RICO

Introduced: 2/8/85
Referred: Judiciary and Finance

IN THE HOUSE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

HOUSE BILL NO. 184

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to illegally controlled enterprises and the forfeiture of property that is used in violation of state law; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. DECLARATION OF LEGISLATIVE PURPOSE. The legislature has determined that the acquisition, establishment, or operation of legitimate and illegitimate enterprises in Alaska through a pattern of criminal activity is inimical to the continued health of our economic and social systems. The purpose of this Act is to provide appropriate penalties and severe financial disincentives that can be applied to combat this type of conduct. The legislature intends that this Act be liberally construed to effectuate its remedial purpose.

* Sec. 2. AS 11 is amended by adding a new chapter to read:

CHAPTER 59. ILLEGALLY CONTROLLED ENTERPRISES.

ARTICLE 1. PROHIBITED ACTIVITIES.

Sec. 11.59.010. UNLAWFUL ACTS. It is unlawful for a person to

(1) acquire or maintain, directly or indirectly, an interest in or control of an enterprise through racketeering;

(2) participate in or conduct, directly or indirectly, the affairs of an enterprise through racketeering; or

(3) use or invest property derived, directly or indirectly, from racketeering, or the proceeds of that property, to acquire or maintain an interest in or control of an enterprise or to participate

in or conduct the affairs of an enterprise.

Sec. 11.59.020. DEFINITION OF "RACKETEERING." (a) As used in AS 11.59.010, "racketeering" means a pattern of illegal activity that involves two or more instances of illegal activity.

(b) As used in this section and AS 11.59.030, "illegal activity" means

(1) a felony against the person under AS 11.41;

(2) a crime against property under AS 11.46, punishable as a class B felony;

(3) a felony against public administration under AS 11.56, a felony against public order under AS 11.61, a felony involving alcoholic beverages under AS 04 or a felony involving securities or takeover bids under AS 45.55 or 45.57;

(4) a crime involving controlled substances under AS 11.71, punishable as an unclassified or class A or B felony;

(5) promoting prostitution in the first degree under AS 11.66.110, promoting gambling in the first degree under AS 11.66.-210; and possession of gambling records in the first degree under AS 11.66.230;

(6) felony conduct which is defined as "racketeering activity" under 18 U.S.C. sec. 1961(1).

(c) As used in this section, a "pattern" of illegal activity means that the instances of illegal activity had the same or similar purposes, results, victims, participants, or methods of commission, or were interrelated by distinguishing characteristics.

Sec. 11.59.030. PROOF OF RACKETEERING. (a) The instances of illegal activity used to establish racketeering, as defined in AS 11.-59.020, must include

(1) one instance of illegal activity that is in violation

of Alaska law;

(2) one instance of illegal activity that occurred after the effective date of this Act; and

(3) one instance of illegal activity that was committed three years before or after the alleged acquisition or maintenance of an interest in or control of the enterprise, or the alleged participation in or conducting of the affairs of the enterprise as described in AS 11.59.010.

(b) The requirements of (a) of this section may be satisfied by a single instance of illegal activity.

(c) Past illegal activity may be used to establish racketeering as defined in AS 11.59.020 if less than five years have elapsed between the date of the most recent instance of illegal activity and the immediately preceding instance of illegal activity.

(d) Illegal activity that is used to establish racketeering as defined in AS 11.59.020 may be proved by

(1) a certified copy of a judgment of conviction;

(2) proof beyond a reasonable doubt in a criminal prosecution under AS 11.59.040 or 11.59.050; or

(3) proof by a preponderance of the evidence in a proceeding under AS 11.59.070 -- 11.59.120.

(e) For purposes of calculating the three-year period specified in (a)(3) of this section and the five-year period specified in (c) of this section, any period of imprisonment, probation, parole, conditional executive clemency, suspended imposition of sentence, formal deferred prosecution or formal pretrial diversion must be excluded.

ARTICLE 2. CRIMES INVOLVING ILLEGALLY CONTROLLED ENTERPRISES.

Sec. 11.59.040. ILLEGAL CONTROL OF AN ENTERPRISE IN THE FIRST

DEGREE. (a) A person commits the crime of illegal control of an enterprise in the first degree if the person violates AS 11.59.050, and if one of the instances of illegal activity used to establish racketeering as defined in AS 11.59.020 was

(1) an unclassified or class A felony in Alaska; or

(2) a crime in Alaska or in another jurisdiction having elements similar to a current class A felony or unclassified felony in Alaska.

(b) Illegal control of an enterprise in the first degree is an unclassified felony and is punishable as specified in AS 12.55.125(i).

Sec. 11.59.050. ILLEGAL CONTROL OF AN ENTERPRISE IN THE SECOND DEGREE. (a) A person commits the crime of illegal control of an enterprise in the second degree if the person violates AS 11.59.010 or attempts or solicits a violation of AS 11.59.010.

(b) Illegal control of an enterprise in the second degree is a class A felony.

Sec. 11.59.060. CHARGING UNDERLYING ACT. In a criminal prosecution under AS 11.59.040 or 11.59.050, a violation of a criminal law that is used to prove racketeering as defined in AS 11.59.020 may be charged as a separate count in the same indictment or information as the violation of AS 11.59.040 or 11.59.050.

ARTICLE 3. CIVIL REMEDIES.

Sec. 11.59.070. EFFECT OF CONVICTION ON OTHER PROCEEDINGS. A criminal conviction for a violation of AS 11.59.040 or 11.59.050 estops the defendant from denying the essential allegations of the crime in any subsequent proceeding brought by any party under this chapter, a forfeiture proceeding under AS 09.50, or under any other provision of law.

Sec. 11.59.080. CIVIL ACTION FOR TREBLE DAMAGES. (a) A person,

including the state or other governmental agency, that is injured in business or property by reason of a violation of AS 11.59.010 may bring an action in the superior court for three times the amount of damages sustained.

Sec. 11.59.090. PROPERTY SUBJECT TO FORFEITURE. Property, or the proceeds of property, is subject to forfeiture to the State of Alaska under AS 09.50 if

(1) acquired or maintained in violation of, or in the course of violating, AS 11.59.010;

(2) used or invested in violation of, or in the course of violating, AS 11.59.010; or

(3) derived, directly or indirectly, from racketeering, as defined in AS 11.59.020.

Sec. 11.59.100. INJUNCTIVE RELIEF. (a) In addition to any other action authorized by law, the attorney general may bring a separate ex parte action in the superior court to enjoin a violation of AS 11.59.010. The superior court may prevent or restrain violations of AS 11.59.010 by issuing appropriate temporary or permanent orders which may include divestiture of any interest in an enterprise, performance bonds, reasonable restrictions on future activities or investments, the attachment and freezing of assets, prohibitions against engaging in the same type of activities as the enterprise engaged in, and dissolution or reorganization of any enterprise, making appropriate provision for the rights of innocent persons.

(b) At any time after a civil or criminal proceeding arising out of a violation of AS 11.59.010 has been instituted, the superior court may issue appropriate orders and injunctive relief that may include the remedies listed in (a) of this section, or any other order to prevent disposal or diminution in value of property subject to

forfeiture under AS 11.59.090(1) or (2) or subject to a claim for damages under AS 11.59.080.

(c) Upon a criminal conviction or a civil judgment, including an order of forfeiture, arising out of a violation of AS 11.59.010, the superior court may issue appropriate orders that may include the remedies listed in (a) of this section.

Sec. 11.59.110. CIVIL INVESTIGATIVE DEMAND. (a) Whenever there is reason to believe that a person or enterprise may be in possession, custody, or control of a document or other material that may be relevant to an investigation relating to a violation of AS 11.59.010, the attorney general may, before the institution of a civil or criminal proceeding, issue a written investigative demand requiring the production of the material for examination.

(b) A demand for material must

(1) state the nature of the conduct that is under investigation;

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

(3) state that the demand must be complied with immediately if there is reason to believe that the material sought may be concealed, destroyed, or tampered with, or specify a date that will provide a reasonable period of time within which the material may be assembled and made available for inspection and copying or reproduction.

(c) Service of a demand for materials under this section may be made by

(1) delivering a copy to a partner, executive officer, managing agent, or general agent of an enterprise, or to an agent

authorized to receive service of process on behalf of an enterprise, or to any individual person;

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

(3) depositing a copy in the United States mail, by registered or certified mail addressed to the principal office or place of business of the person to be served.

(d) A person upon whom a demand issued under this section has been served shall make the material available for inspection and copying by the attorney general at the principal place of business of the person, or at such other place as the attorney general may direct. Failure to comply with a civil investigative demand under this section is punishable in the superior court as contempt, to the same extent as a contempt of any order issued from that court.

(e) The attorney general may take physical possession of any materials produced, and is responsible for their return under this section. No material may be made available for examination by an individual other than the attorney general, without the consent of the person who produced the material. Under such reasonable terms as the attorney general prescribes, documentary material must be available for examination by the person who produced the material, or an authorized representative of that person.

(f) Within 90 days after the production of an original document or other material, or upon the completion of the investigation for which the original material was produced under this section, or upon completion of a case or proceeding arising from an investigation, whichever is sooner, the attorney general shall return all original material which has not passed into the control of a court or grand jury. For good cause, the superior court may grant the attorney

general an extension of time to return the material.

Sec. 11.59.120. ATTEMPT OR SOLICITATION TO VIOLATE AS 11.59.010. As used in AS 11.59.070 -- 11.59.120, the term "violation of AS 11.59.010", or a similar phrase, includes an attempt or solicitation under AS 11.31 to violate AS 11.59.010.

ARTICLE 4. GENERAL PROVISIONS.

Sec. 11.59.900. DEFINITIONS. As used in this chapter, unless the context requires otherwise,

(1) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of persons associated in fact although not a legal entity;

(2) "property" means any thing of value, including real or personal property, claims against or interests in business or property, contractual rights, securities, income, profits, any interest in an enterprise, or any other business or financial interest.

* Sec. 3. AS 09.50 is amended by adding a new article to read:

ARTICLE 7. FORFEITURE.

Sec. 09.50.400. PROCEDURES APPLICABLE IN FORFEITURE PROCEEDINGS. The State of Alaska is authorized to initiate a proceeding to forfeit property if the property is made subject to forfeiture by state law. Unless otherwise specifically provided in a state law authorizing forfeiture, the procedures applicable to the forfeiture of property are specified in AS 09.50.400 -- 09.50.480.

Sec. 09.50.410. SEIZURE AND CUSTODY OF PROPERTY. (a) Property may be seized by a peace officer under an order issued by a court upon a showing of probable cause that the property is subject to forfeiture. The property may be seized without a court order if

(1) constitutionally permissible or otherwise authorized by law;

(2) the property has been the subject of a judgment in favor of the state in a forfeiture proceeding; or

(3) there is probable cause to believe that the property is subject to forfeiture and is easily movable; property seized under this paragraph may not be held for more than 48 hours without a court order, which may be obtained in an ex parte proceeding, based on probable cause that the property is subject to forfeiture.

(b) Property seized under (a) of this section must be held in the custody of the commissioner of public safety or a municipal law enforcement agency authorized by the commissioner to retain custody, subject only to the orders and decrees of the court. If property is seized under this section, the commissioner of public safety or an authorized municipal law enforcement agency may

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(c) Within 10 days after a seizure under this section, the commissioner of public safety or authorized municipal law enforcement agency shall make an inventory of any property seized, including controlled substances, and shall estimate the value of any item seized other than controlled substances. As used in this section, "controlled substance" includes "imitation controlled substance" as defined in AS 11.73.099.

Sec. 09.50.420. NOTICE OF SEIZURE AND FORFEITURE ACTION; ANSWERS. (a) Within 30 days after a seizure under AS 09.50.410, the commissioner of public safety shall, in any manner authorized for service of process under rules of civil procedure, give notice of the

seizure to any person known to have an interest in the property if it has an estimated value of $500 or more, or whose interest in the property is ascertainable from official registration numbers, licenses, or other state, federal, or municipal numbers on the property. The notice required by this subsection need not be given if the state has filed a motion to forfeit or a complaint under AS 09.50.430(a) within 30 days after seizure of the property.

(b) Within 30 days after the filing of a civil in rem action or a motion to forfeit in a civil or criminal action, the commissioner of public safety shall,

(1) in any manner authorized for service of process under rules of civil procedure, provide a copy of the complaint or motion to any person known to have an interest in the property, other than the defendant, when a motion for forfeiture has been filed in a criminal proceeding; and

(2) begin to publish notice of the action to forfeit property with an estimated value of $500 or more in a newspaper of general circulation in the judicial district where the property was seized, or if the property has not been seized, the judicial district where the forfeiture action was filed; if no newspaper is published in that judicial district, the notice must be published in a newspaper published in the state and distributed in that judicial district; the notice must be published once each week during four consecutive calendar weeks.

(c) Upon service of process or publication under (b) of this section, a person claiming an interest in the property, or a defendant in a criminal proceeding who has been served with a motion to forfeit, shall file an answer within the time permitted for answering civil complaints under applicable rules of civil procedure. The answer must

set out the reasons why the property is not subject to forfeiture or why the claimant is entitled to remission under AS 09.50.470. The answer must include the nature of the claimant's interest in the property, the date it was acquired, the consideration paid, and the circumstances under which it was acquired. If an answer is not filed within the required time period, the property must be forfeited to the state without further proceedings or showings.

(d) The notice requirements of this section do not apply to controlled substances under AS 11.71 or imitation controlled substances under AS 11.73.

Sec. 09.50.430. PROCEEDINGS RESULTING IN FORFEITURE; BURDEN OF PROOF. (a) A forfeiture proceeding is initiated by the state by the filing of a motion to forfeit in a criminal case or in a civil proceeding relating to the conduct making the property subject to forfeiture, or by the filing of a complaint in a separate in rem proceeding.

(b) Questions of fact or law in a forfeiture proceeding under this section must be determined by the court sitting without a jury. In a forfeiture proceeding the state must prove by a preponderance of the evidence that the property is subject to forfeiture under the law authorizing forfeiture. A forfeiture proceeding, including discovery, may be held in abeyance until the conclusion of a pending criminal action relating to the conduct making the property subject to forfeiture.

Sec. 09.50.440. DEFENSES EXEMPTED. It is not a defense to a proceeding to forfeit property under AS 09.50.430 that a criminal proceeding has resulted in a conviction of a lesser included offense or an acquittal.

Sec. 09.50.450. PETITION FOR RELEASE OF SEIZED PROPERTY. (a) A claimant may at any time petition the court for release of property

seized under AS 09.50.410 if the claimant

(1) has filed a timely answer under AS 09.50.420(c); or

(2) before the initiation of a forfeiture action, files a notice of claim setting out the nature of the claimant's interest in the property, the date it was acquired, the consideration paid, and the circumstances under which it was acquired.

(b) The court may release property that is not likely to be used as evidence by the state or a defendant in a criminal proceeding, or by any party in a civil proceeding, if

(1) the claimant gives adequate assurance that the property will remain subject to the court's jurisdiction;

(2) the court finds that the release is in the best interests of the state; and

(3) the claimant provides a bond or other valid and equivalent security equal to twice the estimated value of the property.

Sec. 09.50.460. PETITION FOR DISPOSITION OF SEIZED PROPERTY. (a) The state may petition the court for disposition of seized property before the termination of court proceedings. A claimant may also seek a petition for disposition before the termination of court proceedings if the claimant

(1) has filed a timely answer under AS 09.50.420(c); or

(2) before the initiation of a forfeiture action, files a notice of claim setting out the nature of the claimant's interest in the property, the date it was acquired, the consideration paid, and the circumstances under which it was acquired.

(b) The court may grant a petition for disposition if the property is not likely to be used as evidence by the state or a defendant in a criminal proceeding, or by any party in a civil proceeding, and the court finds that the disposition is in the best interests of the

state and the preservation and maintenance of the value of the property seized. Proceeds from the disposition plus interest to the date of termination of the court proceedings become the subject of the forfeiture action.

Sec. 09.50.470. FORFEITURE AND REMISSION. (a) Once the state has established that property is subject to forfeiture under the law authorizing forfeiture, the property must be forfeited to the state, except that a claimant who has filed an answer under AS 09.50.420(c) may prove by a preponderance of the evidence that the claimant is entitled to remission because the claimant

(1) has a valid interest in the property, acquired in good faith;

(2) did not participate in the conduct that resulted in the property being subject to forfeiture; and

(3) did not know or have reasonable cause to believe that the property had been or would be used or derived in a manner making the property subject to forfeiture.

(b) Upon a showing that a claimant is entitled to remission under (a) of this section, the court shall order that

(1) if the claimant is entitled to the property, it must be delivered to the claimant immediately;

(2) if the claimant is entitled to some value less than the total value of the property, the claimant may choose to receive either the value of the interest or, upon payment of the difference in value, the entire property.

(c) The court may, as part of a sentence, or as a condition of a probation or suspended imposition of sentence, order the payment of reasonable maintenance, storage, disposal, publication, attorney fees, or other costs associated with the forfeiture or remission of

property.

Sec. 09.50.480. STATE DISPOSAL OF FORFEITED PROPERTY. Property forfeited under this chapter, other than controlled substances, must be disposed of by the commissioner of administration in accordance with applicable law. Controlled substances and imitation controlled substances must be disposed of under AS 17.30.126. The commissioner of administration may, consistent with other applicable law,

(1) destroy property harmful to the public;

(2) sell the property and use the proceeds for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, custody, and court costs;

(3) take custody of the property and authorize its use in the enforcement of the law or transfer it to another agency of the state or a political subdivision of the state for a use in furtherance of the administration of justice;

(4) take custody of the property and remove it for disposition in accordance with law;

(5) forward it to the United States Department of Justice for disposition; or

(6) transfer ownership of an aircraft to the Alaska Wing, Civil Air Patrol.

* Sec. 4. AS 11.41.520 is amended by adding a new subsection to read:

(e) As used in this section, "obtains the property of another" includes the collection of a debt that was undertaken with the express or implied understanding between the debtor and the creditor that delay in making repayment, or failure to make repayment, could result in commission of any of the acts described in (a)(1) -- (7) of this section.

* Sec. 5. AS 11.66.270 is amended to read:

Sec. 11.66.270. FORFEITURE. If used in violation of AS 11.66.-200 -- 11.66.280, the following property is subject to forfeiture under AS 09.50 [SHALL BE FORFEITED]:

(1) a gambling device or gambling record;

(2) money, not found on the person, used as a bet or stake;

(3) money, used as a bet or a stake which is found on the person of one who conducts, finances, manages, supervises, directs, or owns all or part of an unlawful gambling enterprise.

* Sec. 6. AS 11.73.060(a) is amended to read:

(a) Property used during or in aid of a violation of this chapter may be forfeited to the state to the extent permitted under and in accordance with the provisions of AS 17.30.110 -- 17.30.126 and AS 09.50.

* Sec. 7. AS 12.55.035(b)(1) is amended to read:

(1) $75,000 for an unclassified felony [MURDER IN THE FIRST OR SECOND DEGREE, SEXUAL ASSAULT IN THE FIRST DEGREE, KIDNAPPING, OR MISCONDUCT INVOLVING A CONTROLLED SUBSTANCE IN THE FIRST DEGREE].

* Sec. 8. AS 12.55.125(i) is amended to read:

(i) A defendant convicted of illegal control of an enterprise in the first degree, sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and must [SHALL] be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 -- 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused

serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 25 years.

* Sec. 9. AS 17.30.110 is repealed and reenacted to read:

Sec. 17.30.110. ITEMS SUBJECT TO FORFEITURE. (a) The following property is subject to forfeiture under AS 09.50 and AS 17.30.126:

(1) a controlled substance which has been manufactured, distributed, dispensed, acquired, or possessed in violation of this chapter or AS 11.71;

(2) raw materials, products, and equipment which are used or intended for use in manufacturing, distributing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of this chapter or AS 11.71;

(3) property which is used or intended for use as a container for property described in (1) or (2) of this section;

(4) a conveyance, including but not limited to aircraft, vehicles, or vessels, which has been used or is intended for use in transporting or in any manner in facilitating the transportation, sale, receipt, possession, or concealment of property described in (1) or (2) of this section in violation of a felony offense under this chapter or AS 11.71;

(5) books, records, and research products and materials, including formulas, microfilm, tapes, and data, which are used in violation of this chapter or AS 11.71;

(6) money, securities, negotiable instruments, or other property

(A) furnished by a person in exchange for a controlled substance in violation of this chapter or AS 11.71;

(B) used to facilitate a violation of this chapter or AS 11.71; or

(C) which constitute proceeds derived from a violation of this chapter or AS 11.71; and

(7) a firearm carried during, or used in furtherance of a violation of this chapter or AS 11.71.

(b) In this section, "violation of this chapter or AS 11.71" includes an attempt or solicitation under AS 11.31 to violate this chapter or AS 11.71.

* Sec. 10. AS 17.30.126 is amended by adding a new subsection to read:

(c) As used in this section, "controlled substance" includes "imitation controlled substance" as defined in AS 11.73.099.

* Sec. 11. AS 17.30.112 -- 17.30.124 are repealed.

* Sec. 12. This Act takes effect January 1, 1986.

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January 4, 1984

Senator Patrick M. Rodey
Aglietti, Pennington & Rodey
1200 Airport Heights Road, Suite 520
Anchorage, Alaska 99508

Dear Pat:

Enclosed please find an advanced copy of the Administration's RICO Bill. As I indicated to you I obtained this advance copy as a favor from Dan Hickey and he has asked me to share it with no one but you.

Very truly yours,

BIRCH, HORTON, BITTNER
PESTINGER & ANDERSON

Timothy Petumenos

TP:sab
Encl.

IN THE _____

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

_____ BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

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* Sec. 2. AS 11 is amended by adding a new chapter to read:

CHAPTER 59. ILLEGALLY CONTROLLED ENTERPRISES

ARTICLE 1. PROHIBITED ACTIVITIES

Sec. 11.59.010. UNLAWFUL ACTS. It is unlawful for a person to

(1) acquire or maintain, directly or indirectly, an interest in or control of an enterprise through racketeering or by using or investing property derived from racketeering;

(2) participate in or conduct, directly or indirectly, the affairs of an enterprise through racketeering by using or investing property derived from racketeering.

Sec. 11.59.020. DEFINITION OF "RACKETEERING." (a) As used in

AS 11.59.010, "racketeering" means a pattern of illegal activity that involves two or more instances of illegal activity.

(b) As used in this section and AS 11.59.030, "illegal activity" means

(1) a felony against the person under AS 11.41;

(2) a crime against property under AS 11.46, punishable as a class B felony;

(3) a felony against public administration under AS 11.56, a felony against public order under AS 11.61, ~~or~~ a felony involving alcoholic beverages under AS 04 OR A FELONY INVOLVING SECURITIES OR TAKEOVER BIDS UNDER AS 45.55 OR 45.57;

(4) a crime involving controlled substances under AS 11.71, punishable as an unclassified or class A or B felony;

(5) promoting prostitution in the first degree under AS 11.66.110, promoting gambling in the first degree under AS 11.66.-210; and possession of gambling records in the first degree under AS 11.66.230;

(6) felony conduct which is defined as "racketeering activity" under 18 U.S.C. sec. 1961(1).

(c) As used in this section, a "pattern" of illegal activity means that the instances of illegal activity had the same or similar purposes, results, victims, participants, or methods of commission, or were interrelated by distinguishing characteristics.

Sec. 11.59.030. PROOF OF RACKETEERING. (a) The instances of illegal activity used to establish racketeering as defined in AS 11.-59.020 must include

(1) one instance of illegal activity that is in violation of Alaska law;

(2) one instance of illegal activity that occurred after the effective date of this Act; and

(3) one instance of illegal activity that was committed three years before or after the alleged acquisition or maintenance of an interest in or control of the enterprise as described in 11.59.-010(1), or the alleged participation in or conducting of the affairs of the enterprise as described in AS 11.59.010(2).

(b) The requirements of (a) of this section may be satisfied by a single instance of illegal activity.

(c) Past illegal activity may be used to establish racketeering as defined in AS 11.59.020 if less than five years have elapsed between the date of the most recent instance of illegal activity and the immediately preceding instance of illegal activity.

(d) Illegal activity that is used to establish racketeering as defined in AS 11.59.020 may be proved by

(1) a certified copy of a judgment of conviction;

(2) proof beyond a reasonable doubt in a criminal prosecution under AS 11.59.040 or 11.59.050; or

(3) proof by a preponderance of the evidence in a proceeding under AS 11.59.070--11.59.120.

(e) For purposes of calculating the three year period specified in (a)(3) of this section and the five year period specified in (c) of this section, any period of imprisonment, probation, parole, conditional executive clemency, suspended imposition of sentence, formal deferred prosecution or formal pretrial diversion shall be excluded.

ARTICLE 2. CRIMES INVOLVING ILLEGALLY CONTROLLED ENTERPRISES

Sec. 11.59.040. ILLEGAL CONTROL OF AN ENTERPRISE IN THE FIRST DEGREE. (a) A person commits the crime of illegal control of an enterprise in the first degree if the person violates AS 11.59.050 and one of the instances of illegal activity used to establish

racketeering as defined in AS 11.59.020 was

(1) an unclassified or class A felony in Alaska; or

(2) a crime in Alaska or in another jurisdiction having elements similar to a current class A felony or unclassified felony in Alaska.

(b) Illegal control of an enterprise in the first degree is an unclassified felony and is punishable as specified in AS 12.55.125(b).

Sec. 11.59.050. ILLEGAL CONTROL OF AN ENTERPRISE IN THE SECOND DEGREE. (a) A person commits the crime of illegal control of an enterprise in the second degree if the person violates AS 11.59.010 or attempts or solicits a violation of AS 11.59.010.

(b) Illegal control of an enterprise in the second degree is a class A felony.

Sec. 11.59.060. CHARGING UNDERLYING ACT. In a criminal prosecution under AS 11.59.040 or 11.59.050, a violation of a criminal law that is used to prove racketeering as defined in AS 11.59.020 may be charged as a separate count in the same indictment or information as the violation of AS 11.59.040 or 11.59.050.

ARTICLE 3. CIVIL REMEDIES

Sec. 11.59.070. EFFECT OF CONVICTION ON OTHER PROCEEDINGS. A criminal conviction for a violation of AS 11.59.040 or 11.59.050 estops the defendant from denying the essential allegations of the crime in any subsequent proceeding brought under this chapter, a forfeiture proceeding pursuant to AS 09.50, or under any other provision of law, by any other party.

Sec. 11.59.080. CIVIL ACTION FOR TREBLE DAMAGES. (a) A person, including the state or other governmental agency, that is injured in business or property by reason of a violation of AS 11.59.010 may bring an action in the superior court for three times the amount of

damages sustained.

Sec. 11.59.090. PROPERTY SUBJECT TO FORFEITURE. The following property is subject to forfeiture to the State of Alaska pursuant to AS 09.50:

(1) property used to acquire or maintain an interest in or control of an enterprise, or to conduct or participate in the affairs of an enterprise, in violation of AS 11.59.010(1) or (2); and

(2) property, including any interest in an enterprise, derived or acquired, directly or indirectly, from a violation of AS 11.59.010(1) or (2).

Sec. 11.59.100. INJUNCTIVE RELIEF. (a) In addition to any other relief under this chapter, the attorney general may bring an action in the superior court to enjoin a violation of AS 11.59.010. The superior court may prevent or restrain violations of AS 11.59.010 by issuing appropriate temporary or permanent orders which may include divestiture of any interest in an enterprise, performance bonds, reasonable restrictions on future activities or investments, the attachment and freezing of assets, prohibitions against engaging in the same type of activities as the enterprise engaged in, and dissolution or reorganization of any enterprise, making appropriate provision for the rights of innocent persons.

(b) At any time after a civil or criminal proceeding arising out of a violation of AS 11.59.010 has been instituted, the superior court may issue appropriate orders and injunctive relief that may include the remedies listed in (a) of this section, or any other order to prevent disposal or diminution in value of property subject to forfeiture under AS 11.59.090(1) or (2) or subject to a claim for damages under AS 11.59.080.

(c) Upon a criminal conviction or a civil judgment, including an

order of forfeiture, arising out of a violation of AS 11.59.010, the superior court may issue appropriate orders that may include the remedies listed in (a) of this section.

Sec. 11.59.110. CIVIL INVESTIGATIVE DEMAND. (a) Whenever there is reason to believe that a person or enterprise may be in possession, custody, or control of a document or other material that may be relevant to an investigation relating to a violation of AS 11.59.010, the attorney general may, before the institution of a civil or criminal proceeding, issue a written investigative demand requiring the production of the material for examination.

(b) A demand for material must

(1) state the nature of the conduct that is under investigation;

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

(3) state that the demand must be complied with immediately if there is reason to believe that the material sought may be concealed, destroyed, or tampered with, or specify a date that will provide a reasonable period of time within which the material may be assembled and made available for inspection and copying or reproduction.

(c) Service of a demand for materials under this section may be made by

(1) delivering a copy to a partner, executive officer, managing agent, or general agent of an enterprise, or to an agent authorized to receive service of process on behalf of an enterprise, or to any individual person;

(2) delivering a copy to the principal office or place of

business of the person to be served; or

(3) depositing a copy in the United States mail, by registered or certified mail addressed to the principal office or place of business of the person to be served.

(d) A person upon whom a demand issued under this section has been served shall make the material available for inspection and copying by the attorney general at the principal place of business of the person, or at such other place as the attorney general may direct. Failure to comply with a civil investigative demand under this section is punishable in the superior court as contempt, to the same extent as a contempt of any order issued from that court.

(e) The attorney general may take physical possession of any materials produced, and is responsible for their return under this chapter. No material may be made available for examination by an individual other than the attorney general, without the consent of the person who produced the material. Under such reasonable terms as the attorney general prescribes, documentary material must be available for examination by the person who produced the material, or an authorized representative of that person.

(f) Within 90 days after the production of an original document or other material, or upon the completion of the investigation for which the original material was produced under this section, or upon completion of a case or proceeding arising from an investigation, whichever is sooner, the attorney general shall return all original material which has not passed into the control of a court or grand jury. For good cause, the superior court may grant the attorney general an extension of time to return the material.

Sec. 11.59.120. ATTEMPT OR SOLICITATION TO VIOLATE AS 11.59.010. As used in AS 11.59.070--120, the term "violation of AS 11.59.010", or

a similar phrase, includes an attempt or solicitation under AS 11.31 to violate AS 11.59.010.

ARTICLE 5. GENERAL PROVISIONS

Sec. 11.59.900. DEFINITIONS. As used in this chapter, unless the context requires otherwise,

(1) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of persons associated in fact although not a legal entity;

(2) "person" includes any individual or entity capable of holding a legal or beneficial interest in property, including a natural person, a government as defined by AS 11.81.900(b), and any entity listed in AS 01.10.060(7);

(3) "property" means any thing of value, including real or personal property, claims against or interests in business or property, contractual rights, securities, income, profits, or any other business or financial interest.

* Sec. 3. AS 09.50 is amended by adding a new article to read:

ARTICLE 7. FORFEITURE

Sec. 09.50.400. PROCEDURES APPLICABLE IN FORFEITURE PROCEEDINGS. The State of Alaska is authorized to initiate a proceeding to forfeit property if the property is made subject to forfeiture by state law. Unless otherwise specifically provided in a state law authorizing forfeiture, the procedures applicable to the forfeiture of property are specified in AS 09.50.400--09.50.480.

Sec. 09.50.410. SEIZURE AND CUSTODY OF PROPERTY. (a) Property may be seized by a peace officer under an order issued by a court upon a showing of probable cause that the property is subject to forfeiture. The property may be seized without a court order if

(1) constitutionally permissible or otherwise authorized by

law;

(2) the property has been the subject of a judgment in favor of the state in a forfeiture proceeding; or

(3) there is probable cause to believe that the property is subject to forfeiture and is easily movable; property seized under this paragraph may not be held for more than 48 hours without a court order based on probable cause that the property is subject to forfeiture, which may be obtained in an ex parte proceeding.

(b) Property seized under (a) of this section must be held in the custody of the commissioner of public safety or a municipal law enforcement agency authorized by the commissioner to retain custody, subject only to the orders and decrees of the court. If property is seized under this section, the commissioner of public safety or an authorized municipal law enforcement agency may

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(c) Within 10 days after a seizure under this section, the commissioner of public safety or authorized municipal law enforcement agency shall make an inventory of any property seized, including controlled substances, and shall estimate the value of any items seized other than controlled substances. As used in this section, "controlled substance" includes "imitation controlled substance" as defined in AS 11.73.099.

Sec. 09.50.420. NOTICE OF SEIZURE AND FORFEITURE ACTION; ANSWERS. (a) Within 30 days after a seizure under AS 09.50.410, the commissioner of public safety shall, in any manner authorized for

service of process under rules of civil procedure, give notice of the seizure to any person known to have an interest in the property if it has an estimated value of $500 or more, or whose interest in the property is ascertainable from official registration numbers, licenses, or other state, federal, or municipal numbers on the property. The notice required by this subsection need not be given if the state has filed a motion to forfeit or a complaint under AS 09.50.430(a) within 30 days after seizure of the property.

(b) Within 30 days after the filing of a civil in rem action or a motion to forfeit in a criminal action, the commissioner of public safety shall,

(1) in any manner authorized for service of process under rules of civil procedure, provide a copy of the complaint or motion to any person known to have an interest in the property, other than the defendant when a motion for forfeiture has been filed in a criminal proceeding; and

(2) begin to publish notice of the action to forfeit property with an estimated value of $500 or more in a newspaper of general circulation in the judicial district where the property was seized, or if the property has not been seized, the judicial district where the forfeiture action was filed; if no newspaper is published in that judicial district, the notice must be published in a newspaper published in the state and distributed in that judicial district; the notice must be published once each week during four consecutive calendar weeks.

(c) Upon service of process or publication under (b) of this section, a person claiming an interest in the property, or a defendant in a criminal proceeding who has been served with a motion to forfeit, shall file an answer within the time permitted for answering civil

complaints under applicable rules of civil procedure. The answer must set out the reasons why the property is not subject to forfeiture or why the claimant is entitled to remission under AS 09.50.470. The answer must include the nature of the claimant's interest in the property, the date it was acquired, the consideration paid, and the circumstances under which it was acquired. If an answer is not filed within the required time period, the property must be forfeited to the state without further proceedings or showings.

(d) The notice requirements of this section do not apply to controlled substances under AS 11.71 or imitation controlled substances under AS 11.73.

Sec. 09.50.430. PROCEEDINGS RESULTING IN FORFEITURE; BURDEN OF PROOF. (a) A forfeiture proceeding is initiated by the state by the filing of a motion to forfeit in a criminal case OR IN A CIVIL PROCEEDING RELATING TO THE CONDUCT MAKING THE PROPERTY SUBJECT TO FORFEITURE, or by the filing of a complaint in a separate in rem proceeding.

(b) Questions of fact or law in a forfeiture proceeding under this section must be determined by the court sitting without a jury. In a forfeiture proceeding the state must prove by a preponderance of the evidence that the property is subject to forfeiture under the law authorizing forfeiture. A forfeiture proceeding, including discovery, may be held in abeyance until the conclusion of a pending criminal action ~~involving~~ RELATING TO THE CONDUCT MAKING the property subject to forfeiture.

Sec. 09.50.440. DEFENSES EXEMPTED. It is not a defense to a proceeding to forfeit property that a criminal proceeding has resulted in a conviction of a lesser included offense or an acquittal.

Sec. 09.50.450. PETITION FOR RELEASE OF SEIZED PROPERTY. (a) A claimant may at any time petition the court for release of property seized under AS 09.50.410 if the claimant

(1) has filed a timely answer under AS 09.50.420(c); or

(2) before the initiation of a forfeiture action, files a notice of claim setting out the nature of the claimant's interest in the property, the date it was acquired, the consideration paid, and the circumstances under which it was acquired.

(b) The court may release property that is not likely to be used as evidence by the state or a defendant in a criminal proceeding, or by any party in a civil proceeding, if

(1) the claimant gives adequate assurance that the property will remain subject to the court's jurisdiction;

(2) the court finds that the release is in the best interests of the state; and

(3) the claimant provides a bond or other valid and equivalent security equal to twice the estimated value of the property.

Sec. 09.50.460. PETITION FOR DISPOSITION OF SEIZED PROPERTY. (a) The state may petition the court for disposition of property before the termination of court proceedings. A claimant may also seek a petition for disposition before the termination of court proceedings if the claimant

(1) has filed a timely answer under AS 09.50.420(c); or

(2) before the initiation of a forfeiture action, files a notice of claim setting out the nature of the claimant's interest in the property, the date it was acquired, the consideration paid, and the circumstances under which it was acquired.

(b) The court may grant a petition for disposition if the property is not likely to be used as evidence by the state or a defendant in a criminal proceeding, or by any party in a civil proceeding, and the court finds that the disposition is in the best interests of the state and the preservation and maintenance of the value of the property seized. Proceeds from the disposition plus interest to the date of

termination of the court proceedings become the subject of the forfeiture action.

Sec. 09.50.470. FORFEITURE AND REMISSION. (a) Once the state has established that property is subject to forfeiture under the law authorizing forfeiture, the property must be forfeited to the state, except that a claimant who has filed an answer under AS 09.50.420(c) may prove by a preponderance of the evidence that the claimant is entitled to remission because the claimant

(1) has a valid interest in the property, acquired in good faith;

(2) did not participate in the violation of the law that resulted in the property being subject to forfeiture; and

(3) did not know or have reasonable cause to believe that the property had been or would be used or derived in violation of the law that resulted in the property being subject to forfeiture.

(b) Upon a showing that a claimant is entitled to remission under (a) of this section, the court shall order that

(1) if the claimant is entitled to the property, it must be delivered to the claimant immediately;

(2) if the claimant is entitled to some value less than the total value of the property, the claimant may choose to receive either the value of the interest or, upon payment of the difference in value, the entire property.

(c) The court may, as part of a sentence, or as a condition of a probation or suspended imposition of sentence, order the payment of reasonable maintenance, storage, disposal, publication, attorney fees, or other costs associated with the forfeiture or remission of property.

Sec. 09.50.480. STATE DISPOSAL OF FORFEITED PROPERTY. Property

forfeited under this chapter, other than controlled substances, must be disposed of by the commissioner of administration in accordance with applicable law. Controlled substances and imitation controlled substances must be disposed of under AS 17.30.126. The commissioner of administration may, consistent with other applicable law,

(1) destroy property harmful to the public;

(2) sell the property and use the proceeds for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, custody, and court costs;

(3) take custody of the property and authorize its use in the enforcement of the law or transfer it to another agency of the state or a political subdivision of the state for a use in furtherance of the administration of justice;

(4) take custody of the property and remove it for disposition in accordance with law;

(5) forward it to the United States Department of Justice for disposition; or

(6) transfer ownership of an aircraft to the Alaska Wing, Civil Air Patrol.

* Sec. 4. AS 11.66.270 is amended to read as follows:

Sec. 11.66.270. FORFEITURE. If used in violation of AS 11.66.200--11.66.280, the following property <u>is subject to forfeiture pursuant to AS 09.50</u> [SHALL BE FORFEITED]:

(1) a gambling device or gambling record;

(2) money, not found on the person, used as a bet or stake;

(3) money, used as a bet or a stake which is found on the person of one who conducts, finances, manages, supervises, directs, or owns all or part of an unlawful gambling enterprise.

* Sec. 5. AS 11.73.060(a) is amended to read as follows:

(a) Property used during or in aid of a violation of this chapter may be forfeited to the state to the extent permitted under and in accordance with the provisions of AS 17.30.110--17.30.126 and AS 09.50.

* Sec. 6. AS 17.30.110 is repealed and reenacted as follows:

Sec. 17.30.110. ITEMS SUBJECT TO FORFEITURE. (a) The following property is subject to forfeiture pursuant to AS 09.50 and AS 17.30.-126:

(1) a controlled substance which has been manufactured, distributed, dispensed, acquired, or possessed in violation of this chapter or AS 11.71;

(2) raw materials, products, and equipment which are used or intended for use in manufacturing, distributing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of this chapter or AS 11.71;

(3) property which is used or intended for use as a container for property described in (1) or (2) of this section;

(4) a conveyance, including but not limited to aircraft, vehicles or vessels, which has been used or is intended for use in transporting or in any manner in facilitating the transportation, sale, receipt, possession, or concealment of property described in (1) or (2) of this section in violation of a felony offense under this chapter or AS 11.71;

(5) books, records, and research products and materials, including formulas, microfilm, tapes, and data, which are used in violation of this chapter or AS 11.71;

(6) money, securities, negotiable instruments, or other property

(A) furnished by a person in exchange for a controlled

substance in violation of this chapter or AS 11.71;

(B) used to facilitate a violation of this chapter or AS 11.71; or

(C) which constitute proceeds derived from a violation of this chapter or AS 11.71; and

(7) a firearm carried during, or used in furtherance of a violation of this chapter or AS 11.71.

(b) In this section, "violation of this chapter or AS 11.71" includes an attempt or solicitation under AS 11.31 to violate this chapter or AS 11.71.

* Sec. 7. AS 17.30.126 is amended by adding a new subsection to read as follows:

(c) As used in this section, "controlled substance" includes "imitation controlled substance" as defined in AS 11.73.099.

* Sec. 8. AS 11.41.520 is amended by adding a new subsection to read:

(e) As used in this section, "obtains the property of another" includes the collection of a debt that was undertaken with the express or implied understanding between the debtor and the creditor that delay in making repayment, or failure to make repayment, could result in commission of any of the acts described in AS 11.41.520(a)(1)--(7).

* Sec. 9. AS 12.55.035(b)(1) is amended to read as follows:

(1) $75,000 for <u>an unclassified felony</u> [MURDER IN THE FIRST OR SECOND DEGREE, SEXUAL ASSAULT IN THE FIRST DEGREE, KIDNAPPING, OR MISCONDUCT INVOLVING A CONTROLLED SUBSTANCE IN THE FIRST DEGREE];

* Sec. 10. AS 12.55.125(b) is amended to read as follows:

(b) A defendant convicted of murder in the second degree, kidnapping, <u>illegal control of an enterprise in the first degree,</u> or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years

but not more than 99 years.

* Sec. 11. AS 17.30.112--17.30.124 ~~and 17.30.130~~ are repealed.

* Sec. 12. This Act takes effect January 1, 1985.

COMMENTARY AND SECTIONAL ANALYSIS TO THE 1985 ACT RELATING TO ILLEGALLY CONTROLLED ENTERPRISES

Introduction

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations title of the Organized Crime Control Act of 1970. The legislation was designed to provide adequate criminal penalties and civil remedies to combat large-scale and sometimes highly sophisticated criminal activity. The federal law was based on the premise that a pattern of crime that was engaged in by a single person, or an organized group of persons, posed a much greater danger to society than individual unrelated criminal acts. Concerned that repeated instances of criminal activity were being used to finance the infiltration and takeover of legitimate businesses, and that crime itself had effectively become a business, Congress enacted new statutes to help respond to these two serious problems.

The federal legislation only applies to conduct which affects interstate commerce. That showing might be possible in many cases. Nevertheless, individual states have recognized that the resources available to the federal government are generally inadequate to respond to criminal activity that primarily affects state interests. Additionally, the prosecution of criminal conduct that occurs

within a state and does not directly affect federal interests has traditionally been viewed primarily as a state, rather than a federal responsibility.

During the past 14 years, at least 19 states have adopted legislation which has authorized a state response to some of the concerns addressed by Congress in 1970. (A list of those states is included as Appendix "A".) Significantly, states such as Oregon and Arizona, which like Alaska had only recently revised their criminal codes, concluded that existing laws were inadequate to respond to the problems addressed by the federal legislation. While each of the 19 states has relied on the federal legislation as a model, none has simply enacted the federal law verbatim. Instead, each has selected the best features of the federal legislation.

A similar approach was followed by the Alaska legislature in 1978 when it revised the criminal code. While individual sections were based on provisions appearing in the Model Penal Code, the criminal code revision was tailored to respond to particular Alaskan problems and concerns. A similar approach has also been followed in this legislation. While this bill differs from federal law in a number of important respects, the basic goal remains the same: to assist public officials and individual citizens in their effort to combat the criminal infiltration of

legitimate businesses and to provide appropriate penalties against those who engage in the business of crime.

Section 1. Declaration of Legislative Purpose

This section states the purpose of this bill and requires that its provisions be interpreted liberally by the courts to effectuate that remedial purpose. The purpose of the bill has already been addressed in the introduction to this commentary. The direction that the Act be liberally construed by the courts extends to both the civil and criminal provisions included in this bill. See U.S. v. Forsythe, 560 F.2d 1127, 1135 (3rd Cir. 1975).

Section 2. Illegally Controlled Enterprises

ARTICLE 1. PROHIBITED ACTIVITIES

Sec. 11.59.010. UNLAWFUL ACTS

This section defines the three prohibited acts that form the basis for both the criminal penalties and civil remedies that are authorized in this bill. The section is based substantially on 18 U.S.C. sec. 1962, and it is expected that the numerous federal decisions interpreting the scope of that statute will be of assistance to Alaska courts in interpreting any ambiguities in the Alaska

statutory language. As a general matter, if a specific decision under the federal legislation is intended to be binding on the Alaska courts in interpreting this Act, it is expressly cited in this commentary.

Each of the three instances of prohibited conduct require that "racketeering" be involved. The term "racketeering" is defined in AS 11.59.020, and is discussed in the commentary accompanying that section. It should be noted that at least two instances of illegal activity will be required to establish racketeering. Additionally, the instances of illegal activity must be part of a pattern of illegal activity, and not simply two isolated unrelated crimes.

Each of the three unlawful acts also requires that an "enterprise" be involved. The term enterprise is defined in AS 11.59.900(1), as including any "individual, partnership, corporation, association, or other legal entity, and any union or group of persons associated in fact although not a legal entity." As noted by the United States Supreme Court "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." United States v. Turkette, 452 U.S. 576, 580 (1981). The scope of this definition is discussed further in the commentary accompanying AS 11.59.900(1).

The three unlawful acts described in this section prohibit (1) acquiring or maintaining an interest in or control of an enterprise through racketeering (primarily, the use of a pattern of criminal activity to acquire an interest in a legitimate business); (2) conducting the affairs of an enterprise through racketeering (the use of a pattern of criminal activity to conduct some or all of the affairs of legitimate or completely illegitimate business); and (3) the use of the proceeds of racketeering to acquire or maintain an interest in an enterprise or to conduct the affairs of an enterprise (the use of the ill-gotten gains from a pattern of criminal activity in what would otherwise be a legal attempt to acquire an interest in or run an enterprise). The three prohibited acts can be committed by any person. The term "person" is defined in AS 11.81.900(b). Note that this section merely describes the type of conduct that can result in criminal or civil liability under this legislation. It does not specify the penalties for that conduct, which appear in other sections of this bill. See, e.g., AS 11.59.040.

AS 11.59.010(1) covers the conduct of acquiring or maintaining an interest in or control over an enterprise through racketeering. This prohibition is aimed primarily at the use of illegal activity to take over a legitimate business, although it is broad enough to cover an attempt

by one illegitimate enterprise to take over another illegitimate enterprise.

The conduct prohibited by paragraph (1) covers any attempt to take over an enterprise by the type of illegal activity defined as racketeering in AS 11.59.020. For example, a defendant may violate this paragraph by assaulting the owner of a business and setting fire to property belonging to the owner with the intent of "persuading" the owner to sell the business to the defendant or to take the defendant as a partner. Alternatively, several persons may violate this paragraph if together they engage in the prohibited conduct. For example, assume that two defendants join in an effort to acquire an interest in a legitimate business through racketeering. One defendant bribes a municipal inspector to deny a needed permit to the business while the other commits a felony assault on the owner with the intent of persuading the owner to sell an interest in the business. Together, both defendants have satisfied the definition of racketeering in AS 11.59.020 if the illegal activity of each defendant is chargeable to the other under the general principles of criminal liability specified in AS 11.16, and both have therefore engaged in conduct prohibited by paragraph (1).

As is the case with each of the three prohibited acts described by AS 11.59.010, there is no requirement that the

conduct of the defendants be part of "organized crime" or that the defendant is a member of "organized crime." See Bennett v. Berg, 685 F.2d 1053, 1063-64 (8th Cir. 1982) cert. denied, 104 S.Ct. 527 (1983), and cases cited therein. It is apparent, however, that some of the conduct prohibited by this legislation will indeed fall within a commonly accepted definition of "organized crime." See, e.g., United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982). Nevertheless, it is the intent of this legislation that no "organized crime" connection need be shown in any criminal prosecution or civil proceeding authorized by this chapter.

AS 11.59.010(2) is aimed at the person who participates in or conducts the affairs of an enterprise through racketeering. There is no requirement in the definition of enterprise that the enterprise constitute a legal entity. Consequently, this paragraph would apply to an enterprise that has been established solely to further illegal purposes. United States v. Turkette, 452 U.S. 576 (1980). See also commentary accompanying AS 11.59.900(1).

Paragraph (2) requires that the affairs of the enterprise be conducted "through" racketeering. There is no requirement that the racketeering benefit the enterprise or result in profits for the enterprise. It is sufficient that the defendant engaged in the racketeering activity as part

of the enterprise or that the illegal activity is related to the activities of the enterprise. See United States v. Webster, 669 F.2d 185 (4th Cir. 1982), cert. denied, 456 U.S. 935 (1982); United States v. Welch, 656 F.2d 1039, 1960-62 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Scotto, 641 F.2d 47 (2d Cir. 1980). There is no requirement that the illegal activity that is used to establish racketeering be part of the day-to-day business operation of the enterprise. Engl v. Berg, 511 F.Supp. 1146, 1156 (E.D. Pa. 1981) (quoting United States v. DePalma, 461 F.Supp. 778 (S.D.N.Y. 1978)). It is enough, for example, that the enterprise was used as a front for illegal activity. See United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

One example of the type of conduct covered by paragraph (2) is summarized in a recent opinion by the United States Supreme Court:

> Briefly, the evidence showed that a group of individuals associated for the purposes of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowner, promoters, investors, and arsonists, operated to destroy properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows: 'At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement

> and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds' (footnote omitted).

