. Dickens, 695 F.2d 765 (3d Cir.) (successful RICO prosecution of a group of defendants who operated within the framework of the "New World," a religious organization that was a continuation of the Black Muslims and who committed extensive robberies in order to finance purposes and aims), cert. denied, 460 U.S. 1092 (1983); Von Bulow v. Von Bulow, 634 F. Supp. 1284, 1305 (S.D.N.Y. 1986) (financial purpose element of RICO satisfied where defendant had desire for victim's wealth).

[98] Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); Puckett v. Tennessee Eastman Co., 889 F.2d 1481 (6th Cir. 1989); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782 (D.C. Cir. 1988), vacated and remanded, 109 S. Ct. 3235 (1989), on remand, 883 F.2d 1132 (D.C. Cir. 1989); Saporito v. Combustion Engineering, Inc., 843 F.2d 666 (3d Cir. 1988); Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir.

the instant case could simply have charged an association-in- fact enterprise.

The contrary holdings of the other circuits are premised on a different interpretation of the statutory language and on different policy considerations. Thus, in Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985), the court noted that by requiring the liable person to be "employed by or associated with any enterprise" affecting interstate commerce, Section 1962(c) contemplated a person distinct from the enterprise charged. 747 F.2d at 400.[101] Second, reasoned the court, allowing a corporation to be named as both the defendant and the enterprise in a Section 1962(c) action would illogically and unfairly subject a corporation to liability not only in those instances where the corporation was the major perpetrator or central figure in a criminal scheme, but also in those instances where it was only a passive instrument or even a victim of the racketeering activity. Id. at 401. The court also noted that the person and enterprise could be the same for purposes of a RICO action based on Section 1962(a) rather than Section 1962(c). Id. at 402.[102]

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[101] The Supreme Court granted certiorari in Haroco in order to resolve a different issue involved in that case: whether a private litigant in a civil RICO action must show "racketeering injury" in addition to injury caused by the underlying predicate acts. The Court, in affirming the Seventh Circuit's decision, did not address the issue whether a corporation may constitute both the defendant and enterprise in a Section 1962(c) action.

[102] Accord Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); Saporito v. Combustion Engineering, Inc., 843 F.2d 666 (3d Cir. 1988); Schofield v. First Commodity Corp., 793 F.2d 28 (1st

circuit to hold that a corporation can be both the defendant and the enterprise for purposes of Section 1962(c).[100]

In support of its view that a corporation can simultaneously be both the defendant and the enterprise under RICO, the Eleventh Circuit in Hartley, 678 F.2d at 986-89, relied on RICO's liberal construction clause and the absence of any statutory prohibition of such a dual role; the fact that allowing such a duality would not "read" the enterprise element out of the statute because the government would still have to prove the corporation's separate identity; that corporate liability for the acts of its agents and employees was simply a reality to be faced by corporate entities; and that where the defendant corporation was the central figure in a criminal scheme, Congress could not have intended to allow the central perpetrator to escape while subjecting only the sidekicks to RICO's penalties. Finally, the court reasoned that a contrary ruling would be nonsensical. 678 F.2d at 989. Since the Supreme Court in Turkette upheld RICO convictions in which the defendants were both the offending persons and members of the association in fact that constituted the necessary enterprise, the government in

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[100] United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983). See also Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) (permitting charging of Republican Party as both defendant and enterprise in view of facts of case, particularly the party's victimization by its own agents); Bennett v. Berg, 710 F.2d 1361, 1365 (8th Cir. 1982) (McMillian, J., dissenting), cert. denied, 464 U.S. 1008 (1983); United States v. Local 560, Int'l Brotherhood of Teamsters, 581 F. Supp. 279, 329-30 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) (while RICO requires the showing of a "person" as a separate element apart for the "enterprise," these elements need not be mutually exclusive), cert. denied, 476 U.S. 1140 (1986).

corporation can be a RICO defendant where the alleged enterprise consists of the corporate defendant and other entities. In Entre Computer Centers, Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279, 1287 (4th Cir. 1987), the court, assuming arguendo that a corporation could be part of an association in fact under RICO, stated that a corporate defendant "is already the 'person' the Act is designed to punish" and therefore cannot form with other entities to constitute the RICO enterprise.

In Standard Drywall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985), the enterprise was a group of corporations consisting of Standard Drywall and three of its shell companies. The court rejected the government's argument that the defendant and the enterprise were separate and distinct entities as "particularly tenuous" since the shell companies were non-functioning. Because there was no real distinction between the defendant corporation and the enterprise, the indictment was dismissed.

Similarly, in Witt v. South Carolina Nat'l Bank, 613 F. Supp. 140 (D.S.C. 1985), the plaintiff alleged that the enterprise was a given trust account and the common trust fund of which the account was a part, while the defendant was a bank and its trust department. Accusing the plaintiff of attempting to "plead around" the controlling law, the court held that the trusts and the bank had no separate existence, since the trust could not exist without the trustee, who controlled all of the fund's affairs and owned all of its assets.

There also is a split among the circuits on the question of whether a corporation may be both a defendant and a member of an association-in-fact enterprise. The Second Circuit, in Cullen v. Margiotta, 811 F.2d 728 (2d Cir. 1987), ruled that an entity could be both the RICO "person" and part of the "enterprise" where the RICO enterprise is comprised of more than the entity itself. In so holding, the court reaffirmed its ruling in Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985), cert. denied, 474 U.S. 1058 (1986), that an entity could not be both the RICO person and the enterprise, reasoning that it is not possible for an entity to be "associated with" only itself. 811 F.2d at 730.[103] The Fourth Circuit has declined to adopt the argument that a

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Cir. 1986); Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986), vacated, 109 S. Ct. 1306 (1989); Masi v. Ford City Bank & Trust Co., 779 F.2d 397, 401-02 (7th Cir. 1985); United States v. DiCaro, 772 F.2d 1314, 1319-20 (7th Cir. 1985), cert. denied, 475 U.S. 1077 (1986); Temple University v. Salla Bros., 656 F. Supp. 97, 103 (E.D. Pa. 1986); Hatherley v. Palos Bank & Trust Co., 650 F. Supp. 832, 835 (N.D. Ill. 1986); Abelson v. Strong, 644 F. Supp. 524, 534 (E.D. Mich. 1986); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 806 (E.D. La. 1986); Dunham v. Independence Bank, 629 F. Supp. 983, 990 (N.D. Ill. 1986); United States v. Yonan, 622 F. Supp. 721, 727 (N.D. Ill. 1985), rev'd on other grounds, 800 F.2d 164 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1987); United States v. Gonzales, 620 F. Supp. 1143, 1145 (N.D. Ill. 1985); United States v. Freshie Co., 639 F. Supp. 441 (E.D. Pa. 1986). But see Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213 (10th Cir. 1987) (corporation could not be both enterprise and defendant under Section 1962(a) because corporation received no benefit from racketeering activity); H.J. Inc. v. Northwestern Bell Telephone Co., 653 F. Supp. 908 (D. Minn. 1987), aff'd, 829 F.2d 648 (8th Cir. 1987), rev'd on other grounds, 109 S. Ct. 2893 (1989).

[103] Accord Rockwell Graphics Systems, Inc. v. DEV Industries, Inc., No. 84 C 6746 (N.D. Ill. February 2, 1987); Fustok v. Conticommodity Services, 618 F. Supp. 1074 (S.D.N.Y. 1985).

circumstances.[106]

However, other decisions have focused more sharply on the issue, and have set out definite limits. In McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985), the Seventh Circuit in a civil RICO suit held that a sole proprietorship could be an "enterprise" with which the proprietor could be "associated." Citing Haroco, supra, for the proposition that there had to be some separate and distinct existence for the person liable under RICO (the sole proprietor) and the enterprise (the sole proprietorship), the court found such a separation in that the sole proprietor had employees working for his proprietorship with whom he "associated;" thus, the enterprise was distinct from the sole proprietor. The Ninth Circuit in United States v. Benny, 786 F.2d 1410 (9th Cir.), cert. denied, 107 S. Ct. 668 (1986), adopted the Seventh Circuit's McCullough standard and affirmed a RICO conviction where one of the defendants was associated with his own enterprise. The court reasoned that the co-defendant's association with the sole proprietorship made it a "troupe, not a one-man show." Id. at 1416.[107]

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[106] See United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Elliott, 571 F.2d 880, 898 n.15 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Joseph, 526 F. Supp. 504, 507 (E.D. Pa. 1981); see also United States v. Hawkins, 516 F. Supp. 1204, 1206 (M.D. Ga. 1981), aff'd, 671 F.2d 1383 (11th Cir.), cert. denied, 459 U.S. 943 (1982).

[107] See United States v. Weinberg, 852 F.2d 681 (2d Cir. 1988) (defendant conducted affairs through his real estate business, which employed several persons and included partnerships and corporations); see also Bergen v. L.F. Rothschild, 648 F. Supp. 582, 589-90 (D.D.C. 1986) (defendant may be same as enterprise under § 1962(c) where defendant is partnership).

It is well established, of course, that an individual may be charged both as a defendant and as a member of an association-in-fact enterprise.[104] Virtually every association-in-fact case follows this pattern. There is no reason that the same rule should not apply to corporate defendants, as long as the distinction between the enterprise and the defendant corporation is real. Problems should arise only where all members of the alleged association in fact are a part of, controlled by, or closely related to the corporate defendant.[105] In cases that present close questions, however, it is best to follow the Seventh Circuit's suggestion in Haroco, and charge the corporate defendant with a Section 1962(a) violation.

b. Individual defendants. A related issue is whether an individual person may properly be charged in a RICO prosecution as both an "enterprise" and a defendant. Some courts have said that a person can occupy such a dual role, at least in some

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[104] See, e.g., United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 401 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985); United States v. DiGilio, 667 F. Supp. 191, 195 (D.N.J. 1987); Trak Microcomputer Corp. v. Wearne Brothers, 628 F. Supp. 1089, 1095 (N.D. Ill. 1985).

[105] See, e.g., Old Time Entertainment, Inc. v. International Coffee Corp., 862 F.2d 1213 (5th Cir. 1989) (grouping of corporation with its own employees, officers, or directors is not an association-in-fact enterprise distinct from the corporation itself); Newfield v. Shearson Lehman Bros., 699 F. Supp. 1124 (E.D. Pa. 1988) (RICO claim dismissed where complaint alleged that Shearson formed an association-in-fact enterprise with its own agents).

in Section 1962. Section 1961(5) does not use a definitional term such as "means" or "includes;" rather, the provision states that a 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" (emphasis added). The Supreme Court has analyzed this provision as meaning that "there is something to a RICO pattern beyond simply the number of predicate acts involved."[109]

Several issues of considerable complexity are raised by this definition. First, the pattern must contain at least two acts of racketeering activity, as defined in Section 1961(1). Some aspects of this requirement are clear: the two violations may be both state offenses, both federal offenses, or a mixture of the two. They may be violations of the same statute, or of different statutes. The predicate acts need not have previously been charged.[110]

1. Single Episode Rule

Perhaps the most difficult aspect of defining the requisite

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[109] H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 2900 (1989)(emphasis in original).

[110] United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), modified on other grounds, 590 F.2d 1379 (5th Cir.), cert. denied, 440 U.S. 962 (1979); United States v. Parness, 503 F.2d 430, 441 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975); cf. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985) (reversing circuit court's requirement that plaintiff prove prior criminal convictions on underlying predicate offenses in order to bring a civil RICO action under 18 U.S.C. § 1964(c)).

However, in United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985), cert. denied, 475 U.S. 1077 (1986), the Seventh Circuit relied on Haroco and McCullough to reverse a conviction on a Section 1962(c) count where the defendant was also the enterprise--a one-man criminal operation that carried out four actual or attempted armed robberies, two thefts, and an attempted murder. The court held that its previous decisions governed this case, and found no merit in the government's argument that this case was different because it involved an individual rather than a corporation.

Similarly, in United States v. Yonan, 622 F. Supp. 721, 722-26 (N.D. Ill. 1985), rev'd on other grounds, 800 F.2d 164 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1987), the district court dismissed a Section 1962(c) count against a sole-practitioner attorney who employed one secretary, holding that employing only one secretary was not enough to transform an attorney into an enterprise, but also expressing great reluctance to follow the Seventh Circuit's ruling in McCullough. The Seventh Circuit did not consider the merits of this holding on appeal. 800 F.2d at 165 (government failed to appeal issue timely).[108]

E. Pattern of Racketeering Activity

This is one of the most important definitions in the statute, in that it defines a key element of each substantive RICO offense

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[108] See also United States v. Roth, No. 85 CR 763 (N.D. Ill. June 15, 1987) (all alleged racketeering acts occurring after defendant's law firm became sole proprietorship dismissed); Zahra v. Charles, 639 F. Supp. 1405, 1407 (E.D. Mich. 1986) (individual could not be person and enterprise under § 1962(c)).

the Supreme Court's decision in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), this issue underwent a sudden burst of development in the courts. In describing the elements of a RICO violation, the Court in Sedima discussed in a footnote the definition of "pattern of racketeering activity." The Court quoted with approval language from the legislative history of RICO indicating that the definition requires "continuity plus relationship," rather than "isolated acts" or "sporadic activity."[112] Although this footnote was not necessary to the Court's decision, the "continuity" requirement was seized on by courts in their search for ways to limit the reach of RICO in private civil suits. The Eighth Circuit formulated the strictest test, holding that multiple acts of racketeering activity did not constitute a "pattern" under RICO when the acts were all

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(E.D.N.Y. 1984) (multiple mailings in furtherance of same overall mail fraud scheme); United States v. Marcello, 537 F. Supp. 1364, 1385-86 (E.D. La. 1982), aff'd sub nom. United States v. Roemer, 703 F.2d 805 (5th Cir.) (mail fraud and wire fraud acts related to the same bribery scheme), cert. denied, 464 U.S. 935 (1983); United States v. Mazzio, 501 F. Supp. 340, 342-43 (E.D. Pa. 1980) (multiple bribes of police officers as part of same overall scheme), aff'd, 681 F.2d 810 (3d Cir.), cert. denied, 457 U.S. 1134 (1982); United States v. Chovanec, 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (multiple mail frauds directed against single victim); United States v. Salvitti, 451 F. Supp. 195, 199-200 (E.D. Pa.) (mail fraud and bribery related to same overall scheme), aff'd, 588 F.2d 824 (3d Cir. 1978).

But see United States v. Phillips, 664 F.2d 971, 1038-39 (5th Cir. 1981) (holding that possession with intent to distribute and distribution of marijuana could not be separate predicate crimes because the two crimes would merge into a single violation of 21 U.S.C. § 841(a)), cert. denied, 457 U.S. 1136 (1982); United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975) (expressing concern that a pattern of racketeering activity was generated from a single criminal episode involving one arson and the kidnaping of three employees of the burned building).

[112] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985).

pattern arises in cases where several criminal violations spring from a single transaction. For example, if a defendant is charged with both importation and possession with intent to distribute with respect to the same load of narcotics, the question arises whether this conduct can give rise to the two acts of racketeering activity that form a RICO pattern.

Historically, most courts that addressed the issue in criminal cases held that two offenses can be separate RICO predicates if they could be prosecuted as individual offenses.[111] However, after

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[111] See United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985) (three separate attempted murders), cert. denied, 474 U.S. 1100 (1986); United States v. Pepe, 747 F.2d 632, 661-63 (11th Cir. 1984) (using extortionate means to collect extension of credit in violation of 18 U.S.C. § 894 and traveling in interstate commerce with intent to carry out the same extortionate collection in violation of 18 U.S.C. § 1952); United States v. Bascaro, 742 F.2d 1335, 1360-61 (11th Cir. 1984) (importation of and possession with intent to distribute marijuana), cert. denied, 472 U.S. 1017 (1985); United States v. McManigal, 708 F.2d 276, 282 (7th Cir.) (mailings in furtherance of same mail fraud scheme), vacated on other grounds, 464 U.S. 979, modified on other grounds, 723 F.2d 580 (7th Cir. 1983); United States v. Starnes, 644 F.2d 673, 678 (7th Cir.) (Travel Act, arson, and mail fraud charges all related to a single arson scheme), cert. denied, 454 U.S. 826 (1981); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981) (attempted drug importation and related travel in aid of racketeering), cert. denied, 457 U.S. 1136 (1982); United States v. Colacurcio, 659 F.2d 684, 688 n.4 (5th Cir. 1981) (multiple briberies), cert. denied, 455 U.S. 1002 (1982); United States v. Welch, 656 F.2d 1039, 1069 (5th Cir. 1981) (conspiracy to facilitate gambling under 18 U.S.C. § 1511 and accepting bribes to permit gambling in violation of state law), cert. denied, 456 U.S. 915 (1982); United States v. Martino, 648 F.2d 367, 402-03 (5th Cir. 1981) (arson and related acts of mail fraud), cert. denied, 456 U.S. 949 (1982); United States v. Morelli, 643 F.2d 402, 411-12 (6th Cir.) (telephone call in violation of wire fraud statute and related wiring of money), cert. denied, 453 U.S. 912 (1981); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980) (payment of a bribe in three installments), cert. denied, 449 U.S. 1078 (1981); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978) (multiple mailings in furtherance of same overall scheme to defraud); United States v. Beatty, 587 F. Supp. 1325, 1329

In June 1989, the Supreme Court issued its long-awaited ruling examining the "pattern of racketeering activity" element and the Eighth Circuit's multiple-scheme requirement. In H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 684 (8th Cir. 1987), rev'd, 109 S. Ct. 2893 (1989), the district court dismissed a civil RICO claim for failing to allege a pattern of racketeering activity. The case involved an alleged bribery scheme by Northwestern Bell, designed to illegally influence members of the Minnesota Public Utilities Commission in the performance of their duties as regulators of Northwestern Bell. The Eighth Circuit affirmed the dismissal, holding that the petitioner's allegations were insufficient to establish the requisite "continuity" prong because the complaint alleged only a series of fraudulent acts committed in furtherance of a single scheme to influence the

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requirement that there be more than one racketeering act and threat of continuing activity); Berg v. First American Bankshares, Inc., 796 F.2d 489, 501 (D.C. Cir. 1986) (pattern requires two related racketeering acts).

The Fifth and Sixth Circuits did not take a position on what constitutes a pattern after Sedima. The Fifth Circuit stated it was leaving the question open in Smoky Greenhaw Cotton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280 n.7 (5th Cir. 1986), cert. denied, 482 U.S. 928 (1987), although it purportedly addressed the question in R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) (two related mail frauds sufficient for pattern of racketeering activity). But see Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987) (urging that R.A.G.S. pattern of racketeering ruling be overturned en banc).

Although the Sixth Circuit did not addressed the issue, two courts within the Sixth Circuit, Zahra v. Charles, 639 F. Supp. 1405, 1408-09 (E.D. Mich. 1986), and McIntyre's Mini Computer v. Creative Synergy Corp., 644 F. Supp. 580, 585 (E.D. Mich. 1986), followed the Eighth Circuit's analysis of Sedima's pattern requirement.[114]

related to a single scheme or criminal episode.[113] Other post-Sedima decisions held that multiple violations of predicate offenses could constitute a "pattern of racketeering activity," while emphasizing Sedima's continuity requirement.[114]

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[113] See H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987), rev'd, 109 S. Ct. 2893 (1989); Superior Oil Co. v. Fulmer, 785 F.2d 2521 (8th Cir. 1986).

[114] See, e.g., Indelicato v. United States, 865 F.2d 1370 (2d Cir.), cert. denied, 109 S. Ct. 3192 (1989) (three murders committed in same incident were separate racketeering acts; continuity element satisfied by fact that murders had goal of taking over criminal group); Hospital Employees Div. of Local 79 v. Mercy-Memorial Hospital, 862 F.2d 606 (6th Cir. 1988), vacated, 109 S. Ct. 3236 (1989) (two acts of bribery in furtherance of a single scheme were separate racketeering acts); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782 (D.C. Cir. 1988) (predicate acts involving "vandalism and intimidation during a specific time period in pursuit of a unitary goal" satisfied Sedima's pattern requirement), vacated and remanded, 109 S. Ct. 3235 (1989), on remand, 883 F.2d 1132 (D.C. Cir. 1989); Roeder v. Alpha Industries, Inc., 814 F.2d 22, 31 (1st Cir. 1987) (declining to adopt Eighth Circuit's "single scheme" test and holding that the proper test was whether the racketeering acts were related to one another and threaten to be more than an isolated occurrence); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988) (rejecting Eighth Circuit test and holding that two related predicate acts can constitute a pattern of racketeering activity); Marshall-Silver Const. Co. v. Mendel, 835 F.2d 63, 66-67 (3d Cir. 1987), vacated, 109 S. Ct. 3233 (1989) ("continuous" activity, depending on particular facts, necessary for Sedima pattern of racketeering activity) (appeal pending); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987) (single large continuous scheme might satisfy RICO pattern requirement); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1304 (7th Cir. 1987), cert. denied, 109 S. Ct. 3241 (1989) (predicate acts must be "ongoing over an identifiable period of time so that they can fairly be viewed as constituting separate transactions"); Medallion Television Ent., Inc. v. SelecTV of California, Inc., 833 F.2d 1360, 1363 (9th Cir. 1987), cert. denied, 109 S. Ct. 3241 (1989) (not more than one scheme required, but must show continuity); Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987) (continuity of activity required under Sedima); Bank of America Nat'l Trust & Saving Ass'n v. Touche Ross & Co., 782 F.2d 966, 970-71 (11th Cir. 1986) (nine acts of wire and mail fraud over a three year period sufficient to satisfy Sedima's

One way to show a threat of continued criminal activity would be through direct evidence, such as an explicit threat by an extortionist to continue his illegal conduct.[119] Another way to establish continuity, which covers illegal acts committed on behalf of a criminal organization or a legitimate business, is to show that "the predicate acts or offenses are part of an ongoing entity's regular way of doing business."[120] It is advisable to include a discussion of "continuity" in the jury instructions, although failure to do so may not constitute plain error.[121]

Obviously, the H.J. Inc. decision has not put to rest all uncertainty regarding the "pattern of racketeering activity" requirement. However, although there has not been a proliferation of criminal cases addressing the pattern requirement since Sedima brought this issue to prominence,[122] the Organized Crime and

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[119] Id.

[120] Id.

[121] United States v. Boylan, 898 F.2d 230 (1st Cir. 1990).

[122] See United States v. Horak, 833 F.2d 1235, 1240 (7th Cir. 1987) (recognizing that Sedima requires continuity and relationship among predicates and reasoning that one massive ongoing scheme could satisfy Sedima); United States v. Kragness, 830 F.2d 842, 848 (8th Cir. 1987) (three different drugs imported from different suppliers with different customers and involving different actors sufficient to satisfy pattern element); United States v. Ianniello, 808 F.2d 184, 192 (2d Cir. 1986) (two acts which further enterprise satisfy pattern element), cert. denied, 483 U.S. 1006 (1987); United States v. Klein, Cr. No. S 87-0114 (D. Md. September 17, 1987) (unpublished) (pattern met Sedima continuity plus relationship test with ten counts of misrepresentation to savings and loan depositors); United States v. DiGilio, 667 F. Supp. 191, 196-97 (D.N.J. 1987) (pattern requires a relationship among predicate acts, must be continuous, and cannot constitute an isolated offense); United States v. Persico, 646 F. Supp. 752, 761 (S.D.N.Y. 1986), aff'd in part and rev'd in part, 832 F.2d 705 (2d Cir. 1987)

Commissioners. In light of the division among the circuits,[115] the Supreme Court granted certiorari to determine whether proof of multiple separate schemes is necessary to establish a RICO pattern of racketeering activity.

The Supreme Court unanimously reversed the Eighth Circuit's holding that required multiple schemes. Although the Court did not precisely define "pattern of racketeering activity," it stated that "[w]hat a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat."[116] The Court explained that the required "continuity" is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."[117] Closed-ended continuity, the Court said, can be shown by "proving a series of related predicates extending over a substantial period of time."[118] The Court stressed that it was not attempting to lay down rules to cover every case in advance, but it did offer some examples for general guidance.

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[115] No other circuits have adopted the multiple-scheme requirement, and a number of courts have expressly or implicitly rejected it as a rigid rule. See Roeder v. Alpha Industries, Inc., 814 F.2d 22, 31 (1st Cir. 1987); Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-93 (9th Cir. 1987); Barticheck v. Fidelity Union Bank, 832 F.2d 36, 39 (3d Cir. 1987); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987); United States v. Ianniello, 808 F.2d 184, 192 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987); Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986).

[116] 109 S. Ct. at 2901.

[117] Id. at 2902.

[118] Id.

one unfavorable single-episode decision issued after H.J. Inc., in which the Second Circuit reversed the RICO conviction of a defendant whose pattern of racketeering activity, as established at trial, consisted only of accepting a bribe and, later, obstructing justice by falsely denying his acceptance of the bribe. The court held that these two acts were not sufficient to constitute a pattern of racketeering activity; the court distinguished a situation in which a defendant accepts a bribe and then persuades another person to lie about it.[124] This decision should be limited to its somewhat unusual facts, but it does indicate the need for continued vigilance in the area of potential single-episode issues. In any event, it is expected that the Criminal Division's internal policy regarding single episodes will remain in effect as discussed below for the immediately foreseeable future.

The single-episode rule is a gray area with no clear-cut guidelines, and all cases will be evaluated on an individual basis.

v. O'Malley, 882 F.2d 1196 (7th Cir. 1989) (alleged extortion and mail fraud over 5-month period did not pose sufficient threat of continuing criminal activity); Management Computer Services v. Ash, Baptie & Co., 883 F.2d 48 (7th Cir. 1989) (court rejected contention that each instance of alleged unauthorized copying of computer software was a separate predicate act; this was more like installments of one crime, and not a pattern of racketeering activity); United States v. Gelb, 881 F.2d 1155 (2d Cir. 1989) (in prosecution involving cheating the Postal Service out of proper postage, held, the pattern of racketeering activity showed adequate continuity in that the schemes continued for five years, and "but for their discovery surely would have continued"), cert. denied, 110 S. Ct. 544 (1990).

[124] United States v. Biaggi, 909 F.2d 662 (2d Cir. June 29, 1990), slip op. at 5236-39. Unaccountably, the court did not cite H.J. Inc. in its discussion of this issue.

Racketeering Section, in reviewing proposed criminal RICO prosecutions, has consistently taken a strict approach to the single-episode issue -- in our view, stricter than the requirements set forth in H.J. Inc. Our single-episode policy is continuously being re-evaluated in light of H.J. Inc. and subsequent decisions by the circuits.[123] Prosecutors should pay particular attention to

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(two-and-a-half year series of bribes to an agent set forth pattern), cert. denied, 486 U.S. 1022 (1988); United States v. Freshie Co., 639 F. Supp. 442, 444-45 (E.D. Pa. 1986) (continuity requirement under pattern element means that "there must be racketeering acts over a substantial period of time, which when combined with the relatedness requirement, form a group distinguishable in composition"); United States v. Yin Poy Louie, 625 F. Supp. 1327, 1333-34 (S.D.N.Y. 1985) (facts must satisfy the most stringent requirement of "continuity and relationship"), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986).

[123] See, e.g., United States v. Boylan, 898 F.2d 230 (1st Cir. 1990) (pattern occurring over periods of from one year to six years for various defendants was sufficient); Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) (pattern of fraud against up to 100 salesmen over more than 10 years was sufficient); Marshall-Silver Construction Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990) (on remand after H.J. Inc., court found pattern lasting from June to December insufficient, refusing to focus solely on duration of acts; here, acts lasted relatively short time and did not threaten future criminal conduct); Parcoil Corp. v. NOWSCO Well Service Ltd., 887 F.2d 502 (4th Cir. 1989) (in post-H.J. Inc. case, Fourth Circuit adopted a case-by-case approach to continuity, focusing on elements such as number and variety of predicate acts, length of time over which acts were committed, number of putative victims, presence of separate schemes, and potential for multiple injuries; in this case, sending of 17 false reports over 4 months was not sufficient); United States v. Kaplan, 886 F.2d 536 (2d Cir. 1989) (court affirmed RICO conviction of man who simultaneously bribed two city officials with regard to one contract, finding that these were two distinctly earmarked payments, and that continuity was shown by external factors such as the defendant's willingness to facilitate corruption in the city agency), cert. denied, 110 S. Ct. 1127 (1990); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132 (D.C. Cir. 1989) (on remand after H.J. Inc., held, although close question, pattern of acts over four days could establish a "distinct threat of long-term racketeering activity, either implicit or explicit"); Sutherland

reality coalesce is the issue presented by predicate offenses that are too different to be considered part of the same pattern. This issue was not very troublesome for the government in the past, because most courts did not require that the predicate acts have a close relationship among themselves.[125] As long as the technical requirements of the definition of "pattern" were met, the major "relatedness" test to be met was that the acts be in some way related to the affairs of the enterprise, as required for each substantive RICO offense.[126] The courts rejected arguments that the

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[125] See, e.g., United States v. Gottesman, 724 F.2d 1517 (11th Cir. 1984) (two "isolated" sales of pirated movies sufficient to constitute pattern); United States v. Bright, 630 F.2d 804, 830 n.47 (5th Cir. 1980) (predicate crimes in pattern need only be related to affairs of enterprise, not to each other); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978) (same); United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir.) (enterprise itself supplies unifying links among predicate acts), cert. denied, 449 U.S. 871 (1980); United States v. Benny, 559 F. Supp. 264, 267 (N.D. Cal. 1983) (pattern may be established by proof of two unrelated predicate acts); United States v. Santoro, 647 F. Supp. 153, 175 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989) (predicate acts need not be related to each other; relationship with enterprise sufficient). For a review of early case law on this issue, see United States v. Gibson, 486 F. Supp. 1230, 1241-43 (S.D. Ohio 1980), aff'd on other grounds, 675 F.2d 825 (6th Cir.), cert. denied, 459 U.S. 972 (1982).

[126] See United States v. Robilotto, 828 F.2d 940, 947-48 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); United States v. Killip, 819 F.2d 1542, 1549 (10th Cir.), cert. denied, 484 U.S. 865 (1987); United States v. Delker, 782 F.2d 1033 (3d Cir. 1985) (unpublished), cert. denied, 106 S. Ct. 2248 (1986); United States v. DePeri, 778 F.2d 963, 974-75 (3d Cir. 1985), cert. denied, 106 S. Ct. 1518 (1986); United States v. Conn, 769 F.2d 420, 424-25 (7th Cir. 1985); United States v. Blackwood, 768 F.2d 131, 137-38 (7th Cir.), cert. denied, 474 U.S. 1020 (1985); United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1985), cert. denied, 106 S. Ct. 1499 (1986); United States v. Weinberg, 656 F. Supp. 1020, 1024-25 (E.D.N.Y. 1987); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Branham, No. 86-63 JRR (D. Del. June 5, 1987); United

However, some examples can afford general guidance. Generally, a proposed RICO count will not be approved that contains more than one predicate act arising from a single criminal episode. For example, approval will not be granted where the pattern as to any one defendant includes both importation and possession with intent to distribute with respect to the same load of narcotics. In a mail fraud case, the pattern generally will not be approved if multiple mailings in furtherance of a single scheme to defraud are charged as separate racketeering acts, unless the scheme resulted in multiple harms, such as the defrauding of multiple victims. In a bribery case, the pattern generally will not be approved if all payments are installments of an agreed-upon overall bribe; however, the pattern may be approved if the payments represent individual, separate transactions, as in a case where a public official requests more money to carry out further actions. Of course, approval may be granted in any event if the single-episode problem is remedied. One solution is to drop the overlapping predicates; another solution is to charge the overlapping predicates as sub-parts of a single predicate act.

With regard to charging overlapping predicates as sub-parts of a single racketeering act, the indictment should be worded to clearly show that one or more of the sub-parts amount to only one racketeering act. With regard to special verdict forms, discussed <u>infra</u> at Section VI(G), the special verdicts should set forth the jury's unanimous decision with respect to each sub-predicate.

Somewhat related to the problem of predicate offenses that in

relationship requirement, noting that the definition of "pattern" in 18 U.S.C. § 3575(e) might be a helpful model.[130] As with the single-episode rule, some courts took the Sedima footnote as an indication of how the law should develop, and noted that the racketeering acts must be interrelated in some way.[131] However, most courts that did so did not find the pattern to be lacking the requisite relationship.[132] Then, in its decision in H.J. Inc., the

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[130] 18 U.S.C. § 3575(e), regarding dangerous special offenders provides, in part:

> [C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

[131] See, e.g., Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187, 192-93 (9th Cir. 1987); United States v. Teitler, 802 F.2d 606, 612 (2d Cir. 1986); United States v. Grayson, 795 F.2d 278, 290 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Ellison, 793 F.2d 942, 950 (8th Cir. 1986); United States v. Fernandez, 797 F.2d 943, 951 n.5 (11th Cir. 1986), cert. denied, 483 U.S. 1006 (1987); United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir.), cert. denied, 106 S. Ct. 1499 (1986); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1982); Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118, 122 n.1 (D. Md. 1986); United States v. Yin Poy Louie, 625 F. Supp. 1327, 1333-34 (S.D.N.Y. 1985), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986); First Federal Savings & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427, 446 (S.D.N.Y. 1986); Zerman v. E.F. Hutton & Co., 628 F. Supp. 1509, 1512 (S.D.N.Y. 1986); United Fish Co. v. Barnes, 627 F. Supp. 732, 734-35 (D.N.J. 1986).

[132] See, e.g., United States v. Fernandez, 797 F.2d 943 (11th Cir. 1986), cert. denied, 483 U.S. 1006 (1987); Temporaries, Inc. v. Maryland Nat'l Bank, 638 F. Supp. 118 (D. Md. 1986); First Federal Savings & Loan v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427 (S.D.N.Y. 1986); United Fish Co. v. Barnes, 627 F. Supp. 732 (D. Maine 1986). But see Zerman v. E.F. Hutton & Co., 628 F. Supp. 1509 (S.D.N.Y. 1986) (denying motion to add RICO claim to suit, partly on basis of lack of relationship among predicate acts, but

lack of a specific requirement of relatedness of the acts rendered the definition of "pattern" unconstitutionally vague.[127] Some courts required that the acts constituting the "pattern" bear some relation to each other.[128]

More recently, the Supreme Court has attempted to add more substance to the relatedness requirement. In a footnote in Sedima, S.P.R.L. v. Imrex Co.,[129] the Court discussed the possibility of a

States v. Santoro, 647 F. Supp. 153, 175-76 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); Abelson v. Strong, 644 F. Supp. 524, 534 (D. Mass. 1986); Anton Motors Inc. v. Powers, 644 F. Supp. 299, 301-02 (D. Md. 1986); Acampora v. Boise Cascade Corp., 635 F. Supp. 66, 69-70 (D.N.J. 1986); Tryco Trucking Co. v. Belk Store Services, 634 F. Supp. 1327, 1333 (W.D.N.C. 1986); United States v. Dellacroce, 625 F. Supp. 1387, 1390 (E.D.N.Y. 1986); United States v. Castellano, 610 F. Supp. 1359, 1392 (S.D.N.Y. 1985).

In United States v. Erwin, 793 F.2d 656, 671-72 (5th Cir. 1986), cert. denied, 107 S. Ct. 589 (1987), the court, in reversing the RICO conspiracy conviction of one defendant for failure to prove certain predicates, held that the nexus of the predicate acts to the enterprise was insufficient in that his acts related to a separate organization from the enterprise.

[127] See United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1985), cert. denied, 106 S. Ct. 1499 (1986); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

[128] E.g., United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2d Cir. 1975) (requirement of "common scheme, plan, or motive" conceded by government), cert. denied, 429 U.S. 819 (1976). Other courts have indicated in dictum that there may be some interrelatedness requirement. See United States v. Brooklier, 685 F.2d 1208, 1222 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); United States v. Starnes, 644 F.2d 673, 677-78 (7th Cir.), cert. denied, 454 U.S. 826 (1981); United States v. Weatherspoon, 581 F.2d 595, 601 n.2 (7th Cir. 1978); United States v. Kaye, 556 F.2d 855, 860-61 (7th Cir.), cert. denied, 434 U.S. 921 (1977); see also Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO, 65 Iowa L. Rev. 837, 862-65 (1980).

[129] 473 U.S. 479, 496 n.14 (1985).

some predicate acts occurred before the effective date.[137] As a practical matter, these requirements do not present many problems for prosecutions in the 1990s.[138] However, a related problem exists with respect to the predicate acts added to RICO by amendments over the past several years.[139] For example, the 1984 legislation added to the definition of "racketeering activity" two new categories of offenses: dealing in obscene matter under state or federal[140] law, and federal currency violations under the Currency and Foreign Transactions Reporting Act, now codified in pertinent part at 31 U.S.C. §§ 5311-5324. The 1986 legislation added witness, victim and informant tampering, 18 U.S.C. §§ 1512 and 1513, and money laundering, §§ 1956 and 1957, as RICO predicates. The effective date of the 1984 additions was October 12, 1984 and the 1986 amendments were effective October 27, 1986 (money laundering) and November 10, 1986 (victim, witness and

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[137] See United States v. Brown, 555 F.2d 407, 416-17 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1977); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir.), cert. denied, 439 U.S. 801 (1978); United States v. Campanale, 518 F.2d 352, 364-65 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

[138] One area of concern deserves notice. In a case that alleges predicate acts occurring before the October 15, 1970 effective date of RICO, the jury must be instructed that it must find that the defendant committed at least one predicate act after the effective date. At least one conviction has been reversed because of failure to observe this requirement. United States v. Brown, 555 F.2d 407, 418-21 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978).

[139] See supra notes 4, 5, 6.

[140] 18 U.S.C. §§ 1461-1465.

Court confronted the issue directly, and held that the definition of "pattern" from the Dangerous Special Offender provision[133] sets forth a sufficient definition of relatedness between RICO predicate acts. The few cases to discuss the relatedness requirement after H.J. Inc. have not found problems under this broad definition.[134]

The definition of "pattern" also sets forth technical requirements regarding the time when the predicate acts were committed. Thus, in order to avoid violating the ex post facto clause,[135] the statute requires that one act have been committed after October 15, 1970, the effective date of RICO. Also, the last act must have been committed within ten years of a prior act, excluding any period of imprisonment. This ten-year requirement has occasionally led to confusion, in that it has been interpreted to set forth a ten-year limitations period. In fact, however, this requirement means only that no two acts in the pattern can have occurred more than ten years apart.[136] Courts have held that the requirement that one predicate act be committed after the effective date of RICO eliminates any ex post facto problems, even though

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also on basis of history of frivolous suits by plaintiff).

[133] See supra note 130.

[134] See, e.g., United States v. Gelb, 881 F.2d 1155 (2d Cir. 1989), cert. denied, 110 S. Ct. 544 (1990); Landoil Resources Corp. v. Alexander and Alexander Services, Inc., No. 84 Civ. 6509 (S.D.N.Y. Aug. 11, 1989).

[135] U.S. Const. art. I, § 9, cl. 3.

[136] See United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 86 n.63.

a pattern of racketeering activity.[142] The definition includes debts that are incurred in connection with an illegal gambling business or an illegal money-lending business. If the unlawfulness is based on usury laws, the usurious rate charged must be at least twice the enforceable rate. This definition has not been the subject of much RICO litigation, partly because collection of unlawful debt is not very often charged in RICO counts. One court clarified the role of state law in determining the applicability of the definition. Although, for a gambling debt, the definition requires that the debt be contracted "in connection with the business of gambling" in violation of state law, the court held that it is not necessary that the state specifically outlaw the business of gambling; it is sufficient that gambling is illegal under state law.[143] Another court has held that, where the debt is unlawful because of usury laws, the defendant need not have knowledge of the specific interest rate charged, as long as he knew

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[142] For a case involving numerous instances of unlawful debt collection, see United States v. Pepe, 747 F.2d 632 (11th Cir. 1984). Note that it is possible to have two Section 1962(c) counts, one based on an unlawful pattern and one based on unlawful debt collection. United States v. Vastola, 670 F. Supp. 1244 (D.N.J. 1987). See also United States v. Spillone, 879 F.2d 514 (9th Cir. 1989) (holding that it was not plain error to define "collection" of unlawful debt through the definition of that term in the extortionate credit transactions statute, 18 U.S.C. § 891).

[143] United States v. Salinas, 564 F.2d 688 (5th Cir. 1977), cert. denied, 435 U.S. 951 (1978). For a general discussion of the unlawful debt definition, particularly its "in the business of" aspect, see Durante Brothers & Sons, Inc. v. Flushing National Bank, 755 F.2d 239 (2d Cir.), cert. denied, 473 U.S. 906 (1985). See also United States v. Angiulo, 847 F.2d 956 (1st Cir.), cert. denied, 109 S. Ct. 138 (1988) (holding that gambling debts in illegal poker games clearly were contemplated under the definition of "unlawful debt" in 18 U.S.C. § 1961(6)).

informant intimidation).[141] The question arises whether a RICO indictment returned after those dates can include the racketeering acts added by the respective statutes that occurred on or before their effective date. By analogy to the ex post facto cases concerning predicate acts occurring before the effective date of RICO, it is the policy of the Criminal Division that at least one act under a newly-added predicate statute must occur after the effective date of the amendment in order to permit any other acts under that statute to be charged. Thus, for example, in a RICO indictment returned in 1986, it would be permissible to include as predicate acts Title 31 violations occurring in September 1984 only if at least one other such violation is charged that occurred on or after October 12, 1984. Of course, for statutes such as 18 U.S.C. § 1956 and 1957 (involving money-laundering), which were first enacted at the same time they became RICO predicates, it is not possible to charge violations occurring before the time they became RICO predicates.

F. Unlawful Debt

This definition is of significance with respect to the alternative manner of violating the substantive RICO provisions, namely, through collection of an unlawful debt, rather than through

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[141] In separate legislation enacted on October 25, 1984, predicate offenses involving stolen motor vehicles were added to the RICO statute as acts of racketeering under 18 U.S.C. § 1961(1)(B). These offenses are codified at 18 U.S.C. §§ 2312, 2313 and 2320. The same ex post facto principles apply to use of these predicates as to use of those added on October 12, 1984.

RICO conspiracy in the Third Circuit.[148]

G. Racketeering Investigator

This definition has been of little significance in RICO litigation to date. It applies in connection with the requirements of preserving records that have been received in response to a civil investigative demand under Section 1968.

H. Racketeering Investigation

Like the preceding definition, this definition applies only in the case of the issuance of a civil investigative demand. To date, such demands have been rarely used in RICO investigations.

I. Documentary Materials

This definition, also, is of significance only in connection with the issuance of civil investigative demands under Section 1968. It is worthy of note that such demands can require production only of documentary materials, and not of testimony, in contrast to the broader civil investigative demand available to the government under the antitrust laws.[149]

J. Attorney General

This definition is of importance in connection with civil RICO suits and the issuance of civil investigative demands. The definition is rather broad, and arguably includes any federal prosecutor.[150] Under Section 1964(b), the Attorney General may

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[148] 899 F.2d at 228-29.

[149] See 15 U.S.C. §§ 1311-1314.

[150] Cf. United States v. Wencke, 604 F.2d 607, 612 (9th Cir. 1979) (referral of criminal case by Securities and Exchange Commission to the "Attorney General" did not require referral to the Attorney

the loan was unlawful and the rate was, in fact, usurious by virtue of being at least twice the legal rate.[144] One court dismissed a private civil claim involving a savings and loan transaction, holding that the "collection of unlawful debt" provision is directed at loansharking, and that the statutory elements were not met.[145]

For an instructive example of a major racketeering prosecution involving unlawful debt collections, see United States v. Vastola, 899 F.2d 211, 226-29 (3d Cir. 1990). In that case, the court noted that a RICO charge based on unlawful debt collections does not require proof of extortionate activity,[146] and that the government need only prove one collection, rather than the multiple acts required under the "pattern of racketeering activity" prong of RICO.[147] The court also went into considerable detail in discussing the evidence, and concluded that the evidence was insufficient to show that Vastola actually participated in, or supervised, an actual debt collection, but held that Vastola was properly convicted of RICO conspiracy on the theory that he was aware of one debt collection, and encouraged other conspirators to collect it; thus, he agreed to the commission of one debt collection on behalf of the enterprise, which is sufficient to establish liability for

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[144] United States v. Biasucci, 786 F.2d 584 (2d Cir. 1986).

[145] Sundance Land Corp. v. Community First Federal Savings & Loan, 840 F.2d 653 (9th Cir. 1988).

[146] 899 F.2d at 226 n.18.

[147] 899 F.2d at 228 n.21. See also United States v. Pepe, 747 F.2d 632, 674 (11th Cir. 1984).

trafficking acts to invest in or operate a business.[151]

Several issues are of importance in applying this section. First, it is not entirely clear from the face of the statute whether, in order to violate Section 1962(a), a person must have "participated as a principal" in the underlying pattern of racketeering activity. That phrase could be read to apply only to a collection of unlawful debt, and not to a pattern of racketeering activity. This question most often arises in a situation where an attorney or financial adviser assists a narcotics dealer in investing racketeering proceeds in an enterprise. Depending on how the language of Section 1962(a) is interpreted, the adviser may or may not be liable as a RICO violator.[152] However, as a matter of policy, a RICO prosecution under this provision will not be approved unless the RICO defendant is actually charged with the underlying pattern of racketeering activity. This policy extends

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[151] See, e.g., United States v. Cauble, 706 F.2d 1322, 1342-43 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). As noted in connection with the discussion of the "enterprise" element, some courts have held that, unlike the situation under Section 1962(c), the defendant and the enterprise can be the same entity for purposes of a Section 1962(a) violation. See supra note 102 and accompanying text.

[152] See United States v. Loften, 518 F. Supp. 839, 851 (S.D.N.Y. 1981), aff'd, 819 F.2d 1129 (2d Cir. 1987); cf. Temple University v. Salla Bros., Inc., 656 F. Supp. 97, 103 (E.D. Pa. 1986) (possible for corporation to receive income derived from pattern of racketeering in which it had participated as a principal and use the proceeds in its own operation, which would violate § 1962); Abelson v. Strong, 644 F. Supp. 524, 534 (D. Mass. 1986) (corporation could be held liable under § 1962(a) for using the proceeds of racketeering activity in its operations); Note, Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Non-racketeer Under RICO Section 1962(a), 82 Colum. L. Rev. 574, 582-83 (1982).

institute civil RICO proceedings. Under Section 1966, the Attorney General may certify that a civil RICO action merits expedited consideration by the court. Under Section 1968, the Attorney General may issue civil investigative demands and has certain duties with regard to maintaining records received pursuant to such demands.

III. RICO Offenses -- Section 1962

There are four ways to violate the RICO statute, which are set forth in the four subsections of Section 1962. All four subsections incorporate the basic elements of "enterprise" and "pattern of racketeering activity," discussed in the definitions section above. However, the various offenses are quite different in the ways they combine those elements.

A. Section 1962(a). Section 1962(a) provides, in part:

> (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 1, United States Code, to use or invest, directly or indirectly, any part 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.

This provision essentially makes it illegal to invest the proceeds of a pattern of racketeering activity in an enterprise that affects interstate commerce. A classic example would be a situation in which a narcotics dealer uses the proceeds of his narcotics

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General personally).

Finally, the term "income" has been construed to have its "common usage and meaning."[156] It also has been held that a Section 1962(a) count is viable even though some of the "dirty" money coming from racketeering activity came from the FBI in an undercover operation.[157]

B. Section 1962(b). Section 1962(b) provides:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

This provision has been the least used of the four RICO subsections. Section 1962(b) essentially makes it unlawful to take over an enterprise (that affects interstate commerce) through a pattern of racketeering activity or collection of an unlawful debt. The cases under this subsection have involved situations where

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racketeering activity into an enterprise affecting interstate commerce is sufficient to establish a violation of Section 1962(a)." In that case, it was sufficient to prove that the defendant's receipt of an amount of racketeering income permitted him to invest an equivalent amount of money in the enterprise. The requisite nexus can be shown, under Cauble and McNary, by circumstantial evidence of a nexus between sums of money and the enterprise. Cf. United States v. Parness, 503 F.2d 430, 436 (2d Cir. 1974) (no need for precise tracing under 18 U.S.C. § 1962(b); circumstantial evidence can suffice), cert. denied, 419 U.S. 1105 (1975); Bachmeir v. Bank of Ravenswood, 663 F. Supp. 1207, 1220 (N.D. Ill. 1987) (fraudulently transferred funds could constitute illegal proceeds under § 1962(a) to support charge against bank); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 806-07 (E.D. La. 1986) (plaintiff did not have to trace proceeds to establish a § 1962(d) violation).

[156] United States v. Cauble, 706 F.2d 1322, 1344 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

[157] United States v. Gonzales, 620 F. Supp. 1143 (N.D. Ill. 1985).

to Section 1962(d) conspiracies to violate Section 1962(a), even though there is support for the proposition that a person can conspire to commit a crime that he is legally incapable of committing himself.[153] This rule does not mean that financial advisers can never be prosecuted for this offense; under existing precedents, it may be argued that money launderers can be charged with substantive narcotics violations on the theory that money laundering is essential to the narcotics-trafficking business.[154]

Another issue that arises in connection with Section 1962(a) prosecutions is that of tracing. Although defendants may argue that the government must trace into the enterprise any monies charged as being invested in violation of Section 1962(a), there is precedent for the government to argue that rigorous tracing is not required.[155]

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[153] See United States v. Loften, 518 F. Supp. 839, 851-52 (S.D.N.Y. 1981), aff'd, 819 F.2d 1129 (2d Cir. 1987); Note, Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Non-racketeer Under RICO Section 1962(a), 82 Colum. L. Rev. 574, 587 (1982).

[154] See United States v. Dela Espriella, 781 F.2d 1432, 1436 (9th Cir. 1986); United States v. Orozco-Prada, 732 F.2d 1076, 1080 (2d Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Barnes, 604 F.2d 121, 154-55 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); see also United States v. Zambrano, 776 F.2d 1091, 1094-96 (2d Cir. 1985) (aiding and abetting counterfeit credit card conspiracy by supplying items not in themselves illegal).

[155] See United States v. Vogt, No. 88-5007 (4th Cir. July 26, 1990), slip op. at 19-21. And, in United States v. Cauble, 706 F.2d 1322, 1342 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), the court noted, "[T]he prosecution need prove only that illegally derived funds flowed into the enterprise; it need not follow a trail of specific dollars from a particular criminal act." See United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1980), where the court upheld a conviction under Section 1962(a), holding that "evidence of indirect investment of the proceeds of

C. Section 1962(c). Section 1962(c) provides:

> (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.

This provision is by far the most often used, and consequently the most important, of the substantive RICO offenses. Several issues arising under this subsection have been litigated extensively. While some of these issues have been resolved authoritatively, others remain unresolved, or are the subjects of conflicts among the circuit courts. Several of the elements of the offense are discussed in connection with the materials on definitions, above, namely, "person," "enterprise," "racketeering activity," and "pattern of racketeering activity." This discussion addresses several other important issues.

1. Employed By or Associated With

A person cannot be convicted of violating Section 1962(c) unless he is "employed by or associated with" the enterprise. In the case of a legitimate enterprise, a defendant's employment by the enterprise can be established by evidence that he was on the payroll, had an ownership interest, or held some position in the enterprise.[161] It also is not very difficult to establish that a

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[161] See, e.g., United States v. Horak, 833 F.2d 1235, 1239 (7th Cir. 1987) (defendant, employed by a subsidiary of the enterprise corporation, was employed by and associated with the enterprise); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (owner of all stock of corporation that operated the enterprise-restaurant was "employed by or associated with" the restaurant), cert. denied, 441 U.S. 933 (1979); United States v. Forsythe, 560

defendants have fraudulently or forcibly acquired interests in ongoing businesses.[158] Although the language of the statute lends itself to broad applications, policy considerations discourage creative uses of this subsection. Thus, for example, a Section 1962(b) prosecution might not be approved where the leader of an outlaw motorcycle gang "maintained control" of the enterprise through a pattern of murders and extortions that intimidated the members. Such activity is more easily addressed as a Section 1962(c) violation. In general, Section 1962(b) should be reserved for the classic cases of infiltration of legitimate businesses by organized criminal groups.

In construing the statute, courts have held that strict tracing of funds used in connection with the takeover of an enterprise is not necessary,[159] and that the term "interest" is broad enough to encompass all property rights in an enterprise, including a lease.[160]

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[158] See, e.g., United States v. Biasucci, 786 F.2d 504 (2d Cir.) (acquisition of interests in and control over four businesses through loansharking activities involving collection of unlawful debts), cert. denied, 479 U.S. 827 (1986); United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982) (acquisition of bakery's lease as security for usurious loan); United States v. Parness, 503 F.2d 430 (2d Cir. 1974) (acquisition of interest in corporation by illegally preventing owner from paying off loan to avoid foreclosure), cert. denied, 419 U.S. 1105 (1975). See also Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989) (affirming dismissal of suit alleging improper firing, holding that plaintiff did not allege nexus between racketeering activity and control of enterprise under Section 1962(b)).

[159] United States v. Parness, 503 F.2d 430, 436 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

[160] United States v. Jacobson, 691 F.2d 110, 112-13 (2d Cir. 1982).

defendants, each defendant is necessarily "associated with" the enterprise. Ordinarily, the indictment will allege that the enterprise consists of all the RICO defendants and, in some cases, other persons known and unknown to the grand jury. In a case where a given defendant is not alleged to be a member of the enterprise, his association with the enterprise is not very difficult to establish. Given that the defendant must commit two or more acts of racketeering activity in order to be charged with a substantive violation of RICO, proof of these acts often will establish his association with the enterprise. However, it is preferable to introduce additional proof of the defendant's association in order to avoid a defense argument that this element has not been established separately from the pattern of racketeering activity.[165]

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[165] See United States v. Bledsoe, 674 F.2d 647, 659-66 (8th Cir. 1982) (RICO convictions reversed because of failure to prove the existence of a definite association-in-fact enterprise with a structure separate from the racketeering activity), cert. denied, 459 U.S. 1040 (1983); United States v. Anderson, 626 F.2d 1358, 1362-72 (8th Cir. 1980) (similar to Bledsoe), cert. denied, 450 U.S. 912 (1981). The vast majority of case law on this point has been favorable to the government, and the Supreme Court has provided some helpful insight. See United States v. Turkette, 452 U.S. 576, 583 (1981) (existence of enterprise is proved by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit"); see also United States v. Kragness, 830 F.2d 842, 855-58 (8th Cir. 1987); United States v. Ellison, 793 F.2d 942, 949-50 (8th Cir.), cert. denied, 479 U.S. 937 (1986); United States v. Riccobene, 709 F.2d 214, 221-24 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Cauble, 706 F.2d 1322, 1340 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Sutton, 700 F.2d 1078, 1081-82 (6th Cir. 1983); United States v. Mazzei, 700 F.2d 85, 88-90 (3d Cir.), cert. denied, 461 U.S. 945 (1983); United States v. Cagnina, 697 F.2d 915, 920-22 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Dickens, 695 F.2d 765, 773 (3d Cir.), cert. denied, 460 U.S. 1092 (1983); United States v. Lemm, 680 F.2d 1193, 1197-1201 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); United States v. DeRosa, 670 F.2d

defendant is "associated with" a legitimate business. For example, a bail bondsman who pays bribes to a county sheriff to induce the sheriff to accept bail bonds only from him is "associated with" the sheriff's office for purposes of Section 1962(c).[162] Similarly, a lawyer who pays bribes to an assistant state's attorney is "associated with" the state's attorney's office for purposes of RICO,[163] and a middleman for bribery of judges by lawyers was sufficiently "associated with" the court.[164]

In the case of an illegitimate enterprise, such as a narcotics ring or an insurance-fraud operation, the issue of a defendant's association with the enterprise merges into the issue of the enterprise's identity. Thus, if the evidence adequately establishes the existence of an enterprise consisting of all the

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F.2d 1127, 1136 (3d Cir. 1977) (magistrates who took bribes from bail bonding agency arguably were "employees" of the agency for purposes of RICO); State of New York v. O'Hara, 652 F. Supp. 1049, 1053 (W.D.N.Y. 1987) (corporate defendants associated with enterprise, the City of Niagara Falls, because they bid for city contracts).

[162] United States v. Bright, 630 F.2d 804, 830 (5th Cir. 1980); see also United States v. Kaye, 586 F. Supp. 1395, 1400 (N.D. Ill. 1984) ("concept of 'associated with any enterprise' is very broad").

[163] United States v. Yonan, 800 F.2d 164, 167 (7th Cir. 1985) (defendant attorney could be "associated with" state's attorney's office through bribing undercover operative), cert. denied, 479 U.S. 1055 (1987).

[164] United States v. Roth, 860 F.2d 1382 (7th Cir. 1988), cert. denied, 109 S. Ct. 2099 (1989). See also United States v. Zauber, 857 F.2d 137 (3d Cir. 1988) (pension fund officials who took kickbacks from mortgage company in exchange for providing it with capital were sufficiently "associated with" the mortgage company, even though they didn't know how the money was being used to make loans), cert. denied, 109 S. Ct. 1340 (1989).

a slight effect on interstate commerce is all that is required.[167] It also should be noted that it is the enterprise, itself, that must affect commerce, and not the acts of racketeering activity.[168] However, in the case of an illegitimate enterprise, the enterprise's effect on interstate commerce may, and likely will, be established by evidence that the acts of racketeering activity

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[167] See, e.g., United States v. Norton, 867 F.2d 1354 (11th Cir.) (effect on commerce sufficient where labor organizations represented many employees in building industry, and union officials traveled interstate in furtherance of the conspiracy), cert. denied, 109 S. Ct. 3192 (1989); United States v. Doherty, 867 F.2d 47 (1st Cir. 1989) (in case involving thefts of police exams, effect on interstate commerce shown by evidence that out-of-state consultant developed and graded some of the exams); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988) (use of interstate telephone system and use of supplies purchased from companies in other states), cert. denied, 109 S. Ct. 1319 (1989); United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988), cert. denied, 109 S. Ct. 1966 (1989) (heroin came from another country); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); United States v. Robinson, 763 F.2d 778, 791 (6th Cir. 1985); United States v. McManigal, 708 F.2d 276, 283 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983); United States v. Dickens, 695 F.2d 765, 781 (3d Cir.), cert. denied, 460 U.S. 1092 (1983); United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Allen, 656 F.2d 964 (4th cir. 1981); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Barton, 647 F.2d 224, 233-34 (2d Cir.), cert. denied, 454 U.S. 857 (1981); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

[168] See, e.g., United States v. Qaoud, 777 F.2d 1105, 1116 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Murphy, 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); United States v. Robinson, 763 F.2d 778, 781 (6th Cir. 1985); United States v. Conn, 769 F.2d 420, 423-24 (7th Cir. 1985); United States v. Dickens, 695 F.2d 765, 781 (3d Cir.), cert. denied, 460 U.S. 1092 (1983); United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981); United States v. Groff, 643 F.2d 396, 400 (6th Cir.), cert. denied, 454 U.S. 828 (1981); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Kaye, 586 F. Supp. 1395, 1399 (N.D. Ill. 1984).

The case law is fairly favorable to the government in this area, in that it holds that RICO reaches peripheral figures as well as the central insiders in the enterprise.[166]

2. Effect on Interstate Commerce

The federal power to prohibit RICO violations stems from the interstate commerce requirement in the statute. Section 1962(c) requires that the enterprise be engaged in, or that its activities affect, interstate or foreign commerce. In practice, this requirement is not difficult to meet. The courts have held that

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889, 895-96 (9th Cir.), cert. denied, 495 U.S. 993 (1982); United States v. Bagnariol, 665 F.2d 877, 890-91 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Griffin, 660 F.2d 996, 999-1001 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); United States v. Errico, 635 F.2d 152, 156 (2d Cir. 1980), cert. denied, 453 U.S. 911 (1981); United States v. Diecidue, 603 F.2d 535, 545-46 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Garver, 809 F.2d 1291, 1301 (7th Cir. 1987); United States v. DiGilio, 667 F. Supp. 191, 195-96 (D.N.J. 1987); United States v. Rogers, 636 F. Supp. 237, 247 (D. Colo. 1986).

[166] E.g., United States v. Garver, 809 F.2d 1291, 1301 (7th Cir. 1987); United States v. DePeri, 778 F.2d 963 (3d Cir. 1985), cert. denied, 475 U.S. 1109 (1986); United States v. Tille, 729 F.2d 615, 620 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Dickens, 695 F.2d 765, 779 (3d Cir. 1982), cert. denied, 460 U.S. 1092 (1983); United States v. Elliott, 571 F.2d 880, 903 (5th Cir.) ("RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise"), cert. denied, 439 U.S. 953 (1978); United States v. Branham, Cr. No. 86-63-JRR (D. Del. June 5, 1987); United States v. Ianniello, 621 F. Supp. 1455, 1477 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986); see also United States v. Thevis, 665 F.2d 616, 625 (5th Cir.) (proof of defendant's association with enterprise "may depend wholly on circumstantial evidence"), cert. denied, 458 U.S. 1109 (1982); Town of Kearny v. Hudson Meadows Urban Renewal, 829 F.2d 1263, 1266 (3d Cir. 1987) (whether outside or inside enterprise, participation in enterprise through pattern of racketeering subjects defendants to RICO liability).

United States v. Zauber, 857 F.2d 137 (3d Cir. 1988) (pension fund officials participated in conduct of mortgage company when they took kickbacks from it in return for providing it with capital for loans, even though they had no part in making the loans themselves), cert. denied, 109 S. Ct. 1340 (1989); United States v. Flynn, 852 F.2d 1045 (8th Cir.) (defendant participated in affairs of association-in-fact enterprise in that he joined it to preserve his power in unions and worked to keep it together), cert. denied, 109 S. Ct. 511 (1988); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, & Helpers Local Union 639, 839 F.2d 782 (D.C. Cir. 1988) (Section 1962(c) imposes no requirement that defendant's participation in the enterprise be at management level or even relate to its "core functions"), vacated and remanded, 109 S. Ct. 3235 (1989), on remand, 883 F.2d 132 (D.C. Cir. 1989); United States v. Horak, 833 F.2d 1235, 1239 (7th Cir. 1987) (defendant who was employed by a subsidiary of enterprise corporation was employed by or associated with the enterprise, and conducted the affairs of the enterprise); Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co., 782 F.2d 966, 970 (11th Cir. 1986) (independent auditors were sufficiently involved in conduct of third party's affairs to meet participation requirement of Section 1962(c)); United States v. Delker, 782 F.2d 1033 (3d Cir. 1985) (unpublished) (union official's acceptance of Taft-Hartley payments from contractors to influence his decisions did constitute conducting union affairs through racketeering activity), cert. denied, 476 U.S. 1141 (1986); United States v. Cauble, 706 F.2d 1322, 1341 (5th Cir. 1983) (defendant's position in enterprise permitted him to make facilities and funds available for drug smugglers), cert. denied, 465 U.S. 1005 (1984); United States v. LeRoy, 687 F.2d 610, 617 (2d Cir. 1982) (defendant's position in union enabled him to receive illegal payments and to commit embezzlements), cert. denied, 459 U.S. 1174 (1983); United States v. Kovic, 684 F.2d 512, 516-17 (7th Cir.) (defendant's position with police department permitted him to accept kickbacks from vendors; it did not matter that the police department was also a victim of the racketeering activity--the enterprise need not be benefited, and "may in fact be harmed"), cert. denied, 461 U.S. 928 (1982); United States v. Webster, 669 F.2d 185 (4th Cir.) (en banc) ("conduct" does not mean that the enterprise must be benefited in any way, although it may imply "repeated, even patterned, carrying on of affairs;" here, use of facilities of club to relay messages and for other narcotics-related activities was sufficient), cert. denied, 456 U.S. 935 (1982); United States v. Scotto, 641 F.2d 47, 53-54 (2d Cir. 1980) (test is satisfied if one is enabled to commit the predicate acts solely by virtue of his connection to the enterprise, or the predicate acts "are related to the activities of [the] enterprise;" no need to prove that the predicate acts "concerned or related to the operation or management of the enterprise" or that they affected the affairs of the enterprise "in its essential functions"), cert. denied, 452 U.S. 961 (1981); United States v.

affected commerce.[169] The indictment need not set forth details of the effect on commerce; it is sufficient to track the statutory language.[170] However, failure to allege an effect on interstate commerce has been held to be a fatal defect.[171]

3. Conduct or Participate in the Conduct of the Enterprise's Affairs

The "conduct or participate" requirement has not been very clearly defined by the courts. It is often considered in conjunction with the related element that the conduct of the enterprise's affairs be "through a pattern of racketeering activity," discussed below. Some courts have considered the "conduct or participate" element separately, holding that the element was met by evidence that the defendant engaged in some conduct that was facilitated by his connection to the enterprise.[172]

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[169] See, e.g., United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988), cert. denied, 109 S. Ct. 1966 (1989) (sufficient that heroin sold by defendant to undercover agent came from Mexico); United States v. Dickens, 695 F.2d 765, 781 (3d Cir. 1982), cert. denied, 460 U.S. 1092 (1983). See also United States v. Ambrose, 740 F.2d 505, 511-12 (7th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); Karel v. Kroner, 635 F. Supp. 725, 728 (N.D. Ill. 1986).

[170] See United States v. Kaye, 586 F. Supp. 1395, 1399 (N.D. Ill. 1984); cf. United States v. Roman, 728 F.2d 846, 850 (7th Cir.), cert. denied, 466 U.S. 977 (1984). The indictment should allege the enterprise's effect on interstate commerce or facts from which interstate commerce could be inferred. See, e.g., Weft, Inc. v. G.C. Investment Associates, 630 F. Supp. 1138, 1142 (E.D.N.C. 1986) (dismissing a claim in RICO complaint for failure to allege enterprise's effect on interstate commerce or facts from which interstate commerce could be inferred), aff'd, 822 F.2d 56 (4th Cir. 1987).

[171] United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988).

[172] See, e.g., United States v. Roth, 860 F.2d 1382 (7th Cir. 1988) (middleman for bribery of judges by lawyers held to participate in conduct of affairs of court), cert. denied, 109 S. Ct. 2099 (1989);

the affairs of the enterprise be conducted "through" a pattern of racketeering activity or collection of unlawful debt. This single word has given rise to considerable litigation, and its meaning has not been firmly resolved. As noted earlier, it is difficult to separate this element from the "conduct or participate in the conduct of the enterprise's affairs" element, and the cases discussing that element should be considered in connection with any analysis of the "through" requirement.[174] However, some cases have analyzed this nexus requirement separately.

The prevailing rule appears to be that explained by the Eleventh Circuit in United States v. Carter, 721 F.2d 1514, 1525-28 (11th Cir.), cert. denied, 469 U.S. 819 (1984). In Carter, the court rejected the defendant's contention that the government must show that the racketeering activity affected the "common everyday affairs of the enterprise." Id. at 1526. The court examined several important precedents in some detail, and concluded that the test is also satisfied by "proof that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity." Id. at 1527. While some courts have adopted similar tests,[175] others have noted that

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[174] See supra notes 172, 173 and accompanying text.

[175] See, e.g., United States v. Salerno, 868 F.2d 524 (2d Cir.) (killing of rival boss by one mob faction was sufficiently related to affairs of the mob's "Commission," which had the function of resolving mob leadership disputes; evidence showed that the Commission had approved the murder), cert. denied, 109 S. Ct. 3192 (1989); United States v. Pieper, 854 F.2d 1020 (7th Cir. 1988) (nexus between welfare fund and kickbacks was sufficient where defendant's position facilitated the scheme and the racketeering

However, in other instances, courts have required a stricter showing that the defendant's activities were related to the management of the affairs of the enterprise.[173]

4. Through a Pattern of Racketeering Activity or Collection of Unlawful Debt

One of the most important elements of Section 1962(c) is that

Biaggi, 675 F. Supp. 790 (S.D.N.Y. 1987) (being a victim of the enterprise is sufficient to amount to conducting or participating in the affairs of the enterprise); State of New York v. O'Hara, 652 F. Supp. 1049, 1054 (W.D.N.Y. 1987) (court rejected corporate defendants' argument that they did not conduct affairs of city government enterprise, reasoning that RICO does not require defendant to operate or manage enterprise's affairs).

[173] See, e.g., Averbach v. Rival Manufacturing Co., 809 F.2d 1016, 1018 (3d Cir.) (litigants do not conduct or participate in the conduct of court's affairs under Section 1962(c) by mailing false interrogatory responses), cert. denied, 482 U.S. 915 (1987); United States v. Truglio, 731 F.2d 1123, 1132 (4th Cir.) (RICO conviction reversed where government proved only that defendant was a courier and "go-fer" for a prostitution ring), cert. denied, 469 U.S. 862 (1984); Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir.) (to conduct affairs of enterprise "ordinarily will require some participation in the operation or management of the enterprise itself"), cert. denied, 464 U.S. 1008 (1983); Park South Associates v. Fishbein, 626 F. Supp. 1108, 1112 (S.D.N.Y. 1986) (defendant law firm did not participate in the conduct of the enterprise consisting of NY courts, city attorney's office, and housing authority absent some complicity of an employee of one of the government agencies), aff'd, 800 F.2d 1128 (2d Cir. 1986); United States v. Kaye, 586 F. Supp. 1395, 1400 (N.D. Ill. 1984) (RICO count dismissed before trial where indictment alleged that defendant deputy sheriff solicited bribes to influence judges of court where he worked as part-time bailiff; held, because indictment did not allege that defendant passed bribes on to judges, indictment failed to allege that defendant took part, directly or indirectly, in the direction or management of the circuit court's affairs through his acts of receiving bribes); United States v. Gibson, 486 F. Supp. 1230, 1243-45 (S.D. Ohio 1980) (judgment of acquittal granted on RICO count involving pattern of labor embezzlements, on ground that such conduct constituted personal affairs of defendants, and was not "on behalf of and relating to the purposes of" the union), aff'd on other grounds, 675 F.2d 825 (6th Cir.), cert. denied, 459 U.S. 972 (1982).