Russello v. United States, 104 S.Ct. 296, 298 (1983) (quoting United States v. Martino, 681 F.2d 952, 953 (5th Cir. 1982) (en banc)). Other examples of conduct that is intended to be covered by paragraph (2) are provided in United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981); United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

AS 11.59.010(3) primarily prohibits the use of property derived from racketeering, or the proceeds of that property, to obtain an interest in an enterprise. See United States v. McNary, 620 F.2d 621 (7th Cir. 1980). The term "property" (defined in AS 11.59.900(2)) has been used rather than the undefined term "income" which appears in the federal statute.

At first glance the prohibition described in paragraph (3) appears similar to that contained in paragraph (1). However, unlike paragraph (1), which requires that otherwise illegal means be used to acquire an interest in an enterprise, this paragraph makes unlawful specified conduct

relating to an enterprise when the property used to finance that conduct has been derived from racketeering. Unlike federal law, there is no exception for investments that take the form of securities purchased in the open market amounting to less than one percent of the total securities available in the enterprise. Only four of the state statutes that are based on the federal provision contain a similar provision, and there seems to be little justification for exempting this particular class of investment from the coverage of this legislation.

Considered in conjunction with AS 11.59.100, the prohibition in paragraph (3) will be of significant importance in civil proceedings where a legitimate enterprise attempts to require that the defendant divest himself of any interest in the enterprise that was obtained through the use of property derived from racketeering. This prohibition may also be of assistance in cases where the state seeks forfeiture of the defendant's illegally obtained profits from racketeering since it effectively prevents the racketeer from "sheltering" those gains by investing in a legal enterprise. See AS 11.59.090. Note that there is no requirement that the investment in the enterprise be otherwise illegal. Rather, the investment becomes illegal since it was made possible by using the fruits of racketeering.

Paragraph (3) also prohibits using the "proceeds" of property derived from racketeering. This language is intended to permit tracing of assets derived from racketeering in order to prove that such assets were, in effect, used to take over a legitimate business. Thus illegal profits do not later become legal merely because they have been laundered, or augmented, by an intervening legal investment.

Another point should be noted regarding the applicability of paragraph (3) to cases where the defendant claims that it is impossible to establish that the particular investment in the enterprise was derived from racketeering. The "sufficient nexus" test adopted by the court in United States v. McNary, 620 F.2d 621 (7th Cir. 1980), is intended to apply to such cases. In McNary, the court emphasized that the federal prohibition similar to paragraph (3) is violated if the gains from racketeering "allowed or facilitated" a subsequent investment even though the money derived from racketeering was not directly invested. Id. at 628-29.

Also note that there is no requirement that the defendant himself participate in the racketeering under paragraph (3) -- it is enough that the circumstance exists that the property was derived from racketeering. There may be cases under paragraph (3) where the defendant claims that he or she had no knowledge that the property was derived

from racketeering. In such cases, it is intended that the burden of proof be placed on the state to establish that the defendant acted at least recklessly as to the circumstance that the property was derived from racketeering.

Sec. 11.59.020. DEFINITION OF "RACKETEERING"

In defining the prohibited acts that can form the basis of a criminal prosecution or civil action authorized by this chapter, each of the three paragraphs in AS 11.59.010 uses the term "racketeering." AS 11.59.020 defines that term.

In order to establish racketeering, it must be shown that the defendant engaged in "a pattern of illegal activity that involves two or more instances of illegal activity." Proof of two instances of illegal activity that are held to meet the pattern requirement are sufficient to constitute racketeering. There is no requirement that the two or more instances of illegal activity involve different crimes. See United States v. Davis, 576 F.2d 1065 (3d Cir. 1978), cert. denied, 439 U.S. 836 (1978).

Unlike federal law, this legislation specifically defines the term "pattern" in AS 11.59.020(c). The definition is based on a definition of "pattern" appearing in several state statutes. That definition in turn was derived from United States v. Stofsky, 409 F.Supp. 609, 613-14

(S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2nd Cir. 1975), cert. denied, 429 U.S. 819 (1976), where the court held that the "pattern" requirement could not be satisfied by mere accidental or unrelated acts.

The fact that there was but one objective underlying separate acts of racketeering does not place the conduct outside the definition. United States v. Starnes, 644 F.2d 673, 678 (7th Cir. 1981), cert. denied, 454 U.S. 826 (1981). The issue is rather whether the illegal acts, undertaken to further a single objective or multiple objectives, constitute a pattern of illegal activity.

To establish a pattern of illegal activity, it must be shown that two or more instances of illegal activity were involved. The acts that are sufficient to constitute illegal activity for purposes of the definition are described in subsection (b).

One common characteristic of each crime listed in AS 11.-59.020(b)(1) -- (6) is that they are all classified as felonies. In this regard this legislation differs from federal law which allows prosecution based on underlying crimes that are misdemeanors. In view of the substantial penalties that will arise from a violation of this legislation, it seems appropriate to require that the underlying illegal activity be serious enough to be classified

by the legislature as a felony. The felonies that are listed have been chosen either on the basis that they pose a danger to personal physical security, are crimes that may be used in the effort to obtain control over an enterprise, or are crimes that may be committed by an enterprise that is in the business of crime.

AS 11.59.020(b)(6) refers to felony conduct that has been defined as "racketeering activity" under federal law. It should be noted that this paragraph does not have the effect of granting the state jurisdiction over conduct that exclusively involves federal interests. AS 11.59.-030(a)(1) specifically requires that at least one instance of illegal activity that is used to establish a pattern of racketeering must violate Alaska law. A person, for example, is not covered by this legislation for acquiring an interest in an Alaskan business through a pattern of illegal activity that involved the out-of-state bribery of a federal official and the interstate transportation of stolen property between Washington and Oregon. However, if one of the instances of illegal activity involved conduct falling within AS 11.59.020(b)(1) -- (5), a federal crime listed in 18 U.S.C. sec. 1961(1) will be sufficient to sustain an action under this chapter.

Note finally that there is no requirement that the defendant was previously convicted of the illegal activity that

is used to establish racketeering. See USACO Coal v. Carbonnin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982) and cases cited therein. To the extent that a recent opinion by the Second Circuit Court of Appeals is inconsistent with this approach, it is expressly rejected as not reflecting the intent of this legislation. See Sedima, S.P.R.L. v. Imrex Co., 53 U.S.L.W. 2062 (2d Cir. July 15, 1984).

Sec. 11.59.030. PROOF OF RACKETEERING

While AS 11.59.020 defines racketeering, AS 11.59.030 addresses several issues pertaining to the type of evidence that can be used to establish the requirements of that definition.

Subsection (a) places three restrictions on the type of illegal activity that can be used to satisfy AS 11.59.-020(b)(1) -- (6). AS 11.59.030(a)(1) requires that one of the instances of illegal activity used to establish racketeering must be in violation of Alaskan law. As discussed in the commentary accompanying AS 11.59.020, this limitation prevents the institution of a proceeding authorized by this Act based on conduct that exclusively involves federal interests.

AS 11.59.030(a)(2) requires that at least one instance of

illegal activity that is used to establish racketeering must occur after the effective date of this Act, thus eliminating any ex post facto concerns in criminal prosecutions. See United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

AS 11.59.030(a)(3) requires that at least one instance of illegal activity used to establish racketeering must occur within a three-year period either before or after the defendant becomes involved with an enterprise under the circumstances prohibited by AS 11.59.010. This restriction effectively creates an automatic bar to a finding of racketeering if both instances of illegal activity occur outside the three-year period. While a similar provision does not apply in federal law, the restriction appears appropriate to add to this legislation.

AS 11.59.030(b) clarifies a point that is probably already implicit in the language of subsection (a): the same instance of illegal activity may be used to satisfy each of the requirements specified in (a)(1) -- (3). For example, if one of the instances of illegal activity used to obtain control over an enterprise on December 15, 1985, was an assault committed in Alaska on November 15, 1985, each of the three paragraphs of subsection (a) will be satisfied, assuming that this legislation took effect on January 1, 1985.

AS 11.59.030(c) places a limitation on how far back a prosecutor or civil litigant can go in using illegal activity to establish racketeering. If more than five years has elapsed between the most recent instance of illegal activity and the immediately preceding incident of illegal activity, the past instances of illegal activity cannot be considered. For example, assume that this Act takes effect January 1, 1986. On January 1, 1987, the defendant commits one instance of illegal activity. If the prior instance of illegal activity used to establish racketeering occurred on or after January 1, 1982, it and other past acts may be considered in establishing racketeering under AS 11.59.030. However, if the prior instance of illegal activity took place before January 1, 1982, it may not be considered.

Note that AS 11.59.030(e) qualifies the five-year period specified in subsection (c) by providing that the five-year period does not begin to run until the defendant has satisfied all conditions of a sentence, or conditions of an alternative to a prosecution, for the prior instance of illegal activity. Similarly, subsection (e) also qualifies the three-year period specified in paragraph (a)(3).

An example of the relationship between subsection (e) and (c) is provided by considering the case of a defendant who is 1986 is convicted of felony assault and is sentenced to

two years' imprisonment followed by a two-year probationary period. Assume further that the probationary period is successfully completed in 1990 and that the defendant commits another felony assault in 1993. If the other requirements necessary to establish a violation of this legislation can be established, it may be alleged that the 1986 and 1993 assaults were part of a pattern of illegal activity. In this case, subsection (e) provides that the prior conviction may be considered under subsection (c) since the five-year period did not begin until 1990, the year the defendant completed the probationary period on the earlier assault. A provision similar to subsection (e) appears in AS 12.55.145(a)(1). It is intended that the decision in Griffith v. State, 653 P.2d 1057 (Alaska Ct. App. 1982), interpreting the scope of AS 12.55.-145(a)(1) also apply in interpreting the application of subsection (e).

AS 11.59.030(d) specifies how illegal activity that is used to prove racketeering is established in a proceeding brought under this legislation. In any proceeding a certified judgment of conviction for the illegal activity will always be sufficient to establish that the illegal activity occurred. If a conviction has not been obtained, the illegal activity may be established by proof beyond a reasonable doubt in a criminal prosecution and by a preponderance of the evidence in all other proceedings.

ARTICLE 2. CRIMES INVOLVING ILLEGALLY CONTROLLED ENTERPRISES

Secs. 11.59.040 and 11.59.050. ILLEGAL CONTROL OF AN ENTERPRISE IN THE FIRST AND SECOND DEGREE

AS 11.59.040 and 11.59.050 define the only two crimes created by this legislation. The first degree crime is an unclassified felony punishable by presumptive sentencing and a maximum sentence of 30 years. Additionally, the defendant will be subject to a maximum $75,000 fine under AS 12.55.035(b)(1) if the defendant is a natural person. If an organization is charged under this section, a higher fine may be imposed under AS 12.55.035(c).

Key to both crimes is the requirement that the defendant commit an act prohibited by AS 11.59.010 or attempt or solicit such an act. The coverage of AS 11.59.010 has been discussed in the commentary accompanying that section. If the state can only prove a violation of AS 11.59.010, the crime will be Illegal Control of an Enterprise in the Second Degree, a class A felony.

The second degree crime can be aggravated to the more serious first degree offense depending on the seriousness of the illegal activity used to establish racketeering. If one of the instances of illegal activity was an

unclassified or class A felony in Alaska, AS 11.59.-040(a)(1) provides that the first degree crime has been established. Additionally, the crime will be first degree under AS 11.59.040(a)(2) if one of the instances of illegal activity used to establish racketeering is a crime in Alaska or in another jurisdiction having elements similar to a class A or unclassified felony. This provision will cover crimes repealed when the revised criminal code became effective in 1980, current crimes in Alaska defined outside the criminal code, and crimes committed in other jurisdictions. For example, if in 1979 the defendant committed conduct that would have constituted Murder in the First Degree under the Alaska statute repealed in 1980, the defendant can be convicted of Illegal Control of an Enterprise in the First Degree provided that the other elements of that crime can be established. Similarly, if the defendant committed conduct in Oregon that would be the equivalent of a class A or unclassified felony in Alaska, the first degree crime may also be established.

Under AS 11.59.040(a)(2), the elements of the offense need only be <u>similar</u> to a current unclassified or class A felony offense in Alaska. An identical standard is followed in calculating prior convictions for purposes of presumptive sentencing. AS 12.55.145(a)(2).

Note finally that no culpable mental state requirement is

specified in either of the two crimes. Consequently, the criminal code's general rules on culpability will be applicable and it will be necessary to establish that conduct was engaged in knowingly and that the defendant acted recklessly as to circumstance and result elements. AS 11.81.610(b).

Sec. 11.59.060. CHARGING UNDERLYING CRIME

This section clarifies an issue that may arise in charging a defendant under this legislation. If the prosecutor decides to proceed against the defendant for both a violation of AS 11.59.040 or 11.59.050, and the underlying illegal activity, he or she may do so in the same charging instrument. In the event that consecutive or concurrent sentences are not otherwise prohibited, they may be appropriate in cases where the underlying criminal activity is charged in addition to a violation of AS 11.59.040 or 11.59.050. See United States v. Boylan, 620 F.2d 359, 361 (2nd Cir. 1980) cert. denied, 449 U.S. 833 (1980).

ARTICLE 3. CIVIL REMEDIES

Sec. 11.59.070. EFFECT OF CONVICTION ON OTHER PROCEEDINGS

This section, which is based on 18 U.S.C. sec. 1964, precludes a defendant who has been convicted under AS 11.59.040 or 11.59.050 from denying the essential elements of the crime in subsequent litigation. Unlike the federal statute which only estops the defendant in subsequent litigation with the government, this section estops the defendant in all subsequent litigation with any party. Since the defendant's violation of AS 11.59.010 has already been established beyond a reasonable doubt in the earlier criminal prosecution, there is no reason to require the plaintiff in a civil proceeding brought against the same defendant to relitigate the basis of the criminal conviction. This is particularly the case since the burden of the civil litigant to establish a violation of AS 11.59.010 is by a preponderance of the evidence, while the government has already established a violation beyond a reasonable doubt.

Sec. 11.59.080. CIVIL ACTION FOR TREBLE DAMAGES

This section creates a civil action for treble damages available to any person, including the state, who is injured in business or property as a result of a violation

of AS 11.59.010. This section serves two purposes. First, it compensates those who have been injured as a result of racketeering. Second, it imposes severe financial disincentives on persons who violate AS 11.59.010 that are over and above any criminal penalty that may be imposed and any forfeiture that is ordered. The civil remedies authorized by this section provide another powerful deterrent against persons who may engage in conduct prohibited by AS 11.59.010. The plaintiff is only required to establish an injury "to business or property". "An allegation of commercial or competitive injury is not required...." Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), cert. denied, 104 S.Ct. 527 (1983).

Assuming that a violation of AS 11.59.010 can be established, there is no requirement that the plaintiff additionally show that the injury to his business or property was caused by the defendant's racketeering, as opposed to the illegal activity that was used to establish racketeering under AS 11.59.020. This nebulous and artificial distinction has been recognized in a few recent cases interpreting the federal law, but it is specifically rejected here as being contrary to the intent of this legislation. See Bankers Trust Co. v. Rhoades, 53 U.S.L.W. 2063 (2d. Cir. July 26, 1984); Moss v. Morgan Stanley Inc., 553 F.Supp. 1347 (S.D. N.Y. 1983), cert. denied, 104 S.Ct. 1280 (1984).

Unlike a criminal prosecution under this legislation where the proof required to establish a violation must be beyond a reasonable doubt, the elements of a civil action brought under this section need only be established by a preponderance of the evidence. See United States v. Capetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); Herman & MacLean v. Huddlestom, 51 U.S.L.W. 4099 (Jan. 24, 1983). As previously discussed, there is no requirement that the defendant be shown to be a part of "organized crime."

AS 11.59.080 does not require that a criminal prosecution against the defendant be instituted or successfully completed as a prerequisite for a person to bring a private cause of action. Consequently, it is the intent of this legislation to specifically reject a recent contrary interpretation of the similar federal law. See Sedima, S.P.R.L. v. Imrey Co., 53 U.S.L.W. 2063 (2d Cir. Aug. 7, 1984). However, if a criminal prosecution is first successfully brought, AS 11.59.070 prevents the defendant from denying the essential allegations of the crime in a subsequent civil action.

In addition to allowing a civil cause of action for treble damages, this legislation authorizes a court to grant a wide variety of equitable relief in connection with an action brought under this section. The person may obtain

a restraining order to prevent future violations of AS 11.59.010, as well as restrictions on the conduct of the enterprise, including its dissolution or reorganization. See AS 11.59.100.

Sec. 11.59.090. PROPERTY SUBJECT TO FORFEITURE

One of the principal goals of the federal law upon which this legislation is based was to remove the profit from criminal activity "by separating the racketeer from the dishonest gain." Russello v. United States, 104 S.Ct. 296, 303 (1983). The mechanism used to accomplish that goal was the adoption of an effective forfeiture law. A similar approach is taken in this legislation, with this section providing that property used in violation of AS 11.59.010 is subject to forfeiture. The procedures specifying how the property is forfeited appear in section 3 of this legislation discussed infra. The term "property" is defined in AS 11.59.900(2) to mean "any thing of value, including real or personal property, claims against or interests in business or property, contractual rights, securities, income, profits, or any other business or financial interest." The key to the definition is that the item, claim, interest or right must be a thing of value.

Also covered by this forfeiture provision are the proceeds of property, including profits acquired from a violation

of AS 11.59.010. In Russello v. United States, 104 S.Ct. 296, 301 (1983), the Supreme Court stressed the importance of covering profits derived from racketeering under a forfeiture statutes.

> Forfeiture of an interest in an illegitimate association-in-fact ordinarily would be of little use because an association of that kind rarely has identifiable assets; instead, proceeds or profits usually are distributed immediately. Thus construing [the federal forfeiture statute] to reach only interests in an enterprise would blunt the effectiveness of the provision in combatting illegitimate enterprises, and would mean that "[w]hole areas of organized criminal activity would be placed beyond" the reach of the statute. United States v. Turkette, 452 U.S. at 589.

Under AS 11.59.090(1), property is subject to forfeiture if it was acquired or maintained in violation of, or in the course of violating, AS 11.59.010. Thus the defendant's interest in the enterprise itself is subject to forfeiture if it was acquired in violation of AS 11.59.010. For example, if the defendant acquired a business through racketeering, that business will be forfeited to the state. Moreover, property such as firearms and automobiles is subject to forfeiture if acquired in the course of violating AS 11.59.010. Even if such property is never actually used as part of the illegal activity, it is subject to forfeiture if it was intended to be used to conduct or facilitate illegal activity, or to further the goals of the enterprise.

AS 11.59.090(2) subjects to forfeiture any property used or invested in violation of, or in the course of violating, AS 11.59.010. This paragraph in part permits the forfeiture of property obtained through racketeering to obtain an interest in an enterprise or to run an enterprise. This paragraph also covers property that may not have been originally derived from racketeering, but is nonetheless actually used in the course of violating AS 11.59.010. Property such as firearms, automobiles, cash receipts obtained while running the enterprise, or other business equipment or supplies are thus subject to forfeiture.

Finally, AS 11.59.090(3) covers property, or its proceeds, that is derived from racketeering (i.e., from a pattern of illegal activity) without the requirement that some enterprise actually be taken over. Thus if the scheme is stopped before it can infiltrate a legitimate business, the illegitimate gains from the racketeering are nonetheless subject to forfeiture, even though the defendants are not subject to the severe criminal penalties provided under AS 11.59.040 and 11.59.050. Because it is important to take away the profit motive existing in repeated criminal activity, AS 11.59.090 has been included in this bill.

Sec. 11.59.100. INJUNCTIVE RELIEF

This section provides a mechanism to insure that equitable relief can be obtained to minimize the harm caused by racketeering as well as to preserve the assets of the defendant for future recovery in the context of civil recovery, a criminal fine, or a forfeiture. The type of equitable relief authorized by this section depends on the stage of the litigation in which it is sought and who is requesting the relief. Subsection (a) applies to relief that is sought before an action under this legislation is actually filed and may only be sought by the attorney general. Subsection (b) applies to relief that may be granted once an action is filed. This relief may be sought by either the attorney general or a civil plaintiff. Subsection (c) applies to equitable relief that may be granted once an action is successfully concluded. The relief may be sought in connection with either a civil or criminal proceeding authorized by this legislation.

In reference to equitable relief that may be sought in conjunction with a civil proceeding, this section is subject to due process requirements governing equitable relief. United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). The person seeking the injunction must show some potential injury, but need not show "irreparable injury other than the

injury to the public which [is] inherent in the conduct made unlawful...." Cappetto, 502 F.2d at 1358-59. The breadth of the equitable relief authorized by this action evidences the concern of this legislation that the plaintiff's right to recovery could be seriously impaired by the concealment, disposal, or removal from the jurisdiction of the property at issue.

In reference to equitable relief sought in conjunction with a criminal prosecution, no preseizure hearing is required if the injunction is necessary to achieve important governmental purposes. Preseizure notice might defeat the purposes of this section. Moreover, the injunction is initiated by government officials rather than private parties. United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982). Due process requirements are satisfied by a prompt postseizure hearing once the injunction has been entered. Spilotro 680 F.2d at 617. It is within the discretion of the superior court to continue the injunction if it is satisfied that there is probable cause to believe that the defendant is guilty of violating AS 11.59.040 or 11.59.050 and that the property at issue in the injunction is subject to forfeiture under AS 11.-59.090. United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Long, 654 F.2d 911, 915 (3rd Cir. 1981). "It is not necessary that the hearing duplicate the criminal trial." The prosecution is required

only to establish the probability that the defendant will be convicted and properties will be subject to forfeiture. Spilotro, 680 F.2d at 618. The likelihood of conviction may be established by such evidence as testimony of law enforcement officials concerning the sources of defendant's income and the legality of that income. See Long, 654 F.2d at 915.

Sec. 11.59.110. CIVIL INVESTIGATIVE DEMAND

This section, which is based on 18 U.S.C. sec. 1968 provides the state with the necessary mechanism to insure that investigations into suspected criminal or civil violations of this legislation can be completed successfully. The provisions are largely self explanatory, and considering that no appellate cases have arisen under the similar federal statue in the 14 years since enactment, the provisions of this section will apparently present no problems in administration.

Sec. 11.59.120. ATTEMPT OR SOLICITATION TO VIOLATE AS 11.59.010

This section is included solely for drafting convenience to insure that the quoted phrase does not have to be repeated in the numerous references in AS 11.59.070 -- 11.59.120 that depend on establishing a violation of

AS 11.59.010.

ARTICLE 4. GENERAL PROVISIONS

Sec. 11.59.900. DEFINITIONS

This section defines two key terms that are used throughout this chapter, "enterprise" and "property."

(1) Enterprise: To commit any of the three prohibited acts described in AS 11.59.010 an "enterprise" must be involved. This section defines that term. The definition is not limited to those examples specifically listed, but is merely illustrative. See United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 444 U.S. 1085 (1980). "There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact". United States v. Turkette, 452 U.S. 576, 580 (1980).

The definition specifically includes legal as well as illegal entities. See United States v. Turkette, 452 U.S. 576 (1980); see also United States v. Griffin, 660 F.2d 996 (4th Cir. 1981), cert. denied 102 S.Ct. 1029 (1982). There is no requirement that the membership of the enterprise remain static throughout its existence. See United States v. Clemones, 577 F.2d 1247, 1253, modified, 582

F.2d 1373 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980). Further, the definition of enterprise is broad enough to include a single-person enterprise. See United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), cert. denied, 103 S.Ct. 834 (1983); United States v. Benny, 559 F.Supp. 264, 266-71 (N.D. Cal. 1983).

The federal definition of enterprise has been interpreted on numerous occasions to apply to commercial entities, benevolent organizations, and governmental entities. This legislation intends to adopt the federal approach of broadly interpreting the definition of enterprise as illustrated by such cases as United States v. Weisman, 624 F.2d 1118, 1120 (2d Cir.) cert. denied, 449 U.S. 871 (1980); United States v. Provenzano, 688 F.2d 194, 199-200 (3rd Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Thompson, 685 F.2d 993, 994-95 (6th Cir.), cert. denied, 459 U.S. 1072 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1980) and cases cited approvingly therein; United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980); United States v. Dozier, 672 F.2d 531, 543 and n. 8 (5th Cir.) cert. denied, 459 U.S. 943 (1982); United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 104 S.Ct. 283 (1983).

Establishing a pattern of racketeering is not automatically sufficient by itself to establish the existence of an enterprise. "While the proof used to establish those separate elements may in a particular case coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." United States v. Turkette, 452 U.S. at 583-85. See generally United States v. Mazzei, 700 F.2d 85, 87-90 (2d Cir.), cert. denied, 103 S.Ct. 2124 (1983); United States v. Cagnina, 697 F.2d 915, 921 (11th Cir.), cert. denied, 104 S.Ct. 175 (1983).

(2) Property: This definition will be of primary importance in applying the forfeiture provisions in sec. 3 of the bill. Those forfeiture provisions apply to property and proceeds of property acquired, maintained, used, invested, or derived from violation of AS 11.59.010. Consistent with the recent decision of the Supreme Court in Russello v. United States, 104 S.Ct. 296, the definition of property specifically includes profits.

Section 3. Forfeitures

This section of the bill has two related purposes. First, it specifies the procedures applicable to the forfeiture of property authorized by this legislation in

AS 11.59.090. Secondly, it effectively consolidates many state forfeiture procedures in a single new article added to AS 9. This consolidation of state forfeiture procedures will minimize the possibilities of unintended inconsistencies in coverage and reduce the volume of laws that are required whenever forfeiture is authorized. Additionally, since many instances of racketeering may involve conduct that violates crimes defined outside this legislation, it is appropriate to include the general procedures pertaining to forfeiture in this legislation.

ARTICLE 7. FORFEITURE

Sec. 09.50.400. PROCEDURES APPLICABLE IN FORFEITURE PROCEEDINGS

This section accomplishes the consolidation of forfeiture procedures referred to above. For forfeiture procedures to be initiated, forfeiture must be authorized by state law. AS 11.59.090 specifically authorizes the forfeiture of property used in violation of AS 11.59.010, while other state statutes also authorize forfeiture in specified circumstances. See e.g., AS 11.66.270 and AS 17.30.110 as amended in secs. 5 and 9 of this bill.

If forfeiture is authorized by state law, the sections in this article will govern the procedures applicable to the

forfeiture procedure. There is, however, one important exception to the general rule that all forfeiture proceedings are governed by AS 09.50. In cases where the legislature wishes to make property subject to forfeiture procedures that are different from those included in this article, it can specifically do so. However, if different forfeiture procedures are not "otherwise specifically provided in the state law authorizing forfeiture," the property is subject to forfeiture under the procedure specified in this article.

Sec. 09.50.410. SEIZURE AND CUSTODY OF PROPERTY

Property subject to forfeiture may be seized with or without a court order under the provisions of AS 09.50.410(a). When property is seized without a court order under paragraph (a)(3), it may not be held for more than 48 hours unless an extension is obtained from the court.

Once property has been seized, the commissioner of public safety or a local law enforcement agency is responsible for assuming custody of the property under AS 09.50.-410(b). Only the court with jurisdiction over the property can require a subsequent movement of the property.

AS 09.50.410(c) provides that the property must be inventoried within 10 days after it is seized, and that the

value of any items, other than controlled substances, must be estimated. The results of this estimate will be of importance in determining the required notices that must be sent under AS 09.50.420.

Sec. 09.50.420. NOTICE OF SEIZURE AND FORFEITURE ACTION; ANSWERS

Once property has been seized under AS 09.50.420, the commissioner of public safety is required to comply with the notice provision outlined in this section.

AS 09.50.420(a) pertains to the notice required after seizure of the property but before the state institutes formal forfeiture proceedings. Notice must be sent to any person who has an interest in the property as described in this subsection. However, if a forfeiture proceeding has been instituted within 30 days after seizure of the property, the notice required by subsection (a) need not be given. This is because the notice required in AS 09.50.-420(b) will provide sufficient notice to persons with interests in the property.

AS 09.50.420(b) describes a separate and additional notice that must be sent within 30 days after the state actually institutes the forfeiture proceeding. Since a defendant in a criminal case has already received notice of the

proceeding under AS 09.50.430(a), no additional notice need be sent to the defendant.

AS 09.50.420(c) provides a mechanism whereby parties with an interest in the property sought to be forfeited can file an answer in order to argue against forfeiture or for a remission of the property. Since controlled substances and imitation controlled substances are summarily forfeited to the State under AS 17.30.126, AS 09.50.420(d) provides that the notice requirements specified in this section do not apply to the forfeiture of controlled substances.

Sec. 09.50.430. PROCEEDINGS RESULTING IN FORFEITURE; BURDEN OF PROOF

This section lists the underlying proceedings in which forfeiture may be initiated, and specifies the burden of proof requirement in all forfeiture proceedings.

Under AS 09.50.430(a), a forfeiture proceeding may be initiated in one of three proceedings. In the event that the state has instituted a criminal prosecution or civil action relating to the conduct making the property subject to forfeiture, the filing of a motion to forfeit in that proceeding will initiate the forfeiture action. For example, if the defendant is charged under AS 11.59.040 or

11.59.050 for conduct involving the takeover of an enterprise through racketeering, the state may also file a motion seeking forfeiture of the enterprise and all profits obtained by the defendant as a result of the illegal conduct. See AS 11.59.090. Similarly, if the state has filed a civil action for an injunction or for treble damages, it may also include a motion to forfeit property.

Alternatively, the state may institute a forfeiture proceeding simply by filing a complaint seeking forfeiture in an in rem proceeding involving the property subject to forfeiture. In this instance, there is no requirement that any additional civil or criminal action be instituted that relates to the property which is the subject of the forfeiture.

AS 11.50.430(b) provides that forfeiture proceedings are tried before a judge sitting without a jury. At the hearing, the state must establish by a preponderance of the evidence that the property is subject to forfeiture. The same burden of proof applies regardless of whether the forfeiture is sought by motion in a criminal or civil proceeding relating to the property or in an in rem proceeding.

Sec. 09.50.440. DEFENSES EXEMPTED

This section emphasizes that a forfeiture proceeding is distinct from any criminal proceeding involving the property sought to be forfeited. It is therefore irrelevant in the forfeiture proceeding that an earlier criminal prosecution involving the same property that the state seeks to forfeit resulted in an acquittal or a conviction of a lesser included offense. This is because the burden of proof applicable in the civil proceeding is less than required for a criminal conviction. See United States v. One (1) 1969 Buick Riviera, 493 F.2d 553 (5th Cir. 1974); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972); United States v. Kismetoglu, 476 F.2d 269 (9th Cir.) cert. dismissed, 410 U.S. 976 (1973).

In the civil proceeding the state must only prove by a preponderance of the evidence that the property is subject to forfeiture. AS 09.50.430(b). In a criminal prosecution, the violation of the underlying crime must be established beyond a reasonable doubt. Therefore, a jury determination in a criminal case that the defendant is not guilty of the charged offense does not mean that it has also determined that the state has failed to establish the violation of state law under the preponderance of the evidence standard applicable in civil forfeiture proceedings.

Secs. 09.50.450, 09.50.460. PETITION FOR RELEASE AND DISPOSITION OF SEIZED PROPERTY

Under certain circumstances, property may be released or disposed of under AS 09.50.450 and 09.50.460 before the court's decision on forfeiture. AS 09.50.450(b) provides that property that is not likely to be used in a court proceeding can be released if release is found to be in the best interests of the state and the claimant posts adequate security for the property. Additionally, the claimant or state can request disposition of the property before the decision on forfeiture. This may occur, for example, when the property is perishable or when its value may otherwise decrease during the proceedings. The proceeds of the sale are then treated as the property which is subject to forfeiture.

Sec. 09.50.470. FORFEITURE AND REMISSION

Subject only to the right of an innocent party to protect his interest in the property, this section makes forfeiture mandatory once it is established that the property is subject to forfeiture, regardless of the proceeding in which forfeiture is sought. The court does not retain discretion on the issue of forfeiture once it is shown that the property is subject to forfeiture.

The introductory clause of AS 09.50.470(a) refers to "the law authorizing forfeiture." To resolve any possible ambiguity on this point, the law authorizing the forfeiture

of property obtained in violation of AS 11.59.010 is AS 11.59.090. Other laws, besides AS 11.59.090, authorize the forfeiture of property, and once it is shown that the property was subject to forfeiture under those laws, that property must also be forfeited to the state under AS 09.50. For example, AS 17.30.110, as repealed and reenacted by sec. 9 of this bill, authorizes the forfeiture of property used in violation of the laws involving controlled substances. Once it is shown that the property met the requirements of forfeiture specified in AS 17.30.110, that property must be forfeited to the state in accordance with the procedures specified in this chapter.

The right of an innocent person to obtain the return of his interest in property is sometimes referred to a "remission." Remission is a form of "pardon" of the forfeited property. The Laura, 114 U.S. 411 (1885). Under AS 09.50.470(a)(1) -- (3), a totally innocent person with an interest in property subject to forfeiture may protect his or her interest in the property. In allowing an innocent person to protect his or her interest, this section recognizes that the failure to provide such an opportunity would violate the Alaska Constitution. State v. Rice, 626 P.2d 104, 111-15 (Alaska 1981). Assuming that the claimant can satisfy the requirements of paragraphs (a)(1) -- (3), the court is provided with several options in

AS 09.50.470(b) for protecting the claimant's interest depending on the extent of that interest.

Federal statutory and case law has established that only parties who are ignorant of the illegal use or intended use of property sought to be forfeited, and who are non-negligent in lending or leasing their property, can qualify as claimants entitled to "remission" or "remittance." See, e.g., 18 U.S.C. sec. 3617(b), which codifies case law from the prohibition era. The burden is placed upon the claimant to prove by a preponderance of the evidence that he or she deserves relief under the remission standards. See, e.g., Wilson Motor Co. v. United States, 96 F.2d 29, 30 (9th Cir. 1938); United State v. C.I.T. Corp., 93 F.2d 469, 470 (2d Cir. 1937); United States v. One 1933 Ford V-8 Coach, 14 F.Supp. 243 (E.D. Ill. 1936).

The claimant must establish under AS 09.50.470(a)(1) that he or she had a good faith property interest in the item at the time of the illegal use. Florida Dealers and Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960); United States v. One 1936 Model Ford Coach, 58 F.Supp. 802 (M.D. Ga. 1944). Additionally, AS 09.50.470(a)(2) and (3) require the claimant to establish that he was ignorant of the illegal use or intended use and was not negligent in lending or leasing the property. This provision is based on 18 U.S.C. sec. 3617(b)(2). See One 1941 Ford 1/2 Ton

Pickup Truck v. United States, 140 F.2d 255 (6th Cir. 1944); Federal Credit Co. v. United States, 109 F.2d 121 (5th Cir. 1940). Compare Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

Sec. 09.50.480. STATE DISPOSAL OF FORFEITED PROPERTY

Once the property is forfeited, the commissioner of administration is responsible for determining the eventual disposition of the property. Various options are listed in this section.

Sections 4-12. MISCELLANEOUS SECTIONS

The remaining sections of the bill make several miscellaneous complementary amendments to existing laws.

Section 4. This section amends the existing extortion statute to specifically provide that extortion is committed when the defendant makes one of the threats described in AS 11.41.520(a)(1) -- (7) to assist in the collection of a debt. This provision will insure coverage of conduct commonly associated with loan sharking under this legislation.

Sections 5, 6, 9, and 10. These sections make several conforming amendments to insure that gambling, controlled

substances, and imitation controlled substances are subject to the forfeiture proceedings specified in AS 09.50.

Section 7. This amendment insures that all unclassified felonies, including Illegal Control of an Enterprise in the First Degree, are subject to the fine authorized by this section.

Section 8. This amendment is necessary to authorize a term of imprisonment for a violation of AS 11.59.040.

Section 11. REPEALS. This section repeals several statutes pertaining to procedures applicable in drug forfeiture cases which are unnecessary with the enactment, in sec. 3 of the bill, of the new article in AS 09. Note that existing AS 17.30.126, which pertains to the summary forfeiture of certain controlled substances, is not repealed.

Section 12. EFFECTIVE DATE. This section specifies a January 1, 1986, effective date.

APPENDIX A

States that have adopted legislation similar to the federal Racketeering Influenced and Corrupt Organizations title:

1. Ariz. Rev. Stat. Ann. § 13-2312 (1978).
2. Cal. Penal Code § 186 (West Supp. 1983).
3. Colo. Rev. Stat. § 18-17-101 (1981).
4. 1982 Conn. Pub. Acts. 343.
5. Fla. Stat. Ann. § 895.01 (West Supp. 1982).
6. Ga. Code Ann. § 16-14-1 (Sup. 1982).
7. Hawaii Rev. Stat. § 842-1 (1976).
8. Idaho Code § 18-7801 (Supp. 1982).
9. The Illinois Narcotics Profit Forfeiture Act, H.R. 2450 (1982).
10. Ind. Code Ann., § 34-45-6-1 (Burns Sup. 1982).
11. Nevada Rev. Stat., chapter 207 (1983).
12. N.J. Stat. Ann. § 2C:41 (West 1982).
13. N.M. Stat. Ann. § 30-42-1 (Supp. 1978).
14. N.D. Cent. Code § 12.1-106.1 (C.Cupp. 1983).
15. Or. Rev. Stat. § 166-715 (1981).
16. 18 Pa. Cons. Stat. § 911 (1978).
17. R.I. Gen. Laws § 7-15-1 (Supp. 1982).
18. Utah Code Ann. § 76.10-1601 (Supp. 1981).
19. Wis. Stat. Ann. § 946.80 (Supp. 1982).

RICO REVISITED

*Barry Tarlow**

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I. INTRODUCTION

In recent years federal prosecutors have frequently charged violations of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961-1968, popularly known as RICO. Although the statute was rarely used before 1975, RICO is now regularly discussed in appellate decisions. In 1980, this author published a comprehensive analysis of the RICO criminal provisions, which emphasized the numerous ambiguities in the statute that had not been resolved by the courts.[1] As a result of the dynamic nature of RICO litigation, many of these problems have been resolved, but the answers have created new and complex questions.

One difficulty that continues to plague RICO prosecutions is the prejudicial impact that results from labeling the conduct of a defendant, who may be a businessman, politician, or alleged gangster,

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[1] *See* Tarlow. *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

as racketeering.[2] The co[illegible]re not immune to this prejudice; some judges who are resu[illegible]ented have strained to adopt broad constructions of RICO by ignoring logical and theoretical consistency. The principal result of this phenomenon is that the scope of the RICO statute has been expanded far beyond what was intended by Congress.

Within the legal community, there is a sharp division of opinion concerning the courts' broad constructions of RICO and the Government's zealous exploitation of these interpretations. Although the majority of law review commentaries has urged the courts to exercise greater restraint,[3] some commentators[4] and most prosecu-

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[2] *See infra* text accompanying notes 552-57.

[3] *See, e.g.*, Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 892-93 (1980); Tarlow, *supra* note 1, at 191-99; Note, Elliott v. United States *Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109, 116-21 (1979); Comment, United States v. Sutton *and the Scope of Title IX of the Organized Crime Control Act of 1970: The Sixth Circuit's Narrow Interpretation of the Meaning of "Enterprise,"* 68 KY. L.J. 469, 485-87 (1980) [hereinafter cited as Comment, *The Scope of Title IX*]; Comment, *Reading the "Enterprise" Element Back into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100, 132-33 (1981) [hereinafter cited as Comment, *The Enterprise Element*]; Comment, *The Legitimate-Illegitimate Controversy over Racketeer Influenced and Corrupt Organizations (RICO) Section 1962(c): The Voyage of the "Enterprise" Through the Federal Circuits and a Proposed Solution*, 54 TEMP. L.Q. 62, 107-08 (1981) [hereinafter cited as Comment, *The Legitimate-Illegitimate Controversy*]; Comment, United States v. Sutton, *Reining in on Runaway RICO*, 42 U. PITT. L. REV. 131, 145-48 (1980) [hereinafter cited as Comment, *Runaway RICO*]; Comment, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 VAND. L. REV. 441, 466-67 (1980) [hereinafter cited as Comment, *An Analysis of the Confusion*].

[4] *See* Blakey & Gettings, *Racketeer Influenced & Corrupt Organizations (RICO): Basic Concepts—Criminal & Civil Remedies*, 53 TEMP. L.Q. 1009, 1031-33 (1980); Blakey & Goldstock, *"On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 350-54 (1980); Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 185-91 (1980) [hereinafter cited as Note, *Liberal Construction Clause*]; Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself*, 55 NOTRE DAME LAW. 777, 794-95 (1980) [hereinafter cited as Note, *Construing Legislative History*]. *But cf.* Tybor, *Racketeering Law Facing Key Test*, Nat'l L.J., Dec. 29, 1980, at 19, col. 1 (Blakey quoted as expressing concern that "RICO is being brought in some marginal cases."). Not surprisingly, proponents of broad construction of RICO have urged expansive interpretations of the RICO civil provisions in 18 U.S.C. § 1964 (1976). *See* Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201 (1981); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982) [hereinafter cited as Note, *Civil RICO*]; *see also* Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982) (extensive discussion of RICO urging its use by civil liberties attorneys as a means of furthering the public interest

tors[5] uncritically applaud each decision that expands the scope of RICO. Generally, defense lawyers have condemned the loosely worded provisions of RICO and the many poorly reasoned decisions expanding the scope of the statute.[6]

The American Bar Association has adopted a comprehensive program of reforms that seeks to remedy these problems.[7] Even

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[5] *See, e.g.*, Magarity, *RICO Investigations: A Case Study*, 17 AM. CRIM. L. REV. 367, 370-78 (1980); Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. L. REV. 225, 259 (1981) (Deputy Director of Justice Department Office of Economic Crime Enforcement urged broad construction of RICO forfeiture); Zuckerman & Hunterton, *RICO and Tax Fraud: Return(s) to Racketeering?*, 18 CRIM. L. BULL. 204, 227 (1982); U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, AN EXPLANATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE 2, 33-34 (4th ed. 1978) (describing RICO as providing tools for "imaginative prosecutions" and urging a broad reading of the term "enterprise"); NEWSWEEK, Aug. 20, 1979, at 82, col. 2 (United States Attorney General Benjamin Civiletti declared that the Justice Department would not "shy away from using [RICO] to pursue corrupt enterprises that do not fit the layman's view of organized crime.").

The Government has enjoyed a seemingly symbiotic relationship with commentators who are either present or former prosecutors or who are associated with institutions funded by the Justice Department. For example, in a recent appellate brief, the Government noted that a case restricting RICO had been the object of frequent criticism from commentators. *See* Brief and Appendix for United States at 22 n.10, United States v. McManigal, *appeal docketed*, No. 82-1754 (7th Cir. Apr. 11, 1982). The cited commentators were as follows: (1) Edward C. Weiner, who is an official of the Justice Department; (2) G. Robert Blakey, who is head of the Institute on Organized Crime, an entity whose research has been funded and supported by the Law Enforcement Assistance Administration, United States Department of Justice, *see* 1 INSTITUTE ON ORGANIZED CRIME, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME MATERIALS ON RICO (1980) (inside back cover indicates that the study was funded by the Justice Department); and (3) a Note in the *Notre Dame Lawyer*, published by a school that is presently the home of the Institute on Organized Crime headed by Blakey.

[6] *See* Murray, *Anatomy of a R.I.C.O. Forfeiture*, CHAMPION, Mar. 1981, at 7, col. 3 (noting that continued Government abuse of RICO "will leave strewn in its wake the carcasses of many innocent persons"); Silverglate & Rankin, *Civil Uses of RICO*, CHAMPION, Apr. 1981, at 8, 10, col. 4 (describing RICO as "this ill-considered, poorly-drafted, and Draconian statute"); Tarlow, *RICO: Someone Loaded the Dice (A Response to* RICO: Evening Up the Odds), TRIAL, Feb. 1981, at 54 (in criticism of Government abuse of RICO, stating that "the Justice Department seems determined to apply the statute to almost every form of societal wrongdoing"); Marro & Shannon, *Are Prosecutors Going Wild over RICO*, Legal Times Wash., Oct. 8, 1979, at 32, col. 1 (William Hundley criticized the use of RICO against "all kinds of defendants." He noted: "You know as well as I do that Congress never would have passed it if [they] ever thought they were going to use it against governors and people like that."); Nat'l L.J., Dec. 29, 1980, at 18, col. 2 (Francis Sams, Chairman of the ABA RICO Committee, condemned RICO as the "illegitimate stepchild" of the modern prosecutor's nursery); Nat'l L.J., Nov. 26, 1979, at 12, col. 3 (George Collins termed the statute "totalitarian").

[7] The ABA proposals and the accompanying commentaries originated with the Criminal Law Subcommittee of the Prosecution and Defense of RICO Cases Committee. The Sub-

the courts, which are primarily responsible for the expansion of RICO, have acknowledged the danger of prosecutorial abuse and overreaching.[8]

Essentially, RICO punishes three types of conduct: (1) legal acquisition of an enterprise with money derived from a "pattern of racketeering activity";[9] (2) illegal acquisition of an enterprise through a pattern of racketeering;[10] and (3) operation of an enterprise through a pattern of racketeering.[11]

As defined in 18 U.S.C. § 1961(5), a pattern is established when the accused commits at least two acts of racketeering activity occurring within ten years of one another. The definition of racketeering activity in section 1961(1) includes a number of federal of-

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committee was chaired by the author, and its members included Julian Murray, Jeff Atkinson, and Assistant United States Attorney Francis Burke. Mr. Burke dissented from the Subcommittee's report. Eventually, the major proposals of the Subcommittee were approved with a few exceptions by the Prosecution and Defense of RICO Cases Committee, a mixed group of prosecutors, judges, and defense attorneys. This reform program was then adopted by the Criminal Justice Section and the House of Delegates. *See Report to the House of Delegates*, 1982 ABA SEC. CRIM. JUST. REP. 20 [hereinafter cited as *RICO Report*].

[8] United States v. Ivic, No. 81-1350, slip op. at 1438-39 (2d Cir. Jan. 25, 1983) (noting that Second Circuit warnings against prosecutorial abuse are not sufficiently heeded in the Southern District of New York); United States v. Thordarson, 646 F.2d 1323, 1329 n.10 (9th Cir. 1981) (cautioning against "undue prosecutorial zeal in invoking RICO"), *cert. denied*, 454 U.S. 1055 (1981); United States v. Turkette, 632 F.2d 896, 905-06 (1st Cir. 1980) ("[T]he courts' natural antipathy to organized crime has clouded their perception of RICO. . . . We need not distort a statute in order to properly prosecute criminals. RICO was not enacted as an offensive weapon against criminals, but as a shield to thwart their depredation against legitimate business enterprises."), *rev'd*, 452 U.S. 576 (1981); United States v. Anderson, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980) ("[Among federal prosecutors], RICO has grown in popularity . . . beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power."), *cert. denied*, 450 U.S. 912 (1981); United States v. L'Hoste, 615 F.2d 383, 385 (5th Cir. 1980) (Tate, J., dissenting from denial of en banc hearing) (questioning the possibility of selective enforcement because of the statute's broad sweep and doubting that "it was the intention of Congress to leave to a prosecutor alone the determination to achieve forfeiture of an accused's property by prosecuting him under [RICO] for what . . . represents only two or more violations of local bribery statutes or of somewhat esoterically applied federal crimes . . ."), *cert. denied*, 449 U.S. 833 (1981); United States v. Cryan, 490 F. Supp. 1234, 1242 (D.N.J.) (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 that he neither authorized nor adopted. The government's attempted use of RICO in this case would change these fundamental concepts."), *aff'd mem.*, 636 F.2d 1211 (1980).

[9] 18 U.S.C. § 1962(a) (1976).

[10] *Id.* § 1962(b).

[11] *Id.* § 1962(c).

fenses[12] and eight state crimes.[13] An enterprise is an amorphous concept that has been interpreted to include almost any combination of individuals or entities.[14]

The ambiguity of Title IX and its incorporation of state predicate crimes permit a number of abuses in the employment of the statute. This problem is not remedied by the supposed direction to prosecutors provided by Department of Justice guidelines. These guidelines, described by one observer as "somewhat opaque,"[15] are

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[12] Federal predicate offenses of RICO are enumerated in 18 U.S.C. § 1961(1)(B)-(D) (Supp. IV 1980):

> (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities or the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under law of the United States . . . .

[13] State predicate offenses are set out in 18 U.S.C. § 1961(1)(A) (Supp. IV 1980): "(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year . . . ."

[14] The term "enterprise" has been defined by some courts in such a broad manner as to include almost any informal association of people. *Cf.* United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (two defendants convicted under RICO after committing three robberies). This approach was sharply criticized in United States v. Bledsoe, 674 F.2d 647, 661-62 (8th Cir. 1982). "Enterprise" is defined in 18 U.S.C. § 1961(4) (1976) as follows: "'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 . . . ."

[15] Blakey & Gettings, *RICO's Problem in the Courts: A Classic Case of Misreading*, Nat'l L.J., Mar. 9, 1981, at 28 n.3.

merely advisory and are not binding on the Justice Department.[16] Before the guidelines were issued, the Justice Department required approval of all RICO prosecutions,[17] but it is questionable whether this effectively restrained zealous prosecutors.[18]

Federal authorities have charged RICO offenses when prosecuting small-time criminals[19] or businessmen[20] who do not appear to

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[16] *See* Sullivan v. United States, 348 U.S. 170, 173-74 (1954); Haley v. United States, 394 F. Supp. 1022, 1024-27 (W.D. Mo. 1975). *But see* United States v. Ivic, No. 81-1350, slip op. at 1438 (2d Cir. Jan. 25, 1983) (in support of restrictive view of RICO statute, the court pointed to Government's noncompliance with guidelines and noted that the guidelines "are important evidence of the understanding of the department of government charged with the administration of the statute.").

The impact of the written guidelines is diminished by an explicit disclaimer in the preface stating that they are merely advisory and are not binding on the Justice Department:

> These guidelines provide only internal Department of Justice guidance. They are not intended, 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 prerogatives of the Department of Justice.

UNITED STATES ATTORNEY'S MANUAL § 1.110.101 (Jan. 30, 1981).

[17] *See* Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-1968, Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 16 (1978).

[18] The Justice Department guidelines focus on four principal factors governing the Department's decision to approve a RICO prosecution: (1) the RICO charge must reflect the true nature of the crime in a way that no other federal charge can; (2) RICO prosecution cannot be based on predicate crimes that are all local in nature unless "it can be established that organized crime is involved or . . . that local authorities cannot or will not display an interest in prosecution"; (3) the applicability of forfeiture is a significant benefit for purposes of this guideline; (4) the Government must be able to prove an enterprise under the test in *United States v. Anderson*, which focuses on the existence of a group with "an ascertainable structure" and a common "economic goal." Applying this test, a member of the Justice Department has claimed that "a RICO prosecution will not be approved if the government shows only that a bunch of people committed a bunch of crimes." *Justice Department to Shift Emphasis from White Collar Area, Giuliani Says*, 30 CRIM. L. REP. (BNA) 2238, 2239 (Dec. 23, 1981). Unfortunately, this comment is not fully in accord with the actual practice throughout the country.

[19] *See, e.g.*, United States v. Guiliano, 644 F.2d 85 (2d Cir. 1981) (RICO prosecution of company employee, whose involvement in bankruptcy fraud was limited to following the orders of the prosecution witness, without knowing of the bankruptcy fraud scheme. The employee was charged with concealing cash receipts and a truck and refrigerator unit.); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980) (two county purchasing agents convicted on RICO charges based on taking $12,000 in bribes from the same road equipment salesman); United States v. Dennis, 458 F. Supp. 197 (E.D. Mo. 1978) (factory worker at General Motors charged with collecting usurious debts from fellow workers on General Motors premises).

[20] *See, e.g.*, United States v. Hartley, 678 F.2d 961 (11th Cir. 1982) (RICO prosecution of Florida corporation and its officers and employees for fraudulently selling substandard

be the intended targets of the legislation.[21] RICO has been employed against an astonishing variety of defendants, including members of the Hell's Angels motorcycle club,[22] an attorney charged with investing money derived from a client's drug dealing,[23] a large Japanese corporation manufacturing electrical cable,[24]

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shrimp to U.S. military); United States v. Grapp, 653 F.2d 189 (5th Cir. 1981) (white-collar RICO prosecution in which defendants sold computer equipment on behalf of Honeywell to the State of Louisiana and without the knowledge of Honeywell or Louisiana retained money that had been mistakenly paid by Louisiana); United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981) (RICO prosecution for selling domestic crude oil in excess of legal maximum); United States v. Zang, 645 F.2d 999 (Temp. Emer. Ct. App. 1981) (selling domestic crude oil in excess of maximum); *see also* United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) (RICO prosecution for bribery and defrauding the Government); United States v. Drummond Coal Co., No. 79-M002765 (N.D. Ala. July 8, 1980).

[21] Congress contemplated that RICO would be directed against La Cosa Nostra and similar large scale criminal operations. For example, Senator Scott described RICO as a tool to be used against "syndicate-infiltrated business which use force to eliminate local competition and then charge extortionate prices for state commodities and services." S. REP. No. 617, 91st Cong., 1st Sess. 214 (1969) (statement of Sen. Scott). It is ironic that a statute designed to *protect* "the small or marginal businessman who is most easily subject to invasion by organized crime," *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 496 (1969) [hereinafter cited as *Hearings*], is now used to *prosecute* small or marginal businessmen.

[22] United States v. Barger, No. 79-0226, Wellenkamp, *Hells Angels Trial*, CHAMPION, June 1981, at 7, col. 3 (N.D. Cal. June 4, 1979). The indictment in *Barger* charged members of the Hell's Angels with procurement and distribution of drugs, intimidation and murder of witnesses, and bribery. Most of the conduct involved acts that resulted in prior state court convictions or dimissals. A number of defendants were acquitted in the RICO prosecution because the illegal acts were personal ventures that did not involve operation of the alleged enterprise, the Hell's Angels. *Id.* After two jury trials, each lasting four and six months with votes of nine to three for acquittal, and the Government's expenditure of 14 to 20 million dollars, the RICO charges against the remaining defendants were dismissed. *Id.* The trials occurred in an atmosphere tainted by massive pretrial publicity. For example, the initial wave of searches of the defendants' homes was accompanied by television camera crews. One reason the publicity and the prejudice resulting from the defendants' association with the Hell's Angels and the nature of the charges failed to produce RICO convictions was the questionable character of the Government witnesses. An example was Bryant, a key witness who testified in exchange for $30,000 and immunity for six murders. After one of these murders, Bryant stuffed a murder witness into a barrel and dropped it off the Richmond-San Rafael Bridge. At a press interview after the second trial the jurors commented that the Government's witnesses were "despicable," "beneath contempt," and "scum." *Id.* at 8-9.

[23] United States v. Loften, 518 F. Supp. 839 (S.D.N.Y. 1981); *see infra* text accompanying notes 117-24 (discussing *Loften*).

[24] United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980). Defendants Marubeni American Corp. and Hitachi Cable, Ltd., were two corporations engaged in the manufacture and sale of electrical cable and were bidding on contracts to supply Anchorage Tele-

the owner of Cutter Bill's, "the Neiman-Marcus of cowboy chic,"[25] two Washington state legislators, including the speaker of the state house of representatives,[26] union leaders accused of padding expense accounts,[27] and oil companies accused of violating the Emergency Petroleum Allocation Act by overcharging.[28]

The Government charges RICO violations in these remarkably diverse situations because of the significant advantages that include: (1) the prejudicial effect on judges and juries of the use of the term "racketeering";[29] (2) expansion of federal jurisdiction over local crimes traditionally prosecuted by the state;[30] (3) the ability to reprosecute defendants for transactions that previously have

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phone Utility with cable. The defendants allegedly bribed a utility official to obtain confidential bidding information and artificially lowered their bids by offering some types of cable at depressed prices. The official later persuaded the utility to purchase the more expensive cable. *Id.* at 763, 764.

[25] *See* L.A. Times, Nov. 29, 1981, at 1, col. 1 (RICO prosecution of Rex Cauble, legendary founder of Cutter Bill's, purveyors of such items as $6,000 suede Malaysian crocodile boots with a matching $15,000 blazer and a $110,000 silver Rolls Royce pickup for the cowboy who has everything).

[26] *See* United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982); *infra* text accompanying notes 377-79 (discussing *Bagnariol*).

[27] United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977).

[28] United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981) (defendants allegedly committed mail and wire fraud by participating in scheme fraudulently to certify oil from old wells as oil from new wells); United States v. Zang, 645 F.2d 999 (Temp. Emer. Ct. App. 1981) (same). The alleged activities in *Zang* and *Uni Oil* involve manipulation of federal oil price control laws that distinguish between three types of oil: (1) oil pumped from wells drilled before 1973, priced below the world price; (2) oil drilled from wells drilled after 1973, having a considerably higher permissible price; and (3) oil from wells that pumped less than 10 barrels daily, which were exempt from price controls. This regulatory system was extremely complicated and conducive to cheating. In United States v. Sutton, NEWSWEEK, May 3, 1982, at 68-69, the Government alleged that an individual manipulated the production records of oil wells and changed oil from old wells to higher-priced categories of oil. The alleged scheme produced enormous profits. The defendant's financial condition went from bankruptcy in 1970 to a $250,000,000 colossus, which included an oil refinery and terminal, a Bahamas hotel, 2 jet planes, and 50 Cadillacs. *Id.* at 68.

[29] United States v. Guiliano, 644 F.2d 85, 89 (2d Cir. 1981) (noting that one hazard of a RICO count "is that when the Government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with a label of racketeer tainted the conviction on an otherwise valid count."); United States v. Sam Goody, Inc., 518 F. Supp. 1223, 1225 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982); *see supra* notes 552-57 and accompanying text.

[30] *See* United States v. Altese, 542 F.2d 104, 107-11 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (criticizing broad construction that "radically extends federal jurisdiction to virtually every criminal venture affecting interstate commerce"), *cert. denied*, 429 U.S. 1039 (1977).

been fully litigated;[31] (4) imposition of disproportionately severe punishment and novel sanctions;[32] (5) employment of orders barring a defendant from using available assets to post bail and obtain legal representation or prepare a defense;[33] and (6) joining defen-

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[31] *See infra* text accompanying notes 471-506.

[32] *See, e.g.*, United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) (affirming RICO and 21 U.S.C. § 848 convictions for dealing in marijuana to defendants who had no significant prior records, which produced sentences of 33, 53, and 64 years); United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980) (en banc) (discussed *infra* note 57), *cert. denied*, 453 U.S. 912 (1981); Tarlow, *RICO Report*, CHAMPION, Sept.-Oct. 1981, at 4, col. 3 (describing RICO indictment of three attorneys charged with employing bribery to obtain property tax reduction for clients. The Government sought to forfeit the financial interests of the attorneys in their law firms, including stock in the firms' interests and in the firms' assets, profit-sharing trusts, and all contractual rights and stock redemption agreements.).

[33] *See* United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979). *See generally* Tarlow, *supra* note 1, at 295-304. In the wake of *Bello*, recent decisions have required that the Government establish the validity of forfeiture at a full pretrial evidentiary hearing before a permanent restraining order will be granted. *See* United States v. Spilotro, 680 F.2d 612 (9th Cir. 1982); United States v. Veon, 538 F. Supp. 237, 247 n.16 (E.D. Cal. 1982) (opinion requiring full adversary hearing for 21 U.S.C. § 848 pretrial restraining order on allegedly forfeitable property and noting that "under certain circumstances a restraining order may interfere with a defendant's right to select counsel of his choice").

United States v. Spilotro, 680 F.2d 612, 614 (9th Cir. 1982), was a RICO prosecution involving reputed La Cosa Nostra figures. The defendant "Tony the Ant" Spilotro rose from a "street soldier" for the Chicago La Cosa Nostra to the head of a multimillion-dollar illegal operation based in a Las Vegas jewelry store, the Gold Rush. The operation engaged in bookmaking, burglary, loansharking, and fencing activities that spread throughout Nevada and the California counties of San Diego, Orange, and Los Angeles. Goodman, *Gangster's Rise: Vegas Empire Built on Fear*, L.A. Times, Feb. 20, 1983, at 3, col. 4. This operation was allegedly facilitated by Spilotro's control of two members of the sheriff's organized crime unit in Las Vegas and his contacts with the captain of the organized crime unit of the Las Vegas Police Department. Goodman, *Spilotro Expands His Power in Las Vegas*, L.A. Times, Feb. 23, 1983, at 18, col. 3. More importantly, Spilotro is alleged to have resorted to at least 25 gangland style killings of rival loansharks and Government witnesses characterized by the modus operandi of firing close range shots from a 22-caliber pistol to the victim's eardrum, mouth, and forehead. Goodman, *Gangster's Rise: Vegas Empire Built on Fear*, *supra*, at 3, col. 4.

Spilotro came to Las Vegas in 1971 and was thought to be a local representative for the interests of the Chicago La Cosa Nostra. Chicago control of Las Vegas organized crime was made possible in part by the disarray of the "Mickey Mouse Mafia," the Los Angeles Mafia. Goodman, *Spilotro Seizes 'Mickey Mouse Mafia,'* L.A. Times, Feb. 25, 1983, at 1, 22, col. 1. In Chicago, "Tony the Ant" had allegedly acted as a triggerman for Sam DeStefano. When Spilotro and DeStefano were jointly indicted in Chicago in 1972 for one of the murders, rumors circulated that DeStefano was about to become a Government witness, and, subsequently, someone fired two close range shotgun blasts into DeStefano's chest. Goodman, *Chicago Killing Puts Spilotro in Spotlight*, L.A. Times, Feb. 22, 1983, at 3, col. 1. When Spilotro arrived in Las Vegas in 1971, he operated in conjunction with Frank "Lefty" Rosenthal, whose reputation was that of a brilliant oddsmaker. Rosenthal testified on Spilotro's behalf at a bail hearing and helped Spilotro become a member of the exclusive Las

dants whose conduct is unrelated, orchestrating mass trials, and admitting prejudicial evidence that would be barred in any conspiracy prosecution.[34]

Although the vague language of Title IX has caused considerable confusion, the major source of confusion is the refusal of a number of courts to adopt consistent principles of statutory and constitutional construction. The same language of RICO has been broadly construed in RICO criminal cases while being narrowly construed in RICO civil cases.[35] This Article will explore the courts' adventures and misadventures in administering the RICO criminal provision. The analysis will expose the defects in unnecessarily broad statutory constructions and unduly restrictive constitutional interpretations and reveal the areas in which legislative reform is essential.

II. Overview of Title IX

The RICO statute is not solely a criminal statute; it includes

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Vegas Country Club. Goodman, *Love Triangle Lights a Fuse in Las Vegas*, L.A. Times, Feb. 27, 1983, at 3, col. 1. Spilotro broke with Rosenthal when Spilotro began an affair with Rosenthal's wife. *Id.*

The present RICO prosecution of "Tony the Ant" has been based on the testimony of Jimmy "The Weasel" Fratianno, who turned Government informant out of fear that Spilotro would kill him, and a former Spilotro lieutenant, Frank Cullotta, who feared the same possibility after being arrested for burglary. Goodman, *Spilotro Slips Up, Makes War with Cop*, L.A. Times, Feb. 28, 1983, at 1, col. 1.

[34] *See* Newsweek, Aug. 20, 1979, at 82-83; *see also* United States v. Bledsoe, 674 F.2d 647, 659-60 (8th Cir. 1982) (noting that inclusion of RICO counts enabled Government to join 22 defendants involved in various tenuously related fraud schemes); United States v. Barton, 647 F.2d 224, 237 (2d Cir. 1981) (observing that RICO would permit use of "far-flung" acts, which would not be possible under 18 U.S.C. § 371); United States v. Elliott, 571 F.2d 880 (5th Cir.) (holding that RICO is exempt from traditional limitations of conspiracy law), *cert. denied*, 439 U.S. 953 (1978); Blakey & Goldstock, *supra* note 4, at 348. Paul Coffey, Deputy Chief of the Justice Department's Organized Crime and Racketeering Section, acknowledged RICO's value as a tool to facilitate admission of other crimes although Justice Department guidelines forbid the use of RICO solely to obtain this evidentiary advantage. *Justice Department to Shift Emphasis from White Collar Area, Giuliani Says*, *supra* note 18, at 2239 (stating that "one reason RICO is a 'darling of the prosecutor's nursery' is its value as an evidentiary tool."). The Government apparently believes that Federal Rule of Evidence 404(b) can always be used in RICO cases. *See id.*

[35] The courts have been "hoisted on their own petards." Broad construction of RICO criminal provisions should produce a corresponding expansion of RICO civil liability. Fearing serious caseload problems from RICO civil actions, some trial courts have abandoned concepts of logical consistency by narrowly construing the RICO civil provisions. *See infra* text accompanying notes 46-54.

civil remedies and other procedural remedies and devices that in theory were directed at the problem of organized crime. A person violating any of the four offenses set out in section 1962 can be subject to criminal prosecutions, government civil actions,[36] and private treble damages civil actions.[37]

A. *Remedies for RICO Violations*

1. RICO Civil Actions. In 18 U.S.C. § 1964, Title IX authorizes civil actions against violators of section 1962.[38] A civil judgment under section 1964 can result in divestiture of the defendant's interest in the enterprise and award of treble damages to private parties whose business or property has been harmed. The Government has rarely invoked the civil provisions,[39] although it has signaled a developing interest in exploiting section 1964 by filing a civil action against the officers of a New Jersey Teamsters local.[40] The complaint requested that the officers be divested of their posts and enjoined from further participation in the activities of the union local. It also requested appointment of trustees to assume the duties of the union officers, to operate the pension fund, and to supervise new elections. The complaint alleged that the teamsters local is a "captive labor organization" that has been controlled by a group of individuals termed the "Provenzano Group." This group allegedly controlled the local by means of a series of extortionate acts and sporadic murders of opponents.[41]

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[36] 18 U.S.C. § 1964(a), (b) (1976).

[37] 18 U.S.C. § 1964(c) (1976).

[38] Initially, commentary on RICO civil actions focused primarily on the constitutionality of Government actions for injunctive relief under 18 U.S.C. § 1964(a). *See* Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970*—United States v. Cappetto, 25 DE PAUL L. REV. 508 (1976); Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 TEX. L. REV. 1055 (1975). Recently, the private treble damage provisions of § 1964(c) have attracted increasing attention. *See* Long, *supra* note 4; Note, *Civil RICO*, *supra* note 4; Tarlow, *Using the RICO Statute in Civil Litigation*, Nat'l L.J., May 24, 1982, at 18.

[39] At the present time, there are only three published opinions involving Government civil actions under § 1964. United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); 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).

[40] United States v. Local 560, 550 F. Supp. 511 (D.N.J. 1982).

[41] *Id.* at 512. The danger of applying the RICO civil provisions to union activities is that they can embroil the courts in labor disputes and can become a tool by which employers can disrupt a strike. *See, e.g.*, Kerr-McGee Coal Corp. v. UMW Dist. 12, No. 81-4440 (S.D. Ill.

With increasing frequency, private litigants have attempted to exploit the provisions of section 1964(c) that award treble damages to anyone who is injured in his business or property by reason of a violation of section 1962. If section 1964(c) were broadly construed, the courts would be confronted with an avalanche of RICO civil damages actions. The potential scope of section 1964(c) would be enormous because of the inclusion of wire and mail fraud as a racketeering activity,[42] in that this activity has been accurately described as "thinking deceitfully and mailing a letter."[43] Since virtually all business transactions involve the use of the mails or telephones, a combination of RICO and mail fraud could federalize all torts involving business transactions.[44]

The author predicted that the inevitable reaction of federal courts would be to construe narrowly RICO civil actions.[45] This prediction has been borne out by subsequent district court cases that have evinced unremitting hostility to RICO civil actions. Federal trial judges have developed novel theories to bar RICO civil actions. The most widely used theory for dismissing RICO civil counts is that the plaintiff failed to establish injury to "business or property by reason of" a RICO violation.[46] The courts have adopted a restrictive construction of this language and have set forth a variety of conflicting tests, including: (1) "competitive in-

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filed Oct. 8, 1981) (RICO complaint by employer requesting damages, injunctive relief against picketing, and removal of union officers).

[42] 18 U.S.C. § 1961(1) (Supp. IV 1980); *see also id.* §§ 1341, 1343 (1970) (general mail fraud statutes).

[43] Blakey, *Materials on RICO: Criminal Overview*, in 1 CORNELL INSTITUTE ON ORGANIZED CRIME, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME 25 (1980).

[44] Paltrow, *Now Concerns Are Being Sued as Racketeers*, Wall St. J., July 29, 1982, at 21, col. 3 (quoting attorney Jordan Green as stating that "because most business matters involve the mails, lawyers can use RICO to ratchet an ordinary case into a mail-fraud case"). This federalization of business litigation is a result seemingly desired by proponents of RICO civil actions. For example, Professor Blakey has urged the use of RICO civil procedures against cigarette manufacturers in the wake of an amendment of RICO to include cigarette smuggling as a predicate offense. *See Civil Rights Liability, RICO Discussed at NAAG Mid-Term Meeting*, 28 CRIM. L. REP. (BNA) 2286, 2287 (Dec. 17, 1980). Blakey urged that local governments sue manufacturers for treble damages based on the loss of revenues to cigarette bootlegging and for an injunction requiring the manufacturer to collect the local taxes at the point of origin. *Id.*

[45] Tarlow, *supra* note 6, at 57.

[46] *See, e.g.*, Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir. 1982); Harper v. New Japan Sec. Int'l, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); Maryville Academy v. Loeb Rhoades & Co., 530 F. Supp. 1061, 1069-70 (N.D. Ill. 1981).

jury";[47] (2) "racketeering enterprise injury";[48] and (3) "commercial injury."[49] The courts have also narrowly construed mail fraud to prevent ordinary state fraud claims from being transformed into federal RICO civil actions.[50] Some courts have held that a RICO civil defendant must be connected to "organized crime,"[51] a theory that has been frequently rejected in RICO criminal cases.[52] At least one commentator has criticized these restrictive holdings as a form of improper judicial legislation.[53] A number of these decisions may not be soundly reasoned and may be subject to reversal by the appellate courts if logic overcomes policy considerations.

2. *RICO Criminal Penalties.* The criminal sanctions for a violation of section 1962 are imprisonment for up to twenty years, a fine of $25,000, or both, and forfeiture of any interest in the enterprise acquired in violation of section 1962.[54] Although the severity of

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[47] *See* North Barrington Dev. Co. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980). In *North Barrington* the defendants allegedly participated in a fraudulent scheme to induce the plaintiff to perform services for a real estate development project. The defendants allegedly made fraudulent promises to real estate purchasers to finance loans and threatened purchasers with loss of their deposits if they did not consent to enter into new mortgage arrangements. The defendants argued and the court held that RICO does not provide a civil remedy for the direct victims of racketeering, but only for indirect victims who must compete with enterprises engaged in racketeering. *Id.* at 210-11.

[48] Landmark Sav. & Loan v. Rhoades, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (imposing a requirement that the plaintiff establish a "racketeering enterprise injury"). In *Landmark Savings*, the court dismissed a RICO fraud count on the ground that the plaintiff established injury merely from fraud and not "racketeering enterprise injury." *Id.* at 209. Although the court provided no specific definition of the requisite injury, it seemed to be concerned with the problem of potential RICO plaintiffs suffering only indirect damage from racketeering.

[49] *See* Van Shaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1137 (D. Mass. 1982) (requiring proof of "commercial injury," a term that is not defined with any particularity but that may refer to injury suffered by plaintiff "in a business activity"). In *Van Shaick*, the RICO complaint failed to meet this standard but alleged that the defendant's activities caused the plaintiff to "flee about the United States," experience emotional distress, and spend money on the plaintiff's literature and auditing sessions. *Id.*

[50] *See, e.g.*, Kleiner v. First Nat'l Bank, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981); Salisbury v. Chapman, 527 F. Supp. 577, 580-81 (N.D. Ill. 1981).

[51] *See* Waterman S.S. Corp. v. Avondale Shipyards, 527 F. Supp. 256, 259 (E.D. La. 1981) (dismissing RICO-mail-fraud action based on fraud in the sale of low-pressure and high-speed flexible couplings installed in main propulsion units of lighter-aboard-ship vessels); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747 (N.D. Ill. 1981) (dismissing RICO action based on alleged land fraud by developers).

[52] *See infra* notes 55-56 and accompanying text.

[53] *See* Note, *Civil RICO*, *supra* note 4; *see also* Strafer, Marsumi & Skolnick, *supra* note 4, at 689-709; Tarlow, *supra* note 38, at 20.

[54] 18 U.S.C. § 1963 (1976). The subject of forfeiture is beyond the scope of this Article,

these sanctions may have resulted from Congress's fear of organized crime,[55] RICO is not expressly limited to organized crime, and the courts have refused to read this limitation into Title IX.[56] These severe penalties may result in harsh sentences. Although the federal appellate courts do retain the authority to review excessive sentences,[57] recent Supreme Court decisions indicate that defendants cannot challenge disproportionately long prison terms based on eighth amendment grounds.[58]

A unique feature of RICO criminal litigation is the introduction of forfeiture as a punishment for violations of the statute.[59] Section

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and it is thoroughly analyzed in a number of other articles. *See* Tarlow, *supra* note 1, at 276-305; Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 391-92 (1980); Weiner, *supra* note 5; Tarlow, *Due Process Pays the Price for RICO Forfeiture's High Cost*, Nat'l L.J., June 15, 1981, at 26.

[55] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) ("It is the purpose of this Act to seek the eradication of organized crime in the United States . . . .") (statement of findings and purpose).

[56] *See, e.g.*, United States v. Aleman, 609 F.2d 298, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Rubin, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated & remanded on other grounds*, 439 U.S. 810 (1978); Engl v. Berg, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 646 (N.D. Ill. 1980).

An "organized-crime connection" may have continued applicability in RICO civil actions. *See supra* note 51 and accompanying text.

[57] In the RICO context, the disproportionate punishment problem is illustrated by United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981). The trial judge's imposition of terms and consecutive sentences resulted in the following total sentences for fencing and narcotics trafficking: (1) Sutton, 92 years and $100,000 fine with two 20-year concurrent terms for violations of § 1962(c) and (d); (2) Elkins, 82 years with two 20-year sentences on § 1962(c) and (d) convictions running consecutively; (3) Carter, 82 years with two 20-year sentences on § 1962(c) and (d) convictions running consecutively; (4) Rankin, 60 years with two 10-year concurrent terms for RICO violations; (5) Adams, 93 years with two 20-year terms for RICO violations and a $100,000 fine. *Id.* at 1040-41 (appendix). The en banc *Sutton* opinion characterized these sentences as "extremely severe," *id.* at 1039, and reversed the imposition of consecutive sentences for the § 1962(c) and (d) convictions. *Id.* at 1040. *See infra* text accompanying note 512. The court further stated that appellate review could be available to review trial court decisions on motions to reduce sentences under Federal Rule of Criminal Procedure 35. *Id.* at 1040. The trial judge considered the obvious disapproval of the sentences by the court and subsequently reduced Sutton's terms to 15 years. *See* Carter v. Carlson, 545 F. Supp. 1120, 1121 (S.D. W. Va. 1982) (discussing *Sutton*). The en banc decision indicates that federal appellate courts can review harsh sentences. *See id.* at 1040; *see also* United States v. Gomez, 553 F.2d 958 (5th Cir. 1977); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971); United States v. McKinney, 427 F.2d 449 (6th Cir. 1970).

[58] *See* Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (upholding 40-year sentence for marijuana charges); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life sentence for theft by false pretenses charge under recidivist statute).

[59] *See generally* materials cited *supra* note 54.

1963(a) authorizes forfeiture of (1) any interest acquired or maintained in violation of 18 U.S.C. § 1962 and (2) any interest in the enterprise.[60] The Government's policy is that RICO forfeitures "should be vigorously sought."[61] This policy is illustrated by a series of Chicago cases in which law firms are alleged to be the enterprises and the Government has attempted to forfeit any attorney's fees connected with the alleged unlawful conduct, the lawyers' ownership interests in the firms' assets, and any interests in profit-sharing, retirement, and pension plans.[62]

Presently, the Supreme Court is considering the question of whether RICO authorizes forfeiture of profits or is instead limited to forfeiture of capital interests in the enterprise. The specific issue of statutory construction is whether section 1963(a)(1) is limited to an interest "in the enterprise." Section 1963(a)(1), in contrast to section 1963(a)(2), contains no such limitation. The Government may contend that section 1963(a)(1) is not limited to interests in the enterprise and reason that an enterprise limitation would make (a)(1) surplusage because (a)(2) already applies to forfeiture of enterprise interests. In fact, this argument is specious since the two subsections apply to different types of section 1962 violations and are distinguishable. This construction is suggested by the fact that

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[60] 18 U.S.C. § 1963(a) (1976).

[61] *See* U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, CRIMINAL FORFEITURES UNDER THE RICO AND CONTINUING CRIMINAL ENTERPRISE STATUTES 1 (1980) [hereinafter cited as CRIMINAL FORFEITURES].

[62] *See, e.g.*, United States v. McManigal, *appeal docketed*, No. 82-1754 (7th Cir. Apr. 11, 1982).

The legal fees would be forfeitable only if RICO authorized forfeiture of racketeering profits that were not invested in the enterprise—an issue on which the courts are split. *Compare* United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980) *with* United States v. Martino, 681 F.2d 952 (5th Cir. 1982) (en banc), *rev'g* 648 F.2d 367 (1981), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983). Before the *Martino* en banc ruling, the reversed panel decision was held to be controlling in United States v. Peacock, 654 F.2d 339, 351 (5th Cir. 1981), and United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981). In the *Romano* opinion, District Judge Alcee Hastings sharply criticized cases limiting RICO forfeitures but reluctantly followed the *Martino* panel opinion and modified his forfeiture to eliminate forfeiture of profits. *Id.* at 1215. A bizarre series of events followed the issuance of this opinion. On the same day the Fifth Circuit granted an en banc hearing on *Martino* on its own motion, a search warrant was issued for Judge Hastings's chambers. Judge Hastings was indicted for bribery connected with his modification of the forfeiture order. The Eleventh Circuit has recently upheld the denial of Hastings's motion to quash the indictment, a motion claiming immunity from prosecution for acts involving the exercise of judicial authority. United States v. Hastings, 681 F.2d 706 (11th Cir. 1982). Judge Hastings represented himself at trial and was acquitted by a jury.

although section 1963(a)(1) refers to all section 1962 subsections, the acts of acquiring or maintaining an enterprise interest mentioned in (a)(1) are not violations of section 1962(c), which proscribes operation of an enterprise. If section 1963(a)(1) applies only to (a) and (b) violations, it is obvious that section 1963(a)(2) would be the exclusive forfeiture provision in section 1962(c) cases and, consequently, would not be surplusage even if (a)(1) were limited to interests in the enterprise.[63]

B. Liberal Construction Clause

Title IX includes a clause that arguably authorizes broad judicial interpretation by requiring liberal construction of RICO "to effectuate its remedial purposes."[64] This provision has often been cited in support of holdings that expand RICO criminal liability.[65] In *United States v. Turkette*, the Supreme Court discussed this clause but remained cautiously noncommittal as to its applicability.[66]

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[63] The Fifth Circuit adopted the Government's surplusage argument in its en banc decision in United States v. Martino, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983). Another defect in the surplusage argument is that construing § 1963(a)(1) as authorizing forfeiture effectively makes § 1963(a)(1) surplusage. It is questionable whether § 1963(a)(2) should ever be used if § 1963(a)(1) applies to any proceeds even if those proceeds are not invested in an enterprise. The *Martino* court also did not consider the language of § 1964(a), which authorizes civil divestiture of "any interest, direct or indirect, in any enterprise." There is no policy reason for permitting criminal forfeiture of profits while limiting civil divestiture to interests in the enterprise. In *Marubeni Am. Corp.* the Ninth Circuit, correctly ruling that profits are not subject to forfeiture, reasoned that forfeiture of capital interests was sufficient to accomplish the congressional intent to separate racketeers from the enterprises and that forfeiture of profits did nothing to accomplish this goal. 611 F.2d at 766-69; *see* Tarlow, *supra* note 1, at 290-91.

[64] Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970). The complete text states: "The provisions of this title [enacting this chapter and amending sections 1505, 2516, and 2517 of this title] shall be liberally construed to effectuate its remedial purposes."

[65] *See, e.g.*, United States v. Lee Stoller Enters., 652 F.2d 1313, 1317 (7th Cir. 1981); United States v. Sutton, 642 F.2d 1001, 1008 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981); United States v. Grzywacz, 603 F.2d 682, 686 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979); United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 993 (1979); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); United States v. Parness, 503 F.2d 430, 439 n.12 (2d Cir. 1974), *cert. denied*, 419 U.S. 1104 (1975); United States v. Frumento, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd.*, 552 F.2d 534 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

[66] 452 U.S. 576, 587 (1981).

Any application of the liberal construction clause to the RICO criminal provisions is an improper method of statutory interpretation and a violation of due process. The fundamental principle of statutory construction is the due process requirement that criminal statutes be construed in favor of lenity.[67] If the liberal construction clause is applicable to determine the scope of criminal liability under Title IX, the provision is therefore unconstitutional.[68]

In view of the constitutional proscription on broad construction of criminal statutes, it is inappropriate to apply the liberal construction clause to the RICO criminal provisions. Advocates of broad construction contend that RICO is a "remedial" statute and therefore exempt from the rule of narrow construction, which applies only to statutes characterized as "penal" in nature.[69] The courts, however, do not manipulate this distinction to apply a "remedial" label to statutes that are employed in formal criminal proceedings and that carry long prison terms. A remedial statute, generally, imposes money damages for compensation to an injured party,[70] and it is absurd to contend that a statute imposing a twenty-year prison term is remedial rather than penal.[71]

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[67] United States v. Bass, 404 U.S. 336, 348-49 (1971). In Dunn v. United States, 442 U.S. 100 (1979), the most recent Supreme Court application of this rule, the Court observed that this rule was "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Id.* at 112. *Dunn* cautioned against statutory constructions that impose punishment for actions that are not "plainly and unmistakably prohibited." *Id.* at 112-13. In *Bass* the Court stated:

> [B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the most instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

404 U.S. at 349 (quoting H. FRIENDLY, BENCHMARKS 209 (1967)).

[68] *See* United States v. Anderson, 626 F.2d 1358, 1369-70 (1980) (noting that judicial deference to the liberal construction clause is a questionable approach in view of due process requirement of narrow construction), *cert. denied*, 450 U.S. 912 (1981); *accord* Atkinson, *supra* note 17, at 14; Tarlow, *supra* note 1, at 177-80; Comment, *Racketeer Influenced and Corrupt Organizations Act (RICO)—Application of RICO in the Third Circuit*, 24 VILL. L. REV. 263, 276 (1979). *Contra* Note, *Liberal Construction Clause*, *supra* note 4, at 181-84.

[69] *See, e.g.*, Smith v. Equitable Life Assurance Soc'y, 614 F.2d 720, 723 (10th Cir. 1980); *cf.* Collins v. Kidd, 38 F. Supp. 634, 637 (E.D. Tex. 1941) (Fair Labor Standards Act construed favorably to the defendant because of penal component).

[70] *See* Brown v. Cummins Distilleries Corp., 56 F. Supp. 941 (W.D. Ky. 1944) (treble damages resulting from a violation of the 1942 Price Control Act are penal in nature and do not survive the death of the defendant).

[71] *Cf.* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 376-77 (1973) (statute

Advocates of broad construction have suggested a second theory by which the traditional rule of narrow construction can be evaded. It is contended that because section 1962 establishes a standard for both civil and criminal violations, it defines only "unlawful" conduct and not "criminal" conduct.[72] Therefore, under this theory section 1962 is not a criminal statute subject to narrow construction. Proponents of this argument assume that where a statute establishes a common standard for both civil and criminal liability the standard is immune from the strict construction doctrine. This assumption squarely conflicts with Supreme Court case law,[73] holding that where a statute gives rise to both civil and criminal remedies even the civil remedies must be narrowly construed.[74] Applying this principle to RICO, section 1962 must be construed narrowly regardless of the fact that civil remedies are dependent on that standard.[75]

On the level of statutory interpretation, it is evident that the liberal construction clause was not meant to apply to the punitive

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imposing civil money penalty is not construed "as narrowly as a criminal statute providing graver penalties, such as prison terms").

[72] *See* Blakey & Gettings, *supra* note 4, at 1027 n.91. In another Article by the same authors, they assert: "RICO is not a criminal statute. Sec. 1962 says 'unlawful', not 'criminal'. Conduct may be unlawful either criminally or civilly. In fact, RICO does not draw the line between innocent and criminal conduct, since it requires the violation of two or more independent criminal statutes before it is violated." Blakey & Gettings, *supra* note 15, at 26, col. 4.

[73] *See* FCC v. American Broadcasting Co., 347 U.S. 284 (1954).

[74] *Id.* In *American Broadcasting*, the Court held that a statute proscribing broadcasts of lotteries was subject to strict construction even though the statute could be enforced in both FCC administrative hearings and in federal criminal prosecutions. The Court struck down FCC regulations that broadly construed the statute and concluded that the regulations had to be drafted in accord with the narrow construction rule applicable to criminal statutes. *Id.* at 296. The Court noted:

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly.

Id.

[75] It is noteworthy that the Sherman Act, 15 U.S.C. § 1 (1973), resembles RICO in that a single standard produces both criminal and civil remedies. Nevertheless, the Sherman Act, as a criminal statute, has been subjected to strict construction. *See* United States v. United States Gypsum Co., 438 U.S. 422, 443-44 & n.19 (1978).

provisions of 18 U.S.C. §§ 1961-1963.[76] This view is buttressed by the Supreme Court opinion in *United States v. United States Gypsum Co.*,[77] which indicated that a clause urging liberal construction to effectuate a remedial purpose is generally applicable only to statutes creating civil remedies and not to criminal statutes.[78] Courts interpreting RICO have stood this rule on its head by broadly construing the criminal provisions while narrowly construing the civil provisions.[79]

The confusion and uncertainty engendered by the liberal construction clause has caused the American Bar Association to recommend its repeal.[80] The commentary focused on the difficulty in reconciling that clause with the due process requirement of strict construction.[81]

III. Constitutional Challenges to RICO

Constitutional objections to Title IX have been frequently raised and just as frequently rejected. These objections, however, can

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[76] *See* United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976). Seventh Circuit Judge Swygert has theorized that Congress probably intended the clause to apply only to the civil remedies, considered to be the major innovation of Title IX at the time of its passage. *See* United States v. Grzywacz, 603 F.2d 682, 691-92 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 446 U.S. 935 (1980).

[77] 438 U.S. 422 (1978).

[78] *Id.* at 443 n.19. In holding that intent was an element of Sherman Act criminal provisions, the Court observed:

> An accommodation of the civil and criminal provisions of the Act similar to that which we approve here was suggested by Senator Sherman in response to Senator George's argument during floor debate that the Act was primarily a penal statute to be construed narrowly in accord with traditional maxims:
>
> "The first section being a remedial statute, would be construed liberally with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally . . . .
>
> "In providing a remedy the intention of the combination is immaterial. . . .
>
> "The third section is a criminal statute, which would be construed strictly and is difficult to be enforced. In the present state of the law it is impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment." 21 Cong. Rec. 2456 (1890).
>
> Although the bill being debated by Senators George and Sherman differed in form from the Act as ultimately passed, the colloquy between them indicates that Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the Act.

438 U.S. at 443 n.19.

[79] *See supra* text accompanying notes 41-53.

[80] *RICO Report*, *supra* note 7 at 12-13.

[81] *Id.* at 13.

have the salutary effect of requiring the courts to clarify the broad language of Title IX.[82]

A. *Congress's Authority Under the Commerce Clause*

Generally, statutes enacted by Congress pursuant to the commerce clause of the Constitution[83] require some nexus between the defendant's activities and interstate commerce.[84] Section 1962 requires only that the enterprise affect commerce,[85] a lesser standard of proof that has been upheld as permissible under the commerce clause.[86]

A similar claim is that RICO intrudes upon state sovereignty in violation of the ninth and tenth amendments because the racketeering acts need not affect interstate commerce. In *United States v. Martino*,[87] the court, rejecting this claim, reasoned that the essence of RICO proscribes "the furthering of the enterprise not the predicate acts"; consequently, those acts need not affect commerce.[88]

B. *Ex Post Facto Clause*

Although the problem has abated with the passage of time, RICO charges have frequently been challenged when the predicate racketeering acts were committed before the effective date of Title IX. Title IX may violate the constitutional prohibition on ex post facto laws[89] because it permits prosecution of activities occurring

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[82] *See, e.g.*, United States v. Thevis, 474 F. Supp. 134, 141-43 (N.D. Ga. 1979) (excluding forfeiture of profits from § 1963 in response to vagueness challenge to § 1963); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974) (adopting "common scheme" construction of "pattern" in response to vagueness objection to § 1962).

[83] U.S. CONST. art. I, § 8, cl. 3.

[84] *See* Comment, *supra* note 68, at 275.

[85] *See infra* text accompanying note 364.

[86] *See* United States v. Vignola, 464 F. Supp. 1091, 1097-1100 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979); Atkinson, *supra* note 17, at 5-6. *But see* Comment, *supra* note 68, at 275.

[87] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[88] *Id.* at 381; *accord* United States v. Boffa, 513 F. Supp. 444, 465 (D. Del. 1980), *rev'd in part on other grounds*, 688 F.2d 919 (3d Cir. 1982).

[89] U.S. CONST. art. 1, § 9, cl. 3. The ex post facto clause states: "No Bill of Attainder or ex post facto Law shall be passed." An ex post facto law has been defined as one "that makes an action done before passing of the law, and which was *innocent when done* criminal." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis added).

prior to its effective date.[90] This contention has been rejected based upon a statement in a Senate report on Title IX: "One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder."[91] In addition, at least one court has concluded that the ex post facto clause is not violated because the RICO offense is not complete until a racketeering act occurs after the effective date.[92] The statute theoretically notified the defendant, who committed racketeering acts prior to that date, that a further act would violate Title IX.[93]

A different form of ex post facto argument was raised in *United States v. Martino*.[94] The defendant claimed that the application of RICO to illegal enterprises is an unexpected judicial expansion of law that cannot be retroactively applied.[95] The court rejected this argument and indicated that the illegal enterprise concept was a foreseeable expansion.[96]

C. *Vagueness and Overbreadth*

The "less than pellucid" language of Title IX[97] has frequently precipitated the unsuccessful contention that various portions of Title IX are unconstitutionally vague.[98] The commonly applied

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[90] *See, e.g.*, United States v. Boffa, 688 F.2d 919, 937 (3d Cir. 1982). Other courts, however, have indicated that proper prosecution under Title IX may not violate the ex post facto clause. *See, e.g.*, United States v. Brown, 555 F.2d 407, 418-21 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); United States v. Campanale, 518 F.2d 352, 357, 364-65 (9th Cir. 1975), *cert. denied*, 432 U.S. 1050 (1976); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977).

[91] S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969), *cited in* United States v. Brown, 555 F.2d 407, 417 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *accord* United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976). This legislative comment is codified in 18 U.S.C. § 1961(5), which defines "pattern of racketeering activity" to require one act after the effective date. 18 U.S.C. § 1961(5) (1976).

[92] United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977).

[93] *Id.*

[94] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[95] *Id.* at 381.

[96] *Id.*

[97] United States v. Rubin, 559 F.2d 975, 990 (5th Cir. 1977), *vacated & remanded on other grounds*, 439 U.S. 810 (1978).

[98] *See* United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v.

constitutional standard for vagueness is that a criminal statute is void when it fails to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[99]

The phrase "pattern of racketeering activity" is particularly vulnerable to a vagueness challenge. The Ninth Circuit has acknowledged that if "pattern of racketeering activity" were undefined, the term would be "unmanageable."[100] The court concluded that any ambiguity was cured by the definitions of "pattern" and "racketeering activity" in section 1961.[101] The court, however, ignored the fact that section 1961(5) does not define "pattern" but merely states that there can be no proof of a pattern that does not include proof of the two racketeering activities described in section 1961(5).[102]

The term "enterprise" also seems vulnerable when applied to an illegal enterprise because that construction conflicts with the legislative history.[103] Nevertheless, vagueness arguments have been rejected in this context.[104]

Some potential vagueness and overbreadth problems may remain. The District of Columbia Circuit has indicated that RICO

United States, 103 S. Ct. 721 (1983); United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Pantone, 609 F.2d 675, 679 (3d Cir. 1979); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976); United States v. Parness, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); United States v. Boffa, 513 F. Supp. 444, 460 (D. Del. 1980), *rev'd in part on other grounds*, 688 F.2d 919 (3d Cir. 1982); United States v. Thevis, 474 F. Supp. 134, 139-40 (N.D. Ga. 1979); United States v. Field, 432 F. Supp. 55, 60 (S.D.N.Y. 1977); United States v. Castellano, 416 F. Supp. 125, 128 (E.D.N.Y. 1975); United States v. Stofsky, 409 F. Supp. 609, 612-13 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. Scalzitti, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974).

[99] United States v. Harriss, 347 U.S. 612, 617 (1954), *quoted in* Palmer v. City of Euclid, 402 U.S. 544, 545 (1971).

[100] United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

[101] *Id.*

[102] United States v. Ladmer, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977).

[103] *See* Tarlow, *supra* note 1, at 193-95.

[104] *See* United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976); United States v. Castellano, 416 F. Supp. 125, 128 (E.D.N.Y. 1975); United States v. Scalzitti, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975).

may be overbroad when applied to "'small fry' with only a tangential relationship with a criminal enterprise."[105] In a related holding, *United States v. Boffa*,[106] a district court rejected a claim that RICO was vague "as applied" to the particular case.[107] The court implied that in some cases RICO might be vague as applied.[108]

IV. Section 1962(a) and (b)

A. *Section 1962(a)*

Section 1962(a) proscribes the acquisition or operation of an enterprise with income derived from a pattern of racketeering.[109] Proof of a section 1962(a) violation involves tracing money derived from a pattern of racketeering into the operation or acquisition of an interest in a business. Although some courts had concluded that section 1962(a) applied only to legitimate businesses,[110] the Su-

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[105] United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (while United States v. Elliott, 571 F.2d 880 (5th Cir. 1980), states that "the RICO net is woven tightly to trap even the smallest fish," *Swiderski* cautions that RICO cannot cast "too large a net"); *see also* Atkinson, *supra* note 17, at 4 (RICO can be unconstitutionally vague as applied to some individuals).

[106] 513 F. Supp. 444 (D. Del. 1980), *rev'd in part on other grounds*, 688 F.2d 919 (3d Cir. 1982).

[107] *Id.* at 460-63.

[108] *Id.* The court also rejected a claim that RICO was subject to the first amendment overbreadth doctrine, *id.* at 463-64, holding that RICO "does not affect any association protected by the First Amendment." *Id.* at 464.

[109] Section 1962(a) reads:

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

18 U.S.C. § 1962(a) (1976).

[110] *See* United States v. Sutton, 605 F.2d 260, 269 (6th Cir. 1979), *rev'd en banc*, 642 F.2d 1001 (1980), *cert. denied*, 453 U.S. 912 (1981); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974).

preme Court held in *United States v. Turkette* that acquisition of an interest in an illegal enterprise is encompassed by section 1962(a).[111] Presumably, prosecutions of those investing in illegal enterprises under section 1962(a) will be extremely rare because an investment of "dirty money" in an illegal enterprise can be prosecuted as an illegal operation of an enterprise under section 1962(c).[112]

The second sentence of section 1962(a) establishes an exception to the offense for purchases of securities in the open market amounting to less than one percent of the securities of a class of stock. Unfortunately, there is no similar exemption for money used to operate an enterprise. Consequently, use of trivial amounts of "dirty money" to purchase janitorial supplies for the enterprise may violate section 1962(a). Theoretically, the problem of de minimis use of racketeering income could be remedied by congressional enactment of a one-percent exemption similar to the present exemption for an acquisition of an interest.[113]

The scope of the existing one-percent exemption may be limited by the fact that section 1962(a) applies not only to racketeering income but to proceeds of that income. One consequence of this extension to proceeds of income is that section 1962(a) may be applicable to money derived from racketeering, invested within the stock exception, and upon the sale of the stock reinvested outside the exception.[114]

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[111] 452 U.S. 576, 587 (1981).

[112] *See infra* text accompanying note 353.

[113] Unfortunately, it is difficult to draft language to reflect the concept that the use of racketeering income should be significant in relation to the magnitude of the enterprise's business activities. Those who draft an exemption for "operating" must answer the question: "Percent of what?" There are numerous figures to which the percentage could apply, including four percent of gross income, net income, or operating expenses. Unlike acquisitions, there is no figure that is applicable to all acts of "operating" an interest because the word "operating" is so broad that it can apply to a wide variety of acts. For example, an exemption for percent of operating expenses only responds to a situation where racketeering income is used to pay the expenses of the enterprise. This exemption would fail to resolve "operating" situations involving use of racketeering income to purchase capital assets for the enterprise or to pay off liens on the defendant's stock interest in the enterprise.

[114] *See* Tarlow, *supra* note 1, at 184-85. A somewhat similar issue is being litigated in United States v. Facuseh, No. 81-337 (S.D. Fla. filed July 31, 1981). In *Facuseh*, an indictment charging a Travel Act violation, 18 U.S.C. § 1952, involved two money brokers who allegedly sold cashier's checks and wire transfers to defendants who paid the brokers in cash from illegal drug transactions. The defendants moved to dismiss the indictment on numerous grounds, including a claim that the brokers' transmission of the cashier's checks and

1. Liability of Recipients and Investors of Racketeering Income. The Government has contended that section 1962(a) extends beyond the investor who participates in the racketeering to individuals, including accountants, attorneys, or investment advisers who are not involved in the racketeering but who invest or receive the invested money with or without knowledge of the nature of the illegal source.[115] This interpretation conflicts with the legislative history, which indicates that section 1962(a) is limited to those who are principals in the racketeering acts, excluding innocent recipients or investors who would be accessories after the fact.[116]

The liability of an investor of racketeering income under section 1962(a) and (d) was a pivotal issue in *United States v. Loften*,[117] where an attorney was indicted for conspiracy to violate section 1962(a) by investing a client's drug-related income in various commercial projects. He was not involved in the underlying drug racketeering activity, and the Government contended that it was not required to establish that the attorney knew the funds were drug related. The section 1962(d) conspiracy count alleged that the attorney was an investment adviser to those who committed the drug transactions. The attorney's alleged activities involved such innocuous acts as (1) payments to an engineer and a contractor for a commercial building; (2) discussion of an Arizona gold mine investment and a purchase of diamonds for resale in Asia; and (3) touring Arizona gold mine sites.[118] This was not a money-laundering operation; the defendant Loften wanted to place a large sign on the front of the building, naming it the "Loften Building."

The attorney in *Loften* was not a criminal lawyer and had never represented a defendant in a drug case. He was first asked to cooperate against the client and another lawyer. The Government contended that the attorney was liable even if he did not know that

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wire transfers was not a distribution of proceeds from the drug transactions within the meaning of § 1952. Unlike RICO, which applies to the proceeds of racketeering income, § 1952 applies only to the illegal income itself.

[115] *See, e.g.*, United States v. Rittenberg, No. 80-0256-S (S.D. Cal. Apr. 21, 1980) (§ 1962(a) count filed against an accountant who invested funds from racketeering in which he did not participate).

[116] The clause "in which such person has participated as a principal" was inserted at the suggestion of the Justice Department, which felt that § 1962(a) was directed at a person who was an active participant in the illegal activities. *See Hearings, supra* note 21, at 406.

[117] 518 F. Supp. 839 (S.D.N.Y. 1981).

[118] *Id.* at 842-48.

the client was engaged in drug transactions as long as he mistakenly suspected that the income was from an illegal activity such as gambling. When the prosecution was first asked how the lawyer should have known that his conduct was unlawful, the response was the following: "[H]is nose should have told him there was something wrong."[119] Ultimately, the court rejected this "proboscis" test and held that the Government must prove that the attorney knew that the money was from narcotics activity.[120]

At the trial in *Loften*, the Government attempted to establish the intent element by arguing that the attorney knew that his client had no legitimate source of income and that these clients derived profits from drugs. The Government contended that the attorney had set up a dummy corporation for his clients and was planning to phase out his law practice so that he could spend all of his time on the investments of his clients. Heroin placed in evidence by the Government was always piled high in front of the lawyer.[121]

The jury ultimately rejected the Government's argument by acquitting the attorney on the RICO count. The court acknowledged that section 1962(a) applied only to principals in the racketeering activities. *Loften* adopted this author's view that the section 1962(a) phrase "in which such person has participated as a principal" also applies to patterns of racketeering as the source of the tainted income.[122] Strangely, the Government apparently conceded this point in *Loften* despite filing an earlier section 1962(a) indict-

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[119] Kaiser, *John Martin's Rocky Start*, Am. Law., Feb. 1982, at 36.