However, the "through" requirement is by no means a mere formality. In some cases, RICO prosecutions have failed because the government did not establish a sufficient nexus between the affairs of the enterprise and the pattern of racketeering activity.[177]

D. Section 1962(d). Section 1962(d) provides:

> (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.

This provision is very often used in conjunction with any of the three substantive RICO offenses. Although Section 1962(d) is short and uncomplicated on its face, its application has generated considerable litigation and confusion, particularly with regard to conspiracies to violate Section 1962(c).

(1982); United States v. Hartley, 678 F.2d 961, 990-91 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Webster, 669 F.2d 185, 187 (4th Cir.) (en banc), cert. denied, 456 U.S. 935 (1982); United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Biaggi, 675 F. Supp. 790 (S.D.N.Y. 1987); United States v. Santoro, 647 F. Supp. 153, 175 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); Acampora v. Boise Cascade Co., 635 F. Supp. 66, 67-70 (D.N.J. 1986).

[177] E.g., United States v. Erwin, 793 F.2d 656, 671 (5th Cir. 1986) (finding, as alternate ground for reversing RICO conspiracy conviction, that defendant's racketeering activity was not connected to the affairs of the narcotics enterprise alleged, thus failing to meet the Cauble test), cert. denied, 479 U.S. 991 (1986); United States v. Nerone, 563 F.2d 836, 851-52 (7th Cir. 1977) (RICO conviction reversed for failure to show sufficient connection between mobile-home park enterprise and gambling operation conducted on its premises), cert. denied, 435 U.S. 951 (1978); United States v. Dennis, 458 F. Supp. 197, 198 (E.D. Mo. 1978) (RICO count dismissed where indictment alleged that defendant conducted affairs of General Motors Corporation through collection of unlawful debts, in that he made usurious loans to fellow employees; held, insufficient nexus between enterprise and predicate acts), aff'd on other grounds, 625 F.2d 782 (8th Cir. 1980).

the racketeering acts need not benefit or help the enterprise.[176]

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acts adversely affected the fund's activities); United States v. Robilotto, 828 F.2d 940, 947-48 (2d Cir. 1987) (pattern of racketeering sufficiently related to union enterprise in that bank extended loans to defendant solely because he claimed, as business agent for the local, to be able to secure large deposits for bank from union's fund), cert. denied, 484 U.S. 1011 (1988); United States v. Killip, 819 F.2d 1542, 1549-50 (10th Cir.) (sufficient nexus where enterprise, a motorcycle gang, facilitated illegal activities constituting predicate acts), cert. denied, 484 U.S. 865 (1987); United States v. Ellison, 793 F.2d 942, 949-50 (8th Cir. 1986) (two arsons connected to enterprise's affairs because defendant's position within the enterprise allowed him to assign members to do acts), cert. denied, 479 U.S. 937 (1986); United States v. Delker, 782 F.2d 1033 (3d Cir. 1985) (unpublished) (union official's acceptance of Taft-Hartley payments from contractors to influence his decisions did constitute conducting union affairs through racketeering activity), cert. denied, 476 U.S. 1141 (1986); United States v. Conn, 769 F.2d 420, 425 (7th Cir. 1985) (defendant used facilities of court, including personnel, telephones, records, and courtrooms, to carry out racketeering activity), cert. denied, 106 S. Ct. 2248 (1986); United States v. Blackwood, 768 F.2d 131, 138 (7th Cir.) (applying Cauble test), cert. denied, 474 U.S. 1020 (1985); United States v. Jannotti, 729 F.2d 213, 226 (3d Cir.) (government must show that defendant is enabled to commit predicate offenses solely by virtue of his position in enterprise or involvement in or control over enterprise, or that the predicate acts are related to activities of enterprise), cert. denied, 469 U.S. 880 (1984); accord United States v. Provenzano, 688 F.2d 194, 200 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. LeRoy, 687 F.2d 610, 616-17 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983); United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); see also United States v. Cauble, 706 F.2d 1322, 1331-33 (5th Cir. 1983) (modifying Provenzano-Scotto test to require that defendant's position in enterprise facilitated his commission of the racketeering acts, and that the predicate acts had some effect on the enterprise), cert. denied, 465 U.S. 1005 (1984); United States v. Webster, 669 F.2d 185 (4th Cir.) (en banc) (modifying earlier opinion and holding that repeated use of club's facilities and personnel to assist narcotics activities constituted sufficient nexus between enterprise and racketeering acts), cert. denied, 456 U.S. 935 (1982); United States v. Thevis, 665 F.2d 616, 625 (5th Cir.) (murder of witness against members of illegal enterprise helped protect the illegal activities, and thus had sufficient nexus to the affairs of the enterprise), cert. denied, 456 U.S. 1008 (1982).

[176] E.g., United States v. Cauble, 706 F.2d 1322, 1333 n.24 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Kovic, 684 F.2d 512, 517 (7th Cir.), cert. denied, 459 U.S. 972

with other persons to commit the offense. Conversely, the advantage of charging Section 1962(c) is that the offense is somewhat more concrete and understandable than the conspiracy offense. In practice, many prosecutors choose to charge both the conspiracy and the substantive offense, to cover all bases. This method of charging has the effect of potentially leading to consecutive sentences for the two counts.[182]

The essence of a Section 1962(d) conspiracy is the agreement to commit a substantive violation of Section 1962(a), (b), or (c).[183] Because most of the RICO conspiracy litigation has concerned conspiracies to violate Section 1962(c), this discussion concentrates on the issues arising under that charge. RICO conspiracy law has not been thoroughly explored by the courts, and it should be expected that the doctrines discussed here will evolve in years to come. The following issues are those that have attracted the most judicial attention to date. This discussion focuses on areas that may be treated differently by the courts under RICO conspiracy law than under standard conspiracy law.

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[182] See, e.g., United States v. Watchmaker, 761 F.2d 1459, 1477 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Marrone, 746 F.2d 957, 959 (3d Cir. 1984); United States v. Bagaric, 706 F.2d 42, 63 (2d Cir.), cert. denied, 464 U.S. 840 (1983); United States v. Cagnina, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Martino, 648 F.2d 367, 383 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); United States v. Rone, 598 F.2d 564, 570-71 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). But see United States v. Sutton, 642 F.2d 1001, 1040 (6th Cir. 1980) (en banc) (RICO conspiracy and substantive convictions merge for purposes of sentencing where based on same proof), cert. denied, 453 U.S. 912 (1981).

[183] See, e.g., United States v. Riccobene, 709 F.2d 214, 224 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

1. General Considerations

Before discussing the law of RICO conspiracy, it is useful to discuss some practical considerations. Prosecutors often ask whether it is preferable to charge Section 1962(c) or Section 1962(d). The advantages of charging the conspiracy offense are the normal advantages of conspiracy prosecutions--admissibility of co-conspirators' statements[178] and ease of joinder.[179] However, charging a RICO substantive offense also may facilitate joinder.[180] In addition, as in other conspiracy prosecutions, it is not necessary to show that each defendant actually committed the substantive violation--only that he agreed to do so.[181]

Possible disadvantages are the danger of confusing the jury with the added complexities of instructions on conspiracy law, and the need to prove the additional element that each defendant agreed

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[178] See, e.g., United States v. Carter, 721 F.2d 1514, 1524-25 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

[179] See, e.g., United States v. O'Malley, 796 F.2d 891, 896 (7th Cir. 1986); United States v. Licavoli, 725 F.2d 1040, 1051 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); United States v. Drum, 733 F.2d 1503, 1507-08 (11th Cir.), cert. denied, 469 U.S. 1061 (1984); United States v. Provenzano, 688 F.2d 194, 199 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Welch, 656 F.2d 1039, 1049-54 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982).

[180] See supra note 179.

[181] See, e.g., United States v. Pepe, 747 F.2d 632, 660 n.44 (11th Cir. 1984); United States v. Truglio, 731 F.2d 1123, 1133 (4th Cir.), cert. denied, 469 U.S. 862 (1984); United States v. Brooklier, 685 F.2d 1208, 1220 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); United States v. Phillips, 664 F.2d 971, 1038 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

there are differences, although their extent has not been precisely delineated by the courts. One early and influential decision held that RICO conspiracy permits the joinder of diverse conduct that could not have been joined under standard conspiracy law.[186] However, the scope of that decision has been cut back by later decisions in the same circuit.[187] As other circuits have struggled with the elusive nature of RICO conspiracy, the contrast with traditional conspiracy law appears to be coming into sharper focus.

The major principle that is emerging with some force is that, although general conspiracy law still applies, the objective of a RICO conspiracy to violate Section 1962(c) is broader than, or at least different from, the objective of a general conspiracy under

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628 (4th Cir. 1985); United States v. Pepe, 747 F.2d 632, 659 (11th Cir. 1984); United States v. Riccobene, 709 F.2d 214, 225 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Cagnina, 697 F.2d 915, 922 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Elliott, 571 F.2d 880, 903-04 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Biaggi, 672 F. Supp. 112 (S.D.N.Y. 1987); United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (1986). See also United States v. Rastelli, 870 F.2d 822 (2d Cir.), cert. denied, 110 S. Ct. 515 (1989) (government need not show that each member of RICO conspiracy was aware of each specific component of the enterprise; all that is required is that he know general nature of enterprise and that it extended beyond his individual role).

[186] United States v. Elliott, 571 F.2d 880, 900-05 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

[187] See, e.g., United States v. Sutherland, 656 F.2d 1181, 1189-95 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United States v. Bright, 630 F.2d 804, 834 n.52 (5th Cir. 1980). But see United States v. Pepe, 747 F.2d 632, 659 n.43 (11th Cir. 1984) (explaining that Elliott is still good law in most respects).

2. General Differences from Standard Conspiracy Law

It is not clear exactly how RICO conspiracy law differs from standard conspiracy law under provisions such as 18 U.S.C. § 371. In many respects the two categories of offenses are similar--for example, the admissibility of co-conspirators' statements,[184] and the principle that conspirators need not know the full scope of the conspiracy nor the identity of all co-conspirators.[185] However,

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[184] See, e.g., United States v. Hewes, 729 F.2d 1302, 1313 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985); United States v. Tille, 729 F.2d 615, 620 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Ruggiero, 726 F.2d 913, 923-24 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Carter, 721 F.2d 1514, 1524-25 (11th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Cagnina, 697 F.2d 915, 922 (11th Cir.), cert. denied, 464 U.S. 856 (1983); United States v. Sutherland, 656 F.2d 1181, 1199-1200 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United States v. Zemek, 634 F.2d 1159, 1169-70 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1980).

[185] See, e.g., United States v. Rastelli, 870 F.2d 822 (2d Cir.) (government need only show that defendant agreed to violate RICO through two predicates and knew the general nature of the conspiracy and that it extended beyond his role; similarly, defendant need only know the general nature of the enterprise, not each specific component), cert. denied, 110 S. Ct. 515 (1989); United States v. Norton, 867 F.2d 1354 (11th Cir.) (defendant need not be member of class that could violate predicate statute, 18 U.S.C. § 1954; he need only be aware of general scope of RICO conspiracy that he joined), cert. denied, 109 S. Ct. 3192 (1989); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 109 S. Ct. 1319 (1989); United States v. Zauber, 857 F.2d 137 (3d Cir. 1988) (defendants who provided enterprise with illegal loans were sufficiently aware of scope of conspiracy), cert. denied, 109 S. Ct. 1340 (1989); United States v. Valera, 845 F.2d 923 (11th Cir. 1988) (defendant participated in one overall conspiracy with goal of importing drugs for profit, and, although he may not have known all details of conspiracy, he was aware of others' roles), cert. denied, 109 S. Ct. 1953 (1989); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986), cert. denied, 475 U.S. 1103 (1987); United States v. DePeri, 778 F.2d 963 (3d Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Schell, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Tillett, 763 F.2d

case of an illegal enterprise, the proof that each defendant was "associated with" the same criminal group ordinarily will satisfy the requirement of knowledge of the essential nature and scope of the conspiracy. Thus, in practice, the problem of a variance arising from proof of multiple RICO conspiracies is more likely to arise in a case involving a legal enterprise than in one involving an association-in-fact enterprise.[192]

3. Requirement of Agreement to Personally Commit Two Predicate Acts

One major issue that has been the subject of some controversy is whether a defendant in a RICO conspiracy count must agree to personally commit two or more predicate crimes, or can be held liable on the theory that he agreed to the commission of two or

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[192] On the doctrine of multiple-conspiracy variance in the RICO context, see United States v. Manzella, 782 F.2d 533, 538-39 (5th Cir. 1986) (variance held to be harmless), cert. denied, 476 U.S. 1123 (1986); United States v. DePeri, 778 F.2d 963, 975 (3d Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Mitchell, 777 F.2d 248, 260 (5th Cir. 1985) (finding single conspiracy), cert. denied, 475 U.S. 1096 (1986); United States v. Tillett, 763 F.2d 628 (4th Cir. 1985) (single conspiracy); United States v. Watchmaker, 761 F.2d 1459, 1477 (11th Cir. 1985) (single conspiracy), cert. denied, 474 U.S. 1100 (1986); United States v. Carter, 721 F.2d 1514, 1531 (11th Cir.), cert. denied, 469 U.S. 819 (1984); United States v. Lemm, 680 F.2d 1193, 1202-04 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); United States v. Sutherland, 656 F.2d 1181, 1189-95 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United States v. Zemek, 634 F.2d 1159, 1167-69 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981); United States v. Elliott, 571 F.2d 880, 900-05 (5th Cir.), cert. denied, 439 U.S. 953 (1978); United States v. Cryan, 490 F. Supp. 1234, 1238-44 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980); cf. United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.) (multiple-conspiracy doctrine not violated where predicate acts for RICO conspiracy were themselves conspiracies), cert. denied, 469 U.S. 831 (1984). Whether there are multiple conspiracies or a single conspiracy is a jury question. See United States v. Biaggi, 672 F. Supp. 112, 122 (S.D.N.Y. 1987); United States v. Persico, 621 F. Supp. 842, 857 (S.D.N.Y. 1985).

18 U.S.C. § 371.[188] Thus, it is not sufficient that the defendants agree to commit the predicate acts, or that they participate in the same enterprise.[189] For example, where two defendants, A and B, both conspire with a third person, C, to conduct the affairs of a legitimate enterprise through a pattern of racketeering activity, but A and B are not aware of each other's activities, a single RICO conspiracy charge against A, B, and C cannot be maintained.[190] However, in the case of an illegal association-in-fact enterprise, this multiple-conspiracy problem is less likely to arise because standard conspiracy law permits broad inferences about a conspirator's knowledge of the scope of the conspiracy.[191] In the

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[188] See United States v. Neapolitan, 791 F.2d 489, 497 (7th Cir. 1986) (rather than creating a new law of conspiracy, RICO created a new objective for traditional conspiracy law, namely, a substantive RICO violation), cert. denied, 479 U.S. 939 (1986); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), cert. denied, 105 S. Ct. 156 (1984); United States v. Carter, 721 F.2d 1514, 1529 (11th Cir.), cert. denied, 469 U.S. 819 (1984); United States v. Riccobene, 709 F.2d 214, 224-25 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 330 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

[189] United States v. Riccobene, 709 F.2d 214, 224 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

[190] See United States v. Sutherland, 656 F.2d 1181, 1189-95 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United States v. Cryan, 490 F. Supp. 1234, 1242 n.14 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980) (RICO count dismissed where only connection of alleged co-conspirators to each other was their association with same legal enterprise, at different periods of time).

[191] See supra note 185. On the principle that existence of an association-in-fact conspiracy may be proved by circumstantial evidence, see United States v. Riccobene, 709 F.2d 214, 225 (3d Cir.), cert. denied, 464 U.S. 849 (1983); United States v. Sutherland, 656 F.2d 1181, 1194 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United States v. Welch, 656 F.2d 1039, 1056 n.24 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982).

The most thorough analysis of this issue to date is contained in United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986), cert. denied, 479 U.S. 1101 (1987). The Seventh Circuit analyzed the precedents and pertinent arguments and concluded that RICO conspiracy law, like traditional conspiracy law, should require only that each defendant agree to join the conspiracy, not that he agree to personally commit the acts that would accomplish the conspiracy's objective. The court further analyzed the agreement as having two sub-parts: an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission, by some conspirator, of at least two predicate acts. Id. at 499. Thus, under the court's analysis, a defendant who associated himself with the enterprise, but did not agree to the commission of two or more predicate acts by members of the conspiracy, would not be guilty of RICO conspiracy; nor would a defendant who agreed to the commission of two or more acts, but had no involvement with the enterprise. Id.[196]

In view of the strong analysis in Neapolitan and because a majority of the circuits have reached a similar conclusion, the Criminal Division, as of mid-1988, will permit RICO conspiracy counts to allege that defendants agreed to be members of the

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[196] The court cited the 1985 edition of this Manual, at pages 70-71, as one authority on this point. Several more recent decisions have affirmed Neapolitan's approach to establishing a defendant's membership in a RICO conspiracy. See, e.g., United States v. Harris, 700 F. Supp. 226 (E.D. Pa. 1988), aff'd, United States v. Phillips, 874 F.2d 123 (3d Cir. 1989); United States v. Joseph, 835 F.2d 1149, 1151-52 (6th Cir. 1987); United States v. O'Malley, 796 F.2d 891, 896 n.5 (7th Cir. 1986).

more predicate crimes by other conspirators. The circuits are split on this issue. In two circuits (the First and Second), a defendant does not violate the RICO conspiracy statute unless he personally agrees to commit at least two acts;[193] in seven circuits (the Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh), the defendant need only reach a general agreement with other conspirators that two acts will be committed pursuant to the conspiracy, not necessarily by any particular conspirator.[194] At least one circuit (the Tenth) has expressly left the question open.[195]

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[193] United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

[194] United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 88-89; United States v. Pryba, 900 F.2d 748 (4th Cir. 1990); United States v. Traitz, 871 F.2d 368, 395-96 (3d Cir.), cert. denied, 110 S. Ct. 78 (1989); United States v. Kragness, 830 F.2d 842 (8th Cir. 1987); United States v. Rosenthal, 793 F.2d 1214, 1228 (11th Cir. 1986); United States v. Neapolitan, 791 F.2d 489, 491-98 (7th Cir. 1986), cert. denied, 479 U.S. 1101 (1987); United States v. Joseph, 781 F.2d 549, 554-55 (6th Cir. 1986); United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906 (1985); United States v. Tille, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Alonso, 740 F.2d 862, 871 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); United States v. Carter, 721 F.2d 1514, 1528-31 (11th Cir.), cert. denied, 469 U.S. 819 (1984). See also United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 330-32 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985) (discussing the precedents and apparently holding that agreement personally to commit two acts is not required), cert. denied, 476 U.S. 1140 (1986). In the Adams case, supra, Justice White, joined by the Chief Justice, issued a written dissent in the denial of certiorari, noting the conflict among the circuits on this point.

[195] United States v. Killip, 819 F.2d 1542, 1548 (10th Cir.) (leaving issue open, but considering jury verdict in light of trial judge's instructions that defendant agreed to personally commit two or more racketeering acts), cert. denied, 484 U.S. 865 (1987).

In some cases, it may be appropriate to charge a defendant with RICO conspiracy where it has been shown that, by virtue of his leadership position in a criminal organization, he is legally accountable for the crimes of his subordinates.

The Pinkerton rule is rather controversial and subject to criticism,[201] and the combination of RICO and Pinkerton could lead to unwarranted extensions of criminal liability. At least one court has indicated that RICO will not be extended to hold persons liable for the acts of others who were associated with the same legal enterprise, but during a different period of time.[202]

Prosecutors should take great care in applying Pinkerton in a RICO case. The Organized Crime and Racketeering Section will not authorize a substantive RICO charge against the defendant solely because the Pinkerton rule would presumably hold a RICO conspirator responsible for the commission of substantive crimes in which the defendant did not "personally" participate.

4. Requirement of an Overt Act

A final difference between RICO conspiracy and general conspiracy is that a RICO conspiracy does not require the

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201 See, e.g., May, Pinkerton v. United States Revisited: A Defense of Accomplice Liability, 8 Nova L.J. 21, 21 n.5 (1983).

202 United States v. Cryan, 490 F. Supp. 1234 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980). The court noted, "RICO ... may not and does not change the fundamental principle that an individual may not be convicted on the basis of another person's acts which he neither authorized nor adopted." Id. at 1242; see also United States v. Neapolitan, 791 F.2d 489, 504-05 n.7 (7th Cir. 1986) (citing the above discussion in this Manual and urging caution in applying Pinkerton in RICO cases), cert. denied, 479 U.S. 1101 (1987).

conspiracy and agreed to the commission of two or more predicate acts by others on behalf of the conspiracy. If such an allegation is approved, the Organized Crime and Racketeering Section will require that the drafting of the conspiracy count adhere to the requirements imposed by the court in Neapolitan. Specifically, the count must allege the two sub-parts of the conspiratorial agreement and, if the facts permit, it must include a specific pattern of racketeering activity that was agreed to be committed.[197] This policy, modified somewhat from the first edition of this Manual, is subject to further development as the case law evolves.

Even without the Neapolitan rule, it could be argued that the requirement that each RICO conspiracy defendant agree to commit two acts can be met by the Pinkerton[198] doctrine, which states that each conspirator is liable for the acts of all co-conspirators committed in furtherance of the conspiracy. Although no courts have expressly held Pinkerton applicable in connection with a RICO conspiracy[199], the doctrine has been held to apply in the case of a narcotics continuing criminal enterprise under 21 U.S.C. § 848.[200]

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[197] 791 F.2d at 500-01.

[198] Pinkerton v. United States, 328 U.S. 640 (1946).

[199] See United States v. Walters, 711 F. Supp. 1435, 1448 (N.D. Ill. 1989) (noting, without relying on Pinkerton, that a defendant who joins a RICO conspiracy becomes liable for earlier acts of his co-conspirators).

[200] United States v. Michel, 588 F.2d 986, 999 (5th Cir.), cert. denied, 444 U.S. 825 (1979); see also United States v. Graewe, 774 F.2d 106, 108-09 (6th Cir. 1985) (defendant, acquitted of RICO, could not be convicted under Pinkerton theory because he was not charged with conspiracy), cert. denied, 474 U.S. 1068 (1986).

acts should be ordinary actions, such as meetings, conversations, and other general activities. Although they may be criminal in nature, the overt acts, unlike racketeering acts, should not be alleged as criminal offenses. It is extremely important to avoid confusing these two concepts.

For example, if a defendant is accused of extorting payment of a gambling debt as part of his pattern of offenses, it would be appropriate in the overt acts to allege that on a particular date "the defendant struck the victim." It would be unnecessary, and probably inappropriate, to couch this physical act in the terminology of 18 U.S.C. § 894, as it would also be inappropriate to charge a series of assaults as part of one overt act. It is the position of the Organized Crime and Racketeering Section that the term "overt act" is a specific legal concept that relates to an act, almost invariably physical in nature, and does not encompass statutory terminology or multiple acts.

IV. Penalties--Section 1963

The possible criminal penalties provided for in the RICO statute include imprisonment, fines, and criminal forfeiture. All three may be imposed simultaneously. The forfeiture provisions provide a means for reaching the interests acquired in violation of the statute.

A. Sentencing Guidelines

The United States Sentencing Commission, pursuant to 28 U.S.C. § 994, issued sentencing guidelines which are applicable to all

government to allege or prove an overt act.[203] However, in most cases it is usually desirable to include some overt acts in the indictment in order to present a full picture of the scope of the conspiracy. It is important to note in drafting the indictment that an overt act is not the same thing as an act of racketeering activity. The indictment must allege that the defendants conspired to conduct the affairs of the enterprise through a pattern of racketeering activity; it may allege the commission of overt acts in furtherance of the conspiracy. The racketeering acts must be violations of the offenses listed in 18 U.S.C. § 1961; the overt

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[203] E.g., United States v. Angiulo, 847 F.2d 956 (1st Cir.), cert. denied, 109 S. Ct. 138 (1988); United States v. Tripp, 782 F.2d 38, 41 (6th Cir.), cert. denied, 475 U.S. 1128 (1986); United States v. Pepe, 747 F.2d 632, 645 n.8, 659 n.42 (11th Cir. 1984); United States v. Carter, 721 F.2d 1514, 1528 n.20 (11th Cir.), cert. denied, 469 U.S. 819 (1984); United States v. Coia, 719 F.2d 1120, 1123-24 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984); United States v. Barton, 647 F.2d 224, 237 (2d Cir.), cert. denied, 454 U.S. 857 (1981); United States v. Santoro, 647 F. Supp. 153, 176 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); United States v. Dellacroce, 625 F. Supp. 1387, 1391 (E.D.N.Y. 1986); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 332 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986). The former Fifth Circuit has indicated in dictum that an overt act is required. See United States v. Phillips, 664 F.2d 941, 1038 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). However, the opinion of the Eleventh Circuit in United States v. Coia, supra, persuasively argues that the dictum in Phillips would not be followed by the present Fifth Circuit. 719 F.2d at 1123-24. Two district courts in the Ninth Circuit recently required some form of overt act where a private plaintiff brought a civil RICO action based on section 1962(d). See In re National Mortgage Corp., 636 F. Supp. 1138, 1161 (C.D. Cal. 1986) (civil RICO conspiracy charge in damage suit requires some overt act that causes injury to business or property, unlike criminal conspiracy charge); Medallion TV Enterprises, Inc. v. SelecTV of California, Inc., 627 F. Supp. 1290, 1299-1301 (C.D. Cal. 1986), aff'd, 833 F.2d 1360 (9th Cir. 1987) (no cause of action under § 1964(d) based on § 1962(c) unless there is an overt act causing injury to plaintiff).

be under alternative patterns of racketeering.[209]

For those cases not falling within the sentencing guidelines (i.e., crimes occurring before November 1, 1987), 18 U.S.C. § 1963(a) provides the basis for imprisonment and fines. Under § 1963(a), violation of any provision of 18 U.S.C. § 1962 may result in a term of imprisonment of not more than 20 years (or life, in some cases) or a fine of not more than $25,000, or both.[210]

Several points should be noted. First, courts have held that consecutive sentences for violations of one of the substantive RICO sections (18 U.S.C. § 1962(a), (b) or (c)) and for conspiring to violate one of these sections (18 U.S.C. § 1962(d)) are allowable,[211] as are consecutive sentences for violations of two

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[209] See also Prosecutors Handbook on Sentencing Guidelines & Other Provisions of the Sentencing Reform Act of 1984 (November 1, 1987) at 33 (prosecutors should structure charges in an indictment in a way that would "yield the best sentence under all the guidelines").

[210] See supra note 7 (discussing the alternative fines available pursuant to 18 U.S.C. § 3571).

[211] United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 52-57; United States v. West, 877 F.2d 281 (4th Cir.), cert. denied, 110 S. Ct. 377 (1989); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Thomas, 757 F.2d 1359 (2d Cir.), cert. denied, 474 U.S. 819 (1985); United States v. Marrone, 746 F.2d 957 (3d Cir. 1984); United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983). But see United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980) (where the proof showing that the defendants violated § 1962(c) and conspired to do so were identical, conspiracy charges merged with the substantive conviction for purposes of sentencing), cert. denied, 453 U.S. 912 (1981); United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985) (remanding for possible resentencing on RICO (c) and (d) charges despite concurrent sentences, in light of Ball v. United States, 470 U.S. 856 (1985)), cert. denied, 475 U.S. 1098 (1986).

crimes committed after November 1, 1987.[204] The base offense level is the greater of either the offense level applicable to the underlying racketeering activity, or 19.[205] The commentary suggests that the offense level "usually will be determined by the offense level of the underlying conduct."[206]

The application of the sentencing guidelines to RICO counts creates the same issues that arise in multiple count indictments. When determining the offense level based on the underlying conduct, each underlying offense should be treated as if contained in a separate count of conviction. Chapter three, part D of the sentencing guidelines should be used to determine the final offense level.[207] Where there are state law violations alleged as predicate acts, the offense level "corresponding to the most analogous federal offense is to be used."[208]

The sentencing guidelines are new and complex. Especially in the RICO area, it is important to consider the sentencing guidelines when drafting the indictment. Because the offense level is dependent, to a certain extent, on the predicate acts, it is extremely important to consider what the base offense level would

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[204] Sentencing Act of 1987, Pub. L. No. 100-182, § 2, 101 Stat. 1266 (December 7, 1987).

[205] United States Sentencing Commission, Guidelines Manual §2E1.1, at 2.55 (October 1987).

[206] Id. (Introductory Commentary).

[207] Id. (Application Notes).

[208] Id.

illegally accumulated assets of a criminal enterprise and thereby strike at the heart of such enterprises. Once the conviction is obtained and the basis of the forfeiture is established, the court must order forfeiture under RICO.[215]

1. Background

The RICO forfeiture provisions have their origin in the English common law. Under early English law, the complete forfeiture of all real and personal property followed as a consequence of conviction of a felony or of treason. In addition to the conviction, the defendant's "blood was corrupted" so that nothing could pass by inheritance through his line.[216] In 1787, the forfeiture of estate and corruption of blood for treason was banned by Article III, § 3, cl. 2 of the U.S. Constitution. Three years later, the first Congress abolished that penalty for all convictions and judgments.[217] As a result, criminal forfeitures were unheard of in the United States for 180 years.

In 1970, Congress resurrected the concept by inserting

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two statutes to be mutually exclusive), rev'd on other grounds, 802 F.2d 646 (2d Cir. 1986), cert. denied, 480 U.S. 931 (1987) .

[215] United States v. Hess, 691 F.2d 188, 190 (4th Cir. 1982); United States v. L'Hoste, 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 833 (1980); see also United States v. Kravitz, 738 F.2d 102 (3d Cir. 1984) (jury's recommendation on issue of forfeiture, outside of its findings of fact, was not binding on court), cert. denied, 470 U.S. 1052 (1985).

[216] United States v. Grande, 620 F.2d 1026, 1038 (4th Cir.), cert. denied, 449 U.S. 830 (1980).

[217] 1 Stat. 117, ch.9, sec. 24, codified at 18 U.S.C. § 3563 (repealed, effective Nov. 1, 1986, Pub. L. 98-473, 98 Stat. 1987 (1984)).

substantive RICO subsections.[212] In addition, consecutive sentences have also been upheld for a RICO violations and for the underlying predicate charge.[213]

Finally, the 1984 amendments to the Act include a provision that, in lieu of a fine, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds under Section 1963(a)(3).

B. Forfeitures

The forfeiture provisions under 18 U.S.C. § 1963 are an integral part of a RICO prosecution and should be used whenever possible.[214] These provisions allow the government to reach the

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[212] See United States v. Biasucci, 786 F.2d 504 (2d Cir. 1986) (consecutive sentences under 18 U.S.C. § 1962(b) and (c)), cert. denied, 107 S. Ct. 104 (1986).

[213] See United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 57-64 (RICO and state murder); United States v. Russo, 890 F.2d 924 (7th Cir. 1989) (RICO conspiracy and tax conspiracy based on same facts); United States v. Erwin, 793 F.2d 656 (5th Cir. 1986), cert. denied, 479 U.S. 991 (1986); United States v. Grayson, 795 F.2d 278 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Hartley, 678 F.2d 961, 991-92 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981) (in enacting RICO, Congress intended to permit cumulative sentences for substantive RICO offenses and the underlying predicate offenses); United States v. Carter, 721 F.2d 1514 (11th Cir.), cert. denied, 105 S. Ct. 89 (1984); United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). Cf. Garrett v. United States, 471 U.S. 773 (1985) (upholding prosecution for CCE and its underlying predicates).

[214] Failure to obtain forfeiture under criminal RICO does not necessarily foreclose a simultaneous civil action, such as under the narcotics civil forfeiture statute, 21 U.S.C. § 881. See, e.g., United States v. Schmalfeldt, 657 F. Supp. 385 (W.D. Mich. 1987). But see United States v. Dunn, 630 F. Supp. 1035 (W.D.N.Y.) (government could not seek forfeiture of money under 21 U.S.C. § 881 after jury verdict was obtained against the criminal forfeiture of the money under 21 U.S.C. § 853 because Congress intended the

forfeiture is not limited to property within the district of the criminal prosecution.[221]

One consequence of the in personam character of RICO forfeiture is that, when the forfeiture is for a specific amount of money, the forfeiture constitutes, in effect, a money judgment against the defendant for the same amount of money which came into his hands illegally.[222] This means that the government is not required to trace the path of the illegal proceeds to identifiable assets in order to satisfy the forfeiture. Prior to the decision in United States v. Conner, 752 F.2d 566 (11th Cir.), cert. denied, 474 U.S. 821 (1985), it was not clear whether the government was restricted to the forfeiture of only those specific identifiable assets which could be traced back to the illegal proceeds.[223] The court in Conner held that, since money is a fungible item, it does not matter that the government received the identical money which the defendants received as long as the amount that was received in

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[221] 18 U.S.C. § 1963(j). See also S. Rep. No. 98-225, 98th Cong., 1st Sess. 210 (1983). For further discussion of the differences between in rem and in personam forfeiture, see United States v. Veon, 538 F. Supp. 237, 241-42 (E.D. Cal. 1982); Reed & Gill, RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process, 62 N.C.L. Rev. 57 (1983).

[222] See United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied, 483 U.S. 1021 (1987); United States v. Robilotto, 828 F.2d 940 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985) (en banc), cert. denied, 475 U.S. 1011 (1986); United States v. Navarro-Ordas, 770 F.2d 959 (11th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); United States v. Conner, 752 F.2d 566 (11th Cir.), cert. denied, 474 U.S. 821 (1985).

[223] See, e.g., Webb & Turow, RICO Forfeiture Practice: A Prosecutorial Perspective, 52 U. Cin. L. Rev. 404, 424-29 (1983).

criminal forfeiture provisions in federal statutes creating two new criminal offenses: RICO and the Continuing Criminal Enterprise (CCE) statute.[218] The forfeiture provisions in these two statutes are in personam actions directed against a criminal defendant and are dependent upon convicting the defendant of the substantive offense. Unlike statutes providing in rem forfeiture of property related to criminal activity, which involve separate civil proceedings against the property subject to forfeiture and are relatively common,[219] the RICO and CCE statutes impose forfeiture directly on an individual as part of a single criminal prosecution. However, while the criminal forfeiture of a felon's entire estate was permitted under English law, a forfeiture under RICO is limited to those interests acquired, maintained, or used in violation of 18 U.S.C. § 1962. This difference has led one court to state that the effect of a forfeiture under RICO is the functional equivalent of a forfeiture in rem.[220] There is an important difference, however. Because an in rem action is a proceeding against the property itself, a separate civil action must be filed in each district in which property is located. In contrast, criminal

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[218] 21 U.S.C. § 848. See United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979) (recognizing RICO as the first modern federal criminal statute to impose forfeiture as a criminal sanction directly against an individual defendant), cert. denied, 445 U.S. 927 (1980).