[120] United States v. Loften, 518 F. Supp. 839, 856 (S.D.N.Y. 1981).

[121] Kaiser, *supra* note 119, at 36.

[122] The court commented:

> Subsection 1962(a) as it was originally proposed did not include the requirement that the offender must have been a principal in the racketeering operations. Thus, it was susceptible of the interpretation that the recipients of the racketeer's investments (owners, operators, and employees of the legitimate enterprise) would also be guilty of violating the law. In order to make it completely clear that the substantive offense was not directed at legitimate businessmen, the phrase "in which such person has participated as a principal" was inserted. . . .
>
> It is not clear from the face of the statute whether this phrase modifies both "pattern of racketeering activity" *and* "collection of an unlawful debt," or whether it applies only to the latter. The legislative history indicates (and the Government apparently concedes) that it modifies both. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 184-85 (1980).

518 F. Supp. at 851 & n.19 (emphasis in original) (footnotes omitted).

ment in *United States v. Rittenberg*[123] against a defendant who was an accountant investing funds from alleged drug transactions without participating in those transactions.

The district court opinion in *Loften*, however, establishes a disturbing precedent for lawyers, accountants, and investment advisors. In *Loften*, the Government avoided the restriction on section 1962(a) by indicting the attorney for a section 1962(d) conspiracy to violate section 1962(a). The court approved this indictment format holding that a nonprincipal in racketeering could be liable for a section 1962(d) conspiracy to violate section 1962(a) if the Government could show that he "had knowledge of the substantive statutory offense [§ 1962(a)] and agreed with others to violate it."[124]

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[123] No. 80-0256-S (S.D. Cal. 1980). The ABA has urged the Congress to clarify the statute so as to preclude § 1962(a) prosecutions of those who are not involved as principals in the pattern of racketeering activity. *RICO Report*, *supra* note 7, at 9.

One commentator has suggested that section 1962(a) liability can be imposed on an individual who did not commit the racketeering activity but arranged investments and had a financial stake in the racketeering acts because of an intent to profit. Note, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under RICO Section 1962(a)*, 82 COLUM. L. REV. 574, 581-92 (1982). The Note relies on legislative history that indicates that the addition of the "participated as a principal" clause of section 1962(a) was intended to incorporate the "stake in the enterprise" test of earlier cases. *Id.* at 584. Although the discussion in this Note is balanced and well considered, the problem of statutory construction is somewhat more complex than the Note would imply. Arguably, the "participated as a principal" clause requires that the accused be a principal in specific racketeering acts. If this argument is correct, however, the "stake in the venture" test would not satisfy the explicit requirement of section 1962(a). To illustrate this point, assume that a drug trafficker has received money from two cocaine shipments and approaches an investment advisor about investing the dirty money. The trafficker specifically tells the advisor that the money is derived from the shipments and that the advisor will receive a 10% share of future racketeering profits if he invests the current and future profits in legitimate businesses. If the advisor proceeds to invest the money and receives the profits, can he be prosecuted under § 1962(a)? Applying the "stake in the enterprise" test, the advisor would be liable since, at the time of his investment activities, he had a share of the enterprise profits and intended to aid the racketeering by laundering the profits. The advisor could not be a principal in the two cocaine shipments occurring before his agreement with the trafficker since one cannot be a principal to a crime that has already occurred. *See, e.g.*, United States v. Shulman, 624 F.2d 384, 387 (2d Cir. 1980). As this hypothetical demonstrates, a person cannot act with a "stake in the enterprise" without violating § 1962(a) if the statute requires that the accused act as a principal to specific racketeering acts.

[124] United States v. Loften, 518 F. Supp. 839, 856 (S.D.N.Y. 1981). *See generally* Note, *supra* note 123. The *Loften* court's proposed intent requirement seems to apply only to § 1962(d). Whether § 1962(a) includes a mens rea requirement is an unresolved question. *See* Tarlow, *supra* note 1, at 180-83. The courts are split on the issue of intent in § 1962(c) cases. *See infra* text accompanying note 385.

The investor or recipient who is not involved in racketeering should be immune from RICO liability under either an aiding-or-abetting theory or a conspiracy theory. Where Congress specifically intends to exclude a class of people from liabiiity for an offense, as it did with section 1962(a), a person in that class is also exempt from conspiracy and aiding-or-abetting liability.[125]

2. *Proof of a Section 1962(a) Violation.* Theoretically, it may seem difficult to prove a section 1962(a) violation because of the need to trace the racketeering funds into the enterprise.[126] When the defendant commingles racketeering income with substantial amounts of legitimate income, the Government could encounter difficulty in determining which was the source of money invested in an enterprise.[127]

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[125] *See* Gebardi v. United States, 287 U.S. 112, 123 (1932) (the Court held that where Congress intended to exempt a woman from the Mann Act, she could not be guilty of conspiracy); United States v. Nasser, 476 F.2d 1111, 1118-20 (7th Cir. 1973) (statute prohibiting an ex-employee of the Federal Government from acting as attorney for a client in a matter he had personally participated in as an IRS employee did not provide for punishment of the client; therefore, neither the client nor the attorney could be charged with conspiracy to violate the statute).

[126] Ironically, the chief counsel to the Senate Subcommittee that drafted Title IX, Professor Blakey, believed that § 1962(a) is ineffective, because of the difficulty in uncovering evidence of how much illegitimate income has been gained by the defendant through racketeering activity. Blakey & Goldstock, *supra* note 4, at 356-57.

[127] Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1511 n.97 (1974).

The Government may attempt to adopt theories originating in tax prosecutions. One widely employed theory is the "net worth" method under which the Government attempts to establish the total net value of the taxpayer's assets at the beginning and at the end of a given year. The taxpayer's nondeductible personal expenditures are added to the increase in net value. If this figure is substantially greater than the taxable income reported by the taxpayer, the excess may be considered unreportable taxable income. *See* Holland v. United States, 348 U.S. 121 (1954). The major difficulties encountered by the Government are proving a "firm" opening net worth (an approximation is not sufficient), *id.* at 132, and proof that either (1) the defendant had a likely source of illegal income or (2) the accused had no source of legal income. *Cf.* United States v. Costanzo, 581 F.2d 28, 32 (2d Cir. 1978) (Government successfully negated all possible sources of nontaxable income).

In tax cases, variations on the net worth theory have been developed: (1) the "expenditures" method under which the Government establishes the total cash expenditures, deducts reported income and nontaxable income, and produces a figure for unreported income, *see, e.g.*, Taglianetti v. United States, 398 F.2d 558, 562-63 (1st Cir. 1968); and (2) the "bank deposits" method under which the Government computes bank deposits exceeding reported income, an opening cash balance, an income source capable of producing receipts, and exceeding the reported income, *see, e.g.*, United States v. Slutsky, 487 F.2d 832, 836-37 (2d Cir. 1973). A third tax method, developed independently of the net worth concept, is the "specific items" method under which the Government directly proves that a specific deduc-

Surprisingly, the few section 1962(a) cases indicate that in practice tracing is not an insurmountable problem for the Government even in complex factual situations such as *United States v. Cauble*, which involved over $150,000,000 in assets.[128] For example, tracing was successful in *United States v. McNary*,[129] where the $103,000 enterprise investment was made from an account containing commingled funds that included $65,000 in racketeering income. In *McNary*, there was not enough "clean money" in the account to permit the defendant to invest without the illegal funds.

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tion or item of income was misstated or omitted on the tax return. *See, e.g.*, United States v. Rosenstein, 474 F.2d 705, 708-09 (2d Cir. 1973).

A recent legislative proposal, vetoed by the President, authorized a presumption of forfeitability under Title 21 of the *United States Code*. *See* S. 2320, 97th Cong., 2d Sess. (1982). Any property acquired during or shortly after a drug violation would have been presumed to be forfeitable if the defendant's legal sources of income were substantially insufficient to cover the purchases. *Id.*

[128] In United States v. Cauble, L.A. Times, Nov. 29, 1981, at 1, col. 1, tracing was successful even in a complex case. The Government succeeded in forfeiting between $40,000,000 and $80,000,000 in assets, which included bank accounts and a number of businesses and ranches. The Government was able to establish that $400,000 was derived from illegal transactions. *Id.*

Cauble amassed this wealth in the oil business by starting at age 17 as a roughneck and eventually buying a drill oil rig on credit. Ultimately, Cauble's holdings included large stock interests in three banks, a steel fabricating plant, a horse trailer company, a welding supply company, and six ranches in five counties. Cauble's prize possession was a golden palomino named Cutter Bill. To ensure that Cutter Bill lived comfortably, Cauble built a horse barn that was longer than a football field and wider than a freeway. Cauble later named his legendary clothing stores after his horse. *Id.*

The Government alleged a marijuana operation combining a Columbian source with Texas cowboy smugglers. The marijuana was off-loaded in Texas from shrimp boats. The evidence focused on the activities of "Muscles" Foster, a ranch hand who was both an employee and a friend of Cauble. Foster and another cowboy, Raymond Hawkins, arranged the marijuana shipments until a November, 1978, venture collapsed, resulting in the indictment of 24 people and the seizure of a 73-foot trawler, three trucks, and approximately 40,000 pounds of marijuana. Although nine defendants were convicted in the first trial, Muscles was found not guilty by reason of insanity. In a subsequent trial Cauble was convicted despite evidence that he refused to hire job applicants who had used drugs. *Id.*

[129] 620 F.2d 621 (7th Cir. 1980). In *McNary*, the prosecution alleged that the defendant, a mayor of a town, received payments from building developers in return for his exercise of influence with a zoning board to ensure favorable zoning. The § 1962(a) count arose from the defendant's investment of the proceeds in an enterprise, Ports of Call. The investment in Ports of Call was indirect since the proceeds were first deposited in an account of the mayor's business, B & M. The money from that account was subsequently transferred to Ports of Call. Even though the illegal money in the B & M account was commingled with legitimate income, the court held that this indirect investment was a violation of § 1962(a) because the $65,000 racketeering proceeds enabled the mayor to invest $103,000 in Ports of Call. *Id.* at 629.

The case, therefore, does not resolve the far more complex problem that occurs when $20,000 of dirty money is deposited in an account with $150,000 in clean money, $25,000 in intervening withdrawals occurs, and then $40,000 is invested in a legitimate business. The problem is not as difficult in cases where defendants do not have a large source of legitimate income to cover the expenditures. Juries will generally conclude that funds are obtained from racketeering acts when a defendant does not have a significant source of income.[130]

The tracing problem was more complex in *Balistrieri v. United States*,[131] which dealt with the question of whether the affidavits in support of a search warrant were sufficient to establish probable cause for a section 1962(a) violation. The affidavits included statements by Jimmy "the Weasel" Fratianno and three confidential sources. The defendant was Frank Balistrieri, the alleged head of the Milwaukee Chapter of La Cosa Nostra. Confidential source number three stated that Balistrieri owned various businesses and operated them through front people. Balistrieri paid bills incurred by the businesses from a general fund derived from all of his businesses, including illegal businesses. Confidential source number one confirmed this point. In addition, Fratianno stated that Balistrieri referred to receiving a "transfusion" for the operation of his business. The court held that this established probable cause to believe that section 1962(a) was violated.[132] The fact that a probable cause standard was involved may have obscured the fundamental problem of whether section 1962(a) applies to commingled funds. In this case, Balistrieri allegedly created a general fund that apparently commingled illegal and legal funds.

In the context of a RICO civil action, *Spencer Cos. v. Agency Rent-A-Car, Inc*,[133] a district court dismissed a pretrial challenge to a section 1962(a) count. The complaint alleged that the defendant filed misleading statements with the Securities and Exchange Commission in connection with its 1980 acquisition of $4,000,000 of Gateway stock. In February, 1981, the defendant al-

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[130] 620 F.2d at 628-29. One consequence of this phenomenon is that the Government encourages federal prosecutors to insist on jury trials on forfeiture issues rather than submitting the issue to the trial judge. *See* CRIMINAL FORFEITURES, *supra* note 61, at 18.

[131] 517 F. Supp. 935 (E.D. Wis. 1981).

[132] *Id.* at 941.

[133] [1981-1982] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981).

legedly sold the Gateway stock for $6,000,000 and in the same month began acquiring the plaintiff's stock. The court held that these allegations stated a cause of action under section 1962(a) and rejected any requirement that the plaintiff show direct use of racketeering income to acquire an interest in the enterprise.[134] *McNary, Balistrieri,* and *Spencer Cos.* seem to indicate that courts are willing to find a cause of action under section 1962(a) no matter how complex and tenuous the tracing problem may be.

B. Section 1962(b)

Section 1962(b) applies to the acquisition of an interest in an enterprise through a pattern of racketeering rather than by the income derived from that activity. In practice, section 1962(b) prosecutions involve relatively simple fact patterns in which the defendant is charged with "muscling" into businesses through loansharking, bribery, extortion, or fraud. One of the few illustrations of a section 1962(b) offense is provided by the Second Circuit decision in *United States v. Jacobson,*[135] which involves the relationship between a financially troubled bagel bakery and a local loanshark, Jacobson. Jacobson made a series of usurious loans to the bakery, and, as security for a $15,000 loan, he received an assignment of the bakery's lease, which constituted the acquisition of an enterprise interest in violation of section 1962(b).

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[134] *Id.* at 92,215.

[135] 691 F.2d 110, 113 (2d Cir. 1982). The defense contended that the acquisition of the lease was not an acquisition of an "interest" and a "control" within the meaning of § 1962(b), which 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." The court rejected this argument and held that the lease was an interest in the enterprise under a broad view of the word "interest." *Id.* at 113. Some courts have regarded the term "interest" in RICO as connoting a capital interest in the enterprise, *see supra* note 62, a view implicitly in conflict with *Jacobson.* Arguably, the lender had an interest in the real property on which the enterprise was located without having a capital interest in the bakery itself. *Jacobson* further held that either the acquisition of the lease or the eviction could be regarded as the acquisition of control. *Id.* at 112. Although this holding seems to have some merit, it does serve as a reminder of the troubling ambiguity of § 1962(b). Specifically, it is not clear what constitutes "control" under § 1962(b). Is it enough merely to have some influence over the enterprise's affairs or must the defendant have something akin to majority control of the enterprise? Had Congress intended the broader view of "control," it would have drafted § 1962(b) to proscribe the acquisition of a "source of influence," the language used in § 1963(a).

V. Section 1962(c)

Section 1962(c) is the most frequently litigated offense applying to operation of an enterprise through a pattern of racketeering. The question of what constitutes an enterprise has been the most frequently litigated issue in section 1962(c) cases. The focal point of any analysis of an "enterprise" problem is the broad and ambiguous definition of enterprise in section 1961(4): "[E]nterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . ."[136]

A. Enterprise

1. Operation of Illegal Enterprise.

a. The Turkette *decision.* Prior to the Supreme Court opinion in *United States v. Turkette*,[137] the key issue involving the definition of enterprise was its applicability to illegal enterprises. The Government contended that the absence of any language limiting the term "enterprise" to legitimate organizations authorized prosecutions of those who illegally operate an illegal enterprise as well as those who illegally operate a legitimate one. The majority of courts permitted the Government to allege violations of section 1962(c) based on illegal activities unrelated to the acquisition or operation of legitimate entities such as businesses or unions.[138] Most commentators sharply criticized this view.[139]

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[136] 18 U.S.C. § 1961(4) (1976).

[137] 101 S. Ct. 2524 (1981), *rev'g* 632 F.2d 896 (1st Cir. 1980).

[138] *See, e.g.*, United States v. Sutton, 642 F.2d 1001, 1008 (6th Cir. 1980) (en banc), *rev'g* 605 F.2d 260 (1979), *cert. denied*, 452 U.S. 912 (1981); United States v. Whitehead, 618 F.2d 523, 525 n.1 (4th Cir. 1980); United States v. Rone, 598 F.2d 564, 568-69 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Malatesta, 583 F.2d 748, 754 n.3 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979). *But see* United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979).

[139] *See* Tarlow, *supra* note 1, at 191-99; Note, United States v. Sutton, *The Sixth Circuit Curbs Abuse of RICO: The Federal Racketeering Enterprise Statute*, 28 Cleve. St. L. Rev. 629 (1979); Note, *Statutory Interpretation—Racketeer Influenced and Corrupt Organizations Statute (RICO) Applies Only to "Legitimate" Enterprises:* United States v. Sutton, 11 U. Tol. L. Rev. 685 (1980); Comment, *The Scope of Title IX*, *supra* note 3; Comment, *The Enterprise Element*, *supra* note 3; Comment, *The Legitimate-Illegitimate Controversy*, *supra* note 3; Comment, *Runaway RICO*, *supra* note 3. *But see* Note, *The Liberal Construction Clause*, *supra* note 4, at 184-90; Note, *The Racketeer Influenced and Corrupt Organizations Act: Proscription of Illegitimate and Criminal Enterprises*, 10 Mem. St. U.L.

The majority view established in the cases was upheld by the Supreme Court decision in *Turkette*. The Court's decision was based primarily on the belief that the term "enterprise" was unambiguous and clearly included illegal operations.[140] Unfortunately, the Supreme Court failed to demonstrate the clarity of the "enterprise" concept by providing a workable test for determining when an individual or group of people engaged in illegal activities becomes an enterprise.

The Court implied that the commission of two racketeering acts by the same person or group of people does not by itself establish the existence of an illegal enterprise.[141] Other than this cautionary language, the Court's explanation of enterprise was limited to descriptions of an enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct"; and "an ongoing organization, formal or informal," in which "the various associates function as a continuing unit."[142]

b. Decisions construing Turkette. With this meager guidance, the lower courts must determine the factors that transform a per-

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Rev. 633 (1980); Note, *Construing Legislative History*, *supra* note 4, at 789-94.

[140] 452 U.S. 576, 580-87 (1981).

[141] *Id.* at 583 n.5.

[142] *Id.* at 583. One practical effect of the *Turkette* enterprise standard is to broaden the admissibility of otherwise prejudicial evidence. This point is illustrated by United States v. Dickens, 695 F.2d 765 (3d Cir. 1982). In *Dickens*, the 17 defendants were members of the "New World" religious organization, an offshoot of the Black Muslims. The leader of the group was an inmate of Rahway State Prison, who recruited other inmates to commit "missions," i.e., armed robberies. The group was a hierarchical paramilitary group with ranks ranging from "general," "major," "minister," and "captain" to "lieutenant" and "soldier." The defendants pooled the stolen money to purchase land in South Carolina where they were to establish a separatist community. After two rehearsal robberies of Cooper's Liquor Store and Smitty's Bar, the defendants conducted 12 armed bank robberies within a seven-month period. During one robbery, a police officer was killed. *Id.* at 771.

The defendants objected to the allegation of the New World religious organization as a RICO enterprise. However, this claim was seemingly based on the first amendment rather than on any claim that it could not be an enterprise as a matter of statutory construction. The first amendment argument was that the allegation of the "New World" as an enterprise chilled first amendment rights by effectively placing their unpopular religious beliefs on trial. The defendants claimed that the Government should have employed a simple group-of-associated-individuals enterprise without making reference to the religious goals of the New World. *Id.* at 772.

The *Dickens* court rejected this argument, holding that it was impossible for the Government to avoid the religious aspect of the enterprise. To prove an illegal enterprise, the Government would have to establish the existence of a "common purpose" and the New World's religious beliefs supplied this purpose. *Id.* at 773.

son or group into an enterprise. In addition to *Turkette*, some insights into the enterprise concept can be derived from the definition of "enterprise" in 29 U.S.C. § 203(r) of the Fair Labor Standards Act.[143] This definition of "enterprise" seems to require proof of three elements: (1) a relationship between the enterprise activities; (2) the existence of a "unified operation or common control"; and (3) the existence of a common business purpose. An additional factor may be the existence of a high degree of organization and structure. This factor is of paramount importance in Supreme Court case law on the applicability of the fifth amendment to the records of an organized entity.[144]

The Fourth Circuit opinion in *United States v. Griffin*[145] contains an extensive discussion of what constitutes an illegal enterprise after *Turkette*. In *Griffin*, the indictment charged section 1962(c) and (d) violations based on bribery of Baltimore police officers to protect gambling operations. The defendants were the bookmakers who made protection payments, and the enterprise was an illegal association of bookmakers. The enterprise purportedly began when defendant Garonzik made payments to an officer on behalf of a gambling operation run by defendant Diamond. Diamond told the officers that another gambling operation employing defendant Baumgarten would also make protection payments. Baumgarten subsequently paid $1,000 to the officers. Garonzik informed the officers that a third gambling operation run by Griffin wished to make protection payments, and Griffin subsequently made these payments.

The defendants in *Griffin* claimed that neither a conspiracy nor an illegal enterprise could be established where each bookmaker was concerned only with protecting his own gambling operation.[146] The court's analysis of this claim focused on the nature of a RICO enterprise. Citing *Turkette*, *Griffin* posited two types of enterprises: legal entities and associations in fact.[147] The court believed that there is no problem with proving a legal enterprise aside from proving its legal existence.[148] With respect to legal entities, the

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[143] 29 U.S.C. § 203(r) (1976).
[144] *See* Bellis v. United States, 417 U.S. 85, 94-101 (1974).
[145] 660 F.2d 996, 997-98 (4th Cir. 1981).
[146] *Id.* at 998.
[147] *Id.* at 999.
[148] *Id.*

court stated that "[n]either the actual nor ostensible purpose" is directly relevant proof of a RICO violation.[149] The court then discussed proof of an illegal enterprise and concluded that *Turkette* requires that an illegal enterprise have a "separate existence."[150] The court reasoned that separate existence could be determined from the purpose and composition of the association as controlling factors.[151]

The court commented that the RICO illegal enterprise was intended to remedy the problem of proving a traditional conspiracy by creating an association that is less difficult to prove.[152] The court, however, noted that neither conspiracy nor illegal enterprise can result in guilt by association and that RICO can reach only "purposeful associations of individuals."[153] The *Griffin* court required proof of a "common purpose," which can be established by evidence of a continuing unit characterized by "continuity, unity, shared purpose and identifiable structure."[154]

Although the question was a close one under the facts of *Griffin*, the court held that the jury could find that there was a common purpose to corrupt the police department.[155] Presumably, a significant factor in this decision was that defendants Garonzik and Diamond facilitated the making of protection payments by the other defendants. Had there been a "wheel" operation in which each bookmaker was unaware of the protection payment by other bookmakers,[156] the result should have been different.

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[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 999-1000. This remark is based on the fictitious notion that Congress was aware that RICO created the illegal-enterprise concept when RICO was enacted. In fact, Congress was unaware of this concept and therefore was unaware that traditional conspiracies were being undermine ' by the RICO illegal enterprise. *See supra* text accompanying notes 202-05.

[153] *Id.* at 1000.

[154] *Id.* The conceptual difficulty in ment in *Griffin* is its differing proof requirements for legal entities and enterprises based on a group of associated individuals. The existence of a single definition of enterprise in § 1961(4) implies a single standard for proving any enterprise. *Griffin* creates two definitions of "enterprise" where only one existed before.

[155] *Id.* at 1000-01.

[156] *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 773-74 (1946). The major ambiguity in the *Griffin* holding is whether conspiracy principles are fully applicable to an illegal enterprise. Specifically, it is unclear whether proving a common purpose uniting an illegal enterprise is the same as proving a common agreement under conspiracy law.

Griffin has established the prevailing post-*Turkette* approach to the illegal enterprise problem. Under this approach, the requirements of *Turkette* are satisfied where a continuing entity is established by proof of facts independent of the racketeering pattern. For example, the Ninth Circuit applied this analysis in *United States v. De Rosa*,[157] which involved a relatively simple two-defendant drug enterprise charged under section 1962(c). In rejecting a series of challenges to the RICO count, the court considered the question of whether the ongoing relationship between the two defendants established the *Turkette* requirement of a continuing organization. The court held that this requirement was satisfied by facts independent of the pattern, including the following: (1) the two defendants had been associated for a long period of time; (2) on numerous occasions they sought to introduce undercover agents to drug sources in return for a percentage of profits; (3) they demanded payments from the agents for introducing the agents to drug sources and permitting the agents to distribute drugs in Los Angeles; and (4) one defendant attempted to provide an agent with a crew to facilitate drug distribution.[158]

Some guidance on the appropriate instructions for an illegal enterprise case is provided by *United States v. Errico*.[159] In *Errico*, the defendant was accused of bribing jockeys to hold horses and then informing bettors. The group of jockeys and bettors was the alleged enterprise. Judge Weinstein instructed the jury that an enterprise must continue in an "essentially unchanged form" during the alleged pattern, an element established when the core personnel remained the same.[160] The Second Circuit approved this instruction and held that the enterprise consisting of jockeys and bettors met this standard.[161] The court noted that the group of jockeys and the group of bettors were connected by a "community

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[157] 670 F.2d 889 (9th Cir. 1982).

[158] *Id.* at 896.

[159] 635 F.2d 152, 153-54 (2d Cir. 1980).

[160] The instruction read as follows:

> You may find that a group of individuals joined together to fix horse races is an enterprise as defined by this section. That enterprise must continue in an essentially unchanged form during substantially the entire period charged in the indictment. . . . Essentially unchanged. It doesn't mean that everybody has to be the same. Essentially, the core of it has to be the same throughout the period.

Id. at 155.

[161] *Id.* at 155-56.

of interest," profiting from illegal fixing of races, and "continuing core of personnel."[162]

c. Eighth Circuit cases. The Eighth Circuit definition of "enterprise" in *United States v. Anderson*,[163] which requires that an enterprise have some formal structure,[164] has been adopted in the Justice Department guidelines.[165] In *Anderson*, two Arkansas county administrators allegedly received kickbacks from a person selling construction goods to the counties in return for the defendants' approval of payment for goods that were never received. The court reversed the convictions where the alleged enterprise was a group of individuals (the two defendants and a prosecution witness). The illegal enterprise allegation failed to satisfy the court's requirement that the enterprise have "an ascertainable structure" that is directed toward an economic goal that can be

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[162] *Id.* at 156. The court reasoned:

> Errico's organization here satisfies RICO's enterprise requirement. A circle of jockeys . . . who were joined through Errico with a circle of bettors . . . regularly attempted to profit and did profit from the illegal fixing of races. The two circles came together and continued to operate with that single, illegal purpose from at least August 1974 through March 24, 1975. That community of interest and continuing core of personnel provides the "group of individuals associated in fact" that is required for a RICO conviction.

Id. at 156.

[163] 626 F.2d 1358 (8th Cir. 1980). *Anderson* was decided before the Supreme Court opinion in *Turkette* and consequently cannot be regarded as an authoritative interpretation of *Turkette*. Nevertheless, the Government seems to regard *Anderson* as persuasive authority, a fact demonstrated by its incorporation in the Justice Department Guidelines and the Justice Department's decision not to petition for certiorari in *Anderson*.

[164] The pivotal language in *Anderson* was the following:

> We hold that Congress intended that the phrase "a group of individuals associated in fact although not a legal entity", as used in its definition of the term "enterprise" in section 1961(4), to encompass only an association having 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 constituting the "pattern of racketeering activity."

Id. at 1372.

[165] *See* Zuckerman, *Department of Justice's RICO Guidelines*, CHAMPION, Jan.-Feb. 1982, at 10. Justice Department Guideline VI essentially restates the language in *Anderson*:

> VI. 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 Goal, That Has An Existence That Can Be Defined Apart From The Commission Of The Predicate Acts Constituting The Patterns Of Racketeering Activity.

UNITED STATES ATTORNEY'S MANUAL § 9.110.101 (Jan. 30, 1981).

defined apart from the predicate offenses.[166]

The *Anderson* holding is not free of ambiguity. It is unclear whether *Anderson* requires a focus on the existence of some transcendent economic goal or on the cohesive nature of the group itself. If proof of a distinct economic goal is sufficient, *Anderson* might not pose a significant problem of proof since that goal might simply be defined in every case as the intent to make money through repeated acts of racketeering. An "economic goal" test would preclude only RICO prosecutions of those operating militant political or religious enterprises that are not primarily directed at making money. For example, the Second Circuit in *United States v. Ivic*[167] reversed the RICO convictions of four Croation nationalist defendants who belonged to a group called OTPOR, an organization advocating the separation of Croatia from Yugoslavia and who were charged in a section 1962(d) count with operating a group of associated individuals through a pattern of abortive murder and arson attempts. Although a literal interpretation of the definition of "enterprise" in section 1961(4) supported the Government, the court examined the legislative history and existing case law and found that neither factor authorized the application of RICO to militant political groups. The court held "that when an indictment does not charge that an enterprise or the predicate acts have any financial purpose, it does not state a crime under § 1962(c)."[168] Assuming that the proper focus is on the cohesiveness

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[166] *See supra* note 164.

[167] United States v. Ivic, No. 81-1350 (2d Cir. Jan. 25, 1983). The defendants were convicted on the RICO counts and on five counts alleging the various predicate offenses but were acquitted on one of the arson attempt counts. *Id.*, slip op. at 1411-12.

The defendants' first alleged target was Joseph Badurina, a journalist who supported Croatian independence but opposed the violent tactics of OTPOR. The defendants planned to shoot Badurina from the rear window of a parked van. The FBI disrupted this plot before it came to fruition. *Id.* at 1414-16.

Subsequently, three of the defendants began acquiring dynamite and planning various bombings, the first of which was to be directed at a studio hosting a Yugoslavian Independence Day party. Yugoslavian diplomatic officials were expected to attend the party. The bomb was not placed because, as one defendant explained, "There was no place to park. And at the last moment you have to put that thing together . . . ." *Id.* at 1417. A second bombing was planned for a travel agency that specialized in arranging trips to Yugoslavia. This scheme was aborted when the defendants discovered loose wires indicating Government electronic surveillance.

[168] *Id.* at 1439. *Ivic* is a relatively simple case because the attempted murder and arson attempts produced no income. The harder problem, on which the *Ivic* court expressly refused to rule, *id.* at 1430 n.6, is one in which the political group engages in income-produc-

of the group, this test may be difficult to apply to most criminal ventures, which are generally unstable groups of people who occasionally come together for criminal activity. The test would be satisfied by illegal enterprises such as La Cosa Nostra[169] or dissident

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ing crimes but uses the money to further their political goals. The central ambiguity in *Ivic* is that the requirement of a "financial purpose" may attach to either the "enterprise" element or the "pattern" element. The difficult situation on which *Ivic* reserved judgment is where the pattern has a financial purpose but the enterprise does not. Virtually the entire analysis in *Ivic* focuses on whether the enterprise must have an economic purpose and indicates that the defendants might prevail even if the predicate offenses are crimes such as robbery or extortion. For example, the court's interpretation of the *Turkette* decision seemed to focus on whether the defendants' acts pose a threat to infiltrate legitimate businesses; that threat is probably minimal where the robberies or extortions do not produce income for commercial investment purposes but produce income only to further the defendants' political goals. *Id.* at 1426-39.

It can, however, be persuasively argued that the requirement of a financial purpose attaches only to the pattern; if the racketeering acts are intended to produce income, it is irrelevant that there is some larger goal for which the money will be used. It makes no sense to require that the enterprise have a financial purpose since many commonly accepted RICO enterprises such as police departments and courts do not have that purpose. *See, e.g.*, United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979) (police department); United States v. Bacheler, 611 F.2d 443 (3d Cir. 1979) (city traffic court). However, it may be difficult to reconcile this interpretation with the basic thrust of the *Ivic* analysis focusing on the applicability of RICO to nonincome-producing enterprises.

These problems will be confronted in United States v. Ljubas, No. 81 Cr. 402 (S.D.N.Y. June 30, 1982) (available on LEXIS Genfed library, Dist file), involving a second RICO indictment of OTPOR members. In *Ljubas*, group members were charged with various acts of violence and arson to extort money and to promote their political views. The defendants allegedly stockpiled bombs, machine guns, rifles, silencers, and ammunition. They allegedly murdered those who failed to make extortion payments and those who opposed OTPOR or its methods. In addition, OTPOR members committed arson against those individuals. In the course of these activities, OTPOR members allegedly traveled to New York, Connecticut, Scotland, and West Germany to provide information and bomb construction. Further complicating the case was evidence barred by the trial judge that the Los Angeles police had discovered that one victim of OTPOR was a Yugoslavian agent bent on killing OTPOR members. Ultimately, 5 of the 10 defendants were acquitted on RICO charges. *Id.*

Ultimately, there is considerable merit to the view that if either the enterprise or the racketeering acts have a financial purpose, a RICO count is appropriate. This resolves a problem not discussed in *Ivic*: a profit-making enterprise may be engaged in racketeering acts that have no direct financial purpose. For example, members of an illegal gambling operation may kill a person in retaliation for testimony given by the victim against the gambling operation. Although the individual murder predicate offense may be motivated by vengeance rather than a desire to make money, it is absurd to hold that this act must be excluded from the RICO count where it is committed pursuant to a profit-making illegal enterprise.

[169] *See, e.g.*, United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982) (RICO indictment alleging operation of an enterprise described as the "Los Angeles Family of La Cosa Nostra," a family described in other circles as the "Mickey Mouse Mafia," *see supra* note 33), *discussed in* Marks, *Anatomy of a R.I.C.O. Prosecution*, CHAMPION, Jan.-Feb. 1981, at 7.

political groups such as the Weather Underground, which has been prosecuted for a series of robberies,[170] and which possesses far more formal structures than most criminal ventures.

The Eighth Circuit decision in *United States v. Bledsoe*[171] clarified the *Anderson* test and applied that standard to an extremely complex scheme of securities-fraud violations that involved several corporations and agricultural cooperatives. The alleged scheme involved the sale of an annuity contract called an estate builder. In the summer of 1972 defendant Phillips and Gibson, an attorney who became the Government's star witness, formed an agreement to sell these securities through agricultural cooperatives and to divide the profits. Pursuant to this agreement Phillips and Gibson formed UFA-Mo., a cooperative that had no significant business other than selling the estate builder security. In April, 1973, Phillips and Gibson terminated this relationship with Phillips leaving UFA-Mo. and Gibson continuing to operate UFA-Mo. until June,

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The defendants were charged with obstructing justice through the murder of Frank Bompensiero who was allegedly both head of the San Diego La Cosa Nostra and an FBI informant. In addition, the defendants were charged with the extortion of an FBI undercover business purporting to deal in imported South American pornographic films. The prosecution's major witness was the notorious Jimmy "The Weasel" Fratianno. Prior to the return of the indictment, federal officials leaked information to a national magazine concerning Fratianno's credibility and the imminent grand jury indictment. Marks, *supra*, at 7. Two indictments were dismissed for grand jury irregularities involving the number of grand jurors present when evidence was presented. *Id.* Further complicating the case was an alleged scheme involving Carlos Marcello to bribe the trial judge. *Id.* Ultimately, the defendants were acquitted of any involvement in the Bompensiero murder but were convicted on the RICO conspiracy count based on the jury's apparent confusion of overt acts with racketeering acts. *Id.* at 10. According to the circuit court, however, confusion, if any, helped the defendant. 685 F.2d at 1214. One issue on appeal involves repeated Government misrepresentations that certain defendants were implicated in the FBI sting operation. These false statements provided the basis for the trial court's denial of severance motion. Only during closing argument did the Government concede the falsity of its allegations. *See also* United States v. Tieri, No. 80-381 (S.D.N.Y. June 15, 1980).

[170] *See* N.Y. Times, Nov. 24, 1982, at B1, col. 2. The Government alleged a RICO illegal enterprise against members of the May 19 communist organization, a combination of the Weather Underground and the Black Liberation Army. The alleged pattern consisted of armored car robberies, three murders occurring in the course of the last robbery, and a 1979 New Jersey prison escape. The group allegedly used the proceeds of successful robberies to finance a collection of apartments and other residences known as "safe houses." The operation came to an end in an October 20, 1981, attempt to rob a Brink's truck in which the defendants allegedly attacked the truck, killed a guard, and escaped with $1.6 million. Shortly thereafter, they allegedly killed four police officers in a gun battle at a police roadblock.

[171] 674 F.2d 647 (8th Cir. 1982).

1975.

After the separation Phillips established PFA, another cooperative formed to sell securities. Phillips hired defendants Bledsoe, Burkes, and Cloninger and agreed that they would evenly share all profits derived from PFA. In addition, PFA hired defendants Moffitt and Stafford as salesmen. In May, 1975, Phillips and Gibson agreed to form a partnership to organize cooperatives in other states. Phillips received a share of Gibson's profits in these ventures. Gibson and Moffitt participated in the formation of a cooperative, UFA-OK, which sold the estate builder security. Stafford was also involved in UFA-OK sales activities. In November, 1975, Gibson participated in the formation of an Arkansas cooperative CFA, which hired Moffitt to sell estate builders.

The Government alleged that these cooperatives were used to divert revenue to the principal figures or their personal corporations.[172] The RICO counts charged under section 1962(c) and (d) contained over 150 predicate offenses and alleged an illegal enterprise consisting of an association in fact of twenty-two individual defendants.

The Eighth Circuit reversed the RICO convictions because the Government had not established the enterprise element.[173] In deciding the "enterprise" issue, the court rejected the Government's argument that any confederation, no matter how loose or temporary, can constitute an enterprise.[174] The court implicitly criticized the Seventh Circuit's decision in *United States v. Aleman*,[175] which seemed to permit a RICO prosecution of any association of individuals sporadically committing crimes.[176] The Eighth Circuit viewed RICO as directed at "organized crime" in the sense of crim-

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[172] *Id.* at 654.

[173] *Id.* at 667.

[174] *Id.* at 662.

[175] 609 F.2d 298 (7th Cir. 1979).

[176] 674 F.2d at 662. Although the central issue in *Bledsoe* was the question of what constitutes an enterprise, the court also expressed "grave doubts" as to the validity of opinions rejecting a common-scheme interpretation of pattern, *see* United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), cases finding association with an enterprise based on indirect and tenuous participation, *see* United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978), and cases rejecting a mens rea requirement, *see* United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980). *Bledsoe*, 674 F.2d at 661.

inal activities characterized by a level of organization above that of some "informal group created to perpetrate the acts of racketeering."[177] The court construed RICO as requiring proof "of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering . . . ."[178]

The court specified three factors that characterized an illegal enterprise. With respect to the first factor, commonality of purpose, *Bledsoe* cautioned against undue emphasis on purpose and accurately observed that "[a]ny two wrongdoers who through concerted action commit two or more crimes share a purpose."[179] The court required proof of two factors in addition to common purpose: (1) continuity of both structure and personality (although the membership of an enterprise can change "if an entirely new set of people begin to operate the ring, it is not the same enterprise as it was before");[180] and (2) "'an ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity."[181] Citing the example of a La Cosa Nostra family, the court stated that this "structure" requirement could be established by proof "that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes."[182]

The *Bledsoe* opinion analyzed these factors in the context of the various stages of the alleged enterprise in the case. The initial stage, the agreement of Gibson and Phillips in 1972 to form the UFA-Mo. cooperatives, could not be regarded as the beginning of the charged enterprise because the agreement was dissolved in 1973.[183] The second stage involved the branching off of Gibson's UFA-Mo. operation from Phillips's formation of the PFA cooperative. The court held that the separate branches were not part of the same enterprise—there was no common purpose or entity that united UFA-Mo. and PFA.[184] The court also held that UFA-Mo.

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[177] 674 F.2d at 662-63.
[178] *Id.* at 664.
[179] *Id.* at 665.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* at 665-66.

and PFA could not be part of the same enterprise on the basis of a common modus operandi and the common participation of Phillips, Moffitt, and Stafford in both cooperatives.[185]

The court also found that the Oklahoma and Arkansas cooperatives could not be regarded as part of the alleged enterprise. Defendant Bledsoe had no connection to either cooperative, Stafford was not involved in the Arkansas cooperative, and Cloninger was only tangentially involved in the Oklahoma cooperative. The only factor relating these two ventures was an agreement between Gibson and Phillips to share profits.[186]

With respect to the scheme as a whole, the court held that there was no single enterprise uniting the various cooperatives. In reversing the RICO convictions, the court concluded: "We find no real evidence of a structure, a pattern of authority or control, or of continuity in the pattern of association or the common purpose of all of the defendants."[187]

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[185] *Id.* at 666.

[186] *Id.* at 666-67. The significance of *Bledsoe* is enhanced by the fact that it does not involve an unusual or isolated fact pattern.

In United States v. Berkey, No. 82-170 (S.D. Fla. filed Apr. 5, 1982), the Government alleged an "association in fact" enterprise consisting of individuals who operated a tenuously related network of charities and pharmaceutical companies. As in *Bledsoe*, the alleged enterprise in *Berkey* seems to be a multipronged entity joined primarily by a common modus operandi and the common involvement of two central individuals, Berkey and Weinstein. The indictment alleged a scheme to defraud drug manufacturers by diverting drugs donated or sold at a discount to charities by the manufacturers and selling the diverted drugs at a profit.

One major branch involves activities centering around a charity, Opus Christi, which received operating money from one company, AMI, and drug order forms from defendants Kowitt and Howard. Kowitt and Howard allegedly diverted drugs acquired by Opus Christi and sent them to Florida. These activities occurred largely outside of the five-year statute of limitations.

The activities of the second branch focused on a different charity, Church of God World Missions. This charity received its operating money from AMC and purported to send its drugs to a Belgian corporation, S.P.R.L. Gabar. The church employed two defendants, Markle and Willetts, and dealt with a third, Richman; none of these defendants has any apparent relationship to the Opus Christi activities. Conversely, Kowitt and Howard have no alleged relationship to the church activities.

Some insight into the alleged facts is supplied by the fact that pharmaceutical manufacturers do a great deal of business with charities. The manufacturers ostensibly require the drugs to be sent overseas to keep domestic drug prices at high levels. The manufacturers, however, may overproduce drugs to the point where they tacitly approve of diversion of drugs for sale in the United States. Conceivably the manufacturers could be prosecuted for a RICO violation under an attenuated theory of liability. *See supra* note 44.

[187] 674 F.2d at 667. As an alternative ground for reversal, *Bledsoe* held that the district

The analysis of *Bledsoe* was applied in its letter, if not in spirit, by the subsequent Eighth Circuit decision in *United States v. Lemm*.[188] *Lemm* involved an alleged arson-insurance fraud operation whose participants committed seventeen fires in five states over a three-year period. The Government's chief witness, Gamst, was the central figure in the arson scheme. He would recruit people and instruct them in how to set arson fires. After the fire, Gamst acted as an adjuster of the fire and occasionally acted as a contractor to repair the fire damage. Other defendants helped to locate and purchase the property to be burned.

In determining whether the Government had established an enterprise, the majority in *Lemm*, applying the *Bledsoe* analysis, focused on the existence of the three elements held in *Bledsoe* to characterize an illegal enterprise.[189] The first factor, common purpose, is of little significance since, as *Bledsoe* pointed out, it is fulfilled when "[a]ny two wrongdoers who through concerted action commit two or more crimes."[190] In *Lemm* a common purpose was found in the fact that all the defendants shared the purpose of committing insurance fraud through arson.[191] The *Lemm* majority regarded the second factor, continuity, as a closer issue, particularly because the personnel constantly changed. In the court's view, the continuity of structure element was not the main problem because the basic roles of recruitment, purchasing real estate to be burned, adjustment of claims, setting of fires, and filing of

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court committed prejudicial error in instructing the jury that it could determine the nature and scope of the enterprise. *Id.* at 667 n.11. The jury should have been limited to considering the enterprise charged in the indictment. The trial court's instruction impermissibly allowed the jury to find an enterprise such as one of the cooperatives, which was different from the one alleged by the Government. Additionally, the court held that the RICO conspiracy conviction of Bledsoe was reversible because there was no evidence that he knew of the alleged enterprise. *Id.* at 667 n.12. Strangely, Judge Ross's dissent in *Bledsoe* did not directly respond to either of the alternative grounds for reversal. Judge Ross concluded that a single enterprise existed because of the mutual acts of assistance between the Gibson and Phillips branches of the scheme. *Id.* at 672-74.

[188] 680 F.2d 1193 (8th Cir. 1982).

[189] *Id.* at 1198-1201.

[190] 674 F.2d at 665.

[191] 680 F.2d at 1199. Judge Heaney's dissent in *Lemm* found only a "limited showing of shared purpose among some, but not all, of the defendants." *Id.* at 1206. Judge Heaney focused on the absence of any agreement to share risks or profits from the individual arsons. *Id.*

claims, remained constant.[193] The court's reasoning is flawed. The reason that certain basic roles remained constant in this case was probably owing to the fact that almost any arson-fraud operation requires the performance of these roles. Consequently, the continuity of roles may be more a reflection of the nature of arson-fraud schemes in general rather than of any conscious organizational decisions by the ringleaders of the particular operation.

Lemm analyzed the problem of changing personnel by focusing on the fact that each defendant had an ongoing relationship with the central figure, Gamst.[193] The existence of one central figure distinguishes *Lemm* from *Bledsoe*, in which there were two central figures operating two distinct operations. In *Bledsoe*, a person associated with one ringleader's operation would have no reason to know of the activities of the other ringleader. In *Lemm*, however, the participants in one arson were presumed to have reason to know that Gamst was involved in other arsons.

It is fair to characterize the court's personnel-continuity analysis as focusing on whether there is a central figure involved in all of the racketeering activities. *Lemm* fails to recognize that the size of the core group is a critical factor. When there is a large group of core figures, anyone dealing with them should know that such a large central group is engaged in other racketeering activities. Where there is only one central figure, as in *Lemm*, it is much less apparent to the participants that other racketeering activities are occurring.[194]

The third *Bledsoe* factor, the existence of an ascertainable structure, was analyzed in *Lemm* as a question of whether there is an ongoing structure from facts independent of the racketeering acts. *Lemm* found that there were distinct structural elements indepen-

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[193] *Id.*

[193] *Id.* at 1199-200. In contrast, Judge Heaney's dissenting opinion in *Lemm* emphasized the fact that although each of the defendants had worked with Gamst those defendants had not "worked with one another over a period of time as part of an ongoing enterprise." *Id.* at 1206.

[194] An additional problem discernible in the *Lemm* analysis is that the earlier Eighth Circuit decision in United States v. Dean, 647 F.2d 779, 788-89 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 2296 (1982), seems to contradict the argument that a single RICO offense is established merely because a single person is involved in all of the predicate offenses. The *Dean* holding indicates that a single person commits separate RICO offenses when separate patterns are involved. 647 F.2d at 788. *Lemm* failed to determine adequately that a single *pattern* was involved.

dent of the patterns of racketeering.[195]

Based on its analysis of these factors, *Lemm* found that the enterprise element had been satisfied. Although the court followed the *Bledsoe* test in letter, it is questionable whether its spirit was effectuated. Upon close analysis, many of the factual elements upon which *Lemm* relied are not very meaningful. Judge Heaney's dissent in *Lemm* focused on more significant factors indicating the absence of a "unified system of operation," such as the absence of any arrangement for sharing profits and risks.[196] Ultimately, the value of the *Lemm* case may lie not in its legal analysis but as an illustration that the nature of "enterprise" is so nebulous that it cannot be captured by any test or standard.

The Justice Department guidelines on RICO attempt to clarify the Eighth Circuit test by setting out those factors that indicate a formal structure: (1) "some common denominator such as an interest, a vocation, or other regular activity separate and apart from the criminal acts";[197] (2) the existence of "offices or positions of authority";[198] (3) a "regular membership";[199] and (4) other "indicia of the enterprise's separate existence," including "formalized membership, recruitment and induction and/or membership insignia."[200] These guidelines are not binding[201] and are difficult to reconcile with some of the indictment practices of United States attorneys.

d. Continuing problems created by the "illegal enterprise" concept. Regardless of the manner in which courts ultimately define the amorphous "illegal enterprise" concept, one troubling fact will remain. Even after *Turkette*, there is no persuasive indication that Congress contemplated the use of RICO to prosecute illegal

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[195] 680 F.2d at 1200-01. The Second Circuit has apparently refused to follow the *Bledsoe-Lemm* requirement that the enterprise be proven by facts independent of the pattern. *See* United States v. Mazzei, No. 82-1146, slip op. at 1577 (2d Cir. Jan. 28, 1983). Since the Justice Department Guidelines seem implicitly to adopt the *Bledsoe-Lemm* standard, *see infra* text accompanying notes 197-201, *Mazzei* is arguably at odds with both the Guidelines and Second Circuit authority indicating that the Guidelines are a significant factor in statutory construction of RICO. *See supra* note 16.

[196] 680 F.2d at 1206 (Heaney, J., dissenting).

[197] UNITED STATES ATTORNEY'S MANUAL § 9.110.101 (Jan. 30, 1981) (commentary to guideline VI).

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *See supra* note 16.

enterprises. If Congress never contemplated illegal enterprises, it never contemplated how such enterprises were to be defined, how various RICO remedies apply to such enterprises, or how other statutory and constitutional concepts interrelate with the illegal enterprise concept. After creating a concept with no underlying support in the legislative history, the courts are free to interpret the illegal enterprise notion without any restraints imposed by the legislative history.

To illustrate this point, consider the problem of defining a section 1962(d) conspiracy to participate in an illegal enterprise. Since an illegal enterprise is an informal association of people with various characteristics, a section 1962(d) charge would involve a conspiracy to associate with an illegal enterprise. The charge is a redundancy because both the conspiracy and the illegal enterprise refer to the same group of people. Anyone who conspires will also be a member of the illegal enterprise. It is extremely difficult to provide clear instructions to a jury on the elements of a section 1962(d) count where an illegal enterprise is involved.

A rather serious problem is that there is generally no practical distinction between a section 1962(c) count based on participation in an illegal enterprise and a section 1962(d) conspiracy to participate. The same evidence will usually establish both counts because the illegal enterprise and conspiracy involve the same group of people and the predicate offenses are generally completed crimes. Consequently, defendants can be charged and sentenced under both counts even though the same acts underlie both counts.[202]

These problems will exist regardless of how an illegal enterprise is defined. When dealing with these problems, it is pointless to speak of any legislative intent since Congress never contemplated the existence of such enterprises. The illegal enterprise is a creation of the courts, and they are apparently free to determine its outlines.

Exercising this freedom from statutory limitations, a number of courts have construed the enterprise concept so broadly that it

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[202] *See infra* text accompanying note 511. Of course, there is usually an overlap in proof between conspiracy and substantive offenses. This overlap, however, is particularly noteworthy in RICO cases for two reasons: (1) the substantive offense, § 1962(c), punishes associative behavior in illegal enterprises just as the conspiracy offense does; and (2) the conspiracy offense, § 1962(d), is generally applicable only when one has committed the substantive offense. *See infra* text accompanying notes 454-55.

could include any conceivable combination of individuals or group of individuals.[203] This phenomenon is best illustrated by the Fifth Circuit, which until recently had regarded an enterprise as including any informal network of people engaged in unrelated acts. Under this view, an "enterprise" was described in such terms as an "amoeba-like infra-structure" and a "myriapod criminal network."[204] This biological terminology obscured the basic fact that the Fifth Circuit was adopting a policy of giving prosecutors a free hand in alleging the enterprise and, by extension, in controlling the scope of the trial. Recent Fifth Circuit decisions, however, have shown some concern for prosecutorial abuse of the illegal-enterprise concept and have established some limitations on the scope of RICO enterprises.[205]

2. Corporate Divisions and Group of Corporations.

a. Computer Sciences. Some organized entities may not be enterprises because they are neither a legally recognized formal entity nor a group of associated "individuals" that is not a legal entity.[206] In *United States v. Computer Sciences Corp.*,[207] the district court dismissed an indictment of Computer Sciences Corp. (CSC) and some key employees who were accused of conducting an unincorporated division of CSC through mail and wire fraud and bribery. The defendants allegedly bribed a Government contracting officer to obtain a contract for computer services and purposely overbilled on work performed under the contract. A corporate defendant's unincorporated division could not constitute a

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[203] Many courts have commented that the word "enterprise" is a broad term that should be liberally construed. *See* United States v. Morris, 532 F.2d 436, 441-42 (5th Cir. 1976); United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); United States v. Frumento, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

[204] United States v. Elliott, 571 F.2d 880, 898-99 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). In *Elliott*, the Fifth Circuit held that six codefendants had participated in an enterprise encompassing 20 distinct types of criminal conduct. *Id.* at 884. None of the defendants was involved in all of these acts.

[205] *See infra* text accompanying notes 403-40.

[206] The Supreme Court opinion in United States v. Turkette, 452 U.S. 576 (1981), indicates that § 1961(4) encompasses two basic types of associations: (1) a legally recognized formal entity such as a partnership or a corporation; and (2) a group of associated "individuals" that is not a legal entity. *Id.* at 581-82.

[207] 511 F. Supp. 1125 (E.D. Va. 1981), *rev'd in part*, 689 F.2d 1181 (4th Cir. 1982).

legal entity because a division has no separate identity apart from the corporation of which it is a part. A division was not a group of associated individuals since CSC could not be one of those individuals.[208]

The district court concluded that the term "individual" as used in section 1961(4) connotes a living person and does not encompass a corporation. The court reached this conclusion by comparing the term "individual" in section 1961(4) and the definition of "person" in section 1961(3), which referred to any "individual or entity."[209] The section 1961(3) distinction between individuals and entities indicated that the term "individual" was meant to apply to a living person.[210]

The district court's decision was reversed by the Fourth Circuit, which held that the corporate division constituted a group of associated individuals.[211] Based on other grounds, however, the court held that the corporate defendant could not be a RICO defendant,[212] which eliminated the question of whether the corporation could be one of the associated "individuals."

b. "Group of corporations" enterprise. A similar type of objection has been made to an enterprise consisting of a group of corporations. The Second Circuit, in *United States v. Huber*,[213] held

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[208] *Id.* at 1128-31.

[209] *Id.* The court reasoned:

> However, even if it is such a group of individuals associated in fact, CSC [the defendant corporation], by definition, could not be included in this association. Section 1961(3) defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." It is clear from this definition that "individual" is used differently from "person" in the act to connote a living person.

Id.

[210] In its generally accepted meaning, the term "individual" does not include a corporation. Suttenfield v. Travelers Indem. Co., 133 F. Supp. 418, 424 (E.D. Tex. 1955), *rev'd on other grounds sub nom.* Continental Casualty Co. v. Suttenfield, 236 F.2d 433 (5th Cir. 1956); *cf.* Richmond Television Corp. v. United States, 345 F.2d 901, 908 (4th Cir.) (tax deduction applicable "in the case of an individual" will not be allowed for a corporate taxpayer), *vacated per curiam on other grounds*, 382 U.S. 68 (1965).

An alternative ground in *Computer Sciences*, 511 F. Supp. at 1131-32, was that the corporate defendant could not operate the subsidiary since the subsidiary could not benefit from the racketeering under United States v. Webster, 639 F.2d 174 (4th Cir. 1981), *modified on rehearing*, 669 F.2d 185 (4th Cir. 1982). The *Webster* "benefit" test, however, was rejected on rehearing, *see* 669 F.2d at 186-87; *infra* notes 348-50 and accompanying text, casting doubt on this portion of the *Computer Sciences* opinion.

[211] United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982).

[212] *See infra* text accompanying note 231.

[213] 603 F.2d 387, 393-94 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

that a group of corporations could constitute an enterprise.[214] The *Huber* case did not adequately respond to the argument that a group of corporations is neither a legal entity nor a group of associated individuals.[215] A "group of corporations" does not fall within the first category since that category includes only a single corporation; in general, state and federal laws have not regarded a group of corporations as a legal entity.

A group of corporations could not be a group of individuals since, as *Computer Sciences* demonstrates, a corporation is not an "individual" within the meaning of section 1961(4). In addition, the "common purpose" requirement of *Griffin* would not be practically applicable to a group of corporations, particularly if the group were a large multinational conglomerate engaged in diversified activities.

If *Huber* becomes the prevailing view, the activities of large conglomerates could become the focus of RICO prosecutions. Even the foreign branches of multinational conglomerates could be alleged as part of the enterprise under *United States v. Parness*,[216] which held that a business can be alleged as an enterprise.[217]

3. Governmental Enterprises. Although the courts have seemingly authorized section 1962(c) prosecutions of most patterns of racketeering activity under an "illegal enterprise" theory, the Government has persistently prosecuted government-corruption cases under a theory that the public office is the enterprise. Defendants have had little success in contending that a government entity is not an entity within the meaning of Title IX even though the voluminous legislative history makes no reference to public agencies as

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[214] *Cf.* United States v. Thevis, 665 F.2d 616, 625 (5th Cir. 1982) (upholding an enterprise as "a group of individuals associated in fact with various corporations"), *cert. denied*, 102 S. Ct. 3489 (1982).

[215] An interesting analogy applicable to *Huber* can be found in cases construing the definition of "enterprise" in 29 U.S.C. § 203(r) of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981). In construing § 203(r), the Supreme Court decision in Brennan v. Arnheim & Neely, Inc., 410 U.S. 512, 518 (1973), indicates that an enterprise does not consist of independent business entities.

[216] 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

[217] *Id.* at 438-40. *Parness* involved a complex fraudulent scheme in which Milton Parness gained control of a 90% stock interest in an Antillean hotel and casino by withholding debts owed to the hotel. His failure to pay those debts forced the victim to borrow from third parties to meet the hotel expenses. Through straw men, Parness loaned funds to pay the third-party obligations. The straw men then foreclosed and Parness obtained control of the hotel casino. *Id.* at 433-35.

enterprises. With virtual unanimity, the courts have held that public agencies are enterprises.[218]

A subsequently modified Sixth Circuit panel decision was the only circuit opinion to reject the concept of government enterprises. In *United States v. Thompson*,[219] the defendants were charged with operating the Governor's Office of Tennessee through the selling of executive clemency and immunity from extradition. The panel held that the office did not constitute an enterprise under RICO. The panel focused on the problems inherent in applying RICO civil remedies to a state agency. It noted that divestiture and reorganization could not apply to state government offices, an indication that RICO did not apply.[220] *Thompson* distinguished a statement in *Turkette* that the inapplicability of RICO civil remedies to a particular type of enterprise does not limit the scope of the enterprise concept.[221] Unlike the illegal enterprise where civil remedies are impracticable, dissolution of a government office is practicable but is an unconstitutional intrusion on states' rights. *Thompson* also emphasized that there is no mention of government enterprises in the legislative history. It is clear that RICO is directed at government corruption since bribery is incorporated as a racketeering act. The panel noted, however, that bribery could be punished under RICO by alleging a group of associated individuals rather than a government enterprise.[222]

The majority in the en banc modification of *Thompson* held that as a matter of statutory construction, a state government agency

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[218] *See* United States v. Angelilli, 660 F.2d 23, 30-35 (2d Cir. 1981) (New York City Civil Court), *cert. denied*, 455 U.S. 945 (1982); United States v. Clark, 646 F.2d 1259, 1262-67 (8th Cir. 1981) (county judge's office); United States v. Altomare, 625 F.2d 5, 7 (4th Cir. 1980) (Hancock County prosecuting attorney's office); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's department); United States v. Bacheler, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court); United States v. Barber, 476 F. Supp. 182, 187-89 (S.D. W. Va. 1979) (Alcohol Beverage Control Commission). *But see* United States v. Mandel, 415 F. Supp. 997, 1020-22 (D. Md. 1976) (State of Maryland).

[219] 669 F.2d 1143 (6th Cir.), *modified en banc*, 685 F.2d 993, 995-98 (6th Cir. 1982) (on rehearing en banc the Sixth Circuit affirmed the convictions and concluded that the panel's holding that a governmental entity could not be an "enterprise" was flawed); *see infra* notes 223-27 and accompanying text.

[220] 669 F.2d at 1145.

[221] *Id.* at 1149.

[222] *Id.* at 1148 (citing Tarlow, *supra* note 1, at 206-07); *see also* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 861 (1980); Comment, *An Analysis of the Confusion*, *supra* note 3, at 475-76.

can be an enterprise.[223] The majority also condemned this enterprise allegation as a violation of federal-state comity noting that the allegation may "needlessly cast unfair reflection upon innocent individuals"—a condemnation that was explicitly described as a holding of the case.[224] The court suggested that any future RICO indictments allege a group of associated individuals as the enterprise rather than the Governor's Office.[225]

Obviously, this opinion leaves many unanswered questions. The most important is whether the Sixth Circuit will reverse future convictions if prosecutors ignore the warning and allege a governor's office as an enterprise. If the circuit reverses in the future, the question will remain as to why the convictions were affirmed in *Thompson*.[226] An additional problem is whether the majority's comity discussion applies to all RICO indictments alleging state agencies as enterprises or is limited to governors' offices alleged as enterprises.[227] In view of these uncertainties, further litigation on this point is likely.

4. Single-Person Enterprises. A rarely used form of illegal enterprise, one consisting of a single person, has been approved, largely in dicta, by the courts.[228] This view is based on the words "'enterprise' includes any individual" in section 1961(4). The sin-

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[223] 685 F.2d 993, 998 (6th Cir. 1982).

[224] *Id.* at 1000.

[225] *Id.*

[226] *Id.*

[227] On the other hand, if there will be no reversals, the question remains whether the comity holding is either an advisory opinion barred by the "case and controversy" requirement of article III or some attempt to regulate the prosecuting policies of the executive branch. If a violation of the comity principle is an insufficient basis for precluding a federal criminal prosecution, the chances for reversal are reduced. If comity principles, however, preclude some federal civil actions, *see, e.g.*, Younger v. Harris, 401 U.S. 37 1971), it would seem that criminal actions could also be barred. Perhaps, the *Thompson* court holding is that although federal-state comity may be disrupted by a government-enterprise allegation, it was not sufficiently disruptive in *Thompson* to warrant reversal.

The court's reasoning seems to undercut any restrictive interpretation since all RICO prosecutions involving state government agencies could in some way "needlessly cast unfair reflection upon innocent individuals." 685 F.2d at 1000.

[228] *See* United States v. Marubeni Am. Corp., 611 F.2d 763, 767 n.8 (9th Cir. 1980); United States v. Elliott, 571 F.2d 880, 898 n.18 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); United States v. Ohlson, 552 F.2d 1347, 1349 (9th Cir. 1977); United States v. Hawkins, 516 F. Supp. 1204, 1206 (M.D. Ga. 1981); United States v. Boffa, 513 F. Supp. 444, 478 (D. Del. 1980), *rev'd in part*, 688 F.2d 919 (3d Cir. 1982); *see also* United States v. Benny, No. 82-062 (N.D. Cal. filed Feb. 23, 1983) (approving the assertion that an individual could be both the defendant and the enterprise in an alleged real estate fraud scheme).

gle-person enterprise concept is an absurd notion. A defendant violates section 1962(c) only when he is "employed by or associated with" the enterprise. If the enterprise is the defendant, he is convicted for employing himself or associating with himself.[229] When there is no distinction between the enterprise and the defendant, RICO can be used to punish the enterprise rather than RICO's intended target, the defendant who operates or acquires the enterprise. Accordingly, the language implies that the term "individual" refers to a sole proprietorship business.[230]

The courts have extensively considered a similar issue involving corporations that are alleged as both the enterprise and the defendant operating the enterprise. Although the Fourth[231] and Eleventh[232] Circuits have reached different positions on this issue, in

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[229] The forfeiture remedies of § 1963 are also difficult to reconcile with a single-person enterprise. These remedies permit forfeiture of the defendant's interest in the enterprise. Query: What interest does a person have in himself? In the context of forfeiture, the reference to "individual" in § 1961(4) makes sense only if "individual" refers to a sole proprietorship.

[230] *See* Blakey & Gettings, *supra* note 4, at 1023 n.81. It may be significant that the term "individual" is placed in a series of entities in § 1961(4) that connote legitimate businesses. *See* 18 U.S.C. § 1961(4) ("any individual, partnership, corporation . . .").

[231] In United States v. Computer Sciences Corp., 689 F.2d 1182 (4th Cir. 1982), *rev'g in part* 511 F. Supp. 1125 (E.D. Va. 1981), the Fourth Circuit reached two unequivocal holdings pertaining to RICO. The court held that an unincorporated division of the corporate defendant could be an enterprise under a theory that it is a group of associated individuals. *Id.* at 1190. The fact that the unincorporated division is not a separate entity from the corporate defendant, however, raised the question of whether a defendant could also be the enterprise. The Fourth Circuit held that a corporate defendant cannot also be the alleged enterprise. The *Computer Sciences* court reasoned by analogy to the principle that a person cannot conspire with himself:

> We conclude that "enterprise" was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish. To be sure, the analogy between individuals and fictive persons such as corporations is not exact. Still, we would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon. A corporation, in common parlance, is not regarded as distinct from its unincorporated divisions either.

Id. at 1190.

[232] The discussion of this point in United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), is characterized by superficial and unpersuasive reasoning. The court adopted the facile rationale that a corporation is an "enterprise" under § 1961(4), a "person" under § 1961(3), and, therefore, can be alleged as both the enterprise and the defendant. *Id.* at 988. The court declines to confront meaningfully the basic problem with this indictment format. Since § 1962(c) requires that the defendant be "employed by or associated with" the enterprise, the *Hartley* indictment produced the absurd notion of a corporation being employed

RICO criminal cases, recent RICO civil decisions have uniformly held that corporate defendants cannot simultaneously be charged as the enterprise.[233] It is reasonable to anticipate that these holdings would extend to individuals as well as corporations and preclude an allegation that an individual has operated himself through racketeering.

B. Pattern

"Pattern" is the most nebulous term in RICO since section 1961(5) does not define a pattern but merely states what it "requires."[234] Section 1961(5) describes a "pattern of racketeering ac-

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by or associated with itself.

The court disposed of this point in a footnote, stating that this issue was controlled by the court's earlier holding that a corporation can conspire with its employees. *Id.* at 986 n.41. This does not meaningfully confront the issue because the earlier holding on § 371 was not that a corporation can conspire with itself. While there may be sound reasons to reject holdings that a corporation cannot conspire with its agents, neither these reasons nor any other policy has been advanced to support the proposition that a corporation can conspire with itself. If neither corporations nor individuals can conspire with themselves, *see* United States v. Fleming, 504 F.2d 1045, 1055 (7th Cir. 1974); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), it follows that a RICO defendant cannot be "employed by or associated with" itself. This criticism of *Hartley* was seemingly adopted in Fields v. National Republic Bank, 546 F. Supp. 123, 124 n.5 (N.D. Ill. 1982).

[233] *See* Bennett v. Berg, 685 F.2d 1053, 1061 (8th Cir. 1982), *reh'g en banc granted*, No. 81-1418 (8th Cir. Sept. 16, 1982); Fields v. National Republic Bank, 546 F. Supp. 123, 124-25 (N.D. Ill. 1982); Boys v. Hunter Sav. Ass'n, 539 F. Supp. 1020, 1023-24 (S.D. Ohio 1982); Parness v. Heinold Commodities, Inc., 548 F. Supp. 20, 24 (N.D. Ill. 1982); Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1136 (D. Mass. 1982). Even if courts unanimously preclude the allegation of a corporation as both enterprise and defendant, the issue of dual identity would not be definitely resolved. The Government and civil plaintiffs may attempt to avoid these rulings by alleging that the enterprise is a group of individuals associated in fact, consisting of the corporation and the corporation's employees. Presumably, a corporate defendant would argue by analogy to conspiracy cases that this is a defective allegation of a corporation associating with itself since the employees are legally part of the corporation. *Cf.* Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) ("The defendant is a corporate person and as such it can act only through its officers and representatives . . . . It does not violate the act when it exercises its rights through its officers and agents . . . .").

[234] Although § 1961 is titled "Definitions," § 1961(5) is not actually a definition. *See* United States v. Ladmer, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977). The Eighth Circuit declined to explore this issue in United States v. Dean, 647 F.2d 779 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 2296 (1982). In *Dean*, the defendant objected to jury instructions stating that "the term pattern of racketeering activity *means* at least two acts of racketeering activity." *Id.* at 791 (emphasis in original). He argued that the use of the word "means" was inappropriate because Congress did not fully define pattern but merely provided a "partial

tivity": "'[P]attern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[235]

If this provision is not intended as a full definition of pattern, the courts must determine whether the "pattern" concept requires proof of facts not explicitly mentioned in section 1961(5). When considering this problem, the courts have frequently referred to a passage in a report of the Senate Judiciary Committee. That report commented on the scope of "pattern": "The target of Title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."[236]

1. "Continuity" Analysis of Pattern. One approach to construing "pattern" is to require that the racketeering activities be of sufficient quantity and character to pose "the threat of continuing activity" discussed in the Senate report. In accordance with this report and the express requirement of two acts in section 1961(5), the courts have insisted that one isolated racketeering act does not constitute a "pattern."[237] Arguably, two acts of racketeering could be regarded as mere "sporadic activity" if the two acts were widely separated in time and place from one another.[238]

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contextual definition." *Id.* at 791-92. The defendant contended that since § 1961(5) is not a definition of pattern, there are additional elements of proof that are not mentioned in § 1961(5) and that would be necessary to establish a pattern. This view may conflict with United States v. Turkette, 452 U.S. 576 (1981), which states that the "pattern" element "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Id.* at 583. If this observation were intended as a complete description of pattern, it could be read as rejecting any additional elements of proof that are not mentioned in § 1961(5).

[235] 18 U.S.C. § 1961(5) (1976).

[236] S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969).

[237] *See* United States v. Phillips, 664 F.2d 971, 1038-39 (5th Cir. 1981); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981); United States v. Martino, 648 F.2d 367, 383 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983); United States v. Guiliano, 644 F.2d 85, 88 (2d Cir. 1981); United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976); United States v. Campanale, 518 F.2d 352, 363 n.32 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Ladmer, 429 F. Supp. 1231, 1243 (E.D.N.Y. 1977); United States v. Moeller, 402 F. Supp. 49, 60 & n.9 (D. Conn. 1975).

[238] *Cf.* United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977) ("The language of the

The validity of a pattern analysis focusing on whether the acts pose the "threat of continuing activity" has not been examined in significant detail by any cases. Most cases have involved patterns arising from the commission of many racketeering acts in relatively short periods of time.[239]

The Supreme Court opinion in *United States v. Turkette*[240] approached the continuity problem differently. It indicates that an illegal enterprise must be characterized by continuity and describes an enterprise as "an ongoing organization" in which the participants "function as a continuing unit."[241] The Government conceded in *Turkette* that two sporadic and isolated offenses by the same person or group does not establish an illegal enterprise.[242]

There is a significant distinction between a continuity analysis of illegal enterprises and reading a continuity requirement into the pattern element. The *Turkette* requirement does not preclude a RICO prosecution based on a pattern consisting of two isolated and sporadic acts where the enterprise is an organization characterized by continuity.[243] For example, a person may operate a con-

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Act, which makes a pattern of conduct the essence of the crime, clearly contemplates a prolonged course of conduct."), *aff'd mem.*, 578 F.2d 1371 (2d Cir. 1978). *But see* United States v. Turkette, 452 U.S. 576, 583 (1981) (pattern element "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise").

[239] *See* United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (several illegal card games within 19 months were found to be a pattern and not merely sporadic activity); United States v. Fineman, 434 F. Supp. 189, 192-93 (E.D. Pa. 1977) (acceptance of four bribes to obtain entrance into graduate schools over a two-and-one-half-year period was sufficient to establish a pattern); United States v. Field, 432 F. Supp. 55, 60 (S.D.N.Y. 1977) ("14 separate acts within a four-year period . . . seem to constitute a clear pattern of conduct"), *aff'd mem.*, 578 F.2d 1371 (2d Cir. 1978); United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (21 separate acts within a two-and-one-half-year period constituted a pattern). The large number of cases upholding patterns that involve a single transaction, *see infra* note 260, is probably inconsistent with a continuity requirement.

[240] 452 U.S. 576 (1981).

[241] *Id.* at 583.

[242] *Id.* at 583 n.5. Although the context of this remark is not apparent from the *Turkette* opinion, the quoted passage from the Government's brief must be considered in the light of the Government's argument that an enterprise is characterized by a "common purpose or objective." Brief for Petitioner at 23, United States v. Turkette, 452 U.S. 576 (1981). The Government apparently adopted a common-scheme analysis of enterprise, and not the continuity analysis.

[243] *Cf.* United States v. Corbin, 662 F.2d 1066, 1073 n.16 (4th Cir. 1981) (while holding that Travel Act requires a continuous course of conduct to establish a business enterprise, court refused to decide whether each defendant must commit continuous conduct).

struction business by committing bribery in 1972 and an unrelated act of mail fraud in 1977. The *Turkette* discussion of continuity would be applicable only to an illegal enterprise and would not bar this pattern consisting of isolated and sporadic acts.[244]

A concept of continuity has been adopted by the decision on rehearing in *United States v. Webster*.[245] The court focused on what constitutes "conducting" an enterprise through racketeering and indicated that the term "conduct" signifies continuous activity: "'Conducted,' it is true, signifies repeated, even patterned carrying on of affairs. It may be doubted that an isolated incident amounts to 'conduct.' "[246] Under *Webster*, a defendant's actions would have to be "repeated" to constitute "conducting" an enterprise. In contrast, *Turkette* focuses on whether the enterprise engages in continuing activity, although *Turkette* does not purport to confront the question of whether each defendant's acts must be continuous.

2. "Common Scheme" Analysis of Pattern. The Seventh Circuit has not emphasized the continuity factor but has construed "pattern" to require proof of a common scheme, plan, or motive relating the racketeering acts,[247] a construction approved in dicta by the Ninth Circuit.[248] Under this approach, the word "pattern" requires more than accidental or unrelated instances of proscribed conduct. A common-scheme approach effectively precludes the Government from compiling all of the crimes committed by a person and prosecuting the individual as an illegal enterprise under section 1962(c). Rejecting the common-scheme construction, the Second and Fifth Circuits have held that RICO does not require any relationship between the racketeering activities other than a nexus with the enterprise.[249]

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[244] An example of this situation can be found in United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), in which a single transaction pattern was approved, presumably because the illegal enterprise, the Black Tuna operation, was continuing.

[245] 639 F.2d 174 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981), *rev'd on reh'g*, 669 F.2d 185 (4th Cir. 1982).

[246] 669 F.2d 185, 187 (4th Cir. 1982).

[247] *See* United States v. Starnes, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978); United States v. Stofsky, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974); *see also* 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 56.20, 56.23 (Supp. 1983); Atkinson, *supra* note 17, at 11.

[248] United States v. Brooklier, 685 F.2d 1208, 1222 (9th Cir. 1982).

[249] *See* United States v. Bright, 630 F.2d 804, 830 n.47 (5th Cir. 1980); United States v.

In the context of legitimate enterprises, a common-scheme requirement is essential to any reasonable interpretation of the statute. The need for this requirement in a multidefendant case is suggested by the fact pattern and decision in *United States v. Cryan*.[250] In *Cryan*, three employees of a sheriff's office, the enterprise, were charged with participation in annual illegal payments to a political "slush fund." The Government alleged that, before these defendants joined the office, other employees made a special payment in 1971 to a Democratic Party Chairman in return for his attempt to influence a local legislative body to grant salary increases. The Government contended that the special payment and the subsequent acts of the three defendant employees could be charged together in both section 1962(c) and (d) counts, and that the evidence of the special payment was admissible against the three defendants who were not members of the sheriff's office at the time of the 1971 payment. Under the Government's view, a sheriff making illegal payments in 1975 would be liable as a conspirator for the acts of every employee who ever made or collected an illegal payment.[251]

Holding that the special payment and the subsequent payments were not part of the same offense or the same section 1962(d) conspiracy, the *Cryan* court rejected the use of the vicarious liability doctrine on these facts and dismissed the indictment.[252] The court reasoned that, if the Government could allege all illegal acts in the operation of a common enterprise as part of a single conspiracy, the scope of the conspiracy would be "potentially enormous."[253]

The *Cryan* problem can be illustrated by the following hypothetical. Assume that four state legislators are charged with operating the same legislature through the following patterns: (1) Legislator *A* extorts payments in 1970 for attempting to legalize gambling; (2) Legislator *B* receives bribes in 1972 to exercise influence on behalf of parents seeking admission of their children to state colleges; (3)

Weisman, 624 F.2d 1118, 1122-23 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

[250] 490 F. Supp. 1234 (D.N.J.), *aff'd mem.*, 636 F.2d 1211 (2d Cir. 1980).

[251] *Id.* The court noted that if the Government were correct, "everyone in [the sheriff's office] who ever *made* or *collected* an illegal payment would be bound together as racketeers." *Id.* (emphasis in original).

[252] *Id.* at 1243-45.

[253] *Id.* at 1243.

Legislator *C* commits mail fraud in 1975 by misappropriating campaign funds; and (4) Legislator *D* receives bribes in 1978 from a property developer. All of the legislators have knowledge of, but not involvement in, the activities of the other members.[254] In the absence of a common-scheme requirement, these parties are part of a single chargeable section 1962(c) or (d) RICO offense solely because their acts occur in the conduct of the same enterprise. This produces the bizarre result that a single RICO offense can consist of every racketeering act committed by any employee or member of a large legitimate enterprise (e.g., United States House of Representatives, General Motors, Department of the Interior) during the many decades of the enterprise's existence. A relationship is required between the racketeering activities of the defendants because the mere fact that they operate the same enterprise does not supply a sufficient connection between the defendants.[255]

The fact that acts occur in the conduct of the same legitimate enterprise does not supply a sufficient relationship even in the case of only one defendant. For example, assume that a president of a corporation involved in diversified activities engages in bribery of a legislator in 1970 to further coal-mining activities and commits mail fraud in 1980 to further the affairs of an airplane manufacturing branch of the enterprise. It is difficult to discern any rationale for permitting two far-flung and unrelated activities to satisfy the pattern requirement merely because the same business is involved. Those who operate substantial and stable enterprises for long periods of time would become targets for RICO offenses merely because the Government can compile all disparate offenses committed during the many years in which the enterprise is operated. A common-scheme element would remedy this problem.

The ABA has endorsed the Seventh Circuit view by urging amendment of the RICO statute to require that criminal activities

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[254] This hypothetical is similar to the indictment in United States v. Alonso, No. 81-270 (S.D. Fla. 1981), *aff'd*, 673 F.2d 334 (11th Cir. 1982), in which the Government filed a RICO count against homicide detectives employed by the Dade County Public Safety Department. The predicate offenses were bribery, extortion, and drug trafficking over a two-year period. It is not apparent from the indictment that all of these acts are related except by the existence of a common enterprise or that the individual detectives were aware of or had any interest in the predicate offenses involving others.

[255] *See infra* text accompanying notes 436-40.

"be related by common scheme or plan."[256] The commentary noted that the enterprise alone did not supply a sufficient relationship among the racketeering acts and that a common-scheme requirement was necessary to establish some parameters of a RICO offense.[257] Even in the case of a single defendant, the allegation of a pattern consisting of far-flung and unrelated activities was condemned by the commentary: "Those who operate substantial and stable enterprises for long periods of time become ready targets for RICO offenses merely because the government can compile all disparate offenses committed during the many years in which the enterprise is operated."[258]

3. Single-Transaction Illegal Activity. The most significant question concerning the "pattern" element focuses on whether a pattern can be formed from acts that are part of the same transaction. The RICO statute should be applied only when each defendant's racketeering acts occur in different criminal episodes that are separated in time and place.[259] The danger posed by a single pattern is that a single criminal act that violates two incorporated statutes can be artificially transformed into a pattern. Despite this danger, most courts considering the single-transaction problem have consistently held that a pattern can be composed of closely related racketeering acts.[260]

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[256] *RICO Report*, *supra* note 7, at 6.

[257] *Id.* at 6-7.

[258] *Id.* at 7.

[259] United States v. Moeller, 402 F. Supp. 49, 57 (D. Conn. 1975). In *Moeller*, two acts occurred at the same place, on the same day, and in the course of the same criminal episode. The defendants were alleged to have formed an enterprise to burn a factory. The two racketeering acts were the burning of the plant and the kidnapping of three employees of the plant. Judge Newman noted in dicta that a "common sense interpretation" of pattern implied acts "occurring in *different criminal episodes*, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity." *Id.* at 57 (emphasis in original).

[260] *See* United States v. Phillips, 664 F.2d 971, 1038-39 (5th Cir. 1981) (the separate crimes "need not, however, be in the context of individual schemes or objectives"); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978) (pattern consisting of five mailings in the course of a single fraudulent scheme); United States v. Chovanec, 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (pattern consisting of six acts of wire fraud in the course of defrauding one victim); United States v. Salvitti, 451 F. Supp. 195, 200 (E.D. Pa.) ("all of the mailings . . . were in connection with the single scheme . . . ."), *aff'd mem.*, 588 F.2d 824 (3d Cir. 1978); *see also* United States v. Martino, 648 F.2d 367, 402-03 (5th Cir. 1981) (pattern consisting of arson that was committed to defraud an insurer through mail fraud), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub*

This problem is illustrated by *United States v. Phillips*.[261] Defendant Echezarreta was convicted under RICO for two violations of 21 U.S.C. § 841(a), consisting of possession with intent to distribute and actual distribution of the same 200-pound load of marijuana. The defendant claimed that a single scheme to import marijuana could not form the basis for a RICO pattern. The court rejected this argument by holding that two or more acts arising out of a single transaction can constitute a pattern.[262]

Despite this holding on single-transaction patterns, the court reversed the conviction because the two violations of section 841(a) merged into a single offense. In an earlier en banc opinion, *United States v. Hernandez*,[263] the Fifth Circuit had concluded that possession and distribution merged into a single offense. The *Phillips* court held that because the predicate offenses were a single offense under *Hernandez* the pattern requirement of two separate acts could not be established as to Echezarreta.[264]

This interpretation of pattern leaves a number of significant unanswered questions. It is unclear whether *Phillips* requires two factually distinct acts or simply two unmerged statutory offenses. To

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nom. Russello v. United States, 103 S. Ct. 721 (1983); United States v. Calabrese, 645 F.2d 1379, 1389 (10th Cir.) (a pattern existed even though the transactions "were between the same parties and [arguably] constituted a single customer transaction"), *cert. denied*, 451 U.S. 1018 (1981); United States v. Starnes, 644 F.2d 673 (7th Cir.) (permitting a pattern consisting of an act of arson that was committed to defraud an insurer and the filing of false claims), *cert. denied*, 454 U.S. 826 (1981); United States v. Parness, 503 F.2d 430, 441-42 (2d Cir. 1974) (the interstate transportation of two cashier's checks constituted a pattern), *cert. denied*, 419 U.S. 1105 (1975).

One civil RICO decision, however, seems to apply a more stringent pattern test. Teleprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6 (W.D. Pa. 1981). In *Teleprompter* the plaintiff alleged that at one political fundraising event, a councilman received multiple bribes from employees of two corporations. The court held that this was not a "*series* of incidents and schemes which are *ongoing*" and therefore did not establish the required pattern. *Id.* at 12-13 (emphasis in original). The court indicated that even if many separate bribery payments occurred, a pattern would not be established:

> We do not feel that the facts alleged in the complaint show a *series* of unlawful acts sufficient to establish "a pattern of racketeering activity" within the meaning of RICO. Even if plaintiff could prove that each and every employee or associate of ETI and GEEDC bribed Meredith at the fundraiser, it would only constitute one single act of unlawful activity.

Id. at 13 (emphasis in original).

[261] 664 F.2d 971 (5th Cir. 1981).

[262] *Id.* at 1038-39.

[263] 591 F.2d 1019, 1022 (5th Cir. 1979).

[264] 664 F.2d at 1039.

illustrate this problem, assume that a pattern can consist of a conspiracy predicate offense and that a pattern alleges a single agreement violating two separate conspiracy predicate statutes, conspiracy to import drugs (21 U.S.C. § 963) and conspiracy to possess with intent to distribute (21 U.S.C. § 846). Under *Albernaz v. United States*,[265] these conspiracy offenses do not merge. Although the *Phillips* holding focused on the merger issue, it referred to a requirement that a pattern must contain "two separate acts."[266] If this is a reference to factually distinct acts rather than legally distinct acts, the two conspiracy offenses described in the hypothetical would not constitute a pattern.

If the *Phillips* analysis is limited to whether there is a legal merger of two predicate offenses, the RICO incorporation of state offenses raises an insoluble problem. For example, assume that a RICO count alleges a single drug possession that violates a state statute punishing possession with intent to sell and 21 U.S.C. § 841, punishing possession with intent to distribute. This situation has never been analyzed in terms of merger because the separate-sovereignty doctrine permits separate state and federal prosecutions in which state and federal predicate offenses are based on the same act.

The second hypothetical cannot be resolved under existing law

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[265] 101 S. Ct. 1137, 1142 (1981).

[266] 664 F.2d at 1039.

The erroneous legal merger analysis was applied to state predicate offenses in United States v. Licavoli, No. 79-10-3 (N.D. Ohio June 3, 1982), in which the defendants were charged with a RICO pattern consisting of two conspiracies to murder Daniel Green and John Nardi and the murder of Daniel Green. The Government alleged that members of the Cleveland La Cosa Nostra killed Nardi and Green in two car bombings. Nardi, a Teamster official, and Green were attempting to seize power in the Cleveland La Cosa Nostra by means of car-bombing murders. Nardi's opponents allegedly conspired to retaliate against the Green-Nardi faction by employing two men, Pasquale "Butchie" Cisternino and Ray Ferritto, to murder Green and Nardi. Both victims were killed by remote-control bombs placed in cars parked adjacent to their automobiles.

The defense was successful in merging the two murder conspiracies into one conspiracy for purposes of the RICO count. The relevant Ohio conspiracy statute, OHIO REV. CODE ANN. § 2923.01(F) (Baldwin 1982), provided that one committing a conspiracy to commit more than one offense is guilty of only one conspiracy. The court found that there was a single agreement to kill Nardi and Green by relying on the state court testimony of Ferritto that described various conversations in which he was told that he was being employed to kill Nardi and Green because of the attempts of the Nardi-Green faction to muscle into the gambling operations in Cleveland. This testimony established a single conspiracy that could be charged only as a single predicate offense.

because merger of offenses is a problem of legislative intent.[267] Where multiple federal offenses are involved, it is arguably possible to discern Congress's intent to permit separate punishment of the offenses. The hypothetical involving a state and federal offense, however, is impossible to resolve since Congress could not conceivably have any intent with respect to whether its offenses merge with all similar predicate offenses in all fifty states. Similarly, it is unlikely that state legislatures ever contemplated the problem of whether their state drug offenses merge with federal predicate offenses in a federal RICO prosecution.

As these hypotheticals illustrate, RICO pattern problems cannot be assessed solely in terms of whether the racketeering acts would legally merge. A strict merger analysis cannot adequately deal with a problem of state and federal predicate offenses based on the same act. The appropriate mode of analysis is to focus on whether the racketeering acts are factually distinct.[268]

The common-scheme construction of pattern does not remedy the single-transaction problem. In *United States v. Weatherspoon*,[269] the Seventh Circuit asserted that a common-scheme element is inconsistent with a requirement that the racketeering acts be part of different transactions. The court reasoned that the defendant's challenge to the single-transaction pattern "would require a showing of separate and unrelated schemes" in contrast to the common-scheme approach.[270]

Even if a pattern can consist of a single transaction, there are two indirect limitations. *Turkette*'s requirement that an illegal enterprise be a continuing unit would seemingly preclude an illegal enterprise consisting only of a single transaction.[271] *Turkette*, however, would not be applicable to a defendant's single-transaction pattern if the illegal enterprise involved multiple transactions. A second limitation is found in the *Webster* rehearing decision, hold-

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[267] United States v. Hernandez, 591 F.2d 1019, 1021 (5th Cir. 1979).

[268] *See* Tarlow, *supra* note 1, at 217; *cf.* United States v. Computer Sciences Corp., 689 F.2d 1181, 1189 (4th Cir. 1982) (expressing doubts concerning the validity of a pattern including "a set of closely related wire fraud and mail fraud claims essentially representing subdivisions of a single on-going illegal act").

[269] 581 F.2d 595 (7th Cir. 1978).

[270] *Id.* at 601 n.2.

[271] It is noteworthy that most single transaction patterns involve continuing legitimate businesses to which *Turkette* would not apply.

ing that a person conducts an enterprise's affairs through repeated acts, a test not satisfied by "an isolated incident."[272] Arguably, a single-transaction pattern would be an isolated incident under *Webster*.

In resolving the problem of single-transaction patterns, the Third Circuit has apparently chosen to adopt no coherent legal standard, but to regard the problem as an issue of fact for the jury. In *United States v. Boffa*,[273] two defendants were charged with racketeering patterns consisting of a gift of four months' free use of an automobile; four Taft-Hartley violations corresponded to the four lease payments on the automobile totaling $1200. The payments were sham transactions made between two businesses that were the same entity in most significant respects. The court refused to engage in a detailed statutory analysis of this point, but merely regarded it as a disputed issue of fact as to which the jury could reasonably conclude that each payment was a separate violation of Taft-Hartley.[274] The court failed to come to grips with the question of whether, as a matter of statutory construction of RICO, Congress contemplated racketeering patterns consisting of this type of closely related activity.

The ABA proposals include an endorsement of the *Moeller* formulation, requiring proof of criminal episodes that are separate in time and place yet sufficiently related by purpose to demonstrate a continuity of activity.[275] The commentary endorsed *Moeller* as the only means to effectuate Congress's intent to limit RICO prosecutions to those committing a continuing course of illegal conduct.[276]

C. *Racketeering Activity*

The racketeering acts forming a pattern must come within the definition of "racketeering activity" in section 1961(1). That defini-

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[272] *See supra* note 246.

[273] 688 F.2d 919 (3d Cir. 1982).

[274] *Id.* at 936.

[275] *RICO Report*, *supra* note 7, at 5-6.

[276] *Id.* at 6. In a May 21, 1982, letter, the Criminal Law Committee of the Association of the Bar of the City of New York expressed support for a similar proposal: "We do agree that it would be desirable to clarify that transactions must constitute 'different criminal episodes' if there is to be a statutory violation." Letter from Peter Zimroth, Chairman of the Criminal Law Committee, to the American Bar Association, Section of Criminal Justice (May 21, 1982).

tion includes eight state offenses and twenty-four categories of federal offenses.[277]

1. Incorporated Federal Offenses.

a. Conspiracy. The ambiguity of the definition of racketeering activity has resulted in considerable confusion as to whether conspiracy can be a predicate offense under section 1961(1). In *United States v. Weisman*,[278] the Second Circuit held that a conspiracy may be a predicate offense under section 1961(1)(D). The court reasoned that conspiracy was included in the category of "any offense involving" the section 1961(1)(D) crimes.[279] In the original slip opinion of *United States v. Martino*,[280] the court held that attempts or conspiracies are not racketeering acts. This comment was made in considering the claim of defendant Lostracco that his RICO charge was invalid because he committed only one predicate offense, an arson. The court agreed with this contention, rejected the Government's argument that the second act occurred when Lostracco attempted or conspired to commit mail fraud by submitting an insurance claim, and held that section 1961 specifies only completed offenses as racketeering acts. The *Martino* opinion was substantially modified after the slip opinion and limited to a holding that conspiracy to commit mail fraud was not a predicate offense because it was not specifically included in section 1961(1)(B).[281]

There is little authority on the question of whether a conspiracy to commit a state offense constitutes a "racketeering activity" under section 1961(1)(A). The pivotal language of this provision defines "racketeering activity" as "any act or threat involving" various state crimes. In *United States v. Licavoli*[282] the district court held that the words "any act . . . involving" were intended to in-

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[277] *See supra* notes 12-13.

[278] 624 F.2d 1118, 1123-24 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

[279] *Id.* Section 1961(1)(D) predicate offenses consist of "any offense involving" bankruptcy fraud, securities fraud, and trafficking in "narcotics or other dangerous drugs." 18 U.S.C. § 1961(1)(D) (Supp. IV 1980); *see supra* note 12.

[280] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[281] *Id.* at 400. Section 1961(1)(B) predicate offenses consist of "any act which is indictable" under a series of specifically incorporated federal criminal statutes. 18 U.S.C. § 1961(1)(B) (Supp. IV 1980); *see supra* note 12.

[282] No. 79-10-3 (N.D. Ohio June 3, 1982); *see also supra* note 266.

clude conspiracy to commit the offenses.[283] The court found little significance in the fact that Congress rejected earlier RICO proposals that specifically incorporated any conspiracy to commit enumerated offenses.[284] One of these bills defined "racketeering activity" in subsection (C) as including "any conspiracy to commit any of the foregoing offenses."[285]

These rejected proposals cast doubt on the *Licavoli* court's broad construction of the phrase "any act . . . involving" in the existing statute. If this phrase included conspiracy, the draftsmen of the earlier bills would not have felt the need specifically to mention conspiracy in subsection (C) when they had already employed the "act . . . involving" language.[286]

It is evident that conspiracies can be predicate offenses if they are specifically mentioned in section 1961(1). For example, in *United States v. Zemek*[287] and *United States v. Welch*,[288] the Government alleged predicate offenses consisting of conspiracy to obstruct the enforcement of state criminal laws with the intent to facilitate an illegal gambling business. This conspiracy is pro-

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[283] *Licavoli*, No. 79-10-3, slip op. at 10-17.

[284] *See, e.g.*, S. 1623, 91st Cong., 1st Sess. § 2(1)(C) (1969); H.R. 10077, 91st Cong., 1st Sess. § 2(1)(C) (1969); H.R. 9710, 91st Cong., 1st Sess. § 2(1)(C) (1969); H.R. 7596, 91st Cong., 1st Sess. § 2(1)(C) (1969); H.R. 5216, 91st Cong., 1st Sess. § 2(1)(C) (1969); H.R. 2154, 91st Cong., 1st Sess. § 2(1)(C) (1969); H.R. 760, 91st Cong., 1st Sess. § 2(1)(C) (1969).

[285] S. 1861, 91st Cong., 1st Sess. § 2(a) (1969), which defined "racketeering activity" in the following manner:

> (A) any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following [cited] provisions of Title 81, United States Code . . . ; and (C) any conspiracy to commit any of the foregoing offenses.

[286] This oversight is compounded by the *Licavoli* court's mishandling of the concept of generic designation. Since the state predicate offenses are included by generic designation, *see* H.R. REP. No. 1549, 91st Cong., 2d Sess. 56 (1970), the *Licavoli* court reasoned that the generic designation of murder includes conspiracy to commit murder. United States v. Licavoli, No. 79-10-3, slip op. at 7-8 (N.D. Ohio June 3, 1982). The generic-designation test focuses on "whether the indictment charges a type of activity generally known or characterized in the proscribed category." United States v. Forsythe, 560 F.2d 1127, 1137 (3d Cir. 1977) (holding that bribery payments could be charged as RICO predicate offenses under state statutes applicable to the conduct even if they were not termed "bribery" statutes). It requires no extended analysis to realize that a conspiracy statute is not a murder statute nor is one who conspires to murder always guilty of murder itself. The *Licavoli* court's discussion of "generic designation" is questionable at best.

[287] 634 F.2d 1159, 1170 n.15 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (tavern owner Carbone), *cert. denied*, 452 U.S. 905 (1981) (Sheriff Janovich).

[288] 656 F.2d 1039, 1044 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1767 (1982).

scribed by 18 U.S.C. § 1511, which is specifically incorporated as a racketeering activity in section 1961(1)(B).[289] The *Welch* court indicated in dicta that the section 1961(1)(A) state crimes include conspiracy to commit those crimes and reasoned that section 1962(1)(A) appeared to be as broadly worded as section 1961(1)(D).[290] In addition to section 1511 predicate offenses, conspiracies and attempts are predicate offenses when charged as violations of the Hobbs Act, which is incorporated in section 1961(1)(B).

Generally, courts should regard conspiracy predicate offenses with disfavor. One reason is that it is impossible to reconcile the existence of section 1962(d), the RICO conspiracy provision, with a conspiracy predicate offense. A section 1962(d) agreement to commit conspiracy predicate offenses would be a conspiracy to conspire—an impermissibly vague and anomalous notion.[291] Although the argument was rejected in *Licavoli*, a significant indication that conspiracy should not be a predicate offense unless specifically mentioned in section 1961(1) is that Congress rejected proposed RICO bills that included as a predicate offense any conspiracy to commit the enumerated predicate offenses.[292]

b. Marijuana offenses. The definition of racketeering activity in section 1961(1)(D) punishes federal and state drug offenses but does not state with sufficient specificity which drugs are proscribed by RICO. That definition employs the phrase "narcotic or other dangerous drugs." The latter term, "dangerous drugs," is used in no other federal statute and is conceivably applicable to marijuana. The draftsman of the statute, Professor Blakey, stated that RICO does not apply to marijuana and that exclusion of marijuana was a conscious policy decision by Congress.[293] Blakey's view is sup-

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[289] *Id.* at 1050 & n.19.

[290] *Id.* at 1063 n.32.

[291] *Cf.* United States v. Meacham, 626 F.2d 503, 507-09 (5th Cir. 1980) (rejecting a "conspiracy-to-attempt" as a "conceptually bizarre crime"), *aff'd on other grounds*, 676 F.2d 1359 (11th Cir. 1982).

[292] *See supra* note 284 and accompanying text.

[293] Blakey, *supra* note 43, at 24. Blakey observed:

> Note, there are no [federal] marijuana RICO prosecutions. . . . [The statute includes] narcotics and other dangerous drugs; it does not include marijuana. I don't know that everybody's noticed that, but the . . . language is such that you cannot infer that marijuana is a dangerous drug [under] RICO. There are no federal RICO marijuana prosecutions. There may be some state ones, but there's not going to be

ported by Congress's rejection of earlier RICO proposals that specifically referred to marijuana.[294]

There is no need to include marijuana offenses as RICO predicate acts since marijuana transactions in violation of 21 U.S.C. § 841 are already enhanced by section 841(B)(6) where prior drug convictions or one thousand pounds of marijuana are involved. Since RICO can also be regarded as a penalty enhancement provision,[295] application of RICO to marijuana offenses might constitute double enhancement in violation of *Busic v. United States*.[296] *Busic* apparently holds that the Government cannot apply a general sentence enhancement provision to a felony statute that already contains an enhancement clause.[297]

The argument for excluding marijuana from RICO may be supported by two Ninth Circuit opinions holding that an alien could not be deported for possession of marijuana where the immigration statute, 8 U.S.C. § 1251(a)(11), referred only to "narcotic drugs."[298] The reasoning employed in these cases is probably applicable to RICO cases. The district court opinion in *Mendoza-Rivera*

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any federal ones, and that was a conscious policy choice by the Congressmen involved.

Id. Apparently Blakey's views on RICO were given some weight in statutory construction in United States v. Lee Stoller Enters., 652 F.2d 1313, 1319 n.10 (7th Cir.) ("[Blakey] supports the broad remedy of RICO"), *cert. denied*, 454 U.S. 1082 (1981).

[294] In legislative RICO proposals made prior to the bill that became law, the term "criminal activity" was defined as an act involving "narcotic drugs or marihuana." *E.g.*, S. 1623, 91st Cong., 1st Sess. § 2 (1969); H.R. 326, 91st Cong., 1st Sess. § 2 (1963); H.R. 760, 91st Cong., 1st Sess. § 2 (1969); H.R. 2154, 91st Cong., 1st Sess. § 2 (1969); H.R. 2774, 91st Cong., 1st Sess. § 2 (1969); H.R. 5216, 91st Cong., 1st Sess. § 2 (1969); H.R. 7596, 91st Cong., 1st Sess. § 2 (1969); H.R. 9710, 91st Cong., 1st Sess. § 2 (1969); H.R. 10077, 91st Cong., 1st Sess. § 2 (1969).

[295] United States v. Starnes, 644 F.2d 673, 679 n.7 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981). *But see* United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir. 1982).

[296] 446 U.S. 398 (1980); *see also* Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1008 (C.D. Cal. 1982) (noting that RICO was not "meant to pre-empt or supplement the remedies already provided by those statutes which define a predicate RICO offense").

[297] *Busic*, 446 U.S. at 404.