[219] See, e.g., 19 U.S.C. §§ 1595-1624 (customs forfeiture statutes); 21 U.S.C. §§ 881-885 (narcotics forfeiture statutes); 49 U.S.C. §§ 781-782 (carriers transporting contraband articles--forfeiture statutes).

[220] United States v. Grande, 620 F.2d 1026, 1039 (4th Cir.), cert. denied, 449 U.S. 830 (1980).

of pre-conviction transfers which were not "arm's length" transactions and which were executed to avoid criminal forfeiture. However, in order to protect innocent third parties, the statute also provides that forfeiture will not be ordered if a transferee establishes that he was a bona fide purchaser for value of the property and that he was reasonably without cause to believe that the property was subject to forfeiture.[227]

One court, in a questionable ruling, has held that a defendant's interest in property acquired with racketeering proceeds is not subject to forfeiture under § 1963(a)(1) unless the proof shows that the defendant committed at least two racketeering acts prior to the acquisition of the interest.[228] This holding appears to be too narrow. For example, if a criminal organization were to carry out a series of robberies, it would seem that each defendant who was a member of the group before the robberies were committed, and received a share of the stolen money, should be held accountable for forfeiture of all proceeds that he received, regardless of whether he personally committed each robbery from which he profited. However, under the Angiulo decision, he apparently could only be required to forfeit the proceeds of the

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by defendant, because of relation-back doctrine); United States v. Robilotto, 828 F.2d 940, 948-49 (2d Cir. 1987) (since government need not trace proceeds to assets, it does not matter that defendant no longer retains ill-gotten money), cert. denied, 484 U.S. 1011 (1988).

[227] 18 U.S.C. § 1963(l); see infra pages 134-38 and accompanying text (discussing third parties' rights in forfeited property under RICO).

[228] United States v. Angiulo, 897 F.2d 1169, 1213 (1st Cir. 1990).

violation of the racketeering statute is known. This decision relieves the government of a considerable burden. However, if the prosecutor can trace the illegal proceeds to specific assets, such assets should be included as part of the property subject to forfeiture. It is important to note that under the forfeiture provisions, forfeiture relates back to the time of the commission of the act which gave rise to the forfeiture.[224] Thus, the interest of the United States in the property vests at that time and is not extinguished simply because the defendant subsequently transfers his interest to another person[225] or no longer retains the proceeds for any other reason.[226] This provision also permits the voiding

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[224] 18 U.S.C. § 1963(c). See United States v. Ginsburg, 773 F.2d 798, 801-03 (7th Cir. 1985) (en banc) (forfeiture relates back to time of commission of the offense), cert. denied, 475 U.S. 1011 (1986). This section, which was added in October 1984, was held not to violate the ex post facto prohibition even if applied to racketeering acts committed prior to that date. See United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987); United States v. Pryba, 674 F. Supp. 1504 (E.D. Va. 1987).

[225] The government is not required to prove the continuing existence of forfeitable interests at the time of conviction. It makes no difference whether the government recovers the identical dollars that the defendant received, as long as the amount that the defendant acquired in violation of the statute is known. United States v. Robilotto, 828 F.2d 940 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985) (en banc) (overruling in part United States v. McManigal, 708 F.2d 276 (7th Cir.), vacated, 464 U.S. 979 (1983), reaff'd in part, 723 F.2d 580 (7th Cir. 1983)), cert. denied, 475 U.S. 1011 (1986); United States v. Alexander, 741 F.2d 962, 968 (7th Cir. 1984).

[226] See United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990), (government's interest in forfeitable property under § 1963(a)(1) and (2) vests at the time of the unlawful activity, and cannot be defeated by defendants' subsequent transfer of the property); United States v. Nelson, 851 F.2d 976 (7th Cir. 1988) (CCE case holding that forfeiture is not limited to assets still possessed

forfeiture proceedings.[230]

The eighth amendment proscription against cruel and unusual punishment has also been raised in RICO forfeiture proceedings. In United States v. Busher, 817 F.2d 1409 (9th Cir. 1987), the Ninth Circuit held that forfeiture of the defendant's interest in the corporation could be so grossly disproportionate to the offense as to violate the eighth amendment, and remanded the matter to the district court for a determination of proportionality. Other courts have expressed varying views as to whether forfeiture under the RICO statute can amount to cruel and unusual punishment prohibited by the eighth amendment, or can otherwise be considered disproportionate.[231]

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[230] The approval guidelines are set out at §§ 9-111.000 et seq. of the United States Attorneys' Manual and are reprinted at 38 Crim. L. Rep. 3001 (October 2, 1985).

[231] See United States v. Ofchinick, 883 F.2d 1172, 1184 n.10 (3d Cir. 1989) (rejecting eighth amendment argument concerning forfeiture of $ 2,591,620 as "frivolous" in light of facts of the case); United States v. Porcelli, 865 F.2d 1352 (2d Cir.) (forfeiture verdict requiring defendant to pay twice the amount of taxes owed to New York to the United States was not cruel and unusual), cert. denied, 110 S. Ct. 53 (1989); United States v. Stern, 858 F.2d 1241 (7th Cir. 1988) (upholding forfeiture of condominium whose telephone jacks were the only items used to further prostitution enterprise); United States v. Horak, 833 F.2d 1235, 1241 n.4 (7th Cir. 1987) (stating in dicta that it was highly unlikely that proper forfeiture orders entered under § 1963(a)(1) reaching proceeds of racketeering activity could constitute cruel and unusual punishment violative of the eighth amendment); United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982) (holding that forfeiture of entire interest in hotel owned by RICO defendant convicted of operating the hotel as a place of prostitution did not contravene eighth amendment proscription against cruel and unusual punishment); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979) (rejecting defendant's eighth amendment arguments and ruling that forfeiture measures are constitutional when "keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO"); United States v. Regan, No. S 88 CR 517 (S.D.N.Y. Nov. 6, 1989)

second, and subsequent robberies. No other courts have adopted so narrow a view of forfeiture under § 1963(a)(1).

One consequence of the relation-back doctrine is that attorneys' fees paid by RICO defendants may be subject to forfeiture if it can be shown that the source of the fees was proceeds from racketeering activity. Obviously, this is a very sensitive issue. However, the major legal issues have been resolved by the Supreme Court, which issued two rulings in 1989 regarding criminal narcotics forfeiture statutes that are analogous to the RICO forfeiture provisions. In United States v. Monsanto, 109 S. Ct. 2657 (1989), the Court held that the forfeiture provisions permit the pre-trial restraint, and subsequent forfeiture, of assets that the defendant intends to use to pay attorney's fees. In the companion case, Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989), the Court held that the restraint and forfeiture of attorney's fees do not violate the sixth amendment guarantee of counsel of choice or the fifth amendment guarantee of due process. Prosecutors are advised to check the latest decisions in their circuits for further refinements of the law in this area.[229] In any event, any prosecutor contemplating the forfeiture of attorneys' fees must obtain approval from the Department of Justice before instituting

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[229] See, e.g., United States v. Friedman, 849 F.2d 1488 (D.C. Cir. 1988) (court denied motion for release of forfeited assets to pay for indigent defendant's appeal; no right to have counsel of choice appointed and paid for with government funds).

influence over the enterprise are also subject to a proportionality test, under § 1963(a)(2).[233]

2. Forfeiture Allegations

The first stage in the forfeiture process is drafting the forfeiture allegations. The forfeiture allegations describe the property which is subject to forfeiture and the legal basis for the forfeiture. The forfeiture allegations will be part of the indictment. However, a jury should not be aware of any potential forfeiture until after a guilty verdict has been obtained on the RICO violation.[234] Therefore, no reference to forfeitures should be made in the indictment outside of the forfeiture allegations, and they should not be set out as a count of the indictment.[235]

After a guilty verdict on the RICO charge has been returned, the jury will be instructed to return findings on the forfeiture

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[233] See also United States v. Robinson, 721 F. Supp. 577 (E.D. Pa. 1989) (denying forfeiture of residence under 21 U.S.C. § 853 narcotics-forfeiture provision, holding that rendering defendant and her children homeless would be a disproportionately severe penalty).

[234] See United States v. Sandini, 816 F.2d 869, 874 (3d Cir. 1987) (bifurcation between trial on underlying charges and forfeiture should have been greater and therefore new forfeiture trial ordered). The court noted that this procedure will prevent the potential penalty of forfeiture from influencing the jurors' deliberations about guilt or innocence. See also United States v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

[235] As a practical matter, the forfeiture allegations in the indictment should be on separate pages so that they can be easily removed when presenting the indictment to the jury.

However, regardless of whether the issue is framed as one arising under the eighth amendment, the courts have increasingly been receptive to arguments regarding the proportionality of forfeiture to the criminal conduct in question. In United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied, 110 S.Ct. 53 (1989), the Second Circuit held that the defendant's interest in the enterprise (a group of corporations) was to be forfeited in its entirety. However, the court also held that other corporations outside the enterprise, which were acquired in part with racketeering proceeds, were to be forfeited only to the extent that they were acquired with tainted funds. Finally, the court held that another category of interests "outside" the enterprise, namely, interests affording a source of influence over the enterprise under § 1963(a)(2), were to be forfeited only under a rule of proportionality, as set forth in United States v. McKeithen.[232]

In United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990), the First Circuit adopted proportionality rules similar to those in Porcelli, holding that a defendant's interest in an enterprise is subject to total forfeiture under § 1963(a)(2); that proceeds acquired in violation of RICO are subject to a proportionality test under § 1963(a)(1); and that interests affording a source of

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(district court reduced jury verdict of forfeiture as disproportionate to defendants' offenses under the eighth amendment).

[232] 822 F.2d 310, 315 (2d Cir. 1987)(Continuing Criminal Enterprise forfeiture; held, where jury found that a group of buildings only partially afforded defendant a source of influence over the enterprise, the properties could be forfeited only to that partial extent).

make specific findings as to the extent of the forfeiture.[239] The special verdict form must clearly and precisely describe the interests whose forfeitability the jury is considering. Where the form was not sufficiently specific, one court struck down the forfeiture of the property that was insufficiently described.[240]

Courts have provided differing opinions as to the burden of proof the government must sustain in a forfeiture proceeding. One court has held that, since forfeiture is a criminal penalty and not an element of the crime, it was not inappropriate for Congress to use a preponderance of the evidence as a standard of proof for the criminal forfeiture provision of 21 U.S.C. § 853.[241] However, other courts have held the government to a reasonable doubt standard of proof for RICO forfeiture proceedings.[242] In light of these precedents, the safest approach for the prosecutor is to apply the reasonable doubt standard in preparing for a forfeiture proceeding.

It is also possible for both sides to stipulate to have the

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[239] Fed. R. Crim. P. 31(e). See, e.g., United States v. Kravitz, 738 F.2d 102, 103 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); United States v. Cauble, 706 F.2d 1322, 1346 n.90 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

[240] United States v. Amend, 791 F.2d 1120 (4th Cir.) (CCE forfeiture), cert. denied, 479 U.S. 930 (1986).

[241] United States v. Sandini, 816 F.2d 869 (3d Cir. 1987). See also United States v. Ofchinick, 883 F.2d 1172 (3d Cir.

[242] United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987); United States v. Pryba, 674 F. Supp. 1518 (E.D. Va. 1987) (burden of proof is beyond a reasonable doubt; if Congress had intended a lesser burden, it would have clearly so provided). See also United States v. Ofchinick, 883 F.2d 1172, 1177 n.1 (3d Cir. 1989) (discussing precedents but not deciding the issue).

issue.[236] There is no statutory provision for a separate hearing to present additional evidence relating specifically to the forfeiture, but one circuit has held that forfeiture proceedings should be bifurcated from the guilt phase of criminal trials.[237] Other circuits, however, have given the trial courts more discretion with respect to bifurcation.[238] In many cases, the government will present much of the evidence pertaining to forfeiture during the guilt phase of the trial, but, at least in the Third Circuit, it is not advisable to present evidence relevant only to forfeiture until the forfeiture phase of the trial because of the danger of depriving the defendant of the chance to offer his testimony, limited to forfeiture issues.

Special verdict forms must be prepared so that the jury can

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[236] See United States v. Salerno, No. S 86 Cr. 245 (MJL) (March 10, 1987) (jury instructed on forfeiture after verdict on criminal trial).

[237] See United States v. Ofchinick, 883 F.2d 1172, 1182 n.8 (3d Cir. 1989); United States v. Sandini, 816 F.2d 869 (3d Cir. 1987); see also United States v. Pryba, 674 F. Supp. 1518 (E.D. Va. 1987) (example of bifurcated trial).

[238] See United States v. West, 877 F.2d 281 (4th Cir.) (order of proof within discretion of trial court, where defendant had ample opportunity to argue and present evidence on forfeiture issues), cert. denied, 110 S. Ct. 377 (1989); United States v. Feldman, 853 F.2d 648 (9th Cir. 1988) (sufficient bifurcation can be achieved with separate jury deliberations and additional argument; new evidence can be introduced in trial court's discretion); United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988) (due process not violated by district court's refusal to hold a bifurcated forfeiture proceeding, where jury instructions provided safeguards).

indictment cannot be declared criminally forfeited.[246] A forfeiture order can be imposed as a joint and several liability where there is more than one defendant, and can be based on a RICO conspiracy conviction where the defendants received profits from the conspiracy.[247] If possible, there should be a separate forfeiture paragraph for each defendant specifically alleging his forfeitable interests where more than one defendant is charged with a RICO violation. Also, the forfeiture allegations should clearly state the forfeiture theory (i.e., § 1963(a)(1), (2) or (3)) applicable to each interest. Of course, property can be subject to forfeiture under more than one subsection of § 1963(a). Special verdict forms should allow the jury to consider each alternative theory of forfeiture.

It is not clear exactly how the double-jeopardy principle affects forfeiture proceedings. Thus, if there are defects in some aspects of a forfeiture proceeding, it is not clear whether the government can pursue an appeal or otherwise seek to have a new proceeding held, particularly where the amount of the forfeiture may be increased.[248]

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[246] Fed. R. Crim. P. 7(c)(2). See Weiner, Crime Must Not Pay: RICO Criminal Forfeiture in Perspective, 1 N. Ill. U.L. Rev. 225, 248 n.89 (1981).

[247] United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied, 482 U.S. 916 (1987).

[248] See United States v. Horak, 833 F.2d 1235, 1246 (7th Cir. 1987) (saying in dictum that double jeopardy would not bar appeal of forfeiture order). See also United States v. Ofchinick, 883 F.2d 1172, 1180 n.5 (3d Cir. 1989) (citing precedents but not reaching the issue).

forfeiture issue decided by the court instead of by a special jury verdict, or even to stipulate as to the extent of forfeiture.[243]

In drafting forfeiture allegations, the wording of the statute should be followed as closely as possible. While broad forfeiture allegations have been upheld,[244] interests and property subject to forfeiture should be described with as much specificity as possible.[245] However, if certain interests or property cannot be described with specificity, it is still best to include them in the forfeiture allegations because property not described in the

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[243] See United States v. Hess, 691 F.2d 188 (4th Cir. 1982). But see United States v. Roberts, 749 F.2d 404, 409 (7th Cir. 1984) (court upheld forfeiture as part of plea agreement, but cautioned that the "mere fact that the defendant has agreed that an item is forfeitable in a plea agreement, does not make it so"), cert. denied, 470 U.S. 1058 (1985); United States v. Premises Known as 3301 Burgundy Road, 728 F.2d 655 (4th Cir. 1984) (where there was no record evidence to indicate that defendant possessed any interest in the property which he agreed to forfeit, Consent Judgment for Forfeiture was not properly entered and case was remanded for a hearing to determine the rightful owner of the property). See also United States v. Alexander, 869 F.2d 91 (2d Cir. 1989) (where defendant pleaded guilty to RICO and agreed to disclose assets, but failed to do so fully, held, court could issue order requiring him to comply with the disclosure agreement).

[244] See, e.g., United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1295 (E.D.N.Y. 1985); United States v. Raimondo, 721 F.2d 476, 477 (4th Cir. 1983), cert. denied, 469 U.S. 837 (1984); United States v. Boffa, 688 F.2d 919, 939 (3d Cir. 1982), cert. denied, 465 U.S. 1066 (1983).

[245] United States v. Payden, 623 F. Supp. 1148 (S.D.N.Y. 1985) (CCE). Courts also have held that overly-general forfeiture allegations can be cured by a bill of particulars. See United States v. Amend, 791 F.2d 1120 (4th Cir.) (CCE), cert. denied, 479 U.S. 930 (1986); United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980) (CCE); United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987).

of the interest.[250]

Prior to the enactment of § 1963(a)(3), it was unclear whether § 1963(a)(1) would apply to forfeiture of income or proceeds from racketeering activity.[251] This question was resolved by the Supreme Court in Russello v. United States, 464 U.S. 16 (1983), where the Court held that interests subject to forfeiture under § 1963(a)(1) include proceeds derived from any violation of § 1962. Therefore, § 1963(a)(1) is applicable to violations of any subsection of § 1962 and is not limited to violations of § 1962(a) or (b). While the Russello case was pending, however, an amendment to the RICO statute was introduced to specifically include proceeds in the forfeiture provisions. In October 1984, § 1963(a)(3) was enacted with the proceeds provision.[252]

b. Section 1963(a)(2). Section 1963(a)(2) includes under the forfeiture provisions any:

> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
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> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

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[250] United States v. Ofchinick, 883 F.2d 1172, 1183-84 (3d Cir. 1989).

[251] See, e.g., United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) (proceeds from racketeering activity not subject to forfeiture); United States v. Martino, 681 F.2d 952 (5th Cir. 1982), aff'd sub nom. Russello v. United States, 464 U.S. 16 (1983) (proceeds are subject to forfeiture).

[252] See infra notes 260, 261, 262, 266 and accompanying text for further discussion of § 1963(a)(3).

3. Forfeiture Provisions

As a result of the amendments to the RICO statute in the Comprehensive Crime Control Act of 1984, there are now three sections to the forfeiture provision in the statute.

a. Section 1963(a)(1). Section 1963(a)(1) provides that anyone who violates any provision of Section 1962 must forfeit to the United States "any interest the person has acquired or maintained in violation of section 1962." This section clearly applies to interests in any enterprise, legitimate or illegitimate, which were acquired with income from racketeering activity or through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(a) or (b), respectively. For example, if a defendant has taken proceeds from racketeering activity and used these proceeds to acquire an interest in a legitimate business, that interest may be forfeited.[249] However, the interest to be forfeited under § 1963 (a)(1) must have been acquired or maintained as a result of the racketeering violation; there must be a "but for" relationship between the offense and the acquisition or maintenance

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[249] See United States v. West, 877 F.2d 281 (4th Cir.) (by using automobile as collateral for drug purchases, defendant "maintained" it in violation of RICO, making it forfeitable under 18 U.S.C. § 1963(a)(1)), cert. denied, 110 S. Ct. 377 (1989); United States v. Horak, 833 F.2d 1235, 1242-44 (7th Cir. 1987) (court remanded to district court to determine if defendant's salary, bonuses, and pension and profit-sharing plans were "acquired and maintained" as a result of racketeering activity, but held that his job was "acquired and maintained" as a result of racketeering activity); United States v. Towne, No. 20715 (E.D. Mich. April 28, 1987) (court ordered forfeiture of defendant's salary as interest acquired in violation of RICO).

enterprise may be forfeitable.[255] This could include voting rights in securities of the enterprise, a management contract between the defendant and the enterprise, or even the right to hold a political or union office.[256] Moreover, this subsection could apply to instrumentalities used in the offense, such as buildings or vehicles used in narcotics transactions, or an interest in a bank involved in laundering drug money, if these interests afforded a source of influence over the illegal enterprise.[257] However, in a CCE forfeiture case, one circuit has held that where a set of buildings only partially (43%) afforded the defendant a source of influence over the enterprise, the parcel should be subdivided so forfeiture would be proportional.[258]

The full extent of the scope of this provision remains uncertain. In at least two cases, the government has been unsuccessful in obtaining forfeiture of some assets under the

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[255] United States v. Thevis, 474 F. Supp. 134, 144 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1986); see also United States v. Veliotis, 586 F. Supp. 1512, 1518-19 (S.D.N.Y. 1984).

[256] United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978), cert. denied, 444 U.S. 864 (1979).

[257] See U.S. Department of Justice, Criminal Division, Criminal Forfeitures Under the RICO and Continuing Criminal Enterprise Statutes 22 n.22 (November 1980); United States v. West, 877 F.2d 281 (4th Cir.) (two houses used for storage and sales of drugs afforded defendant a source of influence over the enterprise), cert. denied, 110 S. Ct. 377 (1989); United States v. Zielie, 734 F.2d 1447 (11th Cir.) (government successfully forfeited property which was used for storing marijuana and for counting money from marijuana sales), cert. denied, 469 U.S. 1189 (1984).

[258] United States v. McKeithen, 822 F.2d 310 (2d Cir. 1987).

This section is directed toward the forfeiture of sources of power other than capital or money. Interests in an enterprise may include personal stock ownership in a corporation or even an interest in a partnership. When a defendant has conducted the affairs of the enterprise in violation of Section 1962, his entire interest in the enterprise is subject to forfeiture, even though some parts of the enterprise may not be "tainted" by racketeering activity.[253] In a case involving forfeiture based upon a Section 1962(a) conviction, one court held that interests purchased with the funds of the corporate enterprise, but in the individual defendant's name, were interests in the enterprise and therefore were subject to forfeiture.[254]

While subsections A, B, and C are limited to interests in, securities of, or claims against the enterprise, subsection D is not so limited and thus makes forfeitable any property or contractual right affording a source of influence over the enterprise. Under this subsection, any property or position of a defendant which is not directly part of the enterprise but which allows the defendant to exert control or influence over the

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[253] See United States v. Anderson, 782 F.2d 908 (11th Cir. 1986); United States v. Walsh, 700 F.2d 846, 857 (2d Cir.), cert. denied, 464 U.S. 825 (1983); United States v. Cauble, 706 F.2d 1322, 1349 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982). But see United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) (holding that forfeiture of defendant's interest in corporation could be so grossly disproportionate to offense as to violate eighth amendment, and remanding to district court for determination of proportionality).

[254] United States v. Washington, 782 F.2d 807 (9th Cir.), modified on other grounds, 797 F.2d 1461 (9th Cir. 1986).

the gross, not net, proceeds of racketeering activity, although some direct costs, such as the costs of carrying out contracts, may be deducted from the amounts subject to forfeiture under some circumstances.[262] However, if the defendant is to be allowed to deduct direct costs, one court has said that the defendant has the burden of going forward on this issue; the government need not prove the absence of direct costs.[263] It is not proper to order forfeiture both of proceeds and assets obtained with those proceeds.[264] In addition, questions may arise about the relationship of forfeiture to other penalties or costs associated with the criminal activity in question, such as civil settlements, fines, restitution, and taxes. The case law in this area is in a relatively early stage of development; prosecutors should look to closely analagous case law for guidance.[265] The proceeds or

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[262] United States v. Lizza Industries, 775 F.2d 492 (2d Cir. 1985) (district court properly refused to deduct overhead operating expenses or taxes paid on profits received from illegal bid rigging contracts, although direct costs incurred in performing the contracts were deducted), cert. denied, 475 U.S. 1082 (1986); United States v. Towne, No. 20715 (E.D. Mich. 1987) (defendant's gross, not net, salary subject to forfeiture); see also United States v. Jeffers, 532 F.2d 1101, 1116-17 (7th Cir. 1976), aff'd in part, vacated in part, Jeffers v. United States, 432 U.S. 137 (1977) (court held in a CCE case that jury instructions defining "income" as "gross income or gross receipts" were entirely proper).

[263] United States v. Ofchinick, 883 F.2d 1172, 1182 (3d Cir. 1989).

[264] See United States v. Acosta, 881 F.2d 1039 (11th Cir. 1989).

[265] See, e.g., United States v. Trotter, 889 F.2d 153 (8th Cir. 1989) (in non-RICO narcotics case, where defendant was ordered to pay fine out of assets already the subject of civil forfeiture proceedings, court upheld the order, rejecting government's argument that, because of relation-back doctrine, fine could not be paid out of assets subject to forfeiture); United States v. Elliott, No. 88 CR 645 (N.D. Ill. Aug. 23, 1989) (where defendant

"source of influence" theory.[259]

c. Section 1963(a)(3). Section 1963(a)(3), which was added to RICO in 1984, codifies the holding in Russello v. United States, 464 U.S. 16 (1983). While Russello held that proceeds of violations of § 1962 are subject to forfeiture under §1963(a)(1), Congress enacted § 1963(a)(3) to specifically include proceeds or property derived from proceeds under the statute. Because of its specificity, any proceeds subject to forfeiture should be alleged under this subsection. It has been held that using § 1963(a)(3) for forfeiture of pre-1984 proceeds is an ex post facto violation.[260] However, use of the Russello decision is not,[261] and § 1963(a)(3) is a codification of the Russello holding with respect to proceeds.

Recent cases indicate that RICO forfeiture should encompass

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[259] United States v. Horak, 633 F. Supp. 190, 198-200 (N.D. Ill. 1986) (holding that the phrase "affording a source of influence over [the enterprise]" modifies all prongs of § 1963(a)(2), so that an "interest in" the enterprise is not subject to forfeiture unless it affords defendant a source of influence over the enterprise), aff'd in part, vacated and rem'd in part, 833 F.2d 1235 (7th Cir 1987); United States v. Ragonese, 607 F. Supp. 649 (S.D. Fla. 1985), aff'd, 784 F.2d 403 (11th Cir. 1986) (holding that defendant's interest in an apartment complex did not afford him a source of influence over the enterprise because he disapproved of drug dealings there, used it as a tax shelter, and improved it).

Although the Horak holding is arguably inconsistent with the plain language and punctuation of the subsection, the 7th Circuit declined to issue a writ of mandamus requiring forfeiture of the defendant's interest in the enterprise. See United States v. Horak, 833 F.2d 1235, 1252-53 (7th Cir. 1987).

[260] United States v. Collins, No. 84-20715 (E.D. Mich. February 27, 1985).

[261] Id.

4. Examples of Forfeiture

a. In United States v. McNary, 620 F.2d 621 (7th Cir. 1980), the former mayor of a town in Illinois was convicted of violating RICO under § 1962(a). McNary received a substantial amount of money to approve the rezoning of property and to process building permits. He then placed the payoff money in the bank accounts of his own business, B&M Manufacturing Company. On occasion, McNary transferred money from the B&M account to another business in which he had an interest. Upon conviction, the jury returned a special verdict finding that McNary's proprietary interests in these two businesses were subject to forfeiture.

b. In United States v. Zang, 703 F.2d 1186 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983), two oil company executives were convicted of violating § 1962(a). The defendants mis-certified over 1 million barrels of lower-tier priced crude oil and sold it as higher-tier crude oil, resulting in an illegal profit of nearly $7.5 million. A portion of this income, derived from a pattern of racketeering consisting of mail and wire fraud, was funnelled into a partnership which both held equally. The sole asset of the partnership was an office building. The appellate court upheld the jury's verdict, which found that the partnership interest in the building, acquired by racketeering funds, was subject to forfeiture.

c. In United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), the defendant was convicted of violating § 1962(a), (c) and (d) based on his trafficking in

property purchased with proceeds should be traced as closely as possible and described as specifically as possible. Account numbers of bank accounts, legal descriptions of property, and registration numbers of cars, airplanes or boats will facilitate the forfeiture process. Also, if tracing the proceeds is difficult, it is possible to use the "net worth" method of circumstantial proof to establish proceeds subject to forfeiture.[266]

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was convicted of RICO based on securities fraud, held, he could deduct from forfeiture of proceeds the amounts he paid as commission and margin interest, but not the income tax he paid on the proceeds; he never had the use of the money paid as commission and interest, but he did have use of the money paid as taxes, which should be treated like overhead rather than direct costs); United States v. Elliott, 714 F. Supp. 380 (N.D. Ill. 1989) (in pre-trial ruling in above case, held, defendant would be entitled to offset money paid in settlement of SEC civil charges against any criminal forfeiture, because the SEC is part of the "United States," and Congress did not intend to provide for "double forfeiture" to the United States); Gambina v. Commissioner of Internal Revenue, 91 T.C. 826 (1988) (held, even though § 1963(c) of RICO provides that ownership of forfeited property vests in the United States at time offense was committed, taxpayer must pay tax on the money that he received as income and that ultimately was forfeited; court stated: "To permit a taxpayer to reduce the fruits of a forfeiture by excluding the amount thereof from gross income would not be consistent with" the Congressional purpose behind RICO forfeiture); Wood v. United States, 693 F. Supp. 452 (E.D. La. 1988) (taxpayer must pay tax on illegal income that ultimately was forfeited to the United States under narcotics forfeiture laws; no loss deduction allowed for the forfeiture, as that would be against public policy), aff'd, 863 F.2d 417 (5th Cir. 1989).

[266] See, e.g., United States v. Nelson, 851 F.2d 976 (7th Cir. 1988) (upholding net worth approach for CCE forfeiture); United States v. Harvey, 560 F. Supp. 1040, 1089-90 (S.D. Fla. 1983) (CCE case where court granted a pre-trial restraining order preventing the defendant from selling or transferring his interest in thirteen specific assets based on a net worth analysis), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854 (1986); United States v. Lewis, 759 F.2d 1316 (8th Cir.), cert. denied, 474 U.S. 994 (1985) (CCE forfeiture using net worth theory upheld). In the case of fungibles such as cash, it may not be necessary to perform any tracing. See supra notes 222, 223 and accompanying text.

Horak also challenged the order as unconstitutional under the eighth amendment. The Seventh Circuit did not reach this issue but stated that it was unlikely that proper forfeiture orders entered under § 1963(a)(1) reaching proceeds of racketeering activity were unconstitutional.

e. In United States v. Pryba, 674 F. Supp. 1518 (E.D. Va. 1987), the government sought forfeiture of the defendants' property following their RICO conviction predicated on federal obscenity statute violations. Because the trial had been bifurcated, the RICO forfeiture issues did not arise until the second phase of the trial following the determination of guilt. The major issue addressed by the court was the government's burden of proof in the forfeiture proceedings. The government argued for the lesser preponderance of the evidence standard while the defendants sought to apply the reasonable doubt standard during the guilt phase of the trial. The court found no cases directly on point, but found Congress' silence on the issue to be persuasive. The court reasoned that had Congress intended a different standard to apply during the forfeiture phase of a RICO proceeding, it would have clearly provided so in the language of the statute. Because it did not, the reasonable doubt standard was held to be applicable.

5. Pre-trial Restraining Orders: Section 1963(d)

A critical step in the forfeiture process involves preserving

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pension interest accrued during the period of criminality is forfeitable. Clearly, a strong argument can be made that the institution or labor union employing the defendant would not knowingly provide pension benefits if the defendant's criminal acts were discovered.

marijuana. Cauble owned a one-third interest in a partnership, Cauble Enterprises. Evidence demonstrated that Cauble made cash deposits to the partnership's account and used partnership employees and assets to conduct the marijuana trafficking. The jury returned a special verdict finding that the defendant had maintained his interest in the partnership in violation of § 1962 and that his interest afforded him a source of influence over the enterprise. As a result, his one-third interest in the partnership was forfeited.

d. In United States v. Horak, 833 F.2d 1235 (7th Cir. 1987), John Horak was convicted of a § 1962(c) violation stemming from his management of H.O.D. Disposal Services. On appeal, Horak challenged the district court's forfeiture order under § 1963(a)(1). Horak contended that the order was improper because it had not been proven that he had "acquired or maintained" all of his forfeited interests in violation of § 1962. The Seventh Circuit agreed and remanded the case for further forfeiture proceedings. The court felt that forfeiture of Horak's job as H.O.D. manager was correct but that viewing Horak's salary, bonuses, and pension and profit-sharing plans as indivisible from his position as manager of H.O.D. was improper. On remand, the district court would have to determine what portion of these interests would not have been acquired "but for" Horak's racketeering activities.[267]

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[267] It is the Department's position that when a defendant uses his office, be it an official office or a labor union position, to participate in a pattern of racketeering activity, the defendant's

be allowed[271] and what burden the government must meet to sustain the order.[272] The 1984 amendments specified and broadened the authority of the courts to take pre-trial measures, but by no means resolved all of the concomitant legal issues. For example, the government's burden when seeking a temporary restraining order for potentially forfeitable property remains unclear.[273]

1293, 1298 (9th Cir. 1982), vacated, 468 U.S. 1206 (1984), on remand, 777 F.2d 1376 (9th Cir. 1985) (sanctions under civil and criminal statutes involve questions of due process).

[271] Compare United States v. Spilotro, 680 F.2d 612, 619 n.4 (9th Cir. 1982) with United States v. Harvey, 560 F. Supp. 1040, 1087-88 (S.D. Fla. 1983).

[272] Compare United States v. Harvey, 560 F. Supp. 1040, 1087-88 (S.D. Fla. 1983) (government must establish by a preponderance of the evidence that it is likely to convince a jury beyond a reasonable doubt that the defendant is guilty of violating RICO or CCE, and that the property at issue is subject to forfeiture) with United States v. Veliotis, 586 F. Supp. 1512, 1521 (S.D.N.Y. 1984) (government must demonstrate probable cause to believe that defendant's property is subject to forfeiture); see also United States v. Beckham, 564 F. Supp. 488, 490 (E.D. Mich. 1983) (government must prove by clear and convincing evidence that the property was involved in a RICO violation, that it would be subject to forfeiture under the statute, and that there are reasonable grounds to believe that the defendant is likely to make the property inaccessible to the government prior to the conclusion of the trial); United States v. Mandel, 408 F. Supp. 679, 681-82 (D. Md. 1976) (the guidelines governing the issuance of a preliminary injunction in a civil case should be applied to provide minimal guidance as to entry of a restraining order under RICO); see generally Hegler, Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?, 57 St. John's L. Rev. 776 (1983).

[273] See United States v. Perholtz, 622 F. Supp. 1253 (D.D.C. 1985) (government must show "substantial likelihood that failure to enter order will result in property being destroyed, removed, or otherwise made unavailable for forfeiture, and that the need to preserve the property outweighs any hardship on defendant); United States v. Thier, 801 F.2d 1463 (5th Cir. 1986) (grand jury findings contained in indictment have weight, but are rebuttable on issue of commission of offense and forfeitability of assets), modified, 809 F.2d 249 (1987).

the availability of the property subject to forfeiture. When a defendant or prospective defendant learns that his assets may be subject to forfeiture, he may begin to dispose or transfer them in order to conceal them from the government. He may even transfer a portion to his attorney in anticipation of attorney fees.[268] In order to prevent any disposal of forfeitable property, the RICO statute authorizes the district courts to enter restraining orders or take other action necessary to preserve the availability of the property. These pre-trial orders have been challenged on the ground that the entry of a restraining order is inconsistent with the presumption of innocence, but this claim has been rejected by most courts.[269] Prior to the 1984 amendments to RICO, the statute contained no guidelines for courts to follow in implementing this section. As a result, courts differed as to whether an adversarial hearing on the propriety of a restraining order was constitutionally mandated,[270] and if so, what kind of evidence would

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[268] See, e.g., United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979); United States v. Long, 654 F.2d 911 (3d Cir. 1981); see also supra notes 196-201 and accompanying text.

[269] See United States v. Ferrantino, 738 F.2d 109, 110 (6th Cir. 1984); United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977); United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979). But see United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985) (holding parts of 1984 CCE forfeiture amendments unconstitutional because they permit freezing of assets without providing a hearing to defendants or third parties); United States v. Mandel, 408 F. Supp. 679, 682 (D. Md. 1976) ("entry of a restraining order at this time...would be substantially prejudicial to the defendants").

[270] Compare United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977) (defendant's "contention that he has been deprived of his property without due process is premature") with United States v. Crozier, 674 F.2d

sought usually involves a balancing between the need to separate the defendant from his illegally acquired property and the need to protect innocent third persons. Because such orders can have, or appear to have, an unfair negative impact on individuals and entities who may not have committed any wrongdoing, the Criminal Division in mid-1989 issued new guidelines to ensure that the pre-trial RICO TRO provisions are used fairly.[277] Under these guidelines, which are reprinted in full at Appendix B to this Manual, before seeking a temporary restraining order, a prosecutor must make a careful assessment, particularly in a legitimate business context, of whether freezing the defendant's assets would do more damage than good when the interests of innocent persons are weighed in the balance. In addition, the prosecutor must make certain public statements that clarify the exact nature of the restraints being sought, to minimize negative impact on legitimate interests. Also, under the new guidelines, the United States Attorneys' offices are required to submit any proposed RICO TRO to the Organized Crime and Racketeering Section for review and approval prior to filing it.

The prosecutor can select one of three stages in seeking a pre-trial restraining order.

a. Upon the filing of an indictment or information. Under Section 1963(d)(1)(A), the court may take appropriate action upon the filing of an indictment or information charging a violation of

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[277] See United States Attorneys' Manual § 9-110.414 (blue sheet issued June 30, 1989) (reprinted at Appendix B, infra).

Two courts of appeals have held that portions of the virtually identical CCE forfeiture amendments unconstitutionally deny due process in that they permit the district court to freeze assets without a hearing until after the defendant is convicted.[274] The Tenth Circuit ruled, however, that a temporary restraining order for a CCE forfeiture case is proper without a hearing where there is an indictment which supplied the probable cause for the restraint.[275] Note that the temporary restraining order may be subject to a defense motion seeking modification to permit the defendant to have living expenses.[276]

In appropriate cases, a pre-trial restraining order is an effective means of preventing the defendant from liquidating or otherwise removing forfeitable property from the court's jurisdiction. Whether a pre-trial restraining order should be

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[274] United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (ex parte temporary restraining order after indictment without any post-deprivation hearing other than trial violates fifth amendment due process guarantees); United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985) (unconstitutional to freeze assets without hearing); see also United States v. Thier, 801 F.2d 1463 (5th Cir. 1986) (forfeiture under a temporary restraining order issued in CCE case proper where adversarial hearing conforming to Fed. R. Civ. P. 65 held promptly after ex parte order granted), modified, 809 F.2d 249 (1987); United States v. Perholtz, 622 F. Supp. 1253 (D.D.C. 1985) (temporary restraining order can issue after hearing where government shows likelihood of prevailing on RICO charge and that property is likely forfeitable).

[275] United States v. Musson, 802 F.2d 384 (10th Cir. 1986). See also United States v. Keller, 730 F. Supp. 151 (N.D. Ill. 1990) (need for hearing on pre-trial TRO is determined by balancing government's interests against those of defendant; here, where there was no factual dispute about probable cause, no hearing was required).

[276] See United States v. Madeoy, 652 F. Supp. 371 (D.D.C. 1987).

the position of the Senate Report, the issue ultimately will be decided by the courts. Some courts already have held that some type of evidentiary hearing is required.[281] Pending final judicial resolution, prosecutors should consult the Asset Forfeiture Office of the Criminal Division whenever this issue arises in a pre-trial restraining order hearing.

If a court requires a hearing prior to issuing a restraining order, the prosecutor will be faced with a strategic decision. Decisions such as that in Crozier allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture count, and possibly to put on witnesses well in advance of trial.[282] Section 1963(d)(3) was enacted to ease the government's burden by providing that the court may receive and consider evidence and information at a pre-trial hearing which would be inadmissible under the Federal Rules of Evidence, thereby allowing for the presentation of hearsay evidence. In any case, meeting such requirements can make obtaining a restraining order quite difficult. These requirements may make pursuing a

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[281] See United States v. Harvey, 814 F.2d 905 (4th Cir. 1987); United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), modified, 809 F.2d 249 (1987); United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985); United States v. Perholtz, 622 F. Supp. 1253 (D.D.C. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985). See also Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 216 (1989) (in a case involving an obscenity prosecution under a state RICO statute, held, it was a violation of the first amendment to permit pre-trial seizure of expressive materials based only on probable cause that the RICO violation had occurred).

[282] See United States v. Spilotro, 680 F.2d 612 (9th Cir. 1982).

§ 1962 and alleging that the property sought to be forfeited would, in the event of conviction, be subject to forfeiture. The government may request the court to issue an order enjoining a defendant from destroying, concealing, or moving the property that is subject to forfeiture. One court has held that such an order cannot be issued to restrain property that is not itself subject to forfeiture, even though that property may later be used to satisfy a forfeiture judgment under the fungibility doctrine.[278] However, the order may impose reasonable restraints on third parties, such as banks, where necessary to preserve the status quo.[279] Of course, any such restraints must be tailored to cause the least intrusion possible, and should be sought only when absolutely necessary.

The Senate Report on the 1984 amendments states that the "probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order."[280] This statement was in response to a series of cases in the Ninth Circuit beginning with United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982), vacated, 104 S. Ct. 3575 (1984), on remand, 777 F.2d 1376 (9th Cir. 1985), which held that the due process clause requires an evidentiary hearing on the issue of probable cause before a restraining order can be issued. Notwithstanding

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[278] United States v. Chinn, 687 F. Supp. 125 (S.D.N.Y. 1988).

[279] See United States v. Regan, 858 F.2d 115 (2d Cir. 1988).

[280] S. Rep. No. 98-225, 98th Cong., 1st Sess. 202 (1983); see United States v. Musson, 802 F.2d 384 (10th Cir. 1986) (indictment supplied probable cause for restraint).

availability of the property for forfeiture.

A temporary restraining order under Section 1963(d)(2) is valid for only ten days unless extended for good cause or the party against whom it is entered consents to an extension for a longer period. This section also provides that a hearing requested concerning such an order must be held at the earliest possible time and prior to the expiration of the temporary order.[283] NOTE: The United States Attorneys' Offices are required to obtain approval from the Asset Forfeiture Office prior to making ex parte application for temporary restraining orders or similar relief in criminal forfeiture cases.[284]

6. Post-trial Forfeiture Issues

Upon conviction of a person under this section, the court will enter a judgment of forfeiture to the United States and also authorize the Attorney General to seize all property ordered forfeited under such terms and conditions as the court deems proper.[285] Section 1963(e) governs matters arising during the

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[283] See United States v. Lewis, 759 F.2d 1316 (8th Cir.) (trial court's issuance of an ex parte temporary restraining order in a CCE case was sharply criticized in dicta), cert. denied, 474 U.S. 994 (1985).

[284] See United States Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress 57 (December 1984).

[285] See, e.g., United States v. Kravitz, 738 F.2d 102 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); see generally United States v. Rosenfield, 651 F. Supp. 211 (E.D. Pa. 1986) (district court in criminal RICO case refused to issue money judgment for forfeiture, but court in civil suit granted summary judgment and issued money judgment in amount of criminal forfeiture against defendant).

restraining order inadvisable because of the potential for damaging premature disclosure of the government's case and trial strategy. Such decisions can only be made on a case-by-case basis depending upon the nature and circumstances of the case and the requirements placed on the government by the court.

b. Prior to filing an indictment. Section 1963(d)(1)(B) provides for obtaining a pre-indictment restraining order under certain conditions. First, there must be notice to persons appearing to have an interest in the property and an opportunity for a hearing. Second, the court must determine that:

> 1) there is a substantial probability that the United States will prevail on the issue of forfeiture;
>
> 2) failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
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> 3) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

If a pre-indictment order is obtained under this section, it will be effective for only ninety days unless it is extended for good cause, or an indictment or information is filed within that time.

c. Ex parte pre-indictment restraining order. A temporary ex parte pre-indictment restraining order may be obtained by the government if the government can demonstrate that:

> 1) there is probable cause to believe that the property involved is subject to forfeiture; and
>
> 2) the provision of notice will jeopardize the

Following the entry of an order of forfeiture and the seizure of the forfeited property, the government must publish a public notice of the order of forfeiture and of its intent to dispose of the property.[287] The government may also provide direct written notice to any third parties known to have an interest in the property. Within thirty days after the last publication of notice or actual receipt of notice, an interested party, but not the defendant, may petition the court for a hearing to determine the validity of his interest in the property. The hearing is then held before the court alone.[288]

If possible, the hearing is to be held within thirty days of the filing of the petition, and the court may hold a consolidated hearing to resolve all or several petitions arising out of a single case. At the hearing, both the petitioner and the United States may present evidence and witnesses, and cross-examine witnesses who appear. The court may also consider relevant portions of the criminal trial record.[289] In order to prevail, the petitioner, who has the burden of proof, must establish by a preponderance either: (1) that he had a legal right, title, or an interest in the property superior to the defendant at the time of the acts giving rise to the forfeiture; or (2) that he is a bona fide purchaser for value of the property and at the time of the purchase did not know

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[287] 18 U.S.C. § 1963(l)(1).

[288] 18 U.S.C. § 1963(l)(5).

[289] Id.

period from the entry of the forfeiture order until the time the Attorney General directs disposition of the property. During this time the court may, upon application of the government, enter appropriate restraining orders, require the execution of a performance bond, appoint receivers, trustees, appraisers, or accountants, or "take any other action to protect the interest of the United States in the property ordered forfeited."[286] Section 1963(j) provides that the district courts have jurisdiction to enter such orders without regard to the location of any of the property subject to forfeiture. This is different from a civil forfeiture, where the power of the court extends only to property within the district in which it is located.

Section 1963(l) provides the exclusive judicial procedure by which a third party may claim an interest in property subject to forfeiture. Third parties may not intervene in the criminal case or commence an action at law or equity against the United States concerning the validity of their alleged interest in the property subsequent to the filing of an indictment. However, under Section 1963(f), the court may, upon application of a person other than the defendant or a person acting in concert with or on behalf of the defendant, stay the sale or disposition of the property pending the outcome of any appeal of the criminal case. The applicant must demonstrate to the court that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

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[286] 18 U.S.C. § 1963(d).

forfeiture,[293] and take appropriate measures to safeguard and maintain forfeited property pending its disposition.[294] The statute also authorizes the Attorney General to promulgate regulations for carrying out the responsibilities delegated to him concerning the forfeited property, but no regulations have yet been proposed. Pending the promulgation of such regulations, the currently applicable provisions of the customs laws, 19 U.S.C. § 1602 et seq., remain in effect.

V. Guidelines for the Use of RICO

A. RICO Policy

The RICO statute did not create a new substantive offense because any acts which are punishable under RICO are also punishable under existing state and federal statutes. Since RICO encompasses a wide variety of state and federal offenses which can serve as predicate acts of racketeering, the statute can be used very broadly in a number of different circumstances. While this broad scope provides the government with an effective and versatile tool for dealing with a wide variety of criminal activity, it also provides the potential for abuse and overuse. Injudicious use of the statute would reduce its impact in cases where it is truly

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[293] Procedures and restrictions concerning the awarding of compensation to informants providing information leading to forfeitures are set forth at 28 U.S.C. § 524(c) and in internal Department memoranda. For further information, contact the United States Marshals Service, Seized Asset Management Branch, or the Organized Crime and Racketeering Section.

[294] See generally Govern v. Meese, 811 F.2d 1405 (11th Cir. 1987) (court denied defendant's motion seeking to have IRS tax liens credited from forfeited property, reasoning the suit was barred by sovereign immunity).

that the property was subject to forfeiture.[290]

If, after the hearing, the court determines that the petitioner has a legal right or interest in the property which renders the order of forfeiture invalid in whole or in part, the court will amend the order of forfeiture in accordance with its determination.[291] Following the court's disposition of all petitions filed under this section, the United States has clear title to the forfeited property and may warrant good title to any subsequent purchaser or transferee. The Attorney General may direct the disposition of the property by sale or any other commercially feasible means. Neither the defendant nor any person acting in concert with or on his behalf is eligible to purchase the forfeited property.[292]

Under Section 1963(g), the Attorney General is also authorized to grant petitions for mitigation or remission, compromise claims, restore forfeited property to victims of RICO violations, award compensation to persons providing information resulting in

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[290] 18 U.S.C. § 1963(l)(6); see United States v. Mageean, 649 F. Supp. 820 (D. Nev. 1986) (tort claimants from airplane crash lacked any interest in forfeited plane, but creditors had interest under § 1963(l)); see also United States v. Reckmeyer, 628 F. Supp. 616 (E.D. Va. 1986) (in CCE forfeiture, court construed provisions liberally and awarded some assets to third parties claiming good faith and lack of knowledge of criminal activity).

[291] See, e.g., United States v. Campos, 859 F.2d 1233 (6th Cir. 1988) (denying claims of unsecured creditors under analogous provision of narcotics forfeiture statute, 21 U.S.C. § 853(n)(6)).

[292] 18 U.S.C. § 1963(f).

5. use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;

6. the case consists of violations of state law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has significant interest;

7. the case consists of violations of state law, but involves prosecution of significant political or government individuals, which may pose special problems for the local prosecutor.

The last two requirements reflect the principle that the prosecution of state crimes is primarily the responsibility of the state authorities. RICO should be used to prosecute what are essentially violations of state law only if there is a legitimate reason for doing so.

If after reviewing the case a prosecutor believes that use of the RICO statute is warranted, a prosecutive memorandum and a copy of the proposed indictment, information, civil complaint, or civil investigative demand should be sent to the Organized Crime and Racketeering Section, in accordance with the provisions of chapter 110 of Title 9 of the United States Attorneys' Manual.

B. Drafting the Indictment

1. Structure of the Indictment

While every indictment must be drafted according to the nature of the individual case, there are certain drafting guidelines which, if followed, will facilitate the reviewing process. These guidelines were developed from successful prior prosecutions and are intended to promote uniformity in RICO indictments which, in turn, should promote uniformity in the development of RICO case

warranted. For this reason, it is the policy of the Criminal Division that RICO be selectively and uniformly used. In order to ensure uniformity, all RICO criminal and civil actions brought by the federal government must receive prior approval from the Organized Crime and Racketeering Section in Washington, D.C., in accordance with the approval guidelines at Section 9-110.100 et seq. of the United States Attorneys' Manual. The guidelines are reprinted at Appendix A of this Manual.

Not every case that meets the technical requirements of a RICO violation will be authorized for prosecution. For example, a RICO count should not be added to a routine mail or wire fraud indictment unless there is a special reason for doing so. RICO should only be invoked in those cases where it meets a special need or serves a special purpose that would not be met by prosecution only on the underlying charges. Prosecutors should use discretion in requesting RICO authorization, and should seek to include a RICO violation in an indictment only if one or more of the following requirements are present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;

2. a RICO prosecution would provide the basis for an appropriate sentence under all of the circumstances of the case;

3. a RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;

4. RICO is necessary for a successful prosecution of the government's case against the defendant or a co-defendant;

not treated as multiple acts of racketeering.[296]

If there are multiple defendants who are not all charged with all of the predicate acts, it is useful to include a chart indicating the acts with which each defendant is charged. This will make it easier for the judge and jury to grasp the nature of the RICO violation.

The scope of the RICO allegations should be confined to the facts of the case, especially with respect to organized crime figures or other persons who may well be charged in more than one RICO indictment. This is most important in RICO conspiracy counts, and in allegations relating to venue and to the dates of the RICO offense. The pattern of racketeering should be drafted to allege that it "consists of" rather than "includes" the acts of racketeering. This will help avoid double jeopardy problems if a RICO defendant is to be charged with a second RICO violation sometime in the future.[297] In addition, some courts have expressly held that it is improper to permit the jury to consider as RICO predicates any acts that are not charged in the RICO count.[298]

If both a substantive RICO count and a RICO conspiracy count are charged, the pattern of racketeering activity from the

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[296] See United States v. Kragness, 830 F.2d 842, 860-61 (8th Cir. 1987).

[297] See infra Section V (B)(2)(f) (double jeopardy).

[298] See, e.g., United States v. Neapolitan, 791 F.2d 489, 500-01 (7th Cir.), cert. denied, 479 U.S. 939 (1986); United States v. Cauble, 706 F.2d 1322, 1344 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Panno, No. 86 CR 329 (N.D. Ill. May 7, 1987).

law.

The first guideline is to keep the RICO count as clear and simple as possible. If the pattern of racketeering consists of offenses which are also alleged as separate counts of the indictment, these counts can be incorporated by reference into the RICO count. In such a case, the RICO count should be very concise.

If the racketeering acts consist of state offenses, or federal offenses which are not charged in separate counts, then they must be set out in the RICO count. In such a case, each predicate act should be clearly set out so that it could stand as a separate count of an indictment, including venue, the date of the offense, the defendants charged with that offense, and citation of the statute which was violated.[295] If possible, each racketeering act should be designated and numbered as a predicate act or an act of racketeering so that the structure of the pattern of racketeering is evident. Additionally, if any of the predicate acts are divided into sub-predicates to solve single episode problems, see supra Section II(E)(1), care should be taken in drafting the indictment language to ensure that the sub-predicates of a given predicate are

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[295] RICO does not incorporate state rules of pleading. Even if a state conspiracy statute requires that an overt act be alleged, a RICO predicate based on that statute need not allege an overt act. See United States v. Bagaric, 706 F.2d 42, 62-64 (2d Cir.), cert. denied, 464 U.S. 840 (1983); United States v. Dellacroce, 625 F. Supp. 1387, 1391 (E.D.N.Y. 1986). However, if a RICO predicate is too broadly drafted, it may be dismissed as insufficient. See United States v. McDonnell, 696 F. Supp. 356 (N.D. Ill. 1988) (court dismissed predicate that alleged "multiple" acts of bribery over a 3-year period and did not name the payors or the cases the bribes were meant to influence).

instances, the evidence in the case may not lend itself to the drafting of a very specific pattern of acts. In such circumstances, the Organized Crime and Racketeering Section may approve a RICO conspiracy count containing a somewhat broad and unspecific pattern.[301] This form of pleading should be avoided if possible, however.

2. Other Drafting Considerations

a. Multiplicity

Multiplicity is the charging of a single offense in several counts. This issue arises when defendants are charged with substantive violations of RICO, RICO conspiracy, and committing the underlying predicate offenses. The danger in multiplicity of charges is that it may lead to multiple sentences for a single offense or may prejudice the defendant by creating the impression that several offenses were committed where there may have been but one violation. The test for determining whether one offense or separate offenses are charged is whether each count requires proof of a fact which the other does not.[302] Courts have repeatedly held that RICO and RICO conspiracy charges require proof of different

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[301] See, e.g., United States v. Phillips, 874 F.2d 123 (3d Cir. 1989) (affirming conviction on RICO conspiracy count alleging multiple, unspecified predicate violations).

[302] United States v. Boffa, 513 F. Supp. 444, 476 (D. Del. 1980); see United States v. Biaggi, 675 F. Supp. 790 (S.D.N.Y. 1987) (multiple acts of mail fraud not multiplicities because they involved different proof, as they were based on different schemes).

substantive RICO count can be incorporated by reference into the RICO conspiracy count. In our view, this approach is preferable to incorporating portions of the conspiracy count into the substantive count. Incorporating conspiracy language, with its references to agreement and other features of RICO conspiracy doctrine, can confuse the jury by making it appear that the substantive count contains unnecessary elements and language. For this reason it is preferable to position the substantive count before the RICO conspiracy count in the indictment.

RICO conspiracy counts can pose special drafting problems. There is no requirement that a RICO conspiracy charge include overt acts.[299] There is also no clear legal requirement that a RICO conspiracy count allege the details of the specific acts that make up the pattern of racketeering activity, but it is the policy of the Organized Crime and Racketeering Section that such details be included.[300] It is unlikely that a RICO conspiracy count will be authorized unless a pattern of racketeering activity is alleged in specific detail, to the extent that the evidence will permit. If the details are not included, the defendant may be able to make a strong double jeopardy argument in connection with later RICO prosecutions because it may be unclear exactly what conduct was charged in the earlier RICO conspiracy case. However, in some

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[299] See supra note 203.

[300] In United States v. Neapolitan, 791 F.2d 489, 500-01 (7th Cir.), cert. denied, 479 U.S. 939 (1986), the Seventh Circuit held that considerable specificity with respect to the pattern of racketeering activity is required in a RICO conspiracy count.

946 (1980), the defendants challenged a RICO conspiracy count on the basis that it encompassed several substantive offenses. The court found that the count was not duplicitous because the various substantive offenses were merely descriptive of the single overall agreement to conduct and participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. Similarly, a RICO conspiracy count that alleges predicate acts of racketeering that are in themselves conspiracies is not duplicitous, because a RICO conspiracy is broader than a conspiracy to commit a particular crime.[304]

In United States v. Pepe, 747 F.2d 632 (11th Cir. 1984), the defendants argued on appeal that the indictment was unclear and duplicitous because the substantive RICO count presented alternate grounds of RICO liability (a pattern of racketeering activity and also the collection of unlawful debt). While the court agreed that stating the two RICO prongs in separate counts could simplify matters, it held that the use of alternative grounds of RICO liability did not contravene the statute or any of the defendants' rights. Id. at 673.[305]

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[304] See, e.g., United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 99-100; United States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987); United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984). See also United States v. Yarbrough, 852 F.2d 1522 (9th Cir.) (not duplicitous for RICO count to charge multiple predicate acts concerning the same conduct), cert. denied, 109 S. Ct. 171 (1988).

[305] See also United States v. Vastola, 670 F. Supp. 1244, 1253-54 (D.N.J. 1987) (allowing two Section 1962(c) counts, one based on an unlawful pattern of racketeering and the other on unlawful debt collection).

elements from any underlying predicate offenses.[303] Therefore, such charges are not multiplicities, and separate convictions and sentences are proper for each charge.

b. Duplicity

Duplicity is the joining in a single count of two or more distinct and separate offenses. Where counts are duplicitous the jury is prevented from acquitting or convicting on each separate offense, and duplicity may conceal the specific charge on which a defendant may be found guilty. The duplicity argument has not been raised often in the RICO context. In United States v. Amato, 367 F. Supp. 547, 549 (S.D.N.Y. 1973), the court held that a single conspiracy count which alleged violations of both 18 U.S.C. § 1962 and the general conspiracy statute, 18 U.S.C. § 371, was not duplicitous. However, there is no need to allege § 371 in a RICO conspiracy because § 1962(d) covers that offense. In United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S.

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[303] See, e.g., United States v. Dellacroce, 625 F. Supp. 1387, 1391-92 (E.D.N.Y. 1986) (RICO and RICO conspiracy); United States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985) (RICO and RICO conspiracy), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987); United States v. Castellano, 610 F. Supp. 1359, 1392-96 (S.D.N.Y. 1985) (RICO and RICO conspiracy); United States v. Standard Drywall Corp., 617 F. Supp. 1283 (E.D.N.Y. 1985) (RICO conspiracy and 18 U.S.C. § 371 conspiracy to defraud the United States); United States v. Gambale, 610 F. Supp. 1515, 1546 (D. Mass. 1985) (RICO, RICO conspiracy, gambling, obstruction of justice, and loansharking); United States v. Boffa, 513 F. Supp. 444, 476 (D. Del. 1980) (RICO, RICO conspiracy, and Taft-Hartley violations); United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979) (RICO, RICO conspiracy, and interstate transportation of stolen property), cert. denied, 445 U.S. 946 (1980); United States v. DePalma, 461 F. Supp. 778, 786 (S.D.N.Y. 1978) (RICO, securities fraud, and bankruptcy fraud).

conspiracy.[307] If such a variance can be shown to have affected the substantial rights of the defendants, they are entitled to a new trial. This argument has been used to attack RICO conspiracy convictions because RICO conspiracy charges often involve numerous defendants involved in a wide variety of criminal activities. In many cases not every defendant is involved in every act of racketeering. A single conspiracy to violate a substantive RICO provision may be comprised of a pattern of agreements that, absent RICO, would constitute multiple conspiracies. In this respect, a RICO conspiracy charge may encompass several separate conspiracies. Use of RICO in this manner has been upheld because Congress' purpose in enacting RICO was to provide for single prosecution of multifaceted, diversified criminal enterprises.[308] Thus, a pattern of agreements that would constitute multiple conspiracies may be joined in a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense.[309] If the government's

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[307] United States v. Sutherland, 656 F.2d 1181, 1189 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982). For an analysis of the relationship between "variance" and "misjoinder," see the discussion at 1190 n.6.

[308] United States v. Elliott, 571 F.2d 880, 901-02 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

[309] See United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988), cert. denied, 109 S. Ct. 1966 (1989) (evidence showed that defendant participated in the affairs of overall conspiracy, not just smaller conspiracy); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988) (fact that various defendants participated in affairs of enterprise through different crimes did not mean that there were multiple conspiracies, as long as all acts furthered the enterprise's affairs), cert. denied, 109 S. Ct. 1637 (1989); United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989) (court rejected defense argument that alleging multiple conspiracies as predicate acts amounted to improperly alleging multiple

Another context in which the duplicity argument may arise involves the situation where an act of racketeering consists of several sub-acts. For example, a pattern of racketeering activity may consist of five separate bribery schemes, each of which involved the payment of several individual bribes. Thus, even though each racketeering act in the hypothetical consists of component acts of bribery, the racketeering act is not duplicitous.[306]

c. Variance: Single and Multiple Conspiracies

A material variance between the indictment and the government's evidence is created by the government's proof of multiple conspiracies under an indictment alleging a single

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[306] See United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 100-04 (expressing some concern about duplicity but finding no prejudicial error where special verdicts were used and jury decided on sub-predicates unanimously); United States v. Stolfi, No. 88 Cr 53 (S.D.N.Y. May 13, 1988); United States v. Biaggi, 675 F. Supp. 790 (S.D.N.Y. 1987); United States v. Dellacroce, 625 F. Supp. 1387, 1390-91 (E.D.N.Y. 1986); United States v. Castellano, 610 F. Supp. 1359, 1424 (S.D.N.Y. 1985); see also United States v. Jennings, 842 F.2d 159 (6th Cir. 1988) (government may show that two predicate acts occurred although they are pleaded in one count; here, two separate telephone calls made in furtherance of unlawful narcotics activity); United States v. Kragness, 830 F.2d 842, 860-61 (8th Cir. 1987) (sub-predicates could have been treated as multiple racketeering acts). For a discussion of duplicity in a non-RICO case, see United States v. Berardi, 675 F.2d 894 (7th Cir. 1982).

During the RICO review process, every effort is made to identify and adequately specify "acts of racketeering." Once an act of racketeering has been approved that consists of "sub-predicates," that approval requires the prosecution to adhere to the letter and spirit thereof. In other words, the prosecution may not thereafter argue to the court or to the jury, as separate acts of racketeering, that which has been authorized as one act of racketeering.

rights. In United States v. Manzella, 782 F.2d 533 (5th Cir.), cert. denied, 476 U.S. 1123 (1986), the court found proof of two small conspiracies rather than one overall conspiracy, but held the variance to be harmless because there was no actual prejudice to the defendant. However, the district court in United States v. Cryan, 490 F. Supp. 1234 (D.N.J.), aff'd without opinion, 636 F.2d 1211 (1980), dismissed a RICO conspiracy count because it found that the count charged at least two separate conspiracies involving entirely different groups of people.

Although the variance issue is usually a post-trial issue, it is raised in motions to dismiss the indictment and is also a consideration when preparing jury instructions.[311] In United States v. Boffa, 513 F. Supp. 444 (D. Del. 1980), the district court refused to dismiss the RICO conspiracy count on the ground that it alleged multiple conspiracies. The court found that the indictment only charged a single conspiracy, but warned that if the evidence offered at trial demonstrated multiple conspiracies, the defendants might be entitled to acquittal on that count. The issue relating to jury instructions was raised on appeal in United States v. Le Compte, 599 F.2d 81 (5th Cir. 1979), cert. denied, 445 U.S. 927 (1980), where the defendants contended that the trial court erred in refusing to instruct on the differences between single and multiple conspiracies. The appellate court, having already ruled that there was no fatal variance, held that the requested

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[311] See United States v. Biaggi, 672 F. Supp. 112, 122 (S.D.N.Y. 1987) (issue of multiple conspiracies would be left for decision by properly instructed jury after trial).

evidence does not establish that there was one overall agreement, the conviction may be subject to the variance argument.[310]

While most RICO conspiracy cases meet the single conspiracy requirement, multiple conspiracies were found by appellate courts in a few cases. For example, in United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982), the court found that the RICO conspiracy count consisted of two separate, unrelated schemes to bribe a judge. The Fifth Circuit upheld the convictions, however, because it found that the variance did not affect the substantial rights of the defendants. Similarly, in United States v. Bright, 630 F.2d 804 (5th Cir. 1980), the court found that defendant Bright was not a member of the larger alleged conspiracy but was a member of a limited conspiracy with one of the other defendants. Again the court held that the variance was not fatal because the variance between the indictment and the proof did not affect Bright's substantial

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conspiracies); United States v. McCollom, 651 F. Supp. 1217 (N.D. Ill.) (denying defendant's severance motion and holding that although there were related conspiracies, there was one grand overall scheme), aff'd on other grounds, 815 F.2d 1087 (7th Cir. 1987); United States v. Persico, 621 F. Supp. 842, 856-57 (S.D.N.Y. 1985) (a RICO conspiracy is broader than a conspiracy to commit a particular crime); United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir.) (a RICO conspiracy, supported by acts of racketeering activity that are in themselves conspiracies, does not violate the prohibition against conviction for multiple conspiracies when the indictment charges a single conspiracy), cert. denied, 469 U.S. 831 (1984).

[310] See United States v. Vastola, 670 F. Supp. 1244, 1260 (D.N.J. 1987) (government must prove unified agreement to participate in affairs of enterprise through pattern of racketeering or unlawful debt; otherwise, there would be multiple conspiracies and acquittal).

for severance from two co-defendants on the ground that the co-defendants were involved in other activity that would result in prejudice to him. The court denied the motion, stating that the possibility of guilt by association alone does not afford a basis for severance.[314] In United States v. Le Compte, 599 F.2d 81 (5th Cir. 1979), cert. denied, 445 U.S. 927 (1980), two defendants argued on appeal that they were the victims of prejudicial spillover from testimony concerning the acts of co-defendants. The appellate court affirmed their convictions, holding that "the Constitution does not require that in a charge of group crime a trial be free of any prejudice but only that the potential for transferability of guilt be minimized to the extent possible." Id. at 83.

However, in United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), the court reversed the convictions of two defendants on two substantive counts after reversing their conviction on the RICO conspiracy count. The court found that it was too prejudicial to the defendants, whose involvement in the enterprise was limited, to be tried on the two counts as part of a massive race-fixing conspiracy. Id. at 1138-

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[314] See also United States v. Dellacroce, 625 F. Supp. 1387, 1392-93 (E.D.N.Y. 1986) (joinder upheld in complex case involving eight defendants, relying on prospect of careful instructions); United States v. Persico, 621 F. Supp. 842, 850-55 (S.D.N.Y. 1985) (considerations of judicial economy, safety of witnesses, and the government's asserted need to try the defendants together to provide the jury a fair picture of the criminal activity of the Colombo Family required that a joint trial be held), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987).

instruction was not required.

For purposes of drafting a RICO indictment, consideration should be given to possible arguments that a RICO conspiracy is actually multiple conspiracies, and efforts should be made to prevent this issue from arising. The issue of variance is also related to the issues of severance and misjoinder.

d. Severance, Misjoinder, and Prejudicial Spillover

The issues of severance and misjoinder arise in RICO cases just as they do in other large-scale criminal prosecutions. The only difference is that a RICO prosecution may include a broader range of criminal activity. Otherwise, the same analysis applies to RICO cases. If the enterprise is sufficiently established and each defendant has participated in the enterprise through the commission of two predicate acts which are related to the enterprise, Rule 8(b) should be satisfied.[312] Non-RICO defendants can be included in other counts of the indictment if they participated in offenses which were related to the enterprise.[313]

In United States v. Boffa, 513 F. Supp. 444 (D. Del. 1980), one of the defendants filed a motion under Fed. R. Crim. P. 14

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[312] See United States v. Persico, 621 F. Supp. 842, 850-55 (S.D.N.Y. 1985) (in a prosecution of the Colombo Crime Family, Rule 8(b) misjoinder motion denied, even though all defendants were not named in every count of the indictment nor in every predicate act, because the racketeering acts constituted a "series of acts or transactions" sufficiently linked to allow joinder), aff'd on other grounds, 832 F.2d 705 (2d Cir. 1987); see also United States v. Biaggi, 672 F. Supp. 112, 117-21 (S.D.N.Y. 1987) (joinder proper where defendant has general awareness of enterprise's scope).

[313] United States v. DePalma, 461 F. Supp. 778, 779 (S.D.N.Y. 1978).

multi-defendant cases: the district court should elicit a good-faith estimate of trial time from the prosecutor; if the time is likely to exceed four months, the prosecutor should provide the court with a reasoned basis for concluding that a joint trial is proper; the judge should consider separate trials, particularly for peripheral defendants; and the judge should require the prosecutor to make an especially compelling justification for a joint trial of more than 10 defendants.[317] Other decisions have upheld joinder in multi-defendant cases,[318] and the joinder of RICO and non-RICO charges.[319]

The issue of misjoinder also arises when there is a variance between a single conspiracy indictment and evidence of multiple

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[317] United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989).