[298] Mendoza-Rivera v. Del Guercio, 161 F. Supp. 473 (S.D. Cal. 1958), *aff'd sub nom.* Hoy v. Mendoza-Rivera, 267 F.2d 451 (9th Cir. 1959); Rojas-Gutierrez v. Hoy, 161 F. Supp. 448 (S.D. Cal. 1958), *aff'd*, 267 F.2d 490 (9th Cir. 1959). Section 1251 applied to (1) any "illicit traffic in narcotic drugs"; and (2) various offenses, not including simple possession, of marijuana and other drugs. In the two cases, the question was whether simple possession of marijuana involved "illicit traffic in narcotic drugs." Two district courts held that marijuana was not a narcotic drug, holdings that were affirmed by the Ninth Circuit. *Rojas-Gutierrez*, 161 F. Supp. at 451; *Mendoza-Rivera*, 161 F. Supp. at 475.

v. Del Guercio,[299] notes that Congress could easily have added the word marijuana to section 1251(a)(11) and that Congress knew or should have known that there would have been a question as to whether marijuana was a "narcotic drug."[300] *Mendoza-Rivera* noted that Congress's drug laws had distinguished between narcotic drugs and marijuana and that Congress would probably have been aware of this distinction when it enacted 8 U.S.C. § 1251(a)(11).[301] The Ninth Circuit upheld the district court by noting that it was immaterial that the defendant would obtain an unexpected windfall from exclusion of marijuana from section 1251.[302] The court stated that it is not the duty of the courts to "reform the statutes to fit their terms to the form of every individual criminal."[303]

The only authority on the RICO-marijuana issue is a brief paragraph in *United States v. Phillips*,[304] in which the issue had not been litigated in the trial court. The court concluded without any analysis, precedent, or statutory history that RICO applies to marijuana. The discussion is so brief as to be totally unenlightening.[305] Perhaps this can be explained by the fact that the issue was

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[299] 161 F. Supp. 473 (S.D. Cal. 1958).

[300] The court observed:

> If Congress wished to include within the definition of narcotic drugs in (1) above "marihuana", so there would have been no question as to its intent, it could very easily have added the word "marihuana." Congress knew, or should have known, that there had been a question as to whether the term "narcotic drugs" included marihuana. Certainly it should have been cognizant of the implications which would arise in omitting the term "marihuana."

Id. at 475.

[301] *Id.*

[302] Hoy v. Mendoza-Rivera, 267 F.2d 451, 452 (9th Cir. 195).

[303] *Id.*; *see also* United States v. Jones, 308 F.2d 26, 33 (2d Cir. 196) (en banc). The *Jones* court stated:

> We are keenly aware of the acute national problem created by the illicit traffic in narcotics, and share with the general public a detestation of that business. Nevertheless, our personal revulsion at the activities sought to be federally proscribed here does not override our sworn duty as judges to uphold and enforce the laws of Congress as Congress enacted them.

Id.

[304] 664 F.2d 971 (5th Cir. 1981).

[305] The entire discussion of this issue in *Phillips* is three short sentences: "Platshorn claims that marijuana offenses are not within the ambit of RICO because marijuana is not a narcotic or dangerous drug. However, marijuana has been classified as a Schedule I controlled substance [citations omitted]. Marijuana may be the subject matter of a RICO charge." *Id.* at 1039-40.

never raised or briefed in the trial court and therefore was not an appropriate issue for appellate review.

c. Innovative pleading of predicate offenses. The Government is often faced with a situation in which a defendant's conduct does not appear to be the object of any RICO predicate offense and is specifically governed by a statute that is not mentioned in section 1961. In these cases, the Government may employ imaginative or innovative pleading practices and seize on some RICO predicate offenses that are not clearly applicable but that contain broad language that can be liberally construed. Contorting the facts and statutes to create a predicate offense would certainly appear to be inappropriate considering the severity of the RICO penalties. The favored predicate offense in these situations is mail fraud, which is the broadest offense incorporated as a RICO predicate act. It is arguably applicable to any person who mails a letter with deceitful intent.[306]

The use of mail fraud as a RICO predicate offense was initially restricted by the decision of the district court in *United States v. Computer Sciences Corp.*[307] In *Computer Sciences*, the defendants were accused of submitting false claims to the Government for computer services. They were charged with a RICO violation based on mail and wire fraud offenses. The district court held that the indictment did not charge valid predicate offenses because the false claim conduct is governed by a specific statute that is not

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Phillips is the appellate decision reviewing the convictions of the notorious "Black Tuna" defendants. This case illustrates the manner in which RICO counts can combine with Government press conferences and informant leaks to the media, to inflate a motley bunch of inept criminals into a sophisticated drug syndicate. The defendants received astoundingly lengthy prison terms, *see supra* note 32, despite a history of incompetence and failure. The "Black Tuna" defendants enjoyed some early success as the result of a connection with a resident of Colombia, Raul Davila, who supplied the marijuana and was known as "Black Tuna." In 1977, the tragic-comic series of blunders began. In April, 1977, the police responding to a call by a resident, discovered 16,000 pounds of marijuana, which was being removed from a house by a Black Tuna defendant. In July, 1977, a plan to import marijuana into North Carolina on a yacht also went awry. The yacht took on water through a porthole that had been opened by a crew member who had been using cocaine, and the bilge pumps then failed to work. The yacht was run aground off the Bahamas to save the ship. The Black Tuna defendants then attempted without success to salvage both the yacht and the marijuana in the hold. Similarly inept ventures involving the use of malfunctioning and crashing second-hand airplanes also ended in failure.

[306] *See supra* text accompanying note 43.

[307] 511 F. Supp. 1125 (E.D. Va. 1981), *rev'd in part*, 689 F.2d 1181 (4th Cir. 1982).

incorporated within RICO. Congress's exclusion of the false claims statute, 18 U.S.C. § 287, from the definition of racketeering activity indicated an intent to preclude all RICO prosecutions of false claims to the Government. This intent could not be evaded by using the general mail and wire fraud statutes.[308] It was arguable that the *Computer Sciences* district court opinion precluded the use of the mail fraud statute as a racketeering offense where a specifically applicable statute is not a RICO predicate offense.[309]

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[308] The court observed:

> Under the theory the prosecutors followed in this case, virtually all false claims charges could be transformed into mail fraud charges, with the attendant increase in penalties and with the potential for transforming great numbers of garden variety false claims cases into RICO cases. The prosecutors would have this court sanction a method of racheting an offense specifically proscribed into another offense so that it can bring it within a third statute—RICO—the penalties of which are vastly more serious and which would allow the government to subject the defendants to the forfeiture provisions. The use of this building block method in a criminal case requires close scrutiny by the court, which is charged with insuring that the criminal justice system operates fairly. Accordingly, the court will not approve such a stretching of the acts involved in this case. It is the court's opinion that Congress did not intend to have mail fraud charges tacked onto all false claims charges, and certainly did not intend to have false claim charges become the basis for RICO charges. In fact, Congress excluded false claims from the list of offenses categorized as racketeering activities in § 1961(1).

Id. at 1134-35.

[309] Support for the position adopted in the *Computer Sciences* district court opinion can be found in case law holding that mail fraud cannot be applied to tax evasion cases. In United States v. Henderson, 386 F. Supp. 1048 (S.D.N.Y. 1974), the court dismissed mail-fraud charges in a tax case and observed that mail fraud was intended as a catchall section to protect the public at large rather than the Government. It noted that in enacting specific criminal tax legislation, Congress expressed its intent that tax frauds against the Government be dealt with by Title 26 rather than the more general mail-fraud section. *Id.* at 1052-53. *But see* United States v. Miller, 545 F.2d 1204 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977). *See generally* 1 R. FINK, TAX FRAUD § 16.07[5] (1982).

It has been argued that felony violations of the tax laws, I.R.C. §§ 7201-7217 (1976 & Supp. V 1981), can be prosecuted as a RICO-mail-fraud violation. *See* Zuckerman & Hunterton, *supra* note 5, at 213-18. Zuckerman and Hunterton did not discuss the *Computer Sciences* decision and did not find any great significance in Congress's failure specifically to include Title 26 violations as predicate offenses in § 1961(1). *Id.* Congress may have excluded these violations because Title 26 contains both misdemeanors and felonies. *See* I.R.C. §§ 7201-7217 (1976 & Supp. V 1981). Congress would be understandably reluctant to permit tax misdemeanors to be transformed into RICO offenses carrying 20-year prison terms. *Cf.* 18 U.S.C. § 371 (1976) (conspiracy to commit misdemeanor can be punished only as a misdemeanor). For example, § 1961(1)(B) states that 18 U.S.C. § 659 violations are racketeering acts only if they are felonies. In the one instance where misdemeanors are enumerated in § 1961(1) as racketeering activities, the Taft-Hartley violations in 29 U.S.C. § 186 are specifically mentioned, unlike Title 26 misdemeanors. Taft-Hartley violations are a special class of misdemeanors, which are often associated with organized crime involvement

The status of the *Computer Sciences* district court opinion was placed in limbo by a strangely equivocal Fourth Circuit decision on whether the false claim conduct could constitute racketeering activity.[310] The appellate court expressed doubt that Congress intended to impose RICO criminal liability on this type of conduct by noting: "The defendants do not immediately appear to fit a category against whom the act was generally considered to be directed."[311] Notwithstanding these reservations, the court held that the issue should not be resolved until after trial.[312] The court did not explain why a legal issue of legislative intent should be affected by the resolution of factual issues at trial.

The Eleventh Circuit held that false claims on a government contract can be charged as mail fraud for the purposes of a RICO prosecution. In *United States v. Hartley*,[313] the Government transformed a series of "garden variety" fraudulent claims under a government contract into a RICO prosecution against a Florida corporation and its officers and employees. The corporation, Treasure Isle, Inc., produced frozen breaded shrimp for the military and en-

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in union activities.

Zuckerman and Hunterton implicitly acknowledge this problem by asserting, without any discussion or justification, that only felony violations of Title 26 are subject to RICO mail-fraud prosecutions. Zuckerman & Hunterton, *supra* note 5, at 217. This is a somewhat disingenuous way of describing their theory, because if acts relating tax matters constitute a violation of both the mail fraud statute and Title IX on the basis of the deceitfulness of the acts, there is no basis for distinguishing between deceitful felony acts and deceitful misdemeanor acts.

[310] United States v. Computer Sciences Corp., 689 F.2d 1181, 1189-90 (4th Cir. 1982).

[311] *Id.* at 1189. The court commented:

> We entertain some doubt that Congress ever contemplated the extension of the RICO statute to include a situation where one of the predicate offenses, separated in character and by a long time period, could combine with a set of closely related wire fraud and mail fraud claims essentially representing subdivisions of a single on-going illegal act to meet the predicate requirements of so serious a statute. The defendants do not immediately appear to fit a category against whom the act was generally considered to be directed. It would be tempting indeed to conclude that, although the act does include mail fraud and wire fraud among possible predicate offenses, nevertheless the omission from that category of the false claims statute, combined with the consideration relied on by the district judge in another context, namely, the apparent complete overlap under the facts the government expects to prove between the false claims statute and the wire fraud and mail fraud acts, evidenced a congressional intent to foreclose consideration of the putative wire fraud and mail fraud offenses for RICO purposes.

Id.

[312] *Id.* at 1190.

[313] 678 F.2d 961 (11th Cir. 1982).

gaged in two different schemes to evade government inspection procedures. The first scheme involved the simple replacement of the inspectors' "reject" cards on substandard batches of shrimp with "accept" cards. The other scheme was a more sophisticated one in which the defendants tampered with the inspection samples to ensure that they contained the acceptable shrimp. The *Hartley* court regarded the question of RICO's applicability to false-claim conduct as one of whether the Government is barred from prosecuting false-claim conduct under the broadly worded mail fraud statutes rather than the specifically applicable false-claims statute. The court held that prosecutors have discretion to charge conduct under the general predicate offenses despite the existence of the specific false-claims statute.[314] The possibility that Congress's omission of the false-claims statute as a RICO predicate offense could have evinced a legislative intent to preclude RICO prosecutions of false-claims conduct was not recognized.[315]

The problem in *Computer Sciences* and *Hartley* differs from the issue of statutory intent in *United States v. Zang*.[316] In *Zang*, the defendants were accused of participating in a scheme fraudulently to certify oil from old wells as oil from new wells. The Government alleged that this conduct violated the mail and wire fraud statutes and created a RICO offense by employing mail and wire fraud

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[314] *Id.* at 990 & n.50. The court's framing of this issue as one of prosecutorial discretion enabled the court to avoid the issue. The court's analysis might have been different had *Hartley* been a RICO civil case. In a RICO civil case, prosecutorial discretion would not be an issue. The only apparent issue would be whether RICO was intended to apply to the defendant's conduct. In fact, RICO civil opinions indicate that RICO was not intended to apply to garden-variety fraud claims, Katzen v. Continental Ill. Nat'l Bank & Trust Co., No. 80-1378 (N.D. Ill. Aug. 14, 1980), and that it may be preempted by specifically applicable civil remedies in other federal statutes. *See* Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1008 (C.D. Cal. 1982); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747-48 (N.D. Ill. 1981).

[315] Indulging in some legal sophistry, the *Hartley* opinion offered a meaningless distinction of the *Computer Sciences* district court decision. The *Hartley* court limited that decision to a case where mail fraud and false claims are charged in the same indictment and held that the *Computer Sciences* district court opinion did not apply to cases where the Government chose to prosecute only under the general statute. *Hartley*, 678 F.2d at 990 n.50. This distinction bears no relationship to any rationale or policy set out in the lower court opinion in *Computer Sciences*. In addition, the Supreme Court decision in Busic v. United States, 446 U.S. 398 (1980), in which the Court held that the prosecution may not choose between general and specific statutes but must prosecute under the specific one, directly conflicts with the distinction offered in *Hartley*.

[316] 645 F.2d 999 (Temp. Emer. Ct. App. 1981).

predicate offenses. The alleged conduct in *Zang* was proscribed by specific criminal provisions in the Emergency Petroleum Allocation Act, 15 U.S.C. § 754, that are not incorporated as a RICO predicate offense. The defense argued that the specific criminal statute, section 754, preempted any prosecution under Title 18 offenses. The court rejected this argument and held that there was no indication that by adopting section 754 in 1973 Congress intended to preclude Title 18 prosecutions.[317]

In *Computer Sciences*, there was no claim that the false-claims statute preempted RICO since section 287 was adopted twenty-two years prior to RICO and Congress could not have intended to preempt a RICO statute that did not then exist. Unlike *Zang*, the analysis in *Computer Sciences* should have focused on the legislative intent underlying Congress's refusal to include section 287 as a RICO predicate offense. In *Zang*, section 754 was adopted after RICO, and consequently, there is no issue as to why Congress refused to incorporate section 754 as a RICO predicate offense.

It is conceivable that further limitations on the use of mail fraud as a RICO predicate offense will emerge from RICO civil actions. In *Salisbury v. Chapman*,[318] the court dismissed a RICO civil action against vendors of real property. The mail fraud claims were held insufficient on the ground that under state law the seller had no obligation to disclose certain information.[319]

The Government has also used another broad RICO predicate offense, interstate transportation of stolen property, 18 U.S.C. § 2314, to punish misdemeanor copyright violations that are not RICO predicate offenses. In *United States v. Sam Goody, Inc.*,[320] copyright violations were charged as interstate transportation of stolen property under the theory that copyrighted material consti-

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[317] *Id.* at 1004-05. The Fifth Circuit declined to consider this issue in a similar fact pattern in United States v. Uni Oil, Inc., 646 F.2d 946, 953 n.5 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

[318] 527 F. Supp. 577 (N.D. Ill. 1981).

[319] *Id.* at 530.

[320] 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982). In *Sam Goody, Inc.* the corporate defendant operated a large chain of retail record stores in New York City. Between June and October, 1978, the defendant purchased over 100,000 counterfeit copies of films and records. These counterfeits were shipped to an affiliate in Minnesota. At trial, the RICO counts were either dismissed at the close of the Government's case or produced a jury acquittal. *Id.* at 1224.

tutes stolen property. Similarly, in *United States v. Gottesman*,[321] the defendants were accused of pirating *Bambi* and another film and were charged with the RICO predicate offense of transporting stolen property valued at more than $5,000. To reach a total of $5,000 in stolen property, the Government valued each individual cassette at $25 and multiplied by the number of cassettes. This artifice was used because only two films were pirated.

In *United States v. Guiliano*,[322] the Government attempted to transform an employee's theft of cash from his employer into a bankruptcy fraud where the employer was in bankruptcy. The court remarked: "We doubt that Congress expected the statute to be used in circumstances where an embezzlement can be escalated into a federal bankruptcy fraud, and then joined with another bankruptcy fraud to form an alleged pattern of racketeering activity."[323]

The American Bar Association has expressed the concern that abuse of broadly worded predicate offenses such as mail fraud may result in the imposition of disproportionately severe criminal sanctions and a flood of RICO civil actions. To remedy this problem, the American Bar Association has recommended that a racketeering pattern include at least one offense other than mail and wire fraud, interstate transportation of stolen goods, or sale or receipt of stolen goods.[324] The commentary emphasized the need to limit RICO to continuing activity and condemned the use of mail fraud to permit RICO prosecutions of anyone "who thinks deceitfully and mails two letters."[325] Restrictions on the use of interstate transportation of stolen goods, section 2314, as a RICO predicate offense were also adopted by the American Bar Association for reasons similar to those mentioned for mail fraud: (1) the term "stolen goods" includes those obtained by fraud and thus makes the potential scope of section 2314 as broad as mail fraud; and (2) a racketeering pattern of section 2314 offenses can be easily alleged based on two transportations in pursuance of a single scheme.[326]

2. *Incorporated State Offenses.* Section 1961(1)(A) sets out a

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[321] No. 80-59 (S.D. Fla. Nov. 11, 1980).
[322] 644 F.2d 85 (2d Cir. 1981).
[323] *Id.* at 88.
[324] *RICO Report*, *supra* note 7, at 7-9.
[325] *Id.* at 8.
[326] *Id.* at 8-9.

series of state offenses constituting "racketeering activity" by defining that activity to include "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year."[327] These offenses are included by generic designation,[328] and thereby permit the Government to rely on state offenses that are not specifically labelled as "murder," "kidnaping," or any of the other terms used in section 1961(1)(A). Section 1961(1)(A) establishes a three-pronged test requiring: (1) that the act or threat involve the crimes set forth; (2) that the act be "chargeable" under state law; and (3) that the act be punishable by imprisonment for more than one year.

The major issue arising from section 1961(1)(A) is whether state procedural statutes, such as statutes of limitations, are controlling in RICO prosecutions. The courts have held that the reference to state law in Title IX is for the purpose of defining the prohibited conduct and not for incorporating the state statute of limitations or other procedural rules.[329] Proponents of the view that state stat-

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[327] 18 U.S.C. § 1961(1) (1976). *See generally* Tarlow, *supra* note 1, at 224-28. Because § 1961(1)(A) does not refer to specific statutes, any amendments to the state statutes occurring after the 1970 effective date of the RICO statute will be effective. This is in direct contrast to the specifically mentioned statutes in § 1961(1)(B) and (C) for which post-1970 amendments may be inapplicable. Tarlow, *supra* note 1, at 220 n.272. This point is assumed in United States v. Chatham, 677 F.2d 800, 803-04 (11th Cir. 1982), which confronted the problem of amendments to state predicate offenses. In *Chatham*, the RICO count was based on a state bribery statute that had been superseded. The superseding statute was broader in the sense that it eliminated the only specifically mentioned defenses of the accused and required no new elements of proof. Under these circumstances, the Government's failure to cite the new statute was nonprejudicial error. *Id.* at 803. The court noted, however, that if the new statute had been narrower than the old law, the RICO convictions would have been reversed. *Id.* at 804.

[328] *See* United States v. Salinas, 564 F.2d 688, 689-91 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); United States v. Forsythe, 560 F.2d 1127, 1137-38 (3d Cir. 1977), *rev'g.* 429 F. Supp. 715, 722-23 (W.D. Pa. 1977); United States v. Fineman, 434 F. Supp. 189, 194 (E.D. Pa. 1977); *cf.* Perrin v. United States, 444 U.S. 37, 45-49 (1979) (18 U.S.C. § 1952 includes all state crimes within generic designation). These holdings are supported by the legislative history underlying Title IX, which states that "State offenses are included by generic designation." 1970 U.S. CODE CONG. & AD. NEWS 4032.

[329] *See* 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, 1134-35 (3d Cir. 1977); United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

utes of limitations are applicable have cited the requirement of section 1961(1)(A) that the act be "chargeable under State law and punishable by imprisonment for more than one year." The proponents contend that the act must be chargeable and punishable at the time of the indictment and that after the expiration of the state statute of limitations period the state offense is not chargeable or punishable.[330]

The courts have responded to this argument by construing "chargeable" and "punishable" as applying to the time at which the offense was committed.[331] A construction that provides only that state offenses must be chargeable and punishable at the time they were committed effectively eliminates the impact of any state procedural rule that would bar a prosecution in state court.[332]

Fundamental considerations of federalism should preclude RICO

To the extent that state law defines a RICO racketeering activity, a question remains as to the role of state case law construing these state criminal statutes. Some light on this issue may be shed by the Sixth Circuit appellate proceedings in United States v. Cissell, No. 81-5405 (6th Cir. Feb. 25, 1983). In *Cissell*, the RICO count alleged violations of the Kentucky bribery statute against a defendant who promised to bribe some state judges but never contacted them. The applicability of the Kentucky statute was unclear because of the lack of state court decisions on this point. To remedy this problem, the Sixth Circuit issued an order requesting the Kentucky Supreme Court to rule on this point. United States v. Cissell, No. 81-5405 (6th Cir. Sept. 13, 1982). Ultimately, the RICO convictions were reversed after the Kentucky Supreme Court ruled that no bribery under Kentucky law was committed. United States v. Cissell, No. 81-5405 (6th Cir. Feb. 25, 1983).

Although the Sixth Circuit's procedural approach seems reasonable, it raises the question of the role of federal appellate courts in construing state predicate offenses that are incorporated in a federal statute. More specifically, does this incorporation of state law transform state law issues into federal issues for purposes of appeal? For example, could the Kentucky Supreme Court decision in *Cissell* be reviewed by the Supreme Court? At first it would appear that such review is impossible because of the independent state grounds rule against reviewing judgments of state courts on state law. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). This rule, however, is arguably inapplicable where, as in the RICO situation, the state law issue determines the scope of federal rights and remedies. In this regard, it has been held that the Supreme Court retains the power to correct state judgments "to the extent that they incorrectly adjudge federal rights." *Id.*

[330] United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978).

[331] *See id.*; United States v. Fineman, 434 F. Supp. 189, 194-95 (E.D. Pa. 1977).

[332] Judge Aldisert in his concurring opinion in United States v. Davis, 576 F.2d 1065, 1068-71 (3d Cir.) (Aldisert, J., concurring), *cert. denied*, 439 U.S. 836 (1978), sharply criticized this insertion of "at the time the offense was committed" into the statute. *Id.* at 1069. He characterized this as a proscribed form of judicial definition of criminal activity: "This is not statutory *interpretation;* it is statutory *construction* in the pristine fabricating sense. It is a judicial, not legislative, definition of criminal activity, a genre of statutory interpretation outlawed by a host of Supreme Court decisions." *Id.* (emphasis in original).

prosecutions based on state law offenses that could not be prosecuted in state court because of the state procedural rules. State legislators should have the right to declare which persons have committed chargeable state offenses and to have that declaration bind federal courts.[333] Consequently, section 1961(1)(A) should be construed to bar a federal RICO prosecution of state crimes that could not be prosecuted in state court because of the expiration of the state statute of limitations or the operation of any other state limitation on prosecution.

D. Collection of an Unlawful Debt

A pattern of racketeering is not required to establish a violation of section 1962(c). An alternative is to prove that an enterprise was acquired or operated by means of collection of an unlawful debt. There are few reported cases in which this alternative was em-

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[333] Although Congress may have intended that state law offenses would be incorporated for definitional purposes, the fundamental question of what constitutes the state offense is not answered. The Government would argue that a state offense consists solely of those elements set out in the state statute describing the offense. This argument seems simplistic. The Government's test is an excessively formalistic one that focuses exclusively on what can be found within the four corners of the state criminal statute. An excellent example of the pitfalls of the Government's approach is the district court decision in United States v. Licavoli, No. 70-10-3 (N.D. Ohio June 3, 1982), in which the court rejected the defendant's claim that a substantive murder offense is not a separate predicate offense for purposes of RICO. The defense relied on an Ohio statute, OHIO REV. CODE ANN. § 2923.01(G) (Baldwin 1982), which provided that upon conviction of a substantive offense, a person cannot be convicted of conspiracy to commit that offense. The court rejected this argument and regarded the statute as merely a state procedural statute that is inapplicable to RICO prosecutions. United States v. Licavoli, No. 79-10-3, slip op. at 12-19 (N.D. Ohio June 3, 1982). *See, e.g.*, United States v. Forsythe, 560 F.2d 1127, 1134-35 & n.11 (3d Cir. 1977) (holding that state statute of limitations is inapplicable to RICO prosecutions based on state predicate offenses).

The *Licavoli* court's refusal to apply the statute is arguably inconsistent with the court's earlier holding that Ohio law governs the merging of two murder conspiracies into a single conspiracy predicate offense under RICO. The Ohio statutory provision concerning the multiple conspiracies, OHIO REV. CODE ANN. § 2923.01(F) (Baldwin 1982), is part of the same statutory section as the provision relating to merger of the substantive and conspiracy offenses. Both provisions seem to be directed at the general problem of multiple punishment in conspiracy cases. The *Licavoli* court failed to explain why the two subsections of the same Ohio statute are treated differently. While the court refused to apply OHIO REV. CODE ANN. § 2923.01(G) (Baldwin 1982), because it is not an element of the crime of "conspiracy to murder," United States v. Licavoli, No. 79-10-3, slip op. at 19 (N.D. Ohio June 3, 1982), the court failed to notice that OHIO REV. CODE ANN. § 2923.01(F) (Baldwin 1982), is also not an element of that offense. It would seem that either both subsections are inapplicable procedural rules or both are governing in a RICO prosecution.

ployed,[334] and none discusses its requirements in significant detail.

The term "collection of an unlawful debt" is defined in section 1961(6).[335] Essentially, the offense is committed: (1) when a person collects either a debt that is incurred in illegal gambling or by a usurious loan, and (2) when the debt is incurred in connection with either the "business of gambling" or the "business" of making usurious loans.

A significant difference between a pattern of racketeering and collection of unlawful debts is that there is no explicit requirement that the defendant perform two or more acts involving collections of unlawful debts. One collection may be sufficient while at least two acts of racketeering are required.

E. Relationship Between Illegal Activity and the Affairs of the Enterprise

Those who contend that a pattern need not consist of related acts assert that the only required connection between the acts is that the predicate crimes be related to the affairs of the enterprise.[336] One court has indicated, however, that no particular relationship is required between the racketeering acts and the enterprise's affairs,[337] and the remaining cases have produced a number of ambiguous and conflicting tests to describe this relationship. If the racketeering acts need not be related to each other and there is no requirement of a substantial nexus to the enterprise's affairs,

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[334] *See* United States v. Salinas, 564 F.2d 688 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); United States v. Dennis, 458 F. Supp. 197 (E.D. Mo. 1978), *aff'd on other grounds*, 625 F.2d 782 (8th Cir. 1980). The difficulties inherent in applying "collection of an unlawful debt" are discussed in Comment, *An Analysis of the Confusion*, *supra* note 3, at 453-56.

[335] 18 U.S.C. § 1961(6) (1976) defines "unlawful debt" as:

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

[336] *See* United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); Blakey & Gettings, *supra* note 4, at 1030.

[337] United States v. Stofsky, 409 F. Supp. 603, 613 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

the scope of RICO counts would be virtually unlimited.[338]

The Fourth Circuit had adopted the most stringent standard, requiring that the acts be related to the operation or management of the enterprise. In *United States v. Mandel*,[339] the panel opinion held that a transfer of a capital interest in a company to the Governor of Maryland did not satisfy this test.[340]

This "operation or management" test was rejected by the Second Circuit decision in *United States v. Scotto*.[341] In *Scotto*, the court conceded that section 1962(c) would not be violated by predicate acts unrelated to the enterprise or the defendant's position within it.[342] It rejected the defendant's proposed instructions, however, and set forth its own test, focusing on whether: (1) the defendant is enabled to commit the pattern solely by virtue of his position in the enterprise, or (2) the pattern is related to the enterprise's activities.[343]

The Fifth Circuit decision in *United States v. Martino*[344] has also rejected the Fourth Circuit standard, although the Fifth Circuit has supplied no coherent test for determining the relationship of the acts of the enterprise. In *Martino*, the defendant Lazzara was charged with participation in an illegal enterprise engaged in arson and insurance fraud. Lazzara filed an insurance claim on his

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[338] The following discussion focuses on whether an individual's acts relate to the affairs of some organized entity such as a corporation or union. However, an equally interesting problem arises in the converse situation where a corporation is alleged to have operated one of its employees through racketeering. This odd situation was considered by the district court in Parness v. Heinold Commodities, Inc., 548 F. Supp. 20 (N.D. Ill. 1982), which noted that such an allegation would "turn the English language on its head." *Id.* at 24. It would seem that this type of allegation would be barred by cases requiring that the enterprise be a distinct entity from the defendant. *See supra* note 233. For purposes of this analysis, an agent of the corporation should be regarded as part of the corporation. *Cf.* Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) (corporation cannot conspire with employees who "have been actively engaged in the management, direction and control" of the defendant corporation), *cert. denied*, 345 U.S. 925 (1953).

[339] 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

[340] *Id.* at 1375.

[341] 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

[342] *Id.* at 54.

[343] *Id.* The defendant requested instructions that the jury must find that the predicate acts "concerned or related to the operation or management of the enterprise" and that these acts affected the affairs of the union "in its essential functions." *Id.*

[344] 648 F.2d 367, 402 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

torched laundromat. Lazzara contended that he did not manage the arson operation but was merely an owner who procured the services of the arsonists. The court rejected this argument without setting forth any alternative test.[345]

In addition to the "operation or management" test, the Fourth Circuit initially required that the racketeering acts benefit the enterprise in some way. In *United States v. Webster*,[346] the panel reversed the RICO convictions where the defendants used the facilities of a tavern to aid narcotics trafficking, but did not advance or benefit the enterprise's affairs in committing that activity.[347] On rehearing, the court repudiated its "benefit" analysis, holding that the use of tavern telephone facilities and personnel to relay narcotics-related messages satisfied the requirement of RICO.[348] The test adopted on rehearing focused on the frequency of racketeering acts involving the use of the enterprise and its facilities.[349] The court noted that the "benefit" analysis could not be rationally applied to those who operated government enterprises—while it is clear that a government employee receiving bribes related to his official position is subject to RICO, the government agency, itself, obviously derives no benefit from the bribes.[350]

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[345] *Id.*

[346] 639 F.2d 174, 184 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981), *aff'd on reh'g*, 669 F.2d 185 (4th Cir. 1982).

[347] *Id.* at 185-86; *cf.* United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978) (operation of restaurant satisfies enterprise requirement when business is used for illegal, as well as legal, purposes), *cert. denied*, 441 U.S. 933 (1979).

[348] 669 F.2d 185, 187 (4th Cir. 1982).

[349] *Id.*

[350] *Id.* at 186. Note, *Racketeering RICO: Interpreted as Requiring Benefit to Flow from Illegal Activity to its Associated Business*, 12 SETON HALL L. REV. 116 (1981). The Fifth Circuit has also rejected the original *Webster* decision in United States v. Dozier, 672 F.2d 531, 543-44 (5th Cir. 1982). In *Dozier*, the defendant, a Louisiana Commissioner of Agriculture, was charged with soliciting and accepting bribes in return for favorable action on milk prices and the granting of licenses, charters, jobs, and loan guarantees by the Department of Agriculture. The court held that the defendant had operated the Department through racketeering since the defendant's official position in the Department "enabled him to hawk its services for personal gain." *Id.* at 544.

Dozier is a relatively clear case of operating a government agency through racketeering because the defendant promised to influence the agency's operating policies and actually did influence those policies. A far more difficult problem is raised by a government employee who procures bribes by promising to affect the agency's actions but who either had no power to affect government actions or no intent to do so. To illustrate the intent problem, assume that a prosecutor accepts money to fix cases in his office and has the power to do so but has no intent to carry out his promises. He is simply attempting to commit fraud. Unlike the

Webster illustrates two major problems courts will encounter in formulating a rule for determining when an enterprise's affairs are conducted through racketeering. One problem emphasized by the *Webster* rehearing decision is that a rule developed in the context of private business enterprises may be inapplicable to a government or union enterprise. The second problem emerging from *Webster* is one of designating the point of RICO liability in a spectrum of behavior. At one extreme are cases in which the defendant's acts are related to the enterprise's affairs solely by virtue of the fact that the defendant is an enterprise employee who commits his acts on the enterprise's premises. This category is exemplified by *United States v. Dennis*,[351] in which a RICO count was dismissed where an autoworker at a General Motors factory collected usurious loans from fellow employees on the factory premises and was charged with operating General Motors through racketeering.[352]

At the other end of the spectrum are cases in which there should be little question that the enterprise's affairs are connected to the

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defendant in *Dozier*, the prosecutor has not used his official position by actually exercising his discretionary power in the office.

A similar distinction of *Dozier* would apply where the government employee has no power to accomplish the actions he promises to perform. In contrast to *Dozier*, the employee in the latter situation is not able to "hawk its services" by his official position since that position gives him no power to carry out the promised actions. The only sense in which the employee's position facilitates the commission of the racketeering is that the position gives the deceptive impression that the employee can affect the agency's actions.

This difficult problem is illustrated by United States v. Cissell, *appeal docketed*, No. 81-5405 (6th Cir. Sept. 13, 1982). In *Cissell*, the defendant was a "special bailiff" accused of receiving bribes in return for fixing cases in a county circuit court and a county district court. The defendant was not an employee of either court but occasionally accepted appointments to serve papers. Although the defendant promised to influence the judges, he never contacted them.

To clarify the problems raised by *Cissell*, it is useful to isolate the two issues. In addition to the question of whether the acts were related to the enterprise, there is a question of whether the defendant in *Cissell* was associated with the enterprise. He was arguably an independent contractor with only a tenuous agency relationship with the enterprise.

If the defendant were an auto mechanic who falsely represented himself to be a court bailiff, he could not be regarded as being associated with the court. In this situation, the mechanic does not have even apparent authority to act for the court since the authority could arise only from the statements or conduct of the court. *See* Fargo Nat'l Bank v. Massey-Ferguson, Inc., 400 F.2d 223, 226 (8th Cir. 1968). The fact that the mechanic claims to have authority should not produce any relationship with the enterprise where the judicial enterprise does nothing to ratify or adopt the mechanic's acts.

[351] 458 F. Supp. 197 (E.D. Mo. 1978), *aff'd on other grounds*, 625 F.2d 782 (8th Cir. 1980).

[352] *Id.* at 199.

racketeering. This group is composed of cases in which either: (1) money from the racketeering is used to operate the enterprise,[353] or (2) the racketeering occurs on enterprise property as a part of a plan under which the enterprise is merely a "front" for the racketeering.[354] One difficulty with the first *Webster* decision's "benefit" test is that it does not account for the "front" situation. Where the enterprise's primary intended function is to serve as a "front" for racketeering, its affairs are obviously conducted through racketeering.

The enterprise in *Webster* was arguably a front since it was not a profit-making operation.[355] The rehearing decision did not rely on this theory, however, but emphasized the regular and extensive use of the enterprise's facilities and employees. This reasoning is somewhat murkier since it may be difficult to determine when the use of the enterprise's facilities is sufficiently frequent and extensive to constitute a substantial nexus to the enterprise's affairs. Frequency of use of enterprise property should not be a controlling factor; it is unlikely that the auto worker in *Dennis* could be charged with operating General Motors even had he collected unlawful debts every hour for five years. Although *Webster* is distinguishable from *Dennis* since *Webster* involved a high-echelon employee using not only enterprise property but also enterprise employees as well, other cases may be much closer to the *Dennis* situation and will be more difficult to resolve.

The fate of the "benefit" test of the first *Webster* opinion demonstrates the obstacles to formulating firm rules for determining whether racketeering acts are related to the enterprise's affairs. It seems inevitable that a case-by-case approach will be necessary to explore the gray areas between *Dennis* and *Webster*. A useful starting point for this analysis is to focus on whether the racketeer-

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[353] *See, e.g.*, United States v. Nerone, 563 F.2d 836, 851 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978). In *Nerone* the court suggested in dicta three ways in which a trailer park business could be operated through illegal gambling: (1) by investing gambling proceeds in business; (2) by channeling gambling revenues into business; and (3) by using gambling revenues to pay persons to perform services for the business. *Id.* at 851.

[354] *See, e.g.*, United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (§ 1962(c) conviction upheld where defendant owned all stock in a corporation operating a restaurant and conducted drug trafficking in a restaurant room in which corporate records were kept), *cert. denied*, 441 U.S. 933 (1979).

[355] *See* United States v. Webster, 639 F.2d 174, 184 (4th Cir.), *cert. denied*, 454 U.S. 857 (1981), *aff'd on reh'g*, 669 F.2d 185 (4th Cir. 1982).

ing acts bear some logical relationship to the intended function of the enterprise. In *Dennis* the auto worker's loan activities bore no relationship to the primary function of General Motors, producing cars. In contrast, *Webster* can be regarded as a case in which the defendant's frequent and extensive use of enterprise facilities and personnel, the lack of enterprise profits, and the defendant's control and ownership of the enterprise give rise to an inference that an intended function of the enterprise was that of serving as a front for racketeering.

This suggested analysis is merely a starting point since the relevant factors may differ with the type of enterprises. In union enterprise cases, for example, the intended function of the enterprise is not as important as distinguishing between trivial personal use of union property (e.g., joyriding in union planes)[356] and acts that involve a significant exercise of the union official's discretionary powers.[357]

F. Association with the Enterprise

Section 1962(c) requires that the defendant be "employed by or associated with" the enterprise. Read in combination with the requirement that the defendant conduct the affairs of the enterprise, it is arguable that some agency relationship must be established between the defendant and the enterprise. This interpretation accords with the analogous definition of "enterprise" in 29 U.S.C. §

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[356] *See, e.g.*, United States v. Gibson, 486 F. Supp. 1230, 1243-45 (S.D. Ohio 1980) (dismissing RICO charges against union official who took three joy rides in a union plane and had a girl friend on the union payroll who may not have spent her full workday attending to union business), *aff'd on other grounds*, 675 F.2d 825 (6th Cir. 1982); United States v. Ladmer, 429 F. Supp. 1231, 1243-45 (E.D.N.Y. 1977) (dismissing RICO civil action against defendants who charged the union for personal entertainment expenses at union conventions).

[357] *See, e.g.*, United States v. Scotto, 641 F.2d 47 (2d Cir. 1980) (affirming RICO conviction of union officials who received bribes and kickbacks from waterfront employers to influence the officials to reduce inflated workmen's compensation claims and to assist employers in procuring new business), *cert. denied*, 452 U.S. 961 (1981). *Scotto* can be interpreted as a rejection of the proposed distinction between a trivial personal use and significant exercise of discretion. It states that even acts playing a minor role in the usual operation of the enterprise can satisfy the requirements of RICO. *Id.* at 54. *Scotto* fails to acknowledge the obvious fact that some acts have some relationship to the enterprise but play too minor a role in operating an enterprise. For example, a union official engaged in real estate mail fraud should not be regarded as operating the union through fraud merely because he uses two of the union's postage stamps. Reading *Scotto* broadly, the official could be convicted of operating the union through racketeering.

203(r), which excludes from an enterprise any "related activities performed for such enterprise by an independent contractor."[358]

The courts have apparently rejected this construction and have consistently held that a person can operate an enterprise even if he is not on the legitimate payroll of the enterprise.[359] For example, in *United States v. Forsythe*,[360] the court held that a magistrate conducted the affairs of a bail bond agency where he received bribes from the agency.

An intriguing question relating to the "association" issue is whether an enterprise includes the activities of undercover agents who feign membership in the enterprise as part of a "sting operation." This problem is illustrated by *United States v. Bagnariol*,[361] involving an FBI operation apparently directed against gambling and political corruption in Vancouver, Washington. The FBI established a fictitious California corporation, which was ostensibly organized to conduct legal gambling if gambling were legalized in Washington. The agent made contact with Gallagher, a lobbyist for legalized gambling, and retained him to pay money to various state legislators to promote legalized state gambling.

The RICO enterprise in this case was an illegal enterprise consisting of the lobbyist and two legislators that was organized to liberalize Washington gambling laws. The defendants contended that the Government failed to establish an enterprise. This claim seems to have been based in part on the fact that the scheme did not get past the initial planning and bribery stage. None of the defendants actually did anything to liberalize Washington gambling laws. The court rejected this argument by holding that the Government had established "the existence of an ongoing organization functioning

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[358] 29 U.S.C. § 203(r) (1976). At a minimum, outsiders should be regarded as part of an enterprise only when they intend to facilitate the illegal activities. *See* United States v. Gibson Specialty Co., 507 F.2d 446, 449-50 & n.8 (9th Cir. 1974) ("intent to facilitate a criminal venture" is part of the Travel Act). In the absence of a mens rea element, outsiders are subject to the absurd charge that they operated an enterprise through a racketeering pattern without knowing the enterprise they were operating or the pattern they were committing. *See infra* note 384.

[359] *See* United States v. Starnes, 644 F.2d 673, 679 (7th Cir.) (defendant participated in affairs of enterprise where he committed arson on the enterprise headquarters as part of scheme to defraud insurer), *cert. denied*, 454 U.S. 826 (1981); United States v. Bright, 630 F.2d 804, 830 (5th Cir. 1980) (sheriff participated in affairs of illegal enterprise where he received kickbacks and bribes from enterprise members).

[360] 560 F.2d 1127, 1136 (3d Cir. 1977) (alternative holding).

[361] 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982).

as a continuing unit."[362]

The *Bagnariol* opinion does not specify the factors that established continuity. Consequently, the court does not discuss the problem of whether undercover agents can be considered members of the enterprise and manufacture the continuity and stability of the enterprise by their own actions. By analogy to conspiracy cases, it is arguable that a government agent should not be regarded as a member of the enterprise for purposes of determining continuity and stability.[363]

G. *Interstate Commerce Element*

Although section 1962(c) requires proof of an impact on interstate commerce, this element is of little practical significance in RICO litigation. One reason is that the racketeering act need not affect interstate commerce; only the activities of the enterprise must affect interstate commerce.[364] On appellate review, a minimal impact on interstate commerce is sufficient to sustain a conviction.[365]

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[362] *Id.* at 891. Presumably, this continuity requirement was derived from the Supreme Court decision in United States v. Turkette, 452 U.S. 576, 583 (1981). *See supra* text accompanying note 142.

[363] *See, e.g.*, Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965).

[364] United States v. Allen, 656 F.2d 964, 964 (4th Cir. 1981); United States v. Altomare, 625 F.2d 5, 7-8 (4th Cir. 1980); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Boffa, 513 F. Supp. 444, 471 (D. Del. 1980); United States v. Vignola, 464 F. Supp. 1091, 1097-1100 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980); *see* United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981) (the "effect on interstate commerce is sufficiently alleged" where the defendants' scheme involved the use of the postal service), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983). These holdings have been condemned as warranting an unconstitutional expansion of congressional power under the commerce clause. *See* Comment, *supra* note 68, at 275.

[365] *See* United States v. Allen, 656 F.2d 964 (4th Cir. 1981) (commerce impact established by proof that bookmaking supplies originated outside of Maryland); United States v. Barton, 647 F.2d 224, 233 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981); *see also* United States v. Nerone, 563 F.2d 836, 851, 854-55 (7th Cir. 1977) (Commerce-impact test satisfied where corporate enterprise provided rental space for trailers manufactured out of state. The Government alleged an additional RICO count in which the alleged enterprise was an illegal gambling scheme that operated on the premises of the mobile home corporation. The Government's failure to establish even "slight evidence" of effect on interstate commerce required reversal even though the mobile home corporation itself affected commerce.), *cert. denied*, 435 U.S. 951 (1978). Proof of the interstate commerce element has been found to be sufficient in other cases. *See* United States v. DiFrancesco, 604 F.2d 769, 775 (2d Cir. 1979)

The Ninth Circuit has rejected a challenge to an instruction on the RICO interstate commerce element that permitted the jury to consider two predicate offenses as acts satisfying that element. In *United States v. Bagnariol*,[366] the defense claimed that since the enterprise's activities and not the predicate acts must affect commerce, the commerce element can be satisfied only by acts that are not predicate offenses.[367] The court dismissed this claim by observing that in illegal enterprise cases the same acts that constitute the enterprise's activities are also the predicate acts.[368] Although the Supreme Court decision in *Turkette* seems to permit this coalescence of proof between the facts establishing the pattern and those establishing the enterprise,[369] the Court also held that the pattern and the enterprise are separate elements.[370] *Bagnariol* distinguished legitimate enterprise cases by noting that in these cases "the predicate acts were not considered for jurisdictional purposes because they were unrelated to the activities of the enterprise."[371]

This distinction is obviously specious because the predicate offenses must always be related to the enterprise's affairs. *Bagnariol* implies that in legitimate enterprise cases the predicate acts cannot be the same as the jurisdictional acts. The distinction between the predicate acts and the enterprise's activities is elusive. For example, assume that a legitimate enterprise's legal activities do not affect interstate commerce but that the predicate acts involve the use of interstate commerce. If the predicate acts occur in the conduct of the enterprise, it is somewhat absurd to assert, as does *Bagnariol*, that the enterprise has not affected commerce. For purposes of the interstate commerce element, there is no distinction between the predicate offenses and the activities of the enterprise.

(impact of arson and mail fraud established by payment of insurance claims by companies in other states), *rev'd on other grounds*, 449 U.S. 117 (1980); United States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977) (New York garbage collection enterprise obtained equipment from Texas and arranged to dump garbage in New Jersey), *cert. denied*, 435 U.S. 952 (1978); United States v. Parness, 503 F.2d 430, 439 n.11 (2d Cir. 1974) (requisite effect of foreign enterprise shown where it was owned by American citizens, financed by American banks, had American creditors, and primarily served American tourists), *cert. denied*, 419 U.S. 1105 (1975).

[366] 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982).

[367] *Id.* at 893.

[368] *Id.*

[369] *See* United States v. Turkette, 452 U.S. 576, 583 (1981).

[370] *Id.*

[371] *Bagnariol*, 665 F.2d at 893.

1. Artificial Creation of Federal Jurisdiction. The Government's increasing use of sting operations like ABSCAM and BRILAB has produced a corresponding increase in defense arguments that the Government manufactured federal jurisdiction for a RICO count. The ABSCAM operation produced the most extensive published discussion on this issue in *United States v. Jannotti*,[372] where the defendant was a Philadelphia city councilman who allegedly accepted bribes from FBI agents. The agents purported to be representatives of wealthy Arab investors contemplating construction of a hotel complex in Philadelphia. The district court held that entrapment and artificial federalization of state crimes had occurred.[373] The Government created a RICO pattern of racketeering by manipulating events to ensure that two acts of bribery occurred.[374]

A recent en banc decision of the Third Circuit reversed the trial court decision in *Jannotti*. The en banc decision indicated that the defense of artificial creation of federal jurisdiction applies only where the Government acts for the sole purpose of creating jurisdiction where there would otherwise be no federal interest.[375] The court found that a federal interest existed in that the defendants agreed to commit acts of bribery that would have affected interstate commerce.[376]

The Ninth Circuit decision in *United States v. Bagnariol*[377] considered the applicability of the *Jannotti* district court opinion

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[372] 501 F. Supp. 1182 (E.D. Pa. 1980), *rev'd*, 673 F.2d 578 (8th Cir.), *cert. denied*, 102 S. Ct. 2906 (1982).

[373] *Id.* at 1204-05.

[374] *Id.* at 1204. The district court in *Jannotti* relied on United States v. Archer, 486 F.2d 670 (2d Cir. 1973), in which the Government intentionally made phone calls to satisfy the required interstate commerce element. The *Archer* court reversed the conviction and condemned the Government's conduct as having created a "federally provoked incident of local corruption." *Id.* at 683.

[375] United States v. Jannotti, 673 F.2d 578, 610-11 (8th Cir.) (en banc), *cert. denied*, 102 S. Ct. 2906 (1982). Strangely, there was no published panel opinion in *Jannotti*. One possible inference is that there was originally a two-judge majority panel opinion affirming the district court.

[376] *Id.* at 594, 611. Judge Aldisert's persuasive dissent in *Jannotti* sharply criticized the majority's holding and the FBI's tactics in general. He characterized the FBI's conduct as "revolting," *id.* at 612 (Aldisert, J., dissenting), and as an operation emanating "a fetid odor whose putrescence threatens to spoil basic concepts of fairness that [he] hold[s] dear." *Id.* at 613. Judge Aldisert criticized the majority's finding of a "purely hypothetical" commerce effect as a basis for justifying the federal creation of jurisdiction. *Id.* at 626.

[377] 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982).

without the benefit of the subsequent en banc decision. In *Bagnariol*, the Government created a bogus corporation that engaged in bribery of public officials to promote legalized gambling. The Ninth Circuit rejected the defendant's claims of entrapment and artificial creation of jurisdiction and distinguished the *Jannotti* district court decision as a case of "aggressive solicitation."[378] The court contrasted that case with *Bagnariol* by noting that once the sham corporation was formed by the Government the defendants joined the scheme without "further inducement by the government."[379] Although the interstate element for a Travel Act violation was an FBI agent's phone call from Oregon to the defendant in Washington, the court concluded that this was not an impermissible creation of jurisdiction since the defendant had caused the agent to make the phone call by leaving a message on the agent's answering device.

A similar fact pattern was involved in a BRILAB case, *United States v. Marcello*,[380] where the defendants were allegedly in the business of bribing public officials and labor unions to obtain contracts to insure unions or public agencies. The Government established a sham California insurance business, and FBI agents posing as representatives of that firm allegedly paid the defendants to obtain insurance contracts for the firm. Like Weinberg in the ABSCAM trial, Hauser, the star witness in the BRILAB trial, was shown to be a convicted swindler who would do anything to obtain money and avoid prison. Both men manipulated conversations to induce their targets to make inculpatory remarks. One of the more egregious examples of Government misconduct in *Marcello* involved the retyping and mailing of a letter to Hauser that formed the basis for the mail fraud charge. Hauser asked Marcello's secretary to retype a proposal. Hauser persisted in his request despite the fact that the secretary informed Hauser that the trivial spelling error in the letter could be corrected without retyping. Hauser resorted to elaborate praise and flattery to induce the secretary to

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[378] *Id.* at 883.