[318] See, e.g., United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied, 483 U.S. 1021 (1987); United States v. Teitler, 802 F.2d 606 (2d Cir. 1986); United States v. Russo, 796 F.2d 1443 (11th Cir. 1986); United States v. O'Malley, 796 F.2d 891 (7th Cir. 1986); United States v. Arocena, 778 F.2d 943 (2d Cir. 1985), cert. denied, 475 U.S. 1053 (1986); United States v. Stefan, 784 F.2d 1093 (11th Cir.), cert. denied, 479 U.S. 1009 (1986); United States v. Manzella, 782 F.2d 533 (5th Cir.), cert. denied, 476 U.S. 1123 (1986); United States v. Schell, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Biaggi, 672 F. Supp. 112 (S.D.N.Y. 1987); United States v. McCollom, 651 F. Supp. 1217 (N.D. Ill.), aff'd on other grounds, 815 F.2d 1087 (7th Cir. 1987); United States v. Santoro, 647 F. Supp. 153 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); United States v. Friedman, 635 F. Supp. 782 (S.D.N.Y. 1986); United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985) (67-count indictment against 14 defendants), aff'd, 808 F.2d 84 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987).

[319] United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988) (RICO and income tax charges), cert. denied, 109 S. Ct. 813 (1989); United States v. Qaoud, 777 F.2d 1105, 1118 (6th Cir.) (perjury and RICO charge joined because based on same evidence), cert. denied, 475 U.S. 1098 (1986).

39.[315]

At least two district courts have granted severance motions for case management purposes due to the complexity of the cases.[316] The Second Circuit, in affirming convictions in the massive "Pizza Connection" prosecution, held that the 17-month trial of 21 defendants with more than 275 witnesses was not so complex as to violate due process. However, in recognition of the disadvantages of such trials, the court laid down benchmarks for future complex

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[315] See also United States v. Guiliano, 644 F.2d 85 (2d Cir. 1981), where the two defendants were convicted of RICO and two predicate counts of bankruptcy fraud. The appellate court reversed one of the bankruptcy fraud counts of one of the defendants for lack of evidence, which resulted in reversal of his RICO conviction as well. The court then ordered a retrial of his second bankruptcy fraud count because the prejudicial effect of "tarring a defendant with the label of 'racketeer' tainted the conviction on an otherwise valid count." 644 F.2d at 89. Also, in United States v. Caldwell, 594 F. Supp. 548, 552-53 (N.D. Ga. 1984), the court, sua sponte, divided the indictment for trial because of the number of conspiracy counts, witnesses, and defendants, in order to avoid juror confusion regarding each alleged offense.

[316] United States v. Vastola, 670 F. Supp. 1244, 1262-63 (D.N.J. 1987) (separated RICO and non-RICO defendants); United States v. Gallo, 668 F. Supp. 736, 749-50 (E.D.N.Y. 1987) (held joinder proper, but severed case due to unmanageable complexity). The Gallo case involved the RICO prosecution of 16 members of the Gambino Crime Family. In considering the defendants' motions for severance, the district court examined a number of factors to determine whether "substantial prejudice" would result from a joint trial: the complexity of the indictment; the estimated length of trial; disparities in the amount or types of proof offered against the defendants; disparities in the degrees of involvement by defendants in the overall scheme; possible conflicts between various defense theories and trial strategies; and, particularly, the prejudice from evidence which is admissible against some defendants but inadmissible as to another defendant. After weighing these factors, the court determined that a single jury could not render a fair verdict as to all defendants, and granted, in part, the motions for severance. Prosecutors should be aware that some cases may present circumstances that tend to diminish, rather than enhance, the chances of success.

defendant under § 1962(c).[323] However, a defendant who has joined a RICO conspiracy outside the five-year statute of limitations may be indicted under § 1962(d) if he remains a conspirator within the last five years,[324] or where the conspiracy has not yet accomplished or abandoned its objectives.[325] It is not necessary for the government to establish that within the five-year period the defendant agreed to the commission of additional acts. However, the Organized Crime and Racketeering Section may not approve a RICO conspiracy count against a defendant who has exhibited no active participation in the conspiracy, or association with it, in the last five years, unless special circumstances are present.

In addition, one of the predicate acts must have taken place after October 15, 1970, the effective date of the statute. While this requirement no longer poses a problem, it is important to the extent that new predicate acts were added to the statute in 1984, 1986, 1988, and 1989.[326] If any of these new predicate acts are to

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[323] United States v. Salerno, 868 F.2d 524 (2d Cir. 1989); United States v. Lopez, 851 F.2d 520 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989); United States v. Persico, 832 F.2d 705, 714-15 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Castellano, 610 F. Supp. 1359, 1383 (S.D.N.Y. 1985).

[324] United States v. Salerno, 868 F.2d 524 (2d Cir.), cert denied, 109 S. Ct. 3192 (1989); United States v. Lopez, 851 F.2d 520 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989).

[325] United States v. Rastelli, 870 F.2d 822 (2d Cir.), cert. denied, 110 S. Ct. 515 (1989); United States v. Lopez, 851 F.2d 520 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989); United States v. Persico, 832 F.2d 705, 713-14 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Coia, 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984).

[326] See supra notes 4, 5, 6.

conspiracies. When evidence of more than one crime has been presented in a single trial, it may result in a transference of guilt among defendants who should not have been joined together in a single trial. The difference between these two doctrines is that misjoinder under Rule 8(b) is inherently prejudicial, while a material variance will result in a new trial only if the defendants can show that their substantial rights were affected by the variance.[320]

e. Statute of Limitations

The general federal five-year limitations period (18 U.S.C. § 3282) is applicable to RICO prosecutions.[321] In the case of a charge under Section 1962(c), one of the predicate acts of racketeering must have been committed within five years of the date of the indictment.[322] If there is more than one defendant in the case, the statute of limitations must be satisfied as to each

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[320] United States v. McLain, 823 F.2d 1457, 1466-67 (11th Cir. 1987); United States v. Sutherland, 656 F.2d 1181, 1190 n.6 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United States v. Caldwell, 594 F. Supp. 548, 553-56 (N.D. Ga. 1984).

[321] For civil RICO treble-damages actions, a four-year statute of limitations period applies. Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987).

[322] United States v. Salerno, 868 F.2d 524 (2d Cir.), cert. denied, 109 S. Ct. 3192 (1989); United States v. Lopez, 851 F.2d 520 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989); United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Walsh, 700 F.2d 846, 851 (2d Cir.), cert. denied, 464 U.S. 825 (1983); United States v. Srulowitz, 681 F. Supp. 137 (E.D.N.Y. 1988). See also United States v. Bethea, 672 F.2d 407, 419 (5th Cir. 1982); United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977).

of the commission of a later act of racketeering.[329] For example, if the most recent act of racketeering occurred on January 1, 1987, the second most recent act must have occurred on or after January 1, 1977, and the third most recent act must have occurred on or after January 1, 1967. If, however, in the above example, the most recent act occurred on January 1, 1987 and the second most recent act occurred on January 1, 1980, the next most recent act must occur on or after January 1, 1970. Thus, an easy way for determining RICO statute of limitations is to take the date of the most recent act and count back for each additional act; as long as no adjacent acts are separated by more than ten years, the chain remains intact.

The statute does not provide a definite cut-off point for past predicate acts. Theoretically, a pattern of racketeering activity could include any past predicate act as long as the last act occurred within ten years of the commission of a prior act.[330] The only limitation may be on due process grounds; if an act was committed so long ago that a defendant is unable to prepare a proper defense, this may violate due process principles.

The reach of the RICO statute allows a RICO prosecution to include state and federal offenses which would otherwise be barred

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[329] 18 U.S.C. § 1961(5); see United States v. Pepe, 747 F.2d 632, 663 n.55 (11th Cir. 1984).

[330] See United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267, 292 n.31 (3d Cir. 1985) (acts occurring between 1961 and 1982 were not time-barred under RICO), cert. denied, 476 U.S. 1140 (1986); United States v. Dellacroce, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986) (no prejudice shown from charging some predicate acts occurring between 1967 and 1974 in 1985 case).

be used in the pattern of racketeering, at least one of those offenses must have taken place after the effective date of the amendments.

A related question concerns when an indictment is "found" where it has been sealed under Fed. R. Crim. P. 6(e). For statute of limitations purposes, an indictment is found when the grand jury returns it.[327] However, if the defendant can show "substantial actual prejudice occurring between the date of sealing and the date of unsealing, the expiration of the statute of limitations period before the latter event warrants dismissal of the indictment."[328]

Once the basic limitations requirement is met, the pattern of racketeering activity may include other predicate acts which occurred within ten years, excluding any period of imprisonment,

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[327] See United States v. Srulowitz, 819 F.2d 37 (2d Cir.), cert. denied, 479 U.S. 843 (1987); United States v. Southland Corp., 760 F.2d 1366 (2d Cir.), cert. denied, 474 U.S. 825 (1985).

[328] United States v. Srulowitz, 819 F.2d 37, 40 (2d Cir.) (citing United States v. Muse, 633 F.2d 1041, 1042 (2d Cir.) (en banc), cert. denied, 450 U.S. 984 (1981)), cert. denied, 107 S. Ct. 156 (1987). Other courts have considered whether the statute of limitations has been tolled in RICO cases. See United States v. Madrid, 842 F.2d 1090 (9th Cir.) (statute tolled where later indictment alleged essentially same facts as first), cert. denied, 109 S. Ct. 269 (1988); United States v. Robilotto, 828 F.2d 940, 949 (2d Cir. 1987) (superseding indictment made only minor technical changes to indictment, and therefore statute tolled by original indictment), cert. denied, 484 U.S. 1011 (1988); United States v. McCollom, 651 F. Supp. 1217 (N.D. Ill.) (return of superseding RICO indictment more than five years after some of predicates did not bar prosecution on those predicates because new charges did not alter substance of original charges, aff'd on other grounds, 815 F.2d 1087 (7th Cir. 1987); see also Cullen v. Margiotta, 811 F.2d 698, 720-24 (2d Cir.) (statute of limitations tolled by defendant's duress that deterred plaintiffs from suing and pendency of state action), cert. denied, 483 U.S. 1021 (1987).

limitations normally runs from the date of the last overt act.[333] While overt acts are not required in a RICO conspiracy count, the count must allege an agreement to commit acts of racketeering. The date of the last racketeering act or, if overt acts are alleged, the date of the last overt act, may be used to determine the limitations period. However, some courts have held that the statute does not begin to run until the RICO conspiracy agreement is terminated.[334] It is now the policy of the Organized Crime and Racketeering Section to approve RICO conspiracy counts in appropriate circumstances when some defendants have not committed or agreed to commit any racketeering acts in the last five years, but who remained in the conspiracy within the five-year statute of limitations.[335]

For a RICO charge under Section 1962(a) or 1962(b), the limitations analysis is different than for cases under Section 1962(c). For example, the gravamen of the Section 1962(a) offense is the use or investment of racketeering income in the operation

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[333] Grunewald v. United States, 353 U.S. 391, 396-97 (1957).

[334] In United States v. Coia, 719 F.2d 1120 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984), the district court dismissed an indictment charging a RICO conspiracy because no sufficient overt acts were found to have taken place within the limitations period. The appellate court reversed the dismissal, holding that a RICO conspiracy charge does not require overt acts and that the indictment was sufficient because it alleged that the conspiracy continued into the limitations period. Accord United States v. Persico, 832 F.2d 705, 713-14 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); United States v. Lopez, 851 F.2d 520 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989).

[335] See United States v. Persico, 832 F.2d 705, 713-14 (2d Cir. 1987).

by state or federal statutes of limitation. In United States v. Mazzio, 501 F. Supp. 340 (E.D. Pa. 1980), aff'd, 681 F.2d 810 (3d Cir.), cert. denied, 451 U.S. 1134 (1982), the district court held that the state statute of limitations was irrelevant to a federal RICO prosecution. Similarly, in 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), the court stated that the government can prosecute conduct which occurred more than five years ago as long as at least one act of racketeering activity took place within the five-year limitations period; the separate violations are simply an element of the RICO offense.[331]

If a substantive RICO count under Section 1962(c) is based on collection of unlawful debt rather than a pattern of racketeering activity, then the general five-year statute of limitations is applicable to each act of collection, and the RICO conviction cannot be based on any unlawful debt collection that occurred outside of the limitations period.[332]

The statute of limitations applicable for a RICO conspiracy charge based on a violation of Section 1962(c) is the general five-year period. For a general conspiracy charge, the statute of

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[331] In Field, several of the predicate acts took place prior to the enactment of RICO. The court found that this did not violate the ex post facto clause of the Constitution. 432 F. Supp. at 59. However, the jury instructions must state that the defendant can be guilty of RICO only if it finds that an act of racketeering activity took place after the effective date of the statute. United States v. Brown, 555 F.2d 407, 417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978).

[332] United States v. Pepe, 747 F.2d 632, 663-64 n.55 (11th Cir. 1984).

(1) whether the activities constituting the two "patterns" occurred during the same time period;

(2) whether the activities occurred in the same places;

(3) whether the activities involved the same persons;

(4) whether the two indictments alleged violations of the same criminal statutes; and

(5) whether the overall nature and scope of the activities set out in the two indictments were the same.

While the court found some overlap between the two cases, including the use of one racketeering act in both patterns of racketeering activity, the court concluded that, on balance, the indictments charged the existence of two different patterns of racketeering activity.[337] Even where the only two predicate acts for a Section

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[337] See also United States v. Russo, 890 F.2d 924 (7th Cir. 1989) (adopting five-factor test); United States v. Ciancaglini, 858 F.2d 923 (3d Cir. 1988) (finding no double-jeopardy violation under totality-of-circumstances test, where racketeering patterns were different); United States v. Reiter, 848 F.2d 336 (2d Cir. 1988) (applying multi-factor test and finding no violation in inclusion in RICO indictment of predicate act arising from earlier narcotics charge); United States v. Langella, 804 F.2d 185, 188-90 (2d Cir. 1986) (following Russotti five-factor test and holding that earlier indictment was not so similar as to require dismissal), cert. denied, 109 S. Ct. 532 (1989); United States v. Russotti, 717 F.2d 27 (2d Cir. 1983) (double jeopardy bar results only where both the enterprise and the pattern of racketeering are the same in both cases), cert. denied, 465 U.S. 1022 (1984); United States v. Dean, 647 F.2d 779, 788 (8th Cir. 1981) (two charged RICO counts involved different patterns of racketeering activity and therefore double jeopardy not violated), rev'd on other grounds, 667 F.2d 729 (en banc), cert. denied, 465 U.S. 1006 (1982). One court has held that consecutive sentences could be imposed where two substantially different RICO subsections, § 1962(b) and (c), were violated. United States v. Biasucci, 786 F.2d 504, 515-16 (2d Cir.), cert. denied, 107 S. Ct. 104 (1986); see also United States v. Callahan, 810 F.2d 544 (6th Cir.), (upheld concurrent sentences under § 1962(c) and (d) based on legislative history), cert. denied, 484 U.S. 832 (1987).

or establishment of an enterprise. Thus, the offense is not complete until the use or investment has occurred, which, ordinarily, will be some time after the commission of the racketeering acts that generated the income. Thus, although only one circuit has addressed this issue, the limitations period for a Section 1962(a) offense does not begin to run until the last act of use or investment has occurred.[336] A similar analysis should be used for cases under Section 1962(b).

f. Double Jeopardy

The double jeopardy issue has been raised in RICO cases where defendants, usually organized crime figures, are charged in more than one RICO case. The issue can arise if there is an overlap in the time period alleged in the RICO count or if the same racketeering act is used in separate RICO cases. The issue also can arise where a RICO charge includes predicate acts for which the defendant was previously convicted in a non-RICO case.

For example, in United States v. Ruggiero, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985), two defendants moved to dismiss a RICO indictment in Florida on double jeopardy grounds based on a prior RICO indictment in New York. The court stated that the crucial inquiry was whether the activities set out in the two indictments constituted one pattern of racketeering activity or two different patterns. In conducting its inquiry, the court considered five factors:

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[336] United States v. Vogt, No. 88-5007 (4th Cir. July 26, 1990).

indictment under RICO for the same conduct that had been dismissed earlier in a RICO indictment violated double jeopardy.

Similarly, courts have held that RICO predicates can be based on prior state acquittals[339] or convictions.[340] In another case, the Tenth Circuit upheld a conviction for deprivation of civil rights by murder, where the murder was a predicate for the defendant' earlier RICO conviction; the court held that these were separate offenses with different elements of proof.[341] One other court ruled that evidence from defendant's earlier RICO trial in another district could be admitted in his later trial on firearms offenses, although some of the evidence was prejudicial, and should have been excluded.[342] In another case, the court held that, where defendants were charged with predicate acts of murder, the fact that they might later be tried on state murder charges did not give rise to a fifth amendment violation by inhibiting their

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[339] United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 27-31); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1987), cert. denied, 440 U.S. 962 (1979); United States v. Frumento, 563 F.2d 1083, 1087-88 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); United States v. Castellano, 610 F. Supp. 1359, 1414 (S.D.N.Y. 1985). But see United States v. Yin Poy Louie, 625 F. Supp. 1327, 1337 (S.D.N.Y. 1985) (double jeopardy clause precludes use of a predicate act based on actions of which the defendant had been acquitted in state court), appeal dismissed sub nom. United States v. Tom, 787 F.2d 65 (2d Cir. 1986).

[340] United States v. Pryba, 680 F. Supp. 790 (E.D. Va. 1988) (prior state conviction admissible against defendant who was convicted of them).

[341] United States v. Lane, 883 F.2d 1484 (10th Cir. 1989).

[342] United States v. Salamone, 869 F.2d 221 (3d Cir.), cert. denied, 110 S. Ct. 246 (1989).

1962(c) charge were federal crimes previously charged, one to which the defendant had pleaded guilty in return for dismissal of the others, the court denied a pre-trial double jeopardy motion, noting that the indictment alleged that the defendant had continued his involvement in the affairs of the enterprise after the previously charged conduct.[338] However, in United States v. Cejas, 817 F.2d 595, 601 (9th Cir. 1987), the court ruled that the defendant's re-

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[338] United States v. Persico, 620 F. Supp. 836, 843-44 (S.D.N.Y.), aff'd, 774 F.2d 30 (2d Cir. 1985). The Second Circuit again denied the defendants' double jeopardy claim post-conviction. United States v. Persico, 832 F.2d 705, 710-12 (2d Cir. 1987), aff'g, 646 F. Supp. 752, 759-60 (S.D.N.Y. 1986). In so holding, however, the court suggested that post-plea conduct may not be "necessary to defeat a double jeopardy challenge to RICO convictions based on predicate acts that were the subject of prior guilty pleas." 832 F.2d at 711. For other cases upholding RICO prosecutions following prosecution for predicate crimes, see United States v. Napier, 884 F.2d 581 (6th Cir. 1989) (acts to which defendant had previously pleaded guilty); United States v. Kragness, 830 F.2d 842, 864 (8th Cir. 1987) (RICO conspiracy and narcotics conspiracy); United States v. Muhammad, 824 F.2d 214, 218-19 (2d Cir. 1987) (RICO and CCE), cert. denied, 484 U.S. 1013 (1988); United States v. Williams, 809 F.2d 107 (5th Cir.) (RICO, CCE, and conspiracy to distribute cocaine), cert. denied, 484 U.S. 896 (1987); United States v. Russo, 801 F.2d 264 (2d Cir. 1986); United States v. Binker, 799 F.2d 695 (11th Cir. 1986), cert. denied, 479 U.S. 1089 (1987); United States v. Grayson, 795 F.2d 278 (3d Cir. 1986) (RICO and CCE), cert. denied, 479 U.S. 1054 (1987); United States v. Erwin, 793 F.2d 656 (5th Cir.) (RICO and CCE), cert. denied, 479 U.S. 991 (1986); United States v. Schell, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); United States v. Boldin, 772 F.2d 719 (11th Cir. 1985), modified, 779 F.2d 618 (11th Cir.), cert. denied, 475 U.S. 1048 (1986); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986); United States v. Castellano, 610 F. Supp. 1359 (S.D.N.Y. 1985) (upholding prosecution for CCE and its predicate offenses); United States v. Ryland, 806 F.2d 941, 942-43 (9th Cir. 1985) (RICO and CCE), cert. denied, 481 U.S. 1057 (1987); United States v. Rosenthal, 793 F.2d 1214, 1234-35 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); United States v. Mitchell, 777 F.2d 248, 264 (5th Cir. 1985) (RICO and narcotics conspiracy), cert. denied, 476 U.S. 1184 (1986); United States v. Love, 767 F.2d 1052, 1062 (4th Cir. 1985) (RICO and CCE), cert. denied, 474 U.S. 1081 (1986).

a single prosecution were permissible, but was not the exclusive test for determining whether successive prosecutions were permitted under the Double Jeopardy Clause. The Court stated that successive prosecutions, unlike cumulative sentences imposed in a single prosecution, implicated the concern "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[345] Thus, the Court reasoned that "a technical comparison of the elements of the two offenses as required by Blockburger does not protect defendants sufficiently from the burdens of multiple trials."[346] Accordingly, the Court stated:

> We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.[347]

Applying this standard, the Court held that Corbin's prosecution for the homicide and assault charges was barred, since the state admitted in its bill of particulars "that it will prove the entirety of the conduct for which Corbin was convicted -- driving while intoxicated and failing to keep right of the median -- to establish essential elements of the homicide and assault

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[345] 110 S. Ct. at 2091.

[346] Id. at 2093.

[347] Id. at 2087.

testimony.[343]

In one other, rather unusual situation, a district court struck certain predicate acts from a RICO indictment on the theory of judicial estoppel, holding that the government had improperly charged these predicates after dismissing them in a related case in another district. The First Circuit reversed, holding first that the striking of the predicates was appealable, because at least two acts were stricken for each defendant, thus, in effect, striking a potential RICO charge for each defendant. The court then held that the government had not violated its agreement, and that the stricken predicates therefore could be included in the RICO charges.[344]

A new dimension was added to RICO double jeopardy analysis in 1990, when the Supreme Court decided Grady v. Corbin, 110 S. Ct. 2084 (1990). In that case, which involved a state prosecution for vehicular homicide and assault after a conviction for misdemeanor traffic offenses arising from the same incident, the Supreme Court held that the second prosecution constituted a double-jeopardy violation, and barred it, and that the second prosecution was therfore barred.

First, the Court ruled that the Blockburger test, i.e., whether each offense requires proof of a fact that the other does not, governed the question whether multiple punishments imposed in

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[343] United States v. Yarbrough, 852 F.2d 1522 (9th Cir.), cert. denied, 109 S. Ct. 171 (1988).

[344] United States v. Levasseur, 846 F.2d 786 (1st Cir.), cert. denied, 109 S. Ct. 232 (1988).

generally involves a pattern of conduct extending over a substantial period of time, and does not lend itself to this sort of analysis. Rather, the RICO situation is governed by the Supreme Court's holding in Garrett v. United States, 471 U.S. 773 (1985), where the Court upheld the use of the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, to prosecute a course of conduct including a narcotics offense that had previously been prosecuted.

This position with regard to the applicability of Grady has been upheld, as of this writing, by one appellate court. In United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), the Third Circuit held that Garrett, rather than Grady, governs double-jeopardy issues involving successive prosecutions for a federal offense and a RICO charge including that offense as a predicate. The court concluded by stating: "However significant Grady v. Corbin may prove to be in cases of simple felonies, we are confident that it has nothing whatsoever to do with the compound-complex crimes at issue here." Slip op. at 42. And, in United States v. Esposito, No. 89-5971 (3d Cir. July 31, 1990), the court uphold a conviction for Title 21 narcotics offenses following the defendant's acquittal of a RICO charge that contained those same charges as predicate offenses. The court found that the narcotics charges concerned different "conduct" from the RICO charges for double jeopardy purposes under Grady.

Of course, other circuits may not follow the Third Circuit on this issue. Prosecutors should be prepared to distinguish Grady

offenses."[348]

The Court also said that it was not adopting a "same transaction" test, requiring all charges against a defendant growing out of one transaction to be brought in the same proceeding; rather, the crucial test is whether the government will prove at the second trial conduct constituting an offense for which the defendant has already been convicted. Thus, if the government can establish a second offense arising out of the same transaction without proving conduct established at the first trial, it may still bring the second charge.[349]

The court also indicated in a footnote that there is an exception to the new Grady rule for situations where the prosecution was unable to bring all of the charges arising out of the same conduct at the time of the first proceeding, because of the unavailability of crucial evidence, or another such compelling reason.[350]

Obviously, the Grady decision, because of the breadth of the Court's language, poses potential problems for RICO prosecutions following prior federal prosecutions for one or more of the predicate acts to be charged. The Criminal Division's position is that Grady does not apply to RICO prosecutions, because the Grady ruling stems from the Supreme Court's analysis of cases involving a single incident or course of conduct. RICO, by contrast,

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[348] Id. at 2094.

[349] Id. at 2094 & n.15.

[350] Id. at 2090 n.7.

concern about the indictment's giving a criminal enterprise a name based on a defendant's name (the "Vastola Organization"). Although this practice did not require reversal in this case, the court urged the use of caution in future cases to avoid undue prejudice.[353]

A related issue concerns the inclusion in the indictment, or the introduction into evidence at trial, of material that concerns general criminal activity on behalf of an association-in-fact enterprise, but that is not charged as acts of racketeering activity. Some courts have held that such material can be admitted into evidence if it is relevant to prove the existence or structure of the enterprise or of the conspiracy.[354]

VI. Other Issues in Criminal RICO Cases

A. Liberal Construction Clause

Section 904(a) of Title IX of the Organized Crime Control Act of 1970 (Pub. L. 91-452, enacting RICO), states that "the provision of this title shall be liberally construed to effectuate its

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of defendant's objection to it and lack of compelling reason to leave it in indictment).

In Vastola, supra, the court did grant motions to strike parts of the preamble to the indictment containing information not contained in the body of the indictment, the word "loansharking," and terms "and others," "and with others," and "other criminal means." 670 F. Supp. at 1255-56. The court refused to strike the term "racketeering." Id. at 1255.

[353] United States v. Vastola, 899 F.2d 211 (3d Cir. 1990).

[354] See United States v. Ellison, 793 F.2d 942, 948-49 (8th Cir.), cert. denied, 479 U.S. 937 (1986); United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir.), cert. denied, 479 U.S. 939 (1986); United States v. Murphy, 768 F.2d 1518, 1531-32 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986).

from their situations on other grounds, not just relying on Garrett. For example, as noted above, Grady recognizes an exception for situations in which the prosecutor could not have brought all of the charges at the time of the first prosecution, because not all of the evidence was available. In addition, where the prior prosecution was by the state, the dual-sovereignty doctrine applies, and the Grady analysis should not come into play at all.[351] The Organized Crime and Racketeering Section can provide prosecutors with sample briefs and advice on how best to approach the Grady issue in particular cases.

g. Surplusage

On occasion, particularly in organized crime cases, RICO defendants have argued that the inclusion of certain terms in the indictment such as "mob," "mafia," "racketeering," and "capo," was prejudicial, and that those terms should be stricken as surplusage. Generally, where such terms are relevant to the charges in the indictment and have a legitimate, evidentiary purpose, courts have not ordered them stricken.[352] However, one court has expressed

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[351] See, e.g., United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 27-31.

[352] See, e.g., United States v. Vastola, 670 F. Supp. 1244, 1255-56 (D.N.J. 1987); United States v. Santoro, 647 F. Supp. 153, 177 (E.D.N.Y. 1986), aff'd, 880 F.2d 1319 (2d Cir. 1989); United States v. Dellacroce, 625 F. Supp. 1387, 1392 (E.D.N.Y. 1986); United States v. Ianniello, 621 F. Supp. 1455, 1479 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987); United States v. Persico, 621 F. Supp. 842, 860-61 (S.D.N.Y. 1985); United States v. Gambale, 610 F. Supp. 1515, 1544-45 (D. Mass. 1985); United States v. Castellano, 610 F. Supp. 1359, 1428-29 (S.D.N.Y. 1985); see also United States v. Bastone, No. 86 CR 64 (N.D. Ill. January 27, 1987) (court granted motion to strike citation to RICO penalty section, 18 U.S.C. § 1963, in view

Wharton's Rule provides that a substantive crime which in itself requires the participation of two or more people for its commission cannot also be the subject of a separate conspiracy count.[358] It is a limited exception to the principle that a conspiracy to commit a substantive offense and the substantive offense itself can be maintained as separate counts. Defendants have used Wharton's Rule to attack indictment or conviction on both RICO substantive and RICO conspiracy counts. All such attacks have been unsuccessful. The rule has been held to be inapplicable because the language of § 1962(c) makes it clear that a violation does not necessarily require the participation of two persons, as do the classic examples of Wharton's Rule cases such as adultery or dueling.

In United States v. Rone, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), the defendants argued that the rule is applicable because two persons were required to violate § 1962(c): the person associated with the enterprise and the enterprise itself. The court held that the criminal activity prescribed in § 1962(c) is not the enterprise but the pattern of racketeering, which can be the acts of one person; the enterprise is simply one of the jurisdictional elements of the statute. In addition, Wharton's Rule is only an aid to statutory construction and applies only in the absence of legislative intent to the contrary. In United States v. Ohlson, 552 F.2d 1347 (9th Cir. 1977), the court stated that the inclusion in the statute of

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[358] Iannelli v. United States, 420 U.S. 770, 781-82 (1975).

remedial purposes." Although this provision may seem out of place in a criminal statute, it often has been invoked by the courts in interpreting portions of the RICO statute.[355] The Supreme Court, while not relying on this provision, acknowledged it in United States v. Turkette, 452 U.S. 576, 587 (1981), in the course of construing the term "enterprise." The Court also discussed the rule of lenity but mentioned no conflict between these two differing guides for interpretation. The liberal construction clause can therefore be used in arguing for favorable interpretation of RICO provisions, and the listed cases can be cited as authority for rebutting any argument that a liberal construction rule is out of place in a criminal context.[356] Other courts have held that RICO is not to be burdened with judicial constraints that defeat the broad Congressional purpose.[357]

B. Wharton's Rule

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[355] See, e.g., United States v. Mazzio, 501 F. Supp. 340, 342 (E.D. Pa. 1980), aff'd, 681 F.2d 810 (3d Cir.), cert. denied, 457 U.S. 1134 (1982); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); cf. United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976). But see Shopping Mall Investors, N.V. v. Frances & Co., No. 84 Civ. 1469 (S.D.N.Y. January 30, 1987) (liberal construction clause applies to criminal RICO, but not necessarily to civil RICO).

[356] See also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); Russello v. United States, 464 U.S. 16 (1983); United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), cert. denied, 109 S. Ct. 65 (1988); United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir. 1986), cert. denied, 479 U.S. 939 (1986); United States v. Frumento, 563 F.2d 1083, 1091 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); see generally Palm, RICO and the Liberal Construction Clause, 66 Cornell L. Rev. 167 (1980).

[357] See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499-500 (1985); Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989).

rea requirements when preparing RICO jury instructions.

D. Connection to Organized Crime

In 1989, the Supreme Court confirmed the generally accepted principle that the government need not prove that a RICO defendant is a member of or associated with "organized crime."[364] As the court noted in United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976), if application of the statute were limited solely to members of organized crime, it would probably be unconstitutional. RICO proscribes specific conduct, not the status of being involved in organized crime. In fact, the statute does not even contain a definition of organized crime.

E. Constitutionality of RICO

In H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893 (1989), the four-justice concurrence, in criticizing the Court's lack of clear guidance about the exact meaning of "pattern of racketeering activity," raised a question about the constitutionality of RICO:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge

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[364] H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 2902-05 (1989). See also United States v. Hunt, 749 F.2d 1078 (4th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); United States v. Gottesman, 724 F.2d 1517 (11th Cir. 1984); United States v. Aleman, 609 F.2d 298, 303 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); Plains Resources, Inc. v. Gable, 782 F.2d 883, 886-87 (10th Cir. 1986) (plaintiff need not show racketeering activity connected to criminal conduct of an organized nature).

subsection (d) of § 1962 is persuasive evidence of a contrary intent on the part of Congress.[359]

C. Mens Rea

The RICO statute does not contain any separate mens rea or scienter elements beyond those encompassed in the predicate acts.[360] While the statute requires the willful commission of the predicate offenses, no specific intent to engage in an unlawful pattern of racketeering activity is required.[361] This absence of a specific mens rea requirement has led to challenges to the statute, usually in the context of inadequate jury instructions. In most cases, the scienter requirement relating to the predicate offenses has been held to supply the requisite intent element, especially when all of the instructions are considered as a whole.[362] Even in RICO cases based on violations of the Taft-Hartley Act (29 U.S.C. § 186), which itself does not include a mens rea requirement, convictions have been upheld based on the totality of the instructions.[363] It is important to give consideration to the mens

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[359] See also United States v. Castellano, 610 F. Supp. 1359, 1392-94 (S.D.N.Y. 1985) (rejecting defense argument that Wharton's Rule prevents charging conspiracy under § 1962(d) where association-in-fact enterprise is involved).

[360] United States v. Biasucci, 768 F.2d 504, 512 (2d Cir. 1986); United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), cert. denied, 449 U.S. 833 (1980).

[361] United States v. Scotto, 641 F.2d 47, 55 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981).

[362] United States v. Pepe, 747 F.2d 632, 675-76 (11th Cir. 1984).

[363] United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

upon the powers reserved to the states by the tenth amendment. This argument was rejected in United States v. Vignola, 464 F. Supp. 1091, 1098-99 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979), cert. denied, 444 U.S. 1072 (1980). In Vignola, the court stated that Congress has the power to regulate intrastate activities which have an effect upon interstate commerce. The court then found that Congress had a rational basis for finding that the regulated activity affected commerce and that the means selected for regulating the activity were reasonable and appropriate. Therefore, RICO was a proper exercise of the federal commerce power.

In United States v. Martino, 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), the defendants argued that RICO intruded upon state sovereignty because the statute failed to require that the acts of racketeering per se affect interstate commerce. The court stated that this argument ignored the essence of the Section 1962(c) violation, which is to conduct the affairs of the enterprise through racketeering activity, and not merely to commit the acts of racketeering. As long as the enterprise was engaged in or affected interstate commerce, and the acts of racketeering were related to the enterprise, there was no requirement that each racketeering act affect interstate commerce. Id. at 381. Although challenged on several other constitutional grounds, the statute has been upheld in virtually every instance.[367]

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[367] See, e.g., United States v. Yarbrough, 852 F.2d 1522 (9th Cir.) (first amendment political advocacy and right of association), cert. denied, 109 S. Ct. 171 (1988); United States v. Ruggiero, 726

is presented.[365]

This language, obviously, has been of considerable concern to the government and to private RICO plaintiffs. Numerous defendants have challenged the statute on vagueness grounds since the H.J. Inc. decision was issued. As of this writing, two appellate court had rejected such challenges in criminal cases.[366]

RICO prosecutions which are based on violations of state laws have been challenged on the basis that such use of RICO infringes

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[365] 109 S. Ct. at 2909 (Scalia, J., concurring).

[366] In United States v. Angiulo, 897 F.2d 1169, 1179 (1st Cir. 1990), the court noted:

> The statute is not rendered unconstitutionally vague simply because potential uncertainty exists regarding the precise reach of the statute in marginal fact situations not currently before us. . . . Rather, in the absence of first amendment considerations, vagueness challenges must be examined in light of a case's particular facts. . . . Thus, for defendants' vagueness challenge to succeed, they must demonstrate that the meaning and scope of RICO's "pattern" element was unclear and vague as to their conduct at issue here. Phrased another way, they must show that persons of ordinary intelligence in their situation would not have had adequate notice that the gambling, loansharking and conspiracy offenses at issue here constituted a "pattern of racketeering activity" under RICO.