[379] *Id.* at 882. The Ninth Circuit later followed the reasoning of *Bagnariol* in United States v. Brooklier, 685 F.2d 1208, 1217 (9th Cir. 1982), in which the court found no creation of federal jurisdiction where both the defendants and the Government agents engaged in interstate activities.

[380] 508 F. Supp. 586 (E.D. La. 1981).

retype the letter and mail it.[381] This incident illustrates the ease with which Government agents can create a RICO offense by inducing unsuspecting targets to mail two letters.

Among various arguments for dismissing the RICO indictment, the defense in *Marcello* raised three closely related contentions: (1) the Government had engaged in outrageous misconduct by creating and maintaining criminal activity; (2) the California business was a sham designed to create artificially an impact on interstate commerce; and (3) the fictitious California firm could not affect commerce because it was incapable of actually conducting business. The court held that these were valid defenses,[382] but that the hearing should be delayed until after the trial.[383] The BRILAB trial concluded with the acquittal of two defendants on all counts and the conviction of Marcello on the RICO count and his acquittal on eleven other counts.

H. Mens Rea

In view of the importance of mens rea in American jurisprudence, it is astonishing that the published opinions on RICO include virtually no extended discussion of whether RICO impliedly

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[381] *Defense rests in four-month Brilab case*, Times-Picayune (New Orleans), July 25, 1981, § 1, at 17, col. 5.

[382] 508 F. Supp. at 590-92.

[383] *Id.* at 592-95; *see also* United States v. Clayton, No. 80-74 (S.D. Tex. Oct. 22, 1980) (a Texas BRILAB case in which the speaker of the Texas legislature and two other defendants were charged in a RICO indictment with accepting bribes from the Government's star witness, the informer Joseph Hauser). The Government in *Clayton* alleged that the speaker accepted bribes from Hauser in return for assistance in awarding a state contract to Hauser's purported insurance business. In reality, the evidence merely showed that the defendants were accepting what they thought were political contributions that are exempt from the Texas bribery statute. One reason for this belief was that the insurance transaction was favorable to the State of Texas involving lower prices and greater coverage. The state would have been justified in offering Hauser the contract regardless of the alleged bribes. More importantly, in Hauser's conversations with the defendants, Hauser referred to the payments as political contributions. Not surprisingly, the defendants took Hauser at his word and believed they were legitimate contributions. During his conversation with Hauser, the speaker stated that the awarding of the state contract was an issue separate from the political contributions. Nevertheless, Hauser persisted in offering money for the contract and interrupted any statements by the speaker indicating an honest motive. The three defendants were acquitted on all 19 charges. Aside from the questionable character of the prosecution's evidence, a major reason for the Goverment's failure was the quality and training of the law enforcement personnel the Goverment utilized in this undercover operation. The evidence at trial established that FBI agents controlling the investigation had failed the bar and had never read the Texas bribery statute involved in the prosecution.

requires proof of intent. Although none of the section 1962 subsections refers to any intent element, the courts are empowered to read such an element into the statute. The few opinions discussing this issue in the RICO context are sharply split as to the existence of any mens rea element.[364]

This problem has been considered by the American Bar Association, which recommends that section 1962(b) and (c) be amended to include a mens rea element requiring that the accused knowingly commit the proscribed activities.[365] Strangely, there is no explanation of why the report did not recommend a mens rea element for section 1962(a) or of any relevant distinction between section 1962(a) and the other section 1962 offenses. The commentary noted that a mens rea requirement was appropriate in view of the severe RICO penalties[366]—these severe penalties, however, would appear to apply to *all* section 1962 offenses.

VI. Section 1962(d)—RICO Conspiracy

Title IX grafts a conspiracy offense onto section 1962. That offense, section 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."[367] When the Government alleges a con-

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[364] *Compare* United States v. Scotto, 641 F.2d 47, 55 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir. 1980); United States v. Boffa, 513 F. Supp. 444, 464 (D. Del. 1980) (holding that RICO requires no proof of intent apart from any intent elements of the predicate offense); *with* United States v. Bledsoe, 674 F.2d 647, 661 (8th Cir. 1982); United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983); *and* United States v. Palmeri, 630 F.2d 192, 203-04 (3d Cir. 1980) (stating that defendant must be "voluntarily" connected to the pattern and that the activities were illegal because of the actor's intent), *cert. denied*, 450 U.S. 967 (1981).

The mens rea requirement is particularly important in cases where a nonemployee of an enterprise is charged with operating that enterprise. *See supra* text accompanying note 359. For example, assume that a business enterprise hires an arsonist to burn a structure of a competitor but the arsonist is not told the identity of the business that hired him. Under these circumstances, it is difficult to contend that the arsonist operated the enterprise where he did not know the identity of the enterprise. *Cf.* United States v. Starnes, 644 F.2d 673, 679 (7th Cir.) (arsonist operated enterprise where he burned the enterprise's building with knowledge that arson would affect the conduct of the enterprise's business), *cert. denied*, 454 U.S. 826 (1981).

[365] *RICO Report*, *supra* note 7, at 9-10.

[366] *Id.* at 10.

[367] 18 U.S.C. § 1962(d) (1976).

spiracy to violate subsection (c), it must show that an individual agreed to participate, directly or indirectly, in the affairs of an enterprise through the commission of a pattern of racketeering activity.[388]

A. *Effect of RICO on Traditional Conspiracy Principles*

1. The Elliott *Decision.* Although section 1962(d) appears to be a simple conspiracy provision, it is extremely difficult to apply in practice. The major problem posed by RICO is that upon creating a new form of criminal group known as the illegal enterprise, it could be contended that the courts have no aid in either the statute or the legislative history in determining whether an enterprise is broader or narrower than a traditional conspiracy. Without a clear resolution of this problem, the courts have no means by which to determine the scope of a conspiracy to join an enterprise.

The first opinion to discuss this issue, *United States v. Elliott*,[389] held that an enterprise is broader in scope than a conspiracy, and consequently a section 1962(d) conspiracy is broader than traditional forms of conspiracy. *Elliott* held that unlike traditional conspiracy law set out in *Kotteakos v. United States*,[390] which requires that the defendants' acts be united by a unified scheme, RICO authorizes a section 1962(d) prosecution of a multifaceted, diversified conspiracy. Commentators have widely criticized *Elliott*'s implication that a section 1962(d) count could include all acts occurring in the conduct of the same enterprise even if there were no other relationship.[391]

Elliott has produced conflicting reactions both inside and outside of the Fifth Circuit. The *Elliott* conspiracy doctrine has been rejected by the Eighth Circuit and a Third Circuit district court. In *United States v. Anderson*,[392] the Eighth Circuit sharply

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[388] *See* United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979); United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

[389] 571 F.2d 880, 902-03 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979). The court in *Elliott* found a single RICO conspiracy where six codefendants engaged in over 20 diverse acts, which included arson, theft, murder, and selling illegal drugs. Only one defendant was involved in all of these acts. Most defendants participated in only a few of these transactions, without knowledge of the other activities. *Id.* at 885-95.

[390] 328 U.S. 750 (1946).

[391] *See infra* notes 433-40.

[392] 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

criticized the rationale of *Elliott* by commenting that it found "nothing in the statutory scheme to suggest that Congress intended to discard the traditional legal precepts applied to concerted criminal activity."[393] In *United States v. Boffa*,[394] Judge Latchum criticized *Elliott* in the context of a defendant's claim that the RICO counts charged multiple conspiracies. He observed that RICO was not intended as a major modification of conspiracy law and that section 1962(d) was subject to the *Kotteakos* multiple-conspiracy doctrine.[395] *Boffa* held that section 1962(d) requires some nexus among the defendants that indicates a unified agreement.[396]

The Seventh Circuit seems to have embraced the *Elliott* conspiracy doctrine and holds that a RICO count can include unrelated racketeering acts occurring in the conduct of the same enterprise. In *United States v. Lee Stoller Enterprises*,[397] the RICO count alleged the operation of a sheriff's office through two unrelated schemes. One scheme involved the taking of payoffs for prostitution and towing activities while another scheme involved bribery in the operation of dances sponsored by the Madison County Deputy Sheriff's Association. Defendant Stoller was involved only in the first scheme. Adopting the *Elliott* conspiracy doctrine, the court held that these facts established a single RICO offense since the unrelated acts furthered the same enterprise.[398]

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[393] *Id.* at 1369. *But see* United States v. Lemm, 680 F.2d 1193, 1202 (8th Cir. 1982) (refusing to decide validity of *Elliott*).

[394] 513 F. Supp. 444 (D. Del. 1980).

[395] *Id.* at 474.

[396] *Id.* In a significant footnote, *Boffa* concludes that *Kotteakos* applies to the substantive § 1962(c) count as well as the § 1962(d) count. *Id.* at 475 n.30. It would follow that there must be a nexus among the defendants in a § 1962(c) charge. This may not be in accord with the court's earlier statement that the predicate acts need not be related to each other if each act is related to the conduct of the enterprise's affairs. *Id.* at 463 n.16. If every act in the conduct of the same enterprise can be included in a single RICO count, it is unclear why there should be any nexus among the defendants. Conceivably, the *Boffa* court assumed that a § 1962(c) offense can consist of unrelated acts but that Rule 8(b) precludes joinder of defendants involved in those acts. *See* Tarlow, *supra* note 1, at 273.

[397] 652 F.2d 1313 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981).

[398] *See id.* at 1319. The *Lee Stoller* opinion is surprising since the Fifth Circuit refused to construe *Elliott* as broadly as the Seventh Circuit did. *See, e.g.*, United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981) (limiting the application of *Elliott*). Under *Lee Stoller*, every act committed by an employee of a large corporation or public agency is part of the same RICO offense. 652 F.2d at 1318. This result was rejected by the Fifth Circuit. *See* cases discussed *infra* text accompanying notes 405-21.

In addition, the Second Circuit has supported *Elliott*'s assertion that section 1962(d) is exempt from traditional conspiracy principles.[399] One Ninth Circuit opinion declined to consider the validity of *Elliott* although it refused to apply *Elliott*,[400] and a Sixth Circuit opinion has applied *Kotteakos* principles without considering *Elliott*.[401] The Fourth Circuit has adopted a compromise view, holding that an enterprise is less difficult to prove than a conspiracy but that both entities must involve a common purpose.[402]

Judges Fairchild, Swygert, and Cudahy filed separate dissenting opinions in *Lee Stoller*, all of which sharply criticized the *Elliott* holding. 652 F.2d at 1322-23 (Fairchild, Swygert, Cudahy, J.J., dissenting). Interestingly, without the benefit of Fifth Circuit cases that have restricted *Elliott*, Judge Cudahy accurately noted that the *Lee Stoller* decision exceeds even the limits established on RICO conspiracy by *Elliott*. *Id.* at 1323 (Cudahy, J., dissenting). Judge Fairchild found the majority decision objectionable because it subjected some defendants to "being tried on a charge of a single conspiracy which embraced within the 'pattern' a great many corrupt acts quite different from and more dramatic, colorful, and obviously culpable than the nondisclosure in which they may have been involved." *Id.* at 1322 (Fairchild, J., dissenting).

The recent Seventh Circuit decision in United States v. Melton, 689 F.2d 679, 684-85 (7th Cir. 1982), tentatively implied that *Lee Stoller* was not intended as an unreserved endorsement of *Elliott*. The *Melton* court indicated that *Lee Stoller* is limited to severance questions and is not directly controlling in determining sufficiency of the evidence. *Id.* at 685.

[399] *See* United States v. Barton, 647 F.2d 224, 237 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981); United States v. Loften, 518 F. Supp. 839, 853 (S.D.N.Y. 1981). *Barton* discussed *Elliott* in the course of rejecting a defendant's objection to consecutive sentences on conspiracy convictions under § 371 and § 1962(d). In distinguishing § 371 from § 1962(d), *Barton* seemed to endorse *Elliott* by indicating that § 1962(d) would apply to diverse, unrelated activities:

> Finally, in some instances a prosecution under § 371 for conspiracy to violate § 1962 might be improper because the goals of the conspiracy were too farflung. *See* United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S. Ct. 349, 58 L. Ed. 2d 344 (1978), upholding use of § 1962(d) to reach a "myriopod criminal network, loosely connected but connected nonetheless," *id.* at 899, that involved arson, theft, fencing goods stolen from interstate commerce, murder, and narcotics activity, while observing that such a prosecution probably would not have been possible under § 371 because it linked "highly diverse crimes by apparently unrelated individuals," *id.* at 902.

Barton, 647 F.2d at 237.

[400] United States v. Zemek, 634 F.2d 1159, 1169 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). The court referred to the conspiracy objective in *Elliott* as "ill-defined." *Id.* at 1169 n.12.

[401] United States v. Sutton, 642 F.2d 1001, 1017-36 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981). The court expressly accepted the principles espoused in *Kotteakos*. *Id.* at 1021. The panel opinion in *Sutton* sharply criticized *Elliott*: "We find nothing in the legislative history to support this view." United States v. Sutton, 605 F.2d 260, 271 n.16 (6th Cir. 1979).

[402] United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1029 (1982).

2. *The Fifth Circuit Limits* Elliott. It is ironic that the Seventh and Second Circuits have adopted a construction of the *Elliott* conspiracy doctrine that is broader than the Fifth Circuit interpretation. The Fifth Circuit decision in *United States v. Sutherland*[403] apparently limits the *Elliott* conspiracy doctrine by holding that multiple conspiracies cannot be alleged in a single section 1962(d) count merely because they involve the same enterprise. The defendants were charged with operating the El Paso Municipal Court through bribery. The main defendant, Sutherland, was a Municipal Court judge who received bribes from Maynard and Walker to fix traffic tickets. The Government acknowledged that this was a wheel conspiracy with the judge at the hub. The Government contended that it was not required to establish that Maynard and Walker knew of each other's activities.[404]

The court held that the case involved a nonprejudicial variance and thereby rejected the Government's argument that under *Elliott* the common enterprise unites otherwise unrelated acts.[405] Under *Sutherland*'s construction of *Elliott*, the activities are united not by a common enterprise but by "agreement on an overall objective."[406] The defendants could be charged in a single RICO count only if the nature of the conspiracy were such that they must have known that others were involved in the same enterprise.[407]

In *Sutherland*, there were multiple conspiracies because there was no proof either that Walker and Maynard agreed with each other, or that the nature of their agreement with Sutherland was such that they would necessarily know that others were conspiring to commit racketeering offenses in the conduct of the enterprise. The variance was found to be nonprejudicial because of the small number of conspiracies and defendants and the overwhelming evidence against each defendant that would have been admissible

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[403] 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

[404] *Id.* at 1186.

[405] *Id.* at 1189 & n.12.

[406] *Id.* at 1192-93.

[407] *Id.* at 1193-94. The Justice Department has expressed its assent to the *Sutherland* opinion. *Justice Department to Shift Emphasis from White Collar Area, Giuliani Says*, 30 CRIM. L. REP. (BNA) 2238, 2239 (1981). The Justice Department has acknowledged that *Sutherland*'s restriction of *Elliott* "'will dramatically change' the way we review evidence in approving or disapproving RICO prosecutions." *Id.*

even at separate trials.[408]

The *Sutherland* holding was preceded by three earlier Fifth Circuit decisions limiting *Elliott*. The first of these decisions, *United States v. Bright*,[409] indicated that *Elliott* is inapplicable to conspiracies that have a circumscribed outline. Under *Bright*, where a section 1962(d) conspiracy has a circumscribed outline, a defendant is not liable for acts outside of that outline.[410] In contrast, where the conspiracy has no definite outline, as in *Elliott*, a defendant is liable for virtually all activities of the enterprise.[411] Applying this distinction, *Bright* held that a defendant who bribed a sheriff on behalf of his bail bond company was not a member of a conspiracy consisting of sheriffs and persons committing bribery on behalf of massage parlors and "honky-tonks."[412] The court believed that Bright was a member of a more limited RICO conspiracy, consisting of himself and the sheriff he bribed.[413]

A subsequent Fifth Circuit decision, *United States v. Martino*,[414] modified *Elliott*'s apparent elimination of any meaningful requirement that the defendant know of the enterprise's activities. *Martino* indicated that for purposes of both section 1962(c) and (d) the defendant must know "something" of the enterprise activities but he need not be aware of all of the activities.[415] In addition,

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[408] *Sutherland*, 656 F.2d 1181, 1195-97 (5th Cir. 1981).

[409] 630 F.2d 804, 834 & n.52 (5th Cir. 1980).

[410] *Id.* at 834 n.52.

[411] The court observed:

> However, we are also cognizant of the fact that the RICO conspiracy crime still requires an agreement. The converse of the proposition that a defendant who embarks on a criminal venture of indefinite outline takes his chances as to its contents and membership, *United States v. Elliott*, 571 F.2d at 904, is that one who embarks on a criminal venture with a circumscribed outline is not responsible for acts of his co-conspirator which are beyond the goals as the defendant understands them. *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944).

Id. at 834 n.52.

This dichotomy is ostensibly absurd. In essence, the *Bright* rule is that the more unrelated the conspiracy's activities, the more acts the defendant is liable for. Since a conspiracy consisting of unrelated activities would probably be regarded as having an indefinite outline, a defendant would be liable for all of the acts. Conversely, a conspiracy consisting of related acts is deemed to have a circumscribed outline, and the defendant is not liable for acts outside the outline.

[412] *Id.* at 834.

[413] *Id.*

[414] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[415] The court concluded:

Martino emphasized the *Elliott* requirement that the defendant agree to commit at least two racketeering acts.[416] In practical terms, the agreement to commit two acts can be established only by proof of the actual commission of the two acts.[417]

The third precursor of *Sutherland* was *United States v. Stratton*,[418] which indicated that a RICO offense cannot include every offense committed in the conduct of an enterprise. In *Stratton*, the defendants were accused of operating a state court through bribery. The defendants claimed that the enterprise, Florida's Third Judicial Circuit, was too broad since all unrelated activities in the operation of the same enterprise would theoretically be a single chargeable RICO offense.[419] The court conceded that in some cases this argument would be valid but held that it was inapplicable in *Stratton* where there was a single overall scheme united by one judge's use of the court to make money.[420] *Stratton* appears to recognize the absurdity of declaring that a RICO offense consists of every racketeering act occurring in the conduct of the same public

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> Even with a tightly woven net however, a fish of whatever size, cannot be trapped unless he is "employed by or associated with" the enterprise. In other words, the fish must first be swimming in the stream where the net has been placed before we reach the question of size. The indications from *Elliott* that only minimal association is necessary have caused fine lines to be drawn in determining those who are guilty of violating RICO and those who are not. A defendant must know *something* about his co-defendants' related activities which make up the enterprise, but it is not necessary that he be aware of *all* racketeering activities of each of his partners in the enterprise.

Id. at 394 (emphasis in original).

[416] In reversing the conviction of defendant Chase on the ground that he committed only one predicate act, the *Martino* court observed:

> One who does not agree to do that vital element—participate in the enterprise through the commission of at least two predicate acts—cannot be convicted on a RICO conspiracy charge. In effect there are two agreements contained in a RICO conspiracy charge: an agreement to participate and an agreement to commit at least two proscribed acts.

Id. at 396.

[417] In *Martino*, the defendants contended that double jeopardy precluded multiple punishment of the § 1962(c) and (d) counts. *Id.* at 382. They noted that the practical impact of *Elliott* was to establish a § 1962(d) agreement to commit the two acts. The defendants argued that in practical terms, *Elliott* made proof of § 1962(c) and (d) counts virtually identical. The court implicitly conceded that *Elliott* requires the actual commission of two acts to infer an agreement to commit two acts. The court, however, held that the *Blockburger* test focused only on the elements of the crimes and not the actual evidence introduced. *Id.* at 382-83.

[418] 649 F.2d 1066, 1074 (5th Cir. 1981).

[419] *Id.* at 1073 n.8.

[420] *Id.* at 1073.

agency. It hypothesized that if the Fifth Circuit were an enterprise, a single RICO offense would not include unrelated bribery schemes in El Paso and Fort Lauderdale.[421]

Although *Sutherland* and the earlier cases manifested a Fifth Circuit trend toward limiting *Elliott*, one panel seems to have wandered off the track. In *United States v. Welch*,[422] the court approved an indictment alleging that the defendants were operating a sheriff's office through unrelated racketeering acts. In this case, defendant Welch was sheriff of a Texas county, defendant Cochran was Welch's chief deputy, and defendant Satterwhite was a county commissioner. From 1973 to 1978, Welch and Cochran allegedly protected a gambling operation run by Cantrell while Satterwhite aided the operation by servicing a private road and building a parking lot. This was charged as a violation of 18 U.S.C. § 1511, which proscribes conspiracy to obstruct state criminal laws with the intent to facilitate an illegal gambling business. The defendants were also charged with protecting gambling at the county fair in 1977 and 1978. Welch and defendant Cashell, a justice of the peace, received payments in exchange for protecting the fairground gambling. Defendants Welch and Cochran were charged with attempting and conspiring to kill an informant to conceal the fact that the informant had killed a prostitute while working for the sheriff's office.

The defendants claimed that Rule 8(b) misjoinder had occurred because the conspiracy to protect Cantrell's gambling operation and the conspiracy to protect fairground gambling were not part of the same series of transactions.[423] The Government conceded that in the absence of a RICO count, the two conspiracies could not be joined. The court held that there was no misjoinder because under *Elliott* the enterprise united the offenses.[424] It regarded *Elliott* as holding that even diverse and unrelated acts can be joined by a

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[421] *Id.* at 1073 n.8. The court referred to the Fifth Circuit as it existed before the creation of the Eleventh Circuit.

[422] 656 F.2d 1039, 1055-70 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1767 (1982). *Welch* was decided four days before the *Sutherland* opinion was issued. If the two cases are in conflict, it would seem that *Welch* is no longer controlling in view of the Government's acquiescence to *Sutherland*. *See supra* note 407.

[423] *Id.* at 1048-49.

[424] *Id.* at 1052.

common enterprise.[425] This reasoning apparently conflicts with the *Sutherland* holding that the existence of a common enterprise cannot be the sole relating factor for a section 1962(d) offense.

3. Analysis of Elliott.

a. The logical framework of Elliott. The original *Elliott* doctrine has been sharply criticized by commentators.[426] The most frequently expressed criticism is that it undermines the fundamental concept of conspiracy intent and agreement. Under *Elliott*, a defendant can intend to join a section 1962(d) conspiracy, even though he does not know the purposes, activities, and scope of the conspiracy.[427] Despite this criticism, the *Elliott* doctrine survives although in a somewhat modified form.

Elliott may continue to survive because it is based on an unchallengable but erroneous premise. *Elliott* postulates that Congress intended to permit RICO prosecutions of illegal enterprises. After *Turkette*, this assumption cannot be challenged even though it is demonstrably wrong.[428] If it is assumed, as *Elliott* does, that Congress entertained the intent to create the concept of the illegal enterprise, two successive corollaries will be drawn: (1) an illegal en-

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[425] *Id.* at 1053.

[426] *See* Bradley, *supra* note 3, at 878-79; Marcus, *Co-Conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective*, 7 AM. J. CRIM. L. 287, 319-21 (1979); Tarlow, *Defense of a Federal Conspiracy Prosecution*, 4 NAT'L J. CRIM. DEF. 183, 231-33 (1978); Note, *The Enterprise Element in RICO*, 49 GEO. WASH. L. REV. 123, 139 (1980).

[427] Marcus, *supra* note 426, at 320; Tarlow, *supra* note 426, at 232-33.

[428] There is virtually no statement in the congressional record indicating the possible application of RICO to illegal enterprises. *See* United States v. Anderson, 626 F.2d 1358, 1371 & n.20 (8th Cir.) (asserting an apparent unanimous congressional belief that RICO would apply only to infiltration of legitimate businesses), *cert. denied*, 450 U.S. 912 (1980). Conversely, there is abundant evidence in the legislative record that RICO is directed only at infiltration of legitimate business. S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969) (the Report of the Senate Judiciary Committee); 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan) (remarks of the sponsor of RICO: "Unless an individual . . . uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under Title IX"). The remarks of various congressmen during debate also support this position. *See, e.g.*, 116 CONG. REC. 602-03 (1970) (remarks by Sen. Yarborough) (emphasizing RICO's aim of halting racketeering corruption of legitimate businesses); *id.* at 35,193 (remarks by Rep. Poff); *id.* at 35,201 (remarks of Rep. McCullock). The Congressional Statement of Findings and Purpose states that the money and power of organized crime "are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes." Pub. L. No. 91-452, 84 Stat. 922 (1970).

terprise is an entity that is different from and less difficult to prove than a conspiracy; and (2) even the conspiracy provision, section 1962(d), must be governed by the less restrictive concept of the illegal enterprise. Of course, it is difficult to rebut these arguments with any legislative history since Congress never contemplated the illegal enterprise. This silence in the legislative record permitted *Elliott* to design its novel theory that Congress intended fundamentally to alter conspiracy law.

The first corollary, that the illegal enterprise is some vague association of people that is something different from a conspiracy, is not completely unreasonable. Assuming that Congress intended to create an illegal enterprise, it can be concluded that it is some novel nonconspiratorial association from two factors: (1) the term "enterprise" is a relatively new term in federal criminal law;[429] and (2) operation of an illegal enterprise under section 1962(c) seems to be distinct from conspiring, which is subject to a separate provision, section 1962(d). It should be reiterated that this corollary emerges from the fictional premise that Congress contemplated the illegal enterprise.

Although the first corollary is not absurd if one accepts the underlying fictional premise, it is surprising that it has not been seriously challenged. An illegal enterprise may in fact be a form of conspiracy by analogy to cases construing the term "continuing criminal enterprise" in 21 U.S.C. § 848. Section 848 defines this enterprise as one in which a continuing series of drug offenses is "undertaken . . . in concert with five or more other persons." The Supreme Court has indicated that the "in concert" language connotes a conspiratorial agreement.[430] Conceivably, a RICO "illegal enterprise" could be construed in the same manner to require some form of agreement.[431]

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[429] *See* 18 U.S.C § 1952 (1976) (referring to "racketeering enterprise"); 21 U.S.C. § 848 (1976) (referring to "continuing criminal enterprise").

[430] Jeffers v. United States, 432 U.S. 137, 149-50 (1977) (holding that § 848 is the same offense for double jeopardy purposes as a § 846 conspiracy because both offenses require an agreement).

[431] Admittedly, if an illegal enterprise prosecuted under § 1962(c) requires an agreement, the § 1962(d) conspiracy becomes superfluous in cases where the conspirators have actually committed the § 1962(c) offense. This point, however, carries little weight since an illegal-enterprise theory, regardless of how it is defined, can never be reconciled with § 1962(d). The anomalous nature of § 1962(d) is built into any logical system that proceeds from a postulated congressional intent to create an illegal enterprise concept.

The second corollary of the fictional legislative intent is that the new "illegal enterprise" concept is applicable not only to section 1962(c) but also to section 1962(d). Presumably, the argument underlying this corollary is that if Congress supplanted conspiracy principles by creating the illegal enterprise in section 1962(c), this intent applies to all provisions of RICO including section 1962(d). This reasoning is difficult to refute with any legislative history because there is no significant reference to any illegal enterprise and consequently no mention of its impact on section 1962(d).

In adopting both corollaries, courts following *Elliott* must overlook one fundamental fact: the conspiracy provision, section 1962(d), is meaningless if the existence of illegal enterprises is assumed. For the future, a RICO conspiracy count will be incomprehensible in illegal enterprise cases because a section 1962(d) count will contain two conflicting concepts that refer to the same group of people. A section 1962(d) count would allege that *X* and *Y* agree to associate to commit a pattern of racketeering activity, unlike a traditional conspiracy count, which alleges that *X* and *Y* agree to commit a particular crime. The concept of an "agreement to associate" is an absurd redundancy similar to a "conspiracy to conspire." The RICO conspiracy count will appear in this unintelligible form regardless of how an illegal enterprise is defined. The obvious solution is repeal of section 1962(d) if illegal enterprises are maintained.[432]

b. Application of Elliott. A major flaw in the *Elliott* opinion, as construed by the Seventh Circuit in *Lee Stoller*,[433] is the court's assumption that the scope of a RICO substantive offense or RICO conspiracy is defined by the enterprise. The court believed that although the defendants must agree to commit a pattern of racketeering activity they need not agree to commit the same pattern as long as the defendants' patterns involve the same enterprise.[434] Applying *Elliott* and *Lee Stoller* to a legitimate enterprise, it is apparent that the enterprise does not always supply a substantial connection between the activities of the defendants.

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[432] This solution has been recommended by the American Bar Association, *see RICO Report*, *supra* note 7, at 10-12, and by the Association of the Bar of the City of New York, *see* Letter from Peter Zimroth, Chairman of the Criminal Law Committee, to American Bar Association, Section of Criminal Justice (May 21, 1982).

[433] *See supra* text accompanying notes 397-98.

[434] *Id.*

This point is illustrated by the hypothetical set out in the discussion of the pattern in which four legislators operated a state legislature through completely unrelated patterns of racketeering.[436] Under a literal application of *Lee Stoller*, the legislators in the hypothetical are part of a single chargeable section 1962(c) or (d) RICO offense solely because their acts occur in the conduct of the same enterprise. As discussed earlier, this produces the bizarre result that a single RICO offense can consist of every racketeering act committed by any employee or member of a large corporation or government body during the many decades of the enterprise's existence. In *United States v. Cryan*,[438] the court rejected Government arguments that would have produced this absurd result. Citing *Elliott*, the Government contended that RICO was intended to impute the criminal liability of some individuals to other individuals when they are employed by the same enterprise. *Cryan* dismissed this argument for fear that the scope of a RICO conspiracy to operate a large government agency would be "potentially enormous."[437] *Cryan* required proof that each defendant either committed or authorized the acts constituting the RICO offense.[438]

Cryan leads to a logical and factually compelling conclusion that the enterprise alone cannot define the scope of a RICO offense. A relationship is required between the patterns of racketeering activity committed by the defendants because the mere fact that they operate the same enterprise does not supply a sufficient connection among the defendants.[439] Conspiracy principles require that defendants agree to commit a common pattern of racketeering activity rather than simply require that they agree to operate a common enterprise through a variety of otherwise unrelated patterns.

The Fifth Circuit decisions in *Sutherland* and *Stratton* have acknowledged the existence of the *Cryan* problem and have modified *Elliott* to require that each defendant know of the other defendant's acts.[440] This focus on the defendant's knowledge, however,

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[436] *See supra* text accompanying note 254.

[438] 490 F. Supp. 1234, 1242-44 (D.N.J.), *aff'd mem.*, 636 F.2d 1211 (2d Cir. 1980). The facts of *Cryan* are set out *supra* text accompanying notes 250-51.

[437] *Id.* at 1243.

[438] *Id.* at 1243-44.

[439] *Id.*

[440] *See supra* text accompanying notes 403-08, 418-21; *see also* United States v. Sutherland, 656 F.2d 1181, 1189-90 (5th Cir. 1981) (establishing that the conspirators' knowledge

does not actually respond to the problem raised by *Cryan*. If the acts of two defendants are unrelated, it is unclear why their knowledge of each other's acts supplies any further relationship between these acts. The relationship required by *Cryan* should lie in the nature of the acts rather than in what the defendants know of those acts. Actions should be related only when each defendant has a significant stake in the success of the other defendant's acts. Whatever defects may exist in the rationale of *Stratton* and *Sutherland*, these cases construe *Elliott* more narrowly than the Seventh Circuit decision in *Lee Stoller*.

4. RICO Conspiracy After Elliott. By holding that section 1962(d) is not subject to general federal conspiracy law, *Elliott* created an offense whose characteristics are unknown because they cannot be determined by reference to preexisting law. The courts are free to shape section 1962(d) as they choose.

Until recently, the requirements of *Elliott* were subject to considerable confusion. One cause of confusion was the Fifth Circuit decision in *United States v. Diecidue*,[441] which emphasized the *Elliott* requirement that the defendant agree to commit two or more acts.[442] The evidence was insufficient where the Government failed to establish either that the defendant was involved in more than one criminal transaction or that the defendant knew of any other criminal activities constituting the enterprise.

An example of this principle was the court's examination of the evidence against defendant Boni. His conviction was reversed where the only evidence against him was that he supplied dynamite to certain members of the enterprise and bought cocaine from another member.[443] The sale of dynamite was not a predicate offense for RICO and was excluded as an object of the enterprise conspiracy.[444] The purchase of cocaine was also insufficient to constitute an agreement to join the enterprise. In the absence of other evidence that "Boni knew something about his codefendants' related activities which made the enterprise, he could not be convicted of conspiring to engage in a pattern of racketeering as de-

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of each other is necessary to establish a single conspiracy), *cert. denied*, 455 U.S. 949 (1982).

[441] 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

[442] *Id.* at 557.

[443] *Id.* at 555-56.

[444] *Id.* at 556.

fined by the statute."[445]

Although *Diecidue* cites *Elliott* with approval,[446] the Boni discussion may be difficult to reconcile with the *Elliott* analysis. If *Elliott* requires that the defendant agree to commit two predicate offenses without requiring knowledge of the enterprise's activities, Boni's knowledge of related activities should have been irrelevant because he was involved in only one racketeering offense. There are two possible interpretations of *Diecidue:* (1) a defendant can be responsible for an agreement to commit two predicate offenses either by actually committing them or by committing one offense and having knowledge of related activities, or (2) a knowledge requirement applies to all RICO conspiracy defendants without regard to whether they commit one or two offenses.[447]

The Fifth Circuit decision in *United States v. Martino*[448] adopts the second construction of *Diecidue*, requiring proof that a defendant know "something" of the other defendant's activities.[449] This requirement seems to apply to both section 1962(c) and (d) counts.[450]

The major point of uncertainty after *Elliott* was whether the defendant must actually commit two predicate offenses to violate section 1962(d). The Fourth Circuit construed *Elliott* as requiring proof that two racketeering acts were committed by the defendant,[451] while a Fifth Circuit district court construed it as requiring only proof of an agreement to commit two racketeering acts

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[445] *Id.* This language was quoted with approval in United States v. Northrup, 482 F. Supp. 1032, 1035 n.1 (D. Nev. 1980). The author of *Northrup*, Judge Claiborne, interpreted *Diecidue* as requiring the Government to "prove that the defendant in question had knowledge as to the enterprise's illicit activities." *Id.* at 1035. This standard was applied to a defendant's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29(c). The defendant Northrup supplied explosive and incendiary devices to employees of Culinary Union Local 226. Those employees sought to expand the union's jurisdiction by fire bombing restaurants that did not recognize Local 226 as the bargaining agent for its employees. The court denied Northrup's Rule 29(c) motion and held that he "had knowledge of the nexus between the fire bombings and the affairs of Culinary Union Local 226." *Id.* at 1036.

[446] *Diecidue*, 603 F.2d at 557.

[447] The second construction of *Diecidue* seems to have been adopted in United States v. Northrup, 482 F. Supp. 1032, 1035 n.1 (D. Nev. 1980). *See supra* note 445.

[448] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[449] *Id.* at 394.

[450] *Id.*

[451] United States v. Karas, 624 F.2d 500, 503 (4th Cir. 1980).

and one act by the enterprise.[452]

Recent decisions in the First and Fifth Circuits have rejected arguments that proof of the actual commission of two predicate offenses is an element of section 1962(d).[453] In practical application, however, the actual commission of two predicate offenses is essential for conviction, a fact that is apparent from two trends in RICO conspiracy opinions: (1) the Fifth Circuit has regarded the commission of two predicate offenses as virtually conclusive evidence of a conspiratorial agreement to commit those acts,[454] and (2) the courts have consistently reversed RICO conspiracy convictions where the defendant committed only one predicate offense.[455]

This pleading problem is illustrated by *United States v. Winter*,[456] a First Circuit case involving a defectively pleaded RICO count alleging the fixing of horse races by bribing jockeys and trainers to prevent specific horses from finishing in the top three positions in their races. The defendants allegedly cheated illegal off-track New England bookmakers and independent Las Vegas bookmakers by betting on the fixed races. The major pleading problem was whether *Elliott* required an allegation that each con-

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[452] United States v. Hawkins, 516 F. Supp. 1204, 1208 (M.D. Ga. 1981).

[453] *See* United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981); United States v. Sutherland, 656 F.2d 1181, 1186 n.4, 1203 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); United States v. Martino, 648 F.2d 367, 383 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983); *cf.* United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982) (stating that jury instructions placed "unnecessary burden on the Government" if they were interpreted to require actual commission of two acts for a § 1962(d) conviction). The issue of whether § 1962(d) requires the actual commission of two predicate offenses is separate from the issue of whether § 1962(d) requires proof of an overt act. The Second Circuit has indicated that overt acts are surplusage in a RICO conspiracy. *See* United States v. Ivic, No. 81-1350, slip op. at 1426 (2d Cir. Jan. 25, 1983). *But see* United States v. Bright, 630 F.2d 804, 822 n.35 (5th Cir. 1980) (requiring proof of "one or more of the overt acts charged.").

[454] United States v. Sutherland, 656 F.2d 1181, 1186 n.4, 1189 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451 (1982); United States v. Martino, 648 F.2d 367, 383 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983); United States v. Bright, 630 F.2d 804, 834 (5th Cir. 1980).

[455] *See, e.g.*, United States v. Phillips, 664 F.2d 971, 1038-39 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); United States v. Martino, 648 F.2d 367, 396 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983); United States v. Diecidue, 603 F.2d 535, 556 (5th Cir. 1979).

[456] 663 F.2d 1120 (1st Cir. 1981).

spirator actually committed two predicate crimes. The court held that a conspirator need not actually commit the predicate crimes but must knowingly join an enterprise and agree to commit two or more predicate crimes.[457]

The conspiracy count was defectively pleaded as to defendants Charles and James DeMetri who were mentioned in only one paragraph alleging a scheme to purchase a horse that would finish poorly in several races and then win when the odds were high. The paragraph could not be construed as alleging the requisite agreement to commit two predicate crimes. This deficiency was not cured by the fact that the DeMetris were charged in other substantive counts that could have been predicate offenses.[458]

VII. Defenses and Pretrial Objections to RICO Indictment Format

A. *Statute of Limitations*

The statute of limitations applicable to Title IX is the five-year statute for noncapital offenses, 18 U.S.C. § 3282.[459] Three courts have indicated that the limitations period runs from the date of the last alleged act of racketeering.[460] Although this is probably ac-

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[457] *Id.* at 1136.

[458] *Id.* at 1137-38.

[459] United States v. Davis, 576 F.2d 1065, 1066-67 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); United States v. Forsythe, 560 F.2d 1127, 1134 & n.10 (3d Cir. 1977); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

[460] *See* United States v. Errico, 635 F.2d 152, 155 (2d Cir. 1980), *cert. denied*, 453 U.S. 911 (1982); United States v. Boffa, 513 F. Supp. 444, 480 (D. Del. 1980); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *see also* United States v. Bethea, 672 F.2d 407, 419 (5th Cir. 1982) (reversing RICO mail-fraud conviction where the only mailings within five years of the indictment were not part of a scheme to defraud).

The "last racketeering act" test is flawed by some ambiguities. One problem is whether the last offense of each defendant must occur within the five-year period. Based on an analogy to conspiracy law, it is arguable that if the last racketeering act is committed by any defendant within the limitations period, that act is attributable to all other defendants. *Cf.* United States v. Borelli, 336 F.2d 376, 384-85 (2d Cir. 1964) (where defendants are part of the same conspiracy, statute runs from last overt act of any defendant), *cert. denied*, 379 U.S. 960 (1965). Conspiracy law, however, should be inapplicable since the overt act of one conspirator is attributable to the other defendants only by virtue of the vicarious liability resulting from the agency relationship existing between conspirators. *See* Pinkerton v. United States, 328 U.S. 640, 646-47 (1946). In contrast to conspiracy law, RICO defendants are *not* agents of one another since § 1962(c) requires a relationship among defendants that

curate in most section 1962(c) cases, it is evident that section 1962(a) and (b) contemplates the possible acquisition of an interest subsequent to the commission of the pattern. In those cases, it appears that the statute would run from the date of acquisition.

To some extent, Title IX undermines the operation of the statute of limitations by permitting prosecutions of predicate offenses committed beyond any existing limitations period. The rationale for this undesirable result is that the predicate offenses are not the subject of the prosecution but are merely part of a continuing RICO offense that extends into the limitations periods.[461] RICO prosecutions can reach acts occurring many decades ago by stringing together acts that occurred within ten years of one another and by alleging that the last act occurred within five years of the indictment.

An example of RICO's effect on the statute of limitations is *United States v. Forszt*,[462] in which the defendant was a county commissioner charged with a section 1962(c) count based on his receipt of bribes from January, 1949, to December 31, 1974. He was indicted in 1980, and the defense argued that the five-year statute of limitations had expired.[463] The last act was an April, 1975, bribery payment, which was received after the defendant's term in office expired on December 31, 1974. The court rejected this argument and held that both the state bribery offense and section 1951 violations were crimes that continued beyond the defendant's term in office.[464]

The *Forszt* court seems to have missed a significant issue by fo-

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does not rise to the level of a conspiracy. *See* United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1029 (1982). In view of the developments in RICO conspiracy law, one commentator has argued that no vicarious liability exists between RICO conspirators. *See* Marcus, *supra* note 426, at 319-21. These factors indicate that each defendant can raise the limitation defense if he was not involved in a predicate offense within the five-year period.

It is also questionable whether the "last racketeering act" test is applicable to § 1962(d). Generally, the limitations period on conspiracies runs from the last overt act. Fiswick v. United States, 329 U.S. 211, 216 (1946).

[461] United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977); *see also* United States v. Cohen, 444 F. Supp. 1314, 1320-21 (E.D. Pa. 1978) (illegal payments that were a part of a unified extortion scheme present no limitations issue if payments continued into the five-year limitations period).

[462] 655 F.2d 101, 102-03 (7th Cir. 1981).

[463] *Id.* at 103.

[464] *Id.* at 103-04.

cusing on when the individual predicate offenses ended. The statute of limitations discussion should have focused on whether a RICO offense is one that continues beyond the point at which the defendant is operating the enterprise. Assuming that the county commission was the enterprise, the defendant's receipt of the April, 1975, payment occurred after he ceased conducting the affairs of the enterprise. The April, 1975, payment should not have extended the statute of limitations, because it was not a valid predicate offense—the act did not occur in the conduct of the enterprise.[465]

The discussion in *Forszt* is ambiguous in many significant respects, and consequently, the decision should not be read too broadly. For example, *Forszt* should not be interpreted as supporting the view that the statute of limitations invariably runs from the last racketeering act. This assumption is obviously erroneous in section 1962(a) and (b) cases, where the statute must run from the date of the acquisition of the enterprise interest. By analogy, the analysis should focus on the defendant's relationship to the enterprise rather than the pattern; in section 1962(c) prosecutions the statute should run from the date on which one ceases to be associated with the enterprise.

It may also be hazardous to regard *Forszt* as adopting a rule establishing the date of the last receipt of any benefit from the racketeering as the date on which the statute of limitations begins to run. The legislative history of RICO indicates a contrary legislative intent: Congress rejected a proposed subsection (e) to section 1962 that would have provided that a RICO violation continues as long as the defendant continues to receive any benefits from the violation.[466]

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[465] It is arguable that receipt of the April, 1975, payment constituted indirect participation in the affairs of the enterprise. The fact that the defendant was not an employee of the enterprise in April, 1975, may not be controlling in view of cases holding that nonemployees can be members of the Government enterprises when they bribe Government employees. *See supra* note 287 and accompanying text. These cases are distinguishable since the nonemployees indirectly operated the enterprise in those cases by affecting the actions of an existing employee, while in *Forszt* the 1975 act did not affect the actions of any person operating the enterprise in 1975.

[466] S. Rep. No. 617, 91st Cong., 1st Sess. 160 (1969). As a matter of general conspiracy law, conspiracies in which one conspirator hires another may continue until the hireling is fully paid. *Compare* People v. Leach, 15 Cal. 3d 419, 541 P.2d 293, 124 Cal. Rptr. 752 (1975) (conspiracy to commit murder not extended by receipt of proceeds from insurance policy on

To the extent that *Forszt* impliedly resurrects the rejected section 1962(e) proposal, that case conflicts with an unpublished decision in *United States v. Coia*.[467] In *Coia* the section 1962(d) count alleged that Joseph Hauser controlled a company providing benefit-plan insurance services to members of some union funds and kickbacks to the defendant, who was legal counsel for one of these funds. The only alleged act occurring within five years of the date of indictment took place on October 19, 1976, when the defendant wrote a $2,000 check to himself out of the funds supplied in part by Hauser. Both the magistrate report and the district court opinion held that the RICO count was barred by the statute of limitations because of the absence of an overt act occurring within five years of the indictment. The conspiracy terminated upon Hauser's delivery of the money to the defendant, and consequently, the defendant's writing of the $2,000 check after the Hauser delivery could not be regarded as an overt act in furtherance of the conspiracy.[468]

The American Bar Association has expressed the concern that RICO can undermine the five-year statute of limitations, which would preclude prosecution of the predicate offenses if RICO were not charged. The ABA has recommended that RICO be amended to require that all alleged racketeering acts occur within five years of the date of any RICO indictment.[469] The commentary points out that RICO eviscerates the statute of limitations without responding to the two policies underlying the statute of limitations concept: (1) encouraging prompt investigation of suspect criminal activity, and (2) protection of an accused against state charges for which the defendant cannot gather evidence owing to the death or the fading memories of witnesses.[470]

B. Double Jeopardy

Since certain federal and state crimes constitute racketeering ac-

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victim's life where receipt of proceeds not a major objective of conspiracy), *with* People v. Saling, 7 Cal. 3d 844, 500 P.2d 610, 103 Cal. Rptr. 698 (1972) (conspiracy to commit murder did not terminate until conspirator paid fellow conspirators for their part in the murder).

[467] No. 81-417 (S.D. Fla. Mar. 12, 1982) (magistrate ruling that indictment is barred by statute of limitations).

[468] *Id.*, slip op. at 2-4.

[469] *RICO Report*, *supra* note 7, at 4-5.

[470] *Id.* at 5.

tivity under Title IX, double jeopardy problems can arise when acquittals or convictions on the predicate crimes occur before the RICO litigation. A number of complex issues also must be litigated when the Government alleges two or more separate section 1962(c) offenses or multiple section 1962(d) offenses.

In cases involving multiple offenses arising out of the same transaction, the courts have traditionally applied a "same evidence" test. The test permits separate prosecutions where each offense charged "requires proof of an additional fact which the other does not."[471]

1. Multiple RICO Indictments. Recent modifications of the "same evidence" test should be considered to determine when the Government has impermissibly alleged multiple section 1962(c) or (d) charges based on the same illegal conduct. Some cases have refused to apply strictly the "same evidence" test in situations involving two or more conspiracy charges alleging the same conspiracy statute.[472] These cases have involved Government attempts to charge a single agreement as separate conspiracies by alleging different named conspirators and different overt acts. Since the "same evidence" test seems to permit this indictment format, recent cases have sharply criticized this test.[473] These courts have engaged in a more painstaking analysis of the similarities between the charged conspiracies to determine whether they are in fact a single agreement.[474]

This practical approach to multiple conspiracy indictments will affect cases involving separate section 1962(d) indictments.[475] Al-

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[471] Blockburger v. United States, 284 U.S. 299, 304 (1932) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

[472] *E.g.*, United States v. Tercero, 580 F.2d 312, 315 (8th Cir. 1978).

[473] *See id.* at 314-15; United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978); United States v. Ruigomez, 576 F.2d 1149, 1151 (5th Cir. 1978).

[474] *See, e.g.*, United States v. Marable, 578 F.2d 151, 153-54 (5th Cir. 1978). In *Marable* the defendants were charged in two separate conspiracy indictments. The first indictment alleged conspiracy to possess and distribute heroin from July 14, 1976, to August 20, 1976. The second indictment involved a conspiracy to possess and distribute cocaine between July 12, 1976, and July 29, 1976. The similar time periods, identical personnel, and alleged violation of identical statutes were held to establish a single agreement. *Id.* at 156.

[475] *See* United States v. Campanale, 518 F.2d 352, 357-58 (9th Cir. 1975) (multiple count § 1962(d) indictment criticized as based upon same agreement), *cert. denied*, 423 U.S. 1050 (1976). In United States v. Boffa, 513 F. Supp. 444, 454-56, 481-82 (D. Del. 1980), the defendant claimed that a prior acquittal on a § 1962(d) charge precluded a subsequent § 1962(d) indictment. The first indictment alleged that the defendant operated an illegal enterprise

though no case has directly considered the issue, the extension of the conspiracy double jeopardy analysis to separate section 1962(c) indictments may be a source of potential conflict.[476]

The problem of separate indictments of section 1962(c) and (d) offenses was considered in *United States v. Brooklier*.[477] In *Brooklier*, the defendants were indicted in 1974 under section 1962(d) and subsequently pleaded guilty. One charge made was that in several overt acts the defendants conspired to extort money from a bookmaker, Sam Farkas. In 1979, these defendants were indicted for a section 1962(c) violation that included the extortion as a racketeering act, charges that the defendants moved to dismiss under the double jeopardy clause. The Ninth Circuit upheld the trial court's denial of this motion and applied the *Blockburger* test, under which separate prosecutions of a conspiracy and the substantive offenses are permissible because the elements are not the same.[478]

2. *Separate Indictments of Section 1962(d) Conspiracy and Conspiracy Under Another Statute.* The modification of the "same evidence" test was originally developed in cases involving two or more conspiracy counts charged under the same conspiracy statute. In cases involving a single agreement and multiple conspiracy indictments under *different* conspiracy statutes, the law is somewhat confused. This issue is not directly resolved by case law permitting separate sentences at the same trial[479] because double

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engaged in murder, attempted murder, arson and union embezzlement. The second indictment alleged that he received illegal payments from the enterprise, which engaged in the business of leasing employees. The predicate acts were different, the enterprises were distinct, and the defendant was the only conspirator common to both cases.

The court rejected both a collateral estoppel and a double jeopardy claim. *Id.* at 484. The two conspiracies were found to be distinct. *Id.* The only relationship between the conspiracies was that in both cases Sheeran acted in his capacity as union president; the overt acts occurred in the same vicinity, and the same time period was involved.