(emphasis in original). In United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), the court reached a similar result in a case involving murders and other violent organized criminal activity. The court concluded its discussion of the issue by noting: "[We] have doubts that a successful vagueness challenge to RICO ever could be raised by defendants in an organized crime case." Slip op. at 27. See also Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916 (1989) (in a case decided several months before H.J. Inc., the Court held that the Indiana state RICO statute was not unconstitutionally vague as applied to obscenity offenses, saying: "Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either." 109 S. Ct. at 925). The Organized Crime and Racketeering Section can provide further guidance on the vagueness issue to prosecutors facing it in criminal or civil RICO actions.

mail fraud is a predicate offense under 18 U.S.C. § 1961 and was, therefore, covered for purposes of § 2516.

However, it is extremely important to note the necessity of specifying in the wiretap application exactly what offenses form the basis for the interception. In United States v. Carlberg, 602 F. Supp. 583 (W.D. Mich. 1984), RICO counts were dismissed when the government used evidence for its indictment from wiretaps which had been authorized only for Title 21 drug offenses. The court held that 18 U.S.C. § 2517(5) required judicial authorization before the government could use the drug wiretap evidence for purposes of a RICO indictment. A prosecutor should never use electronic surveillance evidence to prove an offense not specified in the application without first obtaining a Section 2517(5) order.[368]

G. Special Verdicts

Special verdicts have come to be useful and sometimes even crucial in RICO cases. The viability of a RICO conviction on appeal often hinges on being able to determine the number of separate predicates which support the RICO charge. If one or more

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[368] For extensive discussions of wiretapping in the RICO context, see United States v. Dorfman, 542 F. Supp. 345 (N.D. Ill.), aff'd, 690 F.2d 1217 (7th Cir. 1982); United States v. Shakur, 560 F. Supp. 347 (S.D.N.Y. 1983); see also United States v. Van Horn, 789 F.2d 1492, 1503-05 (11th Cir.) (fact that authorizing district court continued to review progress reports and granted extensions for surveillance satisfied judicial approval requirement), cert. denied, 479 U.S. 854 (1986); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985) (upholding validity of wiretap despite failure to obtain Section 2517(5) order for use in RICO case), cert. denied, 474 U.S. 1100 (1986); United States v. Gambale, 610 F. Supp. 1515, 1531-32 (D. Mass. 1985) (wiretap proper even though RICO not named, reasoning any violation of § 2717(5) was harmless).

F. RICO and Electronic Surveillance

Section 2516 of Title 18, as amended in 1970, includes the activities penalized by 18 U.S.C. § 1963 within the list of specific offenses for which interception of wire communications is permitted. Therefore, violations of RICO can serve as a basis for electronic eavesdropping. Because a RICO violation is based on violations of other substantive statutes, conduct involving violations of these other statutes can serve as a basis for electronic surveillance, even if not specifically authorized in 18 U.S.C. § 2516, as long as these other offenses are within the context of RICO. For example, in United States v. Daly, 535 F.2d 434 (8th Cir. 1976), the defendant argued that the wiretap authorization was used for a purpose (mail fraud) not authorized by 18 U.S.C. § 2516. The court rejected this argument because

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F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Riccobene, 709 F.2d 214, 231-32 (3d Cir.) (vagueness), cert. denied, 464 U.S. 849 (1983); United States v. Scotto, 641 F.2d 47, 52 (2d Cir. 1980) (vagueness), cert. denied, 452 U.S. 961 (1981); United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979) (cruel and unusual punishment), cert. denied, 445 U.S. 946 (1980); United States v. Huber, 603 F.2d 387, 393 (2d Cir. 1979) (vagueness), cert. denied, 445 U.S. 927 (1980); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (vagueness), cert. denied, 441 U.S. 933 (1979); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975) (vagueness and ex post facto), cert. denied, 423 U.S. 1050 (1976); United States v. International Brotherhood of Teamsters, No. 88 Civ. 4486 (DNE) (S.D.N.Y. March 6, 1989) (first amendment right of association); United States v. Santoro, 647 F. Supp. 153, 176 (E.D.N.Y. 1986) (first amendment right of association), aff'd 880 F.2d 1319 (2d Cir. 1989). See also Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989) (upholding suit against anti-abortion protesters who had damaged abortion clinic's equipment and thereby extorted its right to do business, but noting that first amendement would preclude a RICO suit based solely on expression of opinions), cert. denied, 110 S. Ct. 261 (1989).

RICO count incorporated other substantive counts in addition to the acts of racketeering listed in the RICO count. While the court struck one of the acts of racketeering, the RICO count was affirmed because verdicts on the incorporated counts operated as special verdicts; by finding guilt on those counts, the jury also found that two predicate acts had been established.[372]

Related to the use of special verdicts is the issue of jury unanimity. A jury unanimity instruction "ensure[s] that the jury is unanimous on the factual basis for a conviction."[373] The jury

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[372] See also United States v. Cardall, 885 F.2d 656 (10th Cir. 1989) (upholding RICO conviction on the basis of numerous valid predicate acts, where some were ruled invalid); United States v. Corona, No. 87-5952 (11th Cir. Sept. 29, 1989) (upholding RICO conviction based on Travel Act predicates after mail fraud predicates were found invalid); Callanan v. United States, 881 F.2d 229 (6th Cir. 1989) (where mail fraud predicates were invalidated, analysis of rest of case allowed court to uphold conviction of one defendant, but not another, based on other predicates the jury evidently relied on); United States v. Brennan, 867 F.2d 111 (2d Cir.) (valid Travel Act predicates, also charged as counts, "operated like special verdicts"; test is "whether the jury rationally could have concluded that Brennan's wire fraud acts were committed in the conduct of the enterprise's affairs and at the same time found that his Travel Act offenses were not"), cert. denied, 109 S. Ct. 1750 (1989); United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), cert. denied, 109 S. Ct. 1340 (1989) (analysis of evidence showed that jury must have relied on valid predicate acts); United States v. Anderson, 809 F.2d 1281, 1284-85 (7th Cir. 1987) (RICO conviction affirmed where jury convicted defendant of four of twelve charged predicates because jury must have relied on two or more of the valid predicates to convict on RICO charges); United States v. Lopez, 803 F.2d 969, 976 (9th Cir. 1986) (court upheld RICO conviction where defendant acquitted on one predicate; court could determine that jury did not rely on acquitted predicate by looking at predicate crimes of which co-defendant was convicted), cert. denied, 481 U.S. 1030 (1987).

[373] United States v. Beros, 833 F.2d 455, 460 (2d Cir. 1987). A jury unanimity instruction, however, should not be given where there is a potential for jury confusion, such as in a complex case. Id.; see also United States v. Payseno, 782 F.2d 832 (9th Cir. 1986) (plain error for failure to give unanimity instructions).

of the predicates are reversed on appeal, the RICO conviction will also fall if the appellate court cannot be assured that the RICO charge is still supported by at least two predicate offenses. If there is no way to establish the basis of the RICO verdict, the appellate court may feel obliged to assume that the verdict was based on the stricken charges.[369] Thus, even though special verdicts are generally not favored in criminal prosecutions, their use has been endorsed in RICO cases.[370]

In United States v. Ruggiero, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984), two members of the court felt obligated to reverse the RICO conspiracy conviction of one defendant after striking one of the eight predicate acts of racketeering. The court noted that the use of a special verdict would have avoided this result.[371] A similar result was avoided in United States v. Pepe, 747 F.2d 632 (11th Cir. 1984), because the

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[369] See, e.g., United States v. Biaggi, No. 88-1530 (2d Cir. June 29, 1990), where the court reversed a RICO conviction even where special verdicts clearly established the defendant's commission of two mail fraud predicates, because the jury, if it had heard the evidence that was improperly excluded, might have concluded that the mail fraud acts were not committed as part of a RICO pattern with a nexus to the affairs of a RICO enterprise. Slip op. at 5252-54.

[370] See, e.g., United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 102-03 & n.74.

[371] See also United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988) (RICO conviction reversed where jury might have relied on invalid mail fraud counts); United States v. Mandel, 672 F. Supp. 864, 877 (D. Md. 1987), aff'd, 862 F.2d 1067 (4th Cir. 1988) (RICO convictions were vacated on petition for writ of error coram nobis; in the absence of special verdicts, court could not determine "with a high degree of probability" whether jury relied on mail fraud predicates, which were invalid under McNally decision, or bribery charges for guilty verdict), cert. denied, 109 S. Ct. 3190 (1989).

phase of the trial must be distinguished from the mandatory use of special verdicts in the forfeiture phase of the trial.[377]

H. Venue

The RICO statute does not contain a specific provision governing venue in criminal cases.[378] Venue for RICO prosecutions is governed by 18 U.S.C. § 3237(a), permitting prosecution of a continuing offense "in any district in which such offense was began, continued, or completed."[379] Thus, a RICO case may be tried in any district where some of the criminal activity occurred.[380]

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[377] Fed. R. Crim. P. 31(e). See generally United States v. Williams, 809 F.2d 1072 (5th Cir.) (jury found 15 of 18 listed items to be forfeitable, and court rejected argument that failure to forfeit three items was inconsistent with guilty verdict), cert. denied, 484 U.S. 896 (1987); United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982) (court affirmed forfeiture of motel used in prostitution enterprise even though special verdict form did not require jury to discern what portion of motel used for prostitution and what portion used for legitimate purposes); cf. United States v. Amend, 791 F.2d 1120 (4th Cir. 1986) (in CCE case, forfeiture of assets specifically listed in special verdict affirmed, while forfeiture of bank account and purebred horse, pursuant to general catch-all category of assets, vacated as impermissible).

[378] The venue provision for civil RICO suits is found in 18 U.S.C. § 1965(a). See generally Civil RICO: A Manual for Federal Prosecutors (February 1988) at IV(B)(2) and VII(C).

[379] United States v. Persico, 621 F. Supp. 842, 857-58 (S.D.N.Y. 1985); United States v. Castellano, 610 F. Supp. 1359, 1388 (S.D.N.Y. 1985) (venue proper in any district where offense was begun, continued, or completed, even though virtually every racketeering act occurred in another district); see also United States v. Russo, 646 F. Supp. 816 (S.D.N.Y. 1986) (court refused to transfer indictment charging obstruction of justice from district where defendants indicted for RICO).

[380] See Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916, 926 (1989) (under state RICO statute, no requirement that all predicate acts be committed in jurisdiction where prosecution is brought; such a requirement "would essentially turn the RICO statute on its head: barring RICO prosecutions of large national enterprises that commit single predicate offenses in numerous jurisdictions, for

instructions should require unanimity not only with respect to the elements of a RICO violation, but also with respect to each predicate act making up the pattern of racketeering activity. Where there are sub-predicates, the prosecutor should request a unanimity instruction as to each sub-predicate.[374] If the jury should, for some reason, find a particular predicate act proven for one RICO count but not another, such inconsistency should have no effect on the RICO convictions.[375] And, in one case, the court ruled that inconsistent verdicts did not require reversal of a RICO conviction, even though the jury acquitted the defendant of substantive counts that were identical to the RICO predicates.[376]

The optional use of special verdicts in the guilt or innocence

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[374] See United States v. Pungitore, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. at 102-03 (special interrogatories should indicate theory on which jury relied for each predicate act); United States v. Tinsley, 800 F.2d 448, 450-52 (4th Cir. 1986) (where there was arguably only one valid predicate against defendant, and jury convicted under § 1962(c) and (d), inconsistent verdict stands and conviction affirmed); United States v. Delker, 782 F.2d 1033 (3d Cir. 1985)(unpublished)(upholding jury instruction that all jurors must agree that defendant committed two acts of racketeering, reasoning that instruction sufficiently informed jury that defendant could not be convicted unless all jurors agreed that he committed the same two acts), cert. denied, 476 U.S. 1141 (1986); see generally United States v. Coonan, 839 F.2d 886 (2d Cir. 1988) (upholding judge's jury instruction to have the jury find, through special verdicts, a RICO enterprise, each defendant's membership in the enterprise, and each individual predicate act, and denying government's motion to have the jury also return a general verdict).

[375] See United States v. Biaggi, 705 F. Supp. 864 (S.D.N.Y. 1988). See also United States v. Chang An-Lo, 851 F.2d 547 (2d Cir.), (defendants could not attack verdict on ground that RICO conspiracy convictions were inconsistent with RICO substantive acquittals), cert. denied, 109 S. Ct. 493 (1988).

[376] United States v. Vastola, 899 F.2d 211, 222-26 (3d Cir. 1990).

ruled that evidence of unindicted crimes, while irrelevant as predicate acts to establish the RICO charge, can be evidence of the defendant's connection to the enterprise or conspiracy.[382] However, in one case, the Second Circuit reversed a RICO conviction when it found that the trial court had admitted evidence of a transaction that was used as part of the basis for the RICO conviction, but that was not clearly charged as part of the RICO allegations.[383]

VII. Civil RICO Suits by the Federal Government

A. Introduction

Although the primary focus of this Manual is on criminal RICO prosecutions, it is worthwhile to include a brief discussion of some of the major points concerning the use of civil RICO by the federal government. Private plaintiffs have used the civil provisions explosively in the past several years, whereas the

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[382] See also United States v. Ellison, 793 F.2d 942, 949 (8th Cir. 1986) (uncharged evidence admitted to establish existence of enterprise), cert. denied, 479 U.S. 937 (1987); United States v. Murphy, 768 F.2d 1518, 1534-35 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986) (proper to admit evidence establishing conspiracy); United States v. King, 827 F.2d 864, 867-68 (1st Cir. 1987) (upheld district court refusal to allow government to reinstate murder predicate under Fed. R. Evid. 403). But see United States v. Flynn, 852 F.2d 1045 (8th Cir.) (error, although harmless here, to admit evidence of murders in which defendant did not participate to prove nature of enterprise; this evidence was unnecessary and prejudicial), cert. denied, 109 S. Ct. 511 (1988).

[383] United States v. Zingaro, 858 F.2d 94 (2d Cir. 1988). See also United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) (RICO conspiracy conviction reversed where trial court did not require bill of particulars on identity of victims in unspecified extortion acts, even though, as dissent pointed out, those acts were not used as RICO predicates, but just to prove the nature of the enterprise).

The indictment may include racketeering acts that occurred in districts other than the district of venue. As long as venue for the overall charge is proper, it may not be necessary that each defendant have participated in conduct within the district.[381]

I. Admissibility of Evidence -- Generally

In RICO cases, there is typically evidence concerning the enterprise, or a conspiracy in a Section 1962(d) count, which is not specifically applicable to the criminal conduct charged. For example, in United States v. Finestone, 816 F.2d 583, 587 (11th Cir.), cert. denied, 484 U.S. 948 (1987). The court upheld the admission into evidence of a murder that the RICO defendant did not commit on the grounds that the evidence showed the conspiracy continued into the limitations period and showed that the individuals who actually committed the murder participated in the conspiracy. Similarly, in United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir.), cert. denied, 107 S. Ct. 422 (1986), the court

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example"); United States v. Long, 697 F. Supp. 651 (S.D.N.Y. 1988) (venue not improper where at least one overt act and one predicate act were alleged to have occurred in the district); United States v. Persico, 621 F. Supp. 842, 858 (S.D.N.Y. 1985) (substantive RICO violation is properly venued in any district where the enterprise conducted business; RICO conspiracy venue proper in any district where an overt act occurred); see also United States v. Pepe, 747 F.2d 632, 660 n.44 (11th Cir. 1984).

[381] Cf. United States v. Persico, 621 F. Supp. 842, 858 (S.D.N.Y. 1985) (court held that it made no difference that any individual defendant was not in the district, as long as the government establishes that the defendant participated in an enterprise that conducted illegal activities in the district); United States v. Fry, 413 F. Supp. 1269 (E.D. Mich. 1976), aff'd, 559 F.2d 1221 (6th Cir. 1977) (finding venue proper in CCE case against a defendant who never committed any component crimes in the district; where he did participate in one component crime, a conspiracy, some of its overt acts were committed in the district).

are also applicable to civil RICO suits.[385] The heart of civil RICO is in the four sections of Section 1964. Section 1964(a) gives federal district courts jurisdiction to grant injunctive and other equitable relief in order to prevent and restrain violations of Section 1962. Section 1964(b) permits the Attorney General to institute civil RICO actions. Section 1964(c) provides that "[a]ny person injured in his business or property" by a RICO violation may sue and recover treble damages and attorneys' fees. Section 1964(d) provides for collateral estoppel in favor of the United States in a civil suit against a person who was convicted in a criminal RICO prosecution.

C. Differences from Criminal RICO

Obviously, there are many differences between criminal and civil cases brought by the United States under the RICO statute. For example, there are differences of procedure, differences in the remedies available, and differences in the situations in which each type of action is most useful. The following discussion presents some of the most important differences.

1. Penalties and Remedies

Criminal RICO prosecution can result in fines, imprisonment, and forfeiture of interests connected to racketeering activity. Civil RICO suits can result only in treble damages or equitable relief, or both. Equitable relief can include an order of divestiture that requires a defendant to sell his interest in an

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[385] Section 1963, setting forth criminal penalties, is the only section of the statute that is inapplicable to civil suits.

federal government has used them on very few occasions.[384] However, government civil RICO suits can effectively complement prosecutions aimed at removing criminal elements from legitimate enterprises.

This discussion is brief as a complete discussion is contained in the civil RICO manual, Civil RICO: A Manual for Federal Prosecutors (February 1988). General concepts are discussed in order to provide a broad overview of what remedies are available under the civil RICO provisions and of some of the issues involved in government civil RICO suits.

B. Overview of Civil RICO Provisions

The civil RICO provisions are set forth at 18 U.S.C. §§ 1964-1968. The general RICO provisions in 18 U.S.C. §§ 1961 and 1962

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[384] See, e.g., United States v. International Brotherhood of Teamsters, No. 88 Civ. 4486 (S.D.N.Y. filed June 28, 1988); United States v. Long, No. 88 Civ. 3289 (S.D.N.Y. filed May 11, 1988); United States v. Turoff, No. CV-87-1324 (E.D.N.Y. filed April 29, 1987); United States v. Rivieccio, No. CV-86-1441 (E.D.N.Y. filed October 16, 1987); United States v. Bonanno Family of La Cosa Nostra, No. CV-87-2974 (E.D.N.Y. filed August 16, 1987); United States v. Local 359, United Seafood Workers, No. 87 Civ. 7351 (S.D.N.Y. filed October 15, 1987); United States v. Local 30, United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, 871 F.2d 401 (3d Cir. 1989), cert. denied, 110 S. Ct. 363 (1989); United States v. Local 6A, Cement and Concrete Workers, Laborers International Union, 663 F. Supp. 192 (S.D.N.Y. 1986); United States v. Shasho, No. CV-86-1667 (E.D.N.Y. 1986); United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987); United States v. Barnette, No. 85-754-CIV-J-16 (M.D. Fla. May 16, 1985); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir.), cert. denied, 476 U.S. 1140 (1986); United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977); United States v. Winstead, 421 F. Supp. 295 (N.D. Ill. 1976); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

This does not include suits filed by quasi-governmental agencies, such as the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. See, e.g., Federal Deposit Ins. Corp. v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985).

RICO prosecutions.[390]

In a case where the government seeks only equitable relief, the defendant generally is not entitled to a jury trial.[391]

D. Differences from Private Civil RICO Actions

RICO suits brought by the federal government are different in several ways from those brought by private plaintiffs. First, the government clearly can obtain injunctive and other equitable relief.[392]

Second, several provisions of the RICO statute apply only to suits brought by the government. Section 1965(c) provides for

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[390] See supra notes 378, 379, 380, 381 and accompanying text (discussing venue for criminal RICO prosecutions).

[391] For a full discussion of this issue, see Civil RICO: A Manual for Federal Prosecutors (February 1988) at IV(E)(1); see also Katchen v. Landy, 382 U.S. 323, 326-38 (1965); In re Evangelist, 760 F.2d 27, 28-31 (1st Cir. 1985); Securities & Exchange Comm'n v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 94-97 (2d Cir. 1978); United States v. Reddoch, 467 F.2d 897, 899 (5th Cir. 1972); see generally Musslewhite, The Measure of the Disgorgement Remedy in SEC Enforcement Actions: SEC v. MacDonald, 12 Sec. Reg. L. Rev. 138, 160 (1984).

[392] Although some courts and commentators have indicated that private plaintiffs can obtain equitable relief under RICO, see Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); Aetna Casualty & Surety Co. v. Liebowitz, 570 F. Supp. 908, 909-10 (E.D.N.Y. 1983), aff'd on other grounds, 730 F.2d 905, 909 (2d Cir. 1984); RICO and the Antitrust Laws, 52 ABA Antitrust L. J. 300, 375-76 (1983), the stronger view appears to be that they cannot. See Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc., 644 F. Supp. 951, 960-61 (D. Del. 1986); Volkmann v. Edwards, 642 F. Supp. 109 (N.D. Cal. 1986); see also Trane Co. v. O'Connor Securities, 718 F.2d 26, 28-29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Kaushal v. State Bank, 556 F. Supp. 576 (N.D. Ill. 1983). See generally Blakey & Cessar, Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim, 62 Notre Dame L. Rev. 526 (1987).

enterprise, but cannot include the uncompensated forfeiture of assets that can result from a RICO prosecution.

2. Procedures

Civil RICO cases are governed by the Federal Rules of Civil Procedure, which provide for, inter alia, extensive discovery on behalf of both plaintiffs and defendants,[386] and liberal rules of pleading, including the possibility of amending the complaint.[387] The burden of proof in civil cases is a preponderance of the evidence, rather than beyond a reasonable doubt.[388] Venue in civil RICO cases is governed by special provisions that are broader than the venue provisions for ordinary civil suits.[389] However, civil RICO venue is somewhat more restrictive than venue for criminal

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[386] See Fed. R. Civ. P. 26-37.

[387] Fed. R. Civ. P. 15.

[388] See United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985) (discussing the case law on this issue and adopting the "preponderance of the evidence" standard for civil RICO suits), cert. denied, 476 U.S. 1140 (1986).

[389] Venue in civil RICO actions is governed specifically by 18 U.S.C. § 1965(a) and (b), but the general venue provision for non-diversity cases, 28 U.S.C. § 1391(b), also may be used to establish venue. See, e.g., So-Comm, Inc. v. Reynolds, 607 F. Supp. 663 (N.D. Ill. 1985). Additionally, the special venue provision for corporate defendants, 28 U.S.C. § 1391(c), may be used. Section 1965(a) permits venue to be established not only where a person resides or where the claim arose, as under Section 1391(b), but also where a person "is found, has an agent, or transacts his affairs." In addition, RICO has a special "ends of justice" provision in Section 1965(b), under which the court may bring parties from any other districts before the court, upon a proper showing. See, e.g., Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985).

demand.[395]

Third, although not a "difference" from private civil RICO, there is no provision for parens patriae RICO damages suits by the federal government. Thus, the government can bring suit for treble damages only in those relatively few instances in which the government itself has been injured in its business or property.

E. Relief Available

1. Equitable Relief

The federal government, through the Attorney General, is given authority to bring actions for equitable relief under 18 U.S.C. § 1964(a) and (b). Section 1964(a) lists several examples of the relief that can be granted:

> 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.

The statute expressly states that the range of relief available is "not limited to" this list and, under general principles of equity, a very broad spectrum of relief is available.[396] Due to the small

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[395] See 18 U.S.C. § 1968(f), (i), and (j). For further discussion of the RICO civil investigative demand, see Civil RICO: A Manual for Federal Prosecutors (February 1988) at V(B).

[396] See, e.g., S. Symons, Pomeroy on Equity §§ 108-112 (5th ed. 1941) (listing ten categories of equitable remedies: declarative; restorative; preventive; specific performance; reformation, correction or re-execution; rescission or cancellation; pecuniary compensation; accounting; conferring or removing official status; and establishing or destroying personal status).

nationwide service of process in suits brought by the United States. Section 1966 provides for expedited treatment of such suits if the Attorney General files a certificate with the court stating that the case is of public importance. Section 1967 provides that proceedings in or ancillary to civil RICO suits brought by the United States may be open or closed to the public "at the discretion of the court after consideration of the rights of affected persons." This provision apparently was intended to permit public depositions if the court permits.[393] Section 1968 provides detailed procedures for the issuance of civil investigative demands by the United States prior to the institution of criminal or civil proceedings. This provision, which was modeled on the antitrust statutes in existence at the time, has not been used at all as of this writing, but may become more useful as the volume of government civil RICO suits increases. The RICO civil investigative demand is not very powerful because it requires only the production of documentary material, rather than testimony, and is subject to more possible avenues of challenge than a grand jury subpoena.[394] In addition, the statute contains detailed procedures for custody of materials received pursuant to the

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[393] See Organized Crime Control: Hearings on S.30 and Related Proposals Before Subcomm. No. S.5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 385, 402, 500, 559-60, 665 (1970); S. Rep. No. 91-617, 91st Cong., 1st Sess. 125, 161 (1969); Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO, 65 Iowa L. Rev. 837, 843 n.32 (1980).

[394] The procedures for litigating compliance with the demand are set forth at 18 U.S.C. § 1968(g) and (h).

granted. RICO injunctive actions can lead to divestiture, but not to forfeiture or to any other punitive action. Furthermore, an equitable action under Section 1964(a) cannot lead to an award of damages, although arguably it may result in an order of restitution. [404]

Once a district court has issued a final injunction or other form of equitable relief, the order may be enforced by contempt proceedings if the defendants violate the order. [405]

2. Treble Damages

Section 1964(c) permits "[a]ny person injured in his business or property by reason of a violation of Section 1962" to sue and recover treble damages and the cost of the suit, including reasonable attorneys' fees. The statute does not make it clear whether the United States is a "person" entitled to sue under this provision. The United States was held not to be a "person" for purposes of an antitrust statute[406] that was the model for this

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[404] See, e.g., Porter v. Warner Co., 328 U.S. 395 (1946); Samuel v. University of Pittsburgh, 538 F.2d 991, 994 (3d Cir. 1976). For an excellent discussion of the law of restitution or disgorgement in injunctive actions by the Securities and Exchange Commission, see Musslewhite, The Measure of the Disgorgement Remedy in SEC Enforcement Actions: SEC v. MacDonald, 12 Sec. Reg. L. Rev. 138 (1984).

[405] See United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). For a discussion of contempt proceedings to enforce civil RICO judgments, see Civil RICO: A Manual for Federal Prosecutors (February 1988) at V(E).

[406] Sherman Act, ch. 647, § 7, Stat. 209 (1890), amended by Clayton Act, ch. 323, § 4, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 15 (1982)).

number of RICO injunctive actions to date, there is very little precedent that explains the equitable remedies available under RICO. In the few injunctive actions brought by the government, courts have granted broad equitable relief against a gambling business that was illegal in itself,[397] and labor unions[398] and a restaurant[399] that were infiltrated by criminal elements. For other examples of equitable relief in suits brought by the government under remedial statutes, it is helpful to consider precedents under the antitrust laws,[400] the securities laws,[401] and other regulatory schemes.[402] It is also helpful to consult general treatises on equity. The range of remedies available is limited only by the imagination of the court and the litigants.[403]

There are, however, some boundaries to the relief that can be

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397 United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

398 United States v. Local 560, Int'l Brotherhood of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir.), cert. denied, 476 U.S. 1140 (1986); United States v. Local 6A, Cement & Concrete Workers, Laborers Int'l Union, 663 F. Supp. 192 (S.D.N.Y. 1986).

399 United States v. Ianniello, 824 F.2d 203 (2d Cir. 1987).

400 See, e.g., United States v. Coca-Cola Bottling Co., 575 F.2d 222 (9th Cir.), cert. denied, 439 U.S. 959 (1978); E. Kintner, Federal Antitrust Law, §§ 40.1 et seq. (1984).

401 See, e.g., Pitt & Markham, SEC Injunctive Actions, 6 Sec. L. Rev. 827, 838-39 (1973).

402 See, e.g., Federal Trade Commission v. Southwest Sunsites, Inc., 665 F.2d 711, 718 (5th Cir.), cert. denied, 456 U.S. 973 (1982).

403 See supra note 396 and accompanying text; see generally Civil RICO: A Manual for Federal Prosecutors (February 1988) at IV(E)(2).

ruling, the Supreme Court held that a defendant need not have been criminally convicted under RICO as a prerequisite to the bringing of a civil suit for damages, and that the plaintiff need not establish a special "racketeering injury" apart from the injury caused by the acts of racketeering activity.[410]

There are several other areas in which courts have issued significant rulings in civil RICO cases. Some of these rulings have begun to impact on criminal prosecutions. For example, as noted in connection with the discussion of the definition of "enterprise," supra Section II(D), several courts have ruled that the defendant and the enterprise cannot be the same entity for purposes of a violation 18 U.S.C. § 1962(c). Most of these rulings have come in civil cases, but some courts have followed them in criminal cases.[411] Another area of growing importance is the question of whether multiple acts arising from one criminal episode can be separate acts of racketeering activity. Although decisions in criminal cases virtually always have been favorable to the government in this area, many courts have ruled in favor of

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[410] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

[411] See, e.g., United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985) (reversing RICO conviction where individual defendant was also alleged to be the enterprise; holding that defendant could not also be enterprise in § 1962(c) count under rule of Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 400 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985)), cert. denied, 106 S. Ct. 1458 (1986); United States v. Yonan, 622 F. Supp. 721, 722-26 (N.D. Ill. 1985) (dismissed § 1962(c) count against solo practitioner who employed one secretary), modified on other grounds, 800 F.2d 164 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1980); United States v. Roth, No. 85 CR 763 (N.D Ill. June 15, 1987) (all alleged racketeering acts occurring after defendant's law firm became sole proprietorship dismissed).

aspect of RICO.[407] In United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20 (2d Cir. 1989), the Second Circuit relied on this antitrust statute to hold that the United States is not a "person" entitled to recover treble damages in a civil RICO action. However, the legislative history of RICO indicates that Congress did not intend restrictive antitrust precedents to apply.[408] In view of the broad remedial purposes of RICO, the Department of Justice has taken the position that the United States is a "person" for purposes of Section 1964(c). Accordingly, treble-damages suits will continue to be approved in appropriate circumstances in jurisdictions other than the Second Circuit. Another district court to consider this issue has upheld the Department's position.[409] The Department is seeking legislative action to make it clear that the United States can recover treble damages under RICO.

Because of the considerable volume of private civil RICO suits brought in recent years, there have been numerous court decisions with respect to several legal issues. In the most important

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[407] United States v. Cooper Corp., 312 U.S. 600 (1941).

[408] See 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan): "There is . . . no intention here of importing the great complexity of antitrust law enforcement into this field . . . Nor do I mean to limit the remedies available to those which have already been established [in the area of antitrust]." See also Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237, 263 (1982).

[409] United States v. Barnette, No. 85-754-CIV-J-16 (M.D. Fla. September 5, 1985) (denying, without opinion, a motion to dismiss a civil RICO complaint on this and other grounds).

Finally, there are considerations of general strategy and tactics. Civil RICO should be used only in situations where its use can provide some definite benefit to the government. If the relief available under civil RICO is not appropriate to redress the RICO violation at issue, it may be preferable to concentrate on developing a criminal prosecution, or to seek some other form of relief. For example, even though the government may have sufficient evidence to bring an injunctive action against an illegal gambling operation, the relief available, such as restrictions on such conduct in the future, may not be sufficient to justify bringing the suit.

defendants in civil cases on this issue. Of course, this area of RICO law is now in a new phase of development after the Supreme Court's H.J. Inc. decision.[412]

As noted earlier, the government has brought very few RICO suits seeking treble damages. One reason for the small number is that the government can only seek treble damages when the government has been injured in its business or property, and when RICO can provide some useful relief that is not obtainable in some other way. However, it is likely that the government will bring more RICO damages suits in the future as prosecutors become familiar with the available options.

F. Other Considerations

There are several other points that federal prosecutors should bear in mind when contemplating a civil RICO suit. First, just as for criminal RICO prosecutions, approval must be obtained from the Organized Crime and Racketeering Section before filing a civil RICO complaint or issuing a civil investigative demand under RICO.[413] Second, Fed. R. Crim. P. 6(e) must be considered when a civil suit follows a grand jury investigation.[414] Third, the implications of civil discovery must be considered before filing a civil RICO suit when a related criminal investigation or prosecution is pending.

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[412] See supra notes 111, 112, 114, 115, 122 and accompanying text.

[413] See United States Attorneys' Manual § 9-110.101.

[414] The Organized Crime and Racketeering Section can provide guidance and materials in this area on request. For a full discussion of legal implications arising from parallel criminal and civil proceedings, see Civil RICO: A Manual for Federal Prosecutors (February 1988) at V(A).

DETAILED
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Appendix A:

RICO Approval Guidelines

9-110.000 ORGANIZED CRIME AND RACKETEERING

9-110.100 RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. NO. 91-617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass any illegitimate enterprise affecting interstate or foreign commerce.

9-110.101 Division Approval

No RICO criminal or civil prosecutions or civil investigative demand shall be issued without the prior approval of the Organized Crime and Racketeering Section, Criminal Division. See RICO Guidelines at USAM 9-110.200, infra.

9-110.102 Investigative Jurisdiction

18 U.S.C. §1961(10) provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. §1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in 18 U.S.C. §1961.

9-110.110 Prohibited Activities

The RICO statute creates three new substantive offenses, and one conspiracy offense contained in 18 U.S.C. §1962, subsections (a), (b), (c), and (d).

18 U.S.C. §1962(a), which outlaws the acquisition of an enterprise with income derived from illegal activity, provides in pertinent part:

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> affairs through a pattern of racketeering activity or collection of an unlawful debt. (Emphasis supplied)

This section is designed to reach those persons who by employment or association in an enterprise use that enterprise to engage in unlawful activities. The enterprise may be legitimate, but need not be. See USAM 9-110.100. For example, a group of individuals could organize an enterprise without legal form or title, but with the appearance of legitimacy, to perpetrate a scheme to defraud certain banking institutions and the U.S. Small Business Administration, as alleged in United States v. Rafsky, Cr. No. 75-0247R (E.D. Va.). United States v. Martino, 648 F.2d 367 (3d Cir), 648 F.2d 407 (1981), vacated in part 650 F.2d 952 (1982).

18 U.S.C. §1962(d) 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.

See United States v. Sutherland, 656 F.2d 1181, reh'g denied 663 F.2d 101 (5th Cir. 1981).

9-110.120 Common Elements

Violations of 18 U.S.C. §1962(a), (b) or (c) require proof of either a pattern of racketeering activity or the collection of an unlawful debt. In a pervasive scheme of criminal activity it is not uncommon to find both elements. Where both are present, each can be charged in a separate count.

In addition, violations of 18 U.S.C. §1962(a), (b) or (c) require that the enterprise involved be engaged in or affect interstate or foreign commerce. This element, the basis for federal jurisdiction, must be proved in all RICO statute cases. It is not, however, an element of proof that the particular acts with which a defendant is charged have, in and of themselves, any effect on interstate or foreign commerce. See United States v. Groff, 643 F.2d 396 (6th Cir. 1981); United States v. Rone, 598 F.2d 564, cert. denied 445 U.S. 946 (10th Cir. 1979); United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied sub nom. Walgren v. United States, 102 S. Ct. 2040 (1982); United States v. Allen, 565 F.2d 964 (4th Cir. 1981).

> 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 . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal derivation of the funds. The acquisition can in all respects be legitimate. Congress simply makes it illegal to invest ill-gotten gains. (See United States v. Cauble, 706 F.2d, Crim. No. 82-2087 (5th Cir. May 31, 1983); United States v. Zang, 703 F.2d 1186 (10th Cir. 1982); United States v. McNary, 620 F.2d 621 (7th Cir. 1980)).

18 U.S.C. §1962(b), which outlaws the acquisition or maintenance of an interest or control in an enterprise through illegal activity, 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 interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal acquisition or maintenance of an interest or control. Examples are the acquisition of control through extortion or a scheme to defraud, see United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975), and the maintenance of an interest through bribery. United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982); United States v. Gambino, 566 F.2d 414 (2d Cir. 1977), cert. denied 435 U.S. 952 (1978).

18 U.S.C §1962(c), which outlaws the use of an enterprise to commit illegal acts, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's

17. Section 1955 (Prohibition of Illegal Gambling Business)
18. Section 2314 (Interstate Transportation of Stolen Property)
19. Section 2315 (Sale of Stolen Goods)
20. Sections 2421, 2422, 2423, 2424 (White Slave Traffic)

C. Violations of 29 U.S.C.:

1. Section 186 (Restrictions of Payments and Loans to Labor Organizations)
2. Section 501(c) (Embezzlement from Union Funds)

D. Bankruptcy Fraud

E. Fraud in the Sale of Securities

F. Felonious Activity Involving Narcotic or Dangerous Drugs, such as:

1. Manufacture
2. Importation
3. Receiving
4. Concealment
5. Buying
6. Selling
7. Dealing

Any combination of the above-listed crimes can form a pattern of racketeering activity, even if both acts constitute state crimes only. See, however, RICO guidelines on judicial prosecution of cases involving only state predicate crimes. The basis for federal jurisdiction, as mentioned above, is the effect of the enterprise on interstate or foreign commerce. However, nexus or relationship between the acts of racketeering charged must be proved to establish the pattern.

> The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires

9-110.121 Pattern of Racketeering Activity

To establish a "pattern of racketeering activity," as defined in 18 U.S.C. §1961(5), requires proof of at least two acts of "racketeering activity." Each racketeering activity must itself be an act subject to criminal sanction, that is, violative of an independent statute. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). 18 U.S.C. §1961(1) enumerates, either generically (state) or specifically (federal), acts which qualify as racketeering activity:

A. Violations of State Law - any act or threat involving:

1. Murder
2. Kidnapping
3. Gambling
4. Arson
5. Robbery
6. Bribery
7. Extortion
8. Dealing in Narcotic or Other Dangerous Drugs

B. Violations of 18 U.S.C:

1. Section 201 (Bribery)
2. Section 224 (Sports Bribery)
3. Sections 471, 472, 473 (Counterfeiting)
4. Section 659 (Theft From Interstate Shipment) (Felony)
5. Section 664 (Embezzlement from Pension and Welfare Fund)
6. Sections 891, 892, 894 (Extortionate Credit Transactions)
7. Section 1084 (Transmission of Gambling Information)
8. Section 1341 (Mail Fraud)
9. Section 1343 (Wire Fraud)
10. Section 1503 (Obstruction of Justice)
11. Section 1510 (Obstruction of Criminal Investigation)
12. Section 1511 (Obstruction of State or Local Law Enforcement)
13. Section 1951 (Interference with Commerce, Bribery, or Extortion)
14. Section 1952 (Interstate Transportation In Aid of Racketeering)
15. Section 1953 (Interstate Transportation of Wagering Paraphernalia)
16. Section 1954 (Unlawful Welfare Fund Payments)

B. The second method requires:

1. A debt incurred in connection with the business of lending money which is unenforceable in whole or in part because of federal or state usury laws (to be usurious the rate of interest must be double the legally enforceable rate of interest under state of federal law); and

2. Collection of that debt.

The first method permits a new avenue of attack on the illegal gambling business in that the new forfeiture provisions of 18 U.S.C. §1963, discussed in USAM 9-110.130, permit the forfeiture of the legitimate front used to cover the illegal activity. The second method is designed to attack the loanshark where there is an absence of proof of violence in the collection of the debt.

9-110.130 Criminal Penalties

18 U.S.C. §1963(a) provides for the imposition of a maximum term of imprisonment of twenty years and a fine of $25,000 for each violation of 18 U.S.C. §1962. In addition, 18 U.S.C. §1963(a) provides for a forfeiture proceeding in personam against the defendant in that, upon conviction, the violator:

> 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.

Any forfeiture is subject, of course, to the rights of innocent persons. Once the property interests of the accused are forfeited, 18 U.S.C. §1963(c) grants the courts the power to authorize the Attorney General to seize the forfeited property or interest and dispose of the same in accordance with the provisions of the subsection.

At the time of an indictment charging a violation of 18 U.S.C. §1962, the United States may move pursuant to 18 U.S.C. §1963(b) for a restraining order or prohibition or other device, including a request for a performance bond, to protect any property interest subject to forfeiture

> more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

S. REP. No. 91-617, 91st Cong. 1st Sess. 158. See United States v. Martino, 648 F.2d 367 (11th Cir. 1981); United States v. Aleman, 609 F.2d 298, cert. denied 445 U.S. 946 (7th Cir. 1979); United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Moreover, one of the acts must have occurred after the effective date of the RICO statute (Oct. 15, 1970) and the more recent act must have occurred "within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering." 18 U.S.C. §1961(5); United States v. Walsh, 700 F.2d 846 (2d Cir. 1983); United States v. Welsh, 656 F.2d 1059 (5th Cir. 1981), cert. denied sub nom Castell v. United States, 102 S.Ct. 1767 (9182). The Criminal Division requires that each defendant must have committed one act of racketeering within the five-year statute of limitation in order to be charged with violating 18 U.S.C. §1962(c). See United States v. Walsh, supra.

Finally, the "social status" of the actor is immaterial. It is not an element of the offense that the defendant is associated with organized crime. He need only have committed acts prohibited by the RICO statute. United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975).

9-110.122 Collection of an Unlawful Debt

The alternative element in a 18 U.S.C. §1962 violation is the collection of an unlawful debt. Unlike the pattern of racketeering element, only one collection is necessary to make out a violation. There are two methods of proving the collection of an unlawful debt. The circumstances are narrow but are peculiarly designed to combat common methods of organized criminal activity.

A. The first method requires:

1. A gambling activity or business illegal under federal, state or local law;

2. A debt incurred or contracted in that gambling activity or business; and

3. Collection of that debt.

given to filing a civil action initially where informants who could be identified by discovery under the Federal Rules of Civil Procedure are concerned. In fact, since the discovery tools provided in a civil action could jeopardize a criminal case prior to trial, the initial finding of a civil case where a criminal proceeding is anticipated, or the simultaneous seeking of an indictment and filing of a Section 1964 civil action is not recommended. Furthermore, in the event that a civil action is filed subsequent to a conviction in a criminal proceeding, Section 1964(d) provides for the assertion of the doctrine of collateral estoppel by the United States in a civil proceeding.

9-110.200 RICO GUIDELINES PREFACE

The decision to institute a federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned.

Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate it remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed--the infiltration of organized crime into the nation's economy.

under 18 U.S.C. §1963(a). Where forfeiture of the enterprise and other property interests used in the commission of a 18 U.S.C. §1962 violation will be sought, the United States can and should move to protect that property interest from liquidation and disposal during the pendency of the criminal proceeding via this provision.

The Federal Rules of Criminal Procedure require the inclusion of an allegation in the indictment specifying the property interests to be forfeited. The purpose of this allegation is to apprise the accused, in accordance with the standards of due process, that he stands to lose his property interests which are utilized in violation of 18 U.S.C. §1962. See United States v. Bello, 470 F. Supp. 723 (S.D. Calif. 1979).

9-110.140 Civil Remedies

9-100.141 Of the United States

The civil remedies contained in the RICO statute are designed "to free the channels of commerce from predatory activities" and not to punish the violator, which remains within the province of the criminal provisions discussed in USAM 9-110.130. S. REP. NO. 91-617, 91st Cong., 1st Sess. 81 (1969); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); United States v. Local 560, International Brotherhood of Teamsters, 560 F. Supp. 511 (D. N.J. 1982).

A. 18 U.S.C. §1964(a) grants district courts the power to hear civil actions by the United States to:

1. Divest a person of any interest in an enterprise;

2. Restrain future activities or investments of any person;

3. Dissolve or reorganize any enterprise, subject to the rights of innocent persons.

B. 18 U.S.C. §1964(b) authorizes the Attorney General, as defined in 18 U.S.C. §1961(10), to institute civil proceedings and directs the courts to expedite such matters. 18 U.S.C. §1964(b) also provides for interlocutory restraining orders and prohibitions and the acceptance of performance bonds pending the final disposition of the civil proceeding.

C. A preceding criminal action is not a prerequisite to the institution of a civil action. However, careful consideration should be

advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecutive memorandum at a later date.

9-110.211 Duties of the Submitting Attorney

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, the Section shall be notified in writing of any significant rulings which have an impact upon the RICO statute. For example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the U.S. Attorney as well as the defense should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other U.S. Attorneys' offices handling similar RICO matters.

Once a verdict has been obtained, the U.S. Attorney should forward the following information to the Organized Crime and Racketeering Section for retention: (a) the verdict on each count of the indictment, (b) a copy of the judgment of forfeiture, (c) estimated value of the forfeiture, (d) judgment and sentence(s) received by each RICO defendant.

9-110.300 RICO SPECIFIC GUIDELINES

9-100.310 Considerations Prior to Seeking Indictment

Except as hereafter provided, the attorney for the government should seek authorization for an indictment charging a RICO violation only if in his judgment those charges:

A. Are necessary to ensure that the indictment:

1. Adequately reflects the nature and extent of the criminal conduct involved; and

2. Provides the basis for an appropriate sentence under all the circumstances of the case; or

B. Are necessary for a successful prosecution of the government's case against the defendant or a co-defendant; or

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative perogratives of the Department of Justice.

9-100.210 Authorization of Prosecution: The Review Process

Effective September 15, 1980, the review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section. To commence the review process, a final draft of the proposed indictment and a prosecutive memorandum shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. The guidelines provide detailed guidance for the use of RICO charges in criminal investigations and prosecutions, as well as in all civil applications of RICO. Attorneys are, however, encouraged to seek guidance from the Organized Crime and Racketeering Section, telephonically or by letter, prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review. Communication with the Organized Crime and Racketeering Section well in advance of indictment may result in the resolution of problems with a proposed RICO indictment and effect an expeditious review.

The submitting attorney must anticipate that the RICO review process, which is handled on a first-in-first-out basis, is a time consuming process, in which the reviewer has no control over the number of cases submitted for review during a given time frame. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. Unless there is a backlog, 15-working days is usually sufficient. The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be

Division having supervisory responsibility for this statute. A RICO prosecutive memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, Box 571, Ben Franklin Station, Washington, D.C. 20044, at least 15-working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire, as authorizations based on oral presentations will not be given.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the sole criteria by which the Department of Justice will determine whether to approve the indictment, felony information, civil complaint, or civil investigative demand. As in the past, the fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. §1962 is not required.

In addition to the above considerations, the use of RICO in a prosecution is also governed by the Principles of Federal Prosecution (July 1980). Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the Principles of Federal Prosecution.

9-110.330 Charging RICO Counts

A RICO count of an indictment will not be charged where the predicate acts consist solely and only of state offenses except in the following circumstances:

A. Cases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest;

B. Cases in which significant organized crime involvement exists; or

C. Provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

9-110.311 Commentary

All-encompassing examples are difficult, if not impossible, to formulate when discussing RICO; however, by way of illustration only:

A. When a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate, charging a RICO conspiracy may be appropriate;

B. When the course of criminal conduct has aspects which aggravate the seriousness of the crime (including prior criminal activity by a RICO defendant) which realistically can be foreseen as grounds for the sentencing judge imposing a heavier sentence under RICO than for the underlying acts, a RICO count may be appropriate;

C. When, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct in a pattern of racketeering activity can be shown to be admissible only under RICO, and not under other evidentiary theories (such as: prior similar acts, continuing crime or conspiracy), a RICO count my be appropriate;

D. When a substantial prosecutive interest will be served by forfeiting an individual's interest in or source of influence over the enterprise which he has acquired, maintained, operated or conducted in violation of 18 U.S.C. §1962, RICO may be appropriate.

9-110.320 Approval of Organized Crime and Racketeering Section Necessary

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division.

9-110.321 Commentary

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal

9-110.360 Charging Enterprise as a Group Associated in Fact

No RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic or other identifiable goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity.

9-110.361 Commentary

The purpose of this guideline is to restrict the use of the RICO statute by requiring that the "enterprise" have a demonstrable existence apart from the mere confederation of the individuals committing the underlying predicate acts. However, RICO counts may be approved in otherwise appropriate circumstances when it can be demonstrated that the enterprise has the attributes required by this guideline.

For example, such an enterprise could be an existing club or unincorporated association, with an organizational framework and hierarchy, with individuals occupying offices or positions of authority in the hierarchy over a regular membership; who function in diversified roles. The enterprise must have some common denominator such as an interest, avocation, or other regular activity separate and apart from the criminal acts, but which is directed toward an economic or other identifiable goal. Other indicia of the enterprise's separate existence may include formalized membership, recruitment and induction and/or membership insignia.

Stated another way, independent of the proof of the requisite pattern of racketeering, the evidence must be forthcoming to demonstrate the structure and existence of the enterprise. See United States v. Turkette, 452 U.S. 576 (1981); United States v. Errico, 635 F.2d 152 (2d Cir. 1980).

9-110.400 RICO PROSECUTIVE (PROS) MEMO FORMAT

9-110.401 Preface

A well written, carefully organized pros memo is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. This section sets out the criteria by which a RICO pros memo is evaluated by the Organized Crime and Racketeering Section. Close

C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.331 Commentary

The purpose of this guideline is to underscore the principle that prosecution of state crimes, except in the circumstances set forth above, is primarily the responsibility of the state authorities. These guidelines will be construed in light of a practical understanding of the realities of state law enforcement rather than a theoretical view of the reach of state law.

9-110.340 Charging a Violation of 18 U.S.C. §1962(c)

No indictment shall be brought charging a violation of 18 U.S.C. §1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction.

9-110.341 Commentary

The purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute.

9-110.350 Relation to Purpose of the Enterprise

In order to constitute a violation of 18 U.S.C. §1962, the pattern of racketeering activity or collection of unlawful debt must have some relation to the purpose of the enterprise.

9-110.351 Commentary

This guideline covers the type of situation that occurred in United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied 435 U.S. 957 (1978) in which mere geographic co-location between the enterprise (a trailer park) and the pattern of racketeering activity (gambling) was held insufficient under 18 U.S.C. §1962(c).

9-110.404 Specific Requirements

Identification of the Defendants

This section should identify each proposed defendant by name and aliases, date and place of birth (if known), criminal arrests and convictions, current employment and major business or labor interests (if any), and connection to or membership in an organized crime family, corrupt union or other criminal organization. If relevant, the defendant's health, age and potential for flight to avoid prosecution should be noted as factors in determining whether he/she will actually stand trial or receive incarceration. The memo should also indicate whether a defendant's current incarceration is likely to diminish the merit of the proposed charges.

9-110.405 A Statement of Proposed Charges

Since the pros memo will not receive final approval until the proposed indictment is reviewed, it is required that the memo provide a schematic of the proposed charges, such as:

Defendant	Charge	Indictment
Smith	Hobbs Act	Counts 3, 4, 5
	Taft-Hartley	Counts 6-10
	RICO	Counts 1 and 2
Jones	Taft-Hartley	Counts 6-10
	Tax Evasion	Count 11
	RICO	Counts 1 and 2

9-110.406 Summary of the Case

This section summarizes the significant highlights of the evidence in the case and the prosecutive theory upon which it is based. The summary should marshall the evidence in a manner likely to provide a clear understanding of the nature and strength of the evidence. While the Summary section covers the same ground as the Statement of Facts, the latter section requires greater detail and witness attribution.

attention by attorneys to the comments below will ensure that delays and declinations are kept to a minimum.

9-110.402 Purpose

The purpose of standardizing the format for RICO prosecutive memoranda is threefold:

A. To ensure compliance with the policy of the RICO guidelines;

B. To ensure legally sufficient indictments and theories of prosecution; and,

C. To provide a manageable means of conveying sufficient information for the timely review of RICO indictments.

9-110.403 General Requirements

A RICO pros memo shall be an accurate, candid and thorough analysis of the strengths and weaknesses of the proposed prosecution. In the interests of uniformity, a RICO pros memo should be divided into the following categories:

A. Identification of the Defendant

B. A Statement of Proposed Charges

C. A Summary of the Case

D. A Statement of the Law

E. A Statement of the Facts

F. Anticipated Defenses/Special Problems or Considerations

G. Forfeiture Section

H. RICO Policy Section

I. Conclusion

J. Final Draft of Proposed Indictment

E. How the enterprise was engaged in or its activities affected interstate commerce.

F. If applicable, the elements and theory of any conspiracy to violate 18 U.S.C. §1962.

9-110.408 Statement of Facts--Proof of the Offense

As the title suggests, this section should state facts, not opinions, hearsay, information or colorful asides. The facts must be recited concisely, accurately, and logically--if for no other reason than that the time within which a pros memo is approved is in inverse proportion to the accuracy and quality of the Facts section. Obviously not every fact unearthed during the investigation should be included and a pros memo which contains needless or peripheral detail has no better chance for prompt approval than one that contains too little. Accordingly, pros memos which merely incorporate by reference investigative reports or grand jury material, or which boilerplate extensive portions of investigative reports within the Statement of Facts section, are not sufficient.

The recommended format for the Facts section is to set out the relevant gist of each key witness' anticipated testimony, individually and in chronological sequence. Not all cases are best articulated in this manner but there should be good reason to depart from the general format. Although it is usually more convenient to write up the case in a single narrative which combines the testimony of several witnesses, do not do so. For many of the reasons set out below, and based on past experience, such narratives are to be discouraged. The Summary section, if done well, will be sufficient to put each witness' testimony in correct context. Where there are groups of witnesses who will merely authenticate documents or who will testify to essentially the same recurring events, their testimony need not be individually summarized.

Before the substance of a particular witness' testimony is set out, the writer must indicate whether the witness has been immunized or promised any considerations and, if so, the details thereof. The witness' past criminal record should be stated. And, importantly, the writer should note whether the witness has already testified in the grand jury; if not, an explanation should be supplied together with the basis for believing that the testimony will be available at trial.

The prospective testimony should be specific on all major points, providing, where possible, the names, dates and places of key events and

Because the Summary is a narrative outline of the Facts section, which in turn is to be based strictly on admissible evidence, neither section should contain informant information, general intelligence data or interesting but inadmissible hearsay. It is not the function of the Summary, once the case reaches the pros memo stage, to establish the significance of the prosecution beyond that suggested by the evidence itself. The strength of the case becomes blurred, not enhanced, by resorting to irrelevant references (from an evidentiary standpoint) to organized crime's involvement or similar allegations. The Summary is essentially equivalent to the government's summation; the Facts section is comparable to a trial brief; neither should stray into areas which the court at trial would not likely permit.

9-110.407 Statement of the Law

This section should state the legal elements of proof for each of the crimes alleged, to include the relevant case law (particularly from the appropriate circuit) governing those elements. Even though the reviewer has undoubtedly seen these elements and cases many times before, the Law section serves the important role of establishing that the writer is knowledgeable of his/her burden and has prepared the memo accordingly. Except in unusual cases the Statement of Law should precede the Statement of Facts; this sequence provides the reviewer with the legal standards against which the evidence is to be evaluated.

The Statement of Law section relates only to the elements of proof and relevant case law in that area. Legal problems and solutions which relate to other areas, such as the Federal Rules of Evidence, anticipated attacks against wiretaps, photo spreads, or joinder of offenses, to name but a few, should be discussed in the Anticipated/Defenses/Special Problems section.

The Statement of Law must provide the following information:

A. The precise formulation of the RICO enterprise.

B. The relevant case law of the circuit which supports this formulation of the enterprise.

C. Any case law, regardless of the circuit it originated in, which would preclude this prosecution.

D. How the enterprises's affairs were conducted through the pattern of racketeering activity.

discuss those points which are critical and indicate the extent of the problem. Not all differences in recollection warrant discussion in the pros memo but material differences do. A pros memo should also alert the reviewer if a government witness has contradicted himself in past statements on major points.

The Statement of Facts should not contain conjecture or opinion, except as allowed by the Rules of Evidence (e.g., state of mind). Frequently pros memos include assumptions or conclusions drawn by a witness based on extrinsic events. For the most part, objections to testimony along these lines will be sustained as hearsay. The writer must also avoid asserting his/her own subjective opinions as if they are fact. For example, "Immediately after his meeting with "E" and "A," according to airline records and cancelled checks, defendant "D" flew to Chicago and discussed the kickback with "C," the union trustee." In fact, the airline records and checks may only establish that "D" flew to Chicago, from which the inference is drawn that a meeting occurred.

9-110.409 Anticipated Defenses/Special Problems of Considerations

The Defense section should cover the factual and evidentiary weaknesses in the case and the likely legal defenses or theories. It would be impossible here to list all of the recurring defenses encountered in RICO prosecutions. In any event, each case is unique. It is the writer's job to recognize, based upon a thorough review of the grand jury transcripts, investigative reports, court papers, etc., which potential defenses merit discussion. For illustrative purposes, the writer should always consider the following:

A. If a search warrant was involved, is there a probable cause issue? Was there proper inventory served? Has the writer personally reviewed the warrant and affidavit and been satisfied that the search will pass muster at a suppression hearing? If the search is questionable, how will the loss of its fruits affect the case; how difficult is the taint problem?

B. If a wiretap was involved, was there proper minimization; prompt service of inventory; adequate voice identification; accurate transcriptions made; are key conversations audible; were the original tapes properly sealed and stored; were 18 U.S.C. §2517(5) orders obtained for use of recorded conversations in unrelated prosections, etc.?

C. If a defendant's prior sworn testimony, confession, or inculpatory admissions are relevant, what will be his defense: failure to warn; failure to comply with Departmental regulations; earlier promise of immunity or non-prosecution?

conversations to the extent the witness has and can do so. For example, where two government witnesses have attended a conspiratorial meeting with two-proposed defendants, the description of each witness' testimony of that meeting should cover the areas of when, where and who said what. Key meetings or conversations must not be summarized to the point where it is unclear to the reader what was said and by whom. A phrase such as "It was then suggested and agreed by the defendants that they would pay the kickback to 'A'" is unacceptable; because, upon close analysis, it is uncertain whether each defendant specifically and verbally "agreed" to something or whether "agreement" was simply inferred by the witness. And the passage also suggests that the defendants agreed specifically to a "kickback," which would be a significant inculpatory admission, when in fact the testimony may only allege that they agreed to a make a "payment" which arguably constituted a kickback. Avoid such characterizations and/or generalizations of this type. If the evidence results from a wiretapped or recorded conversation, the key remarks of a defendant should be quoted verbatim. If the evidence was not recorded, the correct procedure is to set forth, as precisely as recalled by the witness, what was said. For example, "A" will testify that "B" showed a loan application to the group and complained that "C," a union trustee, was balking at processing the loan. "D" responded, "Let's pay 'C,' two points as a fee." "B" said "Good idea, I'll tell him." Although this recitation doesn't explicitly indicate that the "fee" was intended to be a kickback, it is obvious from the context that it was, especially since "C," as a fiduciary of the fund, could not legally receive a fee for processing the loan application. In the Anticipated Defenses section the writer would, of course, anticipate the claim that the defendants intended only to pay a legal fee. The writer would then refute the claim both on its factual incredulity and by citing the case law and union constitution (if applicable) which prohibit such a conflict of interest.

A frequent defect in a pros memo, for which the above hypothetical also serves as an example, is for the writer to gloss over, or fail to recognize, inconsistencies or weaknesses in the case. If two or more government witnesses participated in an event or conversation which is critical to the case, the extent to which the witnesses are consistent or contradictory on any key point is also critical. The pros memo should supply, in the example above, "E's" account of the same meeting with "A," "B" and "D." A general statement, often made in pros memos, that "E" corroborates "A's" testimony that the meeting with "B" and "D" occured is unacceptable. The critical questions are: Does "E" attribute the same responses to "B?" If not, were "A" and "E" asked to cover the same ground in the grand jury and, if not, why not? It is not usual for one government witness to corroborate another government witness on some points while being in dispute on others. The writer must recognize and

raises a substantial issue at trial which was not discussed in the pros memo but the existence of which was or should have been anticipated.

Special problems should also be anticipated. Examples include recordings of poor audibility, the exercise of a privilege (marital or constitutional), the need to depose gravely ill witnesses, and the availability of protected witnesses in multidistrict prosecutions.

9-110.410 Forfeiture

The purpose of this section is to set forth the proof by defendant when the indictment charges that interests of that defendant are subject to forfeiture pursuant to 18 U.S.C. §1963. This section must deal with the following issues:

A. The identity of the interest(s) sought.

B. The proof that those interests are exclusively owned by the defendant.

C. The theory upon which forfeiture is predicated (i.e., interest acquired/maintained or interest affording a source of influence over the enterprise);

D. The identity of any third parties who have a claim to the property sought to be forfeited (e.g., victims of extortion, lien holders, bona fide purchasers for value) or third parties whose property rights will be substantially affected by a forfeiture of the defendant's interest (e.g., minority stockholders in a closely held corporation, partners, individuals with an undivided interest in the property).

E. How the submitting attorney plans to preserve the interests of the United States and innocent third parties in the property during the interval between the entry of the judgment of forfeiture and the time when the government may seize and dispose of the property.

F. What the ultimate disposition of the property should be (e.g., is it commercially feasible to sell it, should it be returned to third parties, should it be destroyed, etc.).

G. Is the forfeiture sought disproportionate to the criminal conduct charged?

D. Does the case involve an unusual application of a federal statute, such as the applicability of the Travel Act to a particular state's commercial bribery statute? If so, what is the prevailing case law in the circuit? How unique is the enterprise that is alleged; what is the prosecutive theory of each defendant's participation in a pattern or racketeering acts; is the theory of participation against one defendant different than as against another?

E. If the indictment contains a RICO conspiracy charge, how does the proof aliunde stack up against each defendant? What is the test and procedural technique in the district of prosecution for proving a conspiracy? How serious will be the spill-over prejudice if the court strikes the evidence against a particular defendant?

F. Are there problems involving:

1. Statute of limitations and pre-indictment delay;

2. Prosecutorial vindictiveness;

3. Tax disclosures;

4. Pre-indictment publicity; Fed. R. Crim. P. 6(e) violations;

5. Chain of custody and authenticity questions for key prosecution documents;

6. Alibis; entrapment; Bruton.

In addition to the selected category above and/or whatever unique problems exist in the case, the writer should make every effort to convey the seriousness of a potential problem instead of skirting it. If a key government witness, upon whom part or all of the prosecution rests, has been convicted of perjury or fraud or has testified in a series of acquittals, it would not be enough to note that his credibility will be severely tested, which states the obvious. In such a case, the pros memo should indicate why the witness' testimony, despite these handicaps, will be credible.

Obviously, it is not necessary to address every conceivable defense nor is it required that the writer negate a defense that would be inapplicable simply to show that an effort was made to anticipate defenses. On the other hand, it ought to be a rare case where a defendant

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

JUN 30 1989

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for the United States Attorneys

Edward S.G. Dennis, Jr.
Assistant Attorney General
Criminal Division

RE: Temporary Restraining Orders Under 18 U.S.C. §1963(d)

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-110.414

PURPOSE: This bluesheet implements new policy regarding the requirement of approval by the Organized Crime and Racketeering Section prior to filing a motion for a temporary restraining order under 18 U.S.C. §1963(d) in connection with a case involving RICO forfeiture.

The following is a new section:

9-110.414 Temporary Restraining Orders

Under 18 U.S.C. §1963(d), the government may seek a temporary restraining order (TRO) upon the filing of a RICO indictment, in order to preserve all forfeitable assets until the trial is completed and judgment entered. Such orders can have a wide-ranging impact on third parties who do business with the defendants, including clients, vendors, banks, investors, creditors, dependents, and others. Some highly publicized cases involving RICO TROs have been the subject of considerable criticism in the press, because of a perception that pre-trial freezing of assets is tantamount to a seizure of

Appendix B:

Blue Sheet on

Temporary Restraining Order

property without due process. In order to ensure that the rights of all interested parties are protected, the Criminal Division has instituted the following requirements to control the use of TROs in RICO prosecutions. (It should be noted that these requirements are in addition to any other existing requirements, such as review by the Asset Forfeiture Office.):

1. As part of the approval process for RICO prosecutions, the prosecutor must submit any proposed forfeiture TRO for review by the Organized Crime and Racketeering Section. The prosecutor must show that less-intrusive remedies (such as bonds) are not likely to preserve the assets for forfeiture in the event of a conviction.

2. In seeking approval of a TRO, the prosecutor must articulate any anticipated impact that forfeiture and the TRO would have on innocent third parties, balanced against the government's need to preserve the assets.

3. In deciding whether forfeiture (and, hence, a TRO) is appropriate, the Section will consider the nature and severity of the offense; the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.

4. When a RICO TRO is being sought, the prosecutor is required, at the earliest appropriate time, to state publicly that the government's request for a TRO, and eventual forfeiture, is made in full recognition of the rights of third parties--that is, in requesting the TRO, the government will not seek to disrupt the normal, legitimate business activities of the defendant; will not seek through use of the relation-back doctrine to take from third parties assets legitimately transferred to them; will not seek to vitiate legitimate business transactions occurring between the defendant and third parties; and will, in all other respects, assist the court in ensuring that the rights of third parties are protected, through proceedings under 18 U.S.C. §1963(l) and otherwise.

The Division expects that the prosecutor will announce these principles either at the time the indictment is returned or, at the latest, at the first proceeding before the court concerning the TRO.

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U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

July 3, 1989

TO: Holders of United States Attorneys' Manual Title 6

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Shirley D. Peterson
Assistant Attorney General
Tax Division

RE: Charging the Filing or Causing the Filing of False Income Tax Returns as Mail Fraud and/or as Mail Fraud Predicates to a RICO Charge

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 6.
3. Insert at end of USAM Title 6.

AFFECTS: USAM 6-4.211(1)

PURPOSE: This bluesheet implements prosecutive policy concerning the use of mail fraud charges and mail fraud predicates for RICO where the filing of false tax returns or forms is involved.

The following supplements 6-4.211 Tax Division Jurisdiction with a new subsection 6-4.211(1) Filing False Tax Returns: Mail Fraud Charges or Mail Fraud Predicates for RICO.

Appendix C:

Blue Sheet on

Tax-related Mail Fraud Predicate Acts

Under certain narrowly defined circumstances, however, a mail fraud prosecution predicated on a mailing of an internal revenue form or document, or where the scheme involved is essentially a tax fraud scheme, might be appropriate in addition to, but never in lieu of, applicable substantive tax charges. See, United States v. Mangan, 575 F.2d 32, 48-49 (2d Cir. 1978)(where the defendant filed false refund claims on behalf of others, thereby acting more like a thief in the traditional sense). Such a situation could arise in a tax shelter or other tax fraud case, when individuals, through no deliberate fault of their own, were demonstrably victimized as a result of a defendant's fraudulent scheme and use of a mail fraud charge is necessary to achieve some legitimate, practical purpose like securing restitution for the individual victims. The fact that a defendant committed conduct which independently victimized individuals is to be reflected in the mail fraud allegations in the indictment. Mail fraud charges could also be used in a tax fraud case when the government was also victimized in a non-revenue collecting capacity. See, e.g., United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987) (case involving primarily false contract claims). However, to the extent victimization of third parties constitutes an exception to the general rule, the evidence must demonstrate direct, substantial victimization as opposed to a general or theoretical harm to a general class of victims.

Normally, in a tax shelter case, the mere imposition of interest and penalties on the investors will not constitute sufficient victimization to warrant the use of mail fraud charges in addition to tax charges. However, each individual case will be reviewed on its

The authorization of the Tax Division is required before charging mail fraud counts either independently or as predicate acts to a RICO charge: (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud scheme (e.g., a tax shelter) 1/. Such authorization will be granted only in exceptional circumstances as explained below.

The filing of a false tax return, which almost invariably involves a mailing, is a tax crime chargeable under 26 U.S.C. 7206(1) (if the violator is the taxpayer) or 26 U.S.C. 7206(2) (if the violator is, for example, a tax return preparer or tax shelter promoter). It is the position of the Tax Division that Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violation motives are involved, even though other crimes may technically have been committed. See, United States v. Henderson, 386 F.Supp. 1048, 1052-53 (S.D.N.Y. 1971). 2/

1/ A scheme does not fall in the latter category if it is designed to defraud individuals or to defraud the government in a non-revenue collecting capacity.

2/ The Ninth Circuit in United States v. Miller, 545 F.2d 1204, 1216 (9th Cir. 1976) cert denied, 430 U.S. 930 (1977) in footnote 17 stated a contrary position, but did not analyze the issue as it was not squarely presented. The case involved corporate diversion and possible fraud on creditors as well as tax evasion.

merits to determine whether the degree of culpability of the individual investors is such as to treat them more as victims than participants in the particular scheme. Among the factors to consider are the existence of bona fide pending civil suits against the promoters by the investors, the nature and degree of misrepresentations made to the investors, and the degree of independent losses beyond the tax liability.

A similar policy will be followed with respect to the filing of RICO charges predicated on mail fraud charges which in turn involve essentially only a tax fraud scheme. Tax offenses are not predicates for RICO offenses--a deliberate Congressional decision--and charging a tax offense as a mail fraud charge could be viewed as circumventing Congressional intent unless unique circumstances justifying the use of a mail fraud charge are present.

However, once a decision has been made by the Tax Division to authorize mail fraud charges, the decision whether to authorize a RICO charge in turn based on these mail fraud charges is one for the Criminal Division to make.

For a determination as to whether a mail fraud charge predicated on the mailing of internal revenue forms or documents is appropriate, the Tax Division should be consulted early in the investigation rather than waiting until a last minute decision is needed.

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