[476] In United States v. Stoksky, 409 F. Supp. 609, 617 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), the court refused to resolve a double jeopardy challenge to multiple § 1962(c) indictments. Those indictments involved different racketeering activities in the conduct of the affairs of the same enterprise. *See infra* text accompanying notes 522-28 (discussing the question of multiple § 1962 counts in the same indictment).

[477] 637 F.2d 620 (9th Cir. 1980).

[478] *Id.* at 621-24.

[479] *See infra* text accompanying notes 507-13.

jeopardy has only limited application to a single prosecution.[480]

The confusion is reflected in three cases involving challenges to section 1962(d) indictments based on factual allegations similar to those in prior prosecutions for conspiracies to manufacture drugs under 21 U.S.C. § 846.[481] Although these cases reject the double jeopardy claim, their rationales differ sharply. Two Fifth Circuit decisions adopt conflicting views; one rigidly applies the "same evidence" test,[482] while another indicates that double jeopardy precludes a section 1962(d) indictment following a section 846 conviction.[483] The Ninth Circuit decision in *United States v. Solano*,[484] adopted a bifurcated approach to this problem. It applied an orthodox "same evidence" test to an appeal of a pretrial challenge to an indictment[485] but implied that this test would not be applied on direct appeal.[486]

3. Separate Indictments of Section 1962(c) and its Predicate Offenses. The Supreme Court decision in *Brown v. Ohio*[487] should be controlling in a situation where the predicate offenses are prosecuted separately from the RICO offense. *Brown* held that under the *Blockburger* "same evidence" test a lesser-included offense and the greater offense are the same.[488] Consequently, *Brown* precludes separate indictments of lesser-included and greater offenses[489] un-

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[480] *See* Albernaz v. United States, 450 U.S. 333 (1981) (permitting separate sentences under 21 U.S.C. § 846 and § 963 for the same agreement). Under *Albernaz*, the issue of separate punishment at a single trial is solely one of legislative intent. *Id.* at 342-44.

[481] United States v. Solano, 605 F.2d 1141, 1143-45 (9th Cir. 1979); United States v. Smith, 574 F.2d 308, 309-11 (5th Cir. 1978), *cert. denied*, 439 U.S. 931 (1979); United States v. Meinster, 475 F. Supp. 1093, 1095 (S.D. Fla. 1979).

[482] United States v. Smith, 574 F.2d 308, 310-11 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978).

[483] In United States v. Meinster, 475 F. Supp. 1093, 1095-96 (S.D. Fla. 1979), the Government conceded and the court observed that double jeopardy would preclude a § 1962(d) indictment following the § 846 conspiracy conviction. On appeal, the Fifth Circuit cited and discussed this author's construction of the district court opinion, without indicating its views on the issue. United States v. Phillips, 664 F.2d 971, 1015 n.64 (5th Cir. 1981) (citing Tarlow, *supra* note 1, at 261 n.521), *cert. denied*, 102 S. Ct. 2965 (1982).

[484] 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980).

[485] *Id.* at 1144.

[486] *Id.* at 1145; *see* Tarlow, *supra* note 1, at 261-62.

[487] 432 U.S. 161 (1977).

[488] *Id.* at 169.

[489] The sequence of prosecutions is not material. *Id.* Double jeopardy precludes successive prosecutions for a greater and lesser-included offense regardless of which offense is prosecuted first. *Id.*

less the facts necessary to establish the greater crime have not taken place at the time of the prosecution of the lesser offense or have not been discovered despite the exercise of due diligence.[490]

The relationship of a RICO offense to the predicate offenses is clearly that of greater and lesser-included offenses. Predicate offenses are lesser included within section 1962(c) since the elements of these crimes must be established to prove the commission of a racketeering activity.[491]

Where two or more predicate offenses are prosecuted separately from the RICO offense, double jeopardy should bar separate prosecutions regardless of any legislative intent. In *Carlson v. State*,[492] the Florida Supreme Court recognized that a state RICO offense and a predicate offense are the same offense under *Blockburger* because the predicate offense is a lesser-included offense of RICO and therefore barred separate prosecutions.[493]

Unfortunately, the Fifth Circuit opinion in the Black Tuna case, *United States v. Phillips*,[494] failed to recognize the applicability of double jeopardy principles to separate prosecutions of RICO and the predicate offenses. This appears in the court's discussion of defendant Grant's claim that prior convictions on North Carolina importations precluded a subsequent section 1962(c) prosecution in Florida. The court held that a person can be convicted of predicate

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[490] *Id.* at 169 n.7.

[491] *See* United States v. Rone, 598 F.2d 564, 571-72 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Forsythe, 594 F.2d 947, 952 (3d Cir. 1979).

[492] 405 So. 2d 173 (Fla. 1981).

[493] *Id.* at 175-76. The Ninth Circuit adopted a similar construction of *Blockburger* in United States v. Brooklier, 637 F.2d 620 (9th Cir. 1980):

> In fact, the *Brown* holding is a very narrow one that follows directly from *Blockburger*. At no time could Brown have been charged with both joyriding and autotheft. The former is a lesser included offense of the latter; to charge him with both, even in a single prosecution, would violate the *Blockburger* test. If *Blockburger* barred simultaneous prosecution *a fortiori* it barred successive prosecutions.

Id. at 623.

The case law pertaining to the continuing criminal enterprise, 21 U.S.C. § 848, is material to this issue since § 848, like RICO, punishes the commission of underlying predicate offenses. The courts have held that the predicate offenses are lesser included within § 848. *See* United States v. Chagra, 653 F.2d 26, 31-32 (1st Cir. 1981); United States v. Stricklin, 591 F.2d 1112, 1124 (5th Cir. 1979) (holding that § 848 charge could not include § 846 conspiracy for which defendant had been convicted prior to § 848 indictment). Consequently, separate prosecutions would appear to be precluded by double jeopardy.

[494] 664 F.2d 971 (5th Cir. 1981).

offenses and subsequently charged with a RICO offense.[495]

Double jeopardy principles might be inapplicable where the prior prosecution involves only a single predicate offense and the facts necessary to establish the RICO offense have not occurred at the time of the first indictment. A difficult problem would arise where two predicate offenses are prosecuted in the first case and a RICO count could have been charged based on those two offenses. In the second trial, when a RICO count charges the two predicate offenses and four subsequent predicate acts, the Government may argue that the facts necessary to establish the four additional predicate offenses did not exist at the time of the first indictment. A literal reading of *Brown*, however, indicates that if a RICO count could have been alleged based on only the two predicate offenses the facts necessary to establish the RICO count should be deemed to have existed at the time of the first indictment. Consequently, a subsequent RICO prosecution based on the two predicate offenses would be precluded by double jeopardy.

The allegation of a RICO predicate offense on which there has been a prior conviction may also be precluded by the RICO statute itself. Congress's intent to exclude these racketeering acts can be discerned from the section 1961(1) definition of "racketeering activity," which requires that an act be "indictable." If "indictable" refers to the date of the RICO indictment, a convicted predicate would not be independently "indictable" since double jeopardy precludes a second prosecution. Unfortunately, this view conflicts with Third Circuit holdings that section 1961(1)'s reference to "chargeable" state crimes means "chargeable" at the time the act was committed.[496] One response to the Third Circuit argument is that section 1961(1) can be reconciled with *Brown v. Ohio* only if "indictable" refers to the time of the RICO indictment.

4. *Impact of Prior State Prosecution on RICO Prosecution.* When a defendant claims that a prior state court prosecution of a state predicate offense precludes a subsequent RICO indictment, the cases have held that double jeopardy is inapplicable.[497] The

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[495] *Id.* at 1009 n.55, 1015.

[496] *See supra* note 459 and accompanying text.

[497] *See* United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Solano, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980); United States v. Maltesta, 583 F.2d 748, 757 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979).

dual sovereignty doctrine authorizes state and federal prosecutions of the same act.[498] There remains a problem of statutory construction, however, involving the requirement in section 1961(1)(A) that state offenses be "chargeable under the state law and punishable by imprisonment for more than one year." Judge Aldisert's dissent in *United States v. Frumento*[499] reasoned that after acquittal in state court the offense is neither "chargeable" nor "punishable" by more than one year of imprisonment.[500]

Although the majority in *Frumento* rejected Judge Aldisert's view, its decision is not in accord with the spirit of federalism that should affect the statutory analysis of RICO.[501] Prior to *Frumento*, the general rule as stated in *United States v. Mason*[502] was that where a federal statute incorporates a state offense an acquittal in state court is controlling in a federal prosecution under the federal statute. *Mason* relied on the well-established rule that the interpretation by a state court of a state law is binding in federal courts.[503] *Mason* seemingly extended this limitation on jurisdiction to a state jury's verdict on a state law offense.[504] If federal courts

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[498] *See* Abbate v. United States, 359 U.S. 187, 193-96 (1959).

To a limited extent, the Government has acknowledged the unfairness of the dual sovereignty doctrine by instituting the *Petite* policy. This policy precludes a federal prosecution following a state prosecution of the same offense without compelling reasons. *See, e.g.*, Rinaldi v. United States, 434 U.S. 22, 25 n.8 (1977). A trial court has little discretion to deny a Government request to dismiss an indictment on the basis of that policy. *Id.* at 31-32. Defendants charged with a RICO count consisting of stale state charges can successfully invoke the *Petite* policy only by pursuing administrative remedies within the Justice Department. *See, e.g.*, United States v. Foster, No. 81 Cr. 548 (S.D. Cal. Apr. 27, 1981). If the Government rejects the administrative appeal, the defendant has no judicial remedy since the courts cannot require compliance with the *Petite* policy. *See, e.g.*, United States v. Thompson, 579 F.2d 1184, 1188 (10th Cir. 1978).

[499] 563 F.2d 1083, 1092 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

[500] *Id.* at 1097.

[501] The Supreme Court has acknowledged the existence of a presumption against statutory convictions that disturb federal-state relations. *See generally* Perrin v. United States, 444 U.S. 37, 49-50 (1979) (acknowledging reversal in a prior case to avoid altering the sensitive federal-state relationship); United States v. Bass, 404 U.S. 336, 349-50 (1971) (absent a clear legislative statement to the contrary, federal statutes will not be so broadly construed as to intrude upon state criminal jurisdiction).

[502] 213 U.S. 115, 124 (1909).

[503] *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (holding that the basis for the "adequate state ground" rule of Supreme Court jurisdiction is that the Court has no power to correct a state court's construction of state law).

[504] The Court commented:

> As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much more should

have no jurisdiction to review state court interpretations of state law,[505] it may follow from *Mason* that federal courts are bound by a state jury's verdict on a state offense.[506]

C. *Multiplicity*

Multiplicity is a defect in an indictment that charges the same offense in more than one count. A multiplicity situation resembles a double jeopardy situation; however, the difference is that multiplicity involves separate counts of the same indictment and double jeopardy applies only to charges in separate prosecutions. Under the recent Supreme Court decision in *Albernaz v. United States*,[507] the issue of separate punishment at a single trial is solely one of legislative intent.[508] When separate charges in the same indictment are brought under separate statutes, the courts will generally discern a legislative intent to permit separate punishment.

> the Federal court accept the judgment of a state court based upon a verdict of acquittal of a crime *against the State* whenever, in a case in the Federal court, it becomes material to inquire whether that particular crime against the State was committed by the defendants on trial in the Federal court for an offense against the United States.

Mason, 213 U.S. at 125 (emphasis in original).

[505] *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). In *Pitcairn*, the Supreme Court described the basis for the independent state grounds rule:

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

324 U.S. at 125-26 (citations omitted).

[506] It may seem that *Mason* conflicts with the separate sovereignty doctrine, which permits separate federal and state prosecutions of the same act. *See* Abbate v. United States, 359 U.S. 187, 193-96 (1959). It can be contended, however, that the rationale for the separate sovereignty doctrine does not extend to a federal prosecution of state law violations. While a sovereign may have an interest in prosecuting under its own laws, that interest may be of considerably less strength when a sovereign is enforcing the laws of another sovereign. This limitation on the separate sovereignty doctrine would have its foundation in the well-established rule that a state cannot enforce the penal statutes of another state. Huntington v. Attrill, 146 U.S. 657, 669-72 (1892) ("Crimes and offences against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them . . . .").

[507] 450 U.S. 333 (1981).

[508] *Id.* at 343-44.

These courts generally rely on the "same evidence" test of *Blockburger* and hold that the separate statutes require different elements of proof.

This approach occurs frequently in RICO cases that have authorized multiple punishment in the following situations: (1) consecutive sentences under section 1962(d) and section 371 for the same agreement,[509] (2) consecutive sentences under 21 U.S.C. § 848 and RICO counts,[510] and (3) consecutive sentences for section 1962(c) and (d) counts.[511] Only in the third situation has there been any dispute. In *United States v. Sutton*,[512] an en banc decision, the Sixth Circuit held that consecutive sentences for section 1962(c) and (d) counts merged where the proof on both charges was identical.[513]

1. Separate Punishment of Section 1962(c) and Its Predicate Offenses. Separate punishments of a RICO count and the predicate offenses raise a unique multiplicity problem, a rare situation in which the offenses are the "same" under *Blockburger*. As discussed earlier, the predicate offenses are lesser-included offenses within RICO and are consequently the same offense for purposes of double jeopardy.[514] In a situation involving separate punishments of greater and lesser-included offenses, the Supreme Court decision in *Whalen v. United States*[515] holds that double jeopardy requires a clear congressional authorization of such punishment.[516]

Strangely, the courts have generally ignored *Whalen* when considering the issue of consecutive sentences for section 1962(c) and the predicate offenses. The Second, Fifth, and Ninth Circuits have permitted separate punishment[517] without considering the fact

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[509] *See* United States v. Barton, 647 F.2d 224, 234-38 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

[510] *See* United States v. Phillips, 664 F.2d 971, 1010-14 (5th Cir. 1981).

[511] United States v. Martino, 648 F.2d 367, 382-83 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[512] 642 F.2d 1001 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981).

[513] *Id.* at 1040. *Sutton* is criticized in United States v. Hawkins, 516 F. Supp. 1204, 1208 (M.D. Ga. 1981), which upheld consecutive sentences under § 1962(c) and (d).

[514] *See supra* text accompanying note 491.

[515] 445 U.S. 684 (1980).

[516] *Id.* at 688; *see also* United States v. Michel, 588 F.2d 986, 1000-01 (5th Cir.) (vacating sentence on 21 U.S.C. § 963 conviction where the offense was also a predicate offense for a § 848 count), *cert. denied*, 444 U.S. 825 (1979).

[517] *See* United States v. Hawkins, 658 F.2d 279, 285-88 (5th Cir. 1981); United States v.

that the predicate offenses are lesser-included offenses within RICO.

Only the Fifth Circuit decision in *United States v. Hawkins*[518] attempts to confront the *Whalen* problem. Nevertheless, the court found a legislative intent to permit separate punishment, citing a provision stating that Title IX does not supersede any federal law imposing criminal penalties in addition to those set forth in RICO.[519] This provision is not material to the consecutive sentence problem since it merely states that RICO does not preempt and thereby annul all statutes dealing with the same subject. The term "supersede" in section 904(b) is generally used to mean "annul," "repeal," or "void."[520] A defendant's objection to consecutive sentences is not related to "superseding" the predicate offense; the objection is to multiple punishment and is not a claim that the predicate offenses are null and void.[521]

2. Multiple Section 1962(c) Counts. In *United States v. Dean*,[522] the Eighth Circuit considered a defendant's challenge to an indictment that charged two separate RICO counts based on two patterns of bribery in the conduct of the same enterprise. The defendant claimed that where a single enterprise is involved only one RICO count can be alleged. The court rejected this argument and held that distinct patterns can create separate RICO violations. The issue in *Dean* was one of statutory interpretation relat-

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Peacock, 654 F.2d 339, 348-49 (5th Cir. 1981); United States v. Boylan, 620 F.2d 359, 360-61 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. Boffa, 513 F. Supp. 444, 476-77 (D. Del. 1980). *See generally* Comment, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CALIF. L. REV. 724 (1982) (extensive and persuasive criticism of *Hawkins*).

[518] 658 F.2d 279, 286-87 (5th Cir. 1981).

[519] *Id.* at 287 (citing Pub. L. No. 91-452, § 904(b), 84 Stat. 941 (codified as 18 U.S.C. §§ 1961-1968 (1976)), which provides: "Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.").

[520] *See* City of Los Angeles v. Gurdane, 59 F.2d 161, 163 (9th Cir. 1932).

[521] *Hawkins* also indicates that the *Blockburger* same-evidence test does not apply to statutes such as RICO where the greater offense and the lesser-included predicates are not necessarily part of the same transaction. United States v. Hawkins, 658 F.2d 279, 288 (5th Cir. 1981). This distinction is not supported by any logical or policy reason. Any conceivable difficulty raised by applying *Blockburger* to multitransaction greater offenses is disposed of by the exception in Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977), for a situation where additional facts necessary for a RICO charge occur after the first prosecution or have not been discovered by the Government despite the exercise of due diligence.

[522] 647 F.2d 779 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 2296 (1982).

ing to the allowable unit of prosecution. The court examined the legislative history and concluded that RICO focuses on the commission of a pattern rather than the enterprise. Consequently, the pattern was regarded as the unit of prosecution.[523]

The *Dean* analysis cannot be reconciled with cases holding that the impact of interstate commerce must be established for the enterprise and not the pattern. One of these cases, *United States v. Martino*,[524] theorized that the pattern need not affect commerce because RICO focuses on the enterprise and not the pattern.[525] If the interstate commerce element attaches only to the enterprise, it can be argued that the enterprise is the unit of prosecution.

Assuming that *Dean* correctly focused on the pattern as the unit of prosecution, the courts will be faced with the difficult task of determining when separately charged patterns are distinct from one another. The *Dean* court employed a standard that was originally developed in multiple-conspiracy-count decisions.[526] That test focused on five factors: (1) the time of the activities, (2) the identity of the persons involved in the activities under each charge, (3) the statutory offense charged as racketeering in each charge, (4) the nature and scope of the activity in each charge, and (5) the places where the criminal acts occurred.[527] In *Dean*, the court found that the two patterns were distinct because of different time periods, different personnel, and different modi operandi.[528]

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[523] *Id.* at 786-87; *accord* United States v. Russotti, 32 CRIM. L. REP. (BNA) 2430 (W.D.N.Y. Jan. 26, 1983).

[524] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[525] *Id.* at 381 ("[t]he essence of RICO . . . proscribes the furthering of the enterprise, not the predicate acts").

[526] *See, e.g.*, United States v. Guido, 597 F.2d 194, 198 (9th Cir. 1979); United States v. Tercero, 580 F.2d 312, 314-15 (8th Cir. 1978); United States v. Marable, 578 F.2d 151, 154-56 (5th Cir. 1978) (*see supra* note 474 (discussing *Marable*)).

[527] 647 F.2d 779, 788 (8th Cir. 1981).

[528] *Dean* involved a defendant who received bribes and kickbacks in the operation of a county office. One RICO indictment charged transactions with one Baldwin, from January, 1974, to May, 1977, and the other RICO indictment charged transactions with one Pratt, from October, 1977, to July, 1978. *Id.* at 788-89.

If the *Dean* standard is consistently applied, it will be a useful tool for defendants who claim that a variance has occurred by virtue of proof of two separate patterns. The courts should refrain from adopting a double standard under which they reject multiplicity challenges by finding separate RICO offenses under *Dean* while rejecting variance claims by finding a single RICO offense. This potential inconsistency is evident from a comparison of *Dean* with United States v. Weisman, 624 F.2d 1118 (2d Cir. 1980). *Weisman* found a single

3. Wharton's Rule. Defendants have contended that section 1962(c) and (d) offenses merge under Wharton's Rule. The rule requires merger of a substantive and a conspiracy offense when, by definition, an intended substantive offense requires concert of action by two or more persons.[529] In that situation, an agreement to engage in that concerted action cannot be prosecuted separately as a conspiracy.[530] Arguably, section 1962(c) requires two or more people, barring a separate section 1962(d) charge. This argument has been rejected by every court considering it on the ground that section 1962(c) can be violated by an individual operating a single-person enterprise.[531]

D. Variance

Since RICO indictments are often confused and rambling documents, it is usually difficult to determine what comprises the alleged enterprise. This confusion can result in reversal of RICO convictions where the Government proves an enterprise different from the one it alleged.[532] The recent Eighth Circuit decision in

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RICO offense based on a March, 1975, securities fraud and a December, 1976, bankruptcy fraud involving the same enterprise. Under a literal application of *Dean*, there may have been two separate patterns, thus two RICO offenses.

[529] *See generally* Ianelli v. United States, 420 U.S. 770, 779-86 (1975).

[530] Pinkerton v. United States, 328 U.S. 640, 643 (1946); United States v. Katz, 271 U.S. 354, 355 (1925).

[531] *See* United States v. Rone, 598 F.2d 564, 570 (1977), *cert. denied*, 445 U.S. 946 (1980); United States v. Ohlson, 552 F.2d 1347, 1349 (9th Cir. 1977); United States v. Hawkins, 516 F. Supp. 1204, 1206 (M.D. Ga. 1981); United States v. Boffa, 513 F. Supp. 444, 478 (D. Del. 1980).

[532] This problem is known as a variance. A variance between pleading and proof is impermissible in that it undermines the defendant's right to be tried only on the charges in the indictment. *See* Stirone v. United States, 361 U.S. 212, 217 (1960). Variance problems commonly arise when an indictment charges a single conspiracy and proof at trial discloses multiple conspiracies. *See, e.g.*, United States v. Bertolotti, 529 F.2d 149, 157 (2d Cir. 1975). In *Bertolotti* the defendants were charged with conspiracy to sell drugs. The evidence established four major narcotics transactions, three of which were transactions in which the defendants either received drugs and refused to pay or received money and never delivered the drugs. No evidence linked the activities together except the presence of two defendants. The court, nevertheless, held there were multiple conspiracies. *Id.* at 155; *see also* United States v. Varelli, 407 F.2d 735, 741-44 (7th Cir. 1969) (indicating a variance between a single conspiracy and proof of multiple conspiracies), *cert. denied*, 405 U.S. 1040 (1972). *See generally* Tarlow, *supra* note 426, at 225-39.

In the RICO context, most cases have assumed that a variance between the alleged enterprise and the one proven at trial is impermissible but have held that variance did not occur in the particular case. *See* United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979) ("While

United States v. Bledsoe[633] illustrates some of the problems resulting from uncertainty as to the Government's theory of the enterprise. In *Bledsoe*, the defendants allegedly operated a series of corporations and agricultural cooperatives through mail and securities fraud. The appellate court found that the evidence did not support an enterprise theory based on an association of individuals, which was the theory the Government presented at trial. The court emphatically refused to consider any theory that the enterprise was one or more of the cooperatives and noted that this theory would raise a serious problem of variance.[634] A variance alone may not result in reversal if the defendant cannot establish prejudice.[635] In *United States v. Sutherland*,[636] the court held that a nonprejudicial variance occurred where the Government established multiple section 1962(d) conspiracies. The Government had alleged a single conspiracy involving bribery of an El Paso Municipal Court judge by two defendants who were unaware of each other's activities. The court found that the variance was not prejudicial because: (1) the number of conspiracies and defendants was small; (2) the evidence as to each defendant's acts was distinct in that the evidence concerning one conspiracy did not directly implicate the other conspiracy; and (3) the evidence of guilt was overwhelming as to all defendants, and the same evidence would have been admissible in

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the government might be faulted for imprecise language on occasion, it is clear that the indictment was predicated on a one-enterprise theory, and that that was the basis on which proof was offered and on which the jury was charged."); United States v. Frumento, 426 F. Supp. 797, 803 (E.D. Pa. 1976) ("The Government never suggested at trial, either by proof or argument, that there was any enterprise other than the Bureau upon which this prosecution was based. The Government's pleading and proof were in conformity."), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

This variance problem was directly confronted by Judge Merritt's dissenting opinion in United States v. Sutton, 642 F.2d 1001, 1042-55 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981). Judge Merritt found a variance between the indictment, which alleged an enterprise engaged in narcotics, burglary, fencing, and fraud, and the proof at trial, which was of four different conspiracies involving different people, goals, and overt acts. *Id.* at 1049-51.

[633] 674 F.2d 647 (8th Cir. 1982).

[634] *Id.* at 660.

[635] Berger v. United States, 295 U.S. 78, 82 (1935). Such prejudice often results from the acts and statements which relate only to separate conspiracies in which the defendant did not participate. The risk of prejudice increases in proportion to the number of separate conspiracies and the number of defendants. Kotteakos v. United States, 328 U.S. 750, 772 (1946).

[636] 656 F.2d 1181, 1196 (5th Cir. 1981).

separate trials.[537]

E. Collateral Estoppel

Collateral estoppel requires that an issue that has been determined by a valid and final judgment be barred in future litigation between the same parties.[538] The collateral estoppel principle is embodied in the double jeopardy clause.[539]

This doctrine was considered in a section 1962(c) case, *United States v. Meinster*.[540] That district court acknowledged that an acquittal on a prior federal aiding and abetting charge precluded the Government from introducing "into evidence any fact which was necessarily resolved against the government at the previous trial."[541] Acquittals in state court on state predicate offenses, however, have no collateral estoppel impact in a RICO case.[542]

In *United States v. DeVincent*,[543] the First Circuit considered a collateral estoppel claim that an acquittal on a RICO conspiracy count required the dismissal of an extortion count. Even though the extortion was also a predicate offense for the RICO count, the court declined to apply collateral estoppel and stated that the RICO acquittal was not based on a jury finding as to the commission of extortion but was probably based on a finding of multiple conspiracies.[544] *DeVincent* illustrates the difficulties defendants will encounter when arguing collateral estoppel based on a RICO acquittal. An acquittal on a section 1962(c) count does not necessarily establish that a particular predicate offense was not committed; a general verdict on a RICO count merely indicates that a pattern of two or more acts did not occur. In the absence of a special

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[537] *Id.* at 1196-97.

[538] Ashe v. Swenson, 397 U.S. 436, 442 (1970). While *Ashe* involved a claim that an acquittal barred a second prosecution, collateral estoppel may estop the Government on issues resolved in the first trial. *See, e.g.*, United States v. Mespoulede, 597 F.2d 329, 334 (2d Cir. 1979) (Government precluded from introducing evidence of a defendant's possession of cocaine in a conspiracy trial held subsequent to an acquittal on a substantive possession charge).

[539] Ashe v. Swenson, 397 U.S. 436, 445 (1970).

[540] 475 F. Supp. 1093, 1096-97 (S.D. Fla. 1979).

[541] *Id.* at 1097.

[542] *See* United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979) (dismissing a collateral estoppel argument because the United States was not a party in the state proceedings and therefore was not bound by the result).

[543] 632 F.2d 155 (1st Cir. 1980).

[544] *Id.* at 160-61.

verdict on the RICO acquittal, the acquittal would not indicate which predicate offenses were committed.

A variation on the collateral estoppel problem occurs when the defendant obtains an acquittal or reversal of a predicate offense but is convicted on a section 1962(c) or (d) charge at the same trial. This is not a collateral estoppel issue that involves two prosecutions since this problem involves an acquittal on the predicate offense and a conviction on section 1962(c) or (d) counts that occur at the same trial. In *United States v. Brown*[545] the court reversed convictions on two of the four predicate offenses alleged in counts separate from the section 1962(c) and (d) counts and then reversed the RICO counts. A reversal of any of the predicate offense convictions required reversal of both section 1962(c) and (d) convictions.[546] Reversal was required because the appellate court could not determine whether the jury convicted the defendants on the RICO substantive charges solely on the basis of the invalid predicate offenses.[547] The Ninth Circuit construed *Brown* as strongly implying "that conviction on the substantive counts which form the basis of the RICO charge is necessary to uphold a RICO conviction."[548] The Fifth Circuit, on the other hand, apparently rejected *Brown* by holding that a RICO conviction can stand despite the reversal of some of the predicate offenses.[549]

The problem in *Brown* could be resolved by a special verdict indicating which predicate offenses form the basis for the RICO verdict. Special verdicts, however, are generally disfavored in criminal cases.[550]

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[545] 583 F.2d 659, 669-70 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

[546] *Id.* at 669.

[547] *Id.* at 669-70.

[548] United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979). This point was made in support of the *Rone* court's holding that separate punishment of predicate offenses and a RICO charge was permissible.

Brown was distinguished in United States v. Huber, 603 F.2d 387, 399 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), on the ground that the evidence in *Huber* was sufficient to sustain all of the predicate offenses. *Huber* indicated, however, that it was not deciding the validity of *Brown*. The court's reluctance to endorse *Brown* may have been based on *Brown*'s departure from the general rule that where the Government alleges a conspiracy to engage in two or more offenses and only one is established, the conspiracy conviction can stand. *See* United States v. Dixon, 536 F.2d 1388, 1401-02 (2d Cir. 1976).

[549] *See* United States v. Peacock, 654 F.2d 339, 348 (5th Cir. 1981); United States v. Grapp, 653 F.2d 189, 195 (5th Cir. 1981).

[550] *See* Tarlow, *supra* note 1, at 241. Despite this general rule against special verdicts, the

A different problem is raised where a RICO conviction is based on only two racketeering acts and one of the acts is reversed on appeal.[551] In this situation the Second Circuit, in *United States v. Guiliano*,[552] held that the RICO count must be reversed because of the absence of two predicate offenses.[553] In addition, the *Guiliano* court reversed the substantive count involving the legally sufficient predicate offense because of the prejudicial influence on the jury resulting from being labelled as a "racketeer" in the RICO count.[554]

Third Circuit has approved the use of such verdicts in RICO prosecutions. *See* United States v. Palmeri, 630 F.2d 192, 202-03 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981). While this would eliminate the *Brown* problem, the defendant would benefit where, as in United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), jury confusion results in a § 1962(c) conviction based on a finding of only one predicate offense and one overt act.

[551] The situation involving appellate reversal of predicate offenses may be analyzed differently from one in which the jury reaches conflicting verdicts, such as convicting the defendant on a RICO charge while acquitting the defendants of the counts charging the predicate offenses. In United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982), the court upheld the RICO conspiracy conviction of one defendant even though the jury acquitted him of all substantive counts, which were also alleged as the predicate offenses. The court held that the inconsistent verdicts were permissible because the evidence was sufficient to support the RICO convictions. *Id.* at 1220. The court did not consider language in an earlier Ninth Circuit opinion that indicated that convictions on the underlying predicate counts were necessary to sustain a RICO conviction. United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979).

The *Brooklier* holding also exposes the fallacy in statements by some commentators that RICO is merely a sentence enhancement provision applicable to those who commit multiple acts of racketeering. *See supra* note 72. The RICO statute cannot be regarded as a mere sentence enhancement provision if it applies to predicate offenses on which the defendant has been acquitted.

[552] 644 F.2d 85 (2d Cir. 1981).

[553] *Id.* at 88; *see also* United States v. Martino, 648 F.2d 367, 399-400 (5th Cir. 1981) (reversing one defendant's RICO conviction where one of two mail fraud offenses was held invalid), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[554] The court indicated that its holding was a narrow one that did not invariably require reversal of all predicate offenses:

> The jury's guilty verdict on Count 3 may well have been influenced not only by the unwarranted inference that Guiliano was involved in an arson but also by the very allegation of the RICO charge. One of the hazards of a RICO count is that when the Government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with the label of "racketeer" tainted the conviction on an otherwise valid count. That claim, of course, need not always or even often prevail, but it does in this instance when the evidence was barely sufficient to permit an inference of the disputed element of knowledge and considerable prejudice was injected by placing Guiliano at the store just before the fire.

Guiliano, 644 F.2d at 89.

The "stigma" problem is not limited to situations involving appellate review. In *United States v. Sam Goody, Inc.*,[555] the jury's acquittal on the RICO charges was a significant factor in granting a motion for a new trial on all charges. The taint of the RICO count was decisive when considered with the prosecution's use of false testimony and the absence of proof of other charges.[556]

The American Bar Association has considered the "stigma" problem discussed in *Guiliano* and *Sam Goody* and has proposed that the RICO statute be amended to replace the term "racketeering activity" with the phrase "criminal activity."[557]

F. Joinder and Severance

Perhaps the most significant procedural benefit to the Government of alleging a RICO count is an enhanced ability to join large numbers of defendants and apparently unrelated substantive offenses in a single trial.[558] A considerable number of RICO cases have considered the problem of joinder involving the inclusion of the offenses of multiple defendants in a single trial. A defendant contesting joinder can raise one of two objections: (1) misjoinder, a claim that joinder is not authorized by Rule 8 of the Federal Rules of Criminal Procedure; or (2) prejudicial joinder, a claim that, even if joinder is authorized by Rule 8, it is improper under Rule 14

The Eleventh Circuit decision in United States v. Kabbaby, 672 F.2d 857 (11th Cir. 1982), quotes with approval the *Guiliano* comment concerning the prejudicial effect of the racketeer label. *Id.* at 862. The court held, however, that there was no prejudice because the jury apparently had not been affected, acquitting the defendant on five of the six counts charged. *Id.* The Ninth Circuit decision in United States v. DeRosa, 670 F.2d 889, 897 n.11 (9th Cir. 1982), also purported to adopt *Guiliano* while distinguishing it. *See infra* text accompanying notes 576-77.

[555] 518 F. Supp. 1223, 1224-25 (E.D.N.Y. 1981). Although the Second Circuit refused to reverse the trial court decision in *Sam Goody* on the grounds that the Government could not appeal the new trial order, the majority indicated some disapproval of the decision. United States v. Sam Goody, Inc., 675 F.2d 17, 26-27 & n.9 (2d Cir. 1982). The court indicated that the concern for racketeering taint is diminished when the jury acquits on the RICO count. *Id.* at 26 n.9. In a concurring opinion, Judge Mansfield condemned the district court decision as a "clear abuse of discretion." *Id.* at 30.

[556] *Id.* at 1225-26.

[557] *RICO Report*, *supra* note 7, at 3-4.

[558] *See, e.g.*, United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (joining defendants engaged in tenuously related activities including cocaine dealing, purchases of counterfeit money, contract murders, armed robberies, and obstruction of justice). Prior to RICO, conspiracy counts had been the primary device for joining large numbers of defendants. *See* Tarlow, *supra* note 426, at 282-94.

because of prejudice to the defendant.

1. Misjoinder.

a. Rule 8(b) joinder. The Government's ability to join offenses and defendants in a multidefendant trial is primarily governed by Federal Rule of Criminal Procedure 8(b).[559] Rule 8(b) permits joinder of two defendants when they participate in the "same series of acts or transactions constituting an offense or offenses." The courts have construed the quoted passage from Rule 8(b) as requiring some relationship between the defendants' activities.[560]

The Government may be able to subvert the "relationship" requirement of Rule 8(b) in RICO cases by relying on cases that reject any requirement of a relationship between the acts constituting a "pattern."[561] Some courts have adopted the Government's position and have held that if otherwise unrelated predicate offenses are part of the same RICO "pattern" they are part of the "same series of acts or transactions" under Rule 8(b).[562]

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[559] FED. R. CRIM. P. 8(b). Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 8(a) controls joinder of offenses when a single defendant is tried. The rule is of little practical significance in multidefendant RICO cases. Rule 8(b) is more restrictive than Rule 8(a) because instead of permitting joinder solely on the grounds that two defendants committed the same or similar type of offense, Rule 8(b) permits joinder of two defendants only if they participated in the "same series of acts or transactions constituting an offense or offenses." *Compare* Williamson v. United States, 310 F.2d 192, 197 n.16 (9th Cir. 1962) (joinder of two unrelated robberies permitted under the "same or similar character" provision of Rule 8(a)) *with* United States v. Jackson, 562 F.2d 789, 796 (D.C. Cir. 1977) (in finding Rule 8(b) misjoinder of robbery with unrelated assaults, the court observed that the "same or similar character" language of Rule 8(a) did not apply).

[560] United States v. Isaacs, 493 F.2d 1124, 1158 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (interpreting "transaction" in Rule 8 as contemplating a series of acts depending "upon their logical relationship"). As interpreted by the First Circuit decision in King v. United States, 355 F.2d 700, 703 (1st Cir. 1966), the same-transaction test is satisfied by showing that essentially the same facts must be shown for each of the joined crimes. The court presumed that the judicial system benefits from this joint proof of facts and that where the joined offenses share no common factual issues, there is no benefit from joinder. *Id.* at 704.

[561] *See supra* note 249.

[562] United States v. Weisman, 624 F.2d 1118, 1129 (2d Cir. 1980); *see* United States v. Thevis, 474 F. Supp. 117, 131 (N.D. Ga. 1979) (joinder of defendants with only one predicate offense with other defendants charged with multiple predicate offenses). *Weisman* is

A similar result was reached in *United States v. Welch*,[563] where a section 1962(c) violation consisted of two unrelated conspiracy predicate offenses occurring in the operation of the same enterprise, a sheriff's office. Defendant Welch was a sheriff of a Texas county, defendant Cochran was Welch's chief deputy, and defendant Satterwhite was a county commissioner. From 1973 to 1978, Welch and Satterwhite aided the operation by servicing a private road and building a parking lot. The defendants also protected gambling at the county fair in 1977 and 1978. Welch and defendant Cashell, a justice of the peace, received payments in exchange for protecting the fairground gambling.

The defendants claimed that Rule 8(b) misjoinder had occurred because the conspiracy to protect Cantrell's gambling operation and the conspiracy to protect fairground gambling were not part of the same series of transactions. The conspiracies involved different defendants, and the court conceded that the two conspiracies could not have been joined in a single indictment without the RICO

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the major case on this point and upholds joinder of predicate offenses involving a 1973 securities fraud, a 1977 bankruptcy fraud, and a subsequent obstruction of justice. 624 F.2d at 1120-21, 1129. All of these offenses allegedly occurred in the operation of a common enterprise, Westchester Premier Theater, Inc.

The Westchester affair began in 1973 when defendant Gregory J. DePalma and Richard Fusco filled 16 acres of Tarrytown swamp land and constructed a theater. DePalma was supposedly associated with the Gambino family of the La Cosa Nostra. O. DE MARIS, THE LAST MAFIOSO 304 (1981). Defendant Weisman was a stockbroker who acted as a straw man holding 450,000 shares for DePalma and Fusco in his own name. The group encountered difficulty in selling its offer of 300,000 shares of stock at $7.50 a share and resorted to selling stock at a penny a share to celebrities Alan King, Steve Lawrence, and Edyie Gorme. *Id.* The defendants then orchestrated sham stock purchases and gave kickbacks to officers of corporations who would buy Westchester stock with the corporations' money at inflated prices. *Id.* at 305. After the theater was constructed, the defendants began to skim revenues from the corporation, selling tickets for seats that were not on the theater's seating charts and scalping tickets for other seats. *Id.* They also skimmed from the theater's restaurants, bars, parking, souveniers and cash concessions. *Id.*

Even after the *Weisman* case indictments pertaining to the Westchester company continued to be issued. Executives of Warner Communications were accused of operating Warner through activities stemming from Warner's investment of $250,000 in Westchester. One executive, Solomon Weiss, was charged with accepting $170,000 in bribes in return for diverting $220,000 from Warner to purchase Westchester stock, *see* Dallos & Delugach, *Jury Indicts Third Warner Executive*, L.A. Times, Sept. 17, 1981, § IV, at 1, col. 5, and was later convicted. The Government prosecutor has claimed that at Weiss's trial the chairman of Warner, Steven Ross, was implicated in the alleged scheme. Lubasch, *Prosecutor Links Chief at Warner to Bribe Plan*, N.Y. Times, Nov. 4, 1982, at Y31, col. 1; Pillsbury, *Warner's Fall from Grace*, FORTUNE, Jan. 10, 1983, at 82, 83.

[563] 656 F.2d 1039, 1044-48 (5th Cir. 1981).

count.[564] The court sustained joinder solely on the basis of the section 1962(c) count.[565]

A different approach was implicitly adopted in *United States v. Boffa*,[566] indicating that Rule 8(b) requires that a common purpose support joinder of the substantive offenses and a section 1962(c) count.[567] The court had previously observed, however, that the predicate acts need not be related to each other if each act is related to the conduct of the enterprise's affairs.[568] Conceivably, *Boffa* is assuming that a section 1962(c) offense can consist of unrelated acts but that Rule 8(b) precludes joinder of defendants involved in those acts. The Eighth Circuit decision in *United States v. Dean*[569] may also limit joinder to the extent that it holds that where an enterprise is operated through separate patterns, separate RICO counts can be alleged.[570]

b. Retroactive misjoinder. Where a RICO count is the only element relating the various predicate offenses, reversal of the RICO count may give rise to the argument that the predicates were misjoined. This argument is substantially weakened by the Supreme Court decision in *Shaffer v. United States*,[571] holding that if a conspiracy count supplied the joinder element a dismissal or acquittal

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[564] *Id.* at 1052.

[565] *Id.* at 1052-53.

[566] 513 F. Supp. 444 (D. Del. 1980). *Boffa* involved a RICO indictment for fraud and union corruption. The defendants filed over 28 separate motions, which produced a correspondingly voluminous series of published opinions on virtually every point of criminal law and procedure that could arise in a RICO case. The judge, Judge Latchum, denied every motion, including a recusal motion. *Id.* at 458-512.

The indictment alleged a complex fraudulent scheme involving an enterprise consisting of a group of associated individuals who were in the business of leasing labor to employers through various dummy corporations. The scheme purportedly commenced when an employer leased labor from UCI, a front for an enterprise that had a collective bargaining agreement with the Teamsters. UCI would then terminate its contract with the lessee-employer and recommend that the employer lease from a second corporation that was also controlled by the enterprise. The employer was unaware that the second corporation was also controlled by the enterprise. UCI would then fire its leased employees and the second corporation would employ drivers at a lower pay than was required under the old Teamster-UCI labor agreement. The enterprise infiltrated a defendant, Sheehan, into the Teamster local, and Sheehan eventually became local president and assisted the enterprise. *Id.* at 454-56.

[567] *Id.* at 475 n.30.

[568] *Id.* at 463 n.16.

[569] 647 F.2d 779 (8th Cir. 1981).

[570] *Id.* at 789; *see supra* text accompanying notes 522-23.

[571] 362 U.S. 511 (1960).

of the conspiracy count during or after the trial does not result in misjoinder.[572]

Applying *Shaffer* to a RICO charge, the Fifth Circuit decision in *United States v. Sutherland*[573] rejected a misjoinder claim despite holding that two conspiracies were improperly joined in a single section 1962(d) count.[574] The court noted that the misjoinder claim must be judged by the language of the indictment; the fact that the Government failed to prove a single conspiracy at trial is not material on an appeal of the Rule 8(b) decision.[575]

In considering the problem of retroactive misjoinder, the Ninth Circuit decision in *United States v. DeRosa*[576] acknowledged the prejudicial effect of the "racketeer" label. In *DeRosa*, the RICO count was dismissed as to two defendants by the trial court at the close of the Government's case. The two defendants then moved for severance, a motion that was denied. On appeal of the severance denials the court found that the racketeering taint was alleviated by two factors: (1) the RICO count in the jury's copy of the indictment did not mention the acquitted defendants, and (2) the Government did not "argue their relationship to the racketeering enterprise in any prejudicial way."[577] It is debatable, however, whether the jury can be expected simply to ignore the fact that for much of the trial two defendants were alleged "racketeers."

Nevertheless, in some instances misjoinder has been found where the RICO count is dismissed on appeal. In *United States v. Winter*,[578] the conspiracy count was defectively pleaded as to defendants Charles and James DeMetri, who were mentioned in only one racketeering offense. The court held that the DeMetris were misjoined since their participation in race fixing was limited to the

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[572] *Id.* at 516. There are two exceptions to *Shaffer:* (1) where the prosecution acts in bad faith; and (2) where the Government indictment was based on an improper interpretation of the law. United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977); *see also* United States v. Kabbaby, 672 F.2d 857, 860-61 (11th Cir. 1982) (rejecting defendant's argument that legal interpretation of the charge and its place in the indictment were improper); Tarlow, *supra* note 426, at 285-90.

[573] 656 F.2d 1181 (5th Cir. 1981).

[574] *Id.* at 1191-95. The full facts of this holding are set out *supra* in the text accompanying notes 403-08.

[575] *Id.* at 1190 n.6.

[576] 670 F.2d 889, 897-900, 897 n.11 (9th Cir. 1982).

[577] *Id.* at 897 n.11.

[578] 663 F.2d 1120, 1138-39 (1st Cir. 1981).

one alleged scheme.[579] The DeMetris were involved in fixing only one race while the other defendants were charged with committing acts of force and violence that did not involve the DeMetris.

In addition to *Winter*, two cases that had rejected RICO counts based on illegal enterprise theories held that misjoinder occurred.[580] In one case, *United States v. Turkette*,[581] a First Circuit panel reversed a section 1962(d) conviction and considered whether the elimination of this count resulted in misjoinder of the predicate offenses, which included drug offenses, arson, and insurance fraud. The court held that misjoinder had occurred because the drug-offense scheme and the arson-mail-fraud scheme were not part of the same series of transactions in the absence of the RICO count.[582] The absence of any evidentiary overlap between the two schemes eliminated any benefit to the Government of a joint trial.[583] The *Shaffer* rule was inapplicable because *Turkette* fell within an exception for cases in which a conspiracy is dismissed for legal insufficiency.[584]

If dismissal or acquittal of a RICO count occurs during or after trial, some courts consider a severance or mistrial motion as an issue of prejudicial joinder governed by Rule 14.[585] In *United States v. Kabbaby*,[586] the court indicated that an invalid RICO count may result in prejudicial joinder because of the prejudicial impact of the "racketeer" label.[587] In *Kabbaby*, the predicate offenses included contract murders, arson, drug trafficking, counterfeiting currency, truck hijacking, loansharking, and prostitution. The defendant was acquitted of all charges except one count alleging a cocaine sale. *Kabbaby* held that no prejudice resulted from the allegation of the RICO count because the jury had carefully consid-

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[579] *Id.* at 1139.

[580] *See* United States v. Turkette, 632 F.2d 896, 906-09 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981); United States v. Sutton, 605 F.2d 260, 270-72 (6th Cir. 1979), *rev'd on rehearing en banc*, 642 F.2d 1001 (6th Cir. 1980).

[581] 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981).

[582] *Id.* at 907-09.

[583] *Id.* at 909.

[584] *Id.* at 907. The Supreme Court, in its opinion reversing *Turkette*, did not discuss the joinder problem because of its conclusion that the RICO count was valid. *See* 452 U.S. at 593.

[585] FED. R. CRIM. P. 14; *see, e.g.*, United States v. Scott, 511 F.2d 15, 18-19 (8th Cir.), *cert. denied*, 421 U.S. 1002 (1975); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

[586] 672 F.2d 857 (11th Cir. 1982).

[587] *Id.* at 862.

ered the evidence and acquitted on all counts except one.[588]

2. Joinder of a RICO Count and an Offense That Is Not Part of the Pattern. Although the inclusion of a RICO count may broaden the scope of joinder as to offenses that are part of the alleged pattern, the inclusion should not affect joinder of offenses that are not part of the pattern. The difficulties in sustaining joinder of nonpredicate offenses with a RICO substantive offense are illustrated by the Eighth Circuit decision in *United States v. Bledsoe*.[589] *Bledsoe* involved a RICO count charging a complex multidefendant scheme of securities fraud employing a series of corporations and agricultural cooperatives. Prior to the events alleged in the RICO count, a defendant, Phillips, had allegedly engaged in similar acts of securities fraud, which were alleged as two counts separate from the RICO charge. These securities fraud counts involved only Phillips and were related to the RICO activities only by a common defendant, Phillips, and a common modus operandi, the sale of certain types of securities.

Bledsoe held that the RICO count was misjoined with the earlier activities of Phillips.[590] The common modus operandi could not suffice to establish joinder because mere similarity of offense is not a basis for joinder under Rule 8(b).[591] The remaining allegations did not satisfy the "same series of acts or transactions" requirement of Rule 8(b), which the Eighth Circuit has interpreted as requiring that all acts "be part of one overall scheme about which all joined defendants knew and in which they all participated."[592]

VIII. Conclusion

Although the growing number of reported RICO decisions has clarified many aspects of the RICO criminal provisions, this should not obscure the need for legislative reform. Under existing case law, RICO can too often be used to expand unfairly the scope of federal criminal trials and to include stale and tenuously related

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[588] *Id.* This prejudicial joinder argument is probably unavailable in the Fifth Circuit, which has refused to hold that an acquittal on some of the underlying predicate offenses may require reversal of the RICO count. *See supra* note 549 and accompanying text.

[589] 674 F.2d 647 (8th Cir. 1982).

[590] *Id.* at 657.

[591] *Id.* at 656.

[592] *Id.* The facts of *Bledsoe* are discussed *supra* in greater detail in the text accompanying notes 171-87.

charges. The grave threat to individual rights and liberties posed by RICO and the consequent need for reform have become evident to informed members of the bar. Responding to these concerns, the American Bar Association has adopted a program suggesting reforms of the RICO statute in areas that include: (1) the use of the term "racketeering";[593] (2) the statute of limitations;[594] (3) single-transaction patterns;[595] (4) a common-scheme requirement;[596] (5) the use of mail fraud, wire fraud, and transportation and receipt of stolen goods as predicate offenses;[597] (6) application of section 1962(a) to principals in the racketeering;[598] (7) mens rea;[599] (8) repeal of section 1962(d);[600] (9) liberal construction of RICO;[601] and (10) RICO forfeiture provisions.

The reforms are not a definitive list of the amendments necessary to improve and clarify the RICO statute. Nevertheless, the recommendations can serve as a valuable starting point for the long-simmering debate as to what RICO should do and how RICO should be drafted to accomplish those aims. This debate did not occur when the statute was enacted since Congress did not have the slightest notion of the expansive manner in which the statute would be applied. Ultimately, Congress must participate in this dialogue in view of the unwillingness of a number of courts to formulate a rational and coherent policy for construing the RICO criminal provisions in a manner consistent with the original congressional intent.

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[593] *See supra* text accompanying note 557.
[594] *See supra* text accompanying notes 469-70.
[595] *See supra* text accompanying notes 275-76.
[596] *See supra* text accompanying notes 256-58.
[597] *See supra* text accompanying notes 324-26.
[598] *See supra* text accompanying note 122.
[599] *See supra* text accompanying notes 385-86.
[600] *See supra* text accompanying note 432.
[601] *See supra* text accompanying notes 80-81.